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# UNQUALIFIED AMBASSADORS

RYAN M. SCOVILLE<sup>†</sup>

## ABSTRACT

*In making appointments to the office of ambassador, U.S. presidents often select political supporters from outside the ranks of the State Department’s professional diplomatic corps. This practice is aberrational among advanced democracies and a source of recurrent controversy in the United States, and yet its merits and significance are substantially opaque: How do political appointees compare with career diplomats in terms of credentials? Are they less effective in office? Do they serve in some countries more than others? Have any patterns evolved over time? Commentators might assume answers to these questions, but actual evidence has been in short supply. In this context, it is difficult for the public to evaluate official practice and hold accountable those who wield power under the Appointments Clause.*

*This Article helps to correct for the current state of affairs. Using a novel dataset based on a trove of previously unavailable documents that I obtained from the State Department through requests and litigation under the Freedom of Information Act (“FOIA”), the Article systematically reveals the professional qualifications and campaign contributions of over 1900 ambassadorial nominees spanning the Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama administrations, along with the first two years of Donald Trump. In doing so, the Article substantially enhances the transparency of the appointments process and exposes conditions of concern: not only are political appointees on average much less qualified than their career counterparts under a variety of congressionally approved measures, but also the gap has grown along with the commonality and size of their campaign contributions to*

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*nominating presidents. These conditions raise the possibility that campaign contributions are generating an increasingly deleterious effect on the quality of U.S. diplomatic representation abroad. The Article concludes by identifying and defending the constitutional merits of plausible legal reforms, including Senate rule amendments and statutory measures to regulate qualifications and enhance transparency.*

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## INTRODUCTION

U.S. presidents often reward financial donors and other political supporters with nominations for ambassadorships to foreign states.<sup>1</sup> Because these nominees tend to come from outside the ranks of the State Department's professional diplomatic corps, their selection is typically justified to the public by reference to other indicia of merit, such as philanthropic work and success in industry.<sup>2</sup> Campaign contributions are brushed aside as tangential.<sup>3</sup> Personal connections to the president are framed as the auspicious portents of access and influence.<sup>4</sup> A career in the Foreign Service is deemed unnecessary and even counterproductive.<sup>5</sup>

Consider a few examples. At least eight of President Trump's first fifteen appointments to bilateral ambassadorships were financial donors.<sup>6</sup> This group includes New York Jets owner Robert Wood Johnson IV, who personally contributed over \$450,000 to the Trump campaign and is now ambassador to the United Kingdom.<sup>7</sup> In 2013, President Obama nominated Colleen Bell, a producer for the daytime television series *The Bold and the Beautiful*, as ambassador to

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1. See, e.g., Lauren Rosenblatt, *Trump's Ambassador Picks So Far Include the Usual Mix of Rich Donors and Loyal Supporters*, L.A. TIMES (July 13, 2017, 3:00 AM), <https://www.latimes.com/politics/la-na-pol-trump-ambassador-nominees-201707123-story.html> [<https://perma.cc/ERH9-GEDG>].

2. See, e.g., GLASS, GEORGE EDWARD – PORTUGUESE REPUBLIC – JUNE 2017, CERTIFICATE OF COMPETENCY, REPORT FOR THE S. COMM. ON FOREIGN RELATIONS, U.S. DEP'T OF STATE (June 15, 2017), <https://www.state.gov/glass-george-edward-portuguese-republic-june-2017> [<https://perma.cc/ZQK8-HSAE>] (describing Glass as a "prominent American businessman" with "expertise in real estate").

3. Compare, e.g., *id.* (listing Glass's qualifications while failing to mention that he made over \$80,000 in contributions to the Trump campaign), with 163 CONG. REC. S4424 (daily ed. July 27, 2017) (reporting Glass's campaign contributions).

4. See MORTON H. HALPERIN & PRISCILLA A. CLAPP, BUREAUCRATIC POLITICS AND FOREIGN POLICY 279 (2d ed. 2006) (discussing this argument).

5. See, e.g., Laurence H. Silberman, *Toward Presidential Control of the State Department*, 57 FOREIGN AFF. 872, 872 (1979).

6. Compare, e.g., 2017 *Certificates of Competency for Nominees to Be Chiefs of Mission*, U.S. DEP'T OF STATE [hereinafter 2017 *Certificates of Competency*], <https://www.state.gov/2017-certificates-of-competency-for-nominees-to-be-chiefs-of-mission/page/6> [<https://perma.cc/CL8L-FGKQ>] (listing Scott Brown, William Hagerty, Callista Gingrich, and Douglas Manchester as among President Trump's earliest nominees), with 163 CONG. REC. S3210–11 (daily ed. May 25, 2017) (reporting Scott Brown's contributions), 163 CONG. REC. S3327 (daily ed. June 7, 2017) (reporting William Hagerty's contributions), 163 CONG. REC. S4421 (daily ed. July 27, 2017) (reporting Callista Gingrich's contributions), and 163 CONG. REC. S5858 (daily ed. Sept. 19, 2017) (reporting Douglas Manchester's contributions).

7. 163 CONG. REC. S4424 (daily ed. July 27, 2017).

Hungary.<sup>8</sup> President George W. Bush nominated five donors whose most significant credential was ownership of a Major League Baseball team.<sup>9</sup> President George H.W. Bush selected as ambassador to Barbados a financial contributor who lacked not only diplomatic experience, but also a college degree and an employment history.<sup>10</sup> And in 1981, President Reagan chose his personal friend John Gavin as ambassador to Mexico.<sup>11</sup> Gavin spoke Spanish and had previously served as an adviser to the Secretary General of the Organization of American States, but he was a Hollywood actor by trade.<sup>12</sup> He was Sam Loomis in Alfred Hitchcock's *Psycho*<sup>13</sup> and a debonair, tuxedo-and-mahogany sort of character in rum commercials for Bacardi.<sup>14</sup>

Cases like these occur against a constitutional backdrop that many view as settled. Article II provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,"<sup>15</sup> and it is generally accepted that this language confers broad discretion: the president enjoys wide latitude in selecting a nominee,<sup>16</sup> and the Senate is comparably free to choose whether to advise and consent.<sup>17</sup> The principal restraints are instead political. As the Founders saw it, the exclusivity of the president's power to nominate and commission would render him primarily responsible for, and thus help to deter, poor selections,<sup>18</sup> and the Senate's power to

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8. 159 CONG. REC. S7932 (daily ed. Nov. 7, 2013); *Colleen Bell*, IMDB, <https://www.imdb.com/name/nm2649171> [<https://perma.cc/5UYF-Q4NV>].

9. *Bush's Baseball Ambassadors*, MOTHER JONES (July/Aug. 2004), <http://www.motherjones.com/politics/2004/07/bushs-baseball-ambassadors> [<https://perma.cc/T2HQ-PAK2>].

10. Ray Moseley, *Critics Say System Spoils the Role of Ambassadors*, CHI. TRIB. (July 30, 1989), <https://www.chicagotribune.com/news/ct-xpm-1989-07-30-8902210442-story.html> [<https://perma.cc/W36W-HDGZ>].

11. 127 CONG. REC. D232 (daily ed. Apr. 28, 1981).

12. Robert D. McFadden, *John Gavin, Actor and Ambassador to Mexico Under Reagan, Dies at 86*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2018/02/09/obituaries/john-gavin-actor-and-ambassador-to-mexico-under-reagan-dies-at-86.html> [<https://perma.cc/P2XL-FMHA>].

13. Ronald Bergan, *John Gavin Obituary*, GUARDIAN (Apr. 3, 2018, 6:07 PM), <https://www.theguardian.com/film/2018/feb/14/john-gavin-obituary> [<https://perma.cc/5YRK-FYX7>].

14. See *spotenlinea, BACARDI*, YOUTUBE (Oct. 10, 2010), <https://www.youtube.com/watch?v=AOAEJUPiWrE> [<https://perma.cc/8WDZ-JHYJ>].

15. U.S. CONST. art. II, § 2.

16. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 34–38 (2003).

17. *Id.*

18. See, e.g., THE FEDERALIST NO. 76, at 527 (Alexander Hamilton) (Henry B. Dawson ed., 1863) (explaining that executive control over nominations would be optimal, in part because the

confirm would necessitate nominations with broad appeal.<sup>19</sup> Meanwhile, each Senator's presumed desire for reelection would incentivize publicly defensible votes in the confirmation process.<sup>20</sup> By this logic, constitutionality is a simple question of procedural regularity, and those who make it through the process are likely to satisfy basic standards of fitness.

And yet, ambassadorial appointments are a perennial source of controversy. The central question is whether it is *optimal* for the president and the Senate to exercise the discretion Article II confers by appointing financial donors and other affiliates of the president from outside the State Department's professional diplomatic corps ("political appointees"), rather than Foreign Service officers ("career appointees"). The White House defends the practice,<sup>21</sup> while the American Foreign Service Association and a collection of former diplomats lead the opposition.<sup>22</sup> This debate is important because the perceived strength of the competing claims substantially dictates whether such appointments are politically tenable. A dialectical settlement on the merits of noncareer ambassadors would help to expand or cabin the discretion that currently facilitates their selection.

A dearth of evidence on nominee qualifications and appointee performance, however, has discouraged such a settlement. Many commentators rely heavily on anecdote to defend their favored

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"sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation").

19. See, e.g., *id.* (explaining that the requirement of Senate advice and consent "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity").

20. Cf. Steven I. Friedland, "Advice and Consent" in the Appointments Clause: From Another Historical Perspective, 64 DUKE L.J. ONLINE 173, 190–91 (2015) (discussing the influence of public pressure on the appointments process).

21. See, e.g., Emily R. Siegel, Andrew W. Lehren, Brandy Zadrozny, Dan De Luce & Vanessa Swales, *Donors to the Trump Inaugural Committee Got Ambassador Nominations. But Are They Qualified?*, NBC NEWS (Apr. 3, 2019), <https://www.nbcnews.com/politics/donald-trump/donors-trump-inaugural-committee-got-ambassador-nominations-are-they-qualified-n990116> [<https://perma.cc/GE7P-CNFY>] (reporting that the Trump administration has defended several political nominees on the ground that their "business acumen . . . qualifies them to represent the U.S. abroad").

22. See, e.g., AFSA Statement on Ambassadors, AM. FOREIGN SERV. ASS'N, <http://web.archive.org/web/20180119102055/http://afsa.org/afsa-statement-ambassadors> [<https://perma.cc/H4J2-L6WG>] ("[AFSA] continues to urge that experienced and qualified members of the Foreign Service generally be appointed to represent the United States as ambassadors.").

position,<sup>23</sup> but this strategy is vulnerable to selection bias and easily neutralized by counterexamples. Legal scholars often advocate greater transparency as a general aid to public accountability and the rule of law,<sup>24</sup> but typically rely upon others to provide it. And while a small number of social scientists have supplied pertinent evidence on discrete issues,<sup>25</sup> important questions remain: Do political nominees typically lack relevant credentials, or are those who make headlines aberrational? How do their backgrounds compare to career nominees' under accepted metrics of competency, such as basic familiarity with the language and government of the receiving state? What is the role of campaign contributions in the appointments process? Do any tendencies emerge with respect to specific bilateral relationships? And have any patterns evolved across recent administrations? In many ways, the answers are unclear.

The resulting uncertainty is unfortunate, as it could very well limit the efficacy of the appointments process as a mechanism for policing untoward forms of influence and weeding out individuals who are unqualified for service. Without anything close to complete data, stakeholders may fail to see the forest of modern practice for the trees

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23. See, e.g., Josh Rogin, *Another Obama Fundraiser Turns Out to Be a Bad Ambassador*, FOREIGN POL'Y (Feb. 23, 2012, 5:56 PM), <https://foreignpolicy.com/2012/02/23/another-obama-fundraiser-turns-out-to-be-a-bad-ambassador> [<https://perma.cc/29ZD-PJHF>] (reporting on the resignation of an ambassador who was an Obama fundraiser with no prior foreign policy experience and “ran her embassy into the ground,” claiming that “[she was] only the latest fundraiser cum ambassador who caused trouble for the boss”).

24. See, e.g., HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* 67–112 (2015) (critiquing constitutional arguments for extensive executive-branch control of information); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1271 (2018) (proposing to subject presidential control over international law “to a comprehensive regime of ex post transparency”).

25. See generally J.W. Fedderke & D. Jett, *What Price the Court of St. James? Political Influences on Ambassadorial Postings of the United States of America* 32 (Econ. Research Southern Afr., Working Paper No. 234, 2012), [https://econrsa.org/system/files/publications/working\\_papers/working\\_paper\\_234.pdf](https://econrsa.org/system/files/publications/working_papers/working_paper_234.pdf) [<https://perma.cc/E3M3-YPJH>] (revealing data on campaign contributions among political appointees in the early years of the Obama administration); Evan T. Haglund, *Striped Pants Versus Fat Cats: Ambassadorial Performance of Career Diplomats and Political Appointees*, 45 PRESIDENTIAL STUD. Q. 653 (2015) (reporting on performance differentials between career and political ambassadors); James S. Pacy & Daniel B. Henderson, *Career Versus Political: A Statistical Overview of Presidential Appointments of United States Chiefs of Mission Since 1915*, 3 DIPL. & STATECRAFT 382 (1992) (reporting changes in the commonality of noncareer ambassadors over the course of the twentieth century); Richard W. Waterman, John Bretting & Joseph Stewart, *The Politics of U.S. Ambassadorial Appointments: From the Court of St. James to Burkina Faso*, 96 SOC. SCI. Q. 503 (2015) (discussing personal ties to the president among nominees in the early 1990s).

of individual nominations, leaving significant trends unappreciated and unaddressed. Likewise, without sufficient information, it is difficult for the public to hold the president and senators accountable and for commentators to make a compelling case for or against any particular class of nominees—donors included. In the end, the quality of U.S. diplomatic representation may suffer, with attendant harm to U.S. foreign relations.

This Article helps to correct for current conditions by revealing multiple dimensions of the appointments process that have long been opaque. Using a novel dataset based on a trove of previously unavailable documents that I obtained from the State Department through requests and litigation under the Freedom of Information Act (“FOIA”),<sup>26</sup> the Article systematically reveals the professional qualifications and campaign contributions of over 1900 ambassadorial nominees spanning the Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama administrations, along with the first two years of Donald Trump. In doing so, the Article sheds new light on the relative and absolute merits of political and career nominees, the bilateral relationships that may have benefited or suffered most under modern appointments practice, and trends across several administrations. This information contributes to what Jack Goldsmith has called the “presidential synopticon”—the multifaceted accountability system whereby courts, Congress, journalists, lawyers, and other actors in civil society monitor the president to help ensure that other governmental institutions “know about the President’s actions, can require him to account for them, and can punish him if they think he is engaged in the wrong policy or acting unlawfully.”<sup>27</sup>

With respect to diplomatic appointments, such monitoring may be particularly important in the present era. Today, there is a pervasive sense that global leadership is up for grabs to an extent that is unprecedented since the end of the Cold War.<sup>28</sup> The United States

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26. See *Scoville v. Dep’t of State*, No. 17-CV-00951 (D.D.C. May 19, 2017).

27. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 209 (2012).

28. See, e.g., Cristiano Lima, *Poll: Under Trump, Global Approval of U.S. Leadership Hits Historical Low*, POLITICO (Jan. 18, 2018, 12:04 AM), <https://www.politico.com/story/2018/01/18/trump-global-leadership-polls-344989> [<https://perma.cc/54PU-V8JF>] (reporting that global public approval of U.S. leadership dropped from 48 percent in 2016 to 30 percent in 2017—the lowest percentage since at least 2007); see also NAT’L INTELLIGENCE COUNCIL, *GLOBAL TRENDS 2025: A TRANSFORMED WORLD* vi (Nov. 2008) (“The international system—as constructed following the Second World War—will be almost unrecognizable by 2025 owing to the rise of emerging powers, a globalizing economy, an historic transfer of relative wealth and economic power from



faces a collection of serious and seemingly intensifying challenges from states such as Russia and particularly China, which is currently overhauling its Ministry of Foreign Affairs to “forge a politically resolute, professionally exquisite, strictly disciplined foreign affairs corps.”<sup>29</sup> If the United States hopes to mitigate the erosion of its influence in an increasingly multipolar order, it can hardly afford an appointments practice that places underqualified or incompetent individuals in major diplomatic posts.

The Article proceeds as follows. Part I provides historical context for the modern controversy over ambassadorial appointments by showing how changes in federal law occurred alongside, and may have helped produce, a substantial transformation in American diplomacy: from the turn of the century to 1950, the percentage of U.S. ambassadorships allocated to noncareer diplomats fell from over 80 percent to roughly 30 percent, where it has remained ever since.<sup>30</sup> This context sets up the central inquiry: What are the merits and significance of the 30 percent? Part II begins the process of providing answers by identifying the principal functions of an ambassador under current federal law and, with those functions in view, enumerating criteria by which to evaluate the competency of nominees. Part III operationalizes the criteria, tests the merits of modern practice by systematically analyzing nearly forty years of official records on the qualifications of nominees, and reports findings.

The empirical findings support a range of conclusions, but two carry overarching significance. First, the average political nominee has been much less qualified than the average career nominee under congressionally approved metrics and, insofar as those metrics foreshadowed performance, less effective in office. Second, things have

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West to East, and the growing influence of nonstate actors. . . . Although the United States is likely to remain the single most powerful actor, the United States’ relative strength—even in the military realm—will decline and US leverage will become more constrained.”).

29. *As U.S. Culls Diplomats, China is Empowering Its Ambassadors*, BLOOMBERG NEWS (Feb. 7, 2018, 10:00 AM), <https://www.bloomberg.com/news/articles/2018-02-07/as-u-s-culls-diplomats-china-is-empowering-its-ambassadors> [https://perma.cc/86HK-NRHD] (quoting a reform committee headed by Chinese President Xi Jinping); *see also* Jessica Terry & Zachary Reeves, *Russia*, in POLICY RESEARCH PROJECT REINVENTING DIPLOMACY, DEVELOPING DIPLOMATS: COMPARING FORM AND CULTURE ACROSS DIPLOMATIC SERVICES 117, 117 (Robert Hutchings & Jeremi Suri eds., 2017) (“The Russian Foreign Service maintains an international reputation for professional excellence and Russian diplomats are known for their profound linguistic and cultural knowledge of assigned regions.”).

30. DENNIS C. JETT, *AMERICAN AMBASSADORS: THE PAST, PRESENT, AND FUTURE OF AMERICA’S DIPLOMATS* 26–27 (2014).

gotten worse: alongside a *rise* in the average size of campaign contributions in recent decades, the qualifications of the average donor-nominee have significantly *fallen* under a number of accepted measures. This points to the possibility that presidents have started to pay less attention to professional credentials and more attention to finances in selecting among prospective nominees, such that the ballooning cost of presidential elections is indirectly degrading the quality of U.S. diplomatic representation overseas.

Part IV discusses practical implications. By systematically demonstrating the relative underqualification of political appointees, the analysis substantially strengthens the argument against the 30 percent. By clarifying the growing role of campaign contributions, the findings intensify preexisting concerns about official corruption.<sup>31</sup> By highlighting potential effects of political appointments on the conduct of U.S. foreign relations, the study identifies avenues for future research. And by suggesting that the problem of underqualification has generally gotten worse rather than better, the study lends urgency to the question of reform.

Part V concludes by identifying and defending plausible legal reforms. To the limited extent that commentators have addressed the topic of unqualified ambassadors, they have suggested that the Constitution inhibits legislative solutions by assigning the president exclusive and formally unlimited discretion over nominations.<sup>32</sup> In contrast, I contend that the Constitution leaves room for several types of legislative intervention: (1) Congress can mandate qualifications by statute. Such a mandate would likely violate the original understanding of the Appointments Clause, but it would be entirely consistent with a substantial body of modern practice. Given recent Supreme Court precedent that accords great weight to such practice in ascertaining the

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31. See, e.g., *Diplomat Buyers Club*, *The Daily Show with Jon Stewart: Diplomat Buyers Club* (Comedy Central television broadcast Feb. 12, 2014), <http://www.cc.com/video-clips/8oq0a5/the-daily-show-with-jon-stewart-diplomat-buyers-club> [<https://perma.cc/753T-QNY4>] (arguing that the appointment of unqualified campaign donors to ambassadorships during the Obama administration was a form of corruption).

32. Aside from two notes from the 1980s and 1990s, there are no legal academic articles on ambassadorial appointments. See James W. Moeller, Comment, *Toward Competent Ambassadors: A Quota of Foreign Service Officers?*, 20 HARV. J. ON LEGIS. 219, 223 (1983) (suggesting that a statutory quota on donor appointments would infringe the president's discretion to nominate); Joanne F. Weil, Note, *Today's Ambassadorships: Plum Positions for Political Payers and Golf Players*, 42 SYR. L. REV. 261, 273 (1991) (same).

separation of powers,<sup>33</sup> the best view is that Congress wields a plausible and even persuasive claim of authority to impose reasonable qualifications requirements by statute. (2) The Senate and Senate Foreign Relations Committee can amend their rules to prevent or at least discourage the appointment of unqualified individuals. And (3) Congress can enact measures to enhance transparency with respect to nominee qualifications, financial contributions, and the performance of officeholders. In short, Congress has options; if it fails to act, it is for lack of will rather than a dearth of possibility.

Two caveats before proceeding: First, I do not purport to measure every credential or ability that might conceivably be relevant to the office of ambassador. Because the documents I obtained focus only on a discrete set of competency metrics, it was not possible to code holistically for each nominee. That said, the study provides a thorough account of the various qualifications that Congress has deemed to be most important in recent decades. Second, I freely acknowledge that credentials do not necessarily predict performance—the ultimate issue in evaluating any appointment. Some individuals might excel in office without first acquiring the types of training and experience that are customary for officeholders, while others might fail even with an orthodox background. It is a standard assumption, however, that credentials are at least loosely predictive of performance, and empirical research suggests that the assumption is generally warranted.<sup>34</sup> Trends in qualifications are thus a worthy topic of inquiry.

## I. TWENTIETH-CENTURY PROFESSIONALIZATION AND STASIS

Modern presidents fill a supermajority of U.S. ambassadorships with Foreign Service officers,<sup>35</sup> but this was not always the case. Prior

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33. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091–94 (2015) (relying in part on historical practice to decide whether the president has an exclusive power to recognize foreign states); *NLRB v. Noel Canning*, 573 U.S. 513, 525–26 (2014) (relying heavily on historical practice to interpret the meaning of the Recess Appointments Clause).

34. See, e.g., Michael A. McDaniel, Frank L. Schmidt & John E. Hunter, *Job Experience Correlates of Job Performance*, 73 J. APPLIED PSYCH. 327, 329 (1988) (“Results indicate that for all levels of job experience and for both low- and high-complexity jobs, the correlation between job experience and job performance is positive.”); Miguel A. Quiñones, J. Kevin Ford & Mark S. Teachout, *The Relationship Between Work Experience and Job Performance: A Conceptual and Meta-Analytic Review*, 48 PERSONNEL PSYCH. 887, 904 (1995) (“The results of the meta-analyses revealed that the relationship between work experience and job performance was positive regardless of the work experience measure used.”).

35. See, e.g., *Ambassadorial Assignments Overseas*, OFFICE OF PRESIDENTIAL APPOINTMENTS, U.S. DEPT OF STATE (Feb. 1, 2018), <https://www.state.gov/wp->

to the twentieth century, U.S. foreign relations relied overwhelmingly on diplomatic amateurs,<sup>36</sup> and many accepted this state of affairs out of indifference and even hostility toward diplomacy itself.<sup>37</sup> As William Barnes and John Heath Morgan have explained, the concept of a permanent diplomatic service was simply “not in the spirit of the times.”<sup>38</sup> This Part provides historical context for modern practice by examining legal aspects of the shift toward professional diplomacy in the twentieth century. Part I.A identifies four specific ways in which the political branches used law to curb amateurism. Part I.B discusses the potential logic and effect of those efforts.<sup>39</sup>

### A. *The Historical Regulation of Ambassadorial Appointments*

In a way, federal law has regulated ambassadorial qualifications ever since 1789. The Appointments Clause provides that the “President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors.”<sup>40</sup> As explained earlier, the Founders aimed in devising this process to protect the quality of the

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content/uploads/2019/01/Ambassadorial-Assignments-1-Feb-2018.pdf [https://perma.cc/X96C-9ZDK] (listing the career status of current appointees).

36. WARREN FREDERICK ILCHMAN, PROFESSIONAL DIPLOMACY IN THE UNITED STATES, 1779–1939: A STUDY IN ADMINISTRATIVE HISTORY 11–12 (1961).

37. *Id.* at 18–22.

38. WILLIAM BARNES & JOHN HEATH MORGAN, THE FOREIGN SERVICE OF THE UNITED STATES: ORIGINS, DEVELOPMENT, AND FUNCTIONS 55 (1961).

39. This Part focuses on U.S. law, but one might also view foreign governments as de facto regulators of ambassadorial qualifications. Under the international law principle of *agrément*, a “sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.” Vienna Convention on Diplomatic Relations art. 4(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; *see also* EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 46–52 (3d ed. 2008) (discussing the origins, procedure, and scope of *agrément*). Although rare in practice, a receiving state could apply this principle to decline its consent to an unqualified nominee. *Cf.* ELMER PLISCHKE, UNITED STATES DIPLOMATS AND THEIR MISSIONS: A PROFILE OF AMERICAN DIPLOMATIC EMISSARIES SINCE 1778, at 48 (1975) [hereinafter PLISCHKE, UNITED STATES DIPLOMATS] (reporting that receiving states rejected American appointees on only three occasions from the Founding to 1975); *see also, e.g.*, REPORT FOR THE S. COMM. ON FOREIGN RELATIONS, AMBASSADORIAL NOMINATION: CERTIFICATE OF DEMONSTRATED COMPETENCE—FOREIGN SERVICE ACT, SECTION 304(A)(4): AMBASSADOR TO YUGOSLAVIA: JOHN D. SCANLAN, in *Certificates of Demonstrated Competence, 1980 – 2016, Tranche III*, at 119 (2018), <https://ryanscoville.files.wordpress.com/2018/01/foia-docs-3.pdf> [https://perma.cc/ML9M-4DHX] (noting that the government of Poland declined to accept President Reagan’s choice of Scanlan to serve as ambassador in 1981). The possibility of such a declination, though remote, might discourage the selection of grossly unqualified individuals.

40. U.S. CONST. art. II, § 2.

appointments that would occur under the new government.<sup>41</sup> It was assumed that one who garnered not only the public support of the president but also a majority of the Senate would satisfy basic standards of fitness.<sup>42</sup>

Yet the Appointments Clause has never operated as a particularly stringent filter. Throughout the nineteenth and early twentieth centuries, presidents nominated individuals to diplomatic posts with little regard for experience, language abilities, knowledge of the host country, or other criteria that are now commonly accepted as relevant.<sup>43</sup> The Senate, moreover, routinely confirmed these nominees.<sup>44</sup> Thus, even into the second decade of the twentieth century, virtually all U.S. chiefs of mission lacked significant prior experience in diplomacy.<sup>45</sup> These individuals rarely spent “more than a few years in the nation’s service overseas” and “did not compare in knowledge and competence, and certainly not in experience, with the professional diplomats of the European powers.”<sup>46</sup> Historians have suggested that this pattern resulted from a combination of public and congressional apathy toward diplomatic appointments, the advent and subsequent normalization of the spoils system, and a general skepticism toward diplomatic expertise in early American politics.<sup>47</sup> These influences created a political context in which amateurism was tolerated and even idealized. In doing so, they rendered the Appointments Clause unavailable as a meaningful restraint on the selection of noncareer ambassadors.<sup>48</sup>

Official practice started to change in the early twentieth century. During this period, the political branches adopted a number of legal

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41. See *supra* pp. 74–75; *supra* notes 15–20 and accompanying text.

42. See *supra* pp. 74–75; *supra* notes 15–20 and accompanying text.

43. See, e.g., BARNES & MORGAN, *supra* note 38, at 132–42 (discussing diplomatic appointments in the post-Civil War period).

44. PLISCHKE, UNITED STATES DIPLOMATS, *supra* note 39, at 48 (reporting that fewer than 3 percent of ambassadorial nominations from 1789 to 1975 failed to result in appointment); see also JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 289 (1953) (explaining that, due to the “wide discretion” accorded to the president in the conduct of foreign relations, there have been “fewer contests over diplomatic nominations than over nominations of any other group of federal officers except Cabinet members”).

45. See Henry M. Wriston, *The Foreign Service and Representation Abroad*, 100 PROC. AM. PHIL. SOC’Y 105, 106 (1956) (“Diplomatic chiefs of mission in a few capitals are seldom or never career officers; the number of such ‘political appointees’ has varied in forty years from 100 per cent in 1914 to about 30 per cent today.”).

46. ANDREW L. STEIGMAN, THE FOREIGN SERVICE OF THE UNITED STATES 17 (1985).

47. See, e.g., BARNES & MORGAN, *supra* note 38, at 68, 89.

48. *Id.* at 55.

reforms to help professionalize U.S. diplomacy. First, and perhaps most importantly, federal law began to challenge the tradition of amateurism by fostering the development of a permanent corps of career diplomats. This process formally began in 1905, when President Theodore Roosevelt issued an executive order requiring “vacancies in the office of Secretary of Embassy or Legation” to be filled “[b]y transfer or promotion from some branch of the foreign service” or “[b]y the appointment of a person who, having furnished satisfactory evidence of character, responsibility and capacity, and being thereupon selected by the President for examination, is found upon such examination to be qualified for the position.”<sup>49</sup> Since then, the law has advanced the cause of professionalization by creating a Foreign Service with entrance examinations, merit-based promotion and retention, salary enhancements, interpost transfers, and periodic rotations to Washington, D.C.<sup>50</sup> In creating such a service, past presidents and lawmakers have signaled the value of expertise and created a viable alternative to donors, friends, family members, and other presidential associates.

Second, the law has encouraged career appointments by requiring the Secretary of State and other advisers to identify and recommend to the president exemplary officers from the Foreign Service. The first of these initiatives came in an executive order from President William Taft, who directed the Secretary of State to “report from time to time to the President, along with his recommendations, the names of those secretaries of the higher grades in the diplomatic service who by reason

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49. Exec. Order No. 368 (Nov. 10, 1905).

50. See Foreign Service Act of 1980, Pub. L. No. 96-465, 94 Stat. 207 (codified as amended at 22 U.S.C. § 3901 (2018)) (creating the Senior Foreign Service, reducing the number of personnel categories, and adding new benefits, among other reforms); Foreign Service Act of 1946, Pub. L. No. 79-724, 60 Stat. 999 (providing for salary enhancements and a new retirement system, requiring the creation of the Foreign Service Institute, and mandating that Foreign Service officers complete a minimum period of service in the continental United States, among other measures); Moses-Linthicum Act, Pub. L. No. 71-715, 46 Stat. 1207 (1931) (providing salary enhancements for Foreign Service officers and reorganizing the Foreign Service Personnel Board, among other reforms); Rogers Act, Pub. L. No. 68-135, 43 Stat. 140 (1924) (creating a unified Foreign Service comprising diplomatic and consular officers, with entrance by examination, merit-based promotion, and rotation among posts, among other characteristics); Stone-Flood Act, Pub. L. No. 63-242, 38 Stat. 805, 805 (1915) (providing that all appointments of secretaries in the diplomatic service “shall be by commission to the offices of secretary of embassy or legation . . . and not by commission to any particular post, and that such officers shall be assigned to posts and transferred from one post to another by order of the President as the interests of the service may require”); Exec. Order. No. 1143 (Nov. 26, 1909) (providing for merit-based promotion and retention of office in the diplomatic service and permitting the filling of vacancies in secretaryships of higher classes only by promotion from the lower grades of the service).

of efficient service have demonstrated special capacity for promotion to be chiefs of mission.”<sup>51</sup> Similar measures appeared in the Rogers Act of 1924,<sup>52</sup> a corresponding executive order from President Calvin Coolidge,<sup>53</sup> the Foreign Service Act of 1946,<sup>54</sup> a 1977 executive order from President Jimmy Carter,<sup>55</sup> and the Foreign Service Act of 1980.<sup>56</sup>

51. Exec. Order No. 1143 (Nov. 26, 1909).

52. Rogers Act, Pub. L. No. 68-135, § 6, 43 Stat. 140, 141 (1924) (directing the Secretary of State to “report from time to time to the President along with his recommendations, the names of those Foreign Service officers who by reason of efficient service have demonstrated special capacity for promotion to the grade of minister”).

53. Exec. Order No. 4022 (June 7, 1924) (implementing § 6 of the Rogers Act).

54. The relevant section of the Act provides:

The Secretary [of State] shall also, on the basis of recommendations made by the Board of the Foreign service, from time to time furnish the President with the names of Foreign Service officers qualified for appointment or assignment as chief of mission, together with pertinent information about such officers, in order to assist the President in selecting qualified candidates for appointment or assignment in such capacity.

Foreign Service Act of 1946, Pub. L. No. 79-724, § 502(b), 60 Stat. 999, 1007.

55. Exec. Order No. 11,970 (Feb. 5, 1977) (establishing a Presidential Advisory Board on Ambassadorial Appointments and requiring it to “make confidential recommendations to the Secretary of State and the President as to the qualifications of individuals for an ambassadorial post for which noncareer individuals are being considered, and such other advice as the President shall request”). The Board’s membership included an odd collection of individuals from a variety of professions, such as a state senator, the director of the Washington office of the United Presbyterian Church, the mayor of Miami, professors at the University of Chicago and Harvard University, and an author. *See* Presidential Advisory Board on Ambassadorial Appointments, *Announcement of Formation and Membership of the Board*, in PUBLIC PAPERS, JIMMY CARTER, BOOK 1 – JANUARY 20 TO JUNE 24, 1977, at 78 (1977). Its recommendations reportedly helped President Carter to resist pressure to appoint some of the most unqualified candidates, but a number of observers concluded that it was largely a failure. *See, e.g., A Bill to Amend the Foreign Service Act of 1980 with Respect to the Number of Chiefs of Diplomatic Mission Who Are Career Members of the Foreign Service: Hearing on S. 1886 Before the S. Comm. on Foreign Relations*, 97th Cong. 43 (1982) (statement of Hon. Carol C. Laise) [hereinafter *A Bill to Amend the Foreign Service Act of 1980*] (explaining that the Board “met infrequently, for short periods of time, and had insufficient information available to it”); Martin F. Herz, *Who Should be an American Ambassador?*, FOREIGN SERV. J., Jan. 1981, at 27–28 (arguing that the Board’s members “lacked the qualifications to determine the qualifications of ambassadors, consisting as it did of a large majority of people who never had anything to do with diplomacy,” and that they “approved, even recommended, some of the obviously unqualified appointees of the Carter Administration”). President Reagan terminated the Board by revoking Carter’s executive order in 1981. *See* Exec. Order No. 12,299 (Mar. 17, 1981).

56. Foreign Service Act of 1980, Pub. L. No. 96-465, § 304(b)(1), 94 Stat. 2071, 2085 (codified at 22 U.S.C. § 3944) (“[T]he Secretary of State shall from time to time furnish the President with the names of career members of the [Foreign] Service who are qualified to serve as chiefs of mission, together with pertinent information about such members.”); *see also* Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, sec. 130(b), 97 Stat. 1017, 1027 (codified at 22 U.S.C. § 3982(d)) (amending the Foreign Service Act of 1980 by providing that “[t]he Secretary of State, in conjunction with the heads of the other agencies utilizing the Foreign Service personnel system, shall implement policies and procedures to insure that Foreign Service officers and members of the Senior Foreign Service of all agencies are able

These measures appear to have facilitated the modern shift toward career appointees by making it easier for the president to identify Foreign Service officers who might serve as effective ambassadors.

Third, the law has promoted professionalization by requiring the State Department to disclose to the Senate each nominee's qualifications for an ambassadorship. This requirement appears to have its origins in 1959, when Senator J. William Fulbright requested that the State Department adopt a practice of providing the Senate Foreign Relations Committee with information on the linguistic abilities, leadership qualities, and country knowledge of nominees.<sup>57</sup> In response to Senator Fulbright's request, Acting Secretary of State Christian Herter expressed that the State Department would, with the president's consent, "institute a practice of sending . . . a confidential letter . . . setting forth the qualifications of the prospective appointee, which the Department took into account when it made its recommendation [of nomination] to the President."<sup>58</sup> The immediate effect of this agreement is unclear, but years later Congress formalized and expanded upon its substance by codifying a number of disclosure mandates. The first of these, from 1973, required each nominee to file with the Senate Foreign Relations Committee and the Speaker of the House of Representatives a report of any financial "contributions made by such person and by members of his immediate family" within the four years preceding the nomination.<sup>59</sup> The Ethics in Government Act of 1978 and the Foreign Service Act of 1980 required similar disclosures,<sup>60</sup> while the latter also mandated disclosures regarding

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to compete for chief of mission positions and have opportunities on an equal basis to compete for assignments outside their areas of specialization").

57. See STAFF OF S. COMM. ON FOREIGN RELATIONS, 97TH CONG., *THE AMBASSADOR IN U.S. FOREIGN POLICY: CHANGING PATTERNS IN ROLES, SELECTION, AND DESIGNATIONS* 23 (Comm. Print 1981) (quoting from Senator Fulbright's request).

58. *Id.*

59. Department of State Appropriations Authorization Act of 1973, Pub. L. No. 93-126, § 6, 87 Stat. 451, 452.

60. Ethics in Government Act of 1978, Pub. L. No. 95-521, § 201(b), 92 Stat. 1824, 1836 (providing that "[w]ithin five days of the transmittal by the President to the Senate of the nomination of an individual . . . to a position, appointment to which requires the advice and consent of the Senate, such individual shall file a report containing" information about personal investments, debts, positions held in business enterprises, and employment agreements, among other matters); § 304(b)(2), 94 Stat. at 2085 (requiring ambassadorial nominees to file with the Senate Foreign Relations Committee and the Speaker of the House a "report of contributions made by such individual and by members of his or her immediate family during the period beginning on the first day of the fourth calendar year preceding the calendar year of the nomination and ending on the date of the nomination," and requiring the printing of the report in the Congressional Record).



professional qualifications,<sup>61</sup> and the Rules of the Senate Foreign Relations Committee have since reinforced these directives.<sup>62</sup> Their collective purpose is “to assist the Committee . . . in the exercise of its Constitutional advice and consent responsibilities” by ensuring that members have sufficient information to make informed judgments.<sup>63</sup>

Finally, since 1960, federal law has formally encouraged professionalization by signaling to the president a preference for career ambassadors. The first statute of this kind declared it the policy of Congress that

chiefs of mission . . . shall have, to the maximum practicable extent, among their qualifications, a useful knowledge of the principal language or dialect of the country in which they are to serve, and knowledge and understanding of the history, the culture, the economic and political institutions, and the interests of such country and its people.<sup>64</sup>

Similar enactments from 1975 and 1976 expressed the sense of Congress that ambassadorships “should be accorded to men and

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61. § 304(b)(2), (a)(4), 94 Stat. at 2085 (“The President shall provide the Committee on Foreign Relations of the Senate, with each nomination for an appointment as a chief of mission, a report on the demonstrated competence of that nominee to perform the duties of the position in which he or she is to serve.”).

62. See COMM. ON FOREIGN RELATIONS, 115TH CONG., RULES OF THE COMMITTEE ON FOREIGN RELATIONS, S. PRT. NO. 115-6, at 7 (Comm. Print 2017) (providing in Rule 10(c) that no nomination will be reported from the Committee to the full Senate unless the nominee has (1) filed a “financial disclosure report and a related ethics undertaking,” (2) assured the Committee that he or she is without “interests which could conflict with the interests of the government in the exercise of the nominee’s proposed responsibilities,” (3) provided a complete list of financial contributions to federal election campaigns, (4) delivered a report of demonstrated competency, and (5) submitted a signed and notarized copy of a questionnaire for executive branch nominees).

63. S. REP. NO. 96-913, at 30 (1980).

64. Foreign Service Act Amendments of 1960, Pub. L. No. 86-723, sec. 7, § 500, 74 Stat. 831, 832. Congress has since varied in its approach to the issue of language competency. The Foreign Service Act of 1980 provided that within six months of assuming his or her position, each chief of mission “shall submit, to the [Senate Foreign Relations Committee and the House Foreign Affairs Committee], a report describing his or her own foreign language competence and the foreign language competence of the mission staff in the principal language or other dialect of that country.” Pub. L. No. 96-465, § 304(c), 94 Stat. 2085. Congress then repealed this requirement in 1999 and replaced it with a more general mandate for the Director General of the Foreign Service to submit a report to the Senate Foreign Relations Committee and House Foreign Affairs Committee “summarizing the number of positions in each overseas mission requiring foreign language competence that—(1) became vacant during the previous calendar year; and (2) were filled by individuals having the required foreign language competence.” *Compare* Act of Nov. 29, 1999, Pub. L. No. 106-113, div. B, § 1000(a)(7), 113 Stat. 1535, 1536 (enacting H.R. 3427 of the 106th Congress), *with* H.R. 3427, 106th Cong. § 208(b) (1999) (repealing Section 304(c) of the Foreign Service Act of 1980, 22 U.S.C. § 3944(c)).

women possessing clearly demonstrated competence to perform ambassadorial duties,”<sup>65</sup> that no one should be accorded such a position “primarily because of financial contributions to political campaigns,”<sup>66</sup> and that “a greater number of positions of ambassador should be occupied by career personnel in the Foreign Service.”<sup>67</sup> The Foreign Service Act of 1980 reiterated these positions.<sup>68</sup>

*B. The Potential Motives for and Effects of Early Regulation*

The emergence of at least some of the historical reforms is puzzling: If they were popular enough to win approval from the political branches, why were they necessary? That is, if the president and the Senate supported the project of professionalization, why did they not simply exercise their respective powers under the Appointments Clause to ensure that professionals filled more diplomatic posts? That approach, after all, would seem to require only a fraction of the effort that must have gone into designing, promoting, adopting, and implementing the subconstitutional measures.

A couple possibilities stand out. First, it is conceivable that the regulatory and statutory attempts to encourage career appointments aimed simply to shape the political environment in which the president and the Senate exercise their discretion under the Appointments Clause. From this perspective, noncareer appointments would remain lawful but generate greater political risk, as there would now be a substantial pool of experienced career diplomats from which to draw and laws that enhance their visibility, promote transparency with respect to professional qualifications and financial contributions, and

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65. Foreign Relations Authorization Act, Fiscal Year 1976, Pub. L. No. 94-141, § 104, 89 Stat. 756, 757 (codified at 22 U.S.C. § 2688).

66. *Id.*

67. Foreign Relations Authorization Act, Fiscal Year 1977, Pub. L. No. 94-350, § 120, 90 Stat. 823, 829.

68. The Foreign Service Act of 1980 takes the position that ambassadorial nominees:

... should possess clearly demonstrated competence to perform the duties of a chief of mission, including, to the maximum extent practicable, a useful knowledge of the principal language or dialect of the country in which the individual is to serve, and knowledge and understanding of the history, the culture, the economic and political institutions, and the interests of that country and its people.

§ 304(a)(1), 94 Stat. at 2085; *id.* § 304(a)(2) (expressing that ambassadorships “should normally be accorded to career members of the [Foreign] Service”); *id.* § 304(a)(3) (“[C]ontributions to political campaigns should not be a factor in the appointment of an individual as a chief of mission.”).

make clear that Congress generally disfavors political appointees.<sup>69</sup> To appoint noncareer individuals in this new context would be to turn down an obvious, qualified, and legally favored alternative.

One might imagine the Senate using its power of advice and consent to generate a similar risk for the president. A pattern of Senate scrutiny might draw public attention to unqualified nominees in a way that discourages the president from making them. But neither the Senate nor the advice-and-consent power it wields is inherently hostile toward any particular type of nominee; those who draw scrutiny one day might sail through the Senate at a different point in time. In contrast, bicameralism and presentment complicate the task of changing federal statutory law<sup>70</sup> and thus infuse considerable inertia into reforms that lawmakers manage to codify. Successors might change course, but it will not be easy. Put another way, Congress may have adopted statutory measures to help ensure that professionalization would be enduring.

Second, advocates may have pushed for reform on the view that it would be more palatable for Congress to discourage political appointments through wholesale measures *ex ante* than to oppose unqualified nominees on a retail basis. Under this possibility, the changes to federal law aimed to depersonalize the critique of political appointees, discourage nondiplomats from seeking office, and therefore help spare the president and the Senate from turning away influential figures who lack appropriate qualifications.

Whatever the motive, the various legal reforms generally coincided with, and may have helped to produce, a significant change in appointments practice. As the twentieth century progressed, the percentage of ambassadors without prior diplomatic experience steadily declined. Political appointees held roughly 80 percent of ambassadorships during the Wilson administration,<sup>71</sup> 50 percent by the end of the interwar period, and only 30 percent by the 1950s, as indicated in Figure 1.<sup>72</sup> Over the first half of the twentieth century, in

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69. See *supra* Part I.A (discussing the various ways in which federal law regulates ambassadorial appointments and citing to relevant authority).

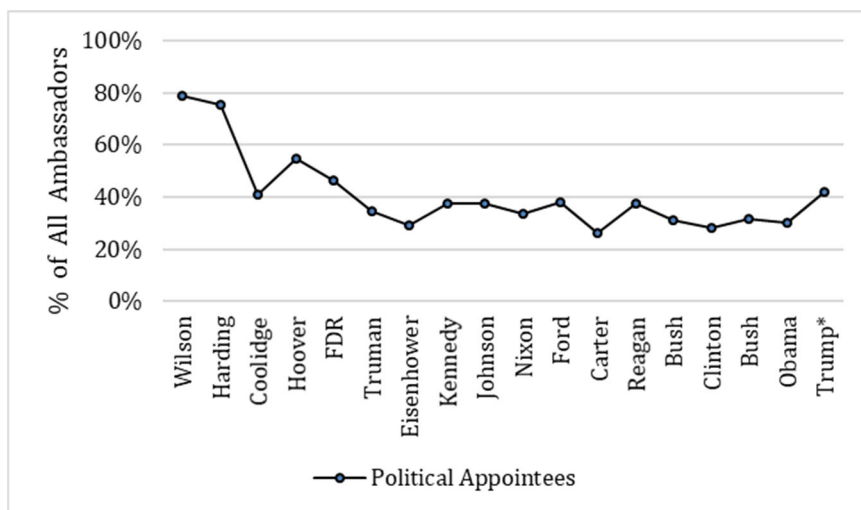
70. See *INS v. Chadha*, 462 U.S. 919, 944–51 (1983) (discussing the purposes of bicameralism and presentment).

71. JETT, *supra* note 30, at 26.

72. These data come from Pacy & Henderson, *supra* note 25, at 392, and the American Foreign Service Association. See *Tracker: Current U.S. Ambassadors* (May 24, 2019), AM. FOREIGN SERV. ASS'N, <http://www.afsa.org/list-ambassadorial-appointments> [<https://perma.cc/2YFQ-Z92A>].

other words, the president and the Senate began to use their discretion under the Appointments Clause to privilege experience and marginalize political affiliations as determinants of who would become the chief diplomatic representatives of the United States.<sup>73</sup> The broader movement for civil service reform, which made political appointments harder to justify, and the increasing importance of U.S. foreign relations, which raised the stakes of competency, reportedly contributed to this shift.<sup>74</sup>

Figure 1. *The Partial Retreat of Political Appointments*



\*Note: first two years of the Trump administration

Further professionalization is possible going forward, but so is a reversion to extensive amateurism. Over the first two years of the Trump administration, over 40 percent of bilateral ambassadorships were filled by individuals who came from outside the Foreign Service, as shown in Figure 1. This is the highest percentage of political appointees since Franklin Roosevelt, 46 percent of whose appointments were of the political variety, and a marked increase from Barack Obama, who appointed noncareer diplomats in only 30 percent of cases.

73. JETT, *supra* note 30, at 24–26.

74. ILCHMAN, *supra* note 36, at 53–59.

At this point, however, it is hard to know what to make of the latest numbers. On the one hand, the increase may be misleading, as it is common for presidents to make a relatively large number of political appointments during the early years of an administration.<sup>75</sup> If President Trump is adhering to that pattern, then the percentage of political appointees will drop in the years to come, and the balance of political and career appointments at the end of the Trump administration could very well follow the modern norm. On the other hand, President Trump appears unusually hostile toward the Foreign Service, viewing many of its officers as part of a “deep state” that works to thwart his initiatives.<sup>76</sup> Given this hostility and his administration’s apparent skepticism toward expertise in general,<sup>77</sup> it is plausible that the president has at times purposefully avoided career diplomats and will continue to do so with abnormal frequency for the rest of his term.<sup>78</sup>

Whatever the case may be, the resilience of political appointments in contemporary practice seems just as noteworthy as the early twentieth-century’s drive toward professionalization. For six decades, the pattern has been one of virtual stasis, with the president and the Senate maintaining a ratio of approximately seven career appointees for every three political appointees.<sup>79</sup> This pattern both distinguishes the United States from other Western governments, which tend to rely

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75. See, e.g., Domenico Montanaro, *Ambassadors: Do Patronage Picks Matter?*, NBC NEWS (Aug. 3, 2009, 3:31 PM), [http://www.nbcnews.com/id/32268349/ns/politics-white\\_house/t/ambassadors-do-patronage-picks-matter](http://www.nbcnews.com/id/32268349/ns/politics-white_house/t/ambassadors-do-patronage-picks-matter) [<https://perma.cc/AF5Z-CR24>] (“[M]any of the political appointments [to ambassadorships] are made early on in a presidency . . .”).

76. See, e.g., Jack Corrigan, *The Hollowing Out of the State Department Continues*, ATLANTIC (Feb. 11, 2018), <https://www.theatlantic.com/international/archive/2018/02/tillerson-trump-state-foreign-service/553034> [<https://perma.cc/JS2V-JUBK>] (quoting a retired ambassador for the idea that the Trump administration “appears to have a unique ‘contempt’” for the State Department’s career workforce); see also Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 151–53 (2018) (describing the rise and content of the deep-state narrative during the Trump administration).

77. See, e.g., Coral Davenport, *In the Trump Administration, Science Is Unwelcome. So Is Advice.*, N.Y. TIMES (June 9, 2018), <https://www.nytimes.com/2018/06/09/climate/trump-administration-science.html> [<https://perma.cc/MA8V-4SF9>] (discussing the marginalization of scientific expertise in the administration’s North Korea policy and in U.S. policy more generally).

78. The latest evidence indicates that President Trump is continuing the pattern he established during his first two years in office, with over 45 percent of all of his ambassadorial nominees coming from outside the Foreign Service as of August 2019. Robbie Gramer, *Diplomats Losing Out to Trump Picks for Top Spots*, FOREIGN POL’Y (Aug. 15, 2019, 5:01 PM), <https://foreignpolicy.com/2019/08/15/former-officials-decry-diplomatic-disarmament-under-trump-state-department-political-appointees/> [<https://perma.cc/EZA7-TLBS>].

79. See *Tracker: Current U.S. Ambassadors*, *supra* note 72; see also Pacy & Henderson, *supra* note 25, at 392.

exclusively on professional diplomats,<sup>80</sup> and raises a series of important empirical questions: Are political appointees as qualified and effective as their career counterparts? What role has money played in sustaining the practice of political appointments? Which receiving states do these appointments most affect? And have any patterns evolved over time?

In the pages that follow, I help to answer these questions and advance the debate on ambassadorial appointments by marshalling a large volume of new evidence to systematically analyze multiple dimensions of official practice.

## II. LEGAL INSIGHTS ON COMPETENCY METRICS

I begin by depicting the work of a modern ambassador. A number of commentators have offered illuminating descriptions by reference to professional norms and stories from the field.<sup>81</sup> Yet the work of an ambassador is substantially a product of law: federal law is the source of the president's power to fill the office<sup>82</sup> and of the powers and duties of its occupants. Because it is binding and broadly applicable, federal law provides a reliable means of ascertaining the baseline functions of all ambassadors, regardless of country or region of service. In this sense, the law provides a useful entrée into the qualifications debate, clarifying what is at stake in its resolution and suggesting the aptitudes that may be necessary for competent service.

Since the first appointment to the rank of ambassador in 1893,<sup>83</sup> the directives of the president and, by extension, the Secretary of State,

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80. KISHAN S. RANA, *THE 21ST CENTURY AMBASSADOR: PLENIPOTENTIARY TO CHIEF EXECUTIVE* 48 (2005).

81. *See generally, e.g.*, AMERICAN AMBASSADORS IN A TROUBLED WORLD: INTERVIEWS WITH SENIOR DIPLOMATS (Dayton Mak & Charles Stuart Kennedy eds., 1992) (interviewing seventy-four senior diplomats).

82. *See* U.S. CONST. art. II, § 2 (granting the president power to “appoint Ambassadors”).

83. European states formalized a hierarchy of diplomatic ranks at the Congress of Vienna in 1815 to limit disputes over what had been an evolving and rather complicated system of precedence. *Questionnaire Adopted by the Comm. of Experts for the Progressive Codification of Int'l Law on the Revision of the Classification of Diplomatic Agents*, League of Nations Doc. C.203M.77 1927 V (1927). This new hierarchy provided for three classes of diplomatic agents: (1) “Ambassadors, Legates, [and] Nuncios,” all of whom were to be treated as the embodiment of the sending sovereign; (2) “Envoys, Ministers, or other persons accredited to Sovereigns”; and (3) “Chargés d’Affaires accredited to Ministers for Foreign Affairs.” Precedence of Diplomatic Agents, Regulations Annexed to the Vienna Congress Treaty of June 9, 1815, reprinted in SIR BERNARD BURKE, *THE BOOK OF PRECEDENCE: THE PEERS, BARONETS, AND KNIGHTS, AND THE COMPANIONS OF THE SEVERAL ORDERS OF KNIGHTHOOD* 77 (1881). Three years later, Austria, France, Great Britain, Prussia, and Russia added a fourth class of “Ministers Resident,” the members of which fell one spot below envoys and ministers, and one spot above chargés

have operated as the most consistent source of ambassadorial authority.<sup>84</sup> Today, these directives exist in executive orders; State Department regulations such as the Foreign Affairs Manual and the Foreign Affairs Handbook; the president's Letter of Instruction, which each new ambassador receives upon assignment to post;<sup>85</sup> and the multitudinous orders that address problems and opportunities on an ad hoc basis. The executive branch, however, is not the only institution to purport to operate as a source of relevant authority. Since World War II, Congress has enacted numerous statutes to reinforce, supplement, revise, and clarify ambassadorial powers and duties.<sup>86</sup> Together, these

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d'affaires. See Protocol of Conference of the Five Powers, Aix-la-Chapelle, Nov. 21, 1818, reprinted in BURKE, *supra*, at 77. The United States was not a party to these agreements, but the president and the Senate appear to have adopted the same hierarchy in practice by appointing individuals as ministers, ministers resident, and chargés d'affaires throughout much of the nineteenth century. See, e.g., S. EXEC. JOURNAL, 36th Cong., 1st Sess. 200 (1860) (reporting the nominations of John Appleton as envoy extraordinary and minister plenipotentiary at St. Petersburg and William M. Churchwell as minister resident in Guatemala); S. EXEC. JOURNAL, 22nd Cong., 1st Sess. 200 (1832) (reporting the nomination of Hugh Legaré as chargé d'affaires to the King of Belgium). Even so, the first U.S. appointment to the rank of ambassador did not occur until shortly after Congress passed an authorizing statute. See Act of March 1, 1893, ch. 182, Schedule A, 27 Stat. 497, repealed by Act of Mar. 2, 1909, Pub. L. No. 60-292, ch. 235, 35 Stat. 672 ("Whenever the President shall be advised that any foreign government is represented, or is about to be represented, in United States by an ambassador . . . he is authorized, in his discretion, to direct that the representative of United States to such government shall bear the same designation."); see also 25 CONG. REC. 66 (1893) (reporting the first confirmation—Thomas Bayard to Great Britain). Prior to this time, the United States did not use the rank of ambassador because many understood it as reserved in international practice for the emissaries of monarchs. JETT, *supra* note 30, at 11–13. It was not until 1970 that all of the principal U.S. representatives to foreign governments held the rank of ambassador. PLISCHKE, UNITED STATES DIPLOMATS, *supra* note 39, at 91–92.

84. Compare LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 41 (2d ed. 1997) (explaining that the President's power of communication with foreign governments "derives in large part from his control of the foreign relations 'apparatus'"), with *infra* note 86 (explaining that legislation on ambassadorial functions was rare prior to World War II).

85. President Kennedy was the first to issue these letters. See Letter from President Kennedy to Chiefs of Mission (May 29, 1961), in THE MODERN AMBASSADOR: THE CHALLENGE AND THE SEARCH 182–84 (Martin F. Herz ed., 1983). For the text of the letters issued under Presidents Obama, George W. Bush, Clinton, and George H.W. Bush, see JETT, *supra* note 30, at 221–36.

86. Congress only rarely legislated on ambassadorial functions and activities prior to World War II. See Pub. L. No. 72-735, § 1093, 47 Stat. 908, 1102 (1933) (conferring authority to authenticate foreign judicial records); Stone-Flood Act, Pub. L. No. 63-242, ch. 24, 38 Stat. 805, 807 (prohibiting ambassadors from working as lawyers or businesspersons in their respective receiving states); Ch. 294, 18 Stat. 77 (1874) (providing that "no Ambassador . . . shall be absent from his post or the performance of his duties for a longer period than ten days at any one time, without the permission previously obtained of the President"). Most prewar statutes simply appropriated funds for salaries or regulated expenses. See, e.g., Act of Apr. 30, 1940, Pub. L. No. 76-499, ch. 172, 54 Stat. 174 (restricting transportation expenses); Act of Mar. 2, 1895, ch. 185, 28 Stat. 815 (appropriating funds for various ambassadorships).

sources reveal two basic functions—one internal and managerial, the other external and diplomatic. Understanding these functions makes it possible to identify reasonable criteria by which to assess qualifications for office.

#### A. *Ambassadors as CEOs*

First, a modern ambassador is, in the language of the State Department’s 2010 Quadrennial Diplomacy and Development Review, the “Chief Executive Officer of a multi-agency mission.”<sup>87</sup> Most generally, he or she has “full responsibility for the direction, coordination, and supervision of all U.S. Executive Branch employees in [country], regardless of their employment categories or location.”<sup>88</sup> As mission CEO, the ambassador has “the right to see all communications to or from Mission elements, however transmitted, except those specifically exempted by law or Executive decision”; an obligation to “provide for the security of all United States government personnel on official duty abroad”; and authority to determine whether to permit U.S. government personnel to enter the country on official business.<sup>89</sup> Likewise, the ambassador will “generally indicate at what level other mission personnel are to interact with the host government

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87. U.S. DEP’T OF STATE, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 29 (2010), [https://pdf.usaid.gov/pdf\\_docs/PDACQ604.pdf](https://pdf.usaid.gov/pdf_docs/PDACQ604.pdf) [<https://perma.cc/7ZXY-YF94>].

88. *President’s Letter of Instruction to Chiefs of Mission*, WIKILEAKS (July 14, 2009), [https://wikileaks.org/plusd/cables/09STATE72909\\_a.html](https://wikileaks.org/plusd/cables/09STATE72909_a.html) [<https://perma.cc/YT2X-K847>]. The formal authority to coordinate first emerged shortly after World War II, when the implementation of major programs of humanitarian and security assistance to countries in Western Europe necessitated a substantial increase in the size and complexity of the relevant diplomatic missions. See Mutual Security Act of 1951, Pub. L. No. 82-165, § 507, 65 Stat. 373, 380 (requiring the president to “prescribe appropriate procedures to assure coordination among representatives of the United States Government in each country, under the leadership of the Chief of the United States Diplomatic Mission”). A series of executive orders and legislative enactments later reinforced this authority. See, e.g., Executive Order 10338, 17 Fed. Reg. 3009 (Apr. 8, 1952) (stating that the Chief of the United States Diplomatic Mission in each country, as the representative of the president and acting on his behalf, “shall coordinate the activities of the United States representatives (including the chiefs of economic missions, military assistance advisory groups, and other representatives of agencies of the United States Government) in such country engaged in carrying out programs under the Mutual Security Act of 1951” and “shall assume responsibility for assuring the unified development and execution of the said programs in such country”); Mutual Security Act of 1954, Pub. L. No. 83-665, § 523(b), 68 Stat. 832, 856 (providing that the president shall “prescribe appropriate procedures to assure coordination among representatives of the United States Government in each country, under the leadership of the Chief of the United States Diplomatic Mission”).

89. *President’s Letter of Instruction to Chiefs of Mission*, *supra* note 88.



and other foreign missions in country”;<sup>90</sup> approve “any proposed changes in the size, composition, or mandate” of all full-time, permanent, direct-hire personnel subject to his or her authority;<sup>91</sup> and make determinations regarding allowances and benefits.<sup>92</sup> The Obama administration adopted a policy that the only federal personnel present in country and *not* subject to ambassadorial authority are “those under command of a U.S. area military commander or on the staff of an international organization,”<sup>93</sup> and the Trump administration appears to take the same position.<sup>94</sup>

The CEO function also has other dimensions. For example, ambassadors are to keep “fully and currently informed with respect to all activities and operations of the U.S. Government” within their respective host countries.<sup>95</sup> They are to establish “effective system[s] of internal controls to prevent waste, fraud, and mismanagement”<sup>96</sup> and

90. U.S. DEP’T OF STATE, GUIDE FOR U.S. GOVERNMENT AGENCIES PLANNING OVERSEAS REPRESENTATION (2006), <https://2009-2017.state.gov/m/pri/rls/72366.htm> [<https://perma.cc/UL7U-37T9>].

91. National Security Decision Directive 38: Staffing at Diplomatic Missions and Their Overseas Constituent Posts (1982); *see also* *President’s Letter of Instruction to Chiefs of Mission*, *supra* note 88 (discussing an ambassador’s authority to “review programs, personnel, and funding levels” to “initiate staffing changes” where existing staffing is excessive or inadequate); 2 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL §§ 112.1(a), 112.2 (2019) [*hereinafter* 2 FOREIGN AFFAIRS MANUAL], <https://fam.state.gov/FAM/02FAM/02FAM0110.html> [<https://perma.cc/8MN2-HHW9>] (providing that the chief of mission determines the “precise structure of a mission, in the light of local circumstances and the specific nature and scope of function assigned to the post,” and that it is Department policy to “delegate to the Chief of Mission the authority for determining the organization and administration of post activities”).

92. *See, e.g.*, U.S. Dep’t of State Office of Allowances, Living Quarters Allowances, ch. 100, § 135.5(b) (2016) (empowering chiefs of mission to make determinations regarding the adequacy of living quarters allowances for deputy chiefs and counselors of diplomatic missions); Payments During an Ordered/Authorized Departure, *id.* at ch. 600, § 610(e)(2) (2001) (“[L]ocally hired dependent employees should be evacuated or authorized to depart as dependents unless the Chief of Mission decides the position is essential, and the Department of State concurs in the decision.”).

93. *President’s Letter of Instruction to Chiefs of Mission*, *supra* note 88.

94. A full copy of President Trump’s Letter of Instruction does not yet appear to exist in the public record, but an excerpt quoted in the State Department’s Foreign Affairs Manual states that “[u]nless an interagency agreement provides otherwise, the Secretary of State and [the Chief of Mission] must provide for the security of all United States government personnel on official duty abroad other than those under the protection of a U.S. area military commander [GCC] or on the staff of an international organization and their accompanying dependents.” 2 U.S. DEP’T OF STATE, FOREIGN AFFAIRS HANDBOOK-2 § H-114.6(a) (2019) [*hereinafter* 2 FOREIGN AFFAIRS HANDBOOK-2 (2019)], <https://fam.state.gov/fam/02fah02/02fah020110.html> [<https://perma.cc/QT56-BLJW>].

95. 2 FOREIGN AFFAIRS MANUAL, *supra* note 91, § 113.1(c)(3).

96. *Id.* § 113.1(c)(4).

“[p]erform[] functions on behalf of any agency or other U.S. Government establishment (including any establishment in the legislative or judicial branch) requiring their services.”<sup>97</sup> Ambassadors also play a role in policy-making. They analyze and report on significant political, economic, and social developments in the host country;<sup>98</sup> they recommend courses of action and counsel on policy implementation;<sup>99</sup> and they advise on the anticipated effects of alternatives to existing programs.<sup>100</sup>

Congress, too, has elaborated on the CEO function. According to the Foreign Service Act of 1980, an ambassador has “full responsibility for the direction, coordination, and supervision of all Government executive branch employees” in the host country other than “Voice of America correspondents on official assignment and employees under the command of a United States area military commander,”<sup>101</sup> and must ensure that these employees “comply fully with [his or her] directives.”<sup>102</sup> The ambassador consults with the Secretary of State on the necessity and sustainability of large-scale capital projects for certain overseas contingency operations.<sup>103</sup> Where necessary, he or she coordinates the activities of Foreign Security Liaison Officers to promote air transportation security.<sup>104</sup> In their capacity as mission CEO, ambassadors are also responsible for making decisions on a wide range of personnel matters.<sup>105</sup> These statutes are largely consistent with

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97. *Id.* § 113.1(c)(6).

98. *Id.* § 113.1(c)(10).

99. *Id.* § 113.1(c)(13).

100. *Id.* § 113.1(c)(12).

101. Foreign Service Act of 1980, 22 U.S.C. § 3927(a) (2018). Congress inserted the term “executive branch” into this provision in 1987 “to remove all congressional . . . employees . . . from [Chief of Mission] supervision and to clarify Congress’ view that the [Chief’s] responsibilities and authorities are limited to U.S. Government executive branch employees.” 2 U.S. DEP’T OF STATE, FOREIGN AFFAIRS HANDBOOK-2 § H-114.6(a) (2015) [*hereinafter* 2 FOREIGN AFFAIRS HANDBOOK-2 (2015)], <https://web.archive.org/web/20170214025345/https://fam.state.gov/FAM/02FAH02/02FAH020110.html> [<https://perma.cc/795P-DW6S>].

102. *Id.*

103. National Defense Authorization Act for Fiscal Year 2013, 22 U.S.C. § 2421f(a)(1)(B) (2018).

104. Aviation Security Improvement Act of 1990, 49 U.S.C. § 44934 (2018).

105. *See, e.g.*, 22 U.S.C. § 2699 (granting chiefs of mission authority to prohibit the family members of Foreign Service officers from accepting employment that “could . . . damage the interests of the United States”); *id.* § 1106(8), § 4136(8) (conferring authority to exclude from the performance of official functions Foreign Service officers who have cases pending with the Foreign Service Grievance Board); Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, 22 U.S.C. § 4342 (granting authority to decide whether to allow relevant executive branch employees to sell imported personal property); Consolidated Appropriations Act, 2005, 22 U.S.C.

and, in some cases, appear to have prompted the executive-branch directives cited above.<sup>106</sup>

By statutory mandate, ambassadors are also essential partners with the Department of Defense (“DoD”) on a range of matters. They wield authority to approve or reject DoD proposals to assist foreigners who provide support for counterterrorism operations conducted by U.S. special forces.<sup>107</sup> They must sign off on DoD procedures for the recovery of personnel who become separated or isolated from their units during military operations.<sup>108</sup> They direct and supervise members of the U.S. armed forces who are present in the host country for the purpose of managing international security assistance programs.<sup>109</sup> Ambassadors also coordinate humanitarian and civic assistance with the commanders of regional combatant commands,<sup>110</sup> along with “military assistance (including civic action) and military education and training programs.”<sup>111</sup>

### B. Ambassadors as Diplomats

Moving to the second and better-known category of functions, ambassadors represent the United States in foreign affairs. They are charged with maintaining close relations, making representations to obtain support for U.S. policies and positions, dissuading foreign governments from courses of action that are contrary to U.S. interests, negotiating international agreements, and attending official ceremonies.<sup>112</sup> They advise, protect, and assist U.S. citizens abroad.<sup>113</sup>

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§ 3927a(a) (providing authority to decide whether to approve the presence of each “staff element under [their] authority, including staff from other departments or agencies of the United States”).

106. Compare, e.g., 22 U.S.C. § 3927(a)(1) (providing that a chief of mission has “full responsibility for the direction, coordination, and supervision” of certain U.S. government employees present in the host country), with *President’s Letter of Instruction to Chiefs of Mission*, *supra* note 88 (same).

107. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811, 2086, as amended by Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, sec. 1208(a), 122 Stat. 4356, 4626 (2008).

108. See Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 943, 122 Stat. 4578, amended by National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, sec. 1271, 129 Stat. 726, 1075 (2015).

109. See Foreign Assistance Act of 1974 § 16, 22 U.S.C. § 2321i(e) (2018).

110. See National Defense Authorization Act for Fiscal Years 1992 and 1993 § 902, 10 U.S.C. § 166a(b)(6) (2018).

111. Foreign Assistance Act of 1961, 22 U.S.C. § 2382(b).

112. 2 FOREIGN AFFAIRS MANUAL, *supra* note 91, §§ 113.1(c)(1), (7), (8), (18).

113. *Id.* § 113.1(c)(14).

Ambassadors also liaise with the representatives of international organizations that are present in the host country and report on their activities; obtain clearances for visits by U.S. naval vessels, scientific expeditions, and government aircraft; and oversee efforts to establish relationships with leaders from civil society.<sup>114</sup> In carrying out these and other related tasks, ambassadors derive much of their authority from the orders of the president and the State Department, which in turn rely upon the president's constitutional power to conduct official diplomacy on behalf of the United States.<sup>115</sup>

Yet Congress has legislated on various dimensions of the diplomatic function since the early 1980s.<sup>116</sup> For example, federal law provides that each ambassador “shall have as a principal duty the promotion of United States goods and services for export to [the host] country.”<sup>117</sup> Each ambassador must also work to achieve counterdrug objectives developed by the Secretary of State in coordination with the Office of National Drug Control Policy and report on actions undertaken to fulfill those objectives.<sup>118</sup> Where appropriate and beneficial, each shall “seek out and contact religious nongovernmental organizations to provide high-level meetings” and “seek to meet with imprisoned religious leaders.”<sup>119</sup> Likewise, ambassadors “should have a prominent role in the formulation of public diplomacy strategies for the countries and regions to which they are assigned and should be accountable for the operation and success of public diplomacy efforts at their posts.”<sup>120</sup> They also must work with their respective host governments to resolve cases of child abduction.<sup>121</sup>

Many of the statutes that codify ambassadorial functions apply without regard for country of service, but Congress has also enacted

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114. *Id.* §§ 113.1(c)(11), (16), (17).

115. HENKIN, *supra* note 84, at 41.

116. Statutes addressing the diplomatic functions of ambassadors were virtually nonexistent prior to this time. I found only two exceptions. *See* Pub. L. No. 72-375, ch. 127, § 1093, 47 Stat. 908, 1102 (1933) (empowering ambassadors to authenticate foreign judicial records); Act of May 22, 1947, Pub. L. No. 80-75, ch. 81, § 8, 61 Stat. 103, 105 (requiring chiefs of mission to Greece and Turkey to perform such functions relating to the administration of certain financial and other assistance to those countries “as the President shall prescribe”).

117. Department of State Authorization Act, Fiscal Years 1982 and 1983, 22 U.S.C. § 3927(c) (2018).

118. Omnibus Consolidated and Emergency Appropriations Act of 1999, 22 U.S.C. § 2656i.

119. International Religious Freedom Act of 1998, 22 U.S.C. § 6414.

120. Intelligence Reform and Terrorism Prevention Act of 2004, 22 U.S.C. § 3922b(a)(2).

121. *See* Sean and David Goldman International Child Abduction Prevention and Return Act of 2014, 22 U.S.C. §§ 9112, 9121, 9122.

more limited measures. Each year, the ambassador to a country under consideration for inclusion in the U.S. Visa Waiver Program must certify to the appropriate congressional committees the accuracy of State Department data on visa applications.<sup>122</sup> Each ambassador to a nondemocratic state “should develop . . . a strategy to promote democratic principles, practices, and values . . . and to provide support, as appropriate, to [relevant] nongovernmental organizations, individuals, and movements.”<sup>123</sup> In some cases, Congress has also imposed responsibilities on the occupant of a specific post.<sup>124</sup> Those who overlook these measures are likely to overstate the exclusivity of executive power regarding the conduct of American diplomacy.<sup>125</sup>

To be sure, the political branches do not always speak with one voice on the role of ambassadors in foreign affairs. Although President Trump’s Letter of Instruction is not yet available to the public, President Obama’s Letter was inconsistent with the Foreign Service Act of 1980 in several respects. The Letter explicitly excluded from an ambassador’s authority U.S. executive branch employees “on the staff of an international organization”<sup>126</sup> in the receiving state, but the statute does not.<sup>127</sup> The Letter implicitly included within an ambassador’s authority Voice of America correspondents on official

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122. 8 U.S.C. § 1187(c)(7)(C) (2018).

123. Implementing Recommendations of the 9/11 Commission Act of 2007, 22 U.S.C. § 8211(c).

124. *See, e.g.*, Enhanced Partnership with Pakistan Act of 2009, 22 U.S.C. § 8411(c)(5) (establishing a “Chief of Mission Fund” to provide to Pakistan certain forms of assistance and humanitarian relief); Panama Canal Act of 1979, 22 U.S.C. § 3620(a) (“The United States Ambassador to the Republic of Panama shall have full responsibility for the coordination of the transfer to the Republic of Panama of those functions that are to be assumed by the Republic of Panama pursuant to the Panama Canal Treaty of 1977 and related agreements.”).

125. *See, e.g.*, Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 35 Op. O.L.C. 1, 4 (2011) (asserting that the “presidential power over the conduct of diplomacy includes the ‘exclusive authority to determine the time, scope, and objectives’ of international negotiations and the individuals who will represent the United States in those contexts” (citations omitted)).

126. *President’s Letter of Instruction to Chiefs of Mission*, *supra* note 88.

127. Foreign Service Act of 1980, 22 U.S.C. § 3927(a).

assignment,<sup>128</sup> while the statute excludes them.<sup>129</sup> The State Department takes the position that the Letter trumps the statute in these kinds of cases because ambassadorial authority “derives ultimately from the president’s constitutional powers rather than from statute,”<sup>130</sup> but the inconsistencies nevertheless create marginal uncertainty regarding the nature of the office.<sup>131</sup>

### C. *The Significance of Legal Authority*

The foregoing legal authorities are important for two reasons. First, they suggest the continuing importance of ambassadorships. In recent decades, some commentators have argued that the office has become antiquated due to advances in technology and the spread of summit diplomacy, which have created alternative channels of official communication; the advent of modern news media, which has allegedly

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128. Compare *President’s Letter of Instruction to Chiefs of Mission*, *supra* note 88 (stating that the chief of mission has “full responsibility for the direction, coordination, and supervision of all U.S. Executive Branch employees in [country], regardless of their employment categories or location, except those under command of a U.S. area military commander or on the staff of an international organization”), with *History*, U.S. AGENCY FOR GLOBAL MEDIA, <https://www.usagm.gov/who-we-are/history> [<https://perma.cc/5Q62-YN5F>] (explaining that the Broadcasting Board of Governors assumed authority for Voice of America in 1998), and Act of Oct. 21, 1998, Pub. L. No. 105-277, ch. 3, § 1322(a)(1), 112 Stat. 2681–777 (codified at 22 USC § 6541) (explaining that the Broadcasting Board of Governors exists “within the Executive Branch of Government”).

129. 22 U.S.C. § 3927(a).

130. 2 FOREIGN AFFAIRS HANDBOOK-2 (2015), *supra* note 101, § 114.6(b).

131. The resolution of these inconsistencies depends on the constitutionality of the statutes—an issue on which there are reasonable grounds for disagreement. On the one hand, the codification of ambassadorial responsibilities might infringe the president’s power to conduct international diplomacy, in which case the statutes would give way to presidential directives. *Cf.* Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 4 (June 1, 2009), <https://www.justice.gov/file/18496/download> [<https://perma.cc/B9SC-H9LQ>] (discussing the president’s exclusive control over the “modes and means” of international diplomacy on behalf of the United States); President Barack Obama, Statement Upon Signing H.R. 2346 (June 26, 2009) (objecting that provisions of the Supplemental Appropriations Act of 2009 interfered with the president’s constitutional authority to conduct foreign relations “by directing the Executive to take certain positions in negotiations or discussions with international organizations and foreign governments”). On the other hand, the president’s uncontroverted prerogative to *conduct* international diplomacy on behalf of the United States does not necessarily entail an additional power to decide the *purposes* for which diplomacy should be conducted or even *how* it should be conducted. *Cf.* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085–86, 2089 (2015) (rejecting the view that the president has “the bulk of foreign-affairs powers” (quoting Brief for Respondent at 16, *Zivotofsky*, 135 S. Ct. 2076 (No. 13–628))). Moreover, the number and variety of statutes on the diplomatic responsibilities of ambassadors since World War II suggest a consistent view in Congress that the matter is a permissible subject of legislation. On that view, the directives of the president do not automatically prevail.

obviated much of the historical function of reporting; and the increasingly technical nature of international affairs, which has necessitated frequent reliance upon experts rather than diplomatic generalists.<sup>132</sup> Others have suggested that the occupant of an ambassadorship is of limited consequence because major policy-making and decision-making functions are centralized in Washington, and because professional embassy staff handle most of the routine work of management and foreign relations and can use their expertise to compensate for ambassadorial deficiencies when necessary.<sup>133</sup> Yet by formalizing a broad and incrementally expanding set of managerial and diplomatic responsibilities, the law suggests that ambassadors remain as vital contributors to a successful foreign policy.

Second, the legal authorities are important because they suggest forms of aptitude that are necessary for competent service. As presidents and Congress have made clear, modern ambassadors are both executives and diplomats.<sup>134</sup> They are managers, coordinators, reporters, policy analysts, and negotiators. They must exercise judgment on issues ranging from security assistance to personnel matters, and they must understand and be able to promote U.S. interests. Successfully executing these functions requires a variety of competencies, including an ability to negotiate, navigate bureaucracy, persuade, analyze complex issues, manage people, and exercise good judgment. The law suggests, moreover, that the office requires various forms of knowledge, including familiarity with federal agencies; an understanding of the language, history, and government of the receiving state; a grasp of international relations and public diplomacy; and knowledge of a broad spectrum of policy issues, such as democracy promotion, human rights, security, and drug trafficking.<sup>135</sup> An

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132. See, e.g., Elmer Plischke, *The New Diplomacy*, in MODERN DIPLOMACY: THE ART AND THE ARTISANS 63–71 (Elmer Plischke ed., 1979) (describing this argument); J. Robert Schaetzel, *Modernizing the Role of the Ambassador*, in MODERN DIPLOMACY: THE ART AND THE ARTISANS 262 (Elmer Plischke ed., 1979) (stating that ambassadors are on the way to “becoming one of the modern world’s anachronisms”); Ruth Walker, *Do Ambassadors Matter Anymore?*, CHRISTIAN SCI. MONITOR (Aug. 27, 1997), <https://www.csmonitor.com/1997/0827/082797.intl.intl.1.html> [<https://perma.cc/8U8Y-C2VL>] (“New communications technologies have undercut the autonomy of embassies and ministries.”).

133. See, e.g., Lydia DePillis, *Do Ambassadors Matter?*, WASH. POST (Dec. 24, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/12/24/do-ambassadors-matter> [<https://perma.cc/N34J-E98D>] (raising these arguments).

134. See *supra* pp. 91–99; *supra* notes 81–131 and accompanying text.

135. See *supra* notes 81–131 and accompanying text. Especially applicable are *supra* notes 124–25 (identifying statutes that impose obligations on ambassadors pertaining to these issues).

assessment of the qualifications debate starts with an awareness of these demands.

### III. METRICS APPLIED: NOMINEE CREDENTIALS FROM 1980 TO 2019

Having specified the functions of the office of ambassador, I proceed to evaluate whether modern appointments practice adequately attends to the competencies that those functions demand. Utilizing a large collection of documents that I obtained from the State Department under FOIA, I systematically analyze the qualifications of the past four decades of U.S. ambassadorial nominees. This Part describes the methodology for the study and reports findings.

#### A. Methodology

In the Foreign Service Act of 1980, Congress mandated the creation of official records by which to assess qualifications. Section 304 provides that, upon the nomination of an individual to serve in the office of ambassador, the president shall provide to the Senate Foreign Relations Committee a “report on the demonstrated competence of that nominee to perform the duties of the position in which he or she is to serve.”<sup>136</sup> Commonly known as “certificates of demonstrated competency,” their purpose is to “deter the nominations of inadequately qualified persons”<sup>137</sup> and help the Senate evaluate each nominee’s capacity to serve in light of whether he or she possesses “a useful knowledge of the principal language or dialect of the [receiving] country” and “knowledge and understanding of the history, the culture, the economic and political institutions, and the interests of that country and its people.”<sup>138</sup>

My first step was to collect these documents. In April of 2014, the Obama administration announced a policy to disclose them to the public for all *future* ambassadorial nominees,<sup>139</sup> and in December of

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136. Foreign Service Act of 1980, 22 U.S.C. § 3944(a)(4) (2018).

137. *Foreign Service Act of 1979: Hearing on S. 1450 Before the S. Comm. on Foreign Affairs*, 96th Cong. 267 (1979) (material submitted by Am. Foreign Serv. Ass’n).

138. 22 U.S.C. § 3944(a)(1).

139. *See Certificates of Competency for Nominees to Be Chiefs of Mission*, U.S. DEP’T OF STATE: ARCHIVED CONTENT, <https://2009-2017.state.gov/m/dghr/coc/index.htm> [<https://perma.cc/SRG4-ULN5>] (providing links to recent certificates); *see also* Aamer Madhani, *State Dept. Will Post Ambassador Qualifications Online*, USA TODAY (Apr. 4, 2014, 1:42 PM), <https://www.usatoday.com/story/news/politics/2014/04/04/obama-ambassador-competency-certificates/7305323> [<https://perma.cc/D38D-F9FX>] (reporting this development).



2016, Congress converted that policy into a statutory obligation.<sup>140</sup> These developments have fostered transparency with respect to dozens of nominations,<sup>141</sup> but they also left unavailable the certificates for all nominees from 1980 to the date of the Obama administration's announcement. To overcome this problem, I filed a FOIA request<sup>142</sup> to obtain the remaining thirty-plus years of certificates. The State Department granted this request in April of 2014 and, over the next three years, delivered approximately one thousand certificates.<sup>143</sup> This amounted to barely more than half of the extant records,<sup>144</sup> however, so I filed a lawsuit in May of 2017 to obtain an order requiring the Department to conduct an adequate search for the remainder.<sup>145</sup> The Department agreed to produce more records in August of 2017<sup>146</sup> and in the ensuing months delivered certificates for an additional eight

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140. Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323, § 712, 130 Stat. 1905, 1945 (2016) (“Not later than 7 days after submitting [a certificate of demonstrated competence] to the Committee on Foreign Relations of the Senate, the President shall make the [certificate] available to the public, including by posting [it] on the website of the Department in a conspicuous manner and location.”)

141. *See Certificates of Competency for Nominees to Be Chiefs of Mission, supra* note 139.

142. Freedom of Information Act, 5 U.S.C. § 552 (2018).

143. Three years is an above-average delay even for “complex” FOIA requests, which are requests that “typically seek a high volume of material or require additional steps to process such as the need to search for records in multiple locations.” *Glossary*, FOIA, <https://www.foia.gov/glossary.html#c> [<https://perma.cc/6A4S-SHC7>]; *see also Create a Basic Report*, FOIA, <https://www.foia.gov/data.html> [<https://perma.cc/2X5C-GVFY>] (providing data on FOIA processing delays for the State Department). In email correspondence, the State Department explained the delay by stating that, since 2008, there had been a “300 percent increase in the number of FOIA and Privacy Act requests” received annually. Email from U.S. Department of State, FOIA Requester Service Center, to Ryan Scoville (Aug. 26, 2016, 2:30 PM) (on file with author). The Department also stated that there had been a “marked increase in the number of FOIA lawsuits filed against the Department in recent years.” *Id.*

144. There were 1943 bilateral ambassadorial appointments from 1980 to the end of 2018. *See Tracker: Current U.S. Ambassadors, supra* note 72. Because there is one certificate per nomination, there are at least 1943 certificates in existence for the covered period.

145. *Scoville v. U.S. Dep’t of State*, No. 17-CV-00951 (D.D.C. May 19, 2017). In response to a request for nonexempt records, an “agency must make ‘a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.’” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). The lawsuit argued that the State Department failed to meet this standard in its initial search for the certificates. *Scoville v. U.S. Dep’t of State*, No. 17-CV-00951 (D.D.C. May 19, 2017).

146. Joint Status Report and Proposed Schedule by U.S. Dep’t of State, *Scoville v. U.S. Dep’t of State*, No. 17-CV-00951 (D.D.C. Aug. 18, 2017), ECF No. 8.

hundred nominees.<sup>147</sup> Combined with those posted online since 2014,<sup>148</sup> I obtained over 1900 certificates covering 99 percent of all bilateral nominations<sup>149</sup> from 1980 through 2018. To aid transparency and future research, I have posted these records online.<sup>150</sup>

My next step was to review and code their contents. To do so, I created a list of five metrics of competency based on the criteria enumerated in § 304 of the Foreign Service Act and the various ambassadorial functions that are established in federal law.<sup>151</sup> The metrics and corresponding legal support are as follows:

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147. Cf. Joint Status Report by U.S. Dep't of State, *Scoville v. U.S. Dep't of State*, No. 17-CV-00951 (D.D.C. Oct. 17, 2017), ECF No. 9 (discussing the production schedule); Joint Status Report by U.S. Dep't of State, *Scoville v. U.S. Dep't of State*, No. 17-CV-00951 (D.D.C. Nov. 28, 2017), ECF No. 10 (same); Joint Status Report by U.S. Dep't of State, *Scoville v. U.S. Dep't of State*, No. 17-CV-00951 (D.D.C. Jan. 24, 2018), ECF No. 13 (same).

148. See *Certificates of Competency for Nominees to Be Chiefs of Mission*, *supra* note 139.

149. I focused exclusively on bilateral ambassadorships to sovereign states because they are far more numerous than ambassadorships to international organizations and call for special forms of competency. See *infra* text accompanying notes 157–67 (discussing metrics and coding rules). Country and regional expertise, for example, are highly relevant for a bilateral office, but make little sense as criteria for evaluating the fitness of a potential ambassador to the United Nations or the International Civil Aviation Organization.

150. *Certificates of Competency for Nominees to Be Chiefs of Mission: 1980 – 2014*, <https://ryanscoville.com/2019/02/13/certificates-of-competency-for-nominees-to-be-chiefs-of-mission-1980-2014> [<https://perma.cc/KN2B-Q6HZ>].

151. See *supra* Part II. I limit my focus to metrics that are objectively measurable by reference to the certificates of demonstrated competency. This has the effect of excluding from the study a number of metrics—such as negotiating skills and judgment—that are material to any holistic assessment of competency but difficult to ascertain from the certificates. To the extent that other metrics are relevant, the president and the Senate will need to use other tools, such as interviews and hearings, to develop a complete assessment on the merits of any given nomination.

Table 1. Competency Metrics and Corresponding Legal Authority

(1) Absence of financial contributions to the nominating president <sup>152</sup>
(2) Knowledge of the receiving state's principal language or other relevant languages <sup>153</sup>
(3) Experience in or involving the receiving state or its region <sup>154</sup>
(4) Experience in U.S. foreign policy <sup>155</sup>
(5) Experience in organizational leadership <sup>156</sup>

I followed specific rules in coding for each of these issues. In coding for financial contributions, I identified the aggregate, inflation-

152. 22 U.S.C. § 3944(a)(3) (2018).

153. *Id.* § 3944(a)(1); *see also id.* § 3927(c) (“Each chief of mission . . . shall have as a principal duty the promotion of United States goods and services for export to [his or her receiving] country.”); 2 FOREIGN AFFAIRS MANUAL, *supra* note 91, § 113.1(c)(1), (7), (8), (11), (16)–(18) (enumerating other functions, such as “[m]aintaining close relations with officials of host government departments,” that are easier to execute with knowledge of languages that are commonly used in the receiving country).

154. *See, e.g.*, 22 U.S.C. § 3944(a)(1) (providing that ambassadors should possess “knowledge and understanding of the history, the culture, the economic and political institutions, and the interests of [the receiving] country and its people”); *id.* § 2656i(a)(2)(E) (requiring the Secretary of State to ensure that every ambassador or chief of mission “works to achieve” national counterdrug objectives); *id.* § 3922b(a)(2) (providing that chiefs of mission “should have a prominent role in the formulation of public diplomacy strategies for the countries and regions to which they are assigned”); *id.* § 6414 (“United States chiefs of mission shall seek out and contact religious nongovernmental organizations to provide high-level meetings with religious nongovernmental organizations where appropriate and beneficial”); *id.* § 8211(c) (providing that each chief of mission to a nondemocratic country shall “develop, as part of annual program planning, a strategy to promote democratic principles, practices, and values in each such foreign country and to provide support, as appropriate, to nongovernmental organizations, individuals, and movements in each such country that are committed to democratic principles, practices, and values”).

155. *See* 2 FOREIGN AFFAIRS MANUAL, *supra* note 93, § 113.1 (enumerating chief-of-mission functions, such as “[r]epresenting the interests of the United States in relation to foreign countries,” that would be easier to execute with experience in foreign policy).

156. *See, e.g.*, 22 U.S.C. § 3927(a) (providing that the chief of mission “shall have full responsibility for the direction, coordination, and supervision of all Government executive branch employees in that country (except for Voice of America correspondents on official assignment and employees under the command of a United States area military commander)”; OFFICE OF MANAGEMENT POLICY, RIGHTSIZING, & INNOVATION, NSDD-38: STAFFING AT DIPLOMATIC MISSIONS & THEIR OVERSEAS CONSTITUENT POSTS (1982), <https://2009-2017.state.gov/m/pri/nsdd/45148.htm> [<https://perma.cc/8984-7324>] (requiring all agencies with staff operating under the authority of a chief of mission to ensure that, “in coordination with the Department of State, the Chief of Missions’ approval is sought on any proposed changes in the size, composition, or mandate of such staff elements”).

adjusted<sup>157</sup> dollar value of all contributions by the nominee to the nominating president or affiliated or supporting entities—such as the president’s political party and independent-expenditure groups—over the four years preceding the nomination.<sup>158</sup> The source of this information was the Congressional Record, which by law must report the value of all such contributions prior to the Senate’s vote on advice and consent.<sup>159</sup> As a second measure of financial support, I collected information from the nonprofit organization Public Citizen on whether and to what extent individuals nominated from 2001 to 2016 had bundled campaign contributions for the nominating president,<sup>160</sup> and then aggregated the inflation-adjusted values of the bundled funds. These efforts make it possible to compare both the size of contributions across administrations and the relative significance of personal contributions and bundling.

The other coding rules were straightforward. With respect to linguistic aptitude, I coded a nominee as having knowledge of the host country’s “principal” language if his or her certificate indicated any capacity to speak a language identified in the CIA’s World Factbook

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157. I adjusted all contributions to their dollar value as of July 2017. See *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, <https://data.bls.gov/cgi-bin/cpicalc.pl> [<https://perma.cc/EGY8-YT38>].

158. For example, in the case of an individual nominated by President George W. Bush, I counted contributions to recipients such as “Bush for President 2003,” the “2001 Presidential Inauguration Fund,” the Republican National Committee, and independent-expenditure groups that favored President Bush.

159. Federal law requires a nominee to disclose the preceding four years of contributions to influence the election of not only the nominating president, but also any candidates for seats in the House or Senate and any unsuccessful candidates for the presidency. See 22 U.S.C. § 3944(b)(2) (2018) (requiring nominees to report all “contributions,” as defined by 52 U.S.C. § 30101(8) (2018)); 52 U.S.C. § 30101(8) (defining “contribution” to mean “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office”); *id.* § 30101(3) (defining “Federal office” for purposes of Section 30101(8) to mean “the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress”). The breadth of this requirement posed a challenge for the data-collection process, as it was not always clear whether a reported contribution aided the election of the nominating president. My strategy in cases of uncertainty was to count a contribution rather than exclude it. While this approach is likely to produce an overstatement of aggregate dollar values, any error should be modest and normally distributed across administrations, receiving states, and nominee types.

160. *White House for Sale*, PUB. CITIZEN, <https://web.archive.org/web/20170121202622/http://www.citizen.org/whitehouseforsale/index.cfm?mid=20&id=63> [<https://perma.cc/R6XJ-BKJE>] (providing bundling data for the 2000, 2004, 2008, and 2012 presidential elections). Data on bundling for other elections are unavailable. *Id.* Bundling nominee data extends to 2016 even though bundling data is unavailable for any election after 2012 because President Obama nominated bundlers for the 2012 election up through the end of his second term.

as either an official language or the most commonly spoken language in the receiving state.<sup>161</sup> Similarly, I coded a nominee as possessing knowledge of another “relevant” language if his or her certificate indicated any capacity to speak any nonprincipal language reported in the World Factbook as among the three most commonly spoken in the receiving state. These tests were purposely generous to limit the risk of undercounting. That is, even when a certificate reported only a limited capacity to speak a relevant language, I coded the nominee as possessing linguistic knowledge. A coding strategy that focused on evidence of fluency would have yielded far lower rates of aptitude.

I also adopted permissive tests in coding for other competency metrics. As evidence of prior experience *in* the receiving state, I counted any indication that the nominee had lived or worked in the receiving state for any period. As evidence of prior experience *in or involving* the receiving state, I counted not only any suggestion that the nominee had previously lived or worked in the country, but also any indication that he or she held a country-specific university degree (e.g., an M.A. in Russian Literature or a B.A. in Japanese Studies), authored one or more publications with a title suggesting country knowledge, or held employment for any period in a position that appeared on its face to entail country-specific responsibilities (e.g., Desk Officer for Peru in the Office of Andean Affairs). In cases of uncertainty, I erred on the side of counting a credential as country-relevant.

I employed analogous tests in coding for regional knowledge and experience and delimited regions in accordance with the geographic boundaries of the six regional bureaus overseen by the Undersecretary of State for Political Affairs.<sup>162</sup> This approach is less than ideal in the sense that the boundaries of the regional bureaus are somewhat

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161. *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook> [<https://perma.cc/XB39-G8XL>].

162. See *Bureau of African Affairs: Countries and Other Areas*, U.S. DEP'T OF STATE: ARCHIVED CONTENT, <https://2009-2017.state.gov/p/af/ci/index.htm> [<https://perma.cc/MF73-YDUM>]; *Bureau of European and Eurasian Affairs: Countries and Other Areas*, U.S. DEP'T OF STATE: ARCHIVED CONTENT, <https://2009-2017.state.gov/p/eur/ci/index.htm> [<https://perma.cc/4G96-EMJJ>]; *East Asian and Pacific Affairs: Countries and Other Areas*, U.S. DEP'T OF STATE: ARCHIVED CONTENT, <https://2009-2017.state.gov/p/eap/ci/index.htm> [<https://perma.cc/8W76-UKAM>]; *Near Eastern Affairs: Countries and Other Areas*, U.S. DEP'T OF STATE: ARCHIVED CONTENT, <https://2009-2017.state.gov/p/nea/ci/index.htm> [<https://perma.cc/4DFF-HUGQ>]; *South and Central Asian Affairs: Countries and Other Areas*, U.S. DEP'T OF STATE: ARCHIVED CONTENT, <https://www.state.gov/p/sca/ci/index.htm> [<https://perma.cc/Z477-6LVW>]; *Bureau of Western Hemisphere Affairs*, U.S. DEP'T OF STATE: ARCHIVED CONTENT, <https://2009-2017.state.gov/p/wha/index.htm> [<https://perma.cc/R5G9-2UTE>].

arbitrary. For example, under my coding strategy, experience in Kazakhstan did not count as regional experience for an individual nominated to serve as ambassador to neighboring Russia because Kazakhstan lies within the jurisdiction of the Bureau of Central and South Asian Affairs, while Russia lies within the jurisdiction of the Bureau of European and Eurasian Affairs. I am unaware, however, of any better approach to regional delimitation.<sup>163</sup> Moreover, using the State Department bureaus as a guide makes it possible to identify nominees who had prior experience in the specific organizational unit that oversees U.S. relations with the prospective receiving state. Such experience is plausibly relevant to competency.

The coding rules for the final two metrics were once again reasonably permissive to avoid the risk of underreporting. With respect to experience in foreign policy, I counted any position of any duration at a federal agency or on a congressional committee with substantial jurisdiction over foreign affairs (e.g., the CIA and the Senate Foreign Relations Committee), as well as any other position with a title indicating substantial involvement in foreign affairs (e.g., Sanctions Compliance Officer in the Treasury Department's Office of Foreign Assets Control). With respect to organizational leadership, I counted experience of any duration in a position that entailed high-level executive responsibilities. In cases of federal employment, I counted membership in Congress, the Senior Executive Service, and the Senior Foreign Service.<sup>164</sup> In cases of other employment, I counted experience as a governor, CEO, president, chairperson, or director.

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163. The CIA's World Factbook also delimits regions, but in a way that raises just as many problems. It places Egypt, for example, in a different region than the rest of the Middle East and Colombia in a different region than neighboring Panama. *Compare The World Factbook: Africa: Egypt*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> [<https://perma.cc/6LZU-7HCG>], with *The World Factbook: Middle East: Iraq*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html> [<https://perma.cc/UF4U-C8TP>]; compare *The World Factbook: South America: Colombia*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> [<https://perma.cc/LTE4-K3W9>], with *The World Factbook, Central America: Panama*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/pm.html> [<https://perma.cc/8R4X-R86H>].

164. See 3 FAH-1 EXHIBIT H-2321.1A, PROCEDURAL PRECEPTS FOR THE 2008 FOREIGN SERVICE SELECTION BOARDS add. 4, in 3 U.S. DEP'T OF STATE, FOREIGN AFFAIRS HANDBOOK-1, [https://fam.state.gov/fam/03fah01/03fah012320.html#X2321\\_1A](https://fam.state.gov/fam/03fah01/03fah012320.html#X2321_1A) [<https://perma.cc/UB42-8E3R>] [hereinafter PROCEDURAL PRECEPTS] ("In order to be eligible for consideration for promotion into the Senior Foreign Service, the employee must demonstrate over the course of his/her career from entry through tenure and up to consideration for promotion at the Senior threshold . . . [l]eadership and management effectiveness."); *Senior Executive Service: Executive Core Qualifications*, U.S. OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data->

Finally, I applied the competency metrics to the nominee data along professional-status-based, geographic, and temporal axes. The first of these compared the data between *career nominees*, which I defined as individuals who had a career in the Foreign Service prior to nomination, and *political nominees*, which I defined as individuals who were not career nominees. The second compared nominee trends across receiving states and regions by examining, for example, whether nominees to the Middle East have had more regional expertise than nominees to Europe. The last axis compared nominees across the presidential administrations that have occurred since the enactment of the Foreign Service Act of 1980, from Ronald Reagan to Donald Trump.

An important caveat is that the coding is only as good as the certificates themselves. Some contained redactions of sensitive information or omitted details that others included, and the authors may have occasionally committed inadvertent errors.<sup>165</sup> Such deficiencies could distort the results. That said, redactions were minimal.<sup>166</sup> Moreover, the certificates are official records, the law that addresses their content has not changed since the date of enactment in 1980,<sup>167</sup> and they generally exhibit a high degree of similarity across administrations, addressing the same types of qualifications in comparable degrees of detail.<sup>168</sup> These conditions support inferences of standardization and reliability.

### B. Results

The document analysis yields a range of new and noteworthy findings with respect to not only the comparative merits of career and

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oversight/senior-executive-service/executive-core-qualifications [https://perma.cc/2FMN-YDNO] (listing the following as requirements for entry into the Senior Executive Service: “the ability to bring about strategic change, both within and outside the organization, to meet organizational goals”; “the ability to lead people toward meeting the organization’s vision, mission, and goals”; “the ability to meet organizational goals and customer expectations”; “the ability to manage human, financial, and information resources strategically”; and “the ability to build coalitions internally and with other Federal agencies, State and local governments, nonprofit and private sector organizations, foreign governments, or international organizations to achieve common goals”).

165. See *Certificates of Competency for Nominees to Be Chiefs of Mission 1980 – 2014*, *supra* note 150 (providing links to the certificates).

166. *Id.*

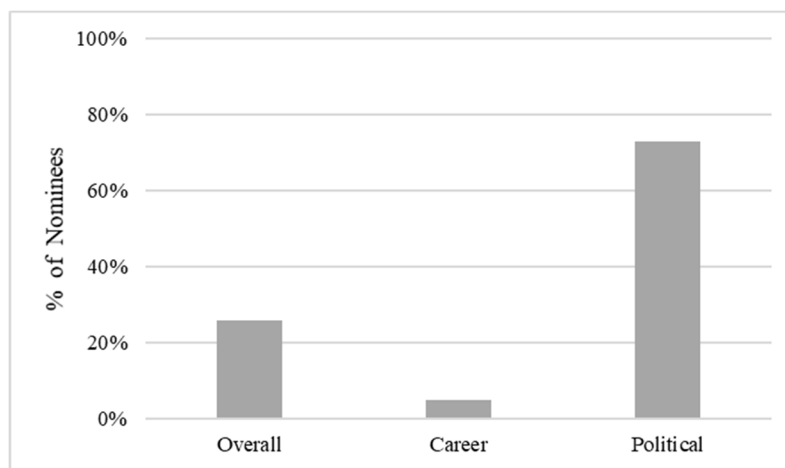
167. See Foreign Service Act of 1980, Pub. L. No. 96-465, § 304, 94 Stat. 2071, 2085 (1980) (codified at 22 U.S.C. § 3944 (2018)).

168. See *Certificates of Competency for Nominees to Be Chiefs of Mission 1980 – 2014*, *supra* note 150 (providing links to the certificates).

political appointees, but also trends across receiving states, geographic regions, and relevant presidential administrations. This Section reveals those findings.<sup>169</sup> Some confirm long-held suspicions; others are quite surprising.

1. *Financial Contributions.* First, the data show that while both career and political nominees make campaign contributions, such financial support has been far more common and significant in size among political nominees. As shown in Figures 2 and 3, 73 percent of political nominees since 1980 made contributions to the nominating president or affiliated or supporting entities within four years prior to their nomination, and those contributions averaged nearly \$85,000. Note, moreover, that this figure excludes the value of any bundled contributions from third parties. By far the largest personal donor was Roland Arnall, a 2005 nominee for ambassador to the Netherlands who gave nearly \$9.5 million to President George W. Bush and a collection of pro-Bush committees and independent-expenditure groups.<sup>170</sup> Contributions were highest on average among nominees to the Netherlands (\$998,079), The Bahamas (\$292,216), Switzerland (\$209,387), France (\$181,271), Belgium (\$178,120), Spain (\$176,752), the United Kingdom (\$150,436), Finland (\$143,915), Austria (\$140,221), and Croatia (\$139,057).

*Figure 2. Commonality of Contributions Since 1980*

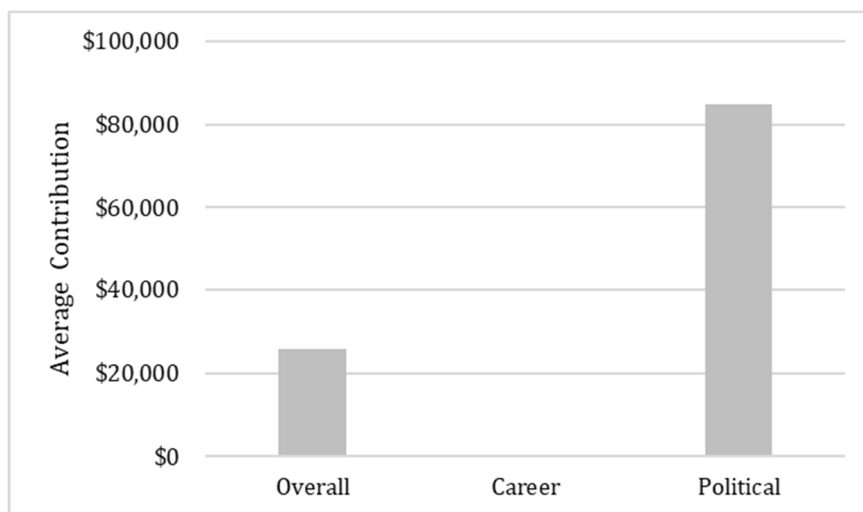


169. The underlying dataset is available at *Ambassador Qualifications Data*, <https://ryanscoville.files.wordpress.com/2019/08/data-file-1.xlsx> [<https://perma.cc/47UD-VFDK>].

170. See 151 CONG. REC. 24,603–04 (Nov. 2, 2005).



Figure 3. Size of Contributions Since 1980



While noteworthy that 73 percent of political nominees donated, it is perhaps more surprising that 27 percent did not. The common assumption seems to be that those who become ambassadors without first entering the Foreign Service must have paid their way into office.<sup>171</sup> The surprise largely dissipates, however, upon closer scrutiny. A clear majority<sup>172</sup> of the 27 percent are individuals with high-level experience in the executive branch or Congress—such as Deputy Chief of Staff at the White House,<sup>173</sup> Chairman of the Joint Chiefs of Staff,<sup>174</sup> and members of the House or Senate<sup>175</sup>—all of whom appear capable of using their influence or personal connections to the president, rather than financial support, to secure a nomination. That said, presidents

171. See, e.g., Weil, *supra* note 32, at 263–66 (providing examples to support the claim that ambassadors’ “selection is in large degree a reward for their political activity or loyalty”).

172. See generally *Ambassador Qualifications Data*, *supra* note 169 (compiling qualifications).

173. 159 CONG. REC. D898 (daily ed. Sept. 23, 2013) (reporting hearings on the nomination of Mark Bradley Childress as ambassador to Tanzania).

174. See 140 CONG. REC. D532 (daily ed. May 12, 1994) (reporting the nomination of William J. Crowe, Jr. as ambassador to the United Kingdom).

175. See, e.g., 153 CONG. REC. D767 (daily ed. June 5, 2007) (reporting the nomination of Rep. Mark Green as ambassador to Tanzania). Presidents have nominated at least thirteen former members of Congress since 1980. See *Ambassador Qualifications Data*, *supra* note 169 (reporting qualifications).

have nominated a small number of individuals who neither reported a significant contribution of funds nor possessed any high-ranking experience in the federal government. Examples of this practice include President Reagan's 1982 nomination of Fred Eckert as ambassador to Fiji, Kiribati, Tonga, and Tuvalu,<sup>176</sup> and President Clinton's 1999 nomination of Diane Edith Watson as ambassador to Micronesia.<sup>177</sup> These kinds of nominations may have occurred because of personal relationships developed through time in politics (both were former state senators) or some form of nonobvious expertise.

The picture for career nominees is much different. From 1980 to 2019, only 5 percent personally contributed, and their contributions averaged only thirty-three dollars.<sup>178</sup> The largest personal contributor from this group was Todd Robinson, a 2014 nominee to Guatemala who gave over \$11,000 to President Obama and affiliated or supporting entities, but his contribution was aberrational at nearly five times that of any other career ambassador.<sup>179</sup> Insofar as the size of a contribution shapes the likelihood of nomination, money has clearly played a much larger role in the selection of political nominees.

Another way to think about the role of money is to examine whether campaign contributions affect bilateral relationships to different degrees. Figure 4 addresses this issue by depicting, for each

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176. 128 CONG. REC. 1226 (Feb. 9, 1982) (reporting a total of \$250 in hotel and travel expenses in connection with the New Hampshire primary).

177. 145 CONG. REC. D6 (daily ed. Jan. 6, 1999).

178. *Supra* Figures 2 & 3. These contributions are unlikely to have violated the Hatch Act. Since 1993, the Act has prohibited civilian officers in the executive branch from “engag[ing] in political activity” while (1) “on duty,” (2) in a federal workplace, (3) wearing an official uniform or insignia, or (4) using a federal vehicle. An Act to Prevent Pernicious Political Activities, 5 U.S.C. § 7324(a) (2018). The U.S. Office of Special Counsel has interpreted this language to bar Foreign Service officers from “mak[ing] political contributions to a partisan political party, candidate for partisan political office, or partisan political group,” but only in the four enumerated circumstances. See *How Does the Hatch Act Affect Me?*, U.S. OFFICE OF SPECIAL COUNSEL, <https://osc.gov/pages/hatchact-affectsme.aspx#whoareyou> [<https://perma.cc/QTk5-RX7E>] (click the “I am a Federal Employee” option); see also 2 FOREIGN AFFAIRS MANUAL, *supra* note 91, §§ 614.1(b), (c)(2) (adopting a similar interpretation). Thus, as long as career nominees made their contributions in *other* circumstances, no violation occurred. Cf. 5 C.F.R. § 734.101 (2014) (defining “on duty” to refer to “the time period when an employee” is either “[i]n a pay status other than paid leave, compensatory time off, credit hours, time off as an incentive award, or excused or authorized absence (including leave without pay)” or “[r]epresenting any agency or instrumentality of the United States Government in an official capacity”). The pre-1993 version of the Hatch Act imposed greater restrictions, but still permitted Federal employees to make campaign contributions. See Milton J. Esmen, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986, 990–91 (1951) (discussing the earlier version of the Act).

179. See 160 CONG. REC. S5048 (daily ed. July 29, 2014) (listing Robinson's contributions).

state, the percentage of the nominees who made financial contributions to the nominating president, with values ranging from 0 percent (white) to 100 percent (black). The data establish that donors were most common among nominees to politically stable and economically developed countries, particularly in Western Europe. This finding corroborates earlier research by Johannes W. Fedderke and Dennis Jett, who found the same trend among early Obama nominees,<sup>180</sup> and is unsurprising insofar as presidents are unlikely to award donors with ambassadorships to countries that suffer from poverty, political instability, or other systemic problems that would limit the desirability of residence. If political nominees are generally less qualified and effective than their career counterparts, then Figure 4 is indicative of the bilateral relationships that are most frequently *disserved* by the influence of money on the appointments process.

*Figure 4. Geography of Contributing Nominees Since 1980, by Receiving State*



Figure 5 further elaborates on the issue of financial support by reporting nomination patterns for those who bundled contributions from other private citizens. Because federal law does not currently

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180. Fedderke & Jett, *supra* note 25, at 7–8.

mandate that nominees disclose this activity, complete data are unavailable, but Public Citizen provides information on individuals who bundled funds for Presidents George W. Bush and Barack Obama.<sup>181</sup> That information suggests that roughly 11 percent of nominees from 2001 through 2016 were bundlers, and that these individuals typically received nominations to serve in the same states that appeared as the leading destinations among large direct contributors. The states with the largest average bundling values were France (\$450,584), Portugal (\$427,386), Switzerland (\$418,548), New Zealand (\$382,295), the Netherlands (\$361,405), Austria (\$337,577), Belgium (\$313,919), Australia (\$289,921), Sweden (\$281,969), and Czechia (\$250,962).

*Figure 5. Geography of Bundling Nominees (2001–2016), by Receiving State*



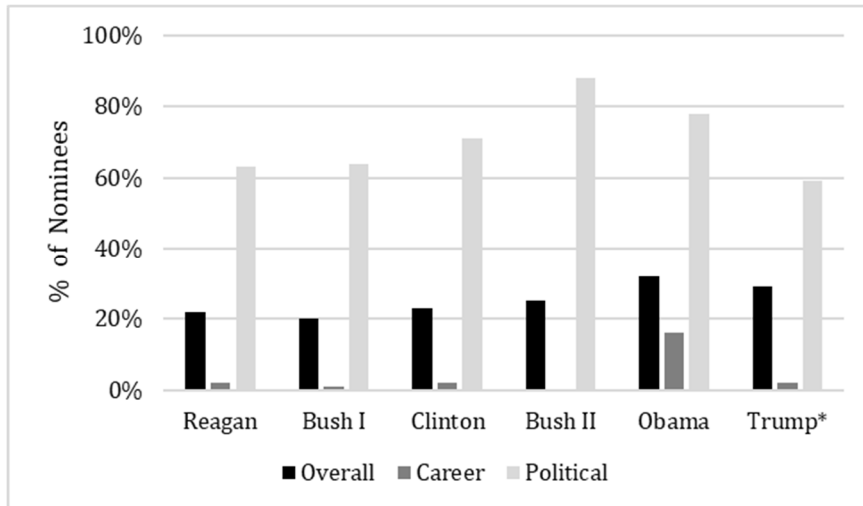
Figures 6 and 7 in turn report changes in campaign contributions over time. These figures show that, since the start of the Reagan administration, contributions have become more common among both categories of nominees and also much larger on average among political nominees. In particular, while only 22 percent of Reagan

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181. See *White House for Sale*, *supra* note 160 (providing bundling data for the 2000, 2004, 2008, and 2012 presidential elections).

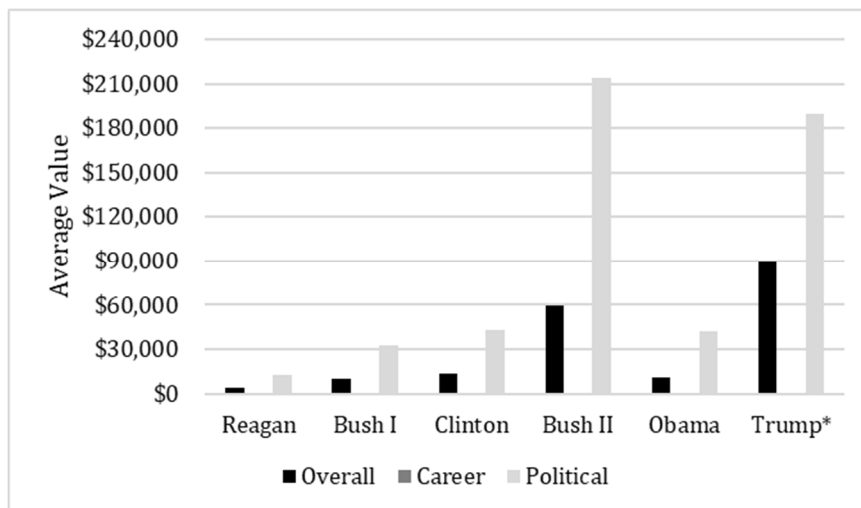
nominees made financial contributions, 32 percent of Obama nominees and 29 percent of Trump nominees did so, and while the average contribution to President Reagan and affiliated or supporting entities was roughly \$4300, the averages under Presidents Obama and Trump were \$11,050 and \$89,632, respectively. Virtually all of the increase is attributable to political nominees, who shifted from an inflation-adjusted mean of \$12,916 under Reagan to \$32,845 (Bush I), \$42,839 (Clinton), \$214,221 (Bush II), \$42,117 (Obama), and then \$189,448 (Trump). These numbers raise the possibility that money has come to play a larger role in ambassadorial appointments over the past twenty years.

*Figure 6. Commonality of Nominee Contributions Since 1980, by Administration*



*\*Note: first two years of the Trump administration*

Figure 7. Size of Nominee Contributions Since 1980, by Administration



\*Note: first two years of the Trump administration

As a point of historical comparison, consider the Nixon administration. In 1974, the Senate Watergate Committee expressed concern that President Nixon had collected “over \$1.8 million in Presidential campaign contributions”—roughly \$9.5 million in present dollars—from fifty-four noncareer ambassadors.<sup>182</sup> On the basis of this and other unrelated findings, the Committee recommended a series of restrictions that later became federal law, including limits on personal contributions to candidates and political parties.<sup>183</sup> In contrast, President George W. Bush benefited from over \$23 million in contributions from more than one hundred noncareer ambassadors, including Roland Arnall, who single-handedly matched the total under Nixon by contributing nearly \$9.5 million to a collection of pro-Bush entities.<sup>184</sup> Twentieth-century concerns about the role of money in politics seem quaint in light of the new data.

Why have campaign contributions become more significant in recent years? Although the reason for the general rise in their commonality is unclear, changes in election law likely aided the rise in

182. S. REP. NO. 93-981, at 493–95, 567–68, 570–71 (1974).

183. Federal Elections Campaign Act Amendments of 1971, Pub. L. No. 94-283, sec. 112, § 320, 90 Stat. 475, 487 (1976). (codified as amended at 52 U.S.C. § 30116 (2018)).

184. 151 CONG. REC. S12,236 (daily ed. Nov. 2, 2005).

average value. In 1976 amendments to the Federal Election Campaign Act, Congress imposed an annual, aggregate limit of \$25,000 on personal contributions to candidates, national political parties, and political action committees (“PACs”).<sup>185</sup> This restriction remained until the Bipartisan Campaign Reform Act of 2002, which established a biennial, aggregate limit of \$37,500 on contributions to candidates, a similar limit of \$57,500 on any other contributions, and biennial adjustments for inflation.<sup>186</sup> Further liberalization followed in 2010, when the D.C. Circuit<sup>187</sup> applied the Supreme Court’s decision in *Citizens United v. FEC*<sup>188</sup> to invalidate limits on personal contributions to so-called “super PACs,”<sup>189</sup> and in 2014, when the Supreme Court invalidated the biennial, aggregate limits on contributions to individuals, political parties, and PACs in *McCutcheon v. FEC*.<sup>190</sup> The cumulative effect of these developments was substantial: whereas ambassadorial nominees could contribute no more than \$25,000 annually under Reagan, Bush I, Clinton, and the first year of Bush II, they could contribute up to \$95,000 biennially starting in 2002,<sup>191</sup> \$101,400 in 2005–2006,<sup>192</sup> \$108,200 in 2007–2008,<sup>193</sup> \$115,500 in 2009–2010,<sup>194</sup> and then without any real limit thereafter.<sup>195</sup> From this

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185. § 112, 90 Stat. at 487; *see also* *Buckley v. Valeo*, 424 U.S. 1, 23–38 (1976) (upholding the constitutionality of the Act’s contribution limits).

186. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307(a), 116 Stat. 81, 102 (codified as amended at 52 U.S.C. § 30116(a)).

187. *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010).

188. *Citizens United v. FEC*, 558 U.S. 310 (2010).

189. “A PAC is a business, labor, or interest group that raises or spends money in connection with a federal election, in some cases by contributing to candidates. A so-called ‘Super PAC’ is a PAC that makes only independent expenditures and cannot contribute to candidates.” *McCutcheon v. FEC*, 572 U.S. 185, 193 n.2 (2014).

190. *Id.* at 227.

191. 52 U.S.C. § 30116(a)(3).

192. Price Index Increases for Expenditure and Contribution Limitations, 70 Fed. Reg. 11,658, 11,660 (Mar. 9, 2005) (reporting a \$40,000 limit on contributions to all candidates and a \$61,400 limit on contributions to all PACs and party committees).

193. Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007) (reporting a \$42,700 limit on contributions to all candidates and a \$65,500 limit on contributions to all PACs and party committees).

194. Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435, 7437 (Feb. 17, 2009) (reporting a \$45,600 limit on contributions to all candidates and a \$69,900 limit on contributions to all PACs and party committees).

195. To be sure, certain formal limits continue to exist. Under current law, a nominee can directly contribute no more than \$2700 per election to any candidate for federal office, \$5000 per year to any political action committee, \$10,000 per year to any state or local party committee, \$33,900 per year to any national political party, and \$101,700 per year to any additional national

perspective, growth in the average size of nominee contributions is unsurprising.

Yet changes in election law appear to be a partial explanation at best. First, relatively few nominees maxed out their contributions. Robert Stuart—one of the largest contributors under Reagan—made an unadjusted contribution of \$59,290 notwithstanding a four-year ceiling of \$100,000.<sup>196</sup> Bruce Gelb—one of the largest supporters under Bush I—made an unadjusted contribution of roughly \$59,000.<sup>197</sup> Gerald McGowan—one of the largest supporters under Clinton—made an unadjusted contribution of \$86,200.<sup>198</sup> This pattern suggests that the market price of an ambassadorship has been lower than the statutory limits on individual contributions.

Second, changes in election law cannot explain a number of differences across administrations: Why, for example, did contributions from political nominees grow by 154 percent in inflation-adjusted value from Reagan to Bush I, given that the statutory limits under Bush I were lower in real terms than they were under Reagan? Why did the average contribution value grow by another 30 percent from Bush I to Clinton? And why was the average contribution under Bush II over five times larger than the average under Clinton and Obama? One possibility is that presidents have placed varying degrees of emphasis on financial support in choosing nominees. Another is that presidents have garnered support from donor classes of varying socioeconomic composition.<sup>199</sup>

Given the findings, the next question is whether financial contributions are in any sense problematic. Do they distort the appointments process in an antimeritocratic way? Do they result, in

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party committee account. See FEC, CONTRIBUTION LIMITS FOR 2017-2018 FEDERAL ELECTIONS 1 (2017), <https://transition.fec.gov/info/contriblimitschart1718.pdf> [<https://perma.cc/3QBF-6F4M>]. But these limits are far less meaningful in light of the D.C. Circuit's 2010 decision, as an aspiring nominee can now contribute any amount of money to Super PACs whose agendas align with the president's. Cf. Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISCIPLINARY L.J. 79, 87–93 (2017) (discussing the effect of *Citizens United* and *SpeechNow* on contribution limits).

196. 130 CONG. REC. S11,022 (daily ed. Sept. 12, 1984); see also *Ambassador Qualifications Data*, *supra* note 169.

197. 137 CONG. REC. S6653 (daily ed. May 23, 1991); see also *Ambassador Qualifications Data*, *supra* note 169.

198. 143 CONG. REC. 24,269 (1997); see also *Ambassador Qualifications Data*, *supra* note 169.

199. Cf. *Donor Demographics*, OPEN SECRETS, <https://www.opensecrets.org/overview/donor-demographics.php> [<https://perma.cc/MV72-YPUH>] (reporting the size of the donor class in recent elections and the total value of their contributions to each of the major political parties).

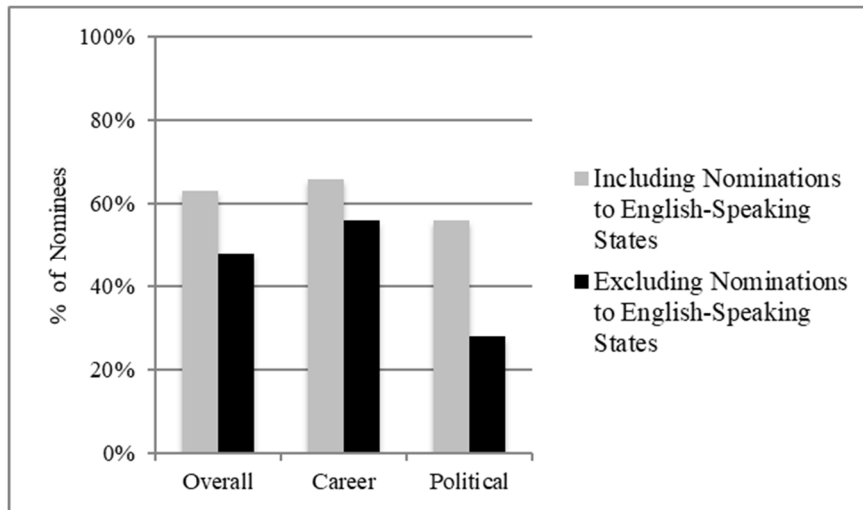


other words, in ambassadorships for individuals who lack credentials that are typically viewed as predictive of performance? Or are the qualifications of political nominees comparable or even superior to those of career nominees? The certificates yield fresh insights on these questions.

2. *Linguistic Aptitudes.* On the issue of language ability, the data are intriguing in a couple of respects. One is that knowledge of the receiving state's principal language is far from given; only 63 percent of nominees possessed such knowledge, and that number drops to 48 percent if one focuses exclusively on countries where English is not the principal language, as shown in Figure 8. In short, in nearly 40 percent of all cases, modern presidents selected individuals who appeared unable at the time of nomination to communicate in the most relevant foreign tongue.<sup>200</sup> This is true, moreover, under exceedingly generous coding rules that counted as evidence of relevant linguistic capacity representations that nominees speak "some" of or possesses a "working knowledge" of the principal language. The percentage of speakers would drop well below 63 percent if one were to exclude all those who lacked fluency. The same is true of nonprincipal languages, the numbers for which are shown in Figure 9.

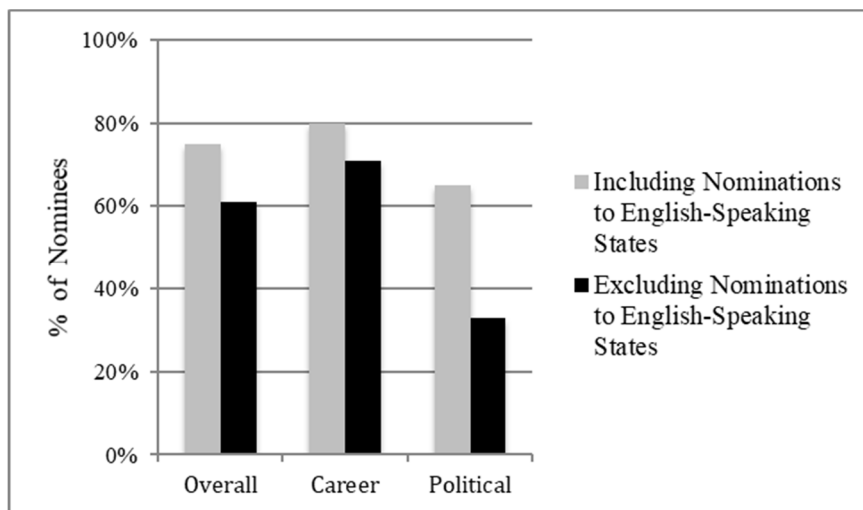
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200. Because most ambassadors are members of the Senior Foreign Service, entry into which typically requires "a tested competence of S-3/R-3 proficiency level in a foreign language," most ambassadors are at least bilingual, but there is no necessary link between their second language and the state to which they are sent. There is no requirement, for example, that they possess at least S-3/R-3 proficiency in the receiving state's principal language. PROCEDURAL PRECEPTS, *supra* note 164, at Part IV.A.

*Figure 8. Knowledge of the Principal Language Since 1980*

Another key finding is that the percentage of career nominees with knowledge of the receiving state's principal language (66 percent) is materially higher than the percentage associated with political nominees (56 percent). Both numbers drop when the denominator comprises only those individuals who were picked to serve in non-English speaking countries, but the drop is substantially larger for political nominees (-28 percent) than it is for the career variety (-10 percent). The numbers improve some when the coding also counts knowledge of other relevant languages, but they improve by a greater margin for career nominees. In short, career nominees fare better in terms of linguistic aptitude, whether one focuses only on the principal language of the receiving state or on any relevant language, and whether or not one excludes states where English is widely spoken.

Figure 9. Knowledge of Any Relevant Languages Since 1980



Variations in language abilities are intriguing in part because they affect bilateral relationships to different degrees. The next figures (10 and 11) depict the rates at which nominees to each state have possessed relevant linguistic knowledge, with values again ranging from 0 percent (white) to 100 percent (black). These results suggest that aptitudes have been quite advanced among nominees to states in South America and Africa. This could be due in part to the commonality of Spanish speakers in the United States, and in part to the customary use of colonial languages in African governments<sup>201</sup> — the effect of which is to render knowledge of English and other common European languages sufficient for service. In contrast, nominees to East Asia, Eastern Europe, the Middle East, and Southeast Asia appear to possess relevant knowledge at considerably lower rates.

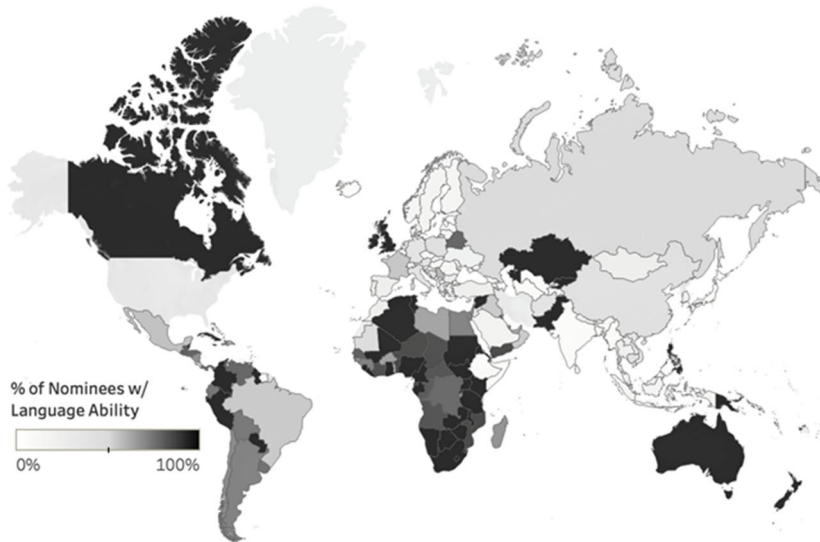
To be sure, at least some foreign officials in these regions are likely to speak English even if it is not a common or official language among their compatriots.<sup>202</sup> But that fortuity is unlikely to dissolve the value

201. See, e.g., *The World Factbook: Africa: Nigeria*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> [<https://perma.cc/ZS37-45SP>] (describing “British influence and control over what would become Nigeria” and listing English as the official language).

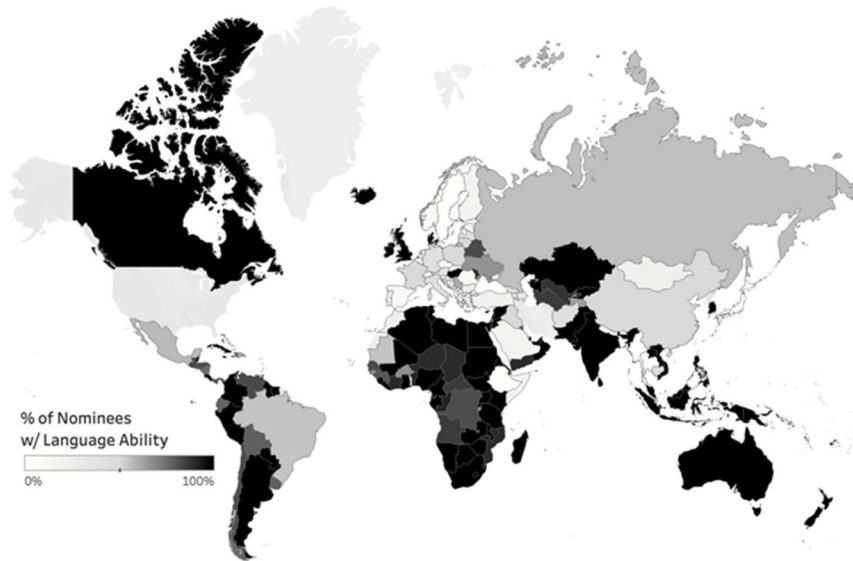
202. See Barbara Crossette, *Diplomatically, French s a Faded Rose in an English Garden*, N.Y. TIMES (Mar. 25, 2001), <https://www.nytimes.com/2001/03/25/world/diplomatically-french-is-a-faded-rose-in-an-english-garden.html> [<https://perma.cc/TU48-8LUW>] (suggesting that “French is fast slipping as the language of diplomacy” and that English is taking its place).

of foreign language skills, which not only guarantee an ability to communicate with a broader range of foreign counterparts, but also facilitate public diplomacy and stand as helpful evidence of respect for the people and culture of the receiving state. Thus, whatever the abilities of foreign officials, one might reasonably surmise that U.S. ambassadors in East Asia, Eastern Europe, the Middle East, and Southeast Asia are on balance less effective at a number of essential tasks.

*Figure 10. Knowledge of the Principal Language Since 1980, by Receiving State*



*Figure 11. Knowledge of Any Relevant Languages Since 1980, by Receiving State*

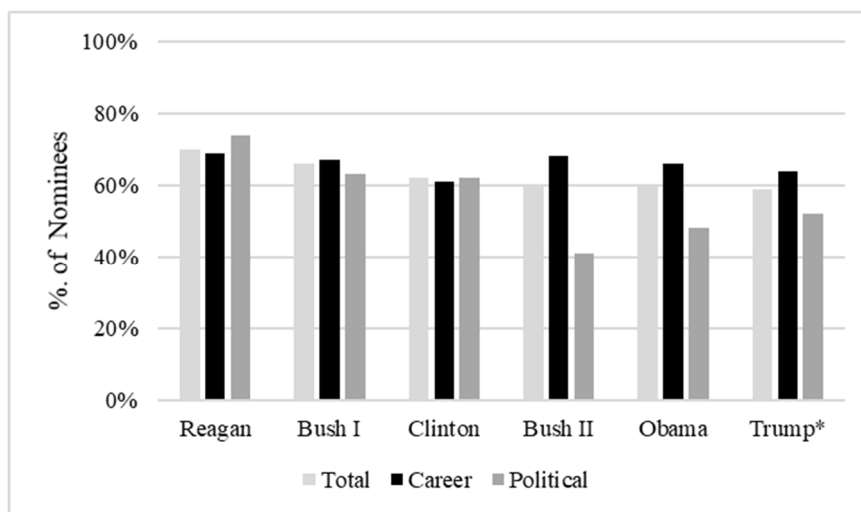


Finally, Figure 12 reports changes in the commonality of linguistic aptitude over time. This Figure shows stability among career nominees. It also shows, however, that language ability has become slightly less common overall and materially less common among political nominees: whereas no fewer than 62 percent were able to communicate in the principal language of the receiving state under Presidents Reagan, George H.W. Bush, and Clinton, the numbers dropped to 41 percent under George W. Bush, 48 percent under Barack Obama, and 52 percent in the first two years of Donald Trump. Note that this shift occurred alongside a general rise in the average size of campaign contributions among those same nominees.<sup>203</sup>

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203. *See supra* Figures 6 & 7.

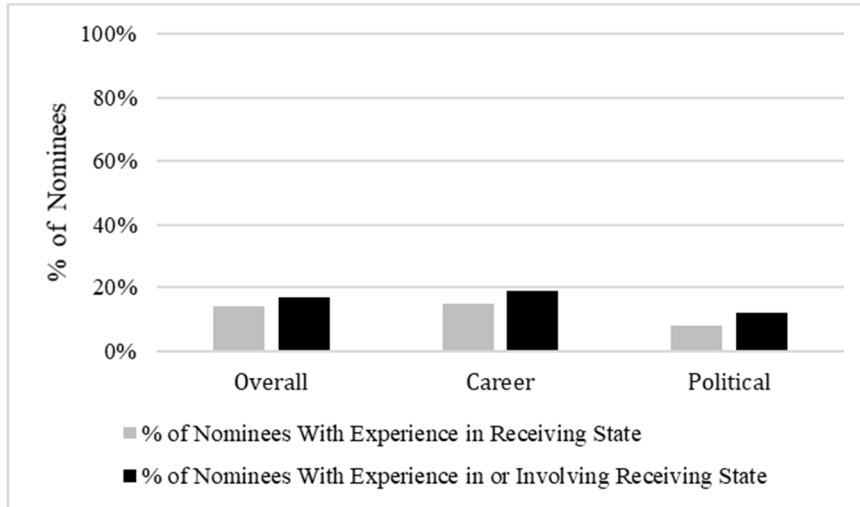
Figure 12. Knowledge of Principal Language by Administration



\*Note: first two years of the Trump administration

3. *Expertise on the Receiving State and Region.* The next metric focuses on nominee experience with the receiving state and region. Figure 13 shows that it is uncommon for a nominee to have any experience in or involving the state to which he or she may become an ambassador. Strikingly, only 14 percent of all nominees previously lived or worked in their prospective receiving state, and this number rises only slightly to 17 percent upon including credentials that merely involve that state, such as a previous position at one of the State Department's country desks in Washington. Experience in or involving the receiving state is low even among career nominees, but lower still among political nominees (19 percent versus 12 percent). These results seem significant insofar as prior experience helps generate expertise with respect to the receiving state's politics, economy, history, and culture. One might imagine that, all else equal, ambassadors with country-relevant backgrounds are more effective.

Figure 13. *Prior Experience in or Involving the Receiving State Since 1980*



Other results suggest that those who control the appointments process share the view that prior experience with the receiving state is helpful. Consider Figures 14 and 15, which depict the rate of such experience among nominees to each state. Here we see that prior experience was uncommon among nominees to most states, but *common* among nominees to several states that have presented considerable challenges for U.S. foreign policy. Of the nominees to Iraq, for example, 82 percent had prior experience in or involving Iraq. In addition to Iraq, rounding out the ten receiving states with the highest percentages are Cuba (100 percent), Vietnam (83 percent), Kosovo (60 percent), Russia (60 percent), Syria (57 percent), Nepal (55 percent), Afghanistan (50 percent), Cambodia (50 percent), and China (50 percent). This suggests that influential actors in the appointments process believe that prior experience can be useful. In this sense as well, political nominees appear comparatively unqualified.

*Figure 14. Prior Experience in the Receiving State Since 1980, by Receiving State*



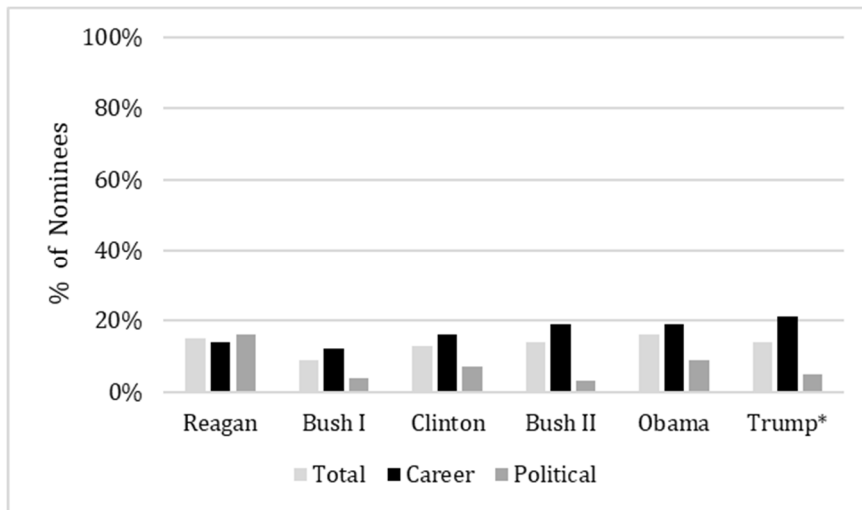
*Figure 15. Prior Experience in or Involving the Receiving State Since 1980, by Receiving State*





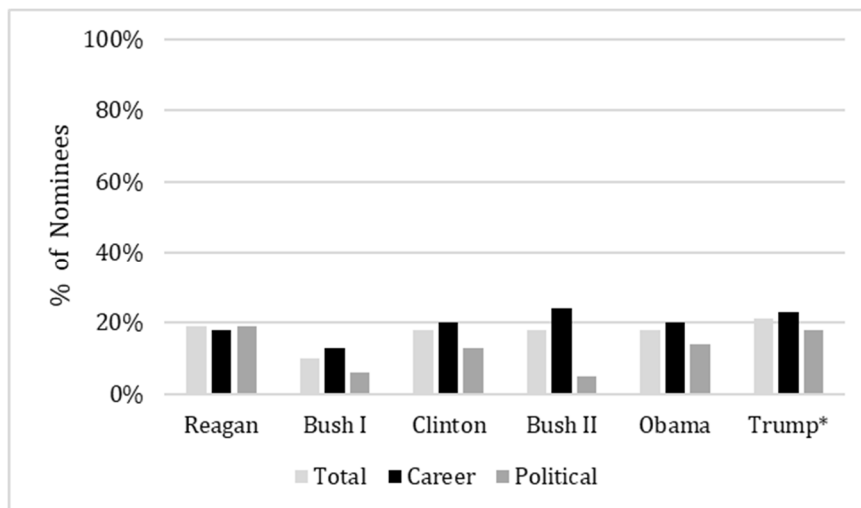
Next consider changes in country expertise over time. Figures 16 and 17 indicate that prior experience in the receiving state has been atypical for decades. Yet these figures also show an upward progression among career nominees: whereas only 14 percent of nominees under President Reagan held prior experience in the receiving state, that number moved to 16 percent under President Clinton, 19 percent under the second President Bush and President Obama, and then 21 percent under President Trump. In contrast, there was no discernable trend among political nominees. It is unclear what accounts for these facts, but one possible explanation is that more recent administrations have placed greater emphasis on country experience in choosing among career nominees, even while at times succumbing to the influence of campaign contributions from prospective political nominees who lack such experience.

*Figure 16. Prior Experience in the Receiving State Since 1980, by Administration*



*\*Note: first two years of the Trump administration*

*Figure 17. Prior Experience in or Involving the Receiving State Since 1980, by Administration*

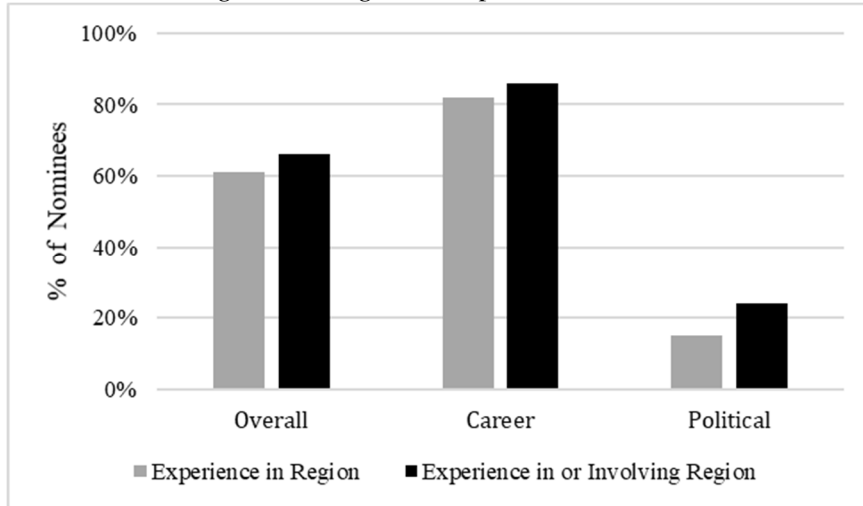


*\*Note: first two years of the Trump administration*

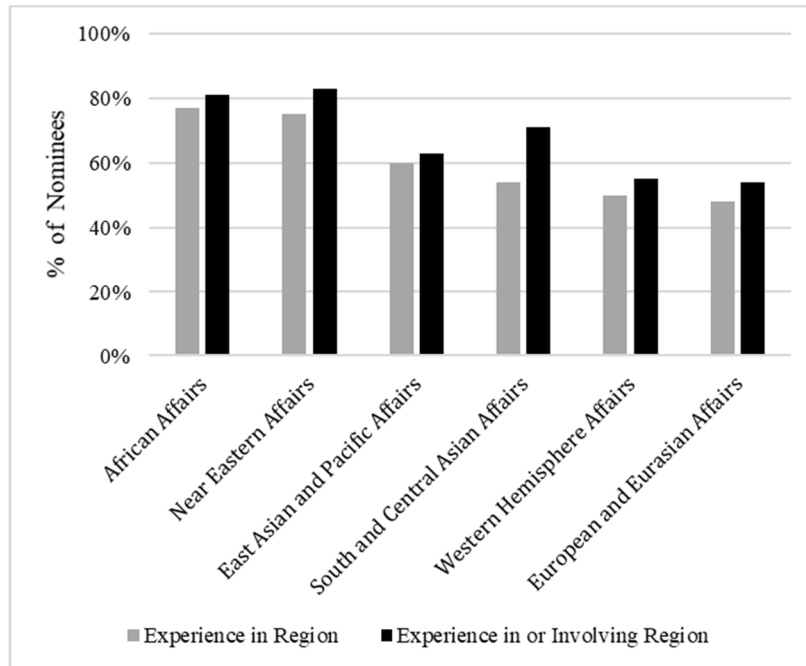
Figures 18 and 19 in turn report the rates at which nominees held prior regional experience, both across the two different types of nominees and the various regions in which they served. The results here suggest a few patterns. First, prior experience with the region in which the receiving state is located is far more common than prior experience with the receiving state itself. Sixty-one percent of all nominees were qualified under the regional metric, while only 14 percent were qualified under the state-specific metric, as discussed above. Second, career nominees—86 percent of whom had prior experience in or involving the region—fared much better than political nominees, only 24 percent of whom had such experience. Third, as shown in Figure 19, rates of prior regional experience varied somewhat across regions. On one end of the spectrum, such experience was common among nominees to Africa and the Middle East: 83 percent of nominees to states within the jurisdiction of the Bureau of African Affairs had prior experience in or involving one or more of the associated African states, and 81 percent of nominees to states within the jurisdiction of the Bureau of Near Eastern Affairs had prior experience in or involving one or more of those states. On the other end of the spectrum, regional experience was least common among nominees to states in Europe (54 percent) and the Americas (55

percent). This raises the possibility that presidents have placed greater weight on regional expertise in making nominations to states in Africa and the Middle East.

*Figure 18. Regional Experience Since 1980*

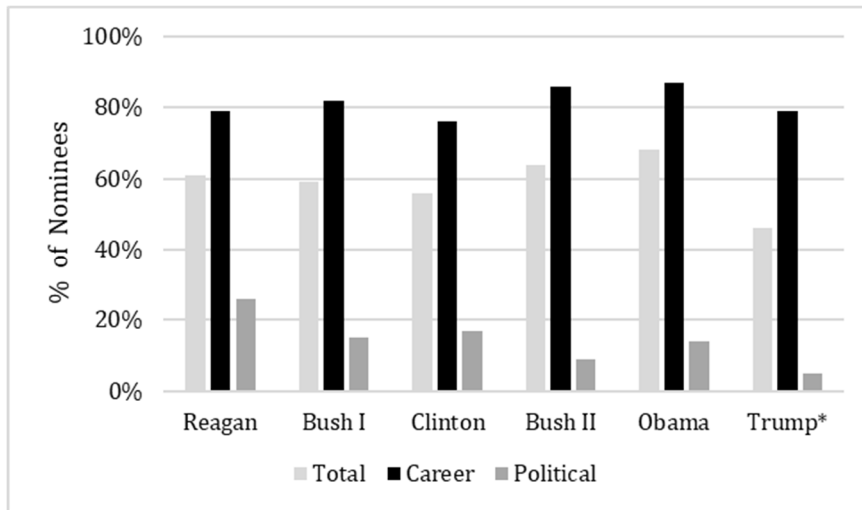


*Figure 19. Regional Experience Since 1980, by Bureau*



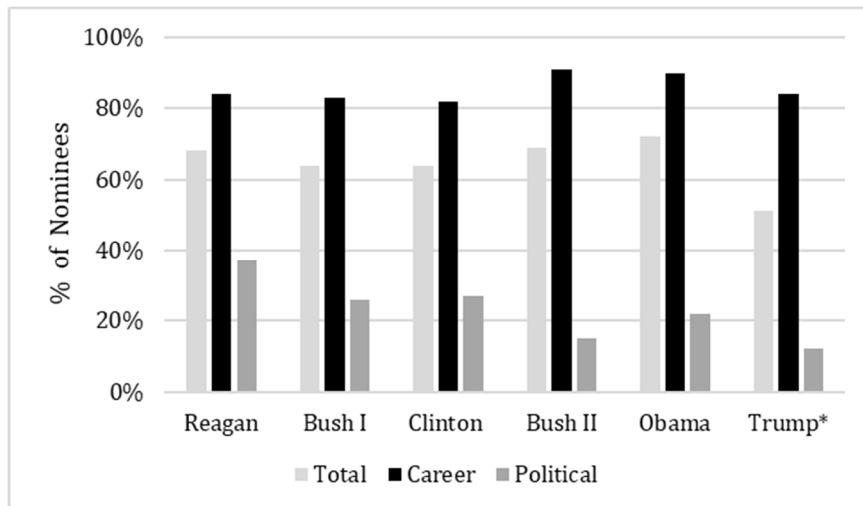
Finally, Figures 20 and 21 report changes in the commonality of prior regional experience over time. The data indicate a trend: whereas the percentage of career nominees with prior experience in the region of the receiving state has generally held steady at approximately 80 percent, the percentage of political nominees with such experience fell from 26 percent under Reagan to 5 percent under Trump. In short, career nominees are much better qualified than political nominees with respect to in-region experience, and the gap has grown significantly over time. The same is true with respect to prior experience in or involving the region, as shown in Figure 21.

*Figure 20. Experience in Region Since 1980, by Administration*



*\*Note: first two years of the Trump administration*

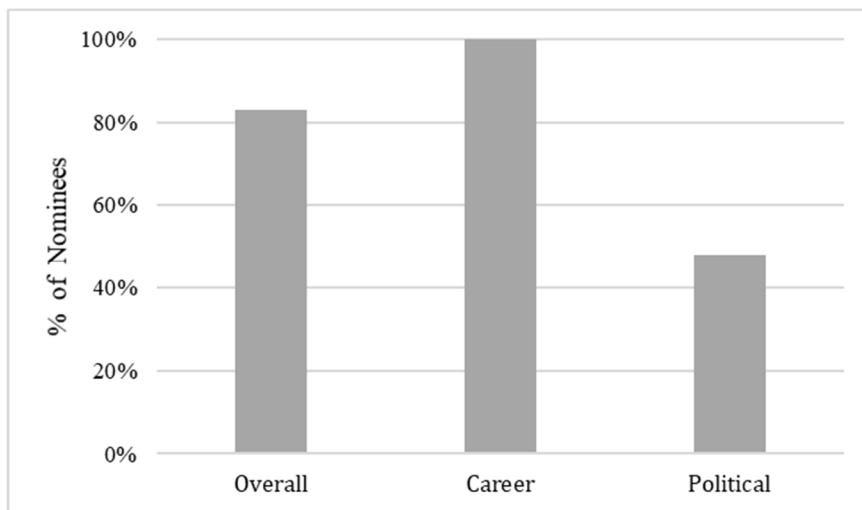
Figure 21. *Experience in or Involving Region Since 1980, by Administration*



\*Note: first two years of the Trump administration

4. *Experience in U.S. Foreign Policy.* The next metric opens the inquiry still further by assessing the extent to which nominees from each group possessed prior experience in U.S. foreign policy. All career nominees have this kind of experience by definition, so the real question is whether and to what extent political nominees exhibited a similar background.

As shown in Figure 22, the answer is relatively few. Even under a permissive coding strategy that counts any experience with the military and agencies such as the Overseas Private Investment Corporation, only 48 percent of political nominees worked, for any period of time, in even a single federal government position that involves foreign policy. The rest worked in law firms, investment banks, universities, state governments, business entities, and civic and philanthropic organizations. To be sure, some of those careers may have entailed considerable exposure to foreign or international affairs, but I excluded them on the view that government work is likely to provide unique forms of experience and perspective.

*Figure 22. Experience in U.S. Foreign Policy Since 1980*

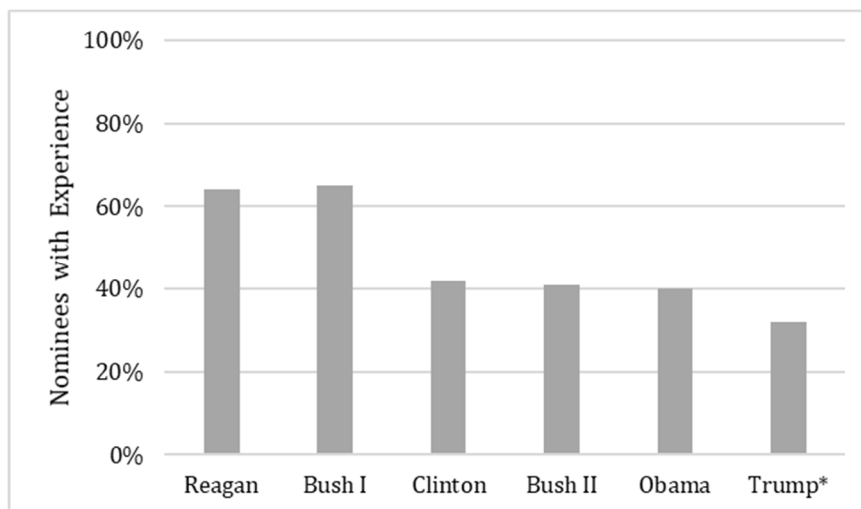
Moving again from nominee categories to geography, the data establish that the commonality of foreign policy experience varied among nominees to different receiving states. As shown in Figure 23, nominations for ambassadorships to Australia, Canada, Japan, New Zealand, and states in Western Europe often involved individuals with no foreign policy experience of any kind. These patterns appear to correlate closely with the financial data set forth in Figures 4 and 5, and thus raise the possibility that campaign contributions have at times displaced foreign policy experience as a determinant of who receives a nomination.

*Figure 23. Experience in U.S. Foreign Policy Since 1980, by Receiving State*



Finally, as shown in Figure 24, the temporal data indicate that experience in U.S. foreign policy has become less common among political nominees since 1980. Whereas roughly two-thirds of these nominees were qualified by reference to this metric under Presidents Reagan (64 percent) and George H.W. Bush (65 percent), the number fell dramatically under Presidents Clinton (42 percent), George W. Bush (41 percent), Barack Obama (40 percent), and especially Donald Trump (32 percent). Once again, we have evidence that political nominees have become less qualified over time. Given the financial trends reported above in Figures 6 and 7, it is conceivable that these nominees have used campaign contributions of increasing size to blunt concerns about diminishing foreign policy credentials.

Figure 24. Political Nominees' Experience in U.S. Foreign Policy Since 1980, by Administration



\*Note: first two years of the Trump administration

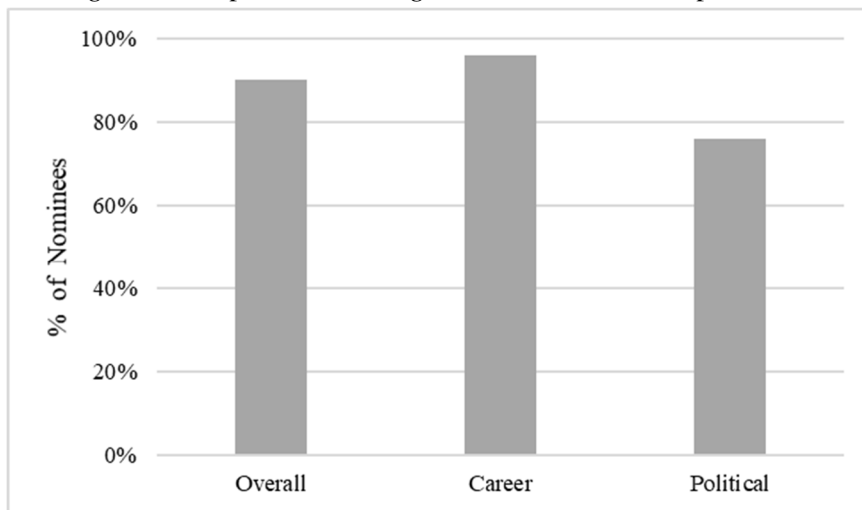
5. *Organizational Leadership.* The last measure is prior experience in organizational leadership. Figure 25 shows that this credential is common, with 90 percent of all nominees possessing some form of qualifying experience. Nevertheless, the data also show that such experience is more common among career nominees (96 percent) than it is among their political counterparts (76 percent). The principal reasons for the difference appear to be twofold. First, the vast majority (94 percent) of career nominees have been members of the Senior Foreign Service, entry into which required them to “demonstrate over the course of [their] career, from entry through tenure and up to consideration for promotion at the Senior threshold . . . [l]eadership and management effectiveness.”<sup>204</sup> Second, lawyers are relatively common in the political category. As practitioners, these individuals often held senior positions in influential law firms, but I excluded such experience on the view that it typically does not entail substantial leadership responsibilities; a partner at a firm might oversee the work of a few associates and participate in financial decision-making, but in most cases his or her principal task is not to lead the organization so much as to represent clients. I also excluded law firm experience in

204. PROCEDURAL PRECEPTS, *supra* note 164, at add. 4.



view of evidence that many lawyers lack training on and are not particularly good at leadership.<sup>205</sup> The resulting numbers call into question the suggestion that political nominees tend to be comparatively strong as executives.<sup>206</sup>

*Figure 25. Experience in Organizational Leadership Since 1980*



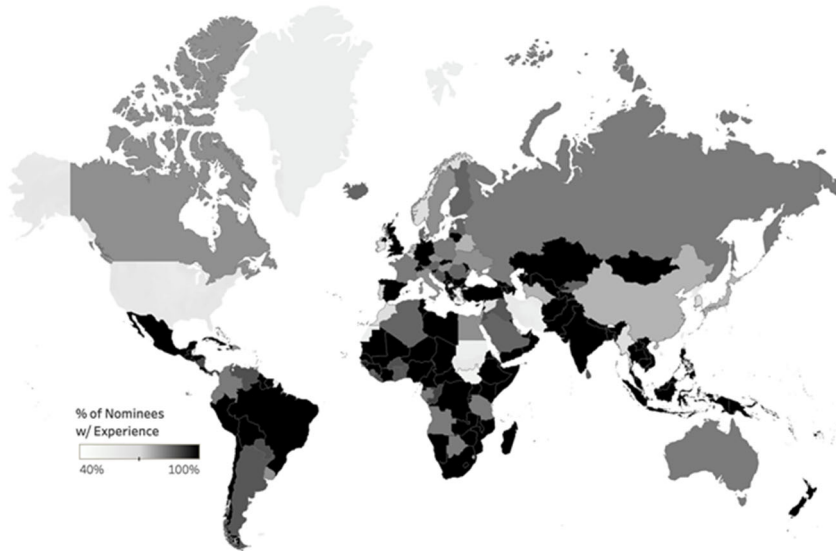
Moving to geography, the data show that experience in organizational leadership varied among prospective receiving states. Figure 26 indicates that this credential was least common among nominees to Belize (44 percent), Singapore (56 percent), Antigua & Barbuda (60 percent), St. Kitts & Nevis (60 percent), Uruguay (60 percent), Grenada (63 percent), Italy (63 percent), Burma (67 percent), Dominica (67 percent), South Korea (67 percent), St. Lucia (67 percent), and Ukraine (67 percent). Meanwhile, the credential was universal among nominees to over eighty states, including such diverse locations as Afghanistan, Brazil, and Turkey. It is difficult to see any patterns in this distribution, but it seems noteworthy that the size of the U.S. embassy and the importance of the receiving state to U.S. interests do not appear to correlate with higher levels of organizational experience among nominees. For example, nominees to China and

205. Deborah L. Rhode, *What Lawyers Lack: Leadership*, 9 U. ST. THOMAS L.J. 471, 472–77 (2011).

206. See Herbert Maza, *Foreign Service Mandarins and Democracy*, 147 WORLD AFF. 43, 47 (1984) (making this argument).

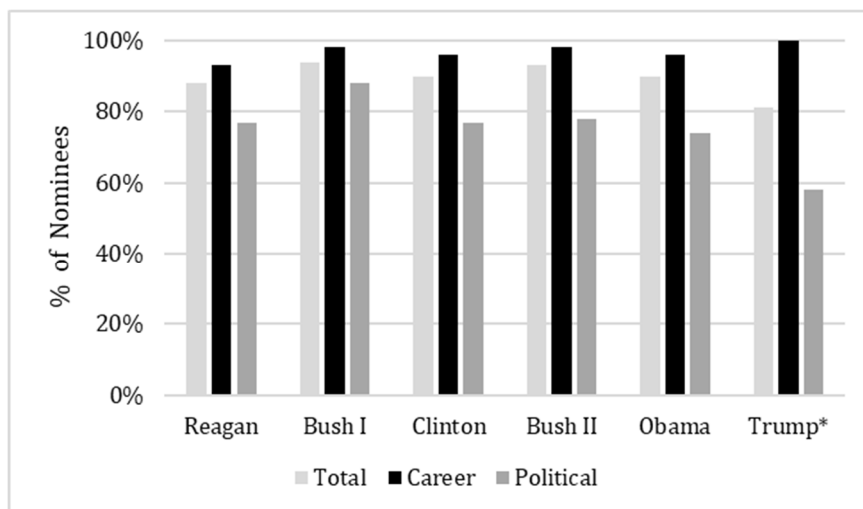
India—both of which host large embassies and carry tremendous significance to U.S. foreign policy—fall in the bottom 20 percent of states when ranked from highest to lowest under the leadership metric. For nominations to these states, other types of credentials appear to have played a more dominant role.

*Figure 26. Experience in Organizational Leadership Since 1980, by Receiving State*



Lastly, as shown in Figure 27, the temporal data indicate two patterns with respect to the commonality of experience in organizational leadership over the past forty years. First, this credential has generally held steady among career nominees, appearing at the rates of 93 percent (Reagan), 98 percent (Bush I), 96 percent (Clinton), 98 percent (Bush II), 96 percent (Obama), and 100 percent (Trump). Second, the commonality of experience in organizational leadership has declined in recent years among political nominees, appearing at the rates of 77 percent (Reagan) to 88 percent (Bush I), 77 percent (Clinton), 78 percent (Bush II), 74 percent (Obama), and 58 percent (Trump). This shows that career nominees have maintained a consistent advantage over political nominees in terms of leadership experience. It also shows that the rate of 58 percent under Trump is the lowest since the start of the reporting period.

Figure 27. Experience in Organizational Leadership Since 1980, by Administration



\*Note: first two years of the Trump administration

In summary, the certificates of demonstrated competency support several significant conclusions regarding the modern practice of ambassadorial appointments.

First, as a group, career nominees have been substantially more qualified than political nominees under all the dominant metrics of competence: they have possessed stronger language abilities and had more experience in and involving receiving states and regions, foreign policy, and organizational leadership. The only metric under which career nominees have been less attractive to nominating presidents is financial; Foreign Service officers contributed far less money to presidential campaigns than their counterparts. These facts—summarized in Table 2—are consistent with the suspicion that political appointments are often rewards for financial assistance, irrespective of other considerations of merit. From this perspective, common attempts to highlight donor credentials appear as post hoc justifications for a practice that is fundamentally nonmeritocratic.<sup>207</sup>

207. Cf., e.g., Olivier Knox, *Trump Touted Conspiratorial Ambassador Nominee's 'Marketing' Skills*, YAHOO NEWS (Feb. 7, 2018), <https://www.yahoo.com/news/trump-touted-conspiratorial-ambassadors-marketing-skills-164052186.html> [https://perma.cc/C43R-SJCA] (“The Trump administration says that an ambassadorial nominee under scrutiny for sharing ‘cuckoo’ conspiracy

Second, even though career ambassadors are extremely well qualified in both an absolute and a relative sense, it is at least conceivable that there is room for improvement. In the first two years under President Trump, 36 percent of career ambassadors had no aptitude in the receiving state's principal language, 77 percent had no prior experience in the receiving state, and 16 percent lacked prior experience in the region. In view of this evidence, critics of political appointments might strengthen their case by exploring ways to further optimize the State Department's training and assignment policies for Foreign Service officers.

Third, the data suggest that federal appointments practice has systematically disserved some states and regions. Western European states and major allies such as Australia, Canada, and Japan have received an overwhelming majority of relatively unqualified donors and bundlers.<sup>208</sup> Language deficiencies have been particularly common among ambassadors to states in Eastern Europe, the Middle East, and East Asia.<sup>209</sup> Lack of regional experience has been comparatively common among ambassadors to Europe,<sup>210</sup> where the United States now confronts a series of challenges, including Russian nationalism; the rise of illiberal governments and populist movements; and significant

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theories about the future president's rivals in 2016 is qualified for the post in part because of his 'considerable' marketing skills.").

208. See *supra* Figure 5. Compare, e.g., REPORT FOR THE S. COMM. ON FOREIGN RELATIONS, AMBASSADORIAL NOMINATION: CERTIFICATE OF DEMONSTRATED COMPETENCE—FOREIGN SERVICE ACT, SECTION 304(A)(4): SWITZERLAND AND LIECHTENSTEIN: PETER R. CONEWAY [hereinafter CONEWAY], in *Certificates of Demonstrated Competence, 1980–2016, Tranche I*, at 528 (2015) [hereinafter CONEWAY], <https://ryanscoville.files.wordpress.com/2018/01/foia-docs.pdf> [<https://perma.cc/4XLC-QNDW>] (suggesting that Coneway, a 2006 nominee to Switzerland and Liechtenstein, lacked prior knowledge of relevant languages, experience in foreign policy, and knowledge or experience involving the receiving states and their region), with *Bundler Data for Peter Coneway (2000)*, PUB. CITIZEN, <https://www.citizen.org/peter-coneway-2000> (reporting at least \$100,000 in bundled contributions for the 2000 election), and *Bundler Data for Peter Coneway (2004)*, PUB. CITIZEN, [tinyurl.com/whitehouseforsale](https://perma.cc/C99U-4CSP) [<https://perma.cc/C99U-4CSP>] (reporting at least \$200,000 in bundled contributions for the 2004 election). Since I last accessed Peter Coneway's bundling data, Public Citizen has redesigned its website in a way that rendered the data unavailable. As long as the data remains unavailable, readers will simply have to trust the accuracy of my representations.

209. See, e.g., REPORT FOR THE S. COMM. ON FOREIGN RELATIONS, AMBASSADORIAL NOMINATION: CERTIFICATE OF DEMONSTRATED COMPETENCE (FOREIGN SERVICE ACT, SECTION 304(A)(4)): EGYPT (CAIRO): NICHOLAS A. VELIOTES, in *Certificates of Demonstrated Competence, 1980–2016, Tranche VII*, at 227 (2018), <https://ryanscoville.files.wordpress.com/2018/05/foia-docs-7.pdf> [<https://perma.cc/8BKJ-QFMW>] (suggesting that Veliotes, a Reagan nominee to Egypt, had competency in French and Italian but not Arabic).

210. See, e.g., CONEWAY, *supra* note 208 (listing experiences that all occurred outside of Europe).

disagreements over trade, the Iran nuclear agreement, climate change, and NATO.<sup>211</sup> To the extent that credentials stand as reliable predictors of performance, these patterns indicate areas in which U.S. ambassadors have been least effective.

Finally, as a group, political nominees have in several ways become materially less qualified over time. Compared to those nominated under Presidents Reagan and George H.W. Bush, the typical political nominee in recent years has possessed less experience in the receiving state, significantly weaker language skills, and much less experience in the region of the receiving state, foreign policy, and organizational leadership. Moreover, the gap between the credentials of the typical career nominee and the typical political nominee has grown under virtually all of these measures. In short, if the preference for career nominees was justified at the enactment of the Foreign Service Act of 1980, it appears to be even more so now. The conjunction of this development and the steep rise in the average size of campaign contributions among political nominees indicates the possibility that the increasing cost of presidential elections is indirectly degrading the quality of U.S. diplomatic representation overseas by shifting the relative weight of credentials and contributions as influences on the appointments process. Table 3 illustrates these findings by comparing the numbers under Reagan and the first two years of Trump.

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211. See, e.g., Steven Pifer, *Is Trump Undoing Trans-Atlantic Relations?*, BROOKINGS (May 31, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/05/31/is-trump-undoing-trans-atlantic-relations> [<https://perma.cc/RJ7X-T3B4>] (arguing that President Trump is undermining transatlantic relations).

Table 2. Career Versus Political Nominees Since 1980

Metric	Career	Political	Difference (percentage point)
Contributions (% of Nominees)	5%	73%	<b>+68 p.p.</b>
Contributions (Average Value)	\$33	\$84,850	<b>+\$84,817</b>
Knowledge of Principal Language (% of Nominees)	66%	56%	<b>-10 p.p.</b>
Knowledge of Any Relevant Language (% of Nominees)	80%	65%	<b>-15 p.p.</b>
Experience in State (% of Nominees)	15%	8%	<b>-7 p.p.</b>
Experience in or Involving State (% of Nominees)	19%	12%	<b>-7 p.p.</b>
Experience in Region (% of Nominees)	82%	15%	<b>-67 p.p.</b>
Experience in or Involving Region (% of Nominees)	86%	24%	<b>-62 p.p.</b>
Foreign Policy Experience (% of Nominees)	100%	48%	<b>-52 p.p.</b>
Leadership Experience (% of Nominees)	96%	76%	<b>-20 p.p.</b>

*Table 3. Changes in Political Nominees Over Time*

Metric	Reagan	Trump*	Difference	% Change
Contributions (Average Value)	\$12,916	\$189,448	\$176,532	<b>+1367%</b>
Knowledge of Principal Language (% of Nominees)	74%	52%	22%	<b>-30%</b>
Knowledge of Any Relevant Language (% of Nominees)	83%	62%	21%	<b>-25%</b>
Experience in State (% of Nominees)	16%	5%	11%	<b>-69%</b>
Experience in or Involving State (% of Nominees)	19%	18%	1%	<b>-5%</b>
Experience in Region (% of Nominees)	26%	5%	21%	<b>-81%</b>
Experience in or Involving Region (% of Nominees)	37%	12%	25%	<b>-68%</b>
Foreign Policy Experience (% of Nominees)	64%	32%	32%	<b>-50%</b>
Leadership Experience (% of Nominees)	77%	58%	19%	<b>-25%</b>

*\*Note: first two years of the Trump administration*

## IV. POLICY IMPLICATIONS

The findings carry important implications for the way in which the president and the Senate exercise their powers under the Appointments Clause. This Part explains how the evidence might inform contemporary policy debates.

Most immediately, the evidence changes the context in which debates about ambassadorial appointments occur. A longstanding dearth of systematic data collection forced critics of political appointments to rely on anecdotal evidence of underqualification and incompetence.<sup>212</sup> This rhetorical strategy always left room for an obvious retort: even if some political appointees are unqualified, many are fit for office.<sup>213</sup> But the collected evidence changes the dynamic by rendering incontrovertible a view that was previously impressionistic: political ambassadors are, as a group, significantly less qualified than career appointees under several metrics that Congress has deemed particularly important. By demonstrating as much, the research confirms that the occasional press reports on the underqualification of donor nominees are representative of broader trends.

In turn, the evidence is consistent with the possibility that a form of plutocratic corruption broadly infects ambassadorial appointments in the United States. In 1974, President Nixon's personal attorney, Herbert Kalmbach, pleaded guilty to promising a European ambassadorship to J. Fife Symington in return for a \$100,000 contribution to the election campaigns of Nixon and a collection of Senate Republicans.<sup>214</sup> The Senate Watergate Committee's final report highlighted this conviction along with "over \$1.8 million in Presidential campaign contributions" from fifty-four noncareer ambassadors in recommending strict limits on federal campaign contributions.<sup>215</sup>

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212. See, e.g., Weil, *supra* note 32, at 265–67.

213. See, e.g., Maza, *supra* note 206, at 47.

214. S. REP. NO. 93-981, at 492 (1974). Kalmbach pleaded guilty of violating § 202 of the Federal Election Campaign Act of 1971, which provided,

Whoever, directly or indirectly, promises any . . . appointment . . . as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Campaign Communications Reform Act, Pub. L. No. 92-225, § 202, 86 Stat. 3, 9 (1972) (codified at 18 U.S.C. § 600 (2018)).

215. S. REP. NO. 93-981, at 493–95, 567–68, 570–71 (1974). In present dollars, this amounts to a little less than \$9.5 million in contributions.



Congress later enacted these limits as amendments to the Federal Election Campaign Act of 1971,<sup>216</sup> but it is hard to avoid the impression that quid pro quo corruption continues to shape official practice.<sup>217</sup> Surely it is no coincidence that relatively unqualified financial supporters have received the vast majority of appointments to attractive destinations for global tourism.<sup>218</sup>

The evidence also suggests the complicity of the Senate. Diplomatic historian Elmer Plischke found that fewer than 3 percent of ambassadorial nominations from 1789 to 1975 failed to result in an appointment.<sup>219</sup> In more recent decades, the Senate has at times rejected or otherwise ended nominations. For instance, George Tsunis, an Obama donor and pick for ambassador to Norway, had to withdraw his nomination in 2014 in light of a disastrous confirmation hearing and considerable Senate opposition.<sup>220</sup> But such cases remain at roughly 3 percent of all nominations in recent decades, with only minimal variation from one administration to the next<sup>221</sup> and no signs of closer scrutiny for political nominees.<sup>222</sup> The evidence of eroding

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216. Federal Election Campaign Act of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 486.

217. See, e.g., David A. Fahrenthold, *Two Weeks After Trump Chose Him for Ambassador, Nominee Pledged Money for a Gala at Trump's Club*, WASH. POST (Feb. 22, 2018), [https://www.washingtonpost.com/politics/two-weeks-after-trump-chose-him-for-ambassador-nominee-pledged-money-for-a-gala-at-trumps-club/2018/02/22/596521f4-1806-11e8-b681-2d4d462a1921\\_story.html?utm\\_term=.2d8af020e685](https://www.washingtonpost.com/politics/two-weeks-after-trump-chose-him-for-ambassador-nominee-pledged-money-for-a-gala-at-trumps-club/2018/02/22/596521f4-1806-11e8-b681-2d4d462a1921_story.html?utm_term=.2d8af020e685) [<https://perma.cc/Q8CG-9985>].

218. See Fedderke & Jett, *supra* note 25, at 10 (reporting evidence of this correlation under the early years of the Obama administration).

219. PLISCHKE, UNITED STATES DIPLOMATS, *supra* note 39, at 48. Plischke purported to provide data for 1778 to 1975, but that is almost certainly an error, given that the Senate did not exist in 1778. See Senate Created: September 17, 1787, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Senate\\_Created.htm](https://www.senate.gov/artandhistory/history/minute/Senate_Created.htm) [<https://perma.cc/RSC7-SWV3>] (explaining that the Senate had its first quorum on April 6, 1789). Accordingly, I have described the Plischke data as covering the years of 1789 to 1975.

220. See Paul Richter, *Obama Donor George Tsunis Ends His Nomination as Norway Ambassador*, L.A. TIMES (Dec. 13, 2014), <https://www.latimes.com/world/europe/la-fg-norway-ambassador-nominee-withdraws-20141213-story.html> [<https://perma.cc/KKS8-ERFG>]; see also GERHARDT, *supra* note 16, at 189–93 (discussing examples of Senate opposition during the Clinton administration).

221. See *Ambassador Qualifications Data*, *supra* note 169 (reporting that forty-five nominations withdrawn, returned due to Senate recess and never renewed, or rejected, and that thirteen nominations resulted in recess appointments that the Senate never confirmed). The percentage of nominations that did not receive Senate confirmation was 1.4 percent under Reagan, 6.6 percent under Bush I, 4.7 percent under Clinton, 1.8 percent under Bush II, and 3.1 percent under Obama. *Id.*

222. *Cf. id.* (reporting that twenty-two of forty-five (49 percent) of unsuccessful nominations involved career members of the Foreign Service).

qualifications among those nominees raises questions about the wisdom of such deference.

The findings further suggest that the various legislative efforts to dissuade the president from nominating comparatively unqualified political supporters have not succeeded.<sup>223</sup> Recall that since 1980, federal law has explicitly stated that campaign contributions should not play a role in appointments, that nominees should generally demonstrate language abilities and country expertise, and that the president should normally fill ambassadorships with career members of the Foreign Service.<sup>224</sup> Given the absence of certificates of demonstrated competency prior to 1980, it is unclear whether this law effected an improvement over earlier practice. It is quite clear, however, that little improved from 1980 to 2018. If anything, the trends reported above suggest that the Foreign Service Act of 1980 has only become less effective over time, particularly during the past decade. The most recent evidence from the Trump administration underscores this conclusion.

There are two plausible consequences, neither salutary. First, the United States may encounter greater difficulty executing foreign relations. Lacking important qualifications now more than any other time in recent memory, political appointees may very well find it harder to communicate with foreign officials, know less about the politics and culture of receiving states and regions, and exhibit a diminished ability to navigate federal bureaucracy and lead embassy personnel. Important insights and opportunities will be missed. Gaffes will occur. Resources will be misused. Morale problems will intensify. And so forth. On a retail basis, none of these problems are overwhelming. But in aggregate and over time, they could materially disserve U.S. bilateral relationships.

Second, the eroding credentials of the donor class might contribute to the marginalization of diplomacy itself. By standard accounts, a substantial militarization of U.S. foreign policy commenced shortly after the Cold War and accelerated following the terrorist attacks of September 11, 2001.<sup>225</sup> Rather than invest in diplomacy and

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223. *See supra* Part II (discussing these reforms).

224. 22 U.S.C. § 3944(a) (2018).

225. ANDREW J. BACEVICH, *AMERICAN EMPIRE* 172–81 (2003); *see also generally* ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING* (Simon & Schuster 2016) (suggesting that this trend has accelerated in recent years); RONAN FARROW, *WAR ON PEACE: THE END OF DIPLOMACY AND THE DECLINE OF AMERICAN INFLUENCE* (2018) (suggesting the same).

civilian capacity to manage foreign affairs, successive administrations and Congresses have allocated vast new resources and functions to the armed forces. Thus, the Defense Department now plays a significant role in a wide range of traditionally civilian domains, such as development assistance.<sup>226</sup> Similarly, in a move that is likely to further mitigate a traditional advantage of the Foreign Service, the Army is now requiring a growing number of military units to develop regional expertise—including cultural and linguistic knowledge—in order to strengthen relationships with foreign partners and better respond to future crises.<sup>227</sup> Rosa Brooks has suggested that these developments are generating a self-perpetuating shift toward higher levels of militarization: as U.S. forces acquire new resources and skills to carry out new functions, civilian capacity atrophies, which in turn makes it easier to justify the allocation of even more resources to the military.<sup>228</sup>

Trends in ambassadorial qualifications might reflect and contribute to this phenomenon. Given the growing number of relatively unqualified political donors in senior diplomatic posts, it should come as no surprise if Washington begins to place more trust in nondiplomatic perspectives and solutions. With respect to Western Europe, for example, one can only imagine that it is difficult for political ambassadors—former daytime television producers, actors, businesspersons, and socialites—to prevail over senior NATO officers in the event of disagreement. The plausible effect is not only a marginalization of civil diplomacy, but also a diminished capacity even to imagine nonmilitary solutions to national security problems.<sup>229</sup> In these ways, the evidence presented above might strengthen the argument for reform.

To be sure, few would argue that a career in the Foreign Service is a strict prerequisite to an effective ambassadorship. A nominee might have acquired an aptitude for leadership, negotiation, and intercultural

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226. See generally BROOKS, *supra* note 225 (describing the shift from war being a temporary state of affairs to one that is constant and discussing the contemporaneous expansion of the role of the U.S. military in foreign policy).

227. See *id.* at 144–55 (discussing these programs); see also M. WADE MARKEL ET AL., RAND CORP., A PRELIMINARY ASSESSMENT OF THE REGIONALLY ALIGNED FORCES (RAF) CONCEPT'S IMPLICATIONS FOR ARMY PERSONNEL MANAGEMENT 9–15 (2015), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1000/RR1065/RAND\\_RR1065.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1000/RR1065/RAND_RR1065.pdf) [<https://perma.cc/QZ2S-QDQ4>] (reporting on implementation).

228. BROOKS, *supra* note 225, at 102.

229. See, e.g., Gordon Adams, *Does Mission Creep Matter?*, in MISSION CREEP: THE MILITARIZATION OF US FOREIGN POLICY? 258–59 (Gordon Adams & Shoon Murray eds., 2014) (discussing the risks of militarization).

communication, among other skills, without ever working for the federal government, much less the State Department, and history offers plenty of examples of successful noncareer appointees. To name just a few, Shirley Temple Black, Mike Mansfield, Edwin Reischauer, John Sherman Cooper, and Averell Harriman all came from outside the Foreign Service and earned considerable plaudits for their work.<sup>230</sup>

At the same time, there is evidence that political appointees exhibit a stronger tendency to underperform. Analyzing data compiled from nearly two hundred embassy inspection reports published by the State Department's Office of Inspector General ("OIG"), a recent study by Evan Haglund found that "politically appointed ambassadors perform worse generally than career diplomats, with a 10% reduction in performance score on average for political appointees compared to careerists."<sup>231</sup> Haglund also found that political appointees are associated with a significant reduction in the quality of an embassy's political and economic reporting.<sup>232</sup> These findings align with more general statistical evidence that federal programs administered by political appointees "get systematically lower [performance] grades than careerist-administered programs even when we control for differences among programs, substantial variation in management environment, and the policy content of programs themselves."<sup>233</sup>

Anecdotal evidence corroborates the point. Several of President Trump's political appointees, for example, have violated traditional diplomatic protocols or committed public gaffes that have hindered bilateral relations, even while comparable indiscretions seem harder to find among his career appointees.<sup>234</sup> One OIG report concluded that a political appointee to The Bahamas and major financial donor to President Obama presided over "an extended period of dysfunctional leadership and mismanagement, which . . . caused problems throughout the embassy."<sup>235</sup> Another report concluded that a donor who became ambassador to Denmark ran the embassy in a way that created

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230. Charles McC. Mathias, Jr., *Politics or Merit? A Senate Bill Introduced Late Last Year Limits the Number of Non-Career Ambassadors*, FOREIGN SERV. J., Apr. 1982, at 28, 29–30.

231. Haglund, *supra* note 25, at 672–73.

232. *Id.* at 674.

233. DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 182 (2008).

234. See Carol Morello, *Political Picks to Be U.S. Ambassadors Causing Headaches Abroad, at Home*, WASH. POST, June 8, 2018, at A8.

235. OFFICE OF INSPECTIONS, ISP-I-12-08A, INSPECTION OF EMBASSY NASSAU, THE BAHAMAS (2012), <https://oig.state.gov/system/files/184725.pdf> [<https://perma.cc/U4L6-CDK6>].

accountability and communication issues, in addition to gaps in strategic planning.<sup>236</sup> Still another found that Ambassador Cynthia Stroum—a political appointee to Luxembourg—caused numerous problems during her tenure.<sup>237</sup> Many of these were “linked to . . . an abusive management style,” but there was also a “chronic communications problem between the front office and the rest of the mission” due to Stroum’s lack of coordination and lack of confidence in her staff, which lead to a “near total absence of regular guidance and advance planning.”<sup>238</sup>

Why would political nominees tend to underperform in these ways? One potential explanation points to their general inferiority in language ability and experience in the receiving state, region, foreign policy, and organizational leadership. Under this possibility, the qualifications discussed in Part IV predict performance in office, and the gradual erosion of those qualifications among political nominees in recent decades has produced an increasingly deleterious effect on performance outcomes. If this hypothesis is correct, the solution is to nominate more individuals who possess the qualifications discussed in Part IV and to devote greater resources to training that enhances those qualifications among nominees who are deficient.

Unfortunately, there is close to zero empirical evidence on the specific traits that predict performance in office, and the limited evidence that exists is mixed: On the one hand, Haglund finds that an ambassador’s language ability correlates positively with his or her ability to facilitate interagency coordination.<sup>239</sup> On the other hand, he does not test for the effects of experience in the receiving state, foreign policy, or organizational leadership; he does not examine the effects of changes in qualifications over time; and he finds that regional experience has no effect on overall performance.<sup>240</sup> Meanwhile no other research has attempted to measure performance outcomes.

Such an empirical record leaves room for a second possibility: political nominees underperform because they are inferior in ways that

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236. OFFICE OF INSPECTIONS, ISP-C-12-20, COMPLIANCE FOLLOW-UP REVIEW OF EMBASSY COPENHAGEN, DENMARK 1 (2012), <https://www.stateoig.gov/system/files/187831.pdf> [<https://perma.cc/A5NX-M6NQ>].

237. OFFICE OF INSPECTIONS, ISP-I-11-17A, REPORT OF INSPECTION: EMBASSY LUXEMBOURG, LUXEMBOURG 1 (2011), <https://www.stateoig.gov/system/files/156129.pdf> [<https://perma.cc/QF23-R6NN>].

238. *Id.* at 5–6.

239. Haglund, *supra* note 25, at 673.

240. *Id.* at 672.

Congress has not specifically addressed. Under this possibility, political nominees are inferior not because they tend to lack experience in the receiving state or foreign policy, but rather because of other potential tendencies, such as a comparative lack of interest in international affairs, diplomacy, or public service. If this hypothesis is correct, the evidence collected in Part IV is largely unrelated to the performance deficit, and Congress needs to reconsider the factors that it has emphasized in the Foreign Service Act of 1980 and deliberations over individual nominees. Additional empirical research is needed to further elucidate whether and why political appointees tend to underperform.

## V. LEGAL REFORMS

For lawyers, the most interesting question is whether the law might facilitate a movement away from unqualified ambassadors. Conceivable reforms include acts of Congress to mandate qualifications, amendments to the rules of the Senate and the Senate Foreign Relations Committee, and statutory measures to improve transparency. This Part explores each of these categories and offers textual, historical, and functional analysis to contend that the Constitution permits legislative intervention.

### A. *Statutory Qualifications Requirements*

Members of Congress have made a number of attempts to regulate appointments since the early 1970s, when evidence surfaced that the Nixon administration had promised certain ambassadorships in exchange for campaign contributions from aspiring nominees.<sup>241</sup> In 1973, Representative Patsy Mink (D-HI) offered a bill to establish that anyone who “contributes more than \$5,000 to the political campaign of a Presidential candidate shall be ineligible to serve as an ambassador.”<sup>242</sup> Similarly, Senator Charles Mathias (R-MD) introduced multiple bills in the mid-1970s and early 1980s to require that career personnel in the Foreign Service fill at least 85 percent of all occupied ambassadorial posts.<sup>243</sup> And in 2008, several members of

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241. See *supra* notes 214–15 and accompanying text (discussing the conviction).

242. H.R. 11,151, 93d Cong. (1973). Adjusting for inflation, a similar requirement today would prohibit the nomination of anyone who contributes more than roughly \$28,000.

243. See 120 CONG. REC. 33,484 (1974) (proposing a requirement that “[a]t any time, not less than 85 per centum of the total number of positions of ambassador which are occupied shall be career personnel in the Foreign Service”); see also S. 1886, 97th Cong. (1981) (proposing the

the House of Representatives introduced a bill to impose a set of minimum qualification requirements.<sup>244</sup>

At least some of these proposals garnered enthusiastic support from the American Foreign Service Association,<sup>245</sup> but each failed due to a combination of policy objections from the executive branch and constitutional concerns. The Nixon administration, for example, opposed one of Senator Mathias's bills on the view that a quota would make it harder for the president to choose the individual most qualified for any given post.<sup>246</sup> Meanwhile, the executive branch and even some members of the Senate have at times suggested that restrictions would violate the Appointments Clause.<sup>247</sup> The rest of this Section identifies the most persuasive arguments against the constitutionality of statutory qualifications requirements, contends that those arguments are far less persuasive than many critics have assumed, and proposes several ways for Congress to mitigate the risk of constitutional infirmity in regulating ambassadorial qualifications.

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same); S. 202, 94th Cong. (1975) (proposing the same); 122 CONG. REC. 8426 (1976) (proposing the same).

244. See H.R. 6742, 110th Cong. § 2 (2008). The bill proposed the following as being necessary for eligibility:

- (i) Unquestioned integrity, personal discretion, and self-discipline.
- (ii) Demonstrated interest, understanding, and experience in foreign affairs and foreign cultures of the assigned region.
- (iii) Thorough knowledge of United States history and thorough knowledge of and commitment to United States values and economic, commercial, and political purposes.
- (iv) Appreciation of the dynamics of United States politics, including the role and limitations of Congress and the executive branch.
- (v) Intellect, perception, and interpersonal skills required to communicate effectively with the host country, including the ability to explain persuasively to foreign governments and publics the United States' position on a particular issue, and with the American people, and to recommend appropriate policies to the President and Secretary of State.
- (vi) Demonstrated efficiency as a leader, manager, and executive, and demonstrated sound judgment and strength of character to lead United States diplomatic and consular missions abroad and to command attention and respect in the United States.

*Id.*

245. See, e.g., 119 CONG. REC. 38,609–10 (Nov. 29, 1973) (letter from Thomas D. Boyatt, Chairman, Board of Directors of the American Foreign Service Association).

246. See, e.g., *id.* at 38,608–09 (letter from Kenneth Rush, Acting Secretary of State).

247. See, e.g., *Nomination of Nathaniel Davis to be Assistant Secretary of State for African Affairs: Hearing Before the S. Committee on Foreign Relations*, 94th Cong. 78 (1975) (statement of Nathaniel Davis); 135 CONG. REC. 22,605 (1989) (statement of Sen. Jesse Helms); 119 CONG. REC. 19,293 (1973) (statement by Rep. John B. Anderson); see also Moeller, *supra* note 32, at 223 (discussing constitutional concerns).

1. *The Source of Congressional Power.* The “power of Congress to specify qualifications for a particular office is generally understood to be incident to its constitutional authority to establish the office.”<sup>248</sup> Pursuant to this understanding, it is widely accepted that Congress can limit eligibility for a broad range of offices, such as Solicitor General<sup>249</sup> and Administrator of the Federal Emergency Management Agency,<sup>250</sup> because Congress holds the power to create them.

But what about ambassador? Can Congress create that office as well? Commentators have not addressed this question,<sup>251</sup> but it is important. Given the traditional view that the lesser power to prescribe qualifications flows from the greater power to create the office itself,<sup>252</sup> qualifications requirements for ambassadorial appointments are likely to be constitutional only if Congress holds power to create the office of ambassador. For insight on this issue, I evaluate standard indicia of constitutional meaning: text, original meaning, and historical practice.

*Text.* In relevant part, the Appointments Clause provides as follows:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other

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248. HENRY B. HOGUE, CONG. RESEARCH SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 3 (2015); *see also* *Bowsher v. Synar*, 478 U.S. 714, 740 (1986) (Stevens, J., concurring) (stating that “it is entirely proper for Congress to specify the qualifications for an office that it has created”); E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 201–05 (2018) (making this argument).

249. 28 U.S.C. § 505 (2018) (“The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.”).

250. 6 U.S.C. § 313(c)(2) (2018) (“The Administrator [of FEMA] shall be appointed from among individuals who have—(A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.”).

251. The full extent of legal academic commentary on ambassadorial appointments consists of two short notes from the 1980s and 1990s. *See generally* Moeller, *supra* note 32 (exploring the implications of a bill to require that at least 85 percent of ambassadorships be held by career members of the Foreign Service); Weil, *supra* note 32 (explaining the ambassadorial appointments process). Those publications offer helpful insights, but do not address whether Congress has power to create ambassadorships.

252. *See supra* note 248 (citing authority).



Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law . . . .<sup>253</sup>

The effect of this language in context seems to be that congressional authority to create the office of ambassador depends on the validity of three propositions: (1) The conferral of power to “appoint Ambassadors” does not itself create or grant to the president the power to create the office, and thus implicitly preclude Congress from doing so. (2) No other language in the Constitution empowers the president or, less plausibly, the judiciary to create ambassadorships. And (3) the phrase “which shall be established by Law” or other language in the Constitution affirmatively grants Congress power to create the office.

The first proposition may or may not be persuasive. On the one hand, there is in principle a distinction between the power to appoint and the power to create the office to which an appointment will be made. Indeed, the Appointments Clause explicitly recognizes as much by granting the president power to “appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>254</sup> This language contemplates not only a distinction between office-appointment and office-creation, but also a separation of these powers, with one held by the president and the other by Congress.<sup>255</sup> As long as that distinction extends to ambassadorial appointments, the grant of the mere power to “appoint Ambassadors” neither creates the office nor authorizes the president to do so.<sup>256</sup> On the other hand, it is conceivable that the Appointments Clause establishes the office in a slightly different way— not by specifying the process for appointments, but instead by using “Ambassadors” as a term of art that recognizes or incorporates by reference a preexisting body of law that has already created the office of ambassador. As I will explain below, early official practice embraced precisely this view, while modern practice rejects it.

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253. U.S. CONST. art. II, § 2. This is the only relevant part of the Appointments Clause because “Ambassadors” are enumerated as a type of principal officer, and thus cannot be “inferior Officers.” *Id.*

254. *Id.*

255. *See, e.g.,* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 117 (2007) (“The Appointments Clause does provide that offices not recognized by the Constitution itself ‘shall be established by Law,’ thus lodging in Congress ultimate authority over the creation of most offices.” (quoting U.S. CONST. art. II, § 2)).

256. U.S. CONST. art. II, § 2, cl. 2.

In contrast, the second proposition seems clearly persuasive. Outside of the Appointments Clause, the word “Ambassadors” appears in the Reception Clause of Article II, which provides that the president “shall receive Ambassadors and other public Ministers,”<sup>257</sup> and in Article III, which provides that the “judicial Power shall extend . . . to all Cases affecting Ambassadors”<sup>258</sup> and that “[i]n all Cases affecting Ambassadors . . . the supreme Court shall have original Jurisdiction.”<sup>259</sup> But no one argues that any of this language creates or grants power to create the office of ambassador, and the reasons are straightforward: The Reception Clause refers only to ambassadors from foreign states,<sup>260</sup> and Article III concerns itself with the federal judiciary. While it is possible that Article III creates the office of Supreme Court Justice,<sup>261</sup> that part of the Constitution is hardly a sensible place to create a diplomatic office responsible for a classic executive function.<sup>262</sup> Moreover, like the Reception Clause, Article III contemplates ambassadors from foreign states.<sup>263</sup>

Some might contend that the Article II Vesting Clause empowers the president to create ambassadorships by conferring upon him or her the “executive Power.”<sup>264</sup> Yet by assigning to Congress the role of creating most federal offices, the Appointments Clause suggests that the Framers generally understood office-creation as something other than a form of executive power.<sup>265</sup> Chief Justice John Marshall stated as much while riding circuit in the 1823 case of *United States v. Maurice*.<sup>266</sup> Confronted with a question about whether the president

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257. U.S. CONST. art. II, § 3.

258. *Id.* art. III, § 2.

259. *Id.*

260. *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (interpreting the Clause in this manner).

261. *See* James Durling & E. Garrett West, Appointments Without Law 21–22 (2019) (unpublished manuscript) (on file with author) (making this argument).

262. *See generally* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (collecting evidence of an original understanding that the concept of “executive power” includes the power to conduct diplomacy).

263. *See* Debates in the Convention of the Commonwealth of Virginia, in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 570 (Jonathan Elliot ed., 2d ed. 1836) (explaining that the purpose of granting federal jurisdiction over cases affecting ambassadors was to “perpetuate harmony between [the United States] and foreign powers” and ensure that the federal government “judges how the United States can be most effectually secured and guarded against controversies with foreign nations”).

264. U.S. CONST. art. II, § 1.

265. *Id.* art. II, § 2, cl. 2.

266. *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823).

could create the office of “agent of fortifications,” Marshall concluded that he could not; the Appointments Clause does not “leav[e] it in the power of the executive, or of those who might be entrusted with the execution of the laws, to create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.”<sup>267</sup> Instead, the Clause is best “understood to declare, that all officers of the United States, except in cases where the constitution itself may otherwise provide, shall be established by [Congress].”<sup>268</sup> This view accords with recent scholarship. Julian Davis Mortenson, for example, has argued that the Vesting Clause provides nothing more than the “power to execute the law,”<sup>269</sup> and even much more expansive interpretations include no suggestion that it confers the power to create ambassadorships, as opposed to the related but nevertheless conceptually distinct power to conduct diplomacy.<sup>270</sup> It thus seems unpersuasive to argue that the Constitution assigns to the president the power to create this office.<sup>271</sup>

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267. *Id.* at 1213.

268. *Id.* at 1214.

269. Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1174–75 (2019) .

270. See generally Prakash & Ramsey, *supra* note 262 (examining the original understanding of “executive Power” and concluding that the Vesting Clause confers a variety of powers related to foreign policy).

271. In a 1996 opinion on whether the Ineligibility Clause prohibits the president from nominating a member of the House of Representatives to serve as ambassador to Vietnam, the Justice Department’s Office of Legal Counsel (“OLC”) concluded that “the President has the inherent, constitutional power to create diplomatic offices such as ambassadorships, without any need for statutory authorization.” *Nomination of Sitting Member of Congress to be Ambassador to Vietnam*, 20 Op. O.L.C. 284, 286 (1996). Yet as far as I can tell, no other authority has ever taken this position. In fact, even the historical sources on which OLC relied concluded that the law of nations—not the president—creates ambassadorships. See *id.* at 286–92. OLC cited to the third edition of Louis Fisher’s *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (1991) for additional support, but Fisher never stated that the president creates ambassadorships. Instead, he explained simply that “[i]n two opinions in 1855 Attorney General Cushing concluded that ambassadors, public ministers, and consuls are officers created by the Constitution, not by acts of Congress,” and that “[e]ven in the absence of statutory authority, a President (with the advice and consent of the Senate) may appoint diplomatic officers.” LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 39 (3d ed. 1991). To interpret this explanation as support for the notion that the president “creates” ambassadorships, one would have to conflate office-appointment and office-creation—two acts that the Appointments Clause clearly distinguishes, as explained above. See *supra* page 154 and notes 254–56. Moreover, Fisher removed the language OLC quoted in its 1996 opinion from subsequent editions of his book, even while retaining the surrounding text. See LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 37 (4th ed. 1997); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 37 (5th ed. 2007). This raises the possibility that Fisher disagrees with the way that OLC cited him.

But what about the third proposition? Does the Constitution empower Congress to create ambassadorships? It is widely accepted that the Appointments Clause's use of the phrase "shall be established by Law" confers on Congress the power to create certain federal offices by statute,<sup>272</sup> so the central question is whether that phrase applies to the office of ambassador. One conceivable reading is that it does—"shall be established by Law" reaches back to the very beginning of the Clause to characterize not only the appointments of "all other Officers of the United States," but also those of "Ambassadors, other public Ministers and Consuls" and "Judges of the supreme Court."<sup>273</sup> The other conceivable reading is that it does not—the Clause mandates not that every enumerated type of principal-officer appointment "shall be established by Law," but instead that the appointments of "all . . . Officers of the United States" *other than* "Ambassadors, other public Ministers and Consuls" and "Judges of the supreme Court" shall be so established.<sup>274</sup>

One important clue in deciding between these possibilities is the presence of the word "and" in the phrase "and which shall be established by Law."<sup>275</sup> That conjunction indicates that the modifier of "shall be established by Law" does not operate alone, but rather in tandem with another. The other modifier is almost certainly the immediately preceding phrase "whose Appointments are not herein otherwise provided for," which is the only other option nearby.<sup>276</sup> Thus, if the first of these applies to an enumerated category of principal officer, so does the second. In other words, Congress holds power to "establish" appointments to a principal office "by Law" only if those appointments are not "otherwise provided for" in the Constitution itself. From this perspective, the issue is whether the Appointments

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272. See Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 255, at 117 ("The Appointments Clause does provide that offices not recognized by the Constitution itself 'shall be established by Law,' thus lodging in Congress ultimate authority over the creation of most offices."); Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107, 128 n.48 (2009) [hereinafter Tillman, *Why Our Next President May Keep His or Her Seat*] (collecting authority in support of this interpretation).

273. See Tillman, *Why Our Next President May Keep His or Her Seat*, *supra* note 272, at 128 n.47 (making this argument).

274. Cf. Durling & West, *supra* note 261, at 9 (making this argument in support of the view that the president can appoint Supreme Court Justices without statutory authorization); Prakash & Ramsey, *supra* note 262, at 309 n.336 (suggesting that this is one possible interpretation of the Appointments Clause).

275. U.S. CONST. art. II, § 2, cl. 2.

276. *Id.*

Clause limits the application of the tandem modifiers to the category of officers that directly precedes them (“all other Officers of the United States”), or whether the Clause instead provides that the president “shall . . . appoint Ambassadors, . . . whose appointments are not herein otherwise provided for, and which shall be established by Law.”

The answer hinges in part on the meaning of “provided for.” On the one hand, it may seem plausible that the Constitution “provide[s] for” appointments whenever it prescribes the process for making them. In such cases, after all, the Constitution will have helped to make the appointments possible by clarifying who holds the power to choose among potential candidates for office. From this perspective, the Constitution provides for ambassadorial appointments simply by stating that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors.”<sup>277</sup> And from there, it would follow that ambassadorial appointments are *not* “not . . . provided for,” that the other half of the modifying tandem is also inapplicable, and that Congress therefore lacks the power to create the underlying office of ambassador.

Yet on closer scrutiny, “provided for” seems more likely to carry a different meaning. Given the distinction between office-appointment and office-creation,<sup>278</sup> a constitutional text that does nothing more than prescribe the process for making an appointment is woefully incomplete, as it leaves the indispensable step of office-creation entirely unachieved. The more complete way of providing for an appointment is to address office-creation and set forth the process for selecting officers. From this perspective, the Constitution does not provide for any given category of appointments unless it accomplishes both.

The virtue of this latter interpretation is that it creates a sensible relationship between the office-creating powers of Congress and the Constitution’s office-creating effects: the Appointments Clause empowers Congress to create principal offices to the extent that the Constitution does not itself create those offices. If, in contrast, the Constitution were to “provide[] for” appointments simply by setting forth the process for filling offices that may or may not exist, the Appointments Clause could very well withhold office-creating powers from Congress precisely when those powers are needed most—that is, when the Constitution specifies the process for filling but fails to create

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277. *Id.*

278. *See supra* page 150 (making this argument).

an office, and thus necessitates office-creating legislation. That would be an unacceptable result.

If we grant, then, that the Constitution “provide[s] for” appointments only in the narrower circumstances where it both attends to the existence of an office and specifies the process for making an appointment, the next question is whether the Constitution provides specifically for ambassadorial appointments. As explained above, that is an issue of uncertainty: The distinction between office-appointment and office-creation means that the Appointments Clause is unlikely to create the office simply by prescribing the process for ambassadorial appointments. But as also stated above, it is conceivable that the Appointments Clause establishes the office by using “Ambassadors” as a term of art that recognizes or incorporates by reference a preexisting body of law that has already created the office of ambassador. On this view, the effect is no different than if the Constitution had created the office on its own: ambassadorial appointments are not “not . . . provided for” in any sense, and Congress lacks authority to enact office-creating legislation. In contrast, if the use of the term “Ambassadors” does not recognize or incorporate by reference a preexisting body of office-creating law, then it is likely that the Constitution does not “provide[] for” ambassadorial appointments, and the argument for congressional power to create the office gains considerable strength. As I will explain, differing views on this issue appear to have driven a shift in official practice over time.

Finally, although there is uncertainty about whether the Constitution provides for ambassadorial appointments, the application of the tandem modifiers to ambassadors is otherwise consistent with common canons of construction. It is consistent with the so-called “series-qualifier canon,” which holds that “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.”<sup>279</sup> As Seth Barrett Tillman has pointed out,<sup>280</sup> it is also consistent with the “rule of the last antecedent,” which admits that while “a limiting clause or phrase . . . should *ordinarily* be read as modifying only the noun or phrase that it immediately follows,”<sup>281</sup> a

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279. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012).

280. See Tillman, *Why Our Next President May Keep His or Her Seat*, *supra* note 272, at 127 n.47.

281. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (emphasis added).

contrary interpretation is permissible when, as here, a comma separates the modifying phrase from the antecedent.<sup>282</sup> These canons strengthen the textual basis for Congress to create ambassadorships by statute.<sup>283</sup>

Putting aside the Appointments Clause, those who oppose statutory qualifications requirements must also establish that the Necessary and Proper Clause provides no basis for legislation, even though the Clause permits Congress to “make all Laws which shall be necessary and proper for carrying into Execution [Article I] Powers, and all other Powers vested by th[e] Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>284</sup> One conceivable justification for such a position is the “ancient interpretive principle” of *generalia specialibus non derogant*, which calls for interpreters to resolve a conflict between a general provision and a specific provision in favor of the specific.<sup>285</sup> Because the Appointments Clause is more specific to the topic of diplomatic appointments than the Necessary and Proper Clause, some might invoke the principle to contend that the Appointments Clause should be dispositive: if the Appointments Clause excludes ambassadorships from the collection of offices that Congress can create, then the Necessary and Proper Clause must honor that exclusion.

But there seems to be a persuasive response. For one, the *generalia specialibus* canon disfavors congressional power only if we presuppose that the Appointments Clause removes ambassadors from the office-creating powers of Congress. As discussed above, that argument is contestable. In addition, if Article II’s mere vesting of the power to

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282. Compare NORMAN J. SINGER & SHAMBIE SINGER, 2A STATUTES & STATUTORY CONSTRUCTION § 47:33, at 494–501 (7th rev. ed. 2014) (“A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.”), with U.S. CONST. art. II, § 2, cl. 2 (providing that the president shall, with the advice and consent of the Senate, 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”).

283. Even scholars who have otherwise adopted generous interpretations of executive power acknowledge this as a possibility. See, e.g., Prakash & Ramsey, *supra* note 262, at 309 n.336 (noting uncertainty regarding the issue).

284. U.S. CONST. art. I, § 8, cl. 18; see also Buckley v. Valeo, 414 U.S. 1, 138 (1976) (“Congress may undoubtedly under the Necessary and Proper Clause create ‘offices’ in the generic sense . . .”).

285. See, e.g., Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012) (applying the canon to interpret a statute).

“appoint” ambassadors does not implicitly create ambassadorships,<sup>286</sup> and if no other form of nonstatutory law creates these offices, then advocates of legislative restrictions on appointments might argue that an act of Congress creating the office of ambassador is necessary and proper as a condition precedent to the execution of presidential and senatorial powers under the Appointments Clause; it is impossible, after all, to appoint someone to an office that does not exist.<sup>287</sup> From here as well, it follows that Congress has constitutional authority to establish the office and impose statutory limits on eligibility,<sup>288</sup> just as it has with respect to Solicitor General, Administrator of the Federal Emergency Management Agency, and numerous other offices dating back to the Founding.<sup>289</sup>

In short, the textual argument against congressional power is far from conclusive. It is reasonable, but there are comparably reasonable counterarguments that favor Congress. In this context, it is helpful to turn to official practice as other evidence of meaning.<sup>290</sup> As I will show,

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286. U.S. CONST. art. II, § 2, cl. 2.

287. On this reasoning, ambassadorship-creating legislation would survive any interpretation of the word “necessary” in the Necessary and Proper Clause. *Compare, e.g.,* *United States v. Comstock*, 560 U.S. 126, 134 (2010) (“We have . . . made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”), *with* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 751–56 (1997) (discussing evidence that a number of Framers, including James Madison and Thomas Jefferson, understood “necessary” to mean strictly necessary).

288. *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 740 (1986) (Stevens, J., concurring) (“[I]t is entirely proper for Congress to specify the qualifications for an office that it has created . . .”); West, *supra* note 248, at 201 (“Congress’s complete authority over office creation should generally include the lesser authority to impose conditions on offices.”).

289. *See* *Myers v. United States*, 272 U.S. 52, 265–74 (1926) (Brandeis, J., dissenting) (collecting over two hundred examples of statutes that impose qualifications requirements on appointments to federal office).

290. It is not uncommon for the Supreme Court to look to historical practice to help resolve uncertainty in the separation of powers. *See, e.g.,* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (relying heavily on historical practice to interpret the meaning of the Recess Appointments Clause). Among scholars, there are marginal disagreements about when historical practice can qualify as an input in constitutional interpretation, but most seem to accept the general legitimacy of this method. *See, e.g.,* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019) (arguing that, in James Madison’s view, official practice can inform the meaning of the Constitution when that meaning is otherwise indeterminate, there is a deliberate course of practice reflecting constitutional interpretation, and the practice gains official acquiescence and public sanction); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 105 VA. L. REV. (forthcoming 2019) (manuscript at 22) (on file with the *Duke Law Journal*) (arguing that “when the Constitution is perceived to be unclear or



the historical sources reveal a marked shift in understanding from the Founding through the twentieth century. This shift offers substantial support for congressional action.

*Original Meaning and Early Practice.* Consider again the possibility that Congress lacks power to create ambassadorships. The dominant—if somewhat curious and underappreciated—view and practice from the Founding to the late nineteenth century holds that while the Constitution creates some offices, such as the presidency, and while statutes create a variety of others, such as the office of the Solicitor General, *neither* creates diplomatic offices. Instead, that task falls to the law of nations—a historical body of legal authority that loosely corresponds with contemporary international law.<sup>291</sup>

Striking though it may seem, the evidence of this view is substantial. To begin, early presidential administrations dispatched a significant number of diplomats to Western European states in the first several decades after the Founding,<sup>292</sup> and early Congresses enacted legislation to pay the salaries of those agents,<sup>293</sup> but those same Congresses did not pass any legislation to create the underlying offices.<sup>294</sup> In fact, President George Washington appointed William Short as chargé d'affaires in France even before the First Congress

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indeterminate as it relates to the separation of powers, longstanding governmental practices that have proven to be stable [can be] consulted to inform constitutional interpretation”).

291. See ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* 1 (2017) (explaining that, “[a]t the founding, the law of nations was a body of law that was understood to arise variously from custom and practice, natural law, and mutual compacts and conventions,” and that this body “had three distinct branches—the law merchant, the law of state-state relations, and the law maritime”); see also Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 U.C.L.A. L. REV. 1487, 1526-27 (2005) (discussing the Founding-era view that diplomatic offices were “not thought to be the exclusive creation of federal law,” but instead “were viewed as being established under the Constitution or possibly under international law”).

292. See, e.g., S. EXEC. JOURNAL, 4th Cong., 1st Sess. 213 (1796) (reporting the nomination and confirmation of John Quincy Adams as minister plenipotentiary at Lisbon); S. EXEC. JOURNAL, 3d Cong., 1st Sess. 157 (1794) (reporting the nomination and confirmation of James Monroe as minister plenipotentiary at Paris); S. EXEC. JOURNAL, 2d Cong., 1st Sess. 92-96 (1791) (reporting the nomination and confirmation of Thomas Pinckney as minister plenipotentiary at London).

293. See, e.g., Act of July 1, 1790, Ch. XXII, Sec. 1, 1 Stat. 128, 128-29 (providing that “the President shall not allow to any minister plenipotentiary a greater sum than at the rate of nine thousand dollars per annum, as a compensation for all his personal services and other expenses”).

294. See Nomination of Sitting Member of Congress to be Ambassador to Vietnam, *supra* note 271, at 287 (acknowledging this history).

created the Department of Foreign Affairs,<sup>295</sup> and Congress did not purport to create its first ambassadorship until the twentieth century.<sup>296</sup> In a letter to George Washington, Charles Thomson, the Secretary of the Continental Congress from 1774 to 1789, made explicit what the early practice implied: “ambassadors, other public ministers and consuls” are “officers recognized by the Constitution & the existence of whose offices *does not depend on, or require a law for their establishment.*”<sup>297</sup>

Of course, evidence that early sessions of Congress avoided creating diplomatic offices does not necessarily demonstrate an understanding that the law of nations does the job itself. But influential figures from the Founding took precisely this position. For example, in an 1822 letter to James Monroe, James Madison wrote that “the practice of the Govt had from the beginning been regulated by the idea that the places or offices of Pub. Ministers” — a category that includes ambassadors<sup>298</sup> — “existed under the law & usages of Nations, and were always open to receive appointments as they might be made by competent authorities.”<sup>299</sup> Monroe responded that Madison’s “view of the Constitution, as to the powers of the Executive in the appointment of public Ministers, is in strict accord with my own, and is, as I understand, supported by numerous precedents, under successive administrations.”<sup>300</sup> As if to underscore the point, Madison wrote several years later that the “place of a foreign minister or consul is not an office in the constitutional sense of the term” because it “is not created by the Constitution” and “is not created by a law authorized

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295. Compare S. EXEC. JOURNAL, 1st Cong., 1st Sess. 6–7 (1789) (reporting the June 16 nomination and June 18 confirmation of William Short as *chargé d'affaires* at London), with Act of July 27, 1789, ch. IV, 1 Stat. 28 (creating the Department of Foreign Affairs).

296. See *infra* note 308 and accompanying text.

297. Letter from Charles Thomson to George Washington (May 19, 1789), in 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 334–41 (Dorothy Twohig ed., 1987) (emphasis added).

298. U.S. CONST. art. II, § 2, cl. 2 (providing that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, *other* public Ministers and Consuls” (emphasis added)); see also Ryan M. Scoville, *Ad Hoc Diplomats*, 68 DUKE L.J. 907, 940–47 (2019) [hereinafter Scoville, *Ad Hoc Diplomats*] (explaining the original understanding of the relationship between ambassadors and public ministers).

299. Letter from James Madison to James Monroe (May 6, 1822), in 9 WRITINGS OF JAMES MADISON 91–93 (Gaillard Hunt ed., 1910).

300. Letter from James Monroe to James Madison (May 10, 1822), in 6 WRITINGS OF JAMES MONROE 285 (Stanislaus Murray Hamilton ed., 1902).

by the Constitution,” but it is instead “created by the law of nations, to which the United States, as an independent nation, is a party.”<sup>301</sup>

In general, early members of Congress appear to have agreed. For example, in 1796, members of the House of Representatives debated a bill providing for the appointment of agents to travel abroad to obtain the release of American sailors who had been impressed or detained by the British.<sup>302</sup> Some of the members opposed this legislation on the ground that it was unnecessary and unconstitutional.<sup>303</sup> In their view, the agents in question qualified as “public Ministers”—a category of officers whose appointments do not depend on office-creating legislation from Congress.<sup>304</sup> Others agreed that office-creating legislation is unnecessary for public-ministerial appointments, but nevertheless concluded that the legislation *was* necessary because the agents in question would *not* qualify as public ministers.<sup>305</sup> In short, everyone agreed that office-creating legislation is inappropriate with respect to diplomatic offices, and simply disagreed on whether the agents in question would occupy offices of that character. Only after accepting the argument that the agents would not be “public Ministers” did a majority pass the legislation in question.<sup>306</sup>

A similar understanding appeared in other debates as well. In 1812, for instance, the fabulously named and mysterious<sup>307</sup> Senator Outerbridge Horsey explained that the office of “public Minister . . . is an office wholly different from the ordinary offices created by the Constitution or by law” as it is “not created by the Constitution, nor by any municipal law, but emanates from the laws of nations and is common to all civilized Governments.”<sup>308</sup> And in 1826, Representative Daniel Webster emphasized that “the office of a public minister is not

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301. Power of the President to Appoint Public Ministers & Consuls in the Recess of the Senate, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350 (J.B. Lippincott & Co. ed., 1865).

302. 5 ANNALS OF CONG. 802–20 (1796).

303. *Id.* at 802, 812 (statements of Rep. Coit).

304. *Id.* at 812.

305. *Id.* at 803 (statement of Rep. Livingston); *id.* at 813 (statement of Rep. Madison).

306. *Id.* at 820.

307. See *Delaware’s Lost Senator: The Mystery of Outerbridge Horsey*, DOVER POST (Aug. 10, 2018, 1:00 PM), <https://www.doverpost.com/news/20180810/delawares-lost-senator-mystery-of-outerbridge-horsey?rssfeed=true> [<https://perma.cc/2H5Z-4ZHJ>] (reporting that there are only forty-five senators in U.S. history for whom there is no photo or illustration in the Senate’s historical archives, and that Senator Horsey is one of them).

308. 26 ANNALS OF CONG. 711–12 (1812).

created by any statute or law of our own government: it exists under the law of nations, and is recognized as existing by our constitution.”<sup>309</sup>

The Supreme Court also endorsed this position in the nineteenth century. In the 1854 case of *Goodrich v. Guthrie*,<sup>310</sup> the Court explained in dicta that “[a]ll offices under the government of the United States are created, either by the law of nations, such as ambassadors and other public ministers, or by the constitution and the statutes.”<sup>311</sup> Likewise, in the 1890 decision of *In re Baiz*,<sup>312</sup> the Court suggested that the references to “Ambassadors, other public Ministers and Consuls” in the Appointments Clause “are descriptive of a class existing by the law of nations, and apply to diplomatic agents. . . .”<sup>313</sup> Lower courts followed suit.<sup>314</sup>

So did the executive branch. In an 1855 opinion,<sup>315</sup> Attorney General Caleb Cushing interpreted an act of Congress as nonbinding even though it purported to mandate diplomatic appointments of particular grades to specific countries.<sup>316</sup> According to Cushing, such an interpretation was necessary to avoid finding the act unconstitutional, as the “power to make [diplomatic] appointments is not derived from, and cannot be limited by, any act of Congress.”<sup>317</sup> In his view, the Constitution “authorizes the nomination and appointment to offices of a diplomatic character, existing *by virtue of international laws*, that is,

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309. 7 REG. DEB. 642 (Feb. 8, 1831) (quoting 2 REG. DEB. 2255 (1826) (statement of Rep. Webster)); *see also*, e.g., 26 ANNALS OF CONG. 699 (1814) (statement of Senator Bibb) (“Ambassadors, other public Ministers and Consuls . . . depend for their original existence upon no law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules . . .”).

310. *United States ex rel. Goodrich v. Guthrie*, 58 U.S. 284 (1854).

311. *Id.* at 290–91.

312. *In re Baiz*, 135 U.S. 403 (1890).

313. *Id.* at 419 (emphasis added). To be sure, *In re Baiz* was not, strictly speaking, a case about the Appointments Clause. The central question concerned the meaning of a statute, and that statute rested exclusively on Article III’s grant of original jurisdiction to the Supreme Court in “all cases affecting Ambassadors, other public Ministers and Consuls.” *Id.* at 417 (quoting U.S. CONST. art. III, § 2). Yet the Court suggested that references to “ambassadors” in the statute and throughout the Constitution carry the same meaning—and refer to offices that come into existence in the same way. *In re Baiz*, 135 U.S. at 419. On this view, evidence of statutory meaning is evidence of constitutional meaning and vice versa. *Id.* at 419–25.

314. *See, e.g.*, *Francis v. United States*, 22 Ct. Cl. 403, 405 (1887) (“Most offices of the Government are established by general laws, except in the diplomatic service, and all salaries are fixed in like manner.”).

315. *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att’y Gen. 186, 186 (1855).

316. *Id.*

317. *Id.*

not depending for existence on acts of Congress.”<sup>318</sup> Opinions from the Justice Department have articulated the same position on two other occasions.<sup>319</sup>

The result of the law-of-nations view would be that congressional power to create diplomatic offices disappears; the Appointments Clause fades as a plausible basis for legislative intervention because Congress cannot reasonably claim to “establish[] by Law” an office that exists by virtue of international society and is incorporated by reference in Article II.<sup>320</sup> In addition, the Necessary and Proper Clause becomes unhelpful because the power to create the office of ambassador ceases to be a “foregoing Power[]” in Article I or a power that is “vested by th[e] Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>321</sup> Instead, that power is held by the authors of the law of nations—the international community of states. Whether through treaty-making or the promotion of certain practices as customary, the United States could in theory work to influence that community and thus international law pertaining to the office of ambassador,<sup>322</sup> but it cannot create—or eliminate—the office on its own any more than it can unilaterally

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318. *Id.* at 207 (emphasis in original).

319. *See* Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 255, at 117 n.17 (“The President has authority to appoint to diplomatic offices without an authorizing act of Congress, because the Constitution itself expressly recognizes such offices under the law of nations.”); Office—Compensation, 22 Op. Att’y Gen. 184, 186 (1898) (explaining that the offices of “ambassadors, other public ministers and consuls” were “adopted from the law of nations, and exist independently of statute or treaty”).

320. U.S. CONST. art. II, § 2, cl. 2.

321. *Id.* art. I, § 8, cl. 18.

322. The principal contemporary authority on diplomatic offices under international law is the Vienna Convention on Diplomatic Relations. *See* Vienna Convention on Diplomatic Relations art. 14, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (providing for three classes of heads of mission—(1) “ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank”; (2) “envoys, ministers and internuncios, accredited to Heads of State”; and (3) “chargés d’affaires accredited to Ministers for Foreign Affairs”). But the concept of “ambassador” has existed for centuries. *See, e.g.*, 2 ALBERICO GENTILI, DE LEGATIONIBUS LIBRI TRES 14 (Gordon J. Laing trans., 1924) (discussing the types of ambassadors that sovereigns dispatched circa 1585).

establish global rules pertaining to human rights or the use of force.<sup>323</sup> In turn, Congress also cannot prescribe qualifications.<sup>324</sup>

Possibly reflecting this view, certain provisions of the Foreign Service Act of 1980—the most important enactment on the modern diplomatic personnel system—clearly shy away from qualifications requirements. Section 301 instructs the Secretary of State to prescribe examinations for prospective appointees to the Foreign Service, but this mandate applies only to appointments “other than as a chief of mission or ambassador at large.”<sup>325</sup> In addition, § 304 states that an individual

appointed . . . to be a chief of mission *should* possess clearly demonstrated competence to perform the duties of a chief of mission, including, to the maximum extent practicable, a useful knowledge of the principal language or dialect of the country in which the individual is to serve, and knowledge and understanding of the history, the culture, the economic and political institutions, and the interests of that country and its people.<sup>326</sup>

If Congress possesses power to create ambassadorships and mandate qualifications, it is curious that it has declined to do so here.

*Modern Practice.* The historical record since the Founding is far from uniform. Evidence of the law-of-nations view essentially disappears around the late 1800s. Courts stopped invoking it. Members of Congress no longer discussed it. And for the most part, neither did the executive branch. Indeed, the only official reference to the law-of-nations view in over one hundred years appears in a 2007 opinion from the Justice Department’s Office of Legal Counsel (“OLC”), which stated in a single sentence of a footnote that the “President has authority to appoint to diplomatic offices without an authorizing act of

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323. Cf., e.g., Victor Rodriguez Cedeño & Maria Isabel Torres Cazorla, *Unilateral Acts of States in International Law*, OXFORD PUB. INT’L L., <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1496#> [<https://perma.cc/X8FF-KXN4>]. The authors note:

It is well established in international law that obligations cannot be imposed upon a State without its consent. There is no reason why this principle . . . should not also be applied to unilateral declarations. The consequence is that a State can only impose obligations on other States to which it has addressed a unilateral declaration if the other States unequivocally accept these obligations.

*Id.*

324. See *supra* note 250 (citing authority).

325. 22 U.S.C. § 3941(b) (2018).

326. *Id.* § 3944(a)(1) (emphasis added).

Congress, because the Constitution itself expressly recognizes such offices under the law of nations.”<sup>327</sup>

The general disappearance of the law-of-nations view does not necessarily prove its desuetude, but this development emerged alongside several new areas of official practice that unmistakably support the claim of congressional power. One area concerns ambassadors: A number of statutes from the twentieth century purported to create or claimed congressional authority to create ambassadorships. The first of these, from 1909, stated that “no new ambassadorship[s] shall be created unless the same shall be provided for by Act of Congress.”<sup>328</sup> In accordance with this language, Congress provided for ambassadorships to Spain,<sup>329</sup> Argentina,<sup>330</sup> Chile,<sup>331</sup> Belgium,<sup>332</sup> Poland,<sup>333</sup> and Russia<sup>334</sup> in a series of enactments over the next forty years. Likewise, to assist with the implementation of the European Recovery Plan—colloquially known as the Marshall Plan—the Foreign Assistance Act of 1948 stated that “[t]here shall be a United States Special Representative in Europe” with “the rank of ambassador extraordinary and plenipotentiary.”<sup>335</sup> A year later, Congress enacted a similar measure providing that “[t]here shall be a Deputy United States Special Representative in Europe,” again with the rank of “ambassador extraordinary and plenipotentiary.”<sup>336</sup> Meanwhile, more recent legislation has created the offices of Special Representative for Trade Negotiations, with the rank of Ambassador

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327. Officers of the United States Within the Meaning of the Appointments Clause, *supra* note 255, at 117 n.17. As support for this proposition, OLC cited Attorney General Caleb Cushing’s 1855 opinion, see *Ambassadors and Other Public Ministers of the United States*, *supra* note 315, at 207, and OLC’s 1996 opinion on whether the Ineligibility Clause prohibits the president from nominating a member of the House of Representatives to serve as ambassador to Vietnam, see *Nomination of Sitting Member of Congress to be Ambassador to Vietnam*, *supra* note 271, at 286. The latter, however, does not actually endorse the law-of-nations view. Instead it concludes that “the President has the inherent, constitutional power to create diplomatic offices such as ambassadorships, without any need for statutory authorization.” *Id.* at 289. As explained earlier, that conclusion is unpersuasive. See *supra* note 271 and accompanying text.

328. Act of Mar. 2, 1909, Pub. L. No. 60-292, ch. 235, sch. A, 35 Stat. 672, 672.

329. Act of Sept. 4, 1913, Pub. L. No. 63-10, ch. 10, 38 Stat. 110.

330. Act of May 16, 1914, Pub. L. No. 63-102, ch. 91, 38 Stat. 378.

331. *Id.*

332. Act of Sept. 29, 1919, Pub. Res. No. 66-16, ch. 72, 41 Stat. 291.

333. Act of Jan. 22, 1930, Pub. Res. No. 71-32, ch. 22, 46 Stat. 57.

334. Act of Mar. 15, 1946, Priv. L. No. 79-428, ch. 95, 60 Stat. 1129, 1129–30.

335. Economic Cooperation Act of 1948, Pub. L. No. 80-472, ch. 169, § 108, 62 Stat. 137, 141–42.

336. Act of Apr. 19, 1949, Pub. L. No. 81-47, ch. 77, § 4, 63 Stat. 50, 50–55.

Extraordinary and Plenipotentiary;<sup>337</sup> Ambassador at Large for International Religious Freedom;<sup>338</sup> Coordinator for Counterterrorism, with the rank and status of Ambassador at Large;<sup>339</sup> and Ambassador at Large to Combat Trafficking in Persons.<sup>340</sup> Depending on certain questions of statutory interpretation, Congress may have also created many other ambassadorships since the early twentieth century.<sup>341</sup> This practice started to emerge just as the law-of-

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337. Act of Jan. 2, 1975, Pub. L. No. 93-618, § 141(b)(1), 88 Stat. 1978, 1999 (establishing the Office of the Special Representative for Trade Negotiations, providing that the Office “shall be headed by the Special Representative for Trade Negotiations who shall be appointed by the President, by and with the advice and consent of the Senate,” and providing that the Special Representative “shall have the rank of Ambassador Extraordinary and Plenipotentiary”); *see also* § 141(b)(2), 88 Stat. at 1999 (providing that “[t]here shall be in the Office two Deputy Special Representatives for Trade Negotiations who shall be appointed by the President, by and with the advice and consent of the Senate” and that each “shall have the rank of Ambassador”).

338. 22 U.S.C. § 6411(a) (2018) (“There is established within the Department of State an Office on International Religious Freedom that shall be headed by the Ambassador at Large for International Religious Freedom appointed under subsection (b) of this section.”).

339. *Id.* § 2651a(e) (“There is within the office of the Secretary of State a Coordinator for Counterterrorism . . . who shall be appointed by the President, by and with the advice and consent of the Senate. . . . The Coordinator shall have the rank and status of Ambassador at Large.”).

340. *Id.* § 7103(e)(1) (“The Secretary of State shall establish within the Department of State an Office to Monitor and Combat Trafficking . . . . Any such Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, with the rank of Ambassador-at-Large.”).

341. Congress has used a wide variety of language in relation to ambassadorial appointments. On some occasions, Congress has “authorized” the president to appoint an ambassador for a designated purpose. *See, e.g.*, Act of Dec. 22, 1987, Pub. L. No. 100-202, § 586(b), 101 Stat. 1329, 1329-186 (“The President is authorized to appoint a special ambassadorial level envoy who shall be responsible for representing the United States in direct negotiations with the parties to the Cyprus dispute . . . .”). On a number of other occasions, Congress has provided that the president “shall appoint” an individual to a specific ambassadorship. *See* Act of Oct. 1, 1988, Pub. L. No. 100-463, tit. VII, § 8125, 102 Stat. 2270, 2270-42 (“The President shall appoint an Ambassador at Large . . . who shall have the responsibility for ensuring a more balanced sharing of defense costs by the NATO members, Japan, the Republic of Korea, and other countries allied to the United States.”); Immigration and Nationality Act, Pub. L. No. 96-212, § 301(a), 94 Stat. 102, 109 (1980) (providing that the “President shall appoint, by and with the advice and consent of the Senate, a United States Coordinator for Refugee Affairs,” and that the Coordinator “shall have the rank of Ambassador-at-Large”); United Nations Participation Act, Pub. L. No. 89-206, 79 Stat. 841, 841 (1965) (“The President, by and with the advice and consent of the Senate, shall appoint a representative . . . to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary . . . .”); Trade Expansion Act of 1962, Pub. L. No. 87-794, § 241(a), 76 Stat. 872, 878 (providing that the president “shall appoint, by and with the advice and consent of the Senate, a Special Representative for Trade Negotiations,” and that the representative “shall have the rank of ambassador extraordinary and plenipotentiary”); United Nations Participation Act of 1945, Pub. L. No. 81-341, ch. 660, 63 Stat. 734, 734 (1949) (codified at 22 U.S.C. § 287(a)-(d)) (“The President, by and with the advice and consent of the Senate, shall appoint a representative and a deputy representative of the United States to the United Nations, both of whom shall have the rank and status of envoy extraordinary and ambassador



nations argument disappeared from official sources, and suggests that qualifications requirements for ambassadorships are permissible because it is commonly accepted that Congress can mandate qualifications for offices that it creates.<sup>342</sup>

Various provisions of the Foreign Service Act of 1980 reflect a similar view. Section 301(a) mandates that “[o]nly citizens of the

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plenipotentiary . . . .”). And on still other occasions, Congress has established classes of Foreign Service officers, including ambassadors. *See, e.g.*, Foreign Service Act of 1946, Pub. L. No. 88-426, sec. 119, § 412, 78 Stat. 400, 411 (codified at 22 U.S.C. § 287) (“There shall be ten classes of Foreign Service officers, including the classes of career ambassador and of career minister.”); Act of Aug. 5, 1955, Pub. L. No. 84-250, ch. 576, sec. 4, § 412, 69 Stat. 536, 537 (“There shall be eight classes of Foreign Service officers, including the classes of career ambassador and of career minister.”); Rogers Act, Pub. L. No. 68-135, ch. 182, 43 Stat. 140, 140-46 (1924) (establishing the Foreign Service and providing that the “officers in the Foreign Service shall . . . be graded and classified as follows . . . Ambassadors and ministers as now or hereafter provided”).

The relevance of this precedent depends on the meaning of the statutes. If authorizing or mandating a particular appointment or creating a “class” of Foreign Service officer implicitly creates the underlying office, then the precedent is relevant and the argument in favor of Congress becomes stronger. But if authorizing or mandating an appointment or creating a class of officer assumes the preexistence or subsequent creation of the office, then the precedent is irrelevant and the argument in favor of Congress becomes weaker. Unfortunately, there is no obvious answer, particularly given the vastly different historical contexts in which Congress enacted the legislation and the general absence of relevant legislative history. As discussed above, there is a distinction in principle between office-appointment and office-creation, so a provision for an appointment does not necessarily create an office, but at least at times, Congress has not operated on that understanding. *Compare, e.g.*, National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1046(c), 105 Stat. 1290, 1466 (1991) (“In conducting the consultations required under subsection (a), the President should make maximum feasible use of the Department of Defense and the post of Ambassador-at-Large created by section 8125(c) of the Department of Defense Appropriations Act, 1989 . . . .”), *with* § 8125(c), 102 Stat. 2270, 2270-42 (“The President shall appoint an Ambassador at Large responsible to the President who shall have the responsibility for ensuring a more balanced sharing of defense costs by the NATO members, Japan, the Republic of Korea, and other countries allied to the United States.”).

A similar point applies to legislation involving diplomatic offices of lower rank. As with ambassadorships, there is evidence that the political branches have at least at times accepted a congressional power to authorize these appointments. *See, e.g.*, Act of June 5, 1930, Pub. Res. No. 81, ch. 404, 46 Stat. 502, 502 (South Africa); Pub. L. No. 67-229, ch. 204, 42 Stat. 600 (1922) (Egypt); Act of Dec. 6, 1913, Pub. L. No. 63-39, ch. 1, § 1, 38 Stat. 241, 241 (“[T]he President is hereby authorized to appoint, as the representative of the United States, an envoy extraordinary and minister plenipotentiary to Paraguay . . . .”); *id.* § 2 (Uruguay); Act of June 16, 1860, ch. 135, 12 Stat. 40, 40 (“[T]he President may, by and with the advice and consent of the Senate, appoint a representative to the kingdom of Sardinia, of the grade of envoy extraordinary and minister plenipotentiary . . . .”); Act of Mar. 1, 1855, ch. 133, § 1, 10 Stat. 619, 619 (providing that “the President . . . shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary” to over twenty different states). Given the obvious functional similarities that these offices share with ambassadorships, the argument in favor of Congress becomes stronger if the authorization of a lower-ranking diplomatic appointment implicitly creates the underlying office.

342. *See supra* note 248 (citing authority).

United States may be appointed to the [Foreign] Service.”<sup>343</sup> Because the Foreign Service includes “Chiefs of mission” and “Ambassadors at large,” among other ranks, it follows that Congress has, for the past forty years, asserted a power to impose a form of qualifications requirement on ambassadorial appointments.<sup>344</sup> In addition, § 105(a) of the Act states that “[a]ll personnel actions with respect to career members and career candidates in the [Foreign] Service”—including ambassadorial appointments—“shall be made in accordance with merit principles.”<sup>345</sup> As amended, this section also requires the Secretary of State to prescribe regulations to ensure that “applicants for appointments in the Service are free from discrimination on the basis of race, color, religion, sex, national origin, age, handicapped condition, marital status, geographic or educational affiliation within the United States, or political affiliation . . . .”<sup>346</sup> If such requirements are permissible, others of similar character should be as well.

Significantly, the president never objected to these enactments on the ground that the creation of ambassadorships is something other than a legislative power.<sup>347</sup> In the case of the Ambassador at Large for International Religious Freedom, President Clinton signed and expressed support for the underlying legislation even while explicitly recognizing that it was office-creating.<sup>348</sup> Even where the president has objected to legislation regarding foreign-affairs appointments on the basis of Article II, he has done so without rejecting the possibility that Congress can create diplomatic offices.<sup>349</sup>

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343. 22 U.S.C. § 3941(a).

344. *Id.* § 3903.

345. *Id.* § 3905(a).

346. *Id.* § 3905(b)(1).

347. *See* Statement on Signing the International Religious Freedom Act of 1998, 2 PUB. PAPERS 1883–84 (Oct. 27, 1998) (registering no objection); Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 2 PUB. PAPERS 2108–14 (Oct. 23, 1998) (registering no objection); Jimmy Carter, Foreign Service Act of 1980 Statement on Signing H.R. 6790 into Law (Oct. 17, 1980), <https://www.presidency.ucsb.edu/documents/foreign-service-act-1980-statement-signing-hr-6790-into-law> [<https://perma.cc/M7LV-CMTK>] (registering no objection).

348. Statement on Signing the International Religious Freedom Act of 1998, 2 PUB. PAPERS 1883–84 (Oct. 27, 1998) (stating an intention to nominate Dr. Robert Seiple “for the position of Ambassador at Large created under the Act”).

349. *Compare, e.g.*, 22 U.S.C. § 7817(a) (“The President shall appoint a special envoy for North Korean human rights issues within the Department of State . . . by and with the advice and consent of the Senate.”), *with* Statement on Signing the North Korean Human Rights Act of 2004, 3 PUB. PAPERS 2575 (Oct. 18, 2004) (“[22 U.S.C. § 7817(a)] purports to direct negotiations with foreign governments and international organizations. The executive branch shall implement [the

Ambassadorship-creating legislation, moreover, has enjoyed support across dominant political parties and ideologies since the early twentieth century. It has passed in Democrat- and Republican-led Congresses alike<sup>350</sup> and been signed into law by such ideologically diverse presidents as Woodrow Wilson, Herbert Hoover, Harry Truman, Gerald Ford, Jimmy Carter, Bill Clinton, and George W. Bush.<sup>351</sup> In other words, the pattern of official practice suggests that it has generally been uncontroversial for Congress to create ambassadorships in recent decades.<sup>352</sup>

The second area of practice concerns appointments to the office of “public Minister[],”<sup>353</sup> which includes diplomats of lower rank, such as minister and counselor.<sup>354</sup> Several provisions of the Foreign Service Act of 1980 impose qualifications requirements or otherwise regulate these appointments. Section 301 requires the Secretary of State to “prescribe, as appropriate, written, oral, physical, foreign language, and other examinations for appointment to the [Foreign] Service”<sup>355</sup>

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statute] in a manner consistent with the Constitution’s grant to the President of the authority to conduct the foreign affairs of the United States.”).

350. Compare, e.g., Act of Jan. 2, 1975, Pub. L. No. 93-618, § 141(b)(1), 88 Stat. 1978, 1999 (establishing the office of “Special Representative for Trade Negotiations” and providing that the Special Representative “shall have the rank of Ambassador Extraordinary and Plenipotentiary”), and International Religious Freedom Act of 1998, Pub. L. No. 105-292, § 101, 112 Stat. 2791, 2792 (codified at 22 U.S.C. § 6401) (establishing an Office of International Religious Freedom headed by an Ambassador at Large for International Religious Freedom), with *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions> [<https://perma.cc/2GDW-VZ32>] (showing Democratic control of the House in 1975 and Republican control in 1998)), and United States Senate, *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/6FEL-GF3N>] (showing Democratic control of the Senate in 1975 and Republican control in 1998).

351. See, e.g., Jimmy Carter, Foreign Service Act of 1980 Statement on Signing H.R. 6790 into Law (Oct. 17, 1980), <https://www.presidency.ucsb.edu/documents/foreign-service-act-1980-statement-signing-hr-6790-into-law> [<https://perma.cc/M7LV-CMTK>] (expressing support for the Foreign Service Act of 1980); see also Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 6(b)(1), 117 Stat. 2881. The Trafficking Victims Protection Reauthorization Act of 2003 was enacted in December 19, 2003, during the George W. Bush administration, without attracting a veto or signing statement of opposition.

352. Cf. Bradley & Siegel, *supra* note 290, (manuscript at 13) (arguing that the influence of historical practice on the meaning of the Constitution “is strongest when the practice has continued over numerous presidential administrations and has enjoyed the support of both major political parties (because such practices are less likely to be the product of mere partisan politics)”).

353. U.S. CONST. art. II, § 2, cl. 2.

354. See generally Scoville, *Ad Hoc Diplomats*, *supra* note 298 (examining the original meaning of “public Ministers” under the Appointments Clause).

355. 22 U.S.C. § 3941(b) (2018).

even though such appointments entail presidential nomination and Senate confirmation.<sup>356</sup> The Act also states that the “fact that an applicant for appointment as a Foreign Service officer [ ] is a veteran or disabled veteran shall be considered an affirmative factor in making such appointments.”<sup>357</sup> In similar fashion, a collection of older statutes imposed citizenship, examination, and other requirements on various ranks of public ministers.<sup>358</sup> These provisions are relevant because the text of Article II identifies “Ambassador[ ]” as a subcategory of “public

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356. *Id.* §§ 3903, 3942(a)(1).

357. *Id.* § 3941(c).

358. *See, e.g.*, Rogers Act, Pub. L. No. 68-135, ch. 182, § 5, 43 Stat. 140, 141 (1924) (requiring prospective Foreign Service officers to hold U.S. citizenship and complete an examination); Act of Mar. 1, 1855, ch. 133, § 9, 10 Stat. 619, 623 (providing that “the President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the government at the time of their appointment, as envoys extraordinary and ministers plenipotentiary” or as “commissioners”).

Another line of statutes mandated specific qualifications for diplomats who were to be appointed by the president without Senate confirmation. *See, e.g.*, Act of June 13, 1902, Pub. L. No. 57-154, ch. 1079, § 4, 32 Stat. 331, 373 (requesting the president to “invite . . . Great Britain to join in the formation of an international commission, to be composed of three members from the United States and three who shall represent the interests of . . . Canada” for the purpose of investigating and reporting on “the conditions and uses of the waters adjacent to the boundary lines between the United States and Canada,” and providing further that the president, in selecting the members of the Commission to represent the United States, “is authorized to appoint one officer of the [Army] Corps of Engineers, one civil engineer well versed in the hydraulics of the Great Lakes, and one lawyer of experience in questions of international and riparian law”); Act of July 9, 1888, ch. 593, § 1, 25 Stat. 243, 243 (providing that the president is “authorized and requested to invite the Government of each maritime nation to send delegates to a marine conference that shall assemble at such time and place as he may designate,” and that the president is authorized to “appoint seven delegates, two of whom shall be . . . officers of the [U.S.] Navy and one an official of the Life-Saving Service, two masters from the merchant marine,” and “two citizens familiar with shipping and admiralty practice to represent the United States at said marine conference”); An Act to Establish Peace with Certain Hostile Indian Tribes, ch. 32, § 1, 15 Stat. 17, 17 (1867) (authorizing the president “to appoint a commission to consist of three officers of the army not below the rank of brigadier general,” who “shall have power and authority to call together the chiefs and headmen of such bands or tribes of Indians as are now waging war against the United States” and “to ascertain the alleged reasons for their acts of hostility, and . . . to make and conclude with said bands or tribes such treaty stipulations, subject to the action of the Senate, as may remove all just causes of complaint on their part”). The relevance of these examples is debatable. On the one hand, the fact that they authorized appointments without requiring Senate confirmation suggests that Congress at the time did not understand the agents in question to be “public Ministers” within the meaning of the Appointments Clause. *Cf.* U.S. CONST. art. II, § 2, cl. 2 (requiring the Senate’s advice and consent for the appointment of “public Ministers”). The examples are less relevant to that extent. On the other hand, they show that Congress has imposed qualifications requirements on diplomatic appointments. In doing so, they further undermine the view that diplomatic positions are categorically exempt from these requirements and thus strengthen the case for congressional intervention with respect to ambassadorships.

Minister[]” and treats both identically by subjecting them to the requirements of presidential nomination and senatorial confirmation.<sup>359</sup> In light of these connections, one might reasonably view Congress’s limitations on public ministerial appointments as suggestive of a power to restrict ambassadorial appointments.

The third area of historical practice concerns the office of “Consul[.]”<sup>360</sup> A statute from 1861 “abolish[ed]” the “office of consul-general at Simoda[, Japan],”<sup>361</sup> and thus seemed to imply congressional authority over the existence of particular consular offices. In addition, and notwithstanding an early practice whereby the president at times filled consular posts with foreigners,<sup>362</sup> Congress imposed a citizenship requirement on consular appointments on nine separate occasions from 1916 to 1924, each time mandating that “[e]very consul general, consul, and, wherever practicable, every consular agent shall be an American citizen.”<sup>363</sup> This practice is relevant because consuls and ambassadors are identically situated as enumerated types of principal officers in the Appointments Clause.<sup>364</sup> If Congress can create or destroy consular offices and mandate qualifications for those who hold them, it is harder to justify a contrary rule for ambassadors.

Finally, consider the historical practice pertaining to the office of Supreme Court Justice: Congress has determined the size of the Court by statute ever since the Founding<sup>365</sup> and in doing so arguably purported to create the office. Supporters of qualifications requirements might contend that this practice is suggestive of congressional power to create the office of ambassador because, once again, “Judges of the supreme Court” and “Ambassadors” are

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359. U.S. CONST. art. II, § 2, cl. 2.

360. *Id.*

361. Act of Feb. 28, 1861, ch. 58, 12 Stat. 170, 171.

362. See BARNES & MORGAN, *supra* note 38, at 57 (explaining that, “wherever possible” under the administrations of George Washington and John Adams, “Americans engaged in trade—or planning to engage in trade—in foreign ports were selected as consuls, but in some places where there were no Americans, foreigners were appointed”).

363. Act of May 28, 1924, Pub. L. No. 68-153, ch. 204, 43 Stat. 205, 208; Act of Jan. 3, 1923, Pub. L. No. 67-377, ch. 21, 42 Stat. 1068, 1071; Act of June 1, 1922, Pub. L. No. 67-229, ch. 204, 42 Stat. 599, 602; Act of Mar. 2, 1921, Pub. L. No. 66-357, ch. 113, 41 Stat. 1205, 1215; Act of June 4, 1920, Pub. L. No. 66-238, ch. 223, 41 Stat. 739, 748; Act of Mar. 4, 1919, Pub. L. No. 65-346, ch. 123, 40 Stat. 1325, 1333; Act of Apr. 15, 1918, Pub. L. No. 65-128, ch. 52, 40 Stat. 519, 528; Act of Mar. 3, 1917, Pub. L. No. 64-379, ch. 161, 39 Stat. 1047, 1057; Act of July 1, 1916, Pub. L. No. 64-131, ch. 208, 39 Stat. 252, 261.

364. U.S. CONST. art. II, § 2, cl. 2.

365. F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 646, 664–71 (2009).

identically positioned in the Appointments Clause as enumerated types of federal officers whose appointments are subject to the requirements of presidential nomination and senatorial confirmation.<sup>366</sup> If Congress can create one of these offices, it is not clear why it would lack power to create the other.<sup>367</sup>

In summary, it is far from settled that the Constitution bars Congress from creating the office of ambassador. Such a claim is reasonable for those who privilege original meaning. But for those who privilege modern practice, it is no less reasonable to conclude that Congress holds power to create ambassadorships and dictate minimum qualifications. Indeed, the procongressional view can point to the series-qualifier canon, the comma exception to the last-antecedent rule, a substantial collection of ambassadorship-creating or regulating enactments signed into law by a series of presidents, the modernity of that practice in comparison to the evidence that supports the law-of-nations view, support from both of the major political parties, and analogous practices involving the offices of public minister, consul, and Supreme Court Justice. In aggregate, this evidence is relevant and persuasive because the Supreme Court has made clear that it “treat[s] practice as an important interpretive factor” in adjudicating the relationship between Congress and the president, “even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”<sup>368</sup> Supporters of a statutory prescription might thus contend that the modern practice informs or imposes a gloss on the Appointments Clause that empowers Congress to create ambassadorships. From here, it follows that Congress wields power under the Necessary and Proper Clause to prescribe qualifications.<sup>369</sup>

2. *The President’s Discretion to Nominate.* The second issue concerns the relationship between congressional power to prescribe qualifications and the president’s discretion to nominate. In various

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366. U.S. CONST. art. II, § 2, cl. 2.

367. Cf. generally Durling & West, *supra* note 261 (arguing that the law-of-nations view suggests that the president can change the size of the Supreme Court without statutory authorization from Congress).

368. NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (relying heavily on historical practice to interpret the meaning of the Recess Appointments Clause); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–24 (2012) (explaining the historical-gloss argument and identifying examples of its use in debates over the separation of powers).

369. See *supra* note 248 (citing authority).

respects, this is an issue of significant uncertainty: Supreme Court precedent provides no clear direction.<sup>370</sup> The D.C. Circuit and Ninth Circuit have encountered claims that qualifications requirements violate the Appointments Clause by restricting the president's discretion to nominate in other contexts, but each dismissed them for lack of justiciability.<sup>371</sup> And while some academic commentary has addressed the issue in relation to officers in general,<sup>372</sup> none of it has examined the unique issues that arise in connection with ambassadorial appointments in particular.

Yet as I will show, there is reason to conclude that a carefully calibrated statutory prescription can be constitutional. To make this point, I highlight two plausible claims that qualifications requirements violate the president's discretion to nominate, and then offer reasons for Congress to reject them and pursue legislative action.

The first potential defect centers on the fact that statutory qualifications requirements empower the House of Representatives to restrict the president's discretion to nominate and the Senate's discretion to advise and consent. While the text of the Appointments Clause commits the power to appoint ambassadors exclusively to the president and the Senate,<sup>373</sup> the enactment of a qualifications

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370. See Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1917 (2007) [hereinafter *Congressional Restrictions*] ("Comparatively little judicial . . . attention has been devoted to whether Congress can impose restrictions on the President's appointment of officers.").

371. See Nat'l Comm. of the Reform Party v. Democratic Nat'l Comm., 168 F.3d 360, 364–65 (9th Cir. 1999); FEC v. NRA Political Victory Fund, 6 F.3d 821, 824–25 (D.C. Cir. 1993).

372. See *Congressional Restrictions*, *supra* note 370, at 1917 ("Comparatively little . . . academic attention has been devoted to whether Congress can impose restrictions on the President's appointment of officers."). The most recent treatments are Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of Labor?*, 37 LOYOLA U. CHI. L.J. 43 (2005); Jamin B. Raskin, "A Complicated and Indirect Encroachment": *Is the Federal Election Commission Unconstitutionally Composed?*, 52 ADMIN. L. REV. 609 (2000); Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 784–86 (2008); Joshua Kershner, Note, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process is Constitutional*, 32 CARDOZO L. REV. 615 (2010); Adam J. Rappaport, Note, *The Court of International Trade's Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001); Matthew A. Samberg, Note, "Established by Law": *Saving Statutory Limitations on Presidential Appointments from Unconstitutionality*, 85 N.Y.U. L. REV. 1735 (2010); West, *supra* note 248, at 200–05.

373. U.S. CONST. art. II, § 2, cl. 2; see also THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining the exclusion of the House on the ground that

requirement would necessitate the involvement of the House of Representatives under basic principles of bicameralism.<sup>374</sup> Such a requirement could not become law without the approval of the Senate and, in most cases, the president.<sup>375</sup> But the possibility of amendment, and thus the scope of a future president's discretion to nominate and a future Senate's discretion to confirm, would depend upon the concurrence of a future House of Representatives.<sup>376</sup>

To illustrate, imagine that Congress passes legislation limiting donor appointments to 15 percent of all ambassadorships, and that the president signs this legislation into law. In the short term, the president and a majority of Senators will presumably honor the new limit and exercise their discretion under the Appointments Clause accordingly. But imagine further that there is a new election, resulting in a new president and a substantial change in the makeup of the Senate, such that both the president and a majority of Senators now oppose the quota. Can they proceed to appoint donors as they see fit? If the statute is constitutional, the answer must be no—given the requirement of bicameralism,<sup>377</sup> the concurrence of the House of Representatives is also necessary to repeal the prohibition. Yet this would mean that a majority of the House could effectively control the extent of the president's and the Senate's discretion in ambassadorial appointments by refusing to pass a new bill repealing the old statute. Given that the Constitution assigns the House of Representatives no role in ambassadorial appointments,<sup>378</sup> some might contend that a statutory qualifications requirement would violate the exclusivity of the appointment powers of the president and the Senate.

But as forceful as this argument might seem, the response is even more so: If it were true that House involvement is impermissible, then

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“[a] body so fluctuating and at the same time so numerous can never be deemed proper for the exercise of [the appointment] power”).

374. See U.S. CONST. art. I, § 7, cls. 2, 3.

375. *Id.*

376. *Id.*; cf. Kochan, *supra* note 372, at 54 (making a similar argument); Volokh, *supra* note 372, at 784–86 (same).

377. See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . .”); *INS v. Chadha*, 462 U.S. 919, 948–51 (1983) (explaining the importance of bicameralism).

378. U.S. CONST. art. II, § 2, cl. 2; THE FEDERALIST NO. 77, *supra* note 373, at 461. Here I mean “appointments” in the strictest sense. As discussed above, there is a distinction in principle between office-creation and office-appointment. It is conceivable that House involvement is permissible in the former even if not in the latter.



*all* statutory qualifications requirements for *all* principal officers—not just ambassadors—would be unconstitutional. This has simply never been the dominant view. Congress has imposed numerous qualifications requirements on a vast range of appointments that are subject to Senate confirmation. In his 1926 opinion in *Myers v. United States*,<sup>379</sup> Justice Louis Brandeis identified over two hundred examples dating back to the Founding.<sup>380</sup> The First Congress required that the Solicitor General, for instance, be “learned in the law.”<sup>381</sup> An 1871 statute required the Commissioner of Fish and Fisheries to be a “person of proved scientific and practical acquaintance with the fishes of the coast.”<sup>382</sup> A statute from 1899 required the Assistant Director of the Census to be “an experienced practical statistician.”<sup>383</sup> An enactment from 1913 required at least two members of the Federal Reserve Board to be “persons experienced in banking or finance.”<sup>384</sup>

And these statutes continue to abound at present. A person may not be appointed as Secretary of Defense “within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.”<sup>385</sup> Any individual nominated for appointment as Director of National Intelligence “shall have extensive national security expertise.”<sup>386</sup> And an individual nominated for appointment as Principal Deputy Director of National Intelligence “shall have extensive national security experience and management expertise.”<sup>387</sup> In light of these and other examples, even OLC—hardly an advocate of congressional power—has admitted that, as a general matter, “Congress has power to prescribe qualifications for office.”<sup>388</sup> Rather than conclude that the political branches have systematically violated the Constitution ever since the Founding, the more reasonable conclusion is that the House can continue to do what it has always done: play a part in restricting the discretion to nominate and confirm,

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379. *Myers v. United States*, 272 U.S. 52 (1926).

380. *Id.* at 265–74 (1926) (Brandeis, J., dissenting on other grounds).

381. An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92–93 (1789).

382. Joint Res. of Feb. 9, 1871, No. 22, § 1, 16 Stat. 593, 594.

383. Act of Mar. 3, 1899, ch. 419, § 2, 30 Stat. 1014, 1014.

384. Act of Dec. 23, 1913, ch. 6, § 10, 38 Stat. 251, 260.

385. 10 U.S.C. § 113(a) (2018).

386. 19 U.S.C. § 3023(a)(1) (2018).

387. 50 U.S.C. § 3026(a) (2018). For other modern examples, see HOGUE, *supra* note 248, at 20–25.

388. Judges—Appointment—Age Factor, 3 Op. O.L.C. 388, 389 (1979).

at least with respect to offices that Congress has created by statute.<sup>389</sup> This view accords with recent Supreme Court precedent, which suggests that historical practice carries substantial weight, including in the specific context of federal appointments.<sup>390</sup>

The second potential defect is that statutory qualifications requirements might unduly restrict the *extent* of the president's discretion to nominate by excluding large classes of individuals he or she might otherwise consider. In *Myers v. United States*, the Supreme Court expressed in dicta that a statute can mandate qualifications for officeholders, but only where the specified qualifications are "reasonable and relevant" and "do not so limit selection and so trench upon executive choice as to be in effect legislative designation."<sup>391</sup> Likewise, in a 1996 opinion on a statute that limited eligibility for appointment to the office of U.S. Trade Representative, OLC stated that a restriction that "rule[s] out a large portion of those persons best qualified by experience and knowledge to fill a particular office invades the constitutional power of the President and Senate to install the principal officers of the United States."<sup>392</sup> To be valid, a restriction must instead achieve a "balance" between the "power of the Congress to prescribe qualifications and the power of the President to appoint,"<sup>393</sup> with the precise location of this balance depending on "the nature of the office in question."<sup>394</sup>

Going on anecdote alone, it would be hard to dismiss the possibility that many of the reforms that lawmakers have considered in

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389. It remains possible that House restrictions on the discretion to nominate are unconstitutional with respect to offices created by the Constitution or the law of nations, rather than by statute, given that the House would have no role in the creation of those offices to begin with. *See, e.g.*, West, *supra* note 248, at 201 ("Congress's complete authority over office creation should generally include the lesser authority to impose conditions on offices."). Under this possibility, ambassadorial-qualifications requirements would be unconstitutional if one accepts that the law of nations creates the office of ambassador. But if one accepts the law-of-nations view, qualifications requirements are already unconstitutional for the reasons elaborated in Part V.A.1, so it is not clear that much hinges on this line of reasoning.

390. *See* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (relying heavily on historical practice to interpret the meaning of the Recess Appointments Clause).

391. *Myers v. United States*, 272 U.S. 52, 128–29 (1926).

392. *Constitutionality of Statute Governing Appointments of United States Trade Representative*, 20 Op. O.L.C. 279, 280 (1996); *see also* *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 516 (1871) ("The right of Congress to prescribe qualifications for office is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment.").

393. *Constitutionality of Statute Governing Appointments of United States Trade Representative*, *supra* note 392, at 280.

394. *Id.*

relation to ambassadorial appointments are unconstitutional under these standards. After all, some noncareer candidates are immensely qualified,<sup>395</sup> and measures such as a quota on financial donors would materially restrict the president's range of choice.

The empirical findings above, however, substantially blunt such an objection, even under OLC's standard. Imagine a quota limiting donor appointments to 15 percent of ambassadorships. To say that it would exclude a "large portion of those persons best qualified by experience and knowledge" simply makes far less sense in light of roughly forty years of evidence that career ambassadors have been much more qualified as a group.<sup>396</sup> In fact, the quota would not exclude *any* of the best candidates—let alone a large portion of them—unless available donors are better qualified than any available career candidates in greater than 15 percent of cases. The certificates of demonstrated competency do not rule out that possibility, but they make it far less likely, especially as the stipulated percentage of career nominees drops.

Stated in the affirmative, there is reason to believe that a quota on donor appointments could achieve the "balance" that OLC demands.<sup>397</sup> The statute at issue in OLC's 1996 opinion prohibited the president from appointing as U.S. Trade Representative any person who had "represented, aided, or advised a foreign entity" in a trade negotiation or dispute with the United States.<sup>398</sup> OLC concluded that this prohibition was unconstitutional because the office of U.S. Trade Representative is "established within the Executive Office of the President" and therefore is "especially close to the President," "entails broad responsibility for advising the President and for making policy," and "involves representation of the United States to foreign governments—an area constitutionally committed to the President."<sup>399</sup> But even putting aside the fact that Congress has implicitly rejected

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395. See generally *Ambassador Qualifications Data*, *supra* note 169 (reporting qualifications data for nominees from 1980 through 2018).

396. See *supra* Part III.

397. Constitutionality of Statute Governing Appointments of United States Trade Representative, *supra* note 392, at 280.

398. 19 U.S.C. § 2171(b)(4) (2018).

399. Constitutionality of Statute Governing Appointments of United States Trade Representative, *supra* note 392, at 280; see also Statement on Signing the Lobbying Disclosure Act of 1995, 2 PUB. PAPERS 1907 (Dec. 19, 1995) ("The Congress may not, of course, impose broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to the highest executive branch positions, and this is especially so in the area of foreign relations.").

OLC's conclusion,<sup>400</sup> it does not follow that a donor quota with respect to ambassadors would also be unconstitutional. Ambassadors are obviously involved in foreign affairs, but they are not established within the Executive Office of the President.<sup>401</sup> They advise on and help to implement policy, but have no statutory or other authority to *make* it.<sup>402</sup> A quota would be far more permissive than the flat prohibition that applied to the office of U.S. Trade Representative.<sup>403</sup> And OLC has elsewhere suggested that restrictions are less problematic in relation to appointments held for relatively short periods of time.<sup>404</sup> That factor favors the validity of a donor quota because ambassadorships are typically held for no more than three years,<sup>405</sup> which leaves room for the president to appoint replacements as necessary to pursue his objectives.

Moreover, even if a donor quota was unconstitutional, Congress might adopt any number of alternative restrictions that are “reasonable and relevant” and “do not so limit selection and so trench upon executive choice as to be in effect legislative designation.”<sup>406</sup> Among other possibilities, Congress could design a restriction to operate only

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400. In 1997, roughly eight months after OLC issued its 1996 opinion, Congress enacted a waiver to the statutory prohibition for the purpose of enabling Charlene Barshefsky to serve as U.S. Trade Representative. Pub. L. No. 105-5, 111 Stat. 11 (1997). In doing so, Congress implied that the prohibition remained operative. *See id.*

401. *See* 2 FOREIGN AFFAIRS MANUAL, *supra* note 93, § 113.1(a) (placing chiefs of mission under the “general supervision of the Secretary of State”).

402. *Compare* 19 U.S.C. § 2541(a) (“The Trade Representative shall coordinate the consideration of international trade policy issues that arise as a result of, and shall develop international trade policy as it relates to, the implementation of this chapter.”), *with* 2 FOREIGN AFFAIRS MANUAL, *supra* note 93, § 113.1(c)(12)–(13) (explaining that the functions of chief of mission include (1) “[e]stimating the effects . . . from implementing alternative U.S. policy programs currently under consideration” and (2) “making recommendations to the Department on possible courses of action and counseling as to which U.S. programs abroad are necessary and feasible to implement the chosen policy and which should be abandoned or modified in the light of changed circumstances”); *see also supra* Part II (discussing statutory authorities for ambassadors).

403. *Cf.* 19 U.S.C. § 2171(b)(4) (“A person who has directly represented, aided, or advised a foreign entity . . . in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative.”).

404. *Cf.* Judges—Appointment—Age Factor, *supra* note 388, at 389 (suggesting that restrictions on judicial appointments are problematic in part because federal judges have tenure and “long, rather than short, careers on the bench”).

405. *See generally* *Chiefs of Mission by Country*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, <https://history.state.gov/departmenthistory/people/chiefsmission/by-country> [<https://perma.cc/86XK-4WJB>] (reporting appointment durations).

406. *Myers v. United States*, 272 U.S. 52, 128–29 (1926).

on individuals who simultaneously exhibit multiple risks of incompetency, such as those who both (1) made donations to the election campaign of the nominating president in excess of a specified sum and (2) lack formal training and professional experience pertaining to the receiving state, its region, and foreign policy more generally. Such a restriction would be more narrowly tailored than the flat prohibition at issue in OLC's opinion on the U.S. Trade Representative.<sup>407</sup> It would be both reasonable and relevant insofar as it limits the president's search to individuals who are most familiar with the issues at stake, the institutions and processes that are involved, and the interests that the United States is pursuing. And it would achieve a "balance" between the president's power to appoint and Congress's power to prescribe qualifications by preventing only those nominations that are likely to flow exclusively from considerations of financial support.<sup>408</sup>

3. *Functional Considerations.* Even if the Constitution's text and modern practice create space for Congress to mandate qualifications, some might object that statutory intervention is problematic in light of functional considerations regarding the purposes of the Appointments Clause and the practical effects of empowering Congress to intervene.

Commentators have offered several versions of this argument in relation to qualifications requirements for appointments to offices other than ambassador. One version maintains that these requirements discourage the Senate from closely scrutinizing individual nominees by providing a false sense of security that statutory compliance is both necessary and sufficient to guarantee competency.<sup>409</sup> On this view, the requirements are counterproductive because the Senate will use them in place of a more effective alternative: holistic, case-by-case assessment of individual nominees. Another version of the argument suggests that statutory requirements will undermine the quality of appointments by diluting the president's accountability.<sup>410</sup> The idea here is that the requirements will mitigate the president's incentive to

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407. See Constitutionality of Statute Governing Appointments of United States Trade Representative, *supra* note 392, at 279–80.

408. *Id.* at 280.

409. See, e.g., Raskin, *supra* note 372, at 617 (“[M]embers of Congress will take seriously their own ‘Advice and Consent’ duties if they are not simply passing upon nominees whose nominations they themselves engineered.”).

410. See, e.g., *id.* at 618 (suggesting that a president operating under statutory qualifications requirements “acquires a sense of *reduced* personal accountability”) (emphasis in original).

exercise care in selecting nominees by enabling him to blame Congress for appointments that turn out poorly. Finally, some have suggested that qualifications requirements will undermine the quality of appointments by precluding the president from nominating individuals who lack traditional credentials but are otherwise well suited to serve.<sup>411</sup> These arguments are reasonable in the abstract and important given that functionalist analysis “has been a recurring feature of judicial decisions in the foreign relations law area” and “has persisted . . . even when the Court has shifted to more formal legal doctrines.”<sup>412</sup>

Yet there are persuasive responses. To begin, all of the functional objections to statutory qualifications requirements assume that the default approach to the Appointments Clause—one that entails no supplemental, statutory requirements of any kind—is more or less effective at ensuring defensible appointments. As the empirical findings above demonstrate, that assumption is doubtful. Presidents have for decades devoted a significant portion of ambassadorships to individuals who have few if any qualifications to serve, notwithstanding the availability of a sizable corps of professional diplomats whose career it is to promote U.S. interests abroad.<sup>413</sup> The trend, moreover, has been one of deterioration rather than improvement in the qualifications of political nominees over time,<sup>414</sup> and as discussed above, there is emerging statistical evidence that political appointees exhibit inferior performance in office.<sup>415</sup> Given this evidence, it seems indefensible simply to assume that the status quo approach to diplomatic appointments is effective or will somehow improve on its own.

True, it is conceivable that qualifications requirements would exacerbate recent patterns by fostering greater complacency on the part of the Senate. But that seems unlikely, if only because the Senate is already extremely deferential to the president in this context. Recall that only 3 percent of ambassadorial nominations have failed in recent

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411. See, e.g., 119 CONG. REC. 38,608–09 (Nov. 29, 1973) (letter from Kenneth Rush, Acting Secretary of State).

412. Curtis A. Bradley, *The Irrepressible Functionalism in U.S. Foreign Relations Law*, in FOREIGN REL. L. 2 (Curtis A. Bradley ed., 2019).

413. See *supra* Part III.B (reporting patterns across recent administrations).

414. See *supra* Part III.B (same).

415. See, e.g., Haglund, *supra* note 25, at 672–73 (reporting this finding on the basis of Inspector General reports).

decades,<sup>416</sup> that the Senate has not refused political nominees at a materially higher rate than career nominees,<sup>417</sup> and that the rate of 3 percent represents a continuation of the rate that prevailed from 1789 to 1975.<sup>418</sup> At least part of the reason for this deference seems to be the sheer number of diplomatic nominations, which has nearly tripled from roughly five hundred per year in the late 1940s to over 1400 per year in 2017 and 2018.<sup>419</sup> As one Senate Foreign Relations Committee print explained, the increase has long raised questions about whether it is possible “to give adequate consideration to such a large number of nominees” and whether “any purpose [is] served” if “time permits only perfunctory deliberation.”<sup>420</sup> In this context, it seems entirely plausible that statutory qualifications requirements would operate not as an excuse to forego vetting that the Committee has ample time to conduct, but rather as an efficient mechanism to promote competency within a large group of nominees that the Committee lacks resources to adequately vet.<sup>421</sup>

The view that qualifications requirements would enable the president to avoid accountability by blaming Congress for unqualified ambassadors seems equally unfounded. Qualifications requirements, after all, have been ubiquitous across a wide range of federal appointments ever since the Founding,<sup>422</sup> and yet examples of presidents attempting to use them to pin blame on Congress for appointments that turn out poorly are exceedingly hard to find. In fact, I am unaware of any. The reason seems obvious: these requirements typically leave ample freedom of choice to the president.<sup>423</sup> It would make little sense for the president to blame Congress for the

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416. *Supra* note 221 and accompanying text.

417. *Supra* note 221 and accompanying text.

418. PLISCHKE, UNITED DIPLOMATS, *supra* note 39, at 48.

419. Compare STAFF OF S. COMM. ON FOREIGN RELATIONS, 97TH CONG., THE SENATE ROLE IN FOREIGN AFFAIRS APPOINTMENTS 34 (Comm. Print 1982) [hereinafter THE SENATE ROLE IN FOREIGN AFFAIRS APPOINTMENTS] (reporting the number of nominations referred to the Senate Foreign Relations Committee from 1949 to 1980), with *Activities & Reports: Nominations*, U.S. SENATE COMMITTEE ON FOREIGN RELATIONS, <https://www.foreign.senate.gov/nominations> [<https://perma.cc/L62X-SNTQ>] (reporting that the Committee received over 2800 nominations during the 115th Congress).

420. THE SENATE ROLE IN FOREIGN AFFAIRS APPOINTMENTS, *supra* note 419, at 37.

421. See, e.g., Samberg, *supra* note 372, at 1749–50 (suggesting that eligibility requirements “allow[] Congress to keep tabs on the federal bureaucracy even when it cannot thoroughly investigate all Senate-confirmable officers in greater detail”).

422. See *Myers v. United States*, 272 U.S. 52, 265–74 (1926) (Brandeis, J., dissenting on other grounds) (listing examples).

423. See *id.* (listing examples).

appointment of a specific individual whom Congress never insisted upon in the first place.

The idea that a qualifications requirement would dissuade U.S. foreign relations by excluding some individuals who are best qualified also seems unpersuasive. Again, that argument appears sensible in the abstract, but not in view of extensive data showing that political appointees are materially less qualified as a group and exhibit inferior performance. As long as modern patterns continue, even a quota that limits political appointees to, say, 10 percent of all ambassadorships would quite likely preserve ample space for optimal nominations in all cases.

Meanwhile, there are two plausible benefits to congressional empowerment and reform. The first is straightforward: statutory qualifications requirements would seem to strengthen the appointments process. They would expressly discourage corruption, promote meritocracy, and, as long as qualifications correspond with success in office, contribute to the effective execution of U.S. foreign relations.

The second benefit is that rejecting the law-of-nations view would reduce uncertainty about whether several of Article I's "anti-corruption clauses"<sup>424</sup>—namely, the Ineligibility Clause, the Incompatibility Clause, and the Foreign Emoluments Clause—apply to ambassadors. The first two respectively state that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time," and that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."<sup>425</sup> The Foreign Emoluments Clause provides that "no Person holding any Office of Profit or Trust under the[] [United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."<sup>426</sup> Together, these

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424. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 354 (2009) (coining this term and arguing that the Constitution "carries within it an anti-corruption principle").

425. U.S. CONST. art. I, § 6, cls. 2 & 3.

426. *Id.* art. I, § 9, cl. 8.



prohibitions were “designed to limit legislators’ opportunities to serve themselves” in office.<sup>427</sup>

The two alternative views on the source of the office of ambassador could carry radically different implications for the scope of Article I’s anticorruption clauses.<sup>428</sup> If, on the one hand, the law-of-nations view is correct, then the office of ambassador is, as James Madison explained, “not an office in the constitutional sense of the term” because it is created by neither the Constitution nor domestic law.<sup>429</sup> From here it could very well follow that an ambassadorship is neither a “civil Office under the Authority of the United States” within the meaning of the Ineligibility Clause, nor an “Office under the United States” under the Incompatibility Clause, nor an “Office of Profit or Trust under the[] [United States]” within the meaning of the Foreign Emoluments Clause.<sup>430</sup> In other words, the law-of-nations view could very well exempt ambassadors from some of Article I’s principal anticorruption clauses. One effect would be to establish that legislators are eligible for ambassadorial appointments at any time, even if they recently voted to increase emoluments for the ambassadorship they

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427. Teachout, *supra* note 424, at 354.

428. I speak tentatively here because there is much uncertainty and little authority on the meaning of—and difference, if any, between—a “civil Office under the Authority of the United States,” U.S. CONST. art. I, § 6, cl. 2, an “Office under the United States,” *id.* art. I, § 6, cl. 3, and an “Office of Profit or Trust under the [United States],” *id.* art. I, § 9, cl. 8. Seth Barrett Tillman, who has provided the most extensive analysis of this area of constitutional law, has argued that the quoted language refers only to appointed federal officers, and thus excludes elected federal officials such as the president. *See, e.g.,* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013) [hereinafter Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*]; Tillman, *Why Our Next President May Keep His or Her Seat*, *supra* note 272, at 129. But his and other extant analyses have not addressed at length the status of diplomatic agents under these clauses. Future research should explore the issue in greater detail.

429. Power of the President to Appoint Public Ministers & Consuls in the Recess of the Senate, *supra* note 301, at 311 (emphasis omitted).

430. U.S. CONST. art. I, § 6, cls. 2, 3; *id.* art. I, § 9, cl. 8. The point here is tentative because it is conceivable that Madison overstated his point. In other words, it is plausible that a position might qualify as a “civil Office under the Authority of the United States,” an “Office under the United States,” and an “Office of Profit or Trust under the[] [United States]” even if it was not created by any form of domestic law. Indeed, the Supreme Court’s canonical definition of “office” does not accord any weight to provenance. *See* *United States v. Hartwell*, 73 U.S. 385, 385 (1867) (explaining that “[a]n office is a public station, or employment, conferred by the appointment of government . . . [and] embraces the ideas of tenure, duration, emolument, and duties”). This authority suggests that a U.S. ambassadorship to France, for example, might qualify as an “Office under the United States” even if it was created by the law of nations, given that the position is filled by the U.S. government to enable the occupant to represent the United States, and given that the position otherwise satisfies the *Hartwell* criteria.

seek to occupy. As OLC explained in its 1996 opinion on the eligibility of a member of the House of Representatives for an ambassadorship to Vietnam, “[w]ere Madison correct in denying that an ambassadorship is an ‘office’ in the constitutional sense, no Ineligibility Clause issue would arise.”<sup>431</sup> The other effect would be that ambassadors can receive foreign emoluments without consent from Congress, notwithstanding the potentially corrupting implications.<sup>432</sup>

If, on the other hand, ambassadorships are created by Congress, then they are almost certainly offices in the constitutional sense and, in turn, covered by the Ineligibility Clause, the Incompatibility Clause, and the Foreign Emoluments Clause.<sup>433</sup> Under this latter interpretation, legislators cannot be appointed to ambassadorships created during their term, individuals cannot serve simultaneously as an ambassador and as a member of the House or Senate, and ambassadors cannot receive foreign emoluments without the consent of Congress. The general effect is that the Constitution provides a greater barrier against corruption. The Ineligibility Clause has a broader scope and thus exerts greater influence as a preservative of “the separation of powers, legislative accountability, and [the] disinterestedness” of members of Congress;<sup>434</sup> the Incompatibility Clause similarly reinforces the separation of powers in the context of diplomatic appointments; and the Foreign Emoluments Clause operates as a stronger barrier against unaccountable foreign influence.

In summary, there have been reasonable grounds for disagreement in past debates over the functional merits of congressional empowerment and intervention. In part, this is because the merits of reform depended on the answers to empirical questions that lacked firm answers on the record of the time. In many ways, the empirical record is still incomplete. But even so, the new evidence that the appointments process has become more vulnerable to abuse in recent decades, the plausible meritocratic effects of qualifications

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431. Nomination of Sitting Member of Congress to be Ambassador to Vietnam, *supra* note 271, at 291 n.22.

432. Cf. U.S. CONST. art. I, § 9, cl. 8 (prohibiting only those persons “holding any Office of Profit or Trust under [the United States]” from accepting “any present, Emolument, Office, or Title” from a foreign government).

433. Even Tillman, who favors a relatively narrow interpretation of the offices covered by these clauses, argues only that *elected* officials are excluded. See, e.g., Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*, *supra* note 428, at 181–82.

434. Note, *The Ineligibility Clause’s Lost History: Presidential Patronage and Congress, 1787–1850*, 123 HARV. L. REV. 1727, 1727 (2010).

requirements, and the collateral benefits of the procongressional view on parts of the Constitution that combat corruption seem to push the needle in favor of Congress.

4. *Alternative Strategies of Legislation.* For those who remain unconvinced that statutory qualifications requirements are compatible with the Appointments Clause, it is worth considering whether any alternative measures might mitigate the risk of unconstitutionality. Several options are conceivable. For reasons of space, I raise them merely as possibilities, rather than as definitively constitutional options, and leave it to other commentators and Congress to more thoroughly evaluate their merits.

As one possibility, imagine a statute that regulates donor appointments not by purporting to bar the president from making them, but rather by barring donors from accepting an otherwise lawful commission. Under such a statute, the president would remain free to nominate anyone he sees fit, but donors who are nominated and confirmed would have to decline their appointments. Strictly speaking, this reform would leave the president's power to nominate formally unrestricted and may thus avoid inconsistency with the Appointments Clause.

As another possibility, imagine statutes that impose passport restrictions to discourage the appointment of unqualified ambassadors. One conceivable option would permit the appointment of individuals who lack congressionally prescribed qualifications, but also prohibit those same individuals from using an official or diplomatic passport in international travel. Another option would prohibit the Secretary of State from issuing official or diplomatic passports to appointees who fall short of congressional standards. In a sense, there is ample precedent for this approach. Various statutes dating back to the early twentieth century have prohibited the Secretary of State from issuing passports to designated categories of individuals. For example, a statute from 1902 stated that “[n]o passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.”<sup>435</sup> Similarly, statutes currently in force prohibit the Secretary of State from issuing passports to certain convicted drug traffickers,<sup>436</sup> individuals convicted of certain

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435. Act of June 14, 1902, Pub. L. No. 57-158, ch. 1088, § 2, 32 Stat. 386.

436. 22 U.S.C. § 2714 (2018).

cross-border sex offenses,<sup>437</sup> and those who have “seriously delinquent tax debt.”<sup>438</sup> If these measures comport with the separation of powers, the same may be true of a restriction pertaining to unqualified ambassadors.<sup>439</sup>

As still another possibility, Congress might permit the president to appoint donors or other specified categories of prospective nominees and permit those same individuals to accept commissions and obtain and use diplomatic passports, but then prohibit the use of federal funds to pay their salaries and benefits. These measures, too, have appeared in the past. In 1867, for example, Congress enacted a statute providing that “[n]o money appropriated by this act shall be applied to the payment of salary or compensation to any diplomatic representative of any grade, or to any consul or commercial agent of the United States, who is not a citizen of the United States, native, or duly naturalized.”<sup>440</sup> According to OLC, “it has long been established that the spending power may not be deployed to invade core

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437. *Id.* § 212a(b)(1)(A).

438. *Id.* § 2714a(e)(1)(A). For a broader collection of passport-regulating legislation, see Brief for Am. Jewish Comm. as Amicus Curiae Supporting Petitioner at 24–30, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2014) (No. 13-628).

439. Constitutionality is not assured, for a few reasons. First, there is no clear Supreme Court precedent on the matter. Congress cannot regulate the content of passports in order to recognize foreign borders, *Zivotofsky*, 135 S. Ct. 2076, but the issue here is different. Second, the precise basis for legislation under Article I is unclear. Given that ambassadors are often involved in promoting American business to foreign audiences, see, e.g., DePillis, *supra* note 133 (suggesting that “ambassadors are expected to be salespeople for American business—and run interference when they get into trouble”), Congress might rely upon its power “[t]o regulate Commerce with foreign Nations,” U.S. CONST. art. I, § 8, cl. 3, but that theory is untested. Cf. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 983–1040 (2010) (arguing that the Foreign Commerce Clause empowers Congress to regulate channels of foreign commerce with the United States, instrumentalities of foreign commerce with the United States or persons or things therein, and activity that substantially affects commerce with the United States). Finally, unlike statutes pertaining to drug traffickers, sex offenders, and tax dodgers, a statute on unqualified ambassadors would implicate the president’s power to conduct diplomacy. Cf., e.g., Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(A) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011, *supra* note 125, at 4 (stating that the president’s diplomacy power includes “exclusive authority to determine . . . the individuals who will represent the United States in” international negotiations). Congress would need to account for these complexities in imposing passport-based restrictions on appointees.

440. Act of Feb. 27, 1867, ch. 99, 14 Stat. 412, 414; see also Act of Mar. 3, 1859, ch. 75, 11 Stat. 402, 402 (1859) (appropriating funds for the salaries of diplomats to a discrete list of states and providing that “no other ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, diplomatic representative, or chargé d’affaires, shall be entitled to any compensation during the said fiscal year”).

Presidential prerogatives in the conduct of diplomacy,”<sup>441</sup> but it is not clear that this sort of measure would constitute an impermissible invasion, given that it would still allow the president to make the disfavored type of appointment and permit the nominee to accept a commission.<sup>442</sup>

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In summary, statutory qualifications requirements raise difficult questions about the meaning of the Constitution but are far from obviously unconstitutional. For those who privilege modern practice as a guide to meaning, a creative and well-calibrated approach seems likely to pass muster, even under standards articulated by the executive branch. For those who remain unconvinced, alternative strategies of legislation remain worthy of consideration.

### *B. Amendments to Senate Rules*

Another series of reforms would seek to amend the rules of the Senate or the Senate Foreign Relations Committee, which exercises jurisdiction over ambassadorial nominations.<sup>443</sup> To illustrate, in the 1970s, the Senate considered a rule prohibiting advice and consent for “non-career ambassadorial nominees when the number of such nominees exceeds 15 percent of the total number of U.S. ambassadors accredited to foreign nations.”<sup>444</sup> The Senate also considered a rule providing that, “in the absence of clearly demonstrated foreign policy competence or experience, [the Senate] will oppose confirmation of ambassadorial nominees whose *prima facie* qualification for appointment rests on monetary political contributions (direct or indirect) in excess of [\$5000 – \$10,000] in the last campaign year.”<sup>445</sup>

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441. Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. O.L.C. 189, 197 & n.18 (1996).

442. See also QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 325 (1922) (“Congress has, in fact, organized the permanent diplomatic and consular services and through its control of appropriations it seems able to compel acceptance of its organization.”).

443. STAFF OF S. COMM. ON RULES & ADMIN., 115TH CONG., AUTHORITY AND RULES OF SENATE COMMITTEES, 2017–2018, at 110 (Comm. Print 2017) [hereinafter AUTHORITY AND RULES OF SENATE COMMITTEES] (“The committee has a special responsibility to assist the Senate in . . . all nominations to the principal executive branch positions in the field of foreign policy and diplomacy.”).

444. 119 CONG. REC. 38,608 (Nov. 29, 1973).

445. *Id.*

The most significant advantage of this type of reform is that it would avoid contestable issues of constitutional law. A rule change would have a clear foundation in Article I, § 5, which gives the Senate power to “determine rules of its proceedings.”<sup>446</sup> Because adoption would not require the involvement of the House of Representatives, a rule would not raise questions about the constitutionality of House influence over the appointment of principal officers.<sup>447</sup> And by restraining only the Senate’s discretion to advise and consent, it would leave the president’s discretion to nominate formally untouched. As a practical matter, the president would have to account for the rule in selecting nominees, but the president must always account for the Senate’s likely response to a nomination if he or she hopes to fill an office—that is the point of advice and consent. If the president can choose to exclude major donors or other groups of individuals from ambassadorships by simply declining to nominate them, then it is hard to see why the Senate cannot achieve the same result by adopting a tailored rule against advice and consent for such nominees.

Changes to the rules of the Senate Foreign Relations Committee might also help, again without raising constitutional questions.<sup>448</sup> At present, these rules impose several requirements. The first is a waiting period: “Unless otherwise directed by the chairman and the ranking member, the Committee . . . shall not consider any nomination until 5 business days after it has been formally submitted to the Senate.”<sup>449</sup> The second is a conditional requirement of transparency: “Nominees for any post who are invited to appear before the committee shall be heard in public session, unless a majority of the committee decrees otherwise . . . .”<sup>450</sup> The third concerns document collection: “No nomination shall be reported to the Senate” unless the Committee receives financial disclosure and ethics reports, an assurance that the nominee lacks conflicts of interest, a complete list of financial contributions by the nominee and his or her family members to any

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446. U.S. CONST. art. I, § 5.

447. *See id.* art. II, § 2, cl. 2.

448. Generally speaking, the Committee Rules “may be modified, amended, or repealed by a majority of the committee, provided that a notice in writing (including by electronic mail) of the proposed change has been given to each member at least 72 hours prior to the meeting at which action thereon is to be taken.” COMM. ON FOREIGN RELATIONS, 115TH CONG., RULES OF THE COMMITTEE ON FOREIGN RELATIONS, S. PRT. NO. 115-23, at 13 (Comm. Print 2018) [hereinafter 115TH CONG., RULES OF THE COMMITTEE].

449. *Id.* at 7.

450. *Id.*

federal election campaign over the four years preceding the nomination, the certificate of demonstrated competency that is required by § 304 of the Foreign Service Act of 1980,<sup>451</sup> and a signed and notarized copy of a Committee questionnaire.<sup>452</sup>

Lawmakers could revise these rules to improve the output of the appointments process in several ways. For instance, while the rules require that the Committee receive a certificate of demonstrated competency for each ambassadorial nominee, they do not require that the Committee actually *consider* the certificate or nominee qualifications more generally in deciding whether to report a nominee to the Senate.<sup>453</sup> This omission distinguishes the rules from those of several other committees that explicitly mandate consideration of nominee qualifications.<sup>454</sup> By adopting the same approach with respect to ambassadors, the Foreign Relations Committee could reinforce the message that it cares about and will scrutinize qualifications. Likewise, the Committee could extend the waiting requirement imposed by Rule 10(a), which generally prohibits consideration of a nomination until five business days after it has been submitted to the Senate.<sup>455</sup> Although it is important to weigh the cost of additional delay, the Committee has employed a longer waiting period in the past,<sup>456</sup> and an extension would make it easier to evaluate and draw attention to questionable nominations. In addition, the Committee can follow the practices of other committees by mandating hearings and testimony from nominees.<sup>457</sup> If that mandate is too burdensome to apply to all

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451. 22 U.S.C. § 3944(a)(4) (2018).

452. 115TH CONG., RULES OF THE COMMITTEE, *supra* note 448, at 115–16.

453. *See id.* at 116.

454. Rule 4.2 for the Committee on Agriculture, Nutrition, and Forestry in AUTHORITY AND RULES OF SENATE COMMITTEES, *supra* note 443, at 13 (“In considering a nomination, the committee shall inquire into the nominee’s experience, qualifications, suitability, and integrity to serve in the position to which he or she has been nominated.”). *See also id.* at 39 (stating the same for the Committee on the Budget); *id.* at 149 (stating the same for the Committee on Homeland Security and Government Affairs); *id.* at 201 (stating the same for the Committee on Small Business and Entrepreneurship).

455. 115TH CONG., RULES OF THE COMMITTEE, *supra* note 448, at 115.

456. *See, e.g.*, 127 CONG. REC. S2808 (daily ed. Feb. 24, 1981) (“Unless otherwise directed by the Chairman and the Ranking Minority Member, the Committee on Foreign Relations shall not consider any nomination until six days after it has been formally submitted to the Senate.”).

457. *See, e.g.*, AUTHORITY AND RULES OF SENATE COMMITTEES, *supra* note 443, at 40 (“The committee shall conduct a hearing during which the nominee shall be called to testify under oath on all matters relating to his or her suitability for office, including the policies and programs which he or she would pursue while in that position.”).

prospective ambassadors,<sup>458</sup> the Committee might sensibly restrict it to nominees who come from outside the Foreign Service or whose certificate of demonstrated competency otherwise reveals an absence of traditional credentials. Finally, the Committee could eliminate the majority-vote exception to the public-hearing requirement and conduct all hearings on donor nominees or other designated groups in public session. These changes would signal to the president a stronger commitment to merit-based appointments and help to foster transparency and public engagement.

The downside of these reforms is that they may be easier to reverse than statutory qualifications requirements. Whereas the latter require simple majorities of both houses of Congress and, in most cases, the signature of the president,<sup>459</sup> the Senate can unilaterally undo its own rule amendments as long as “two-thirds of the Senators present and voting”<sup>460</sup> agree to end debate on the matter and a simple majority votes to adopt the change.<sup>461</sup> For this reason, rule reform may lack the longevity of other legislative measures.

### C. *Statutory Transparency Measures*

A final series of reforms would aim to discourage nonmeritocratic appointments by amending the U.S. Code to generate greater transparency with regard to credentials, campaign contributions, and performance in office. Federal statutes currently mandate three forms of disclosure:

- *Certificates of Demonstrated Competency*: Section 712 of the Department of State Authorities Act, Fiscal Year 2017 requires the president to post to the State Department’s website the certificate of demonstrated competency for each new nominee.<sup>462</sup>

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458. Cf. THE SENATE ROLE IN FOREIGN AFFAIRS APPOINTMENTS, *supra* note 419, at 32–34 (reporting that the number of nominations referred to the Senate Foreign Relations Committee more than doubled from 1949 to 1981, and that the increase has placed a heavy burden on the Committee).

459. U.S. CONST. art. I, § 7, cl. 2–3.

460. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 16 (2013).

461. RICHARD S. BETH, CONG. RESEARCH SERV., R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES, Cong. Research Serv. 3 (2013).

462. Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323, § 712, 130 Stat. 1905, 1945 (2016) (“Not later than 7 days after submitting [a certificate of demonstrated competence] to the Committee on Foreign Relations of the Senate, the President shall make the [certificate] available to the public, including by posting [it] on the website of the Department in a conspicuous manner and location.”).



- *Financial Reports*: Section 304 of the Foreign Service Act of 1980 requires each nominee to file with the Senate Foreign Relations Committee and the Speaker of the House a “report of [political campaign] contributions made by such individual and by members of his or her immediate family” in the four years preceding the nomination and requires the printing of those reports in the Congressional Record.<sup>463</sup>
- *Inspection Reports*: Section 209 of the Foreign Service Act of 1980 requires the State Department’s Inspector General (“IG”) to “periodically (at least every 5 years) inspect and audit the administration of activities and operations of each Foreign Service post,”<sup>464</sup> including by conducting a “systematic review and evaluation” on whether “policy goals and objectives are being effectively achieved and whether the interests of the United States are being accurately and effectively represented.”<sup>465</sup> The IG highlights cases of mismanagement and other problems by publishing these reports for embassies around the world.<sup>466</sup>

These measures are well intentioned but suffer from several flaws. First, although the Foreign Service Act of 1980 enumerates aptitudes, forms of knowledge, and other qualifications that Congress does and does not deem relevant to ambassadorial competence,<sup>467</sup> the Act does not actually require that a certificate of demonstrated competency address any particular qualification. As a result, the certificates have often been extremely sparse on important details. Since 1980, many have categorically omitted information about subject-matter expertise, such as knowledge about counterterrorism or trade policy.<sup>468</sup> Some have left out language aptitudes, and even those that address the matter have often stated simply that the nominee “speaks” a relevant

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463. 22 U.S.C. § 3944(b)(2) (2018).

464. *Id.* § 3929(a)(1).

465. *Id.* § 3929(b)(5).

466. *See Inspection Reports*, OFF. OF INSPECTOR GEN., U.S. DEP’T OF STATE, <https://www.stateoig.gov/reports/inspection> [<https://perma.cc/RVM6-39S6>].

467. *See* 22 U.S.C. §§ 3944(a)(1), (3) (providing that an individual appointed to be chief of mission “should possess clearly demonstrated competence to perform the duties of a chief of mission, including, to the maximum extent practicable, a useful knowledge of the principal language or dialect of the country in which the individual is to serve” as well as “knowledge and understanding of the history, the culture, the economic and political institutions, and the interests of that country and its people,” and that “[c]ontributions to political campaigns should not be a factor”).

468. *See Certificates of Competency for Nominees to Be Chiefs of Mission: 1980 – 2014*, *supra* note 139 (providing links to the collected certificates).

language.<sup>469</sup> Virtually none have identified whether the nominee has knowledge of the receiving state's history and culture.<sup>470</sup> The certificates for political appointees have frequently highlighted credentials of marginal relevance, such as support for philanthropic and community organizations.<sup>471</sup> And although the overall quality of the certificates has improved somewhat in recent years, the State Department appears to spend very little time on composition—virtually no certificate exceeds a single page in length.<sup>472</sup> These deficiencies, which quickly led even the original author of § 304 to question the certificates' utility,<sup>473</sup> limit the value of posting them online pursuant to the 2017 Department of State Authorities Act.<sup>474</sup>

The second flaw is that although public disclosure is now mandatory with respect to both the certificates and the financial reports, the law segregates these sources of information by providing for disclosure in two different locations, with certificates appearing on the State Department's website and financial reports appearing in the Congressional Record.<sup>475</sup> This makes it harder for the public to evaluate nominees and encourages the mistaken impression that campaign contributions are immaterial to the appointments process.

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469. See, e.g., REPORT FOR THE S. COMM. ON FOREIGN RELATIONS, AMBASSADORIAL NOMINATION: CERTIFICATE OF DEMONSTRATED COMPETENCE—FOREIGN SERVICE ACT, SECTION 304(A)(4): REPUBLIC OF BOTSWANA: EARL ROBERT MILLER, in *Certificates of Demonstrated Competence, 1980 – 2016, Tranche I*, at 10 (2015), <https://ryanscoville.files.wordpress.com/2018/01/foia-docs.pdf> [<https://perma.cc/5W9R-6A53>] (reporting that the nominee “speaks Indonesian, Spanish, and French”).

470. See generally *Certificates of Competency for Nominees to Be Chiefs of Mission: 1980 – 2014*, *supra* note 150 (providing links to the collected certificates).

471. See, e.g., REPORT FOR THE S. COMM. ON FOREIGN RELATIONS, AMBASSADORIAL NOMINATION: CERTIFICATE OF DEMONSTRATED COMPETENCE—FOREIGN SERVICE ACT, SECTION 304(A)(4): AUSTRIA: WILLIAM CARLTON EACHO, III, in *Certificates of Demonstrated Competence, 1980 – 2016, Tranche I*, at 69 (2015), <https://ryanscoville.files.wordpress.com/2018/01/foia-docs.pdf> [<https://perma.cc/5W9R-6A53>] (reporting that the nominee had been a “board member, former chair, and former acting CEO of the Boys & Girls Clubs of Greater Washington”).

472. See generally, e.g., *Certificates of Demonstrated Competence, 1980 – 2016, Tranche I*, <https://ryanscoville.files.wordpress.com/2018/01/foia-docs.pdf> [<https://perma.cc/5W9R-6A53>].

473. See *A Bill to Amend the Foreign Service Act of 1980*, *supra* note 55, at 30 (statement of Sen. Claiborne Pell).

474. Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323, § 712, 130 Stat. 1905, 1945 (2016).

475. Compare, e.g., CRAFT, KELLY – CANADA – JUNE 2017: CERTIFICATE OF COMPETENCY, U.S. DEP'T OF STATE (June 15, 2017), <https://www.state.gov/craft-kelly-canada-june-2017> [<https://perma.cc/8WG9-EWP2>] (reporting qualifications), with 163 CONG REC. S4421–23 (daily ed. July 27, 2017) (reporting contributions).

Indeed, at present, neither the certificates nor the website contain any hint that the financial reports even exist.<sup>476</sup>

The third flaw is that nominees' financial disclosures are not user-friendly. They typically provide detailed information about the amount and date of each contribution, but they almost always omit total values, and they report "contributions" as defined by the Federal Election Campaign Act of 1971, which uses the term to mean "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."<sup>477</sup> In the present context, that definition is overinclusive because it encompasses funds donated to support candidates for seats in the House of Representatives and unsuccessful candidates for the presidency, none of whom have a role in ambassadorial appointments.<sup>478</sup> The result is that the reports are often cluttered with financial data of zero relevance.<sup>479</sup>

Finally, current law provides inadequate transparency with respect to appointee performance. Embassy inspection reports can be useful in identifying cases of mismanagement. In a 2012 report on the U.S. embassy in The Bahamas, for example, the IG concluded that Ambassador Nicole Avant—a political appointee and major financial donor to President Obama—had presided over "an extended period of dysfunctional leadership and mismanagement" that "caused problems throughout the embassy."<sup>480</sup> Critical media coverage ensued.<sup>481</sup> Yet this form of transparency is fairly atypical. The average embassy reportedly receives an inspection only once every eight years because Congress routinely waives the statutory five-year requirement.<sup>482</sup> Given that most ambassadors hold office for a period of only three years,<sup>483</sup> it is

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476. See *Certificates of Competency for Nominees to Be Chiefs of Mission*, *supra* note 139.

477. Federal Election Campaign Act of 1971, 52 U.S.C. § 30101(8)(A)(i) (2018).

478. Compare *id.* § 30101(3) (defining "Federal office" to mean "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress"), with U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . .").

479. See, e.g., 163 CONG. REC. S4421–23 (daily ed. July 27, 2017) (reporting all contributions by Kelly Craft and family members, including irrelevant contributions such as \$2700 to Barbara Comstock for Congress).

480. OFFICE OF INSPECTIONS, ISP-I-12-08A, INSPECTION OF EMBASSY NASSAU, THE BAHAMAS (2012), <https://oig.state.gov/system/files/184725.pdf> [<https://perma.cc/U4L6-CDK6>].

481. See e.g., Rogin, *supra* note 23 (discussing the report).

482. JETT, *supra* note 30, at 193.

483. See generally *Chiefs of Mission by Country*, *supra* note 405 (showing that appointment durations tend to be three years).

not uncommon for appointees to serve without undergoing a thorough performance review.<sup>484</sup> The IG's Office of Inspections works to mitigate this problem by adopting a "risk management approach to prioritize projects and to ensure that [its] discretionary inspections address high-cost programs, key management challenges, and vital operations,"<sup>485</sup> but the fact remains that thorough evaluations are infrequent.

A recent administrative reform does little to improve matters. In a 2012 memorandum to the Undersecretary of State for Management, the IG recommended the institution of "a system to assess the performance of leadership" at U.S. embassies, including through the use of confidential staff surveys.<sup>486</sup> The Department's Bureau of Human Resources has since implemented this recommendation by arranging for so-called Chief of Mission Leadership Surveys, which call upon embassy personnel to periodically rate their ambassadors for a handful of leadership qualities.<sup>487</sup> The survey results, however, are unavailable to the public. Thus, reliable information on ambassadorial performance remains largely inaccessible.

A series of modest reforms could help to correct for these problems. First, Congress can enact a requirement that every noncareer nominee complete an examination at the Foreign Service Institute to test their abilities to read, write, speak, and listen to the language(s) most relevant to the prospective receiving state.<sup>488</sup> Second, Congress can amend § 304 to *mandate* that certificates of demonstrated competence report all unclassified information on the following issues<sup>489</sup>:

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484. JETT, *supra* note 30, at 193.

485. *Office of Inspections*, OFFICE OF INSPECTOR GENERAL: U.S. DEPARTMENT OF STATE, <https://oig.state.gov/10189> [<https://perma.cc/U9HQ-RG3K>].

486. Memorandum from Harold W. Geisel, Deputy Inspector Gen., U.S., Dep't of State, Improving Leadership at Posts and Bureaus, ISP-I-12-48 (Sept. 19, 2012), <https://www.stateoig.gov/system/files/198810.pdf> [[perma.cc/2WC3-QAEP](https://perma.cc/2WC3-QAEP)].

487. See Steve A. Linick, Inspector General, *Inspector General's Assessment of Management and Performance Challenges*, in U.S. DEP'T OF STATE, FISCAL YEAR 2014 AGENCY FINANCIAL REPORT 125 (2014), <https://2009-2017.state.gov/documents/organization/234331.pdf> [<https://perma.cc/JB3Q-8TKV>].

488. Cf. JETT, *supra* note 30, at 192 (supporting such a measure).

489. As a refresher, § 304 states that an individual appointed to be a chief of mission "should possess clearly demonstrated competence to perform the duties of a chief of mission, including, to the maximum extent practicable, a useful knowledge of the principal language or dialect of the country in which the individual is to serve" as well as "knowledge and understanding of the history, the culture, the economic and political institutions, and the interests of that country and its people." 22 U.S.C. § 3944(a)(1) (2018). Section 304 also states that the president "shall provide

- The scores from the nominee's language examination(s) at the Foreign Service Institute.<sup>490</sup>
- Prior experience in or involving the receiving state.
- Prior experience in or involving the region of the receiving state.
- Prior experience in organizational leadership.
- Prior experience in foreign affairs.
- Specialized knowledge on a topic—such as environmental, counterterrorism, or refugee policy—that is likely to prove particularly relevant to the appointment.
- Specialized skills, such as negotiating abilities, that are likely to prove useful in office.
- For the four years preceding the nomination, itemized and total dollar values for all financial contributions made by the nominee and his or her immediate family in support of (1) the nominating president and (2) members of the Senate.
- The total dollar value of any campaign contributions bundled in support of the nominating president.
- Any other information the president deems useful in evaluating the merits of the nominee.

Third, Congress can provide the Chief of Mission Leadership Survey with a firm statutory foundation by enacting legislation to require that the Bureau of Human Resources administer the survey to personnel at each embassy on a regular basis and then publish the results online, next to the associated certificates of demonstrated competency.<sup>491</sup>

These reforms could help to reduce the commonality of unqualified ambassadors. By requiring that certificates of

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the Committee on Foreign Relations of the Senate, with each nomination for an appointment as a chief of mission, a report on the demonstrated competence of that nominee to perform the duties of the position in which he or she is to serve." *Id.* § 3944(a)(4). This language does not mandate that the certificate of demonstrated competence supply any particular information regarding nominee competence.

490. The Institute typically scores examinees on a scale of zero to five in reading, listening, speaking, and writing. See *Descriptions of Proficiency Levels*, INTERAGENCY LANGUAGE ROUNDTABLE, <http://www.govtilr.org/Skills/ILRscale1.htm> [perma.cc/BLV2-DJQ2].

491. Former ambassador Dennis Jett recently made a similar recommendation. See JETT, *supra* note 30, at 193 (arguing that the State Department should administer an annual, electronic leadership survey to embassy personnel).

demonstrated competence elaborate on a broader range of issues, an amended § 304 would foster greater transparency on the determinants of nominations. By focusing on professional credentials and simple financial data, the reforms would generate nontechnical information that is relatively easy for senators, journalists, and the public to understand. By excluding irrelevant financial contributions and ensuring that all information is located in one place, the reforms would reduce the time and effort necessary to monitor nominations. And by enhancing transparency with respect to ambassadorial performance, they could help to dissuade underqualified individuals from seeking office in the first place.

These reforms, moreover, would avoid common pitfalls of mandatory-disclosure regimes.<sup>492</sup> They would require very little additional effort from nominees. They would necessitate only minimal additional expenditure of public resources. They would not produce an unmanageable volume of new information. They would not call for the disclosure of any classified information.<sup>493</sup> And they would avoid the constitutional questions associated with statutory qualifications requirements. Whether Congress is willing to enact them is of course unclear, but the findings revealed in Part III may help to create a political context in which reform is easier to achieve.

## CONCLUSION

An important debate in U.S. politics centers on the question of whether it is justifiable for the president to appoint campaign contributors and other political affiliates to ambassadorships. Despite the longstanding nature of this debate, commentators have made little headway since the 1950s, when the political branches settled on a ratio of approximately seven career appointees for every three political appointees. Using requests and litigation under FOIA to collect previously unavailable documents on the credentials of hundreds of U.S. ambassadorial nominees from 1980 through 2018, this Article has reported new data on multiple dimensions of modern practice, including the influence of money on the appointments process, the comparative merits of career and political ambassadors, the ways in

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492. Cf. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 679–742 (2011) (cataloguing the shortcomings of these regimes).

493. Although not previously available to the public, none of the past certificates were classified. See generally *Certificates of Competency for Nominees to Be Chiefs of Mission: 1980 – 2014*, *supra* note 150 (providing links to the certificates).

which political appointments have affected some bilateral relationships more than others, and changes over time. By revealing that political appointees are, as a group, significantly less qualified than the average career ambassador under a collection of congressionally approved measures; that states such as Australia, France, Japan, and Italy have received a disproportionate share of political appointees; and that the credentials of the average political appointee have diminished just as the average size of campaign contributions has grown, the data call for renewed attention to the issue of diplomatic appointments, including through consideration of statutory and rule reforms to improve the quality of U.S. representation abroad.