RANK AND FILE: THE DEPTH OF "OFFICER" UNDER SECTION THREE OF THE FOURTEENTH AMENDMENT

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INTRODUCTION

In the aftermath of the American Civil War, the Republic faced a monumental task: extending full citizenship and constitutional rights to nearly four million recently emancipated persons while healing deep wounds from the destructive conflict.[1] Thus, in 1866, Congress passed a series of prescriptive measures for the nonagenarian nation through the Fourteenth Amendment.[2] Amid this "Second Founding,"[3] the amendment's various sections established a number of well-known rights and privileges for both citizens and government that form critical pillars of American legal tradition: complete naturalization for those born in the territorial United States,[4] apportionment of representation within the House of Representatives based on each person,[5] and authorization for Congress to enact legislation to ensure the rights and privileges of the amendment.[6]

But then there is Section Three. This "forgotten" section of the Fourteenth Amendment built a constitutional safeguard against insurrection, barring, among others, "officers of the United States" who betrayed their oath of office by engaging in rebellion from serving again in state or federal positions of public trust.[7] The provision fell into disuse after the Amnesty Act of 1872 lifted most office-holding bans from the Civil War, but it commands attention today following the January 6th Capitol Attack.[8] There, over 2,000

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1. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 17–20 (2019).

2. *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (examining congressional debates over and incorporation of the Fourteenth Amendment).

3. The "Second Founding" refers to the profound changes in American society during the Civil War and Reconstruction era, which reshaped the Constitution and set the stage for ongoing debates about citizenship, rights, and the role of government. *See generally* FONER, *supra* note 1 (detailing passage and enforcement of the Reconstruction amendments).

4. U.S. CONST. amend. XIV, § 1; *see, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 682, 693 (1898) (holding that the Citizenship Clause permits birthright citizenship with exceptions).

5. U.S. CONST. amend. XIV, § 2.

6. *Id.* § 5; *see, e.g.*, Slaughter-House Cases, 83 U.S. 36, 81 (1873) (holding that state laws must comport with the Fourteenth Amendment, and the Enforcement Clause authorizes congressional action to comport with the Fourteenth Amendment).

7. FONER, *supra* note 1, at 85; *see* Mark A. Graber, *Donald Trump and the Jefferson Davis Problem*, N.Y. TIMES (Nov. 29, 2023), https://www.nytimes.com/2023/11/29/opinion/trump-president-candidate-constitution.html [https://perma.cc/4LYQ-V7JY].

8. *See, e.g.*, Graber, *supra* note 7 (arguing Section Three should be applied to disqualify President Trump from the 2024 presidential election).

rioters entered the Capitol in an attempt to obstruct congressional certification of the 2020 Presidential election.[9] More than 1,200 Americans have been charged—ranging from misdemeanor crimes to seditious conspiracy—in its aftermath, including government officials.[10] Elsewhere, election disqualification challenges stemming from January 6th are already occurring, and the issue is likely to persist beyond the 2024 election, presenting constitutional, political, and federalism challenges.[11]

Though historically overshadowed in constitutional scholarship, Section Three's disqualification provision intersects with the Appointments Clause to answer a foundational question of American governance: who is an "officer of the United States?"[12]

"Officers of the United States" generally refer to high-ranking and mid-level officials within the federal government.[13] While often existing far below the chief officer, the President, they play a critical role in the nation's Executive Branch, and their value cannot be overstated among the branch's 2.5 million personnel.[14] Functionally, the thousands of officers within government represent a vital mechanism for proper executive control of the execution and administration of the nation's laws.[15] Yet, despite recent Supreme Court decisions, administrative law remains plagued with ambiguity over

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9. Ryan Lucas, *Where the Jan. 6 Insurrection Investigation Stands, One Year Later*, NPR (Jan. 6, 2022, 5:00 AM), https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice [https://perma.cc/7BT4-44JA]; *see Three Years Since the Jan. 6 Attack on the Capitol*, U.S. ATT'Y'S OFF., https://www.justice.gov/usao-dc/36-months-jan-6-attack-capitol-0 [https://perma.cc/GPF5-WB8H] (Jan. 5, 2024).

10. *E.g.*, District of Columbia v. Proud Boys Int'l, LLC, No. 21-CV-03267 (APM), 2023 WL 2733767 (D.D.C. Mar. 31, 2023); Jan Wolfe, *Trump Aide who Stormed the Capitol Broke an 'Oath to Protect America,' Judge says*, REUTERS (Mar. 9, 2021), https://www.reuters.com/article/idUSKBN2B12P3/ [https://perma.cc/33NL-3JRV].

11. This Comment does not seek to define insurrection (or its relation to the January 6th Attack), determine if the President is an "Officer of the United States," or address the amendment's self-executing power, nor does it address post-January 6th litigation.

12. This idea was first posited in the groundbreaking article by Professors William Baude and Michael Stokes Paulsen. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 725 n.480 (2024).

13. *See infra* Parts II.B–II.C.

14. *See* H.R. COMM. ON OVERSIGHT & REFORM, 116TH CONG., POLICY AND SUPPORTING POSITIONS (Comm. Print 2020) (listing more than 9,000 civil service positions within the federal government); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52 (10th Cir. 2016) (Gorsuch, J., concurring) (discussing "the colossus" of the administrative state).

15. *See, e.g.*, 1 ANNALS OF CONG. 481 (1789) (statement of Rep. Madison) ("[I]f any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.").

what delineates the boundary between an "Officer of the United States" and an employee of the United States.[16] Indeed, the discourse surrounding the distinction between principal and inferior officers is far from settled, and there is considerable uncertainty regarding the necessary criteria used to ascertain whether a government official qualifies as an "Officer of the United States."[17] Using new technological research and document analysis methods, scholars have examined Founding-era documents and ideas to identify the original meanings of "officer," leading them to propose a rather expansive definition of the term.[18]

This Comment humbly endeavors to shed light on the nebulous boundary between officers and employees under the Appointments Clause. Part I traces the evolution of "officer" jurisprudence from the early nineteenth century to the Roberts Court, highlighting the deficiencies in the current doctrine. It also features an originalist perspective on Founding-era understandings of "officer," as well as a historical overview of the General Land Office, a key component of the Interior Department during the Second Founding. Part II delves into the mechanics and legislative history of Section Three to uncover a broad understanding of "officer" during the Reconstruction era.[19] It also identifies tension between various contemporary sources in their forays into officer definitions. Here, the analysis centers around three primary sources totaling more than 7,100 pages of legislative history and executive documents: the Report of the Joint Committee on Reconstruction, the Congressional Globe for the 39th Congress's First Session, and the annual reports from the General Land Commissioner.[20] Specifically, it leverages the corpus linguistics method known as Key-Word-in-Context (KWIC) searches, which groups text excerpts to show how a particular word or phrase is used in

16. *See infra* Part I.

17. Lucia v. SEC, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) ("While precedents like [*Freytag v. Comm'r*, 501 U.S. 868, 880–82 (1991),] discuss what is *sufficient* to make someone an officer of the United States, our precedents have never clearly defined what is *necessary*.").

18. *See infra* Part I.D.

19. I recognize the inherent tension in assigning value to the intent of the amendment's framers while analyzing Section Three's text for its plain meaning; one is thoroughly originalist and the other textualist. Nonetheless, regarding this Comment's subject, I believe they complement one another. *See* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 857, 859–60, 863 (2020); *infra* Part II.

20. These documents were then converted to .txt files and uploaded to AntConc, a free, downloadable corpus linguistics program. AntConc, LAURENCE ANTHONY'S WEBSITE, https://www.laurenceanthony.net/software/antconc/ [https://perma.cc/V8FF-Q69J] (last visited Nov. 11, 2024) (using version 4.3.1).

context.[21] Finally, this Comment recommends adopting a capacious historical conception of "officer" advanced by scholars and the amendment's framers, thereby departing from the Court's Appointments Clause palimpsest and enhancing executive accountability while pragmatically upholding separation of powers in the modern administrative state.

I. "OFFICER" JURISPRUDENCE AND ITS DEFICIENCIES

A. Overview

Section Two of Article II, commonly referred to as the Appointments Clause, is concerned solely with officers, not nonofficers (also referred to as "mere employees").[22] The Appointments Clause is a cornerstone of executive power, its raison d'etre being protection of the separation of power and ensuring accountability in the federal government.[23] As a threshold matter, the tests articulated by the Supreme Court to determine precisely who is an officer are unclear and difficult to administer, as defining the term has been neither a straightforward nor satisfactory task for the judiciary.[24] With the expansion of the administrative state in the twentieth century, separation of power issues have only accelerated.[25] Nevertheless, it is critical to first distinguish basic terminology.

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21. Corpus linguistics is a field of study that involves analyzing large collections of naturally occurring language data, known as *corpora*, using technological methods like computations. *See generally* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311 (2018) (arguing the method is most effective when the legal issue concerns distribution of language usage, there is a clear notion of what "ordinary meaning" means, and the right corpus is leveraged). This data-driven approach to studying language emerged with the advent of computers and the ability to store and analyze large amounts of text. *Id.* at 1339–40.

22. *See* U.S. CONST. art. II, § 2, cl. 2; Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018); Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 37 (D.C. Cir. 2016).

23. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483, 497–98 (2010).

24. *See* The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 153 (1867) ("It is impossible here to proceed by way of enumeration, and to distinguish by name all those who are included [as officers] and all those who are excluded. All that can be done is to establish some fixed rules."). While the opinion was written nearly 160 years ago, the frustrations expressed are still very current. *See, e.g.*, *Lucia*, at 2052 ("[M]aybe one day we will see a need to refine or enhance the [officer] test [*Buckley v. Valeo*, 424 U.S. 1 (1976),] set out so concisely. But that day is not this one . . . .").

25. *See, e.g.*, Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 765–66 (2008).

Officers may be broken into three categories: constitutional officers (e.g., the President), principal officers, and inferior officers.[26] Most relevant to this Comment are the latter two. Principal officers must be appointed by the President and confirmed by the Senate, exercise "significant authority" under federal law, and hold a "continuing and permanent" position.[27] Critically, albeit obviously, any non-Constitutional officer who does not satisfy the status of "principal officer" is definitionally an inferior officer.[28] Inferior officers' conditions and functions differ in several respects. First, they have less stringent appointment requirements and may be appointed by the President, courts, or department heads.[29] Second, rather than report to the President as principal officers would, inferior officers often have a supervisory relationship under higher-ranking officers.[30] Finally, they have limited jurisdiction and may serve temporary appointments.[31] Below the officers' delineation exists the "mere employees."[32] Employees, in contrast, retain little to no constitutional protections and do not possess a continuing or permanent position with significant federal authority, and their duties are restricted to activity under an officer's supervision.[33] Whereas employees are simply *hired*, officers must be *appointed* in accordance with Article II.[34]

B. Nineteenth-Century Concepts of "Officer"

1. Early Attempts to Clarify under Maurice

At the nation's founding, the federal government was at its nadir in terms of size. For example, the State Department boasted a domestic staff of seven, while the Attorney General only served part-time.[35] Meanwhile, Treasury

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26. *Cf.* United States v. Germaine, 99 U.S. 508, 509 (1878) ("The Constitution for purposes of appointment very clearly divides all its officers into two classes.").

27. *See Lucia*, 138 S. Ct. at 2051; *Buckley*, 424 U.S. at 125–26, 126 n.162.

28. Morrison v. Olson, 487 U.S. 654, 668 (1988).

29. *See* Freytag v. Comm'r, 501 U.S. 868 (1991) (holding that inferior officers may also be appointed by individuals other than the President); *Morrison*, 487 U.S. at 659–60, 670–77.

30. *See* Edmond v. United States, 520 U.S. 651, 662–63 (1997).

31. *See Morrison*, 487 U.S. at 672670–71.

32. *Lucia*, 138 S. Ct. at 2049.

33. *See id.*; John T. Plecnik, *Officers Under the Appointments Clause*, 11 PITT. TAX REV. 201, 203 (2014) ("[E]mployees may be hired by any arm of government.").

34. *See, e.g.*, Stryker Spine v. Biedermann Motech GmbH, 684 F. Supp. 2d 68, 82 (D.D.C. 2010) (citing Buckley v. Valeo, 424 U.S 1, 126 n.162 (1976)).

35. *Office of the Historian*, U.S. DEP'T OF STATE, http://history.state.gov/departmenthistory [https://perma.cc/Q3V9-KWYU] (last visited Nov. 11, 2024); *Organization*, U.S. DEP'T

fared no better. Despite its monumental tasks to collect revenue (mainly through customs duties, excise taxes, and land sales), assume the national debt, disburse government funds, and audit all public accounts,[36] in 1792, the department maintained just 110 personnel—from the "Secretary down to 'messenger and office keeper'"—including surveyors.[37] In contrast to its remarkably *de minimis* stature, some scholars have argued that the Founding Generation's government had an expansive understanding of "officers" under Article II.[38]

However, courts only first undertook a hard look at the term "officer of the United States" nearly three decades after the Constitution's ratification in *United States v. Maurice*.[39] In 1823, Chief Justice Marshall adjudicated a suit brought by the federal government against Maurice and his sureties.[40] There, the central question was whether Maurice, appointed as an "agent of fortification" by the Secretary of War without explicit Congressional authorization, was an "officer of the United States."[41]

Despite some ambiguity, Chief Justice Marshall turned to the Appointments Clause and concluded that Congress must establish all offices.[42] Chief Justice Marshall defined an "officer" as one who performs duties of a public charge or employment for the United States and, if employed by the United

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OF JUSTICE, https://www.justice.gov/doj/organization-mission-and-functions-manual-office-solicitor-general [https://perma.cc/NW39-GUT2] (last visited Nov. 11, 2024).

36. Richard Sylla, *Financial Foundations: Public Credit, the National Bank, and Securities Markets*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S 59, 66–67, 73, 77 (Douglas Irwin & Richard Sylla eds., 2010) (outlining various ways the early federal government sought revenue); Farley Grubb, *U.S. Land Policy: Founding Choices and Outcomes, 1781–1802*, *in id.* at 265, 268–69 (detailing the 222 million acres of salable land worth acquired by the federal government from 1784 to 1802, but noting that by 1800, it had only sold less than 2%, or 1.28 million acres, for approximately $1.05 million). In land value alone, the federal government held approximately $215 million in assets by 1802. *Id.* at 259–60.

37. Tucker v. Comm'r, 135 T.C. 114, 127 (2010) (citation omitted); *see id.* at 126–34 (outlining the history of Treasury officials, including surveyors, during the Founding).

38. *See* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 486–90 (2018) (employing contemporary commercial dictionaries, legal dictionaries, and commentaries, as well as drafters' writings, finding the scope of "officer" to be broad). Mascott notes that early Republic dictionaries "essentially defined a civil 'officer' as a 'man employed by the publick' and an 'office' as a 'public charge' or 'public employment.'" *Id.* at 486 (alteration removed) (citations omitted); *infra* Part II.

39. 26 F. Cas. 1211 (C.C.D. Va. 1823).

40. *Id.* at 1212.

41. *Id.* at 1212–13.

42. *Id.*

States, is considered an officer of the United States.[43] To distinguish officers from contractors, the court relied on several key factors: (1) having continuing duties defined by the government rather than by contract; (2) being appointed to perform those duties without an employment contract; and (3) having the duties continue even if the person performing these duties is replaced.[44] Thus, under the *Maurice* language, "officers" and "offices" would be read as incredibly expansive.[45] Finally, *Maurice* appears to establish the officer test's pervasive—yet not dispositive—component: continuity.[46]

2. Amid Reconstruction: Narrowing of "Officer" and Germaine

The formalism of *Maurice* was short-lived. Following the Civil War, the Supreme Court again took two cases in an attempt to determine the scope of Article II's "officer." While integral to the lineage of case law, it is important to note that the Court focuses more on quantitative components of officers (e.g., tenure) rather than the qualitative authority of the position.[47] During the Reconstruction period, however, two cases, *United States v. Hartwell*[48] and *United States v. Germaine*,[49] included two separate tests for determining who is and is not an "officer" under the Constitution with respect to the Fourteenth Amendment.[50]

In *Hartwell*, the Supreme Court utilized a functionalist test to determine whether a clerk in the office of the assistant treasurer of the United States was an "officer of the United States" subject to indictment for embezzlement.[51] The *Hartwell* Court held that factors such as tenure, duration, duties, and

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43. *Id.* at 1214 ("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."); *cf.* Mascott, *supra* note 38, at 486 n.227 (including an eighteenth-century definition: "[A] publick charge or employment; magistracy").

44. *Maurice*, 26 F. Cas. at 1214.

45. For example, read seriously, *Maurice*'s theory could mean that any position created under an enabling statute would weigh in favor of an officer status. *See id.* at 1213–14 ("The constitution then is understood to declare, that all officers of the United States, except in cases where the constitution itself may otherwise provide, shall be established by law.").

46. *Id.* (noting that a "continuing" duty irrespective of the personal office holder, *inter alia*, would make it "very difficult to distinguish such a charge or employment from an office").

47. *See* E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J. F. 42, 42–44, 46 (2017) (criticizing post-Civil War cases for giving disproportionate weight to quantitative features, such as tenure, duration, and continuity).

48. 73 U.S. 385 (1867).

49. 99 U.S. 508 (1878).

50. *See* Myles S. Lynch, *Disloyalty and Disqualification: Reconstructing Section Three of the Fourteenth Amendment*, 30 WM. & MARY BILL RTS. J. 153, 158–65 (2021).

51. *See* 73 U.S. at 392–94.

compensation indicate whether a government position constitutes an "office."[52] The Court stated that "[a]n office is a public station, or employment, conferred by the appointment of government" and found that Hartwell's clerical position, with its continuing duties and regular compensation, qualified as such.[53]

A decade later, the Court articulated a separate test for determining officers in *Germaine*.[54] Undertaking a different approach from *Hartwell*, this formalist test asked whether the officer's duties were "continuing and permanent," and whether a compensation requirement existed.[55] The Court found that a surgeon who occasionally provided services to disabled pensioners but had not been appointed per the Appointments Clause was not an officer.[56] In doing so, the Court "primarily relied on a simple *formal* test: did the supposed officer obtain their position in accordance with the Appointments Clause?"[57] Thus, under *Germaine*, if an official is duly appointed by the President, heads of departments, or courts of law to a continuing position created by law, they are an officer.

Mixed opinions have surfaced about the Court's decision in *Germaine*. While it has been criticized for being somewhat circular,[58] it does offer yet another emphasis on the *Maurice* Court's point that an office is "continuing and permanent, not occasional and intermittent."[59] Nevertheless, the Supreme Court continued to rely on *Germaine* well into the twentieth century, as seen in *Burnap v. United States*.[60] There, the Court emphasized that the test needed to ensure proper Article II status rested with Congress.[61] The *Burnap* Court reasoned that the officer-employee distinction laid with "the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto."[62]

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52. *See id.* at 393.

53. *See id.*

54. 99 U.S. 508 (1878).

55. *Id.* at 511–12.

56. *Id.*; *see* U.S. CONST. art. II.

57. Lynch, *supra* note 50, at 162 (citing *Germaine*, 99 U.S. at 510–12).

58. *See, e.g.*, Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1132–33 (D.C. Cir. 2000) ("[T]he earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department."). *But see* CONG. GLOBE, 39th Cong., 1st Sess. 2915 (1866) (statement of Sen. Doolittle) (noting that Congress required all officers under the federal government to take an oath).

59. *See Germaine*, 99 U.S. at 511–12; Jennifer L. Mascott, *"Officers" in the Supreme Court:* Lucia v. SEC, 2018 CATO SUP. CT. REV. 305, 325 (2018).

60. 252 U.S. 512 (1920).

61. *Id.* at 515–16 (resting on the "established by Law" provision of Article II).

62. *Id.* at 516.

C. Contemporary Interpretations

Interpretations of "officer" from more contemporary Supreme Court precedent appear to expand on *Germaine*. Additionally, a burgeoning characteristic of American government emerged in the late nineteenth and early twentieth century: the administrative state.[63] But while federal tribunals have continued to struggle to craft a precise definition of "officer," they created a cobblestone road of tests and analyses regarding multiple Executive Branch officials.[64]

1. Amid the Administrative State: Buckley*'s Expansion*

The modern employee-officer distinction stems from "the basic framework" outlined in *Germaine* but was elaborated on in *Buckley v. Valeo*.[65] In *Buckley*, the Court begins a more contemporary precedent by defining "officer" broadly.[66] Similar to the *Germaine* Court, the *Buckley* Court found that any appointee exercising "significant authority" under the laws of the United States is an "officer" who must be appointed according to the Appointments Clause.[67] To test whether someone is an officer, *Buckley* noted that courts look at factors like duties, functions, and whether they are subject to the control or direction of any other executive, judicial, or legislative authority.[68] Further, the *Buckley* Court distinguished officers from "lesser functionaries" but critically failed to define "lesser functionary."[69]

Decades later, in *Freytag v. Commissioner*,[70] the Court established further criteria to distinguish a new component of the government bestowed by the administrative state—administrative law judges.[71] In *Freytag*, the Court attempted to delineate a boundary between administrative law judges and "special masters" appointed by Article III courts.[72] The Court found these

63. *See* Damien M. Schiff & Oliver J. Dunford, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause—A Question of "Significance,"* 74 RUTGERS L. REV. 469, 492–510 (2022) (noting the continued struggle to "reconcile the modern administrative state with democratic accountability and presidential control of executive officials") (cleaned up).

64. *See generally id.*; West, *supra* note 47.

65. 424 U.S. 1 (1976); *see* Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

66. *Buckley*, 424 U.S. at 118–19.

67. *Id.* at 124–26 (comparing United States v. Germaine, 99 U.S. 508 (1878)).

68. *Id.*

69. *See id.* at 126 n.162 ("Employees are lesser functionaries subordinate to officers of the United States, . . . whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other [government] authority.") (citations omitted).

70. 501 U.S. 868 (1991).

71. *See generally id.*

72. *Id.* at 881.

judges to be inferior officers but noted that under Article II, the chief judge's appointment power was constitutional as one of a "Court[] of Law" under the Appointments Clause.[73] Additionally, the Court elaborated on key factors to identify inferior officers, focusing primarily on final decision authority and discretion.[74] But even without finality, these inferior officers exercise meaningful discretion by presiding over trials, evidentiary matters, and discovery orders.[75] Thus, exercising such discretion involves more than "ministerial" tasks expected of employees.[76] Similarly, in *Edmond v. United States*,[77] the Court determined that judges with the Coast Guard Court of Criminal Appeals were inferior officers; they neither rendered final decisions for the government nor possessed policymaking authority.[78] Additionally, their work was "directed and supervised at some level" by others appointed via the Appointments Clause.[79]

2. The Roberts Court: Lucia *and Catch and Release*

Like its predecessors, the Roberts Court has persistently—yet unsuccessfully—attempted to confront vexing Appointments Clause questions.[80] However, the Roberts Court has notably engaged in a "catch and release" posture with its Appointments Clause cases. That is, once the Court appropriately finds an Article II violation, it appears to be increasingly willing to prescribe a solution to remedy the unconstitutional behavior within the same decision.

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73. *Id.* at 882–84, 889–92. However, the chief judge could not be the head of a "Department" as meant in the Clause, which applies to Cabinet-level departments. *Id.* at 884–88.

74. *See id.* at 881–82 ("They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.").

75. *Id.* at 880–82.

76. *Id.* To be sure, the Court reasoned, the fact that judges may sometimes undertake employee-type duties does not negate their officer status if they operate as officers in other capacities. *Id.* at 882.

77. 520 U.S. 651 (1997).

78. *See id.* at 652, 664–65. In contrast, the Court in *Freytag* suggests that special trial judges of the Tax Court may be principal officers because they exercised significant duties and discretion, like the power to enforce compliance with discovery orders, punish contempt, and enter decisions in certain cases. Their role went beyond just assisting the regular Tax Court judges. *Freytag*, 501 U.S. at 881–82.

79. *See Edmond*, 520 U.S. at 663; *see* Morrison v. Olson, 487 U.S. 654 (1988) (finding an independent counsel an inferior officer after assessing her limited duties, limited jurisdiction, and removability by a superior official).

80. *See* Michael Birnbaum, Jordan Eth, Joel Haims & Craig Martin, Lucia *Leaves Many Important Questions Unanswered*, LAW360 (June 25, 2018, 5:30 PM), https://www.law360.com/articles/1056183 [https://perma.cc/HGQ7-JV8T?type=standard].

Lucia v. SEC[81] is the Court's most recent attempt at differentiating officers from employees. There, the Court found SEC administrative law judges to be inferior officers who must be appointed consistent with the Appointments Clause.[82] The Court considered the administrative law judges' ability to take testimony, conduct trials, rule on evidence, admissibility, and enforce discovery compliance, mirroring the *Freytag* factors.[83] Nonetheless, it declined to further elaborate on *Buckley*'s "significant authority" test to determine what is necessary to qualify as an officer.[84] So, while *Lucia* mirrors *Freytag* in assessing administrative law judges as officers "point for point" based on their adjudicatory functions, many questions remain unresolved regarding what standards determine officer status more broadly.[85]

Notably, the Court has declined to develop analysis as to the existence of constitutional violation on several occasions. On at least three occasions, the Court has offered a prescription for the constitutional violation at issue. Take, for example, *Free Enterprise v. Public Company Accounting Oversight Board* (*PCAOB*).[86] There, after finding the PCAOB members were unconstitutionally appointed inferior officers, the Court simply severed the second removal restriction to make PCAOB members removable at will by the SEC Commissioners, rendering them inferior officers.[87] In succeeding double removal protection cases, the Court has undertaken similar actions to address the Appointments Clause quagmires.[88] This trend is a departure from the Court's

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81. 138 S. Ct. 2044 (2018).

82. *See id.* at 2050–56.

83. *See id.* Though lacking some of the special trial judges' powers from *Freytag*, like commanding deferential factfinding review, the Court reasoned that Securities and Exchange Commission (SEC) administrative law judges still possessed "conventional weapons" to enforce compliance, and the SEC also often defers to their factfinding. *Id.* at 2054.

84. *See id.* at 2051–52.

85. *Id.* at 2051 (declining to elaborate on *Buckley*'s "significant authority" test, deeming it that "project unnecessary" given *Freytag*); *id.* at 2056 (Thomas, J., concurring) ("[W]hile precedents like *Freytag* discuss what is *sufficient* to make someone an officer of the United States, our precedents have never clearly defined what is *necessary*.").

86. 561 U.S. 477 (2010).

87. *Id.* at 509 ("Concluding that the removal restrictions are invalid leaves the [Public Company Accounting Oversight] Board removable by the [Securities and Exchange] Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight."); *see* Lofstad v. Raimondo, No. 24-1420, 2024 WL 4283087, at *1 (3d Cir. Sept. 25, 2024) (severing a fishing Regional Council's veto power to cure the Article II defect).

88. *See* Collins v. Yellen, 594 U.S. 220 (2021) (holding that Housing and Economic

action in the touchstone of officer-employee case law, *Buckley*.[89]

To be sure, this is neither a guaranteed approach nor a hard-and-fast rule. Indeed, these cases on the Roberts Court's docket deal primarily with removal issues, and the only way to remedy Appointments Clause issues is a proper appointment (i.e., an appointment from the President, department head, or court of law), but its decisions may demonstrate the Court's willingness to readily remedy constitutional violations, rather than send the appointments process in question back to the congressional drawing board.[90]

D. A Recent Originalist Theory and a Case Study: Interior's Ad Hoc Boards of Appeal

A number of questions still permeate courts and academia regarding the discourse around officers.[91] The miscellany of jurisprudence has left scholars and courts in a murky bog that has spurred multiple to compensate for its ambiguity.[92] For example, in 2018, Professor Jennifer Mascott offered a perceptive article that employed a corpus linguistics analysis, gleaning Founding-era and congressional documents to inquire into the original meanings of "officer."[93] Mascott argues that the original public understanding of the term "officer" in the Appointments Clause likely encompassed any federal

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Recovery Act provision restricting removal power over lone Federal Housing Finance Agency Director violates Article II); Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020) (severing removal protection to allow the Consumer Financial Protection Bureau (CFPB) to continue operating with a single director with at-will removal after holding that the single-head leadership structure violated Article II). The Court also issued a constitutional prescription in yet another adjudication-focused case in the same term as *Collins*. United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (holding patent judges' final decisionmaking power unconstitutional, but curing the defect by providing U.S. Patent and Trademark Office Director with final review authority).

89. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (positing that Congress could remedy the constitutional foul by vesting Federal Election Commission Commissioner appointment in the President, department heads, or courts of law). Of note, other seminal cases did not find Appointments Clause violations. *See* Edmond v. United States, 520 U.S. 651 (1997) (appointment by Transportation Secretary constituted department head).

90. Removal is the complementary power afforded to the President through the Appointments Clause. Meyers v. United States, 272 U.S. 52, 196 n.4 (1926) (finding that a "considerable majority" of the First Congress favored "declaring the power of removal to be in the President"). *But see* SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (avoiding the much-anticipated removal protection issue).

91. A straightforward example, both *Edmond* and *Freytag* cite *Buckley*, but neither define "significant." *See Edmond*, 520 U.S. at 662 (quoting *Buckley*, 424 U.S. at 126); *Freytag*, 501 U.S. 868, 881 (1991) (quoting *Buckley*, 424 U.S. at 126).

92. *See, e.g.*, West, *supra* note 47, at 42–44, 46.

93. Mascott, *supra* note 38.

official entrusted with an ongoing statutory responsibility, including low-level administrative roles like record-keeping clerks.[94] Fundamentally, this original meaning suggests that "officer" implies responsibility for any federal statutory duty rather than necessitating significant authority or discretion.[95] This interpretation is considerably more expansive than the criteria currently employed by the Supreme Court.[96] To support her theory, Mascott cites various early Founding-era documents to demonstrate that "officer" commonly described those with minor duties.[97] In one example, Mascott examines documents within the First Congress that treated clerks executing statutory tasks as officers.[98] Mascott concludes that modern positions within the federal government—revenue collectors, customs officials, contract specialists, disaster response managers, and administrative law judges—were likely officers under the original meaning.[99]

Accompanying this definition, Mascott argues that properly reclassifying thousands more civil servants as Article II "officers" may enhance accountability and transparency by ensuring department heads give final approval for selecting both competitive service board members and candidates.[100] She further contends that this approach comports with the Appointments Clause's purpose of accountability through restricted appointment mechanisms and direct lines of responsibility and may curb patronage concerns by ensuring merit-based hiring is transparently approved by principal officers such as department heads.[101]

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94. *Id.* at 484–507, 511–14; James C. Phillips, Benjamin Lee & Jacob Crump, *Corpus Linguistics and "Officers of the United States,"* 42 HARV. J.L. & PUB. POL'Y 871, 886, 929 (2019) (concurring with Mascott's conclusion using a greatly expanded corpus of Founding-era texts).

95. Mascott, *supra* note 38, at 443–44, 507–14; Phillips et al., *supra* note 94, at 929 (concluding that despite the "murkiness of [their] results," officer "should be defined more broadly than one exercising significant government authority . . . .").

96. *See supra* Part I.C.

97. Mascott, *supra* note 38, at 484–507.

98. *Id.* at 507, 511–14. Mascott also argues that her definition comports with references to petty officers, tidewaiters, tax gatherers, and judicial clerks as Article II "officers." *Id.* at 496–500.

99. *See id.* at 546–57. Mascott's article was published prior to *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), where the Supreme Court determined that SEC administrative law judges and U.S. Patent Office patent judges were inferior officers, respectively.

100. Mascott, *supra* note 38, at 548, 552–56, 558–61. Additionally, this is what the Supreme Court has done to rectify constitutional violations regarding improper officer appointments. *See, e.g.*, *supra* Part I.C.2.

101. Mascott, *supra* note 38, at 558–61.

Nevertheless, the Court has failed to adopt Mascott's argument,[102] and despite its recent doctrine illustrating the perimeter in great detail surrounding Article I courts,[103] its ad hoc approach[104] has left a number of executive departments in an opaque constitutional puzzle.[105] One such example is the U.S. Department of the Interior's (Interior Department's) Ad Hoc Boards of Appeal.

The Ad Hoc Appeals Board's historical origins are closely tied to the General Land Office, the predecessor to the modern Bureau of Land Management.[106] The General Land Office, created in 1812 amid rapid territorial expansion and initially under Treasury's purview, was responsible for cataloging and selling public lands to generate substantial revenue for Washington before Congress established the Interior Department.[107] Yet, despite its role in overseeing a key national priority, Congress only provided for a mere two officials: a Land Commissioner and their chief clerk.[108] While the President would appoint the Commissioner "by and with the advice and consent of the Senate," the Commissioner could appoint an "inferior officer," the chief clerk.[109] Additionally, Congress apparently acknowledged the inferior officer and employee distinction, forbidding any "person *appointed to an office* instituted by this act, or *employed* in any such office" to engage in direct or

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102. *See, e.g.*, *Arthrex*, 141 S. Ct. at 2007–10 (Thomas, J., dissenting) (citing Mascott).

103. *See, e.g.*, *id.* at 6 (holding patent judge structure under 35 U.S.C. §§ 311, 6(a) unconstitutional).

104. *See infra* note 145 and accompanying text.

105. In addition, these adjudication-focused cases are largely unhelpful when considering the tens of thousands of government positions that do not resemble judicial roles at all. *See Federal Civilian Employment*, OFF. OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/ [https://perma.cc/J6VB-KUAG] (Sept. 2017) (listing over 4.4 million employees).

106. 43 U.S.C. § 1(a) (1964), *repealed by* Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8(a), 80 Stat. 632.

107. Act of Apr. 25, 1812, ch. 68, § 1, 2 Stat. 716, 716 (granting Treasury authority to "superintend, execute and perform, all such acts and things, touching or respecting the public lands of the United States"); ROBERT M. UTLEY & BARRY MACKINTOSH, THE DEPARTMENT OF EVERYTHING ELSE: HIGHLIGHTS OF INTERIOR HISTORY 1 (1989).

108. Act of Apr. 25, 1812, ch. 68, §§ 1–2, 2 Stat. at 716 ("That there shall be in the said office, an inferior officer, to be appointed by the said principal officer, to be employed therein as he shall deem proper, and to be called the chief clerk of the general land-office, who, in all cases, when the said principal office shall become vacant . . . ."); *see also supra* notes 35–37 and accompanying text (outlining other critical, yet small departments during the Founding era).

109. Act of Apr. 25, 1812, ch. 68, §§ 2, 11, 2 Stat. at 716–17.

indirect sales of public land.[110] Several clerks were also permitted at the Commissioner's discretion, so long as their collective salaries did not exceed $7,000.[111]

The General Land Office's value grew as conquest and land acquisitions increased its domain.[112] By the 1840s, Congress foresaw a need for a new department to oversee federal land (formerly under the Treasury), Indian affairs (previously managed by the War Department), patents (initially overseen by the State Department), and military pensions (previously associated with War and Navy Departments).[113] Notwithstanding separation of powers concerns, Congress established the Department of the Interior in 1849, rehousing the General Land Office.[114] Critically, the new Interior Secretary was authorized to appoint the department's chief clerk, and Congress also provided the Secretary with the power to appoint and remove clerks in the several bureaus that are transferred to the Department of the Interior by this act, including the General Land Office.[115] As a state actor in antebellum, the General Land Office was also marked by the institution of slavery, as some of the ceded land became part of slave states, and the Interior Department would then record the number of enslaved people in each state alongside farm acreage and crop counts.[116]

At the time of the outbreak of the Civil War, the General Land Office continued to play a key role in national policy. Seminal policies, from the Homestead Act to the transcontinental railroad, rested on large swaths of

110. *Id.* § 10, 2 Stat. at 717 (emphasis added).

111. *Id.* § 12, 2 Stat. at 718.

112. *See, e.g.*, Robert Lee, *Accounting for Conquest: The Price of the Louisiana Purchase of Indian Country*, 103 J. AM. HIST. 921, 923 (2017) (providing a range of estimates for the size of the Louisiana Purchase, from 519 million acres to 813 million acres). *See generally* CASES AND MATERIALS ON FEDERAL INDIAN LAW 103–05, 116–28 (David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., Matthew L.M. Fletcher & Kristen A. Carpenter eds., 7th ed. 2017) (detailing aggressive U.S. westward expansionism during the early nineteenth century and its impact on American Indians).

113. UTLEY & MACKINTOSH, *supra* note 107, at 1–2.

114. *See* Act of Mar. 3, 1849, ch. 108, §§ 1, 3, 9 Stat. 395, 395. In response to concerns about federal power-grabbing at the expense of the states, Senator Daniel Webster pointedly noted, "There are duties respecting our foreign relations; and there are duties respecting our internal affairs. . . . That is the whole of it." CONG. GLOBE, 30th Cong., 2d Sess. 677 (1849).

115. Act of Mar. 3, 1849, ch. 108, § 11, 9 Stat. at 396.

116. *See, e.g.*, U.S. CENSUS BUREAU, AGRICULTURE OF THE UNITED STATES IN 1860 223 (1864) (recording 33,730 slaveholders and 435,080 enslaved people in Alabama alone in 1860).

land grants in the hundreds of millions.[117] In addition, the General Land Office continued its time-held duties; it supervised approximately 1.4 billion acres of federal land.[118] In 1860, for example, the government sold approximately 2.5 million acres for $1.8 million, its second-largest source of revenue.[119] This trend continued well into the early twentieth century, as the General Land Office dispensed 500 million acres, mostly to farmers, speculators, industries, and railroads.[120]

Today, Interior enjoys plenary power over the approximately 480 million acres of public lands, which is about one-fifth of the U.S. land area and a majority of federally-owned lands.[121] The Bureau of Land Management manages nearly 250 million acres of public land (about 10% of total U.S. land area) and is responsible for approximately 800 million acres of federal onshore subsurface mineral estate and mineral development on about 60 million acres of Indian trust lands.[122] Finally, the Bureau of Land Management still cedes land, but now to states, such as Alaska and Indian

117. *The Homestead Act of 1862*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/homestead-act#background [https://perma.cc/3P6D-9QGX] (last visited Nov. 11, 2024) (noting the United States ceded a total of 270 million acres until the program's sunset in 1934, with 160 acres allotted per family for $1.25 per acre in 1862); Robert S. Henry, *The Railroad Land Grant Legend in American History Texts*, 32 MISS. VALLEY HIST. REV. 171, 172 (1945) (explaining how the government ceded over 131 million acres to railroad companies).

118. Henry, *supra* note 117, at 171; *see also* Tucker v. Comm'r, 135 T.C. 114, 126–34 (2010) (noting that the First Congress created surveyor positions with Treasury at all ports to work in tangent with customs officials). To be sure, these are figures from 1850, but President Lincoln signed the Homestead Act into law just twelve years later in 1862.

119. Stanley Lebergott, *The Demand for Land: The United States, 1820–1860*, 45 J. ECON. HIST. 181, 211 (1985); THOMAS L. HUNGERFORD, CONG. RSCH. SERV., RL33665, U.S. FEDERAL GOVERNMENT REVENUES: 1790 TO THE PRESENT 10 (2006) (calculating the federal government's land sales at 6.6 million acres from 1860 to 1867). *See generally* BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 2–6, 547–49 (1924) (illustrating the importance of a profitable land sale program in pre-income tax America but its imperfect administration).

120. *Homestead Act (1862)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/homestead-act [https://perma.cc/6U2Z-GH2S] (last visited Nov. 11, 2024).

121. Best v. Humboldt Placer Min. Co., 371 U.S. 334, 336 (1963) (noting Interior has plenary power); MARK K. DESANTIS, CONG. RSCH. SERV., R45480, U.S. DEPARTMENT OF THE INTERIOR: AN OVERVIEW 1 (2019) (stating Interior oversees 480 million acres of public land, 700 million acres of subsurface minerals, and 1.7 billion acres of the Outer Continental Shelf); CAROL HARDY VINCENT, LAURA A. HANSON & LUCAS F. BERMEJO, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020) (explaining the U.S. government owns approximately 640 million acres total).

122. DESANTIS, *supra* note 121, at 1, 8.

corporations, rather than to private individuals.[123]

Additionally, the modern-day Ad Hoc Boards of Appeal, appointed by the Director of the Office of Hearings and Appeals (OHA), hear appeals and render decisions, possess the power to issue final rulings on behalf of Interior concerning all factual and legal questions essential to fully resolving matters under consideration.[124] Specific issues include matters related to acquiring property, acreage limits, and government land surveys.[125] In certain instances, appeals to the Interior Secretary that fall outside of the appellate review jurisdiction of Interior's Board of Land Appeals[126] and are not specifically exempted from the general delegation of authority to the Director may be considered and ruled upon by the Director or by the Ad Hoc Boards.[127]

The Ad Hoc Boards are likely unconstitutional for several reasons. First, the positions are arguably created by law under the *Lucia* and *Freytag* framework.[128] Second, Ad Hoc Boards possess the power of finality.[129] Third, they have authority over adversarial hearings, specifically appeals that should "ensure fair and orderly adversarial hearings" between challengers and the Interior Department.[130] Fourth, they very well may maintain "significant"

123. Ninety-seven percent of land transfers to private individuals occurred before 1940. VINCENT ET AL., *supra* note 121, at 2. Further, from 1990 to 2015, the Bureau of Land Management's land ownership decreased by 25.3 million acres (roughly 10%), largely due to disposals to Alaska and Alaskan Natives. *Id.* at 14.

124. *See* 43 C.F.R. § 4.1(b)(3) (2024).

125. *About the Office of the Director*, U.S. DEP'T OF THE INTERIOR [hereinafter *OHA Director's Office*], https://www.doi.gov/oha/organization/about-oha-director [https://perma.cc/4VMJ-9LJ7] (last visited Nov. 11, 2024).

126. *See* 43 C.F.R. § 4.1(b)(1)–(2). As Professor William Funk notes, the constitutionality of another Interior board, the Board of Land Appeals, is questionable because it acts without an enabling statute from Congress; it was created by mere regulation. *See* William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful?*, 49 ENV'T L. 737, 746 (2019).

127. *See* 43 C.F.R. § 4.1(b)(3).

128. *See* 5 U.S.C. §§ 557, 5372 (establishing appellate procedures under the Administrative Procedure Act (APA) and pay rates for administrative appeals judges). To be sure, these precise positions have not been created by an express statute, only Interior regulations, but *Lucia* suggests that is irrelevant so long as the APA provides a framework. *See* Lucia v. SEC, 138 S. Ct. 2044, 2052–53 (2018) (affirming *Freytag*'s use of 5 U.S.C. §§ 557, 5372 to establish the creation of Administrative Law Judges (ALJs) positions and their pay rates by statute). *Contra* Funk, *supra* note 126, at 740–46 (arguing mere existence of the APA providing a general framework for administrative adjudication is not enough to satisfy the constitutional requirement that offices be "established by Law").

129. *See* 43 C.F.R. § 4.1(b)(3) (granting the Ad Hoc Board the authority to "decid[e] finally for the Department all questions of fact and law necessary for the complete adjudication of the issues"); *Lucia*, 138 S. Ct. at 2053–54.

130. *Lucia*, 138 S. Ct. at 2053; *see* 43 C.F.R. § 4.1(b)(3).

authority because they are empowered to hear any claim not within the jurisdiction of the Board of Land Appeals or the Board of Indian Appeals,[131] and they may hear a portion or entire matter on appeal.[132] Fifth, they are supervised by a principal officer—the Interior Secretary—but their decisions are final.[133] Critically, however, its members are appointed by the OHA Director, not the Secretary of the Interior,[134] the relevant "Head[] of Department[]."[135] Thus, in an almost "point for point" comparison to the *Freytag* factors emphasized in *Lucia*,[136] members of Interior's Ad Hoc Boards of Appeal may very well be unconstitutional.

To be sure, ad hoc positions are not as easily categorized as inferior officers compared to other positions.[137] The primary objection is their "temporary" nature.[138] When analyzing the constitutionality of Special Counsel Mueller in 2018, then-Chief Judge Howell of the U.S. District Court for the District of Columbia reconciled an apparent inconsistency in *Lucia*. There, she noted that under *Morrison v. Olson*'s[139] iteration of the principal-inferior officer test, a position is "temporary" if limited in duration, even without a fixed end date.[140] Comparatively, the *Lucia* Court held that a position is

131. *See* 43 C.F.R. § 4.1(b)(3).

132. *See* 36 Fed. Reg. 7,185 (Apr. 15, 1971) (to be codified at 43 C.F.R. § 4.704).

133. 43 C.F.R. § 4.1(b)(3); 50 C.F.R. § 11.25(b) (2024) ("The determination of the board to grant or deny an appeal, as well as its decision on the merits of an appeal, shall be in writing and become effective as the final administrative determination of the Secretary in the proceeding on the date it is rendered, unless otherwise specified therein."); *see* Edmond v. United States, 520 U.S. 651, 662 (1997) ("Whether one is an 'inferior' officer depends on whether he has a superior.").

134. 43 C.F.R. § 4.1 (stating that the Director is "an authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary"); *see id.* § 4.2(a) (leaving open the possibility for non-ALJs to serve on the Ad Hoc Boards).

135. U.S. CONST. art. II, § 2, cl. 2.

136. *See Lucia*, 138 S. Ct. at 2053.

137. *But see* Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 910–11, 913–17 (2019) (arguing that the current practice of unilateral diplomatic appointments by the President is at odds with the Constitution's original meaning).

138. *Lucia*, 138 S. Ct. at 2051 (noting that *Germaine* "made clear that an individual must occupy a 'continuing' position established by law to qualify as an officer") (citation omitted).

139. 487 U.S. 654 (1988) (relying heavily on a multi-prong factors test to deem special counsel as an inferior officer). *But see* United States v. Trump, No. 23-80101-CR, 2024 WL 3404555, at *34 (S.D. Fla. July 15, 2024) (alleging *Morrison*'s reading remains dubious, leaving the court with a "mixed picture" and "reservations").

140. *In re* Grand Jury Investigation, 315 F. Supp. 3d 602, 644 (D.D.C. 2018) (Howell,

"temporary" if the duties are only "occasional," "intermittent," or "episodic," rather than ongoing and regular.[141] Failing this *Lucia* officer-employee test would mean the position is not an officer. Thus, Judge Howell reasoned, while the special counsel's position was "temporary" under *Morrison* in the sense that it would eventually end when the investigation was complete, it was not "temporary" under *Lucia* because the special counsel's work was ongoing and regular until finished, not just occasional or episodic.[142] Therefore, Special Counsel Mueller was still an officer under the Appointments Clause.[143] By finding "temporary" to mean "the position's *duties* are occasional, intermittent, or episodic,"[144] Judge Howell appears to have cast a notably broader net than previously established by the Court.

Under Judge Howell's discussion of the Court's haphazard jurisprudence, members of Interior's Ad Hoc Boards of Appeal cannot easily be considered officers because they are just that—ad hoc.[145] Yet, the Boards of Appeal may very well be officers because their duties—adjudicating over appeals—may not be "occasional, intermittent, or episodic."[146] Nonetheless, a new source, largely untouched by mainstream Appointments Clause scholarship, may shed additional light on the constitutional designation of inferior officers: Section Three of the Fourteenth Amendment.

II. SECTION THREE AND THE UNDERSTANDING OF "OFFICER"

A. Mechanics of Section Three

The impetus for Section Three, also referred to as the Disqualification Clause, occurred in the aftermath of the bloody, four-year conflict that was

C.J.), *aff'd*, 916 F.3d 1047 (D.C. Cir. 2019) (citation omitted); *see also* Jeffrey S. Lubbers, *A Good Student Question on the Appointments Clause—And a Judge's Answer*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 3, 2019), https://www.yalejreg.com/nc/a-good-student-question-on-the-appointments-clause-and-a-judges-answer-by-jeffrey-lubbers/ [https://perma.cc/N34U-BTJW].

141. *Grand Jury*, 315 F. Supp. 3d at 644 (first quoting United States v. Germaine, 99 U.S. 508, 512 (1878); and then Freytag v. Comm'r, 501 U.S. 868, 881 (1991)); *see also Lucia*, 138 S. Ct. at 2051.

142. *Grand Jury*, 315 F. Supp. 3d at 644.

143. *Id.*

144. *Id.* (emphasis added) (cleaned up).

145. Additionally, one could categorize members of an Ad Hoc Board as employees because they are "lesser functionaries." *See* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). But the logic from the Court's recent Appointments Clause jurisprudence counsels against this argument. *See supra* Part I.C (detailing multiple Supreme Court cases where they found officer status within non-Article III courts).

146. *Grand Jury*, 315 F. Supp. 3d at 644 (internal quotations and citations omitted).

the American Civil War.[147] The conflict placed the country in an existential battle against the Confederate States of America and cost over 620,000 American lives—roughly two percent of the national populace.[148] Critically, 1865 presided over the termination of the centuries-old institution of slavery, which victimized an estimated 10.5 million persons, dispossessing them of their fundamental human rights.[149] To preserve the institution, the eleven slave-holding Southern states attempted to create a government similar to that in Washington.[150] Following the war and the Confederacy's dissolution, the federal government sought to include the insurrectionists in American society, albeit with skepticism.[151] Congress rejected generous approaches to postwar reconciliation, like the strategy favored by President Andrew Johnson, which would have excluded only high-level Confederate officials, and instead sought a broader scope.[152]

Section Three is aimed at preventing those disloyal to the United States from gaining political power following an "insurrection or rebellion."[153] Compared to its accompanying sections, it is a notably punitive measure:[154]

> 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

147. *See* JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10569, THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT 1–2 (2022).

148. *The Civil War - An Introduction*, NAT'L PARK SERV., https://www.nps.gov/civilwar/overview.htm# [https://perma.cc/B4QG-3HM2] (Aug. 5, 2013).

149. J. David Hacker, *From '20. and Odd' to 10 Million: The Growth of the Slave Population in the United States*, 41 SLAVERY & ABOLITION 840, 849 (2020).

150. *See, e.g.*, CONST. OF THE CONFEDERATE STATES art. I (establishing a bicameral legislature comprised of a Senate and House of Representatives).

151. *See* CLAUDINE L. FERRELL, RECONSTRUCTION 19, 20 (Linda S. Frey & Marsha L. Frey eds., 2003); Michael S. Rosenwald, *There's an Alternative to Impeachment or 25th Amendment for Trump, Historians Say*, WASH. POST (Jan. 12, 2021, 9:20 PM), https://www.washingtonpost.com/history/2021/01/11/14th-amendment-trump-insurrection-impeachment/ [https://perma.cc/9RXH-U6K9] ("[Section Three] was specifically aimed at Confederates following the Civil War, seeking to bar them from holding public office during Reconstruction.").

152. *See, e.g.*, Proclamation No. 37, 13 Stat. 758 (May 29, 1865) (forbidding amnesty for only high-ranking military officers, diplomats, and civil officers); Proclamation No. 38, 13 Stat. 760 (May 29, 1865) (establishing negligible terms for accession of former Confederate state North Carolina).

153. ELSEA, *supra* note 147, at 2.

154. *Compare* U.S. CONST. amend. XIV, § 3 (prohibiting individuals who engaged in insurrection from holding office), *with id.* §§ 1–2 (guaranteeing citizenship and voting rights, as well as equal protection).

> 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.[155]

In essence, the provision bars an individual from office if they had (1) "previously taken [a constitutional] oath" as an "officer of the United States" and (2) (a) "engaged in insurrection or rebellion against the same," or (b) "given aid or comfort to the enemies thereof."[156] The section also includes a caveat allowing Congress to override the prohibition against the class through a two-thirds bicameral vote.[157]

Critically, the section enumerates a series of individuals to whom this prohibition applies, including state and federal legislators, as well as state and Article III judges.[158] While the section also extends to "officer[s] of the United States," its plain language fails to enumerate exactly who those individuals are or what offices they hold.[159] Therefore, an analysis of Section Three's legislative history is necessary to illuminate the intentions of the Fourteenth Amendment's framers and ratifiers.[160]

B. Legislative History of Section Three

The drafters designed Section Three to incorporate former members of the Confederacy into the national political fold without jeopardizing the political will and institutions of the victorious federal government.[161] Following the unconditional surrender of the Confederate armies, some 273,000 former rebel soldiers lived within the reconfirmed territorial United States.[162] In the choice words of Pennsylvania Congressman and leading Radical Republican Thaddeus Stevens, it was critical for the government to protect itself from being "filled with yelling secessionists and hissing

155. *Id.* § 3.

156. *Id.*

157. *Id.*

158. *Id.*

159. It should be noted that "officer of the United States" is not capitalized here as in the Appointments Clause, id. art. II, § 2, cl. 2, but the distinction is irrelevant because that would mean principal officers (e.g., the Secretary of State) are not covered under Section Three.

160. For a similar analysis regarding the presidency, see John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 BRIT. J. AM. LEGAL STUD. 237 (2024).

161. *See* U.S. CONST. amend. XIV, § 3 (permitting a pathway for former Confederates to eventually return to office through Congressional action absent congressional override).

162. 8 U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 811–12 (1899).

copperheads"—references aimed at former Confederates and antiwar Northern Democrats.[163] Thus, Section Three was critical to securing the amendment's passage.[164]

Throughout the First Session of the 39th Congress,[165] clerks kept extensive records regarding many legislative affairs that gripped the healing nation following the Civil War.[166] First, looking at the Joint Committee on Reconstruction's report, members of Congress mentioned the word "officer(s)" or "office(s)" on several occasions.[167] Indeed, mention of those terms is scarce, and the report entries that do mention the terms do so in a manner unhelpful to the endeavor of determining the officer-employee delineation.[168]

Second, turning to the structural drafting[169] of Section Three itself, Congress undertook an oscillating path toward its final and current form.[170] An

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163. Rep. Stevens's intemperate remarks specifically referenced the House, but his fears may be easily extrapolated to the government as a whole. *See* Kurt T. Lash, *The Meaning and Ambiguity of Section Three*, 47 HARV. J. L. & PUB. POL'Y 310, 344 (2024).

164. Stevens demanded: "Give us the third section or give us nothing." Lash, *supra* note 163 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866)). As Professor Lash notes, some congressional Republicans wanted to strike Section Three entirely, favoring proposals that disenfranchised former Confederates instead. *See* Lash, *supra* note 163, at 338–43 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866) (statement of Rep. Eliot) ("[Section Three] may be stricken out, and the affirmative value of the amendment will yet be retained.")).

165. The First Session of the 39th Congress lasted from December 4, 1865 to July 28, 1866. *Dates of Past Sessions*, CONGRESS.GOV, https://www.congress.gov/past-days-in-session [https://perma.cc/3URK-KQ4T] (last visited Nov. 11, 2024).

166. Beginning with the 32nd Congress in 1851, the *Congressional Globe* shifted to printing reports that resembled near-verbatim accounts of the debates. *Congressional Globe*, LIBR. OF CONG., https://www.loc.gov/collections/century-of-lawmaking/articles-and-essays/debates-of-congress/congressional-globe/ [https://perma.cc/5MVA-HXCJ] (last visited Nov. 11, 2024).

167. *See, e.g.*, REP. OF THE J. COMM. ON RECONSTRUCTION, H.R. REP. NO. 39-30, at 41–45 (1866) (referring to a plantation inspector of the Freedman's Bureau as an officer).

168. *See, e.g.*, *id.* at 16, 107, 122 (referencing military officers only).

169. There is, of course, skepticism surrounding the use of legislative history. Justice Scalia famously derided peeling back the legislative record for its questionable constitutionality. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997) ("It is the *law* that governs, not the intent of the lawgiver."); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) ("[Legislative history is a] frail substitute[] for bicameral vote upon the text of a law and its presentment to the President.") (citations omitted).

170. Interestingly enough, some of the Fourteenth Amendment's framers appear to subscribe to a similar approach. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1927 (1866) (statement

early section draft from Congressman Samuel McKee's February 1866 proposal was expansive, covering future rebellions and permanently disqualifying rebels from office.[171] Yet, McKee's draft was simultaneously underinclusive because its effects only reached as low as presidential appointees.[172] That is, those barred by the language were only officers appointed by the President and confirmed by the Senate, such as cabinet secretaries.[173] McKee later proposed a second draft,[174] this one including "[a]ll persons who voluntarily" participated in or aided the Confederacy.[175] Notably, McKee's second draft stated that those individuals were "forever excluded from holding *any office* of *trust* or *profit* under the Government of the United States."[176]

Outside of McKee's drafts, other proposals varied in their severity.[177] Independent of these drafts, the Joint Committee on Reconstruction's June 1866 draft focused more narrowly on disenfranchising rebels from voting for members of Congress or Presidential electors until 1870 but did not disqualify ex-rebels from re-entering government.[178] Following a series of debates in the upper chamber, the final Senate version notably replaced disenfranchisement with disqualification from federal or state offices for those who had

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of Sen. Williams) ("[I]n the interpretation of the laws passed by Congress[,] it is necessary and advisable to refer to the debates which were had at the time the laws were passed.").

171. Roger Parloff, *"For Whatever Reason": Will the Colorado Supreme Court Apply the Constitutional Insurrectionist Bar to Presidents?*, LAWFARE (Dec. 6, 2023, 8:23 AM), https://www.lawfaremedia.org/article/for-whatever-reason-will-the-colorado-supreme-court-apply-the-constitutional-insurrectionist-bar-to-Presidents [https://perma.cc/7FDU-SZYV].

172. The provision applied to "any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate . . . ." *Id.*

173. *See id.*

174. CONG. GLOBE, 39th Cong., 1st Sess. 2504 (1866) (statement of Rep. McKee).

175. *Id.*

176. *Id.* (emphasis added). *Compare id.*, *and id.* at 2545 (statement of Rep. Garfield) (moving to amend Section Three to read: "All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States."), *with Office*, 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 196 (S. Converse 1828) [hereinafter WEBSTER'S DICTIONARY 1828] ("A particular duty, charge or trust conferred by public authority and for a public purpose").

177. *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 2286–87 (1866) (disqualifying principal officers, military officers, graduates of the service academies, judges, and members of the 36th Congress) (statement of Rep. Stevens), *and id.* at 2767–68 ("prefer[ring]" to prohibit "all persons who have participated in the rebellion" who were twenty-five years old or older in 1861 from federal and state offices) (statement of Sen. Howard), *with id.* at 2460 (discussing the possibility of disenfranchisement for rebels in municipal, congressional, and presidential elections until 1876) (statement of Rep. Stevens).

178. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2545 (1866).

violated oaths taken previously.[179] Contrasting with the Joint Committee version, the Senate's final language did not detach the prohibition from the exclusive grip of the Civil War, it included the catch-all for *any* officer, both state and federal.[180] Thus, the section's structure indicates any delineation of principal officers from inferior is irrelevant, as the general language covers *all* offices.[181]

C. Additional Contemporary Sources

The Framers certainly intended to include all officers,[182] so the question becomes: who are the officers? Employing methods used by other corpus scholars may ultimately fall short of a clear and convincing distinction between officer and employee. However, these methods do provide meaningful insight that may illuminate and clarify boundaries.[183]

1. Nineteenth Century Dictionaries

The natural and plain reading[184] of the term "officer" is expansive per dictionaries contemporaneous with the drafting of the amendment. Replicating a truncated version of Professor Mascott's study,[185] the terms "office"

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179. *Id.* at 2869 (introducing language most similar to the final amendment construction) (statement of Sen. Howard).

180. *See id.*

181. *See* U.S. CONST. amend. XIV, § 3.

182. *See id.*

183. While not as comprehensive as the studies by Professors Mascott and Phillips, it serves as an introduction to other possible methods to better understand congressional intent. However, scholars have debated the benefits and problems with corpus linguistic studies, but their benefits—especially in the face of an ambiguous record—are heavy, and courts are increasingly adopting corpus linguistics in decisions. *Compare, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 278 (2021) (describing several positive attributes, such as greater transparency, context, and analytical power to statutory interpretation through evidence-based analysis of ordinary meaning in language usage across texts), *with* John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50 (2019) (highlighting that method risks flattening textual context, outsourcing judgments on source credibility, introducing methodological errors, and entrenching biases in ways that can subvert hierarchies of authority and produce outcomes resistant to review).

184. *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 3–6 (2021) (prioritizing publicly available concepts over proto-originalism, which considers how an amendment's drafters interpreted the language).

185. It is critical to stress that this is not a true corpus linguistics study as that would

and "officer" were analyzed in eleven dictionaries and key nineteenth-century jurisprudence—*Maurice*, *Hartwell*, and *Germaine*.[186]

Congruent with its use by members of Congress within the *Congressional Globe*, the nineteenth-century understanding of "officer" was diverse, and it included definitions related to the civil, military, corporate, and clerical contexts.[187] Both American and English commercial dictionaries defined "office" broadly as a position of trust, duty, or authority, often conferred by public authority for a public purpose.[188] Similarly, Worcester's dictionary defined "office" as "a public charge or employment."[189] Browne even went

require a substantially larger volume of sources. *See* Lee & Mouritsen, *supra* note 183, at 304 (outlining a model corpus "rang[ing] from hundreds of millions of words to several billion words"). Additional scholarship using a larger corpus would certainly round out this area.

186. A truism, officers are directly linked to office; the dictionaries often use "officer" and "office" interchangeably, closely linking the terms. *E.g.*, *Officer*, BLACK'S LAW DICTIONARY 845 (1st ed. 1891) [hereinafter BLACK'S DICTIONARY 1891] ("one who is lawfully invested with an office"). Similarly, Webster's 1828 dictionary defined "officer" as a "person commissioned or authorized to perform any public duty," mirroring its broad definition of "office," "[a] particular duty, charge or trust conferred by public authority and for a public purpose." *Officer*, WEBSTER'S DICTIONARY 1828, *supra* note 176.

187. *See, e.g.*, *Officer*, 2 JOHN BOUVIER, A LAW DICTIONARY 260 (5th ed., rev. 1855) [hereinafter BOUVIER'S DICTIONARY 1855]; *Officer*, 2 JOHN BOUVIER, A LAW DICTIONARY 255 (14th ed. 1874) [hereinafter BOUVIER'S DICTIONARY 1874] (segregating civil officers from other categories (e.g., military officers)).

188. *See e.g.*, *Office*, WEBSTER'S DICTIONARY 1828, *supra* note 176 ("A particular duty, charge or trust conferred by public authority and for a public purpose; an employment undertaken by commission or authority from the government or those who administer it . . . . *Offices* are civil, judicial, ministerial, executive, legislative, political, municipal, diplomatic, military, ecclesiastical . . . ."); *Office*, 2 A POPULAR AND COMPLETE ENGLISH DICTIONARY 906 (John Boag ed., William Collins 1848) ("A particular duty, charge or trust conferred by public authority, and for a public purpose"); *Office*, WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 500 (William A. Wheeler ed., G. & C. Merriam 1872) ("A special duty, trust, or charge, conferred by authority and for a public purpose."); *see also Officer*, 7 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 82 (James A. H. Murray ed., 1st ed. 1909) ("One to whom a charge is committed, or who performs a duty, service, or function; a minister; an agent."). The terms may be defined too broadly: many entries defined religious ministers as officers. *E.g.*, *Officer*, WEBSTER'S DICTIONARY 1828, *supra* note 176. This clearly limits the expansive officer definition because ordained clerics would surely not be in violation of Article II and Section Three. *Cf.* Scalia, *supra* note 169, at 24 ("Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.").

189. *Office*, JOSEPH E. WORCESTER, DICTIONARY OF THE ENGLISH LANGUAGE 987 (Hickling, Swan & Brewer 1860) [hereinafter WORCESTER'S DICTIONARY 1860] ("public charge or employment").

so far as to say an "officer" is "a man employed by the public."[190] These definitions suggest that officers encompassed a wide range of public positions and, critically, were not limited to only high-ranking roles.[191]

The law dictionaries provide definitions generally consistent with the general dictionaries, underscoring the idea that offices, as understood by the legal community and possibly a majority of Congress,[192] involved public employment with associated duties and compensation.[193] For example, *Bouvier's 1855 Law Dictionary* described an office as "a right to exercise a public function or employment, and to take the fees and emoluments belonging to it."[194] The same edition also included an element elicited by courts, which is that officers are positions in which the officeholder has no discretionary power or authority to make judgments.[195] Echoing Bouvier, an 1860 legal dictionary defined office as "a right to exercise a public or private employment, and to take the fees and emoluments thereto belonging."[196] Of note, several legal dictionaries cited state cases illuminating a shared understanding that officers engage in a position that is "to be an employment on behalf of the government, in any station or public trust, not merely *transient*, *occasional* or *incidental*."[197]

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190. *Officer*, THOMAS BROWNE, THE UNION DICTIONARY 306 (3d ed. 1810).

191. *Civil Officer*, JOHN BOUVIER, A LAW DICTIONARY (6th ed., rev. 1856) ("By this term are included all officers of the United States who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or the lowest departments . . . .").

192. Richard L. Aynes, *The 39th Congress (1865-1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021, 1025 n.34 (2009) (over 160 lawyers).

193. *See e.g.*, *Office*, BOUVIER'S DICTIONARY 1855, *supra* note 187, at 259; THE LAW DICTIONARY 671–72 (T. E. Tomlins ed., C. & R. Baldwin 1810) ("Officers are public, or private; and it is said, that every man is a public officer who hath any duty concerning the public.").

194. *See Office*, BOUVIER'S DICTIONARY 1855, *supra* note 187, at 259.

195. *See id.* ("Ministerial offices are those which give the officer no power to judge of the matter to be done, and require him to obey the mandates of a superior."); *see, e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986–87 (2021) ("Decisions by [Administrative Patent Judges] must be subject to review by the Director . . . . The Director accordingly may review final [Patent Trial and Appeal Board] decisions and, upon review, may issue decisions himself on behalf of the Board.").

196. *Office,* 2 ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY 257 (2d ed. 1860) [hereinafter BURRILL'S DICTIONARY 1860].

197. *In re* Oaths to be Taken by Att'ys & Couns., 20 Johns. 492, 493 (N.Y. Sup. Ct. 1823); *see Office*, BLACK'S DICTIONARY 1891, *supra* note 186, at 844 (citing *Oaths*, 20 Johns. at 493); *Office*, BOUVIER'S DICTIONARY 1855, *supra* note 187, at 259 (citing Pennsylvania v. Sutherland,

In sum, the nineteenth-century dictionaries defined an "office" as (1) a public position or employment[198] that (2) involves a duty, trust, or charge[199] and is (3) conferred by public authority for a public purpose,[200] while an "officer" is someone lawfully holding an office.[201] The two terms retained their liberal definitions well into the nineteenth century during the Second Founding.[202] Of course, these definitions fail to enumerate certain positions relevant to the officer-employee puzzle.[203] Yet, the dictionary entries,[204] designed to capture the full scope of a word's meaning, reflect the Second Founding-era's understanding of "office" and "officer." Further, they consistently afford broad meanings to the terms, aligning with the plain, less restrictive understanding advanced by Mascott and Phillips et al. based on their corpus linguistics analyses.[205] Mascott argues that in the Founding era, "officer" encompassed any federal official with ongoing statutory duties, even low-level roles,[206] and the dictionaries analyzed in this Comment contain broad definitions of "office" as a public position of duty or trust, thus supporting Mascott's interpretation nearly a century after the drafting of the Appointments Clause.[207] Indeed, the consistency of these broad definitions across nearly a century, from the Constitutional Convention to the Second Founding, strongly supports an expansive interpretation of "officer" and "office" rather than an artificial narrowing of their scope.

2. 39th Congress's General Legislative History

Like the dictionary entries, the 39th Congress mentioned "officer(s)" or "office(s)" repeatedly during the First Session outside of the Fourteenth

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3 Serg. & Rawle 149 (Pa. 1817) (noting that positions dealing with a "temporary or local concern," such as road commissioners, are outside the scope of the Pennsylvania constitution)); *see also supra* notes 138–144 and accompanying text (discussing Chief Judge Howell's "temporary" distinction).

198. *See, e.g. Office*, WORCESTER'S DICTIONARY 1860, *supra* note 189, at 987.

199. *See, e.g.*, *Office*, BLACK'S DICTIONARY 1891, *supra* note 186, at 844; *Office*, JOHN BOUVIER, 2 A LAW DICTIONARY 242–43 (3d ed. 1848).

200. *Office*, DR. WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 908–09 (Chauncy A. Goodrich & Noah Porter eds., London, Bell & Daldy 1864).

201. *See Officer*, BURRILL'S DICTIONARY 1860, *supra* note 196, at 257.

202. *See* Mascott, *supra* note 38, at 487–88.

203. *See e.g.*, *Office*, BOUVIER'S DICTIONARY 1874, *supra* note 187, at 255 (enunciating the offices of the President of the United States, of the heads of departments, of the members of the legislature, are of this number).

204. *See supra* Part II.C.1.

205. *See* Mascott, *supra* note 38; Phillips et al., *supra* note 94.

206. *See* Mascott, *supra* note 38, at 450; *see also* Phillips et al., *supra* note 94, at 904–05.

207. *See* Mascott, *supra* note 38.

Amendment debate, supporting a broader interpretation of the term and even enumerating specific positions. As with the amendment's drafting, congressmen used the terms colloquially.[208] Indeed, the 39th Congress frequently discussed officers in the context of the U.S. Navy[209] and sheriffs,[210] mirroring Bouvier's all-encompassing definition, which includes "[n]aval officers are those who are in command in the navy" and "[e]xecutive officers are those whose duties are mainly to cause the laws to be executed."[211]

However, some congressional statements identify a specific position that may reside comfortably within the title of "inferior officer" under modern jurisprudence. The references do offer some insight, certainly more than the discussions of the Fourteenth Amendment themselves.[212] Several other mentions do not involve relatively high-ranking officials (e.g., assistant cabinet secretaries) but suggest a floor for who qualifies as an officer, certainly closer to the employee-officer demarcation line. Members of Congress enumerated certain positions when discussing officers, such as "Clerks in the Interior Department,"[213] "Solicitor of the War Department,"[214] "Chief Clerk of the House,"[215] "Sergeant-at-Arms,"[216] and "[C]hief of the Bureau of Navigation."[217] Again, while not dispositive on the common understanding of the term officer, the congressional usage of officer suggests administrative and ministerial roles still fell under the officer umbrella by common

208. *See also* Pennsylvania v. Sutherland, 3 Serg. & Rawle 145, 149 (Pa. 1817) (stating that appointment issues dealt with the Pennsylvania constitutional understanding of "office," not the colloquial sense, which was "very vague and indefinite import").

209. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2906 (1866) (statement of Rep. Schenck) (army officers); *id.* at 3002–03 (statement of Rep. O'Neill) (naval officers).

210. *E.g.*, *id.* at 2534 (statement of Rep. Eckley) ("officers of justice"); *id.* at 2543 (statement of Rep. Bingham) (same).

211. *Officer*, BOUVIER'S DICTIONARY 1874, *supra* note 187, at 255 (emphasis omitted). Interestingly, Bouvier's definition of executive officer lists several positions, such as the President and state governors, but does not define "ministerial officers." *Id.* These "ministerial officers," or "those whose duty it is to execute the mandates, lawfully issued, of their superiors," appear to be most analogous to modern inferior officers. *Id.*; *see* Edmond v. United States, 520 U.S. 651, 662 (1997) ("Whether one is an 'inferior' officer depends on whether he has a superior.").

212. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2639 (1866) (statement of Sen. Fessenden) (describing the addition of a new Assistant Secretary of State as creating a "new civil office").

213. *Id.* at 2984 (statement of Sen. Kirkwood) ("Now, if by passing this bill we are increasing the pay of certain grades of officers in one Department, so as to make it necessary to increase the pay of all other officers of the same grades in all other Departments . . . .").

214. *Id.* at 2641 (statement of Sen. Howard).

215. *Id.* at 3237 (statement of Sen. Johnson).

216. *Id.*

217. *Id.* at 3131 (statement of Sen. Grimes).

understanding, lending credence to a more expansive understanding of the term.

3. Contemporaneous Government Understandings

Another issue is that there is very little case law on Section Three, likely due to its short lifespan and scarce enforcement. A combination of Supreme Court interpretations[218] and subsequent congressional legislation[219] ultimately led to its disuse in the early 1870s, just five years after enactment. Most glaringly, an overwhelming majority of Section Three enforcement cases involve a suit against an *elected* official post-election, eliminating the opportunity for further judicial clarification of the officer-employee distinction for Section Three.[220] However, within those cases, multiple state courts indicated Section Three covered a variety of low-level civil officers, such as "Entry Taker[s]," "Inspectors of Flour, Tobacco, &c.," and a postmaster.[221]

Though not every government position is an office, the line is not always clear.[222] Although not a federal court opinion, another contemporaneous document provides additional insight.[223] In interpreting the Reconstruction Acts, U.S. Attorney General Stanbery issued an 1867 opinion noting the distinction between an "office" and "employment," and between an "officer of a State" and an "agent of a State."[224] The latter are "occasional employments" rather than "general and continuing official duty," and Stanbery

218. Professors Baude and Paulsen note that Section Three fell into decay following a Fourth Circuit decision in *In re Griffin*, an opinion written by Supreme Court Chief Justice Salmon Chase while riding circuit. Baude & Paulsen, *supra* note 12, at 635–49; *see In re* Griffin, 11 F. Cas. 7 (C.C.D. Va. 1869) (holding that Section Three was not self-executing). By 1898, Congress removed the disability from the Civil War entirely. Act of June 6, 1898, ch. 389, 30 Stat. 432.

219. *See* Act of May 22, 1872, ch. 193, 17 Stat. 142.

220. *See The Precedent for 14th Amendment Disqualification*, CREW (Aug. 17, 2023), https://www.citizensforethics.org/reports-investigations/crew-reports/past-14th-amendment-disqualifications/ [https://perma.cc/YC9T-WBPM].

221. Worthy v. Barrett, 63 N.C. 199, 202–03 (1869) (listing a litany of offices from the Attorney General down); Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 98–99 n.59 (2021) (citing *Worthy*).

222. *See, e.g.*, United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823).

223. CONG. GLOBE, 41st Cong., 2d Sess. 3034, 3036 (1870) (statement of Rep. Jenkes) ("Whether the opinion of the Attorney General be right or wrong, it is an opinion which ought to be followed by all the officers of the Government until it is reversed by the decision of some competent court.").

224. The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 156–57 (1867) (citing Pennsylvania v. Sutherland, 3 Serg. & Rawle 149 (Pa. 1817)).

notes they likely do not qualify as officers[225] despite the term's colloquial usage and positions' creation by law.[226] Whether the position exercises important functions of trust is another key factor.[227] Stanbery continues to identify positions that would not be officers, including: commissioners of public works, directors of state asylums, penitentiaries, and state banks or corporations, visitors of state universities, and "special commissioners or agents appointed by the governor or other State authority to perform special duties" such as bank examiners, public notaries, and "commissioners to take acknowledgment of deeds."[228]

A survey of over three dozen cases, however, offers insight into the understanding of landmark nineteenth-century cases regarding Appointments Clause jurisprudence.[229] These decisions provide useful context because they demonstrate how lower courts employed the Court's holdings following *Maurice*, *Hartwell*, and *Germaine*.[230] Several common themes emerge in the definition of an "officer," one, critically, being continuity.[231] Further, several cases either explicitly focus on the position's degree of responsibility and authority or indicate that continuity is not a prerequisite for officer status at all.[232] Additionally, numerous cases from the Reconstruction era involving receiver positions (like Treasury positions that oversaw affairs of an insolvent bank) saw courts finding officer status even though the position was severely limited and temporary, active only until the receivership's responsibilities ended.[233]

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225. *Id.* at 155.

226. *Id.* at 156–57 (citing *Sutherland*, 3. Serg. & Rawle 149).

227. *See id.* at 153.

228. *Id.* at 156–57.

229. *See supra* Part II.C.3.

230. United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823); United States v. Hartwell, 73 U.S. 385 (1867); United States v. Germaine, 99 U.S. 508 (1878).

231. *See, e.g.*, *In re* Twenty per Cent. Cases, 87 U.S. 179 (1873) (articulating that mere employees or those employed for ministerial offices have no appointment, no fixed tenure, and are required to obey some superior rather than exercise independent authority); Donovan v. United States, 21 Ct. Cl. 120, 121 (1886) (finding a referee did not constitute an officer because he was "appointed to perform a specific duty, and as soon as that duty is performed the service ceases"); *accord* BOUVIER'S DICTIONARY 1855, *supra* note 187, at 260 (defining "ministerial officers").

232. *Compare* Exec. Commc'n of the 14 Oct., 1868, 12 Fla. 651, 652 (1868) (defining "officer of the State" as "a person in a public charge or employment, commissioned or authorized to perform any public duty, under an oath to support the Constitution and Government, and to perform the duty faithfully"), *with In re* Corliss, 11 R.I. 638, 640–42 (1876) (finding commissioners to be officers when their duties "continue[d] until the close of the exhibition" and had "the highest degree authoritative, discretionary, and final in their character").

233. *See, e.g.*, Frelinghuysen v. Baldwin, 12 F. 395, 396–97 (D.N.J. 1882) (doubting

Specifically looking at the General Land Office, its responsibility to administer America's public lands was assigned to various officers and bureaus in the nineteenth century. Instructed by Congress to serve throughout the expanding territories, the office's Registers and Receivers held a wide range of duties related to land sales, claims, and management, as instructed by Congress.[234] In essence, Registers accepted land purchase applications and maintained records of land sales, while Receivers accepted payments for land purchases and provided receipts for payments received.[235] Critically, Congress provided that the "Register of the Land Office" was to be appointed by the President with the advice and consent of the Senate.[236] As the century progressed, the Land Office continued to process land claims and manage land sales, but they also adjudicated certain types of land claims, such as pre-emption and homestead claims.[237] In various field offices, the Register and Receiver would review land claims, physical evidence (e.g., eighteenth-century deeds), and witness testimony originally compiled by the fact-finders, which were typically local commissioners, but could be Registers and Receivers themselves.[238] From there, the Register and Receiver would determine whether the original claim was valid or not, and they would then submit their recommendation to the General Land Commissioner.[239]

Appeals were heard throughout the federal government: the General Land Office, Interior Secretary, Congress, federal courts, and even the

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whether continuity is a dispositive factor in appointing a bank receiver); Platt v. Beach, 19 F. Cas. 836, 840 (E.D.N.Y. 1868) (holding that if a receiver is appointed by a constitutionally prescribed method to perform duties defined by law, they qualify as a U.S. officer).

234. *See, e.g.*, 3 REG. DEB. app. 21–22 (1827) (detailing the President's signature on Congress's act to "provid[e] for the adjustment of land claims in the State of Alabama"); S. REP. NO. 20-159, at 3 (1828) (submitting the statements the General Land Office's Register and Receiver in St. Stephen's, Alabama "under the provisions of the act of Congress of the 3d of March, 1827").

235. *E.g.*, Act of May 10, 1800, ch. 55, §§ 1, 6, 2 Stat. 73, 73, 75.

236. *Id.* § 1, 2 Stat. at 73.

237. U.S. DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE TO THE SECRETARY OF THE INTERIOR 95 (1868) (noting those officers were prohibited from purchasing land through pre-emption or homesteading because they adjudicate those very types of claims).

238. *See, e.g.*, S. REP. NO. 20-159, at 5, 12, 15, 17, 18 (1828); *see also id.* at 21–33 (compiling notes on adjudication records regarding each claim).

239. *See, e.g.*, *id.* at 8–9 ("[F]rom a careful examination of the several references by him in his first and second applications . . . and from all the testimony on the subject of this claim . . . we are of opinion that the claim is entitled to confirmation, and ought to be confirmed . . . .").

President.[240] At the General Land Office headquarters, land adjudications were assigned to various bureaus, including the Private Land Claims Bureau.[241] The bureau was headed by a principal clerk who supervised junior clerks.[242] Specifically, they were responsible for issuing or denying patents on approximately 16,000 private land claims originating under foreign governments but requiring federal finalization.[243] Another department, the Pre-Emption Claims Bureau, was responsible for overseeing 1,500 and 2,000 "cases of complaints and appeals from the decisions of land officers remaining to be adjudicated."[244] In practice, smaller claims were typically confirmed without difficulty, but larger claims underwent a more complex process, and the government sometimes reconsidered claims multiple times.[245]

In sum, the contemporary understanding presents a more nuanced view of ad hoc positions. While some authority supports the idea that an ad hoc position does not readily fit the definition of officer, others suggest continuity was not a preeminent factor. Thus, rather than scaling back the understanding of "officer," the historical evidence suggests the federal government took a more functional approach, considering factors like responsibility and authority alongside continuity.

III. RECOMMENDATIONS

This Comment recommends that federal courts adopt a more expansive understanding of "officer of the United States" than current Supreme Court definitions to better align the modern administrative state with the original understanding of the term "officer" under Article II and the Fourteenth Amendment. While adopting the corpus linguistics and original understanding will be disruptive and murky,[246] it would allow the Secretary of the

240. *See* Paul Wallace Gates, *Private Land Claims in the South*, 22 J. S. HIST. 183, 190–204 (1956) (detailing various complex land claim appeals with some taking as much as sixty years).

241. For example, by 1865, the General Land Office headquarters had a total of 136 employees. Along with the Commissioner, Recorder, and Chief Clerk, the office included a principal clerk for each original bureau (public lands, private land claims, and surveys), 106 clerks ranging from class one clerks to class four clerks, and twenty-two employees, such as messengers, laborers, draftsmen, and watchmen. U.S. DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE TO THE SECRETARY OF THE INTERIOR 56 (1864).

242. *See* U.S. DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE TO THE SECRETARY OF THE INTERIOR 33 (1883).

243. *See* S. REP. NO. 24-216, at 7 (1836).

244. *See id.* at 8.

245. *See* Gates, *supra* note 240, at 190 (illustrating various land appeals from 1800 to 1858).

246. *Infra* notes 268–269 and accompanying text.

Interior to appoint members of the Ad Hoc Boards of Appeal, faithfully adhering to Article II.

The Ad Hoc Boards might not rest on firm constitutional ground because, while they could very well be considered temporary in nature, they do retain significant authority over the adjudication of impactful appeals, such as debt collection and Indian gaming regulation.[247] And while it may be appropriate to characterize positions as "special commissioners" appointed by federal "authority to perform special duties,"[248] what happens if an individual is repeatedly asked to serve on the boards? Is the position continuous if the matter lasts for an extended period of time?[249] In addition, several holdings close to the passage of the Fourteenth Amendment introduce even more ambiguity, diverging from current Supreme Court jurisprudence by focusing on function over tenure[250] and positing continuity as an indicator of an officer, rather than a dispositive element.[251] Modern dicta echoes potential alternative readings as well.[252]

Moreover, the evolution of the General Land Office, from its 1812 inception to its modern incarnation as the Bureau of Land Management, offers compelling historical support for a broader interpretation of "officer."[253] As the General Land Office's responsibilities expanded, so too did the authority of its officials.[254] Registers and Receivers, for instance, were tasked not only with processing land claims and managing sales but also with adjudicating certain types of land claims, reviewing evidence, hearing testimony, and making recommendations to the General Land Commissioner.[255] Furthermore, Registers were initially appointed by the President.[256] Today, the Ad Hoc Appeals Board continues to hear a variety of appeals, partially involving

247. *See OHA Director's Office*, *supra* note 125.

248. *See* The Reconstruction Acts, 12 U.S. Op. Att'y Gen. 141, 157 (May 24, 1867).

249. *See* Morrison v. Olson, 487 U.S. 654, 672 (1988) (finding the special counsel to be an officer even though tenure ended "when that task [was] over"); Frelinghuysen v. Baldwin, 12 F. 395, 396–97 (D.N.J. 1882) (suggesting an officer is terminated once their successor is appointed).

250. *See* Exec. Commc'n of the 14 Oct., 1868, 12 Fla. 651, 652 (1868) (emphasizing that an officer is determined by their authority to "perform any public duty").

251. *See Frelinghuysen*, 12 F. at 396–97.

252. *See In re* Grand Jury Investigation, 315 F. Supp. 3d 602, 644 (D.D.C. 2018) (Howell, C.J.) (finding a position is "'temporary' if the position's 'duties' are 'occasional,' 'intermittent' . . . or 'episodic'") (citations omitted), *aff'd*, 916 F.3d 1047 (D.C. Cir. 2019).

253. *See supra* notes 106–120 and accompanying text.

254. *See* Henry, *supra* note 117, at 171 (noting that inferior officers at Interior supervised approximately 1.4 billion acres of federal land).

255. *See, e.g.*, S. REP. NO. 20-159, at 17–33 (1828) (detailing roles in adjudications).

256. Act of May 10, 1800, ch. 55, § 1, 6, 2 Stat. 73, 73, 75.

Interior's administration of nearly 250 million acres of public land and 800 million acres of federal subsurface mineral, a responsibility it has been tasked for over 200 years.[257] This historical trend illustrates why adopting a broader understanding of "officer" is not only historically justified but pragmatically necessary in the context of the modern administrative state.

Instead, a clearer rule may be needed to implement the understanding supported by this Comment and scholarship on the Founding-era understanding of "officer." These theories advocating for an expansive read of the term "officer" have been criticized as overinclusive and unworkable.[258] But the modern emphasis on "significant authority"—especially in adjudication[259]—provides further indication that the theories posited by Mascott and this Comment are correct: "Officers" should be read expansively, enhancing accountability and transparency by ensuring department heads formally approve Executive Branch appointments. Indeed, eighteenth and nineteenth-century understandings of the term covered wide-ranging federal posts below high-level roles: clerks at Interior,[260] customs officials,[261] wagon-masters,[262] "Entry Taker[s]," "Inspectors of flour, Tobacco, &c.," and a postmaster.[263] While not definitive, these references suggest that even minor and nontenured roles, not only significant posts, were viewed as public offices.[264]

Further, this debate is not merely a game of semantics—the Fourteenth Amendment should be taken seriously.[265] The designation of officers and employees goes to the very heart of our constitutional fabric, serving as a key mechanism of executive function, separation of powers, and ordered liberty.[266] With

257. DESANTIS, *supra* note 121, at 1, 8.

258. *See* West, *supra* note 47, at 44–45, 50 n.48 (offering a narrower definition as anyone who is authorized to alter legal rights and obligations with finality); Jennifer L. Cotton, Note, *If Established by Law, Then an Administrative Judge is an Officer*, 53 GA. L. REV. 309, 331 (2018) (proposing a bright-line "established by Law" test to distinguish officers from employees in the case of administrative judges). *But see* Tucker v. Comm'r, 135 T.C. 114, 159 n.79 (2010) ("[T]he history of [the Internal Revenue Service] is replete with officials whose positions were specified by statute, but were not appointed pursuant to the requirements of the clause.").

259. *See* Lucia v. SEC, 138 S. Ct. 2044, 2052 (2018).

260. CONG. GLOBE, 39th Cong., 1st Sess. 2984 (1866) (statement of Sen. Kirkwood).

261. Mascott, *supra* note 38, at 517.

262. Phillips et al., *supra* note 94, at 902.

263. Worthy v. Barrett, 63 N.C. 199, 203 (1869); Magliocca, *supra* note 221, at 98–99 (citing *Worthy*); FONER, *supra* note 1, at 259.

264. *But see supra* Part I.C (holding elements like continuity are essential).

265. *See also* Ex parte Young, 209 U.S. 123, 150 (1908) ("We may assume that each [amendment] exists in full force . . . .").

266. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 880 (1991) ("The structural interests

this understanding and guarded optimism, the Ad Hoc Boards could qualify as properly appointed inferior officers if their appointment was reassigned from the Director of Hearings and Appeals to the Secretary of the Interior.[267]

There are, of course, issues with this approach. First, while illustrative, the 39th Congress's legislative history and nineteenth-century definitions fail to construct a bright-line rule, depriving scholars and courts of such a rule's prime benefit: clarity.[268] Moreover, these definitions are not self-executing because they would still require judicial rulings, thereby introducing another potential issue: uniformity. Indeed, the broader definitions of "officer" advanced by scholars and this Comment still require judicial endorsement, especially because the Supreme Court has not overruled its continuity requirement, let alone elaborate on its varied tests.[269]

Constitutional abidance by the Department of the Interior is nonetheless critical. The Appointments Clause matters, and the Supreme Court's "catch and release" policy is not readily applicable here because, in accordance with the Appointments Clause, the Ad Hoc Board must be properly appointed by "the President alone, [by] Courts of Law, or [by] Heads of Departments."[270] While the Court declines to elaborate on key aspects of the Appointments Clause, a broad understanding of the term balances both practical concerns with constitutional obligations.[271]

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protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic."); *see also* THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) ("[The King] has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."); THE FEDERALIST NO. 70 (Alexander Hamilton) ("But in a republic, where every magistrate ought to be personally responsible for his behavior in office the reason which in the British Constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution . . . . In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself.").

267. *See* 43 C.F.R. § 4.1(b)(3) (2024); U.S. CONST. art. II, § 2, cl. 2.

268. *See supra* Part I.C.

269. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) (noting that historical analogs to patent judges were ad hoc positions that "may not have even constituted offices").

270. U.S. CONST. art. II, § 2, cl. 2; *see, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 188 (1824) (Marshall, C.J.) ("As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.").

271. *See* Mascott, *supra* note 38, at 564 (arguing her proposal is "far-reaching" yet nonetheless "achievable" through a modified competitive processes that maintain accountability).

CONCLUSION

This Comment explored the ambiguous definition of an "officer of the United States" under the Appointments Clause. By examining the Fourteenth Amendment's legislative history and contemporary sources, evidence suggests a broader original understanding of the term than employed by the Supreme Court's current doctrine. The amendment's framers appear to have understood offices to encompass a wide range of federal positions.

Adopting this expansive interpretation could enhance accountability by ensuring department heads approve selections for many federal posts. Though disruptive, this approach best aligns with the Constitution's text and purpose.[272] Courts should consider incorporating these broader historical understandings into Appointments Clause jurisprudence. While some ambiguity remains, embracing a more expansive definition pragmatically upholds separation of powers and promotes transparency and accountability in appointments.[273] As the administrative state grows, faithfully adhering to the Appointments Clause's original meaning is increasingly vital to ensure our constitutional structure functions as intended.

272. Justice Jackson admits as much when discussing the seminal case of executive power, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring). *See* Trump v. United States, 144 S. Ct. 2312, 2381–82 (2024) (Jackson, J., dissenting) ("[T]he majority is [not] wrong when it perceives that it can be cumbersome for a President to have to follow the law while carrying out his duty to enforce it. . . . But any American who has studied history knows that 'our government was *designed* to have such restrictions.'").

273. *See* Stacy M. Lindstedt, *Developing the Duffy Defect: Identifying Which Government Workers are Constitutionally Required to Be Appointed*, 76 MO. L. REV. 1143, 1148 (2011).