THE PRESIDENT IS NOT AN “OFFICER OF THE UNITED STATES”;  
A PARTIAL RESPONSE TO GRABER, OUR QUESTIONS, THEIR ANSWERS 
AND TO THE COLORADO SUPREME COURT 

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In an article published on SSRN on October 4, 2023, Section Three of the Fourteenth 
Amendment: Our Questions, Their Answers (University of Maryland Legal Studies Research 
(hereinafter “Our Questions”), Professor Mark Graber concludes that, for purpose of § 3 of 
the Fourteenth Amendment, the President is an “officer of the United States.”² And, in 
Anderson v. Griswold, 2023 CO 63 (Dec. 19, 2023), the Colorado Supreme Court, relying 
at least in part on Our Questions, reversed the district court and concluded that the President 
is an “officer of the United States.” These conclusions are erroneous, as shown by the plain 
language of the original Constitution and the debates in Congress in 1866 on what would 
become § 3 of the Fourteenth Amendment (hereinafter “§ 3”) when ratified by the states.

SUMMARY

The use of the word “officer” in the original Constitution and in the legislative history 
of § 3 demonstrate that the President is not “an officer of the United States” within the 
meaning of § 3. In the original Constitution, the word “officer” is always used in 
contradistinction to the President, so that the President cannot be deemed an “an officer of 
the United States.” The same is true of the debates on § 3; senators and representatives 
understood that “officer” was distinguished from the President, so that the President was not

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served since November, 2016. The conclusions expressed in this article are the author’s only. 
Nothing in this article is intended to express an opinion on any case which may come before him or 
to express the opinion of any other judge of the Court.

² “No person shall be a Senator or Representative in Congress, or elector of President and 
Vice President, or hold any office, civil or military, under the United States, or under any State, who, 
having previously taken an oath, as a member of Congress, or as an officer of the United States, or 
as a member of any State legislature, or as an executive or judicial officer of any State, to support 
the Constitution of the United States, shall have engaged in insurrection or rebellion against the 
same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of 
each House, remove such disability.” (Emphasis added).
“an officer of the United States.” Professor Graber’s conclusion and the Colorado Supreme Court’s construction of § 3 in Anderson v. Griswold, 2023 CO 63 (Dec. 19, 2023), as including a former President among those barred from federal office in the wake of the Civil War, are both textually and historically erroneous.

THE PRESIDENT IS NOT AN
“OFFICER OF THE UNITED STATES”

Introduction

This article is limited to addressing the narrow question of whether the President is an “officer of the United States” within the meaning of § 3. If he is not, he is thereby not barred from office by § 3, even if he had “engaged in insurrection or rebellion . . . .”

I.
The Text Of The Constitution Demonstrates That
The President Is Not An “Officer Of The United States”

“We assume that Congress is aware of existing law when it passes legislation.” Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990). Accordingly, reference must be had to the use of a term in the original Constitution to understand the use of that term in a subsequent amendment to the Constitution.

The original Constitution uses the word “officer” 7 times. And, in all but 1 instance (Art. I, § 8, Cl. 18, discussed, infra), an “officer” is distinguished from the President, thus plainly indicating that the Constitution, when it refers to “officer,” is not referring to the President.

3 This article does not dispute that the Presidency is an “office, civil or military, under the United States . . . .”

The most telling example is in Art. II, § 3, which states: “He shall . . . commission all the officers of the United States.” U.S. Con. Art. 2, § 3. It is beyond obvious that, because the President has the constitutional duty of commissioning “all the officers of the United States” that he cannot simultaneously be an “officer of the United States”; otherwise, he would have to commission himself, a nonsensical concept. To equate the President to an officer of the United States is thus not constitutionally feasible. Indeed, because Art. II, § 3 is so explicit in its distinguishing the President from “officers,” the determination of the first question presented by Petitioner could begin, and end, with Art. II, § 3.

Art. II, § 4 is conceptually consistent with Art. II, § 3 in that it distinguishes the President from “all civil officers”:

The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.


Art. II, § 1 is likewise consistent with Art. II, § 3:

[T]he Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.


If an “officer” can “act as President,” an “officer” is not the same as, and is thus distinguished from, the President.

Similarly, in Art. II, where the President is empowered to nominate and appoint “ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law . . . .” U.S. Con. Art. 2, § 2 (emphasis added). The President thus cannot be an “officer” as he is the one who nominates and appoints “officers.” See, e.g., Wright v. United States, 302 U.S. 583 (1938):
To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. “In expounding the Constitution of the United States,” said Chief Justice Taney in *Holmes v. Jennison*, 14 Pet. 540, 570, 571, 614, 10 L.Ed. 579, “every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.”

302 U.S. at 588.

Thus, the Constitution recognizes a distinction between the President (and the Vice President) and officers of the United States.

The constitutional distinction between the President and officers of the United States is further exemplified by the oath requirements of the Constitution. Art. VI requires that “senators and representatives” and “the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution . . . .” U.S. Con. Art. 6 (emphasis added). By contrast, Art. II, § 1 establishes a unique oath for the President:

I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.


Moreover, § 3 refers to persons who have “taken an oath . . . to support the Constitution of the United States . . . .” This is clearly a reference to the Art. VI oath (which is for “senators and representatives” and “the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states”) as the Art. VI oath is an oath “to support” this Constitution. By contrast, the oath for the President is an oath “to preserve, protect and defend” the Constitution. Thus, it is evident that § 3 was
not addressing the President.5

Finally, while Art. I, § 8 does not draw the stark distinction between the President and officers of the United States as do the above-referenced provisions, Art. I, § 8, cl. 18 (the final clause of Congress’ enumerated powers) also recognizes that distinction when it empowers Congress to:

make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Con. Art. 1, § 8, cl. 18 (emphasis added).

Art. I, § 8, cl. 18 thus equates an “officer” as being someone who is a member of a “department” of the Government and the President is not a member of a “department” of the Government.

A similar recognition of an officer as being a member of a department is found in U.S. Con. Art. 2, § 2 (“The President . . . may require the opinion, in writing, of the principal officer in each of the executive departments”) (emphasis added). Indeed, long after the Fourteenth Amendment was adopted, the Twenty-Fifth Amendment continued the same recognition of an officer as being a member of a department: “Whenever the Vice President and a majority of either the principal officers of the executive departments” and “a majority of either the principal officers of the executive departments . . . .” U.S. Con. 25th Amd., § 4 (emphasis added).

In sum, it is evident from the text of the original Constitution (and the Twenty-Fifth

5 Our Questions states:

The President of the United States was among the officials who took the oath to the Constitution that under Section Three triggered disqualification for participating in an insurrection.

Our Questions 17.

In light of the specific oath for the President, this statement is incorrect.
Amendment) that the President is not an “officer of the United States.”

II.
The Legislative History Of § 3 Demonstrates That The President Is Not An “Officer Of The United States”

A. The Legislative History Of § 3

Section 3 had its origin in H.R. No. 127, a House resolution. It stated:

Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President or Vice President of the United States.


With little debate, the House passed H.R. No. 127 on May 10, 1866 and sent it to the Senate. Id. at 2545.

The Senate took up H.R. No. 127 on May 23, 1866 as the Committee of the Whole. When Senator Howard (R-MI) contended that § 3 will not “be of any practical benefit to the country” because it “will not prevent rebels from voting for members of the several State Legislatures” which then may be “made up entirely of disloyal elements . . . .” Id. at 2768. In response, Senator Clark (R-NH) stated that he had an amendment, which stated:

That no person shall be a Senator or Representative in Congress or permitted to hold any office under the Government of the United States who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto.


Later that day, Senator Clark formally offered his proposal as an amendment. Id. at
On May 29, 1866, the Senate struck the House version of § 3. *Id.* at 2869. Senator Howard then offered a new § 3 to read:

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

*Id.*

With the exception of the final clause becoming a separate sentence, this is the version of § 3 which was ratified.

During debate on May 30, 1866, Senator Hendricks (D-IN) moved to amend Senator Howard’s proposal by inserting the words “during the term of office” before “have engaged in insurrection or rebellion against the same”. *Id.* at 2897. Senator Howard opposed Senator Hendricks’ amendment. *Id.* at 2898. During the debate, Senator Johnson (D-MD) observed that Senator Howard’s amendment “does not go far enough.” He did:

not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation.

*Id.* at 2899.

The “gentlemen” to whom Senator Johnson was referring were “all the members of the State Legislature, all the judicial officers of the State . . . .” *Id.* at 2898. Notably, Senator Johnson did not include the President (or the Vice President) in the class of “gentlemen” who
were to be barred by § 3.

Senator Morrill (R-VT) pointed out, however, that Senator Howard’s amendment included the words “or hold any office, civil or military, under the United States.” *Id.* No senator disagreed. Senator Johnson thus conceded that he was “wrong as to the exclusion from the Presidency . . . .” *Id.* It was thus evident to the Senate that the Presidency was encompassed by the “any office, civil or military, under the United States” language.

In debating who was barred by § 3, Senator Sherman (R-OH) discussed “Senators . . . who resigned” and “went directly to the South and took up arms,” as well as “officers of the Army and Navy” who “proceeded to the South and organized rebellion against the Government of the United States.” He concluded that:

> If those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States are to be deprived for a time at least of holding office, it is not a very severe stipulation.

*Id.*

In referring only to Senators and officers of the Army and Navy as “men who have once taken an oath of office to support the Constitution,” Senator Sherman did not suggest that the President, who takes an oath “to preserve, protect and defend” the Constitution, was barred by § 3.6

Senator Hendricks’ amendment was defeated (8 yeas and 34 nays). *Id.* at 2899.

Senator Johnson then moved to strike the words “or as a member of any State Legislature, or as an executive or judicial officer of any State.” *Id.* Senator Johnson’s amendment was defeated (10 yeas and 32 nays). *Id.* at 2900. The next amendment was also by Senator Johnson, who moved to strike the words “having previously taken” and inserting

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6 Because the President takes a constitutional oath -- but not an oath “to support” the Constitution -- *Our Questions* is incorrect when it uses Senator Sherman as an example of “the persons responsible for the Fourteenth Amendment sought to bar from present and future office all persons who betrayed their constitutional oath.” *Our Questions* 17.
the words “at any time within 10 years preceding the 1st of January, 1861, had taken”. That amendment was also defeated. (10eas and 32 nays). Id.

After further discussion on whether Senator Howard’s proposal was a punishment, Senator Trumbull (R-IL) noted: “No officer is responsible to the President, but his responsibility is to the law under which he acts.” Id. at 2901. Senator Trumbull thus drew a distinction between the President and an officer. No Senator disagreed.

The Senate renewed consideration of Senator Howard’s amendment on May 31, 1866. Id. at 2914. Senator Doolittle (R-WI) followed up on Senator Trumbull’s comment about officers, noting that the President is “the chief Executive” and that “executive officers who are under him are responsible to him in that sense that he must see that they faithfully discharge their duties.” Id. Senator Doolittle also referred to “the oath which Congress required all officers under the Government of the United States to take . . . .” Id. at 2915 (emphasis added). And he distinguished that oath from the oath taken by the President which is not the oath “the oath which Congress required all officers under the Government of the United States to take,” but a unique oath “specified in the Constitution . . . .” Id. (see Art. I, § 1) (emphasis added). Thus, Senator Doolittle distinguished the President from an officer under the Government of the United States. No Senator disagreed with him.

7 A few minutes earlier, Senator Doolittle stated that he had previously: “stated that executive officers were responsible to the President as the chief executive officer of the Government” which his subsequent statement corrected.

8 Our Questions states that Senator Doolittle “included ‘the President of the United States’ as one of the ‘officers under the Government of the United States’ who was required to take an oath.” Our Questions 22. Senator Doolittle said no such thing. Indeed, as shown, supra, he stated just the contrary.

9 Our Questions states:

No member of the Congress that (sic) drafted the Fourteenth Amendment distinguished between the presidential oath mandated by Article II and the oath of office for other federal and state officers mandated by Article VI.

Our Questions 18.

This is incorrect; as discussed in the text, supra, Senator Doolittle drew exactly that distinction.
Senator Doolittle offered two amendments to § 3 (Id. at 2918), which were extensively debated; neither related to whether the President was an “officer” and both of which were defeated. *Id.* at 2921. The Senate then immediately passed Senator Howard’s proposal for § 3, by a vote of 32 ayes to 19 nays and 7 absences. *Id.* There was no further floor debate on § 3 until June 8, 1866.

On June 7, 1866, Senator Davis (U-KY) published remarks in the Appendix to the *Congressional Globe* where he recognized the distinction between the President’s oath and the oath of “officers of the United States,” and thus the fact that the President is not an “officer of the United States.” Referring to the Framers of the Constitution, Senator Davis stated:

> They provided . . . that all officers, both Federal and State, should take an oath to support [the Constitution]; that the President . . . should take an oath, to the best of his ability to preserve, protect, and defend the Constitution.


Senator Davis did not suggest that there was no legal difference between the two oaths; indeed, he plainly recognized that there was a difference by referring to one oath for “all officers” and a different oath for the President.11

On June 8, 1866, debate on § 3 resumed. Senator Henderson (U-MO) observed:

> When the section is closely scrutinized, it will be seen that comparatively few men will fall subject to the exclusion. It does not, as sometimes supposed,

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10 The first amendment was to add the word “voluntarily” before “engaged in insurrection or rebellion”; the second amendment was to add before the word “but” the words “excepting those who have duly received pardon and amnesty under the Constitution and laws, and will take such oath as shall be required by law.”

11 *Our Questions* erroneously states:

Senator Davis “saw no legal difference between the constitutional requirement that “all officers, both Federal and State, should take an oath to support” the Constitution and the constitutional requirement that the president “take an oath, to the best of his ability to preserve, protect, and defend the Constitution.”

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reach all who may have taken an oath to support the Constitution of the United States. The civil officers of the Federal Government, previous to the war, were comparatively few. With the exception of postmasters, perhaps not a thousand are yet remaining in the South.

Id. at 3036 (emphasis added).

Senator Henderson estimated the probable categories and numbers of persons who would be barred by § 3: former civil officers of the Federal Government (of which there “were comparatively few . . . remaining in the South”), former Army and Navy officers of the United States (“doubtful whether three hundred . . . yet survive the rebellion”), former members of Congress (“the number cannot be very great”), state executive and judicial officers (“will not likely exceed two or three hundred”), and former members of the state legislatures (“[p]erhaps fifteen hundred or two thousand”). Cong. Globe, 39th Cong., 1st Sess., 3036 (1866).

What is notable is that, at no point, did Senator Henderson suggest that a former President was encompassed by § 3. Given his thorough analysis of who was included, it seems unlikely that he would have omitted the President from the enumeration of those who would be barred by § 3. Indeed, Senator Henderson effectively excluded the President from being considered a civil officer of the United States when he observed that, with the exception of postmasters, “perhaps not a thousand [civil officers of the United States] are yet remaining in the South.” (emphasis added).12

Moreover, there was a common sense reason that the President was not included in § 3. In 1866, there were 3 living former Presidents: James Buchanan (Pennsylvania; served March 4, 1857 – March 4, 1861; died June 1, 1868), Franklin Pierce (New Hampshire; served March 4, 1853 – March 4, 1857; died October 8, 1869), and Millard Fillmore (New York; 12 Senator Henderson also noted that § 3 “strikes at those who have heretofore held high official position . . . .” Cong. Globe, 39th Cong., 1st Sess. 3036. Our Questions incorrectly states that Senator Henderson noted that § 3 “strikes at those who have heretofore held high office position” (citing Congressional Globe, 39th Cong., 1st Sess. P. 3035-36), Our Questions 18. While changing “official” to “office” is seemingly a minor inadvertent error, it is not as the entire thrust of Our Questions is that, because the President occupies a civil office, he must be an “officer of the United States.” Thus, to make its point, Our Questions needs to show that senators and representatives referred to § 3 as barring those in “high office,” i.e., the President.
served July 9, 1850 – March 4, 1853; died March 8, 1874), none of whom was from the South, let alone joined the Confederacy. 13

On the other hand, the President of the Confederacy, Jefferson Davis, would have been understood to have been barred by § 3 by virtue of his having been a United States Senator before becoming the President of the Confederacy and thus barred by the “having previously taken an oath, as a member of Congress” clause. Alexander Stephens, the Vice President of the Confederacy, would also have been understood to have been barred by § 3 by virtue of his having been a United States Representative before becoming the Vice President of the Confederacy and thus barred by the “having previously taken an oath, as a member of Congress” clause. 14 Further, Robert E. Lee also would have been understood to have been barred by § 3 by virtue of his having been an officer in the United States Army before becoming a general of the Army of the Confederacy and thus barred by the “having previously taken an oath, . . . as an officer of the United States” clause.

Because no living President had joined the Confederacy, the desire of Congress, as stated by Senator Sherman (R-OH), to deprive from holding office “those men who have once taken an oath of office to support the Constitution of the United States and have violated that oath in spirit by taking up arms against the Government of the United States” (Cong. Globe, 1st Sess., 2899 (1866)), was implemented by § 3, even if it did not include the

13 Only one former President, James Tyler, joined the Confederacy. Tyler, however, had died on January 18, 1862, so there was no reason to exclude him from holding office.

14 Our Questions asserts that Jefferson Davis and Alexander Stephens:

both could have sworn truthfully that they did not “exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States” if presidents and vice-presidents were not officers under the government.

Our Questions 24.

In the first place, the quoted language is not from § 3; it is from An Act to prescribe an Oath of Office, and for other Purposes, 12 Stat. 502 (July 2, 1862). Second, the quoted language refers to the functions of any “office” under any pretended authority in hostility to the United States, not to “officers.” Thus, whether or not presidents and vice-presidents were officers under the government, Davis and Stephens could not have “sworn truthfully” that they did not “exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States” because they both held offices under a “pretended authority in hostility to the United States.”
President as an “officer of the United States.”\textsuperscript{15}

Later in the day on June 8, 1866, Senator Davis moved to remove the references to the States in § 3 (\textit{Id.} at 3041); his motion was defeated. \textit{Id.} The Senate then moved to concur on the amendments made by the Committee of the Whole. With respect to § 3, the Senate voted to concur on the amendment to § 3 proposed by Senator Howard (42 yeas, 1 nay, 6 absences). \textit{Id.} at 3042. The Senate then voted to adopt H.R. No. 127, as amended (33 yeas, 11 nays, 5 absences). \textit{Id.} As H.R. No. 127, as amended, was adopted by two thirds of the Senate, it was sent back to the House.

On June 13, 1866, the House concurred in the Senate amendments (120 yeas, 32 nays, and 32 not voting) and H.R. No. 127, as amended by the Senate, was adopted. \textit{Id.} at 3149.

\textbf{B. The Colorado Supreme Court’s Analysis Of The Legislative History Of § 3}

\textit{Anderson v. Griswold}, 2023 CO 63, noted that, at page 915 of the \textit{Congressional Globe} for the 39\textsuperscript{th} Congress, 1st Session, there was reference to the President as the “chief executive officer of the country.” \textit{Id.} at ¶ 146. This is a misleading reference as it occurred on February 19, 1866, long before § 3 even came into existence (May 29, 1866), and thus was not intended to be, and could not have been, an interpretation of the word “officer” in the then non-existent § 3. Rather, it was merely a passing reference by Senator Saulsbury (D-DE) in a debate about whether Congress had the power to disarm the militias in the former Confederate states. Senator Saulsbury stated: “Mississippi is a State in the Union recognized by the President of the United States, the chief executive officer of the country.”

\textit{Anderson v. Griswold} also cites, at ¶ 146, \textit{Our Questions} at 18-19. Page 18 of \textit{Our Questions} states, \textit{inter alia}:

Many members of Congress, sometimes quoting President Andrew Johnson or Attorney General James Speed, declared that the president was “the chief executive officer of the United States.” n. 105.

\textsuperscript{15} Senator Hendricks observed that the “theory” of § 3 was “that persons who have violated the oath to support the Constitution of the United States ought not to be allowed to hold any office.” \textit{Cong. Globe}, 1\textsuperscript{st} Sess., 2898 (1866). As no former living Presidents had violated the oath to support the Constitution of the United States, there was no need to consider the President as an “officer of the United States.”
The supporting footnote cites:

*Congressional Globe*, 39th Cong., 1st Sess., p. 1318. See *Congressional Globe*, 39th Cong., 1st Sess., pp. 335 (Guthrie) (same); 775 (Conkling) (quoting Speed); 915 (H. Wilson); 2551 (Howard) (quoting A. Johnson) (“chief civil officer”); 2914 (Doolittle); *Congressional Globe*, 39th Cong., 1st Sess., App., p. 150 (Saulsbury).

These citations do not show that “[m]any members of Congress . . . declared” that the President was “the chief executive officer of the United States” and they certainly do not show that the President was “an officer of the United States” within the meaning of § 3.16

Beginning with the reference to page 1318 (debate on March 10, 1866 -- many months before the existence of § 3), Representative Holmes (R-NY) read a Proclamation of President Andrew Johnson “for the purpose of securing a reorganization of the government” of the former states of the Confederacy and appointing provisional governors of those states. In that Proclamation, the President referred to himself as “chief executive officer of the United States . . . .” Representative Holmes did not indicate, nor did any other representative, that he agreed with the President’s non-constitutional characterization.

Turning to page 335 (debate on January 20, 1866 -- again, many months before § 3 existed). On that date, the Senate was debating enlarging the powers of the Freedmen’s Bureau. In discussing the constitutional duty of the President with respect to bringing former Confederate states back into the Union, Senator Gutherie (D-KY) stated: “I think it was in the perfect line of his duty, either as Commander-in-Chief or as chief executive officer of the United States, to bring them back.” *Cong. Globe*, 39th Cong., 1st Sess., 335. No other senator expressed agreement with Senator Gutherie’s non-constitutional characterization.

Most egregiously, at page 775 (February 9, 1866 -- months before § 3 came into being), Representative Conkling (R-NY) did not “quot[e] [Attorney General James] Speed”; rather, Representative Conkling simply asked that a report from Attorney General Speed to the President be read to the House. In that report, the Attorney General stated:

Sundry reports of the facts that go to show that Jefferson Davis and other

16 Much of *Our Questions*, after pages 18-19, focuses on the Presidency being an “office . . . under the United States,” thereby suggesting that the President is an “officer of the United States.” But because the Presidency is an “office under the United States” does not necessitate the conclusion that the President is an “officer of the United States.” Thus, much of *Our Questions* is simply immaterial to the question of whether the President is an “officer of the United States.”
rebels have been guilty of high crimes have been made to you as the chief executive officer of the Government.


Importantly, Representative Conkling did not indicate, nor did any other representative, that he agreed with the Attorney General’s non-constitutional characterization of the President.

At page 915 (February 19, 1866), Senator H. Wilson (R-MA) made no reference to the President being “the chief executive officer of the United States.”

At page 2551 (May 11, 1866), Senator Howard quoted from a Proclamation of President Johnson (the same Proclamation referred to by Representative Holmes, _supra_, at _Cong. Globe_, 39th Cong., 1st Sess., 1318) appointing “various provisional governors” of the former Confederate states. Senator Howard stated:

> After reciting in various laborious phrase the fact that he is President of the United States, that he is Commander-in-Chief of the Army and Navy, and adding what is not contained in the Constitution or the laws of the land, that he is also “chief civil executive officer of the United States,” he says . . . .


Thus, far from endorsing the characterization of the President as “chief civil executive officer of the United States,” Senator Howard strenuously _condemned_ the use of the term as it was not “contained in the Constitution or the laws of the land . . . .”

The next reference is to page 2914, where, as discussed, _supra_, Senator Doolittle initially referred to the President as “the chief executive officer of the Government,” but then clarified that “the President being the chief Executive,” “executive officers who are under him are responsible to him in that sense that he must see that they faithfully discharge their duties.” _Cong. Globe_, 39th Cong., 1st Sess., 2914.

The next reference is to the Appendix for the _Congressional Globe_, at page 150, and a statement by Senator Saulsbury. In fact, Senator Saulsbury made no reference to the President being “the chief executive officer of the United States.”

17 _Our Questions_ incorrectly states that President Johnson had referred to himself as “chief civil officer.”
Our Questions contains other misleading assertions upon which the Colorado Supreme Court apparently relied. For example, it states that “Representative Andrew Rogers of New Jersey included the presidency when he stated, ‘Without the States an officer of the Government cannot be elected,’” citing Cong. Globe, 39th Cong., 1st Sess., p. 198. Representative Rogers’ statement was made on January 11, 1866, long before § 3 came into existence, so it was plainly not intended to be an interpretation of § 3.\footnote{Our Questions discusses, at pages 19-20, the Report of the select committee investigating Representative Conkling concerning pay he had received as a federal prosecutor after being elected to Congress. The select committee Report had nothing whatever to do with whether the President is an “officer of the United States.” The issue before the select committee was whether “a member of Congress and his office are not included in the scope or meaning of the words of the Constitution ‘officer under the United States’ or ‘civil office under the authority of the United States.’” Cong. Globe, 39th Cong., 1st Sess., 3939 (1866). The select committee further observed that its report was “not, perhaps, a proper case in which to make a precedent upon so vital a constitutional question.” Id. at 3940.}

Our Questions also states that the Congressional Globe for the Thirty-Ninth Congress, 1st Session, is “littered with statements acknowledging that the President and Vice President were officers.” Our Questions 22. Most of the citations (51) are to the months before § 3 came into being, so they are not material, even if they did “acknowledg[e] that the President and Vice President were officers.” Of the 10 citations during the debates on § 3, none is an acknowledgment by a member of Congress that the President and Vice President were officers.

Starting at page 2451, Senator Trumbull referred to the “office of the President . . . .” At page 2453, Senator Howe (R-WI) referred to the “presidential office . . . .” At page 2523, Senator Nye (R-NV) stated nothing concerning the President and Vice President being officers. At page 2550, Senator Howard referred to the President as the “Executive of the United States.” At page 2696, Representative Ross (D-IL) referred to the “office of President.” At page 2773, Representative Eliot (R-MA) stated nothing concerning the President and Vice President being officers. At page 2899, Senator Johnson referred to the “two highest offices in the gift of the nation.” Senator Doolittle’s statement at page 2914 is discussed, supra. At page 3172, Representative Windom (R-MN) referred to President Johnson as the person “who at present fills the executive chair of the United States.” And, at page 9 of the Appendix, the Secretary of War, in a report to Congress dated November 22, 1865 (the year before § 3 came into being), mentioned the “comprehensive conspiracy to assassinate the President, the Vice President, Secretary of State, Lieutenant General, and other officers of the Government.” As the Secretary of State and Lieutenant General are certainly officers of the Government, it is likely that “other officers of the Government”
meant officers similar to the Secretary of State and Lieutenant General and was not suggestion that the President and Vice President were “officers.”

Of the 51 citations to the months before § 3 came into being, a mere 12 mention the word “officer” -- and only four of those statements “acknowledg[e] that the President” was an “officer”; none even reference the Vice President, none could have been intended to interpret “officer of the United States” in § 3 as it did not yet exist and none was endorsed by any other senator or representative:

335 (Guthrie) (“I think it was in the perfect line of his duty, either as Commander-in-Chief or as chief executive officer of the United States, to bring them back”).

363 (Saulsbury) (“the President of the United States, the highest executive officer of your Government”).

1158 (Eldridge) (“I do not indorse any unconstitutional act of any President or other officer of the Government”).

1800 (Wade) (“The President is a mere executive officer, bound to obey our mandates and our behests”).

All of these references appear to be merely colloquial use equating the President with an “officer,” particularly as three of the four use the term “executive officer.”

Of the remaining eight citations:

Two representatives presented statements from President Andrew Johnson’s Proclamation appointing provisional governors, where President Johnson referred to himself as “the chief executive officer of the nation.” See 661 (Hubbell) and 1318 (Holmes); neither representative indicated, nor did any other representative, that he agreed with the President’s characterization.

One representative merely asked that a report from Attorney General Speed to the President be read to the House. See 775 (Conkling), discussed, supra. Representative Conkling did not indicate, nor did any other representative, that he agreed with the Attorney General’s characterization of the President.

19 This statement is discussed, supra.

-17-
One representative introduced a constitutional amendment (931 (Wade)) stating in part:

Whenever Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, such officer shall not again be eligible to the office of President of the United States during the term of his natural life.

This language not only does not “acknowledg[e] that the President and Vice President were officers,” it emphasizes that the President was not understood to be an “officer” because an “officer” could “act as President . . . .”

One representative introduced a constitutional amendment (919 (McKee)) which did not refer to the President as an “officer”; it only referred to “the office of President . . . .”

One representative and two senators not only did not “acknowledg[e] that the President and Vice President were officers,” it distinguished the President from “officers”:

351 (Schenck): “My point of order is that these resolutions denominate the President of the United States ‘His Excellency.’ There is no such officer known to the Constitution of the United States.”

2306 (Henderson): “Mr. Madison gave his opinion simply on the appointment of the chief executive officers who stand in a confidential relationship with the President. . . . [T]he President has the right to remove an officer.”

2310 (R. Johnson): Faithful execution of the laws “can only be done through the instrumentality of subordinate officers named in the Constitution, or officers appointed under the authority conferred on Congress by the Constitution. . . . He cannot execute the laws except by means of officers . . . . But what is to supply the evil consequent upon the inability of the President to execute the laws because the officers placed under his charge are not fit . . . .”

In sum, the legislative history of § 3 is not inconsistent with the usage of the term “officer of the United States” in the original Constitution.
III.

Case Law Does Not Support The President
Being An “Officer Of The United States”

The Colorado Supreme Court also misconstrued the case law discussing the meaning of “Officer of the United States.”

In *Motions Sys. Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006), the court stated:

The Constitution repeatedly designates the Presidency as an “Office,” which surely suggests that its occupant is, by definition, an “officer.” *See, e.g.*, U.S. Const. art. I, § 3, cl. 5; art. II, § 1, cl. 1; art. II, § 1, cl. 5; art. II, § 1, cl. 6; art. II, § 1, cl. 8; amend. XXII, § 1; amend. XXV, §§ 1, 3, 4. An interpretation of the Constitution in which the holder of an “office” is not an “officer” seems, at best, strained.

437 F.3d at 1371-1372.

The court, however, went on to acknowledge:

It is true, however, that our understanding of the category of “officers of the United States” comes primarily from the Appointments Clause and the jurisprudence associated with it. The Appointments Clause and the Commissions Clause, by their terms, apply to all “officers of the United States” and all “civil officers of the United States,” respectively. *See id.* at art. II, § 2, cl. 2; art. II, § 3; art. II, § 4. Those clauses, and other constitutional provisions, contemplate a class of “officers” inferior in status to the President, who nominates and commissions them. The key features of that class are nomination by the President, appointment with the advice and consent of the Senate, commission by the President, and removal by impeachment. It is plain that the President is not an “officer of the United States” for Appointments Clause, Commission Clause, or Oath of Office Clause purposes.

437 F.3d at 1372.

Indeed, it is plain, as discussed, *supra*, that the President cannot be an “officer of the United States” since it is the President’s duty to “commission all the officers of the United States.” U.S. Con. Art. 2, § 3. The President thus cannot simultaneously be an “officer of the United States”; otherwise, he would have to commission himself, a nonsensical concept.
Moreover, it is not at all “strained” that the holder of an “office” is not an “officer”; on the contrary, because “officer” implies not just someone who holds an office, but someone who has discretionary executive responsibilities that are not merely clerical, merely holding an office would not necessarily make a person an “officer.” A person may be “an agent or employé working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.” United States v. Germaine, 99 U.S. 508, 509 (1878).

In The Floyd Acceptances, 74 U.S. 666 (1868), there is dictum which suggested that the President was an “officer of the United States.” The Court stated:

We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law.

74 U.S. at 676–77.

Clearly, the point that the Court was making was that anyone who holds an office under the United States does so “under the law” and that there are no offices which exist but which have been established by law. The Court was not attempting to establish that the President is an “officer of the United States.” Indeed, the Court goes on to refer to offices in all three branches of the Government, thereby emphasizing that the Court was not using the terms “officer” or “office” in their precise constitutional sense.

IV.
Attorney General Opinions Do Not Support The President Being An “Officer Of The United States”

After Congress passed the Fourteenth Amendment on June 13, 1866 (but before its ultimate ratification in 1868), Congress passed the Reconstruction Acts, which set forth the conditions under which most of the Confederate states would be readmitted to the Union. The Acts incorporated § 3 of what would become the Fourteenth Amendment. Under the Reconstruction Acts, voters in the former Confederate states were limited to “male citizens of said State twenty-one years old and upwards, of whatever race, color, or previous condition, who have been resident of said State for one year previous to the day of election.”

-20-
In an Opinion of May 24, 1867, Attorney General Stanbery opined on the Reconstruction Acts, focusing on “[w]ho are entitled to vote and who are disqualified from voting at the elections provided for or coming within the purview of these Acts?” 12 Op. Att’y Gen. 141. One of the issues was whether the Reconstruction Acts applied to military as well as civil officers. Accordingly, the Opinion would not have, and did not, consider whether the President was an “officer of the United States.”

In the Opinion, the Attorney General stated in part:

Who is to be considered “an officer of the United States,” within the meaning of the clause under consideration? Here the term officer is used in its most general sense, and without any qualification, as legislative, or executive, or judicial; and I think, as here used, it was intended to comprehend military as well as civil officers of the United States who had taken the prescribed oath.


It is thus evident that Attorney General Stanbery was not considering whether the President, in his unique constitutional role, was an “officer of the United States.”

In a subsequent Opinion of June 12, 1867, the Attorney General opined on the authority of military commanders in the former states of the Confederacy; he also provided a “Summary” of his earlier Opinion on the question of who could vote in the former states of the Confederacy, stating:

As to [officers of the United States], the language is without limitation. The person who has at any time prior to the rebellion held any office, civil or military, under the United States, and has taken an official oath to support the Constitution of the United States, is subject to disqualification.


As with his first Opinion, the Attorney General was only determining who among “male citizens of said State twenty-one years old and upwards, of whatever race, color, or previous condition, who have been resident of said State for one year previous to the day of election” could vote in elections in the former states of the Confederacy. Indeed, in the very next paragraph of the Opinion, the Attorney General stated: “Military officers of any State, prior to the rebellion, are not subject to disqualification.” Id. Consequently, the Opinion did not purport to address, and cannot properly be viewed as addressing, whether the President was an “officer of the United States.”
CONCLUSION

From the original Constitution to the Twenty-Fifth Amendment to the debates in Congress, it is evident that the President is not an “officer of the United States” within the meaning of § 3.