TEMPORARY OFFICERS

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INTRODUCTION

In *Lucia v. Securities and Exchange Commission*,[1] the Supreme Court held that an administrative law judge in the Securities and Exchange Commission ("SEC") qualifies as an "Officer of the United States" under the Appointments Clause of the Constitution.[2] The Appointments Clause establishes as a default rule that all "Officers of the United States" are to be nominated by the President "by and with the Advice and Consent of the Senate."[3] There are only two exceptions to this rule: (1) Officers "whose Appointments are . . . otherwise provided for" in the Constitution, such as the President, Vice President, and Congressional Officers;[4] and (2) "inferior Officers" if—and only if—Congress has affirmatively "vest[ed]" their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments."[5] Although Congress had specifically authorized the Commission—the head of the SEC—to appoint administrative law judges ("ALJs"),[6] all parties to the case agreed that the ALJs in question were actually selected by "[o]ther staff members, rather than the Commission proper."[7] As such, the "sole question [for the Court to decide was] whether the [SEC]'s ALJs are 'Officers of the United States' or simply employees of the Federal Government."[8]

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1 138 S. Ct. 2044 (2018).

2 *Id.* at 2057.

3 U.S. CONST. art. II, § 2, cl. 2.

4 *Id.*

5 *Id.*

6 15 U.S.C. § 78d(b)(1) (2018) ("The Commission shall appoint and compensate officers, attorneys, economists, examiners, and other employees in accordance with section 4802 of Title 5"); 5 U.S.C. § 4802 (2012) ("The Commission may appoint and fix the compensation of such officers, attorneys, economists, examiners, and other employees as may be necessary for carrying out its functions . . . ."). At the time these statutes were passed, administrative law judges were typically referred to as "hearing *examiners*." Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 938 (1990) (emphasis added).

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

8 *Id.* at 2051.

It should be noted at the outset that although the distinction between "officer" and "employee" is ahistoric and anachronistic,[9] that distinction appears to be firmly entrenched in case law and is unlikely to change.[10] Consequently, if a federal appointee is deemed to be a mere employee, then—in the words of Justice Kagan—"the Appointments Clause cares not a whit about who named [her]."[11] Writing for the majority in *Lucia*, Justice Kagan laid out what appears to be a two-part test for making this determination:

> Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercise[ed] significant authority pursuant to the laws of the United States." The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.[12]

This Article leaves to others[13] the task of debating the historical accuracy and wisdom of the "significant authority" prong of Justice Kagan's test and instead focuses on the "continuity" prong.

In 2007, the Office of Legal Counsel issued a memorandum opinion titled "Officers of the United States Within the Meaning of the Appointments Clause."[14] The opinion addressed "the requirements of the Appointments Clause of the Constitution"[15] and found continuity to be among those factors necessary for the Appointments Clause to apply. According to the opinion, for a position to be continuous, it must be "permanent, meaning that it is not limited by time or by being of such a nature that it will terminate by the very

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9 *See* James Heilpern, *A Corpus-Based Response to Justice Sotomayor's Comments in* Lucia v. SEC, ORIGINALISM BLOG (May 4, 2018), http://originalismblog.typepad.com/the-originalism-blog/2018/05/a-corpus-based-response-to-justice-sotomayors-comments-in-lucia-v-secjames-heilpern.html ("[T]he word 'employee' is a French loan-word that . . . did not seem to enter into the American vernacular until sometime after the Civil War . . . ."); *see also* Jennifer L. Mascott, *Who are "Officers of the United States"?*, 70 STAN. L. REV. 443, 450 (2018).

10 *See* Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991); Tucker v. Comm'r, 676 F.3d 1129, 1133–35 (D.C. Cir. 2012); Mascott, *supra* note 9, at 447–48.

11 *See Lucia*, 138 S. Ct. at 2051.

12 *Id.* (citations omitted).

13 *See* Mascott, *supra* note 9, at 443 ("[T]he original public meaning of 'officer' . . . encompass[es] any government official with responsibility for an ongoing governmental duty."); *see also* Brief for Scholars of Corpus Linguistics as Amici Curiae Supporting Petitioners at 28–29, Lucia v. SEC, 138 S. Ct. 2044 (2018) ("[A]n 'Officer of the United States' is any federal employee that exercises non-negligible government authority."); James C. Phillips, Benjamin Lee & Jacob Crump, *Corpus Linguistics and "Officers of the United States"*, 42 HARV. J.L. & PUB. POL'Y (forthcoming 2019).

14 31 Op. O.L.C. 73 (2007) [hereinafter OLC].

15 *Id.* at 73.

fact of performance."[16] The opinion alleged that this rule is a reflection of "[e]arly American practice and precedent, particularly with regard to diplomacy."[17] It asserted that during the Founding era, positions "summoned into existence only for *specific temporary purposes*" were not understood to be "'offices' in the sense of the Constitution."[18]

If adopted, this definition would cast doubt on the continuing validity of parts of *Morrison v. Olson*.[19] In *Morrison*, the Court was called upon to determine whether an independent prosecutor appointed pursuant to the Ethics in Government Act of 1978 was an Officer of the United States.[20] The Court concluded that she was, even though the position was "'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated."[21] The Court considered the "factors relating to the ideas of 'tenure, duration . . . and duties'" stressed in *Germaine* but concluded that the temporary nature of the position merely "establish[ed] that [the independent prosecutor was] an 'inferior' officer" rather than a principal one.[22] It is unclear whether Justice Kagan intended to incorporate the OLC's definition of continuous, but at a minimum, *Lucia* appears to elevate the importance of this factor, making it now a threshold requirement for distinguishing between officers and employees.[23]

If this is true, many important, congressionally created positions exercising sovereign power are suddenly outside the requirements of the Appointments Clause. Consider, for example, the Passenger Rail Investment and Improvement Act of 2008. The Act "task[ed] Amtrak and the Federal Railroad Administration (FRA) with jointly developing performance metrics and standards as a means of enforcing Amtrak's statutory priority over other trains."[24] If the two entities were unable to reach an agreement "on the composition of these metrics and standards," either could "petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."[25] This arbitrator, therefore, had the final authority to establish the "metrics and standards" which would appear in the Federal Register and which the entire railroad industry would be compelled to obey.[26] Because of this, the D.C. Circuit concluded that the arbitrator was an Officer of the United States and that his appointment by the

16 *Id.* at 111 (internal quotation marks and citations omitted).
17 *Id.* at 102.
18 *Id.* at 103.
19 487 U.S. 654 (1988).
20 *Id.* at 659–60.
21 *Id.* at 672.
22 *Id.*
23 *Lucia*, 138 S. Ct. at 2051.
24 Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 23 (D.C. Cir. 2016).
25 *Id.* at 24 (internal quotation marks omitted).
26 *Id.* at 39.

Surface Transportation Board was unconstitutional.[27] But *Lucia* and the OLC's opinion cast doubt on this conclusion. After all, the arbitrator was only appointed for "*specific temporary purposes*."[28]

The Supreme Court has stated that the requirements of the Appointments Clause should not be read as mere "etiquette or protocol,"[29] but are "among the significant structural safeguards of the constitutional scheme" that are "designed to preserve political accountability relative to important government assignments."[30] The Clause serves as "a bulwark against one branch aggrandizing its power at the expense of another branch"[31] and "prevent[s] the diffusion of the appointment power."[32] But the continuity requirement spelled out in *Lucia* creates a significant loophole in this Constitutional scheme, enabling Congress to circumvent this "structural safeguard[]"[33] at its leisure and "aggrandize[e] its power at the expense of" the Executive.[34]

Not only is the continuity requirement a dangerous erosion of the Constitutional scheme of checks and balances, it is also ahistoric. Relying on a number of sources that have previously been overlooked by the OLC and past literature,[35] this Article will first show that from the earliest days of the Washington administration, presidents consistently sought Senate confirmation even for officials sent on temporary missions,[36] including many of the very officials the OLC's opinion falsely claims were unilaterally appointed by presidents. It will then turn to precedent and show that the case law the *Lucia* opinion relies on is at best inconsistent, with many of the cases being easily distinguished.

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27 *Id.* at 37.

28 OLC, *supra* note 14, at 103.

29 Buckley v. Valeo, 424 U.S. 1, 125 (1976).

30 Edmond v. United States, 520 U.S. 651, 659, 663 (1995).

31 Ryder v. United States, 515 U.S. 177, 182 (1995).

32 Freytag v. Comm'r, 501 U.S. 868, 878 (1991).

33 *Edmond*, 520 U.S. at 659.

34 *Freytag*, 501 U.S. at 878.

35 These sources were identified primarily using two electronic databases of Early American documents, the Corpus of Founding Era American English [https://lawcorpus.byu.edu/cofea/concordances/search] and Founders Online [founders.archives.gov], using what linguists refer to as "corpus-driven" techniques. *See* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1340–41 (2017).

36 As Professor Lawrence Solum has observed, "The early history of implementation . . . provides *evidence* bearing on the communicative content of the constitutional text. If those who implemented the text intended to act in ways that are consistent with the text, what they did is *evidence* of what they understood the text to mean." Lawrence B. Solum, *Triangulating Public Meaning*: *Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1658 (2017) (emphasis added). This is of course not dispositive to the question of original meaning, but when other more direct tools are less clear in pointing to original public meaning, it may make sense to turn to early practice to help "triangulate" the meaning. *Id.*

I. EARLY AMERICAN PRACTICE

The OLC's memorandum opinion claims that "[e]arly American practice . . . , particularly with regard to diplomacy . . . strongly support[s] and illuminate[s] th[e] understanding that, to be an office, a position must have continuance or duration."[37] The author asserts that during the Founding era, "diplomatic assignments . . . summoned into existence only for *specific temporary purposes*" were not considered "offices in the sense of the Constitution."[38] This is evidenced by the fact that "[f]rom the beginning, Presidents repeatedly have 'dispatched "secret" agents on diplomatic or semi-diplomatic missions without nominating them to the Senate'" first.[39] For example, in one of his first acts as president, George Washington allegedly sent "Gouverneur Morris (a fellow delegate to the Constitutional Convention) as a special agent to explore a commercial treaty with Britain."[40]

This could not be further from the truth. George Washington and his two immediate successors routinely sought Senate confirmation even when appointing individuals to short-term assignments. This is particularly true in the case of Indian Commissions and Envoys Extraordinary who were appointed to negotiate treaties on behalf of the United States.[41] It is also true for at least a narrow class of positions established by Congress in the wake of the Jay Treaty of 1794.[42] As the Supreme Court indicated a century later in *Perkins v. United States*,[43] the fact that these officials were appointed vis-à-vis one of the mechanisms provided for in the Appointments Clause is compelling evidence that the President and Congress understood them to be Officers of the United States despite their limited tenure.

A. *Indian Commissions*

In August 1789—less than four months after his first inauguration as President—Washington "by and with the Advice and consent of the Senate appointed and constituted" Benjamin Lincoln, Cyrus Griffin, and David Humphreys as Commissioners to "the Creeks and all other Nations of Indians situated within the limits of the [United] States to the Southern end of the

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37 OLC, *supra* note 14, at 102.

38 *Id.* at 103 (quoting EDWARD S. CORWIN, THE PRESIDENT: OFFICE & POWERS 86 (1957)) (quotation marks omitted).

39 *Id.* at 102 (quoting EDWARD S. CORWIN, THE PRESIDENT: OFFICE & POWERS 86 (1957)).

40 *Id.* at 102 (citing DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD: 1789–1801, at 44 (1997)).

41 *See infra* Part I.A.

42 *See infra* Part I.B.

43 116 U.S. 483 (1886).

river Ohio."[44] Prior to the ratification of the Constitution, Georgia had entered into a series of treaties with the Creeks, acquiring from them large swaths of previously disputed lands.[45] Hostilities between the two nations flared up again in late 1788, with the Creeks attempting to drive American settlers off of the allegedly ceded lands. In a letter to the Commissioners dated August 29, 1789, Washington explained that the "first great object of [their] commission [was] to negotiate and establish peace between the state of Georgia and the Creek Nation."[46] The negotiations were short-lived and futile, concluding on September 27, 1789—less than a month after the Commissioners were appointed.[47] They submitted their final report, detailing their failure, to Secretary of War Henry Knox on November 17, 1789.[48] Having completed their report, the Commission ceased to exist.

But Washington's efforts to negotiate peace with the Creeks were not over. Following the failure of the Commission, he thought it "prudent" to take "informal" measures "for disposing [the Creeks] to a Treaty."[49] These included sending personal correspondence through friends and persuading Alexander McGillivray, the leader of the Creek nation, to come to New York.[50] Once there, the President flattered the Chief, lionizing him "in one public celebration after another."[51] During these revelries, "treaty negotiations were begun and a treaty draft [was] presented to McGillivray."[52] However, when it came time to formalize an agreement, President Washington once again sought Senate confirmation for a new Commissioner, Henry Knox, to represent the interests of the United States.[53] Knox—suddenly holding two distinct offices—signed the treaty the next day as both "Secretary of War *and* [the] Commissioner for treating with the Creek Nation."[54]

This was not an isolated incident. At some point, one of Washington's Attorneys General—probably Edmund Randolph—issued a "written opinion" concluding "that the President had not power by the Constitution to appoint a Commissioner [to negotiate a treaty with a Native American tribe]

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44 Proclamation from George Washington, President of the U.S., to the S. Indians (Aug. 29, 1789), https://founders.archives.gov/documents/Washington/05-03-02-0328.

45 *See* Randolph C. Downes, *Creek-American Relations, 1782–1790*, 21 GA. HIST. Q. 142, 144 (1937).

46 Letter from George Washington, President of the U.S., to the Comm'rs to the S. Indians (Aug. 29, 1789), https://founders.archives.gov/documents/Washington/05-03-02-0326.

47 *See* Downes, *supra* note 45, at 178–80.

48 *See id.* at 180–81.

49 Letter from George Washington, President of the U.S., to the U.S. Senate (Aug. 6, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0090.

50 See Downes, *supra* note 45, at 182.

51 *Id.*

52 *Id.*

53 Washington, *supra* note 46.

54 Treaty of New York with the Creek Nations of Indians, Creek Nation of Indians–U.S., Aug. 7, 1790, (emphasis added), http://wardepartmentpapers.org/s/home/item/11877.

without the advice and consent of the Senate."[55] As such, Washington sought Senate confirmation before appointing Indian commissioners throughout his two terms in office.[56] That these appointments were considered temporary rather than continuous is exemplified by Washington's actions with respect to negotiations with the Cohnawaga tribe. Sometime in 1795, Washington appointed, with Senate approval, Jeremiah Wadsworth "to hold a treaty with the Cohnawaga Indians, stiling themselves the seven Nations of Canada, to enable the State of New York to extinguish by purchase a claim which the said Indians had set up to a parcel of land lying within that State."[57] The initial negotiations failed. When both parties agreed to try again the following year, Washington *resubmitted* Wadsworth's name as Commissioner for a second round of Senate approval.[58]

Either ignorant of or choosing to ignore all this evidence, the OLC's opinion suggests that such Indian commissioners were not officers. To support this assertion, the OLC opinion highlights Jefferson's appointment of "Senator Daniel Smith as a commissioner to negotiate and execute treaties with the Cherokee Indians," claiming that "Jefferson did not submit the nomination to the Senate, and Smith did not vacate his seat in the Senate."[59] Smith vacating his seat might have been expected under the Ineligibility Clause, which prohibits anyone "holding any Office under the United States" from serving as "a Member of either House [of Congress] during his Continuance in Office."[60]

But this assertion does not accurately reflect history. Jefferson appeared to have appointed Smith (along with Return Jonathan Meigs) as a recess appointment.[61] Secretary of War Henry Dearborn informed the pair of the

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55 *See* Letter from Timothy Pickering, Sec'y of State, to George Washington, President of the U.S. (Aug. 27, 1796) (referencing the opinion), https://founders.archives.gov/documents/Washington/99-01-02-00887.

56 Letter from George Washington, President of the U.S., to the U.S. Senate (Mar. 1, 1793) (nominating Benjamin Lincoln, Beverly Randolph, and Timothy Pickering "to be Commissioners . . . for holding a Conference or Treaty with the hostile Indians [in the Northwest Territory]"), https://founders.archives.gov/documents/Washington/05-12-02-0187; Letter from George Washington, President of the U.S., to the U.S. Senate (June 25, 1795) (nominating Benjamin Hawkins, George Clymer, and Andrew Pickens as "Commissioners for holding the proposed treaty" with the Creeks), https://founders.archives.gov/documents/Washington/05-18-02-0200; Letter from George Washington, President of the U.S., to the U.S. Senate (Mar. 2, 1797) (nominating "Isaac Smith to be a Commissioner to hold a Treaty with the Seneka Nation"), https://founders.archives.gov/documents/Washington/99-01-02-00385; Letter from George Washington, President of the U.S., to the U.S. Senate (May 17, 1796) (nominating Abraham Ogden as Commissioner "to hold a Treaty with the Cohnawaga Indians"), https://founders.archives.gov/documents/Washington/99-01-02-00523.

57 Letter from George Washington, President of the U.S., to the U.S. Senate (May 2, 1796), https://founders.archives.gov/documents/Washington/99-01-02-00484.

58 *Id.*

59 OLC, *supra* note 14, at 102.

60 U.S. CONST. art. I, § 6.

61 *See* WALTER T. DURHAM, DANIEL SMITH: FRONTIER STATESMAN 214 (1976).

President's decision in a letter dated April 4, 1804,[62] and the presidential commissions were signed two weeks later on April 23, when the Senate was not in session.[63] At the time, Smith was only the Senator-designate from the State of Tennessee, having been duly elected by the Tennessee General Assembly on September 23, 1803, but had not yet been seated.[64] The Tennessee House Journal notes that he was "to represent [the] state in the Senate of the United States from and after the third day of March 1805"[65]—the day the Eighth Congress adjourned.[66] But the Ninth Congress did not gavel into session until December 2, 1805.[67] During the interim, Smith served as an Indian Commissioner, concluding two treaties with the Cherokee nation, one signed on October 25, 1805 and the other on October 27, 1805.[68] It seems likely that neither Jefferson nor Smith felt this service violated the Ineligibility Clause because, having not taken the Oath of Office,[69] Smith was not yet officially serving as a member of the Senate. Furthermore, it is important to note that Jefferson *did* eventually submit Daniel Smith's name to the Senate on November 9, 1804, shortly after Congress reconvened, as part of a lengthy "[l]ist of appointments made by the President of the United States, subsequent to the rising of the Senate in March 1804."[70]

It is worth noting that while judges, cabinet secretaries, and generals were routinely sent on diplomatic missions, this is the only instance that an elected member of Congress was sent. Even if Smith's appointment was unconstitutional—which it likely was not—he is the exception rather than the

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62 *See id.* at 214–15.

63 *See Dates of Sessions of Congress*, United States Senate, https://www.senate.gov/reference/Sessions/sessionDates.htm (last visited Mar. 3, 2019) (noting that Eighth Congress adjourned on March 27, 1804 and did not reconvene again until November 5, 1804).

64 *Tennessee 1803 U.S. Senate, Special*, A NEW NATION VOTES: AM. ELECTION RETURNS 1787–1825, https://elections.lib.tufts.edu/catalog/tufts:tn.ussenate.special.1803 (last visited Mar. 4, 2019).

65 *Id.*

66 *See Dates of Sessions of Congress*, *supra* note 63.

67 *Id.*

68 *See* DURHAM, *supra* note 61, at 228–29 (citing 1 AM. ST. PAPERS, INDIAN AFFAIRS, at 697–98 (1832)). Smith and Meigs had negotiated another treaty the previous October, but for some reason it was not ratified until 1824. *See* 2 AM. ST. PAPERS, INDIAN AFFAIRS 506–07 (1834). The discrepancy was noticed during the administration of James Monroe who forwarded the treaty to the Senate with the following note: "I communicate to the Senate a treaty entered into with the Cherokee nation as early as 1804, but which, owing to causes not now understood, has never been carried into effect. Of the authenticity of the transaction, a report from the Secretary of War, with documents accompanying it, furnishes the most unquestionable proof. I submit it to the Senate, for its advice and consent as to the ratification." *Id.* at 506.

69 Mr. Smith did not take the Oath of Office until December 2, 1805. S. JOURNAL, 9th Cong., 1st Sess. 4 (1805).

70 Thomas Jefferson, *List of Appointments, with Jefferson's Notes*, PAPERS OF THOMAS JEFFERSON (Nov. 9, 1804), http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-01-02-0614. Next to Smith and Meigs' names was a handwritten note in the margins written in Jefferson's hand which read "need not given in unless it should not be voted before end of session." *Id.* It is unclear whether this note had reference to the commissions or the treaty.

rule. Both John Adams and Thomas Jefferson followed Washington's precedent of seeking the advice and consent of the Senate when appointing Indian Commissioners.[71] Jefferson even sought Senate confirmation in 1808 before he again appointed Return Jonathan Meigs to be a Commissioner to negotiate a treaty between Tennessee and the Cherokees, even though he was already an "agent for the US[] with the Cherokees" at the time.[72] As Professors Vine Deloria, Jr. and Raymond J. DeMallie have noted:

> In almost every instance in which treaties and agreements were made [with Native Americans throughout American history], *Congress authorized a commission* to be sent to a specific tribe or group of tribes to seek certain concessions and sales of particular lands, to establish peace on the frontiers, or even to settle intertribal quarrels. . . . [T]he choice of commissioners became an opportunity for political appointment by the president.[73]

B. *Foreign Diplomatic Missions*

The same practice was followed while negotiating treaties and trade deals with European nations. During Washington's administration, the United States entered into four treaties with foreign powers: England, Spain, Algiers, and Tripoli.[74] As will be seen, in appointing Commissioners and envoys to negotiate these treaties on behalf of the United States, Washington

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71 *See, e.g.*, Letter from John Adams, President of the U.S., to the U.S. Senate (Jan. 8, 1798) (nominating Fisher Ames, Bushrod Washington, and Alfred Moore "to be Commissioners of the United States with full Powers to hold Conference and Conclude a Treaty with the . . . Cherokee Nation"), https://founders.archives.gov/documents/Adams/99-02-02-2291; Letter from John Adams, President of the U.S., to the U.S. Senate (Mar. 23, 1798) (nominating George Walton and John Steel "to be Commissioners for treating with the Indians"), https://founders.archives.gov/documents/Adams/99-02-02-2387; Letter from John Adams, President of the U.S., to the U.S. Senate (May 3, 1798) (nominating Joseph Hopkinson "to be Commissioner to hold a Treaty with the . . . Oneida tribe"), https://founders.archives.gov/documents/Adams/99-02-02-2441; Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Jan. 6, 1802) (nominating commissioners to "treat with" the Cherokees, Chickasaws, Choctaws, Creeks, and Tuscaroras), https://founders.archives.gov/documents/Jefferson/01-36-02-0183-0007; Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Feb. 1, 1802) (nominating John Taylor "to be a Commissioner to hold a treaty between the state of New York and the Saint Regis Indians"), https://founders.archives.gov/documents/Jefferson/01-36-02-0312; Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Mar. 9, 1802) (nominating John Taylor "to be Commissioner for the US[] to hold a convention or conventions between the state of New York and the confederacy of the six nations of Indians"), https://founders.archives.gov/documents/Jefferson/01-37-02-0021.

72 Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Mar. 18, 1808), https://founders.archives.gov/documents/Jefferson/99-01-02-7658.

73 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979, at 177 (1991).

74 *See* Treaty of Peace and Friendship, Tripoli-U.S., Nov. 4, 1796, 8 Stat. 154 [hereinafter Peace and Friendship]; Treaty of Friendship, Limits, and Navigation Spain-U.S., Oct. 27, 1795, 8 Stat. 138 [hereinafter Friendships, Limits, and Navigation]; Treaty of Peace and Amity, Algiers-U.S., Sept. 5, 1795, 8 Stat. 133 [hereinafter Peace and Amity]; Treaty of Peace, Gr. Brit.-U.S., Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Peace].

was careful to follow the relevant Constitutional provisions by seeking the advice and consent of the Senate if Congress was in session or by providing short-term commissions if the Senate was in recess. Washington did so even though each of these Commissions, by their very nature, was temporary in the sense that they were "of a transient, evanescent character," which would "terminat[e] when the [treaty] was accomplished."[75]

1. England

The OLC opinion points out that Washington sent Gouverneur Morris "to explore a commercial treaty with Britain"[76] without obtaining Senate confirmation first. While this is true, in doing so he viewed Morris as his "private [rather than public] Agent," believing it "most expedient to have these Inquiries made informally" first.[77] In fact, Morris set sail for Europe before Washington was even elected President or a Senate existed, and he was asked to perform other more mundane, private tasks on Washington's behalf during his trip such as purchasing a gold watch for him in Paris.[78] When it came time to actually negotiate a formal treaty, Washington sought the advice and consent of the Senate, nominating Chief Justice John Jay as "envoy extraordinary of the United States, to his britannic Majesty."[79] In this respect, Washington's actions paralleled his diplomatic overtures to the Creeks. "Informal" negotiations could be performed by friends and acquaintances, but Senate confirmation was required to confer the sovereign authority of the State.[80] As Alexander Hamilton explained, "there is *no* power in the President to appoint an Envoy Extraordinary, without the concurrence of the senate."[81]

It is worth noting that Jay was *not* appointed as a permanent Ambassador to Great Britain. He did not replace Thomas Pinckney, who at the time was serving as "Minister Plenipotentiary" of the United States in London and

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75 Bunn v. People *ex rel.* Laflin, 45 Ill. 397, 402 (1867).

76 OLC, *supra* note 14, at 102.

77 Letter from George Washington, President of the U.S., to Gouverneur Morris (Oct. 13, 1789), https://www.questia.com/read/38275632/the-writings-of-george-washington-from-the-original.

78 *See* Catharine Keppele Meredith, *Sketch of the Life of Gouverneur Morris*, 2 PA. MAG. HIST. & BIOGRAPHY 185, 192 (1878).

79 Letter from George Washington, President of the U.S., to the U.S. Senate (Apr. 16, 1794), https://founders.archives.gov/documents/Washington/05-15-02-0473.

80 Washington followed the same approach in his failed efforts to negotiate a treaty with Portugal. *See* Letter from George Washington, President of the U.S., to the U.S. Senate (Feb. 18, 1791) (informing the Senate that the President had sent David Humphreys to reciprocate the Court of Lisbon's "amicable advances for cultivating friendship and intercourse with the United States . . . informally"), https://founders.archives.gov/documents/Jefferson/01-19-02-0062.

81 Letter from Alexander Hamilton, Sec'y of the Treasury, to George Washington, President of the U.S. (July 5, 1796), https://founders.archives.gov/documents/Hamilton/01-20-02-0157.

would in fact continue to hold that post for another two years.[82] Rather, Jay's commission was considered a "special command," limited to a single task: "to meet and confer with the Ministers, Commissioners, or Deputies of [the King of England] . . . to agree, treat, consult, and negotiate . . . and conclude and sign a Treaty or Treaties, Convention or Conventions" with Great Britain.[83] Once completed, Jay was to return home, personally "transmitting the [treaty] to the President of the United States of America for his final ratification by and with the Advice and Consent of the Senate of the United States."[84]

2. Spain

Washington's efforts with Spain are likewise enlightening.[85] In 1792, he was hoping to enter into a treaty with the King of Spain which would allow "for the free navigation of the River Mississippi by the citizens of the United States."[86] Washington nominated William Carmichael and William Short to serve as "Commissioners plenipotentiary"—a temporary position with a single assignment: "negotiating and concluding, with any person or persons duly authorized by his Catholic Majesty, a convention or treaty for the free navigation of the River Mississippi."[87] It is worth noting that at the time, Carmichael was already serving as the United States' permanent *Chargé des Affaires* in Madrid—a position Washington had appointed him to with the advice and consent of the Senate early in his first term.[88] Yet—as with the appointment of Knox as an Indian Commissioner—it is clear that Washington viewed the office of Commissioner Plenipotentiary as distinct from Carmichael's existing responsibilities. Washington sought Senate confirmation for

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82 *Thomas Pinckney (1750–1828)*, OFFICE OF THE HISTORIAN, https://history.state.gov/departmenthistory/people/pinckney-thomas (last visited Nov. 26, 2018).

83 George Washington, Notice of John Jay's Powers as Envoy Extraordinary to Great Britain (May 6, 1794), https://founders.archives.gov/documents/Washington/05-16-02-0021.

84 *Id.*

85 *See* Letter from George Washington, President of the U.S., to the U.S. Senate (Nov. 21, 1794) (nominating Thomas Pinckney "to be Envoy Extraordinary" to Spain for the purposes of negotiating a commercial treaty), https://founders.archives.gov/documents/Washington/05-17-02-0129; Letter from George Washington, President of the U.S., to the U.S. Senate (Jan. 11, 1792) (nominating William Carmichael and William Short as "Commissioners plenipotentiary for the special purpose of negotiating and concluding . . . a convention or treaty" with Spain), https://founders.archives.gov/documents/Washington/05-09-02-0252; *see also* Letter from George Washington, President of the U.S., to the U.S. Senate and U.S. House of Representatives (Feb. 28, 1795) (noting that the envoy to Spain was "specially charged"), https://founders.archives.gov/documents/Washington/05-17-02-0401.

86 Letter from George Washington, President of the U.S., to the U.S. Senate (Jan. 11, 1792) (quoting Report from Thomas Jefferson, Sec'y of State, to George Washington, President of the U.S. (Dec. 22, 1791)), https://founders.archives.gov/documents/Washington/05-09-02-0252.

87 *Id.*

88 Letter from George Washington, President of the U.S., to the U.S. Senate (Sept. 29, 1789), https://founders.archives.gov/?q=Date%3A1789-09-29&s=1111311111&r=8.

Carmichael's appointment as a Commissioner—even though the appointment was "of a transient, evanescent character" and would "terminat[e] when the [treaty] was accomplished."[89] When negotiations stalled and it became clear that Carmichael and Short would be unable to "bring [the treaty] to a happy and speedy issue," Washington nominated Thomas Pinckney as "Envoy Extraordinary of the United States to his Catholic Majesty."[90] That Washington expected this assignment to be short-lived is evidenced by the nomination letter he submitted to the Senate, which noted that he believed that Pinckney's "*temporary* absence from London in the discharge of these new functions" would cause "no injury . . . to the United States."[91]

3. The Barbary Nations

Finally, a set of treaties was signed and ratified during the Washington administration with the "Barbary nations" of Algiers, Tripoli, and Morocco.[92] Four years prior to the ratification of the Constitution, two commercial vessels flying the American flag had been seized "by an Algerine cruiser" off the coast of Cape St. Vincent, Portugal, and twenty-one American citizens were taken hostage.[93] At the time, Congress had recently appointed John Lamb as an "Agent for treating of peace between the U.S. and the government of Algiers."[94] But, his commission had not included a provision for "[t]he ransom of prisoners, being a case not existing when [his] powers were prepared."[95] Acting on their own accord, John Adams and Thomas Jefferson—who were then serving as American ambassadors to England and France, respectively—decided "to endeavor to ransom [their] countrymen, without waiting for orders."[96] Recognizing that they were "acting without authority" they still "gave a supplementary instruction to Mr. Lamb to

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89 Bunn v. People *ex rel.* Laflin, 45 Ill. 397, 402 (1867).; Letter from George Washington, President of the U.S., to the U.S. Senate (Jan. 11, 1792), https://founders.archives.gov/documents/Washington/05-09-02-0252.

90 Letter from George Washington, President of the U.S., to the U.S. Senate (Nov. 21, 1794), https://founders.archives.gov/documents/Washington/05-17-02-0129.

91 *Id.* (emphasis added).

92 *See* Peace and Friendship, *supra* note 74; Peace and Amity, *supra* note 74; *see also* Letter from James Simpson, Consul of the U.S. at Gib., to Edmond Randolph, Sec'y of State (Aug. 15, 1795) (showing that previous treaty with Morocco was reaffirmed), *in* STATE PAPERS AND PUBLICK DOCUMENTS OF THE UNITED STATES: FROM THE ACCESSION OF GEORGE WASHINGTON TO THE PRESIDENCY, EXHIBITING A COMPLETE VIEW OF OUR FOREIGN RELATIONS SINCE THAT TIME 405–06 (2d ed. 1817).

93 *See* Letter from Thomas Jefferson, Sec'y of State, to John Paul Jones (June 1, 1792), https://founders.archives.gov/documents/Jefferson/01-24-02-0001 [hereinafter Jefferson June 1792 Letter].

94 *Id.*

95 *Id.*

96 *Id.*

ransom [the] captives," if it could be done for $200 per man or less.[97] The negotiations failed, as did a subsequent effort (which Congress approved) in 1787.[98]

By the time the Constitution was ratified, the government's policy "was to avoid the appearance of any purpose . . . ever to ransom our captives, and by the semblance of neglect, to reduce the demands of the Algerines to such a price as might make it hereafter less their interest to pursue [American] citizens than any others."[99] In 1790, Congress approved the expenditure of funds for the procuring of the captives' release, "provided . . . a peace [should] be previously negociated [sic]."[100]

Washington's efforts to secure that treaty were frustrated by the untimely deaths of multiple appointees, making the entire appointment process appear like a convoluted Constitutional Law exam question. On June 1, 1792, Washington appointed Admiral John Paul Jones of Revolutionary War fame to serve as "Commissioner for treating with the Dey and government of Algiers on the subjects of peace and ransom of our captives."[101] Jones's appointment date is important because Congress was not in session at the time.[102] The Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[103] Secretary of State Jefferson noted this in his letter of instruction, explaining to Jones that his commission, "being issued during the recess of the Senate, [was] in force, by the constitution, only till the next session of the Senate."[104]

At the time, Washington knew Jones—having recently retired from the Russian navy—was living in Paris, but acknowledged it had been some time since he had last heard from him. Worried that "in the event of any accident to [Jones], it might occasion an injurious delay, were the business to await new commissions from [the United States]," Washington thought it expedient to appoint a backup.[105] He therefore instructed Thomas Pinckney, who was to carry Jones' commission across the Atlantic, to forward to Thomas Barclay "all the papers addressed to Admiral Jones" if it should be discovered that something had befallen him, along with a letter signed by the President "giving [Barclay] authority on receipt of those papers to consider them

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97 *Id.*

98 *Id.*

99 *See* Jefferson June 1792 Letter, *supra* note 93.

100 *Id.*

101 *Id.*

102 *Dates of Sessions of the Congress*, *supra* note 63.

103 U.S. CONST., art. II, § 2, cl. 3. It is possible to argue that Washington's actions were nonetheless unconstitutional because the "Vacancy" did not "*happen*" during the recess. *See id.* This question merits further research.

104 *See* Jefferson June 1792 Letter, *supra* note 93.

105 Letter from George Washington, President of the U.S., to Thomas Barclay (June 11, 1792), https://founders.archives.gov/documents/Jefferson/01-24-02-0057 [hereinafter Letter to Barclay].

addressed to [him], and to proceed under them in every respect as if [Barclay's] name stood in each of them in the place of that of John Paul Jones."[106] That letter was dated on June 11, 1792—also during the Congressional recess.[107]

Washington proved to be prescient. Jones died on July 18, 1792, before he ever received his commission. Pinckney followed the President's instructions and delivered the papers to Barclay, who was stationed in Morocco at the time. Unfortunately, Barclay also became ill and passed away on January 19, 1793, while in Lisbon, Portugal attempting to secure funds needed for his mission.[108]

Two years later, Washington tried one last time to secure peace with the Barbary nations and negotiate a release of the captive Americans. On March 30, 1795—during another Senate recess[109]—he appointed David Humphreys as "Commissioner plenipotentiary, giving him full power to negotiate a Treaty of Amity and Commerce with [Algiers, Tripoli, and Morocco]."[110] Humphreys concluded the treaty with Algiers on September 5, 1795[111] and the treaty with Tripoli on February 10, 1797.[112] The United States' previous treaty with Morocco—signed by the prior sultan back in 1783—was reconfirmed by Humphrey's agent James Simpson on August 18, 1795.[113] Although it is unclear whether Washington ever submitted Humphrey's name to the Senate, it seems likely that he did. When Secretary of State Jefferson explained the nature of recess appointments in his original instructions to Jones, he stated that "their renewal . . . is so much a matter of course, and of

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106 *Id.*

107 *Dates of Sessions of the Congress*, *supra* note 63.

108 Gary E. Wilson, *American Hostages in Moslem Nations, 1784–1796: The Public Response*, 2 J. EARLY REPUBLIC 123, 129 (1982); *see also* FRANK LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 73 (2005); Patrick N. Teye, *Barbary Pirates: Thomas Jefferson, William Eaton, and the Evolution of U.S. Diplomacy in the Mediterranean* 43 (Aug. 2013) (unpublished M.A. thesis, East Tennessee State University), https://dc.etsu.edu/cgi/viewcontent.cgi?article=2355&context=etd.

109 *See Dates of Sessions of Congress*, *supra* note 63 (noting that Congress adjourned on March 3, 1795 and did not reconvene until June 8, 1795).

110 Letter from George Washington, President of the U.S., to the Dey of Algiers (Mar. 21, 1793), https://founders.archives.gov/documents/Washington/05-12-02-0278; Circular from George Washington, President of the U.S., to the Barbary Powers (Mar. 30, 1795), https://founders.archives.gov/documents/Washington/05-17-02-0470.

111 *See* Peace and Amity, *supra* note 74.

112 *See* Peace and Friendship, *supra* note 74. The treaty was actually negotiated on November 4, 1796 by Joel Barlow and Joseph Donaldson, who the treaty asserts were appointed by President Washington as "Junior Agents" under the authority of Humphreys. *Id.* Humphreys then "approve[d] and conclude[d]" the treaty in his role as Commissioner Plenipotentiary on February 10, 1797. *Id.*

113 *See* Simpson, *supra* note 92. As with the treaty with Tripoli, David Humphreys sent a Junior Agent to negotiate the treaty with Morocco. *See* Letter from David Humphrey, Comm'r Plenipotentiary of the U.S., to All Concerned (May 21, 1795) (appointing James Simpson as his agent), *in* STATE PAPERS AND PUBLICK DOCUMENTS, *supra* note 92, at 404–05.

necessity" that Jones should "consider that as certain, and proceed without interruption."[114] There is little reason to believe that Washington would not have done the same with Humphreys.[115]

4. Adams and Jefferson

It is worth noting that this practice did not end with the Washington administration. During the administration of President John Adams, the United States formalized treaties with Tunis,[116] Prussia,[117] and France.[118] The Adams Papers are not as extensive as those of Washington, but we know that at the very least he sought the advice and consent of the Senate in his appointment of an "Extraordinary Commission" for the sole purpose of "negotiat[ing] with [the French] Republic and adjust[ing] by treaty all the differences between the two nations."[119] The three men selected as "Envoys Extraordinary and Ministers Plenipotentiary to the French Republic" were General Charles Cotesworth Pinckney, Francis Dana (the former Chief Justice of the Massachusetts Supreme Judicial Court), and General John Marshall.[120] The Commission failed, but two years later Adams sought Senate confirmation for three new Commissioners: Chief Justice Oliver Ellsworth, Governor Patrick Henry, and William Vans Murray, who succeeded in negotiating the Treaty of Friendship and Commerce of 1800.[121] Adams also used a recess appointment to appoint his son, John Quincy Adams, as a Commissioner to negotiate changes to the United States' 1783 Treaty with Sweden—although it did not result in a formal treaty. The commission was clearly temporary since John Quincy was to continue serving as the United States' permanent "Minister at Berlin."[122] Nevertheless, President Adams still submitted John

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114 Jefferson June 1792 Letter, *supra* note 93.

115 It is worth noting that even if he did not submit Humphrey's name to the Senate, it would be the exception, not the rule. Even Washington was capable of acting unconstitutionally. A single unconstitutional appointment does not change the clear import of the Appointments Clause.

116 Treaty of Amity, Commerce, and Navigation, Tunis-U.S., Aug. 28, 1797, 8 Stat. 157, https://www.loc.gov/law/help/us-treaties/bevans/b-tunis-ust000011-1088.pdf.

117 Treaty of Amity and Commerce, Prussia-U.S., July 11, 1799, 8 Stat. 162, https://www.loc.gov/law/help/us-treaties/bevans/b-de-ust000008-0088.pdf.

118 Treaty of Friendship and Commerce, French Republic-U.S., Sept. 30, 1800, 8 Stat. 178, https://www.loc.gov/law/help/us-treaties/bevans/b-fr-ust000007-0801.pdf.

119 Letter from John Adams, President of the U.S., to the U.S. Senate (May 31, 1797), https://founders.archives.gov/documents/Adams/99-02-02-1998.

120 *Id.*

121 Letter from John Adams, President of the U.S., to the U.S. Senate (Feb. 25, 1799), https://founders.archives.gov/documents/Adams/99-02-02-3355.

122 Letter from John Adams, President of the U.S., to the U.S. Senate (Mar. 12, 1798), https://founders.archives.gov/documents/Adams/99-02-02-2371.

Quincy's name to the Senate for approval during the next legislative session.[123]

Likewise, during his two terms in office, Jefferson ratified treaties with Great Britain,[124] France,[125] and Tripoli.[126] He appointed temporary commissions for negotiating each of these agreements.[127] The most famous of these was the Louisiana Purchase. Jefferson sought the advice and consent of the Senate for his appointment of James Monroe and Robert Livingston as the Envoys Extraordinary of the United States, even though Livingston was already serving as the permanent American minister to France.[128]

C. *Non-Diplomatic Officers*

All of the *temporary officers* discussed thus far have been commissioners or envoys sent on diplomatic missions either to Indian tribes or to foreign monarchs. It is worth noting that such diplomatic commissions are unique in the sense that the offices were not "established by law" prior to appointment. As Edward Corwin noted, "until 1855 Congress left it entirely with the President, subject to the advice and consent of the Senate, to appoint such ambassadors, other ministers and consuls as in his judgment the national interests required" on the theory that these offices were "derived from the law of nations and the authority to appoint from the Constitution."[129]

But there was also at least one instance when Congress "established by law" a series of expressly nonpermanent positions during the Washington

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123 *Id.*

124 Convention Signed at London Supplementing Articles 6 and 7 of the Jay Treaty and Article 4 of the Treaty of September 3, 1783, Gr. Brit.-U.S., Jan. 8, 1802, 8 stat. 196, https://www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0038.pdf.

125 Cession of Louisiana: Financial Arrangement, French Republic-U.S., Apr. 30, 1803, 8 Stat. 206, https://www.loc.gov/law/help/us-treaties/bevans/b-fr-ust000007-0816.pdf; Cession of Louisiana, French Republic-U.S., Apr. 30, 1803, 8 Stat. 200, https://www.loc.gov/law/help/us-treaties/bevans/b-fr-ust000007-0812.pdf.

126 Treaty of Peace and Amity, Tripoli-U.S., June 4, 1805, 8 Stat. 214, http://www.loc.gov/law/help/us-treaties/bevans/b-tripoli-ust000011-1081.pdf.

127 Cession of Louisiana, *supra* note 125 (noting that James Monroe and Robert Livingston were appointed "by and with the advice and consent of the Senate"); Convention, *supra* note 124 ("The President of the United States, by and with the Advice and Consent of the Senate thereof, has named for their Plenipotentiary, Rufus King Esquire."); Letter from Thomas Jefferson, President of the U.S., to the U.S. Senate (Nov. 11, 1803) (renominating Tobias Lear as "a Commissioner to treat the peace with the Bashaw of Tripoli" to prevent the expiration of his recess appointment), https://founders.archives.gov/documents/Jefferson/01-41-02-0527. It is worth noting that Lear was appointed as "Consul General of the US[] For the city and kingdom of Algiers" at the same time, but the wording of the nomination letter makes it clear that these were two separate offices—one permanent, one temporary—as was the case with Henry Knox's appointment as an Indian Commissioner. *Id.*

128 Cession of Louisiana, *supra* note 125 (noting that James Monroe and Robert Livingston were appointed "by and with the advice and consent of the Senate").

129 EDWARD S. CORWIN, THE PRESIDENT: OFFICE & POWERS 70–71 (1957) (quotations omitted).

administration. The Jay Treaty created a bilateral commission to resolve commercial disputes between citizens of the United States and subjects of Great Britain.[130] Following the Commission's establishment, Congress authorized "the President of the United States . . . , by and with the advice and consent of the Senate, to appoint a proper person to act in behalf of the United States . . . in relation to such claims as may be made against the United States, before the commissioners appointed to carry into effect" the relevant portions of the Jay Treaty.[131] It also authorized the Attorney General to "employ such agents, in different parts of the United States, as the business before the said commissioners, in his opinion, shall make necessary."[132] Because the Commission created by the treaty was a temporary body designed to "terminate 'by the very fact of performance,'"[133] the agents appearing before it, by definition, had to be temporary as well.

Interestingly enough, the OLC memorandum opinion cites the actual *commissions* created by the Jay Treaty of 1794 as "[t]he most prominent early example" of temporary appointments not being considered officers.[134] In addition to the commission "for resolving both a border dispute and claims between creditors and merchants of the United States and Great Britain" mentioned above,[135] the treaty created two additional tribunals. The first consisted of three commissioners to determine "what River was truly intended under the name of the River st Croix in the . . . Treaty of Peace."[136] One commissioner was to "be named by His Majesty," the King of England; another "by the President of the United States, by and with the advice and Consent of the Senate;" and the third by agreement of the first two, "or if they cannot so agree, They shall each propose one Person, and of the two names so proposed one shall be drawn by Lot."[137] The second was a five-person commission created "to handle the complaints of Americans against Great Britain arising from the irregular or illegal captures or condemnations of American vessels" and "British complaints on American outfitting of privateers."[138] These commissioners were to be selected in the same manner as the St. Croix River Commission, with two commissioners selected by each country and the fifth by agreement or by lot.[139]

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130 Treaty of Amity Commerce and Navigation, Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 116, available at http://www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0013.pdf [hereinafter Jay Treaty].

131 Act Directing the Appointment of Agents, in Relation to the Sixth Article of the Treaty of Amity, Commerce and Navigation, Between the United States and Great Britain, 5 Stat. 523 (1797).

132 *Id.*

133 OLC, *supra* note 14, at 111 (quoting Bunn v. People *ex rel.* Laflin, 45 Ill. 397, 405 (1867)).

134 *Id.* at 103.

135 *Id.*

136 Jay Treaty, *supra* note 130, at art. 5.

137 *Id.*

138 Richard B. Lillich, *The Jay Treaty Commissions*, 37 ST. JOHN'S L. REV. 260, 276 (1963).

139 Jay Treaty, *supra* note 130, art. 6.

As the OLC opinion points out, opponents of the Treaty argued that these Commissions were unconstitutional because the commissioners were to be appointed without their offices first being created "by law"—that is, by legislation passed by Congress.[140] This charge fell flat. As Alexander Hamilton noted in defending the Treaty, the Supremacy Clause of the Constitution "gives *ipso facto* the force of law to Treaties, making them equally with the Acts of Congress, the supreme law of the land."[141] The clear implication was that the Commissions were, therefore, created by law even if not created by Congress. But Hamilton took this argument a step further and contended that the commissioners were never officers to begin with.

> [T]hey are not in a strict sense Officers. They are *arbitrators* between the two Countries. Though in the Constitutions, both of the U[nited] States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.[142]

This passage has been used throughout history in support of the argument that "United States representatives" to "multinational or international entities" do not need to be "appointed in accordance with article II."[143] But it is difficult to see how this supports the continuity argument advanced by the OLC and in *Lucia*. Hamilton's argument doesn't contain a temporal component. Instead, he argues that the Commissioners were not officers in the "strict sense" because they were "arbitrators *between* the two countries."[144] Put another way, they were Officers of a multinational body, not the United States. Just as the President of the United States is not considered an Officer *of Virginia*, the Commissioners were not considered Officers *of the United States*. This was true regardless of whether the commissions had been temporary or permanent.

II. EARLY AMERICAN CASE LAW

In light of this consistent practice among the founding presidents, what should we do with Justice Kagan's continuity requirement? One possibility is to simply consider it dicta and ignore it in the future. But early American case law provides an alternative approach to harmonize *Lucia* and *Morrison*.

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140 OLC, *supra* note 14, at 103 & n.22.

141 Alexander Hamilton, *The Defence No. XXXVII*, NAT'L ARCHIVES: FOUNDERS ONLINE (Jan. 6, 1796), https://founders.archives.gov/documents/Hamilton/01-20-02-0006 (quoting U.S. CONST., art. VI).

142 *Id.*

143 *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 146 & n. 67 (1996).

144 Hamilton, *supra* note 141 (modified emphasis).

There is another, older definition of "continuous" that appears in the case law—one that diverges starkly from the one pushed by the OLC. As Corwin noted, at the time of the Founding, common law had defined the term *office* as "an *institution* distinct from the person holding it."[145] An office was said to be continuous whenever it was "capable of persisting beyond [an individual's] incumbency."[146] Chief Justice John Marshall relied on this understanding of the term in *United States v. Maurice*,[147] a case he presided over while riding the Circuit. The question in *Maurice* was whether an "agent of fortifications" was an officer within the meaning of the Appointments Clause.[148] Chief Justice Marshall concluded that it was, distinguishing between those whose duties were defined by the government and those whose duties were defined by contract:

> 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. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, *if those duties continue, though the person be changed*; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.[149]

This distinction makes sense. A contemporary of Marshall defined a contract as "a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other."[150] Almost by definition, a contract is individually negotiated. If one party fails to fulfill its obligation, the other cannot simply appoint another in his stead on the same terms. A new contract would need to be individually negotiated. Not so where the duties are defined by a governmental body. Where duties and emoluments are defined by statute, there is no room for individual adaptation.

Under this theory, a position "summoned into existence only for specific temporary purposes" is still considered to be continuous—and therefore an office—as long as it is "capable of persisting beyond [an individual's] incumbency."[151] The independent counsel position at issue in *Morrison* clearly fell into this category. The Ethics in Government Act of 1978 specifically

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145 CORWIN, *supra* note 129, at 70; *see also* Donaldson v. Beckett (1774) 1 Eng. Rep. (HL) 837, 840 ("An office is the work of civil policy, and [is a] being of positive institution.").

146 CORWIN, *supra* note 129, at 70.

147 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747).

148 *Id.* at 1212.

149 *Id.* at 1214 (emphasis added).

150 1 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 6–7 (1796).

151 CORWIN, *supra* note 129, at 70–71.

provided that "[i]f a vacancy in office arises by reason of the resignation or death of a special prosecutor, the division of the court may appoint a special prosecutor to complete to the work of the special prosecutor whose resignation or death caused the vacancy."[152] In other words, had the special prosecutor quit or died in a tragic car accident part way through her investigation, the Special Division would have had the authority to appoint a replacement to finish the job even though the office was "temporary."

This historical definition of continuity is best exemplified by the office of "Commissioner for treating with the Dey and government of Algiers on the subjects of peace and ransom of our captives"[153] discussed above. Washington recognized that due to Admiral John Paul Jones's age and health, he might not be able to complete his mission, so he appointed Thomas Barclay as a back-up who could step into the role of Commissioner should some accident befall Jones, and "to proceed under [Jones's commission and instructions] in every respect as if [Barclay's] name stood in each of them in the place of that of John Paul Jones."[154] Washington's instructions to Barclay and Pinckney make clear that this transfer of commission was to take place even if Jones had not died before receiving his commission. In other words, the office of Commissioner was to remain an "institution" separate and apart from Jones and "continue" after his death if he had not finished negotiating the treaty. The fact that this did not happen more often is a simple result of probability—the fact that these appointments were short-lived, often lasting only a few months, made it far less likely that a commissioner would resign or die and create a vacancy.

The OLC, however, muddied the water by trying to incorporate the holdings of a handful of nineteenth-century state court decisions into its analysis. All but one of these were interpreting the appointment clauses of their respective *state* constitutions.[155] During the Founding Era, the appointment

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152 S. REP. NO. 95–127, at 48 (1978) (Conf. Rep.). The act likewise provides that "[i]f a vacancy in office arises by reason of the removal of a special prosecutor, the division of the court may appoint an acting special prosecutor to serve until any judicial review of such removal is completed. Upon completion of such judicial review, the division of the court shall take appropriate action." *Id.*

153 Jefferson June 1792 Letter, *supra* note 93.

154 Letter to Barclay, *supra* note 105.

155 *See, e.g.*, Shelby v. Alcorn, 36 Miss. 273, 289 (1858) (holding that a levee commissioner was a civil officer within the meaning of the Mississippi constitution); *In re* Oaths to be Taken by Attorneys & Counsellors, 20 Johns. 492, 493–94 (N.Y. 1823) (holding that a statute that required all attorneys to take "an oath that he has not been engaged in a duel" did not violate the New York Constitution prohibiting any "oath, declaration, or test" for public office—other than an oath to uphold the federal and state constitutions—because attorneys were not officers of the state); State *ex rel.* Attorney Gen. v. Kennon, 7 Ohio St. 546, 563 (1857) (holding that the General Assembly's appointment of commissioners to serve on a commission to appoint other officers violated the Ohio Constitution); Shepherd v. Commonwealth, 1 Serg. & Rawle 1, 6 (Pa. 1814) ("This question [of whether certain commissioners are state officers] must be decided *by the Constitution of Pennsylvania* and the acts passed under it." (emphasis added)); *cf.* United States v. Barton, 24 F. Cas. 1025, 1027 (E.D. Pa. 1833) (No. 14,534) (holding that a deputy collector was not an officer within the meaning of the federal Constitution).

practices of the several states varied wildly both from each other and from the federal government,[156] making reliance on these cases when interpreting the federal Appointments Clause an apples-to-oranges situation. Furthermore, a majority of the cases cited by the OLC were decided fifty or more years after the ratification of the federal Constitution—weakening the persuasiveness of the precedent even more.

For example, the OLC opinion spends a fair amount of time discussing *Bunn v. People ex rel. Laflin*, an 1867 Illinois Supreme Court case.[157] *Bunn* considered whether commissioners appointed by the Illinois General Assembly by statute to supervise "the erection of a new state house" were "officers, within the meaning of the [Illinois] constitution," and if they were, whether their appointments complied with the state's constitution.[158] The Illinois Constitution of 1848 specifically prohibited officers from being "appointed or elected by the general assembly."[159] The Court, however, held that the commissioners in question were "not . . . officers within the meaning of the constitution"[160] in part because there were no "general duties imposed by the act . . . on these appointees; they [had] only one single special duty to perform . . . and when that [was] performed their functions, *ipso facto*, [were] at an end."[161] In reaching this conclusion, the court distinguished the facts of the case from *Maurice*, concluding "[w]e hardly think it possible, had the principal obligor [in *Maurice*] been appointed merely to superintend the erection of a single fortification [rather than a *system* of fortifications], . . . that he would have been held to be an officer."[162]

But by the court's own admission, this was only a secondary justification for its holding which was based primarily on historical practice *within* the state. The court noted that under the Illinois Constitution of 1818, "nearly all the important offices of government were filled by an election on joint ballot of the two houses—that is, by the action of the general assembly alone."[163] When a convention was called to amend the constitution, "one of the great objects to be effected by the call[] was to deprive the legislature of the power to elect or appoint such officers as had been appointed by that body under the old Constitution" including "judges of the Supreme, Circuit and inferior courts, the auditor and treasurer of the State and many others, whose functions were directly connected with some one or more of the departments of government which the Constitution had established, and who were to aid

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156 *See* WILLIAM SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS OF THE SEVERAL STATES WITH EACH OTHER, AND WITH THAT OF THE UNITED STATES 18, 27–28, 30, 32–33 (1796) (describing the procedures for appointing officers under various state constitutions).

157 OLC, *supra* note 14, at 83.

158 Bunn v. People *ex rel.* Laflin, 45 Ill. 397, 399 (1867).

159 *Id.* at 400 (quoting ILL. CONST. of 1848, art. IV, § 12).

160 *Id.*

161 *Id.* at 405.

162 *Id.* at 404.

163 *Bunn*, 45 Ill. at 401.

in carrying on the government."[164] Despite the new prohibition on legislative appointments, beginning in its very first session under the new Constitution in 1849 and "repeated at almost every session since," the General Assembly appointed a series of minor commissions tasked with temporary, special tasks such as "locat[ing] State roads, in relation to the Supreme Court rooms, in relation to public buildings, [completing] the present State house, . . . [taking] evidence in relation to claims against the State, . . . [building] a house for the governor," and so forth.[165]

The court concluded that this "practice under the Constitution for a long series of years, unchallenged and unquestioned, [could] be resorted to as affording strong evidence of the meaning of" the Illinois appointments clause.[166] In other words,

> [the a]cts, passed by the legislatures, and approved by governors of different political sentiments, many of whom were sound constitutional lawyers, and all of them of approved patriotism, and who had been sworn to support the Constitution in all its purity, are strong evidence that such appointees were not "such officers," as they were inhibited by [the Illinois Constitution] from appointing.[167]

But, as shown above, the consistent "practice under the Constitution"[168] for the Federal Constitution points in the opposite direction. However well established the appointment practices of Illinois or Ohio or Mississippi or Pennsylvania may have been, they were based on different appointments mechanisms contained in different constitutions governing different jurisdictions. In deciding whether certain land commissioners were officers, the Pennsylvania Supreme Court noted that "[t]his question must be decided by the Constitution of *Pennsylvania* and the acts passed under it, and not by cases under the common law of *England*."[169] The same is true for federal appointments questions—they must be decided by the United States Constitution and the acts passed under it, and not by the case law of other jurisdictions.

This brings us to *United States v. Germaine*,[170] the case Justice Kagan claimed was the source of the continuity requirement. *Germaine* was only tangentially about the Appointments Clause. A federal statute criminalized and set a maximum penalty for "[e]very officer of the United States who is guilty of extortion under color of his office."[171] The defendant in the case was a surgeon appointed by the Commissioner of Pensions to "make the

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164 *Id.*
165 *Id.* at 402.
166 *Id.* at 400–01.
167 *Id.* at 402–03.
168 *Id.* at 409.
169 Shepherd v. Comm'r, 1 Serg. & Rawle 1, 7 (Pa. 1814).
170 99 U.S. 508 (1879).
171 *Id.* at 509 (quoting 4 Stat. 118 (1825)).

periodical examination of pensioners" and "to examine applicants for pension" as may be deemed necessary by the Commissioner.[172] The statute authorizing his appointment indicated that he would be paid two dollars for each examination performed, "out of any money appropriated for the payment of pensions."[173] He was indicted by the state of Maine "for extortion in taking [additional] fees from pensioners to which he was not entitled."[174] The question before the Court was whether the criminal statute applied to him.[175] To determine this, the Court had to decide whether he was considered an Officer of the United States.

The Court concluded that he was not. The crux of the holding was that Germaine could not be an officer *because* the Commissioner of Pensions was not a department head. It reasoned that because the "Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument," it could not "be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed" by the President, the courts, or a department head.[176] That Congress might create an office but provide an unconstitutional mechanism for filling it seems to have been unfathomable.[177] Congress indicated which officials within the employ of the federal government were to be considered officers *through* the selected appointment mechanism.[178]

Without doing so explicitly, *Lucia*—like *Freytag v. Commissioner*[179] and *Buckley v. Valeo*[180] before it—refutes this conclusion. Clearly Congress can and does pass unconstitutional appointment mechanisms from time to time. Justice Kagan's continuity requirement, therefore, comes from *Germaine*'s dicta, which states that the term officer "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional and temporary."[181] Germaine's duties were "*not* continuing and permanent" but were "occasional and intermittent" because

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172 *Id.* at 508.

173 *Id.* at 508–09.

174 *Id.* at 509.

175 *Id.*

176 *Germaine*, 99 U.S. at 510.

177 This same reasoning is also reflected in Shepherd v. Commissioner. *See* 1 Serg. & Rawle 1, 10 (Pa. 1814).

178 *See id.*; *see also* Perkins v. United States, 116 U.S. 483, 484 (1886) (concluding that a Navy cadet-engineer was an officer because "Congress has by express enactment vested the appointment" of the position in a department head).

179 501 U.S. 868 (1991). The *Freytag* Court said that the express intent of Congress was that the Tax Court exists as an Article I court and not an executive agency, and applying the appointments clause to its members frustrated that intent. *Id.* at 887–88.

180 424 U.S. 1 (1979). The *Buckley* Court held that because the powers conferred to the Federal Election Commission were powers of "Officers of the United States," that the mechanism by which Commissioners were appointed was unconstitutional. *Id.* at 143.

181 *Germaine*, 99 U.S. at 511–12 (citing United States v. Harwell, 73 U.S. (6 Wall.) 385, 393 (1867)).

he was "only to act when called on by the Commissioner of Pensions in some *special* case."[182] Both Justice Kagan and the OLC relied on this language in a way that appears to preclude the possibility of *temporary* officers. But when viewed in light of both early American practice and early federal case law, this language should be properly understood to merely require the duties and emoluments of the position to be established by law and not by contract, and to be capable to surviving an individual's incumbency.

CONCLUSION

In conclusion, *Lucia*'s continuity test for officers should be viewed with skepticism. To the extent that it allows Congress to create short-term offices that exercise the powers of the State—whether they be arbitrators, special prosecutors, or diplomats—but are not subject to the requirements of the Appointments Clause, it stands in stark opposition to the consistent practices of the founding Presidents. Moving forward it should be interpreted to mean only that to be an office, the duties and powers of the position must be capable of being passed from one incumbent to the next without the creation of a new, individualized contract.

182 *Id.* at 512 (second emphasis added).