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## Recovering American Administrative Law: Federalist Foundations, 1787-1801

**ABSTRACT.** By scholarly convention, federal administrative law begins in the United States in 1887 with the establishment of the Interstate Commerce Commission. Before that time the national government is perceived as a state of courts and parties in which federal administration was minimal and congressional statutes were either self-executing or so detailed as to preclude significant administrative discretion. Such administration as there was went on within executive departments under the exclusive control of the President, and judicial review of administrative action was virtually unknown. From this perspective the administrative state of the twenty-first century, with its independent commissions, combinations of legislative, executive, and judicial authority in administrative agencies, broad delegations of administrative discretion, limitations on presidential control of administration, and ubiquitous opportunities for judicial review of executive action, represents a radical transformation of original constitutional understandings.

There is much truth in this conventional vision of nineteenth-century governance, but far from the whole truth. This Article begins a project of recovering the lost one hundred years of federal administrative law. For statutory sources, agency practice, and common law actions in the Federalist period reveal a quite different and more nuanced picture. From the very beginning some administrators were clothed with broad statutory authority, made general rules, adjudicated cases, were located outside of departments, and were tightly bound to congressional oversight and direction. And common law actions provided a judicial review that was often more intrusive and robust than we observe in contemporary practice. If there was an original understanding of the structure, function, and control of administration in early federal law, Federalist practices suggest that it was a much more complex and pragmatic understanding than our conventional account admits.

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*In hindsight, the development of administrative law seems mostly a contribution of the 20th century. . . . The creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis.<sup>1</sup>*

*The past is a foreign country: they do things differently there.<sup>2</sup>*

## INTRODUCTION

The conventional conception of administrative law in the United States has long suffered from two misperceptions—one is tempted to describe them as governing myths. The first is that the national government, from 1787 until the late nineteenth century, was a government of courts and parties.<sup>3</sup> In such a government, administration, and as a corollary administrative law, is a backwater—a place of little importance in the grand scheme of governance. The second is that administrative law is the law of judicial review of administrative action. On this view, to the extent that law holds administration accountable, it is law in courts that counts.

These myths, or misperceptions, are connected. Until well into the twentieth century federal judicial remedies respecting administrative action took two dominant forms: either a common law action against the officer or a suit challenging the constitutionality of the administrator's authorizing statute. From this perspective administrative law disappears into common law subjects like torts, contracts, property, and civil procedure or into constitutional law. Administrative actions that do not provoke a lawsuit that can be fit within any of these preexisting legal categories become legally invisible. From this court-

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1. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439 (2d ed. 1985).

2. L. P. HARTLEY, *THE GO-BETWEEN* 9 (1953).

3. This description is particularly associated with Stephen Skowronek. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982). This Article does not dispute Skowronek's central claims that courts and parties were core elements of the institutional structure of the antebellum United States government or that the late-nineteenth- and early-twentieth-century period he examines ushered in a new vision of state-building. It does challenge the notion, implicit in Skowronek's account and the conventional 1887 starting point for administrative law, that the administrative institutions created in the Federalist period (and maintained with little significant change until Andrew Jackson's presidency) and the means by which they were made accountable by law were minor aspects of governance, of little significance for our understanding of the structure of the infant Republic.

centered perspective, administrative law becomes recognizable as a field only as courts beat back the boundaries of administrative discretion pursuant to grants of judicial jurisdiction that demand neither a claim of common law right nor an assertion of unconstitutionality.

Moreover, to the extent that administrative activity at the national level was limited, there should not have been much administrative action for courts to be concerned about, even were we to admit that these traditional forms of litigation should be reclassified as “administrative law.” Relying on Lord Bryce<sup>4</sup> and his own review of congressional statutes, Theodore Lowi famously described the actions of the national government throughout the nineteenth century as ninety-nine percent subsidy or patronage policies.<sup>5</sup> Here Bryce and Lowi relied implicitly on the notion that administrative action becomes legally significant only to the extent that it creates specialized agencies to regulate private conduct. Hence the Interstate Commerce Commission (ICC) as the conventional starting point.<sup>6</sup> While there was extensive regulation of health, safety, commerce, and morals in the early Republic,<sup>7</sup> it was most prominent at the state and local level.

Indeed, Lowi explicitly connected regulation and the rise of administrative governance: “Delegation of power did not become a widespread practice or constitutional problem until government began to take on regulatory functions. The first century was one of government dominated by Congress and virtually self-executing laws.”<sup>8</sup> On this view, Woodrow Wilson was quite correct to title his 1885 study of American national governmental organization *Congressional Government*.<sup>9</sup> And Bryce, writing three years later, claimed that

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4. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 465 (London, MacMillan 1888).
  5. See THEODORE J. LOWI, *THE END OF LIBERALISM* 128-29 (1969). Interestingly enough, Lowi cited nothing other than Bryce for this proposition, and Bryce cited nothing at all.
  6. This is hardly just Lawrence Friedman’s view. See, e.g., Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189 (1986); Richard J. Stillman II, *The Constitutional Bicentennial and the Centennial of the American Administrative State*, 47 *PUB. ADMIN. REV.* 4 (1987).
  7. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).
  8. LOWI, *supra* note 5, at 94.
  9. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (Boston, Houghton, Mifflin 1885). Two years later, Wilson launched the field of public administration with his famous essay. See Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197 (1887).

even at the implementation stage, Congress chose to act itself, through “law” rather than through “officials.”<sup>10</sup>

These conventional characterizations capture some essential truths about national administrative organization and administrative law in antebellum America. But, too heavy a reliance on them causes us to miss much of the action. Indeed, these generalizations are sometimes wrong. From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action. And the first independent agency at the national level was not the ICC, but the Patent Office, created ninety-seven years earlier.

If these assertions are true, as I hope to demonstrate, then administrative law has a century of history at the national level that has yet to be carefully explored. Recovering the largely untold story of the legal structure of administration in the early Republic, like most historical exploration, has its own interest and charm. But as Hartley’s aphorism at the opening of this Article suggests, historical inquiry is also a species of comparative method. This inquiry into the early development of American administrative law seeks to exploit Hartley’s insight to do something more than challenge conventional historiography. Just as we mine foreign systems to better see the peculiar features of our own, so the past is mined here to reveal something of the enduring structure of American administrative law. Exposing the scope and diversity of Federalist administration, and the way law both built administrative capacity and made administration politically and legally accountable, helps to reveal what is missing from contemporary understandings of the domain of American administrative law.

The first and most obvious thing missing is that administrative law is not to be found primarily in judicial opinions. American administrative officials are accountable to courts through lawsuits, but their accountability hardly ends there. Administrators are accountable as well to the political branches: Congress and the President. Indeed, administrators are awash in legal

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10. 2 BRYCE, *supra* note 4, at 465. Two legislative techniques seem to provide the basis for Bryce’s conclusion: First, legislation made quite specific decisions, decisions that we would now expect to be delegated to administrators. Second, statutes often relied on ordinary legal sanctions—that is, criminal penalties or forfeitures rather than on providing administrative officers with “inquisitorial powers” that might prove oppressive. Because Bryce provided no examples, and spoke generally of the United States, not just congressional practice, his claims may have been based as much or more on observations of state legislation as on national.

instructions from both quarters. And because administrators conform to most of their instructions most of the time, statutes, executive orders, and congressional and executive oversight are much more important sources of constraints on administration than judicial opinions. Administrative officials receive their subject matter jurisdictions, their powers of action, their fiscal and human resources, much of their internal structure, and the processes by which they must act, not from the courts that review their actions, but from the Congresses and Presidents who create, empower, appoint, fund, and monitor them. How administration works in any particular period of American history depends primarily upon the understandings, statutory precedents, and legal innovations of the executive and legislative branches, not the judiciary. While “constitutional” in some ultimate sense, these understandings are to be gleaned largely from legislative and executive practice, not, as Justice Jackson lamented, from the sparse and fragmented jurisprudence of the Supreme Court.<sup>11</sup>

Both judicial review of administrative action and political control of administration presume yet another form of administrative law. When a litigant sues the Secretary of Health and Human Services, or Congress summons the Commissioner of the Food and Drug Administration to a hearing, both assume that these high-level officials have effective control over the bureaucracies that they manage. They assume, in effect, that there is an internal law of administration<sup>12</sup> by which higher level officials instruct subordinates and through which they can call them to account for their actions. It is these internal forms of administrative accountability that are most powerful in shaping the conduct of subordinate officials. To call up one familiar modern example, disability adjudicators determine millions of Social Security disability claims each year while never looking at either a statute or a

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11. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring). This Article relies on early statutes and congressional records to develop an understanding of legal techniques of empowerment and control of administration in the early Republic. Administrative practice and political understandings are derived primarily from secondary sources thought to be reliable, but there is more work to be done in departmental archives, the papers of key actors, and so on.
  12. The concept of an internal law of administration as part of administrative law was developed in one of the earliest treatises on American administrative law. See BRUCE WYMAN, *ADMINISTRATIVE LAW* 1-23 (1903). But the idea of exploring administrative law by looking at administrative practice and decisions seems to have been suppressed by the hegemony of the case method emanating from Wyman’s own school. See generally WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982) (arguing that the attempts of Ernst Freund and others to continue this tradition were overwhelmed by the rise of the case method as the only respectable approach to professional training).

judicial decision.<sup>13</sup> The same could be said for the thousands of officials who enforce our immigration laws or who carry out Occupational Safety and Health Act (OSHA) inspections. They are bound, and take themselves to be bound, by the internal instructions promulgated by the Social Security Administration (SSA), OSHA, or the Department of Homeland Security, either in the form of regulations, or, more commonly, in less formal instruments—manuals, memoranda, opinion letters, and the like.

These bureaucratic forms of accountability extend beyond the individual agency to the supervisory institutions of the executive branch and to the audit agencies of Congress. In contemporary administration the managerial accountability exercised by the Office of Management and Budget is often a more crucial constraint on agency action than is the prospect of judicial review.

The extremely limited record of judicial review of administrative action, and the special forms that review took in the Federalist period, help to free us from the tyranny of our currently judicio-centric legal culture. To see federal administrative law in the early Republic, we are forced to concentrate first on the techniques of administrative empowerment and control that Congress devised, and the debates surrounding those choices. And to understand how those legal innovations worked, we must be attentive, second, to the administrative practices that grew up in the process of implementing the congressional will. In the Federalist period, the structure of government, its accepted legal techniques, and the relationship of administrators to Congress, the President, their departmental superiors, and the courts were all up for grabs. Investigation of how those questions were approached, resolved, or managed forces us to recover a broader vision of administrative law—one that is currently submerged by an almost relentless focus on judicial opinions. But there is more at stake in the recovery project than that.

The court-centeredness of American administrative law—indeed of American lawyers' view of law in general—has hardly gone unnoticed.<sup>14</sup> But only in administrative law has this myopia been provided with a normative

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13. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983) (emphasizing the development of an internal law of administration as the most effective means for assuring accuracy and fairness in administrative adjudication).

14. As Robert Gordon has recently reminded us, even those legal realists concerned with administrative law and the emerging administrative state, whose academic agenda was to try to redirect legal studies away from the study of courts, spent most of their time criticizing how courts reviewed administrative agency action rather than investigating administrative action itself. Robert W. Gordon, *Willis's American Counterparts: The Legal Realists' Defence of Administration*, 55 U. TORONTO L.J. 405, 410-11 (2005).

defense. Professor Dicey proclaimed famously, “In England, and in countries which, like the United States, derive their civilisation from English sources, the system of administrative law and the very principles on which it rests are in truth unknown.”<sup>15</sup> In Dicey’s view, suppressing the idea of “administrative law” and subjecting officials to the strictures of the common law in ordinary courts were the very essence of preserving the rule of law.

Even here, as a functional matter, Dicey got it wrong. As Professor Carr put it:

He wasted pity on the French for being at the mercy of officials whom they could not bring into the ordinary courts, when in truth the special courts for deciding disputes between citizens and officials in France were working most acceptably and giving a practical remedy where English citizens got none.<sup>16</sup>

But, more importantly, this negative liberty view of the project of administrative law ignores the positive functions of the state and the role of law in shaping effective administration. We want administration that is respectful of individual rights. But we also want administrative institutions that are responsive to the democratic will as expressed through constitutionally legitimate forms of political action, and that are effective and competent in their assigned tasks.

In short, as I have argued elsewhere, the accountability system for administrative officials spans three domains: political accountability to elected officials, legal accountability to affected interests via judicial remedies, and administrative or managerial accountability to administrative superiors.<sup>17</sup> While much of the domain of legal accountability through judicial remedies (certainly not all) focuses on curbing the exercise of administrative authority, political and administrative accountability often, perhaps even predominately, feature action to ensure that the democratic will is effectively implemented. Administration projects state power, and much of the law of administration is concerned with promoting effective governance. The task of administrative law is to generate institutional designs that appropriately balance the simultaneous

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15. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 330 (9th ed. 1939).
  16. CECIL THOMAS CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 22-23 (1941).
  17. See Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, <http://www.bepress.com/ils/iss6/art4>.



demands of political responsiveness, efficient administration, and respect for legal rights.

These ideas are hardly new, but they seem to have been mostly forgotten. Frank Goodnow, Dicey's contemporary, outlined them in much this way in his 1905 treatise, *The Principles of the Administrative Law of the United States*.<sup>18</sup> Goodnow's formulation of the task or project of administrative law is worth quoting at some length, for he was writing near the time that administrative law emerged as a recognized field, and he formulated its domain from the perspective of nineteenth-century experience.

In the formation of the control over the administration, regard must be had, then, for the interests to be furthered by the administrative law. The first of these interests is that of governmental efficiency. Some method of control must be devised by which harmony and uniformity of administrative action and administrative efficiency may be secured, as many cases may arise where the neglect of officials will not cause a serious violation of private rights, but will simply tend to impair governmental efficiency. This method of control should be so framed that it may be exercised by the organs of the government of their own motion and not simply at the instance of private persons.

The second interest to be regarded is the preservation of individual rights, the maintenance in its entirety of the sphere of freedom of individual action guaranteed by the law of the land. Some method of control must be devised by which the officers of the government may be prevented from encroaching upon this sphere. As this method of control is framed in the interest of the individual, it should be possible for the individual to set it in motion by appealing to impartial tribunals from those administrative acts which he believes violate the rights assured to him by the law. Such impartial tribunals are found in the courts which in various ways may be entrusted with the power to prevent encroachment by the administration on the domain of private rights.

The third interest to be regarded by the administrative law is the social well-being. There must be some method of control devised which will force the administration in its action to keep before it always the fact that it is not a law unto itself; that one of the great reasons of its existence is the promotion of the social well-being as expressed in the

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18. FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905).

law. Such a method of control should be so organized as to allow that body which is most thoroughly representative of public opinion—that is, the legislature—to step in and compel the administration to obey the law.<sup>19</sup>

Goodnow, in my view, got it almost right. The first missing ingredient in his formulation is the recognition that political or “democratic” control includes presidential oversight and direction. The second is the degree to which any one of these three purposes can be served by techniques that he assigns to an alternative form of control.<sup>20</sup> Internal managerial controls can protect private rights and promote fidelity to legislative purposes. Congressional oversight often concentrates on administrative (in)efficiency or violations of private interests. Judicial review is widely understood as democracy-reinforcing and can be structured to energize flabby administration.<sup>21</sup>

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19. *Id.* at 371-72.

20. Goodnow was not wholly oblivious to these overlaps, *see id.* at 376, but downplayed their importance.

21. For example, my daily *New York Times* on the morning that these words were first written carried three stories on the protection of the individual rights of foreigners dealing with American administrative institutions. On the Op-Ed page, Bob Herbert’s column called for Congress to create a bipartisan independent commission to investigate the breakdown of command oversight that apparently led to the prisoner abuses at Abu Ghraib Prison in Iraq. Bob Herbert, *On Abu Ghraib, the Big Shots Walk*, N.Y. TIMES, Apr. 28, 2005, at A25. On the front page, Eric Schmitt reported on the issuance of a new interrogations manual by the Army that specifies in great detail (the manual runs more than two hundred pages and is accompanied by dozens of classified “interrogation scenarios” that contextualize the new rules) what procedures may or may not be used, and in what circumstances. Eric Schmitt, *Army, in Manual, Limiting Tactics in Interrogation*, N.Y. TIMES, Apr. 28, 2005, at A1. And somewhat buried on page A16 was the story of a tort settlement against the government in favor of one Rosebell N. Munyua, who sued the U.S. for its negligent handling of her asylum claim, which resulted in persecution when she was forced to return to her native Kenya. Dean E. Murphy, *In Rare Accord, Spurned Asylum Seeker To Get \$87,500*, N.Y. TIMES, Apr. 28, 2005, at A16. Almost any day’s newspaper could produce similar examples. The noteworthy thing about them is that they all seek to provide some form of accountability for violations of private rights, but none involves any standard form of judicial review of administrative action. Congress is called upon to protect prisoners’ rights through political oversight, and Ms. Munyua got some form of redress through a tort suit, although judicial review in conventional modern forms is notably absent from much of the administration of immigration law. Perhaps the most effective action described in the *Times* stories was the Army’s revision of its interrogation manual. Inside the armed forces, manual instructions have the status of military orders, and a violation of military orders carries a host of potential sanctions.

As the historical analysis that follows will demonstrate, recovering something like Goodnow's broad vision of administrative law is critically important to understanding what administrative government, and government according to law, was about in the Federalist period. For—as it was written—there was a hole in the U.S. Constitution. The Constitution provided a legislature, a Supreme Court, and two executive officers. Administration was missing. During Washington's two terms and Adams's one, Federalist Presidents, Congresses, administrators, and occasionally courts—in the midst of military insecurity, economic uncertainty, and civil unrest—made enormous progress in constructing a system of political, managerial, and legal controls over administration. And they accomplished this while simultaneously building the administrative institutions necessary to run a government. These early years of the Republic were in some sense a continuation of the Constitutional Convention.

Their project was preeminently state building, a focus that contemporary administrative law's concentration on control and accountability all but obscures.<sup>22</sup> To be sure, concerns about the impairment of administrative efficiency or effectiveness, and the recognition that agencies are also monitored and instructed by political principals, run like a leitmotif through contemporary judicial opinions reviewing, or declining to review, administrative action. But once a bow has been made to politics or administrative necessity, what goes on in those domains is left unexplored, or perhaps implicitly farmed out to other disciplines.

When looking at the Federalist period, these matters of administrative structure and technique, and how they can be shaped through law, are necessarily at the heart of the state-building enterprise. Energy and effectiveness in administration were critical to the very survival of a union that could easily have disintegrated before it became operational. The design and operation of the federal government's new administrative institutions would determine in substantial part whether Americans were to be bound together in a common project of government under law.<sup>23</sup> Today they determine the

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22. The persistence of the belief that administration was almost nonexistent at the national level prior to the late nineteenth and early twentieth centuries may also relate to the widespread, and erroneous, belief that the *laissez-faire* ideology dominated all of, not just the late nineteenth century. On the late-nineteenth-century origins of *laissez faire*, see NOVAK, *supra* note 7, at 84-88; and Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988).

23. The autonomous impact of administrative institutions on social and political development and the critical importance of the Federalist period are themes that animate a number of

degree to which we retain the capacity to carry through on the multitude of common projects that the modern administrative state has launched or to manage emerging threats and grasp emerging opportunities.

Federalist institutional designers did not always produce administrative institutions that worked. But observing their efforts highlights techniques and issues of administrative structure that contemporary administrative lawyers should not ignore.<sup>24</sup>

This Article's recovery project proceeds in five parts. Part I sets the stage for the Federalists' legislative and administrative project by looking at the Constitution's missing article on administration. It views Article II as most important for what it leaves out, not for what its sparse and cryptic language conveys.<sup>25</sup> As we shall see, between 1787 and 1801, Congresses, Presidents, and

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political and historical studies that carry forward the historical institutionalist project that Skowronek's *Building a New American State* began. See *supra* note 3. As with this Article, those who focus on administrative institutions and their effects tend to dissent from Skowronek's view of the relative importance of administrative institutions as shapers of both politics and nationhood in the antebellum era. For an excellent survey of this literature by one of its contributors, see Richard R. John, *Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835*, 11 *STUD. AM. POL. DEV.* 347 (1997).

24. This is not to say that these matters are always ignored. Over the last two decades a considerable literature has addressed the gridlocked or "ossified" processes of federal administrative action, particularly agency rulemaking, and has begun to suggest ameliorative reform programs. For a small sampling see, for example, Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 *U. PITT. L. REV.* 405 (1996); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *DUKE L.J.* 1385 (1992); and Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 *U. KAN. L. REV.* 689 (2000). And there is much debate about whether contemporary reforms that attempt to make regulation more "responsive," "collaborative," or "reflexive" increase agency effectiveness or abandon regulatory missions. Compare Eric W. Orts, *Reflexive Environmental Law*, 89 *NW. U. L. REV.* 1227 (1995) (providing a very positive view of these practices), and E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program That Works!*, 92 *MICH. L. REV.* 1840 (1994) (same), with Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 *ADMIN. L. REV.* 713 (1997) (suggesting reasons to be skeptical of the "responsiveness" turn), and Sidney A. Shapiro & Randy S. Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 *ADMIN. L. REV.* 97 (2000) (same).
25. This is not, I hasten to add, an argument that Presidents lack inherent powers or were not meant to exercise supervisory controls over executive branch personnel, or that some version of the "unitary executive" theory might best explain constitutional understandings both at the founding and today. For the development of a similar view, see AKHIL REED AMAR, *THE CONSTITUTION: A BIOGRAPHY* 234-36 (2005).

administrators made much of the Constitution's generous vacuity. Looking closely at the institutional arrangements that they constructed suggests that contemporary administrative arrangements do not represent some fall from a state of separation-of-powers grace in the early Republic. Early Congresses delegated broad policymaking powers to the President and to others, combined policymaking, enforcement, and adjudication in the same administrative hands, created administrative bodies outside of executive departments, provided for the direct responsibility of some administrators to Congress itself, and assigned "nonjudicial" business to the courts.

But these Federalist-era state builders were not operating with a twenty-first-century kit of administrative understandings either. The idea of "office," for example, was highly ambiguous—an unsettled blend of public and private stations. This ambiguity made the legal structure of office-holding problematic along multiple dimensions, from the way "officers" should be remunerated, to whether and how they were subject to hierarchical direction and control by administrative superiors, to the means and extent to which they should be legally responsible in court. And making a customs official in Charleston an energetic tax collector, responsive both to the law and to a Treasury Secretary in Philadelphia (or New York or Washington), was no mean feat under late-eighteenth-century conditions of transportation and communication, even if

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Much of the historical discussion in this Article, particularly in Part II, bears on what has come to be known as the "unitary executive" controversy and in ways that might be thought to support those who argue that the construction of a broad and exclusive power to administer the law from the text of Article II is an overreading of both the language of the Constitution and the historical context within which Article II was drafted and ratified. But while I am sympathetic to the views on the historical questions advanced in Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994), I do not think that either the "unitarians" or the "anti-unitarians" have delivered knockout blows. I find the debate inconclusive because the terms of the debate ("direction," "control," even "unitariness" itself) seem to be vague and shifting, in part because the contestants deploy differing conceptions of what counts as evidence (e.g., rhetoric, practice, context), and in part because, were there agreement on all of these things, much of the evidence seems to me irreducibly vague or ambiguous. Suffice it to say, for now, that this Article is not meant to be a direct intervention into the unitarianism debate.

Much of the unitary executive literature up through 1995 is cited in the Flaherty and Lessig and Sunstein articles. In the subsequent decade, Steven Calabresi and Christopher Yoo continued to lead the "unitarianists" campaign with four articles spanning the whole of U.S. constitutional history. Most of the post-1995 literature on both sides of this continuing debate can be found in their final installment, Christopher S. Yoo, Steven G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (2005).

the ambiguities of office were fully resolved. The combination of economic incentives, criminal sanctions, reputational qualifications, accounting devices, common law actions, and departmental exhortations the Federalists developed to attack these issues of administrative accountability seem strange to say the least to current administrative lawyers. We now presume the existence of highly institutionalized methods of presidential and congressional control, the impersonality of office, the hierarchical organization of a career civil service, and a highly articulated system of judicial review.

Yet, however peculiar some late-eighteenth-century techniques for building administrative capacity and attempting to make it responsive, effective, and lawful, Federalist administrative law can still be understood in terms of Goodnow's broad categories of political, managerial, and legal accountability. Parts II, III, and IV therefore organize discussion not as a straightforward historical narrative describing how the hole in Article II was filled, but through attention to these conceptual categories. Those Parts provide a snapshot of the multiple ways that statutory texts, administrative and congressional practices, the deployment of presidential authority, and the recognition and construction of private causes of action in the courts built and bound the Federalist administrative state.

Part V concludes by reflecting on the structure of Federalist administrative law.<sup>26</sup> It is a law that is both strange and familiar—often strange in its techniques, but generally familiar in its purposes. In relation to its most general purposes, how could it not be? There may be a hole in the Constitution where “The Administrative Branch” might have gone, but there is little doubt about that document's broad commitments. It sought to construct a national government that was effective, republican, and limited by respect for state

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26. Public administration scholars have never doubted the existence of an administrative system from the very beginnings of the Republic, indeed from the very beginnings of anything that looked like human governance. And they have also presumed that that administrative system operates in accordance with law. Leonard White's foundational history of Federalist administration, LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* (1948), is essentially the story of the Federalists' attempt to establish the civil authority of the United States government through the creation and execution of national law. And while White does not go so far, some would claim that the Federalists constructed an administrative state that satisfied in some rudimentary form all the Weberian criteria for a fully functioning bureaucracy based on the rule of law and the equality of persons before the law. See Paul P. Van Riper, *The American Administrative State: Wilson and the Founders—An Unorthodox View*, 43 *PUB. ADMIN. REV.* 477 (1983). Van Riper's argument is elaborated and more persuasively argued in Paul P. Van Riper, *The American Administrative State: Wilson and the Founders*, in *A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE* 3 (Ralph Clark Chandler ed., 1987).

prerogatives and individual rights. Whatever administrative tasks were necessary to carry out national purposes had to be constructed through legal forms that honored those constitutional imperatives. But, it is also a body of law that is wonderfully various, experimental, and innovative. Those who would deploy it to derive first principles to settle contemporary controversies about the necessary constitutional structure of the federal administrative state do so at considerable historiographic peril.

## I. THE CONSTITUTION AND ADMINISTRATION

Administration is missing? To be sure, there is an executive branch. But it has only two constitutionally prescribed offices, President and Vice President. And, as John Adams complained to John Trumbull, the Vice Presidency could hardly have been designed to be less significant to the actual functioning of the government.<sup>27</sup> Earlier versions of Article II submitted to the Constitutional Convention contained extensive specification of the major departments of the government: delineating their respective jurisdictions and requiring that they form a Council of State “to assist the President in conducting the public affairs.”<sup>28</sup> But those provisions were all abandoned.

The Constitution presumes that there will be heads of departments and other officers of the United States and provides that the President should appoint them. And the President is charged with seeing “that the Laws be faithfully executed.”<sup>29</sup> But the only explicit power given to the President by the

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27. Letter from John Adams, Vice President of the United States, to John Trumbull (Jan. 23, 1791), in 9 THE WORKS OF JOHN ADAMS 573 (Charles Francis Adams ed., Boston, Little, Brown 1854).
  28. CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 121 (1969). For a discussion of this so-called Morris-Pinckney plan, see *id.* at 121-23.
  29. U.S. CONST. art. II, § 3. The drafters’ perspective on the importance of this duty might be gleaned from its location in the text. It is listed immediately following the President’s apparently ceremonial duty to receive foreign ministers. In *The Federalist Papers* Hamilton described that latter function as one more of “dignity than authority” and explained it as a matter largely of convenience—to avoid having to reassemble the Congress to receive the credentials of every newly arrived foreign minister, even if he arrived merely to replace a departed predecessor. THE FEDERALIST NO. 69, at 355 (Alexander Hamilton) (Max Beloff ed., 1987). Writing over a century later, Charles Thach agreed with Hamilton. THACH, *supra* note 28, at 124. Later commentators have viewed the power as considerably more important. David Currie has claimed that the power to receive foreign diplomats “empowers the President to decide with which governments the United States shall have diplomatic

Constitution with respect to executing the laws is the power to require reports in writing from the heads of departments<sup>30</sup> – whatever “departments” might be.

These provisions, plus Article II’s Vesting Clause,<sup>31</sup> have been sufficient for some to construct a “textual” or “structural” case for the so-called unitary executive.<sup>32</sup> But, as I have stated, I find these arguments unpersuasive.<sup>33</sup> The Constitution’s silence on most matters administrative provides extremely modest textual support for the notion that all administration was to be firmly and exclusively in the control of the President. Not only are the President’s stated constitutional powers feeble, Congress’s powers are broad. Those enigmatic departments would be whatever authorities the Congress decided to create.<sup>34</sup> The Senate must agree to the President’s appointment of the

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relations.” DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 45 (1997).

30. U.S. CONST. art. II, § 2. The power to require reports seems to be the only thing left from the Morris-Pinckney plan to specify departments in the Constitution and make them a Council of State to advise the President. THACH, *supra* note 28, at 119. If so it is surely not there, necessarily, as a means of instantiating “Privy Council” government. Akhil Amar has argued that the Opinion Clause is designed to do almost the opposite, to confirm the President’s hierarchical position in relation to other executive branch officers and to ensure that the President remains ultimately accountable for executive branch actions. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996).
31. U.S. CONST. art. II, § 1.
32. Two of the most complete developments of this position can be found in Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541 (1994); and Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).
33. See *supra* note 25.
34. This too is merely a constitutional convention. Some members of the Congress seem to have believed that congressional establishment of executive departments was an undue intrusion on the President’s powers. Senator William Maclay argued that the President should have the discretion to create whatever administrative apparatus he thought appropriate. William Maclay, Diary Entry (June 18, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, at 81-83 (Kenneth R. Bowling & Helen E. Viet eds., 1988) [hereinafter CONGRESS DOCUMENTARY HISTORY]. After all, unlike Article III’s provision for the creation of lower federal courts, the Constitution is silent concerning how departments are to be created. Moreover, there is the curious locution of the Necessary and Proper Clause, which speaks of “Powers vested by this Constitution . . . in any Department or Officer.” U.S. CONST. art. I, § 8, cl. 18. This textual suggestion that the Constitution confers determinant powers on the departments is almost certainly a drafting error, perhaps a residue of the proposals to include a provision for specific departments with defined duties in the constitutional text. However, since those departments were not included in the Constitution, it surely seems appropriate to presume that the intention was for Congress to



government's principal officers.<sup>35</sup> And Congress may assign the President's appointment power over all "inferior Officers" (whoever they might be) to the judiciary or to the heads of departments.<sup>36</sup> So far as the Constitution provides—that is, nothing—the terms of office of officers of the United States, their method of removal (other than impeachment), and by whom, is left to congressional discretion.

Among the writers of *The Federalist Papers*, Hamilton seems to have given public administration the most thought, and in those writings he carried virtually the full burden of persuasion with respect to Article II. Hamilton famously asserted, in *Federalist No. 68*, that the goodness of the overall constitutional structure should be judged by the degree to which it was conducive to good administration. But why he thought the scheme devised in 1787 would have that quality remains somewhat obscure. Hamilton's defense of the new Constitution's provisions on the executive branch is contained in *Federalist Nos. 69-77*, which are devoted almost exclusively to the defense of the organization and powers of the presidency, and his assertion concerning good "administration" is in the context of a defense of the Electoral College. Much of Hamilton's *Federalist* defense of Article II seeks merely to reassure critics and doubters that the President will have only modest power and authority by comparison with the King of England, or with some of the governors of the several states.<sup>37</sup>

The "energy" in the executive that Hamilton so often emphasized seems to be located in the chief magistrate himself.<sup>38</sup> And that energy, as well as responsibility, is guaranteed mostly through the provision for a single chief executive, whose decisions would not be thwarted or submerged in a Council of State, such as those that were common in the state constitutions of the period. On Hamilton's account, energy and responsibility are further

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shape the executive departments in the exercise of its powers under the Necessary and Proper Clause. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 600-01 (1984).

35. U.S. CONST. art. II, § 2.

36. *Id.*

37. Hamilton was highly selective about the latter. Governors were notoriously weak in most of the new state constitutions other than Massachusetts and New York. And even in New York the Governor was saddled with a Council having significant control over executive functions. See THACH, *supra* note 28, at 25-54.

38. So far as I have been able to determine, Hamilton never gave definitive content to what he meant by "energy." It seems to have been for him something like the flip side of "responsibility." Responsibility focused on a single individual would engage his reputation and honor and provide powerful motives for action.

buttressed by a reasonable duration of office, the veto power, and the elimination of the threats or blandishments that could be expected from a Congress that controlled the incumbent's salary.<sup>39</sup>

Perhaps the answer to Hamilton's and other Federalists' apparent satisfaction with the administrative prospects generated by Article II of the Constitution lies in what might have been. The President might have had no independent electoral base, but taken office instead as the appointee of Congress. "He" might have been "they." Major decisions might have been subject to approval by a Council of State. Having escaped the Convention with an executive branch clothed with some independence of operation may have seemed enough of a base upon which to build.<sup>40</sup>

Federalist perspectives were also shaped by having borne close witness to the ineffectiveness of the administrative arrangements under the Articles of Confederation.<sup>41</sup> Operating first merely as ambassadors from the various states—and after 1781, under Articles of Confederation that provided for no executive—the Continental Congress attempted to administer military affairs, finance, and foreign affairs by either ad hoc committees or the Committee of the Whole. Time and again this system proved incompetent, as these part-time representatives of the states struggled to conduct the mounting business of the government while serving on standing committees, ad hoc committees, and as final decisionmakers in the Committee of the Whole. By one count the Continental Congress created 3249 different committees between 1774 and

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39. Hamilton discussed what we would understand as administration—as distinguished from the Executive or Chief Executive—only in passing in his defense of the appointments power. Here he urged that the appointment of capable officers is more likely if it is made the responsibility of a single accountable individual, the President, but subject to ratification, and thus checked, by the Senate. But there is no brief here for presidential control and direction of administration. In one of his few missteps in predicting the interpretation that would subsequently be given to the new Constitution, Hamilton argued that stability in administration will be assured, not just by the fact that the President can be reelected, but also by the requirement that any removal of a presidential nominee be acceded to by the Senate as well. Hamilton's error is surely excusable given the tenor of the debates about the Senate's role both in the Constitutional Convention and the ratification debates. John A. Rohr, *The Administrative State and Constitutional Principles*, in *A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE*, *supra* note 26, at 113.

40. See WHITE, *supra* note 26, at 13-25.

41. On administration under the Articles of Confederation, see LLOYD MILTON SHORT, *THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 35-77* (1923); and THACH, *supra* note 28, at 55-75.

1788.<sup>42</sup> It created 498 in its 1783 session alone, giving the average representative something like twenty committee assignments (although many of these assignments were pretty trivial).

Under increasing pressure to develop a government that worked, the Continental Congress responded by moving to a multi-member “board” system for important activities such as war and finance. But these boards, like the standing committees, were made up entirely of members of Congress and they quickly found themselves overwhelmed as well. Where the effects of inefficient administration were most obvious—that is, prosecuting the war and financing it—Congress strengthened the board system by adding full-time employees who were not members of Congress.

This change brought some order into the chaotic administration of the fledgling national government; but the composition of the boards was constantly shifting, and Congress could not resist micromanaging through detailed and tedious reporting requirements and scores of ad hoc committees to investigate particular matters or advise the boards on particular policies. Delay was endemic to this process. Washington’s frustrations with the inefficiencies of congressional control of the military are well known.<sup>43</sup> And, in rare agreement, both Hamilton<sup>44</sup> and Jefferson<sup>45</sup> called for stronger executive authority.

42. CALVIN JILLSON & RICK K. WILSON, CONGRESSIONAL DYNAMICS: STRUCTURE, COORDINATION, AND CHOICE IN THE FIRST AMERICAN CONGRESS, 1774-1789, at 93-97 (1994).

43. Many of the problems had to do with supply. The desperate situation of Washington’s army at Valley Forge in the winter of 1777-1778 resulted in part from a congressional reorganization of the Commissary Department that removed the authority of the Commissary General to appoint deputies and lodged that power in Congress itself. This destroyed the supervisory power of the Commissary General, and the supply operation fell apart under the combined weight of profiteering, graft, and simple inefficiency. For this example and others concerning the internal difficulties of congressional management of the war effort, see ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789, at 421, 502-43 (rev. ed. 2005).

44. Hamilton wrote to Robert Morris in 1780:

We want a Minister of War, a Minister of Foreign Affairs, a Minister of Finance, and a Minister of Marine. There is always more decision, more dispatch, more secrecy, more responsibility, where single men, than where bodies are concerned. By a plan of this kind, we should blend the advantages of a Monarchy and of a Republic, in a happy and beneficial union. Men will only devote their lives and attentions to the mastering of a profession, on which they can build a reputation and consequence which they do not share with others.

SHORT, *supra* note 41, at 53 (quoting Letter from Alexander Hamilton to Robert Morris (1780)).

Congress finally capitulated by resolving to appoint a Financier (or Superintendent of Finance), a Secretary of War, and a Secretary of Marine in February of 1781.<sup>46</sup> Alas, like everything else, the appointment of these officials was left to election by the Congress. The effects of that system of appointment can be appreciated by noting that General Benjamin Lincoln was appointed the first Secretary of War on October 30, 1781—eleven days after General Cornwallis had surrendered to General Washington at Yorktown.<sup>47</sup>

Hence, the mere fact that the heads of departments would be appointed by the President, that Congress itself had no appointing power for administrative officials under the Constitution, and that “heads of Departments” in the Appointments Clause *seemed* to presume single-headed administrative entities, would suggest to any proponent of the new Constitution’s executive arrangements a colossal improvement over the years of the Confederacy. There would indeed be a unitary “executive” but what that meant for the organization of “administration” remained to be determined.<sup>48</sup>

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45. Jefferson proposed that the Continental Congress should establish something like an executive committee that would have broad executive powers, including virtually all of those that were subsequently given to the President in the Constitution. While surely also concerned about failures of execution under the confederation arrangements, Jefferson seems to have been motivated more by the concern that the details of execution were bogging down the Continental Congress in trivia and preventing the assembly from transacting its important business. *See, e.g.*, Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), in 4 THE WRITINGS OF THOMAS JEFFERSON 1784-1787, at 424 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1894). Jefferson’s draft report proposing the executive committee can be found at Thomas Jefferson, Draft of Report on a Committee of the States (Jan. 30, 1784), in 3 THE WRITINGS OF THOMAS JEFFERSON 1781-1784, *supra*, at 388.

46. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 126-28 (Gaillard Hunt ed., 1912).

47. DAVID B. MATTERN, BENJAMIN LINCOLN AND THE AMERICAN REVOLUTION 123 (1995).

48. W.F. Willoughby, for example, claimed in his influential treatise on comparative government that the authors of the U.S. Constitution “failed utterly to recognize or to make any direct provision for the exercise of administrative powers.” W.F. WILLOUGHBY, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES 242 (1919). And he went on to say, “In consequence of this failure our entire constitutional history has been marked by a struggle between the legislative and the executive branches as to the relative parts that they should play in the exercise of this power.” *Id.* His brother, W.W. Willoughby, was similarly unimpressed with the notion that Article II dealt with administration. In his treatise on constitutional law, he argued:

[I]t was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose function should, in the main, consist in the performance of those political duties which are not subject to judicial control.

Presidents have often emphasized the necessity and constitutional warrant for centralized control of administration—a view constantly reinforced by the degree to which Congress has assigned the President administrative responsibilities. But these arrangements do not flow naturally from the text or the context of the drafting and ratification of Article II. The American Constitution creates a political system for governance, but it does not establish a government. Governments are not run by legislators, judges, or even Presidents. They are run by administrators, the people who, in Karl Llewellyn's trenchant phrase, "have the doing in charge."<sup>49</sup>

Administration, and with it, administrative law, would have to be constructed on some model hardly hinted at by the constitutional text. That job fell to the Federalist administrations and the first Congresses of the new Republic. As they carried out that task, the administration that they constructed was neither the neat, unitary system envisioned by some late-twentieth-century legal commentators, nor the almost equally neat separation of politics and administration claimed by W.W. Willoughby and his late-nineteenth-century colleagues.<sup>50</sup> Presidential and congressional control over administration was to be a much more complicated, various, and practical set of arrangements.<sup>51</sup>

## II. CONGRESS AND THE POLITICAL CONTROL OF ADMINISTRATION

Had Federalist Congresses done little, or done virtually everything via self-executing laws, the issue of political control of administration and the techniques by which it might be accomplished need not have loomed large in the early Republic. But this was not the pattern. The sheer range of activities

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It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the government, with general power of directing and controlling the acts of subordinate federal administrative agents.

2 W.W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1156 (1910). In this latter sentiment, practice has proved W.W. Willoughby to have overstated his case. Perhaps the sounder judgment was offered twelve years later by Charles Thach when he said, "Again, nothing is more vital than the relations of the executive head to the chief officers of the administrative departments, and the relations of the latter to the legislature. And yet the Constitution furnishes no final and authoritative decision of the question." THACH, *supra* note 28, at 140.

49. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 3 (1960).

50. See *supra* note 48.

51. For a more extensive development of this idea, see Lessig & Sunstein, *supra* note 25, at 38-84.

attended to in the congressional sessions that make up the first volume of the *United States Statutes at Large* is astonishing. The First Congress established the great Departments of War, Foreign Affairs, and Treasury, soon to be followed by a Naval Department and the Post Office. Legislation was adopted on patents and copyrights. A host of legislative initiatives dealt with navigation, ranging from providing lighthouses, to registering U.S. vessels, to establishing a system of seamen's hospitals. Congress established the Customs Service, along with the first Bank of the United States. Statutes establishing rules and regulations for the sale of public lands initiated the great project of settling the West. The legal affairs of the Republic were put in the hands of an Attorney General and of U.S. Attorneys in each district (or state). The Judiciary Act of 1789 created the lower federal courts and specified their jurisdiction. A mint was established and the first bankruptcy act passed. Legislation addressed the issues of naturalization and the regulation of aliens, and steps were taken to attempt to protect American citizens from impressment into the navies of foreign powers. Congress established procedures for regulating trade with Indian tribes as well as with foreign nations. The early statutes evidence, as well, an overriding concern with money, appropriations, and taxes to finance the fledgling government.

Within a decade of the effective date of the Constitution, Congress had created a substantial government. To be sure, the national government's primary attentions were directed to defense and development. Land grants, protection of intellectual property, the creation of post offices and post roads, and the promotion of the carriage of goods by sea were all crucial to the creation of the new national market. And, although the government's efforts were relatively feeble, given its lack of funds, Congresses and Presidents were often preoccupied with the precarious position of a new nation surrounded both on land and at sea by Britain, France, and Spain—the great European powers of the age—and by potentially hostile Indian tribes on the frontier.

Yet around the edges of these dominant themes of development and defense, familiar modern concerns and administrative techniques began to emerge. Pension benefits, tax collection, and land patents gave rise to a host of individual disputes that were distant harbingers of the modern age of mass administrative justice. Licenses were required for ships engaged in coastal trade and in the whale or Banks fisheries and for trading with Indian tribes. The terms and conditions of seamen's contracts were extensively regulated along

with the provisions, medicines, and seaworthiness of vessels employing them.<sup>52</sup> And, in perhaps the first use of the spending power for regulatory purposes, Congress conditioned bounties paid to participants in the cod fishery on the execution of satisfactory contracts for the division of the catch with their seamen.<sup>53</sup> Forays were made into health regulation<sup>54</sup> and regulation of the quality of exports<sup>55</sup> by the simple expedient of requiring compliance with state quarantine and inspection laws as a condition for clearance into and out of U.S. ports. In aid of tax collection, administrative inspections were authorized without the necessity of a warrant to enter premises.<sup>56</sup>

The revenue statutes were the most complexly articulated administrative system devised by the early Congresses, and some more detailed elaboration of their content is revealing. These statutes pay close attention to the balance between effective tax collection and the protection of the individual rights of reluctant taxpayers. They also employ a host of different techniques to energize officials, guard against corruption, bring relevant expertise to bear on the determination of the value of goods, satisfy local interests, and utilize existing state and local enforcement resources.

On July 31, 1789, for example, Congress adopted “An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States.”<sup>57</sup> This Act gave all major ports three officials—a collector, a naval officer, and a surveyor—who had both separate responsibilities and requirements to act in unison to accomplish a number of tasks.<sup>58</sup> This division and combination of functions

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52. An Act for the Government and Regulation of Seamen in the Merchants Service, ch. 29, §§ 1, 3, 8, 1 Stat. 131, 132, 134 (1790). I have chosen to cite statutes from the Federalist Congresses by their descriptive titles (rather than their dates of enactment) to provide a more complete historical picture of administrative activity in the early Republic. I have omitted codification and repeal information because it is not relevant to the historiographic task at hand.

53. An Act Concerning Certain Fisheries of the United States, and for the Regulation and Government of the Fishermen Employed Therein, ch. 6, § 1, 1 Stat. 229, 229-30 (1792).

54. An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796).

55. An Act To Prevent the Exportation of Goods Not Duly Inspected According to the Laws of the Several States, ch. 5, 1 Stat. 106 (1790).

56. An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, § 29, 1 Stat. 199, 206 (1791).

57. Ch. 5, 1 Stat. 29 (1789).

58. *Id.* § 5.

seems to have been part of a scheme to avoid corruption in revenue collection, which as colonial and confederation practice had shown was a constant threat.

The statute armed these officials with substantial powers of enforcement. Ships entering a port were required to clear in with the port authorities and surrender their ship's registration. The registration was returned only on clearing out of the port with a certificate showing the ship's next destination. Without a registration the ship would, at the next port, be treated as a foreign vessel and its cargo subjected to import duties as if they were all foreign goods.

Under the terms of the Act, goods could be unloaded only with permission of the collector, who issued a statement, counter-signed by the naval officer, that all duties had been paid or a bond supplied for their payment. Collectors were authorized to enter and inspect any ship to search for dutiable merchandise and to make similar inspections on land after obtaining a warrant from a justice of the peace. If goods were found on which duties had not been paid they were forfeited and subject to sale. Customs officers were also authorized to seize any goods declared if they suspected that the invoices showing their value were fraudulent. Ships used in any scheme to defraud the United States of its revenue might be seized and forfeited as well.

The statute provided compensation for collectors, naval officers, surveyors, inspectors, weighers, and gaugers by a combination of commissions, piece rates, and daily fees, and by the right to receive one half the value of goods or ships that were forfeited for fraud or nonpayment of duties.<sup>59</sup> Thus energized by the prospect of gain, they were also given some statutory protection against harassment by lawsuit. In any claim against an official for improperly seizing or levying duties on ships or goods the officers were entitled to plead the Act as a defense, and if they prevailed to collect double their litigation costs from the plaintiff. Moreover, even if the plaintiff won, the judge could find that the officers had reasonable cause for seizure of goods or a ship, thus rendering the officer not liable for either damages or court costs.<sup>60</sup>

Ship owners and shippers received statutory protections as well. Congress presumed that a common law action would lie for any improper seizure or excessive duties charged. It also protected against fee-gouging by requiring that all fees, which were paid directly by ship's masters to the relevant officials, be posted conspicuously, and by providing stiff penalties for taking excessive fees.<sup>61</sup>

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59. *Id.* § 29.

60. *Id.* § 27.

61. *Id.* § 29.



Customs officials were required to take the ship's papers and invoices for goods as prima facie evidence of what the ship contained and the value of the goods.<sup>62</sup> If the officials attempted to levy additional duties, either because they claimed that some goods were not disclosed or that the invoices misrepresented their value, they could do so only with the consent of two reputable merchants who would determine the value of the goods and the conformity of the goods to the invoices presented by the ship's master.<sup>63</sup> Presumably these worthies would have the interest of the ship and shippers at least as much in mind as the interests of the United States in effective tax collection. Similarly, when collectors decided whether to allow the unloading of cargo at a port other than the port of destination shown in the ship's papers, their decision had to be attested to by either the wardens of the port (presumably state or local officials) or, if none, two reputable citizens "acquainted with matters of that kind."<sup>64</sup> And in the special case in which goods were not accompanied by invoices or were damaged in transit, they were to be valued by two merchants. As in the case of suspected fraud in the invoices, one merchant was appointed by the collector and one by the owner or consignee of the shipment.<sup>65</sup>

Congress adopted a similarly detailed and complex administrative system for the collection of taxes on distilled spirits in the Act of March 3, 1791.<sup>66</sup> Moreover, Congress had clearly learned something about tax administration in the interim, for it adopted further measures to protect both officers and taxpayers. For example, the statute contained strong inspection provisions, but made a nice distinction between administrative inspections and criminal investigations. Inspectors could be placed in a distillery at all reasonable times (but only in the daytime) to observe and ensure that the provisions of the Act were complied with.<sup>67</sup> But, entry into any premises for the purpose of seizing spirits concealed fraudulently—in violation of federal law—was to be authorized by a search warrant.<sup>68</sup>

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62. *Id.* § 13.

63. *Id.* § 22.

64. *Id.* § 12.

65. *Id.* § 16.

66. An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, 1 Stat. 199 (1791).

67. *Id.* § 27.

68. *Id.* § 32. This latter provision authorizes the issuance of such warrants by any judge, state or federal, but does not explicitly prohibit entry except by warrant. "Hot pursuit" or some

In addition, taxpayers were given a special statutory suit for any injury resulting from an officer's failure to perform his duties in accordance with the Act.<sup>69</sup> And while officers were protected against damages when they seized goods with reasonable cause, claimants could nevertheless recover damages for loss, waste, or detention from the United States, if the seizure was determined to be improper. (Officers were required to reimburse the United States for these expenses if they were determined to be negligent in handling the claimant's property). Moreover, penalties for fraud could be mitigated through a process of petition to any court that would, acting as merely a factfinder, take evidence and submit the case to the Comptroller of the Treasury for decision.<sup>70</sup>

Given the (rightly) anticipated resistance to the payment of the whiskey tax, collectors were handsomely compensated. The Act provided that they were to be paid out of revenues collected, as determined by the President, up to seven percent of the total revenues for the year or \$45,000, whichever was less. The President might have given himself a hefty raise by resigning and becoming a whiskey tax collector.<sup>71</sup>

As these revenue statutes attest, congressional attention was not directed exclusively to getting the government up and running—the empowerment side of governance. Men who had experience in colonial affairs, and who had suffered under the yoke of British administrative practices, were hardly naive about the need to control government as well as empower it. In the Continental Congress, control of administration had been straightforward—agents were responsible to Congress—and had rendered much of the government incompetent. Congressional administration, however, was not the model enshrined in the new Constitution.

But how much control should Congress cede to others in carrying out its aims? The Federalists' success in creating an executive branch with a single head having independent political authority was not the ratification of a consensus vision of a powerful central government meant to deploy an extensive administrative apparatus. These revenue statutes were carefully constructed because they were highly controversial. They were important compromises between Federalist ambitions and widespread suspicion of big government, particularly big government represented by armies of federal

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other contextual factors might have excused the failure to obtain a warrant. On this the statute is silent.

69. *Id.* § 41.

70. *Id.* § 43.

71. *Id.* § 58.

administrators wielding discretionary power.<sup>72</sup> When delegation of authority was required, how could Congress ensure that its will was being carried out and that administration would, therefore, be perceived as “democratic” and legitimate?

*A. Whose Agents Are These Anyway? The Struggle over the Removal Power*

The United States is famously a government of separated powers. In theory this division of functions protects the citizen against tyranny. But separation of powers also poses obstacles to political accountability. Administrators are accountable both to the President who appoints them and to the Congress who creates, regulates, and funds their offices. Who is to have the upper hand? And if political principals disagree, does this leave administrators paralyzed, or free to exercise their own notions of good public policy? To what extent can, or should, the courts referee this contest for the hearts and minds of administrative actors? And should they resolve conflict by unifying authority, or by maintaining contested, joint control?

These questions have plagued American administrative law for over two centuries, and they were debated in earnest as the First Congress began to create administrative departments. The Constitution is tolerably clear about how the heads of these departments will be appointed—by the President with the advice and consent of the Senate. But, how are they to be removed? Only by impeachment—the only method mentioned in the Constitution? By the President who appoints them? By the President with the advice and consent of the Senate? By no one, if Congress provides for a secure term of office? By the President, but under such regulations and procedures as the Congress shall provide?

Virtually all of these views were represented in the First Congress,<sup>73</sup> which was made up of some of the same people who drafted the Constitution and participated in state ratification debates. But reflection on the constitutional debates provided the fledgling Representatives and Senators with little definitive guidance. The delegates to the Constitutional Convention were so fixated on the question of appointment that they virtually ignored the question

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72. For an extensive elaboration of this idea based on recently available documents surrounding state ratification of the Constitution, see MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* (2003).

73. An extended discussion of the leading congressional debates is provided in *Myers v. United States*, 272 U.S. 52 (1926). A crisp discussion of the congressional debates can be found in SHORT, *supra* note 41, at 87-105; and in THACH, *supra* note 28, at 140-65.

of removal, Hamilton's confident claim to the contrary in *The Federalist Papers* notwithstanding. There was, therefore, agreement in the First Congress on very little.

A provision in the House bill to establish a Department of War that the Secretary might be removed by the President was opposed both by those who thought the advice and consent of the Senate was required and by those who thought that to put such a provision into the statute would imply, contrary to sound constitutional interpretation, that the President's removal power was a function of what Congress provided by statute. Even those who favored the constitutional interpretation that the President's removal power should be unencumbered by senatorial acquiescence disagreed about whether the provision for removal should be in the statute. For some of those in favor of the statutory provision thought, not that it was necessary, but that it was dangerous to leave the legislation silent on the matter when there seemed to be a clear majority in favor of confirming the President's removal power.<sup>74</sup>

Representative Benson proposed a clever compromise.<sup>75</sup> He moved to strike out the clause specifically providing for the President's removal power. In its place, he proposed to insert, in a section making the Chief Clerk the custodian of all the records and papers of the Department, the words, "whenever the said principal officer shall be removed from office by the President of the United States, or any other case of vacancy."<sup>76</sup> Benson's amendment, presuming but not creating a presidential removal power, passed. The bill thus reflected the majority sentiment of the House on the interpretation of the Constitution, and avoided the risk of a contrary understanding that might have resulted from a statutory delegation of the power of removal itself. Similar provisions were inserted in the bills establishing the Department of Foreign Affairs and, after much controversy, the Department of the Treasury.

The House interpretation of the President's removal power had considerably less support in the Senate. After all, it was the Senate's power that was most at issue. The clause recognizing the President's removal power survived in the bills establishing the Departments of War and Foreign Affairs by virtue of the "casting" or tie-breaking vote of Vice President Adams.<sup>77</sup> But it

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74. CURRIE, *supra* note 29, at 36-40.

75. *Id.* at 40.

76. An Act To Establish an Executive Department To Be Denominated the Department of War, ch. 7, § 2, 1 Stat. 49, 50 (1789).

77. William Maclay, Diary Entry (July 16, 1789), in 9 CONGRESS DOCUMENTARY HISTORY, *supra* note 34, at 115.

was removed from the Senate's version of the Treasury's statute, and only reinserted after the House declined to accede to the Senate version of the bill.

The proponents of an implied presidential power of removal thus won a narrow victory, but the issue of Congress's power to regulate removal has never died. It has reemerged again and again, in congressional debates, in judicial proceedings, and occasionally at the level of constitutional crisis, as during the impeachment trial of President Andrew Johnson and the independent counsel investigation of President Richard Nixon.

The removal debate and its resolution thus provide a splendid microcosm of the difficulties of deriving general principles from early constitutional practice. At one level this episode—engaging some of the ablest members of Congress for many hours—can be seen as of the greatest importance in confirming the powers of the President vis-à-vis lower-level executive officials. A President without removal authority might be seriously weakened, even ineffectual, in ensuring that the laws were “faithfully executed.” But what exactly was resolved and what were its implications? The removal power conferred would be of little utility if a reluctant Senate refused to confirm replacements. The potential role of the Senate was reduced, but hardly eliminated. The statutes spoke directly only to heads of departments, not to the subsequently sticky questions of congressional power to provide fixed periods of tenure for lower-level appointees or congressional regulation of the terms upon which removals could be effected.

### *B. Administration's Many Forms: Structuring the First Departments*

Whatever the President's power to remove heads of departments, early Congresses made clear that they too meant to exercise political control over administration. While Congress was content to direct the Secretaries of War and Foreign Affairs to do little more than carry out the instructions provided by the President,<sup>78</sup> the Treasury was a quite different matter. The organic act establishing the Treasury<sup>79</sup> gave the Secretary a substantial number of specific functions, and later grants of authority added even more statutory detail. More importantly, the statute vested important powers in other officers in the Department, such as the Comptroller, the Auditor, the Treasurer, and the

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78. An Act for Establishing an Executive Department To Be Denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28-29 (1789); An Act To Establish an Executive Department To Be Denominated the Department of War § 1.

79. An Act To Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).

Registrar, all of whom were subject to presidential appointment and senatorial confirmation. These officers were meant to provide checks on the Secretary and each other in the crucial matter of safeguarding the integrity of the fiscal and monetary affairs of the nation.<sup>80</sup>

Moreover, some of these officers had independent, quasi-judicial authority. Requests for payment from the Treasury were sent to the Auditor, who examined and certified the amount due and then transmitted the accounts and accompanying documentation to the Comptroller for a final decision. Any person who was dissatisfied with the audit of an account was provided with an appeal to the Comptroller against the Auditor's settlement.<sup>81</sup> Because of this authority to determine individual appeals, James Madison suggested that the Comptroller should not hold office subject to presidential removal, but should be given a term of years. Although he ultimately withdrew his suggestion, Madison argued that

[i]t will be necessary . . . to consider the nature of this office . . . [and] in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive . . . . The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character.<sup>82</sup>

Given that the Treasury was where much of the real power lay in the early structure of the American government—the Treasury collected and dispersed all public money, oversaw the Bank of the United States, was in charge of all military procurement, and supervised the Post Office—Congress seemed jealous of its own authority over the Department. The initial Treasury statute thus appears to make the primary responsibility of the Secretary of the Treasury to the Congress, rather than to the President. The Secretary was required to “perform all such services relative to the finances, as he shall be directed to perform.”<sup>83</sup> Because the President was not mentioned, and the

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80. See SHORT, *supra* note 41, at 99-101; WHITE, *supra* note 26, at 116-22.

81. An Act To Establish the Treasury Department § 5.

82. 1 ANNALS OF CONG. 611-12 (Joseph Gales ed., 1834). Although Congress did not provide the Comptroller with a fixed term of office, it did ultimately specify that his decisions would be “final and conclusive to all concerned.” An Act for the More Effectual Recovery of Debts Due from Individuals to the United States, ch. 48, § 4, 1 Stat. 441, 442 (1795).

83. An Act To Establish the Treasury Department § 2.

Treasury Department, unlike the Departments of War and Foreign Affairs, was not statutorily denominated an "Executive Department," these directions were presumably to come from Congress.<sup>84</sup> The Secretary was also enjoined to "make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office."<sup>85</sup>

The Secretary's accountability, thus, was to be direct and to each chamber independently, provisions that perhaps anticipated later disputes about what materials the Congress could demand from the executive branch. Or, perhaps not. The Congress may have thought that the Secretary of the Treasury was functionally a part of the Congress. As soon as Hamilton was confirmed to that office, the House abolished the Committee on Ways and Means and turned its functions over to the Secretary.<sup>86</sup> Where money was concerned, congressional control seemed to be Congress's model of political responsibility.<sup>87</sup>

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84. The distinction established here between the President's power to remove and his power to direct seems to have been well understood in the early years of the Republic. For example, in one of the most famous uses of the presidential removal power, President Jackson was required to replace two Secretaries of the Treasury before he found one who would agree to remove the funds of the United States from the Second National Bank. The two recalcitrant Secretaries resisted Jackson's instructions on the apparently quite proper understanding that, although the President could remove them, they were not legally required to follow the President's directions when they viewed those directions as contrary to law. See, e.g., LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 16 (1975); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 73 (1983).
85. An Act To Establish the Treasury Department § 2.
86. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 241 (1989). The other departments also often functioned in the way we would now expect standing committees to operate—as the investigatory and legislative drafting arms of Congress. See RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 242-44 (1917). The Ways and Means Committee reemerged as a part of Albert Gallatin's program to bring the Treasury more firmly under congressional control. JOHN SPENCER BASSETT, *THE FEDERALIST SYSTEM: 1789-1801*, at 141 (1968).
87. Ardent Republicans objected to the use of the Treasurer's plans and estimates as a basis of congressional action as usurping the power and responsibility of the House to originate all money bills. Representatives Gerry and Tucker argued that even secretarial reports with respect to taxation would offend Article I, Section 7. See 11 CONGRESS DOCUMENTARY HISTORY, *supra* note 34, at 1055-73. On the other hand, as we shall see, *infra* notes 109-115 and accompanying text, when appropriating money for actions particularly within the President's constitutional power, Congress was capable of making extraordinarily broad discretionary grants.

The special position of the Treasury also responded to colonial and state precedent in the matter of financial administration.<sup>88</sup> It was not until late in the proceedings of the Constitutional Convention that the provision for the appointment of the Treasurer of the United States by both Houses of Congress, included in both the draft submitted by the Committee of Detail and the one submitted by the Committee of Style, was struck from the document in favor of presidential appointment of all department heads.<sup>89</sup>

But one can make too much of these peculiarities in the Treasury's position. The Salary Act, adopted nine days after the adoption of the Treasury Department's organic statute, described the Secretary of the Treasury as an "Executive Officer."<sup>90</sup> That the Secretary reported to the Congress hardly prevented him from reporting to the President or receiving directions from him. Moreover, the idea that the Secretary was to be directed by law, without more, in no way denies that the Secretary's discretion within the law might be subject to presidential direction. The Secretaries of State and War were certainly different, but that resulted in no small measure from the virtual absence of any "law" in their departments' organic acts, other than to follow the President's directions.

Giving the Treasury Secretary special responsibilities to Congress could also be a double-edged sword. Congress did not hesitate to exercise its powers to call the Treasury to account. As Alexander Hamilton learned to his dismay, the reporting requirement in the hands of political opponents could be a prodigious mechanism for harassment.<sup>91</sup> On the other hand, many of Hamilton's famous reports to the Congress—for example on the public credit, manufacturers, and the mint—allowed him to set major portions of the domestic agenda throughout his tenure at the Treasury.<sup>92</sup> By binding the

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88. HENRY BARRETT LEARNED, *THE PRESIDENT'S CABINET: STUDIES IN THE ORIGIN, FORMATION AND STRUCTURE OF AN AMERICAN INSTITUTION* 101 (1912) (recognizing that colonial and state practice tended to leave administration of financial matters, not just appropriations, in the hands of legislative committees or officials appointed by the legislature).

89. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 182, 614 (Max Farrand ed., rev. ed. 1966).

90. An Act for Establishing the Salaries of the Executive Officers of Government, with Their Assistants and Clerks, ch. 13, § 1, 1 Stat. 67, 67-68 (1789); see also Calabresi & Prakash, *supra* note 32, at 647-48.

91. RON CHERNOW, *ALEXANDER HAMILTON* 455-57 (2004); LOUIS FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 86-89 (1972).

92. CHERNOW, *supra* note 91, at 288, 295-308, 319-32, 355-56, 374-79, 480; see also HARLOW, *supra* note 86, at 140-42.



Treasury to itself, Congress created a powerful vehicle for executive leadership on matters of legislative policy.

The Navy Department, established in 1796, was chartered by a statute similar to those creating the Departments of War and State. The Department was said to be an executive department whose Secretary was “to execute such orders as he shall receive from the President of the United States” concerning the “procurement of naval stores . . . , equipment and employment of vessels of war,” and other naval matters.<sup>93</sup>

As I discuss in more detail later, Congress provisionally adopted the Post Office in its Articles of Confederation form by substituting the President for the Continental Congress as the party to give the Postmaster General directions. But when Congress reorganized the Office in 1792, the President’s directing power was removed from the statute and the Postmaster General was given relatively broad authority to enter into contracts, make appointments, and operate on the basis of postal revenues.<sup>94</sup> Nor was the Post Office denominated an “executive department.”

Interestingly enough the Postmaster General is not included in the Salary Act’s provision of pay for “Executive Officers of the Government.”<sup>95</sup> But, again, these indicia of congressional understandings of the Constitution’s demands for separated powers are treacherous. The Salary Act includes in the list of “Executive Officers” the three judges of the “western territory.”<sup>96</sup> Is this a conscious decision to establish Article I judges, or just the casual insertion of a provision for officers whose pay was not otherwise established, in a housekeeping statute whose title should not bear any significant interpretive weight?

The statutes constructing the original departments of the federal government thus reveal a complex balance between presidential power, congressional prerogative, and the need for agency independence. The independent functions of officers within the Treasury, particularly the Comptroller, seem to respond to what we now recognize as “separations-of-functions” protections within agencies to assure fairness in the adjudication of

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93. An Act To Establish an Executive Department, To Be Denominated the Department of the Navy, ch. 35, § 1, 1 Stat. 553, 553 (1798).

94. An Act To Establish the Post-Office and Post Roads Within the United States, ch. 7, §§ 2-3, 1 Stat. 232, 233-34 (1792).

95. An Act for Establishing the Salaries of the Executive Officers of Government, with Their Assistants and Clerks § 1.

96. *Id.*

claims.<sup>97</sup> They also interrupt the line of hierarchical control that might be thought to run from the President through department heads to lesser officials. And while presidential appointment and removal was common to all the departments, Congress seemed to distinguish between those departments that were exclusively under presidential direction and those that were also directed according to law. In short, administration was constructed contextually to solve practical problems. Congress was building a system of checks and balances, calibrated differently in different areas, to produce effective governance and to avoid undue concentration of power.<sup>98</sup>

*C. Mongrel Administrators: The Attorney General and Others*

Edmund Randolph, the first Attorney General, complained to a friend in 1790:

I am a sort of mongrel between the State and the U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former, — perhaps in a petty mayor’s or country court. I cannot say much on this head without pain, which, could I have foreseen it, would have kept me at home to encounter my pecuniary difficulties there, rather than add to them here.<sup>99</sup>

Randolph’s complaint about his status was largely a complaint about his inadequate compensation, a retainer of \$1500 per year, one half the salary of department heads.<sup>100</sup> He was expected to support himself by an independent law practice, and thus seemed halfway between an officer of the United States and a mere hired attorney or contractor.

But Randolph was a mongrel in other ways as well. His office was created by one paragraph in the Judiciary Act of 1789:

And there shall . . . be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or

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97. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 433-38 (5th ed. 2003).

98. For a sophisticated elaboration of these points, see Strauss, *supra* note 34.

99. MONCURE DANIEL CONWAY, *OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH* 135 (New York, G.P. Putnam’s Sons 1888), *quoted in* WHITE, *supra* note 26, at 164-65.

100. WHITE, *supra* note 26, at 135.

affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments

. . . .<sup>101</sup>

Notice that while the statute provides for an appointment, it does not say by whom the Attorney General should be appointed, nor does it create a department of which he is the head. Indeed, the initial draft of this provision seemed to presume that the Attorney General was a part of the Judicial Department because his appointment was conferred upon the Supreme Court, while that of U.S. Attorneys was given to the district courts in each state.<sup>102</sup> In the absence of the statement of an appointing power, the President appointed the Attorney General. And, presumably the President could remove him as well, because the statute was equally silent on removal—an odd omission after the extended and contentious debates over the removal power with respect to the War, State, and Treasury Departments.

We have come to view the Attorney General as almost an extension of the President, but that was hardly his initial position. To be sure, the Judiciary Act gave the President the right to request opinions from the Attorney General, but that right was also given to the heads of executive departments and in the early years was repeatedly exercised by the Congress as well.<sup>103</sup> Moreover, we know that Washington treated at least Jefferson, Hamilton, and Jay, and even Knox (the Secretary of War) as legal advisers and famously took Hamilton's advice on the constitutionality of the first Bank of the United States, notwithstanding the contrary views of Randolph and Jefferson.<sup>104</sup>

The position of the Attorney General was equally peculiar in relation to the United States Attorneys in each district. These officers were supervised, not by

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101. An Act To Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789).

102. See JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 490 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Vol. 1, 1971); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923). How or why changes were made in the original draft remains mysterious. There is no record of the relevant debate in either the drafting committee or the Senate as a whole.

103. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 581-82.

104. BASSETT, *supra* note 86, at 39.

the Attorney General, but by the State Department. But they in fact acted more like independent law officers. Their contact with the State Department was slight. And, while Attorneys General sometimes attempted to direct their activities, these “directions” carried no legal authority. Randolph attempted to obtain directive authority (and a clerk), but Congress failed to act.<sup>105</sup>

The Attorney General was not the only mongrel created by Congress in the Federalist period. Congress created commissions and boards outside of any of the major departments to oversee the Mint, to buy back debt of the United States, and to rule on patent applications. Because these commissions and boards were made up of already existing officers of the United States, Congress in effect appointed the officers by the same legislative act that created their offices. From this perspective these were “independent commissions” in an even stronger sense than those we recognize today. Some of these ex-officio commissioners could be replaced by the President by replacing the officers. But other Boards of Commissioners contained nonremovable officials like the Chief Justice and the President of the Senate.<sup>106</sup>

The Post Office was similarly established outside of any departmental hierarchy. The Postmaster General was required to provide quarterly reports to the Secretary of the Treasury, but the statute gave the Secretary no explicit power other than to receive them.<sup>107</sup> Finally, as I shall discuss later, Congress occasionally gave administrative adjudicatory powers to both state and federal courts and to ad hoc commissions appointed by the President. In short, if practice is any guide, early Congresses created departments and officers, charged them with administrative tasks, and subjected them to political supervision in a variety of ways that exhibit modest concern for rigid or formal conceptions of the separation of powers. While one can find individual

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105. WHITE, *supra* note 26, at 167-68, 408. On the other hand, White cited at least one instance in which President Washington ordered a U.S. Attorney to nolle prosequi an indictment. *Id.* at 31 n.15. The President’s pardon power would certainly have made resistance to this sort of order futile in any event. Nor did the district attorneys have control over all federal litigation. The Comptroller of the Treasury was charged with the power “to institute suit for the recovery of” a “sum or balance reported to be due to the United States, upon the adjustment of [any revenue officer’s account].” An Act To Provide More Effectually for the Settlement of Accounts Between the United States, and Receivers of Public Money, ch. 20, § 1, 1 Stat. 512, 512 (1797). That power was later expanded to direct suits and legal proceedings to collect any debt owed to the United States. An Act To Provide for the Prompt Settlement of Public Accounts, ch. 45, § 10, 3 Stat. 366, 367 (1817).

106. See *infra* Section II.G.

107. An Act To Establish the Post-Office and Post-Roads Within the United States, ch. 23, § 4, 1 Stat. 354, 358 (1794).

expressions of doctrinaire, or even extreme, opinions on separation of powers questions in the debates, when Congress acted, it acted in a spirit of pragmatic compromise.

#### *D. The Problem of Delegation*

Early Congresses also micromanaged administration, particularly Treasury administration, through specific instructions. Many statutes laid out the duties of officers and of private parties subject to the legislation in excruciating detail. The 1791 statute outlined earlier, laying taxes on distilled spirits, occupies fifteen pages in the *Statutes at Large* and specifies everything from the brand of hydrometer to be used in testing proof, to the exact lettering to be used on casks that have been inspected, to the wording of signs to be used to identify revenue offices.<sup>108</sup> Reading this legislation one would hardly be surprised to find an instruction concerning when inspectors were to rise in the morning, or that while engaged in official duties the collectors should keep breathing.

The 1791 Revenue Act was not unique. But the situation was in some ways special. The use of customs duties—and Congress hoped land sales and postage revenue—as the primary means of fiscal extraction from the populace was a response to serious and sustained political opposition to lodging general taxing powers in the central government. Land sales and use of the Post Office were voluntary; customs and tonnage duties most affected that group of seaboard merchants and shipowners who were economically benefited by the union. Moreover, customs duties fell upon manufactured items. Many of these commodities were considered luxury goods by agrarian anti-Federalists and were of no great concern to them. Customs collection also required no substantial corps of federal collectors in a potentially hostile countryside. Excises, on the other hand, could be applied to anything, anywhere.<sup>109</sup> Congress acted with restraint when the nation's need for revenue demanded expansion into excise taxation. It levied taxes on goods that were widely perceived as contributing to vice and sought, through detailed specification of powers and procedure, to assure that whiskey producers would be treated strictly according to law.

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108. An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, 1 Stat. 199 (1791).

109. On the politics of imposts and excise taxes, see EDLING, *supra* note 72, at 149-218.

More general claims<sup>110</sup> that early congressional practice establishes a narrow view of what could constitutionally be delegated to administrative officials are not terribly convincing. For one thing, political control of all official behavior by statute was never feasible. Legislative language might instruct the Collector of Customs at the Port of Philadelphia to permit imported teas to be exported under the same regulation as other tea, or describe the specific forms to be used for ship manifests, but there are inherent limits to political control by statutory instruction.

No one doubted the delicacy of collecting taxes or the wisdom of constraining the discretion of tax collectors, yet even here statutory precision was elusive. Statutes could specify the level of the tax and on what it should be levied. But when objective tests, such as proof measured by a specific type of hydrometer, were not feasible, judgment by revenue officers was inevitable concerning the nature or grade of the articles taxed and their value. Administrative discretion was also required precisely to avoid the injustice of rigid application of highly specific statutory requirements. Tax collectors, for example, were given the power to excuse offenses when there had been “substantial compliance,” no “intent to defraud,” or when a violation was caused by unavoidable circumstances.<sup>111</sup>

Nor was Congress driven to statutory vagueness solely by necessity. The debates over the Post Office—the agency other than the revenue services that employed the most personnel and most directly affected individual Americans—provide an illuminating case study of both statutory form and divided congressional beliefs. The first attempt at bringing the Post Office under the new Constitution by providing a statutory charter failed because of a dispute over delegation.<sup>112</sup> Some members insisted that the establishment of

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110. See *supra* notes 4-8 and accompanying text.

111. WHITE, *supra* note 26, at 453, 454.

112. For more detail on the Post Office delegation controversy, see CURRIE, *supra* note 29, at 146-49, from which the following account is taken. The Post Office Department had a lineage stretching back into the colonial period. It had always been a single-headed organization and was the only administrative function organized in that fashion throughout the period when the Continental Congress was running everything else by committee. Much of this early history is ably recounted in George L. Priest, *The History of the Postal Monopoly in the United States*, 18 J.L. & ECON. 33 (1975). After failing to agree to allow the President to designate post roads, the First Congress, in 1789, simply adopted the Post Office as provided for in the resolutions of the Continental Congress, and, in a statute of one paragraph, enacted a breathtaking, but temporary, delegation by ordering the Postmaster General to carry on the business of delivering the mails under such directions as he should receive from the President. An Act for the Temporary Establishment of the Post-Office, ch.

post offices and post roads should be left to the President or to the Postmaster General as had been true under the Articles of Confederation. Proponents objected that Congress could not sensibly determine the merits of a particular route, that it would be overburdened by detail and its judgment distorted by incessant lobbying from local interests. Opponents insisted that the power to establish post offices and post roads was vested in Congress by an express clause of the Constitution and could not be delegated elsewhere.

The battle resumed in the Second Congress with opponents of delegation making elaborate claims that if the designation of post routes were left to the President, the Congress might as well adjourn and leave all objects of legislation to his consideration. Those claims were met by the response that surely the Constitution did not imagine that the Congress would as a body borrow money, manufacture coins by working in the mint, or punish pirates by taking to the high seas. In the end the nondelegation forces seem to have been victorious because the bill goes on for several pages listing the main stations through which the main post road should pass. Postal rates are also set out in exquisite detail.

But these provisions are not characteristic of the remainder of the statute. The Postmaster General was given the authority to provide for additional post roads and to decide where to set up post offices. He was given full authority to contract for the carriage of mail by whatever devices he thought "most expedient" and to prescribe regulations for his subordinates as he found necessary.<sup>113</sup> Indeed, Congress's listing of stations through which the post roads must pass did not designate the roads themselves. Where two or more routes between the points on the statutory list existed, the Postmaster General was to determine which was to be designated as a post road. David Currie has concluded: "Despite all the crocodile tears, one is tempted to attribute the House's zest for detail [in specifying the postal stations] more to a taste for pork than to a principled concern for the virtues of representative government."<sup>114</sup>

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16, § 1, 1 Stat. 70, 70 (1789). This delegation was subsequently supplanted by the provisions discussed here.

113. An Act To Establish the Post-Office and Post Roads Within the United States, ch. 7, § 3, 1 Stat. 232, 234 (1792).

114. CURRIE, *supra* note 29, at 149. One might make the same comment about the detail in contemporary appropriations bills related to rivers and harbors, highways, and other public works of local importance.

Richard R. John and Christopher J. Young have argued that Currie's position is at best incomplete.<sup>115</sup> On John and Young's account, the 1792 statute represented a turning point in thinking about the Post Office. Prior to that time it had been established and operated as a revenue-generating device serving the seaboard commercial interests and urban centers that generated the vast majority of the mail. But those in the hinterlands had repeatedly complained of neglect and had petitioned Congress and the Postmaster General, both directly and indirectly, for expansions of service. Petitioners argued their cases on a variety of grounds, including commercial desirability, the need of the citizenry for information about the activities of the government, and, as in Currie's account, the promised gratitude of constituents.

When Congress kept the designation of post offices in its own hands in the Postal Act of 1792, it recognized that it would set in motion demands for the expansion of the postal service that would likely destroy its value as a revenue-generating activity and that would inundate the Congress with petitions from virtually every hamlet in the Republic. That Congress was willing to establish a procedure that would promote expansion<sup>116</sup> through the highly egalitarian and democratic petition process reveals that there was more to congressional jealousy over its power to designate post offices than simple pork. In this sense, Congress's refusal to continue the delegated authority of the Postmaster General to determine the location of post offices was, contrary to Currie, a reinforcement of representative government. But that reinforcement seems to have had more to do with maintaining the vitality of the petition process than with separation of powers concerns about the constitutionally appropriate specificity of legislation.

Moreover, as we shall see, Congress made broad delegations of authority in a host of other statutes, often to the President, but with full knowledge that his discretion would of necessity be sub-delegated to others. For example, by an Act of September 29, 1789, Congress assumed responsibility for the payment of

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115. Richard R. John & Christopher J. Young, *Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism*, in *THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT* 100 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

116. The expansion was substantial. In 1790, the postal system consisted of only 1875 miles of post routes. This had grown to 5642 by the time the 1792 statute passed. Two years later mileage had doubled to 11,984 and by 1801 the total had reached 22,309. *Id.* at 132. This vast expansion had enormous effects in binding the country together and establishing a truly national dialogue on the issues of the day. For more general discussion of the nation-building function of the postal system in the early Republic, see RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1995).



the invalidity pensions to veterans that had originally been paid by the states pursuant to a resolution of the Continental Congress. The statute—one sentence long—provides simply that pensions should be paid “to the invalids who were wounded and disabled during the late war” for the space of one year “under such regulations as the President of the United States may direct.”<sup>117</sup>

Finally, we must conjure with the First Bank of the United States.<sup>118</sup> The Bank’s function was essentially that now served by the Federal Reserve Board in regulating the money supply. Given the collapse of credit during the revolutionary conflict, the general scarcity of specie, and the distrust of most of the paper money then in circulation, the Bank could hardly have been of greater significance. Yet, if anything, the Bank operated more independently of congressional instruction, or indeed presidential direction, than does the Federal Reserve Board today.

The statute authorizing the Bank provided a charter and specified the total capitalization of the enterprise. It also provided voting rules for stockholders, limits on total debt and the amount of interest to be charged, and a limit on the subscription to be made to the Bank by the federal government. But all of the Bank’s operating policies were left to the laws and regulations to be adopted by the Bank’s directors, only a minority of whom would likely be selected by the United States.<sup>119</sup> The Secretary of the Treasury was authorized to require reports from the Bank and to inspect its records, and the United States or a private party was authorized to bring a lawsuit to recover from the directors if they exceeded the Bank’s lending authority. But, if the Secretary thought the Bank was failing in its operations in any other particular, the only remedy seemed to be to seek further legislation from the Congress. Thus was one of the most sensitive and crucial aspects of restoring commerce and prosperity delegated to a hybrid public-private corporation.

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117. An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, § 1, 1 Stat. 95, 95 (1789).

118. An Act To Incorporate the Subscribers to the Bank of the United States, ch. 10, 1 Stat. 191 (1791).

119. Election was by a plurality of the shares voting, and the United States was limited to a subscription equaling one-fifth of the Bank’s capitalization. The statute is silent on who would vote the government’s shares. *Id.* §§ 4, 11.

### E. Congressional Administration

The delegation of discretionary authority was by no means inevitable. Congress could, as in the Confederacy period, attempt to administer the law itself. And, when money claims against the United States were involved, it often did so. During its first twelve years, the House of Representatives received nearly three thousand petitions for relief of some sort.<sup>120</sup> Resolving these claims consumed a great deal of congressional energy. According to a contemporary journalist, the “principal part of [Congress’s] time has been taken up in reading and referring petitions—the number of which is great.”<sup>121</sup>

The usual system for handling these requests was a memorial or request to the Congress presented by the representative from the petitioner’s district.<sup>122</sup> The House might immediately take up the request for debate, refer it to an ad hoc committee, refer it to some officer in the State, War, or Treasury Departments, or refer it to its Committee on Claims. When a report came back from one of these sources, often the Treasury,<sup>123</sup> Congress would then vote

120. John & Young, *supra* note 115, at 107.

121. Letter from John Fenno to Joseph Ward (Dec. 25, 1795), *quoted in* Christine A. Desan, *Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in Chisholm v. Georgia*, in *THE HOUSE AND THE SENATE IN THE 1790S*, *supra* note 115, at 178, 201. Petitions to Congress for money relief covered a wide variety of categories. Many involved expenses arising out of the Revolutionary War. These ranged from a claim for room, board, and bribery expenses incurred while spying for the Continental Congress in British-occupied New York, to Timothy Pickering’s petition for a special appropriation of \$40,000 to keep him out of debtor’s prison as the result of private debts he had contracted on behalf of the public as Quartermaster General during the last years of the Revolutionary conflict.

Other petitioners asked for the discharge of customs duties paid on goods subsequently destroyed by fire, flood, or seizure by pirates. Impecunious former soldiers, and their widows and orphans, petitioned Congress for support. Persons seeking land grants or to purchase public lands petitioned Congress for special bills authorizing the grant or sale. Inventors and artists petitioned for patents or copyrights before the passage of the first patent and copyright legislation. William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in *THE HOUSE AND THE SENATE IN THE 1790S*, *supra* note 115, at 29.

122. See Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

123. The number of private bills sent to the Treasury for evaluation was so great that Hamilton cited them in a letter to Vice President Adams as one of the burdens of his office that was causing him to work “to the utmost extent of my faculties and to the injury of my health.” Letter from Alexander Hamilton to John Adams (Feb. 22, 1794), *quoted in* CHERNOW, *supra* note 91, at 455-56.

merely on whether to concur in the report of the officer or the committee. Mostly it concurred.

Many statutes were so-called private bills that settled the claim of a single individual. But petitions also came in concerning classes of parties, and here the press of business made it almost impossible for Congress to avoid setting up some administrative machinery to adjudicate individual claims. A 1794 statute appropriated \$15,000 for the relief of persons resident in the United States who had fled the insurrection in Saint Domingo.<sup>124</sup> The criteria were large and loose, authorizing the President to withdraw and distribute funds “in such manner, and by the hands of such persons, as shall, in the opinion of the President, appear most conducive to the humane purposes of this act.”<sup>125</sup>

Indeed, Michele L. Landis has argued that the American welfare state, and its accompanying welfare bureaucracy, began with a bill to relieve those whose property was damaged or destroyed by the insurgents in the Whiskey Rebellion.<sup>126</sup> Once again the authority was given to the President to appoint a “board of inquest”<sup>127</sup> to determine the extent of the damages and then to distribute money “[t]o aid such of the said sufferers as, in his opinion, stand in need of immediate assistance.”<sup>128</sup> After first sending Alexander Hamilton to make a preliminary inspection, Washington appointed commissioners to the board and sent them to western Pennsylvania. They established a claims office in Lafayette County, took applications, investigated claims, and interviewed witnesses. The money was disbursed to those whom the board found deserving.

This foray into administrative adjudication was hardly uncontroversial. Some members of Congress objected that giving a presidential board the power to grant or deny claims was an unacceptable delegation of Congress’s power of the purse. Representative Giles complained, “the mode is . . . totally wrong. Let persons who have suffered come here in the usual manner. It is said that a gentleman has had his house burned. Let him come here and tell us so.”<sup>129</sup> But Giles’s objections were overridden by the

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124. An Act Providing for the Relief of Such of the Inhabitants of Saint Domingo, Resident Within the United States, as May Be Found in Want of Support, ch. 2, 6 Stat. 13 (1794).

125. *Id.*

126. Michele L. Landis, “Let Me Next Time Be ‘Tried by Fire’”: Disaster Relief and the Origins of the American Welfare State, 1789-1874, 92 NW. U. L. REV. 967, 983-85 (1998).

127. See 4 ANNALS OF CONG. 1001 (1794) (statement of Rep. Gilbert).

128. See 4 *id.* at 1002 (amendment of Rep. Boudinot).

129. 4 *id.* at 1001.

inconvenience of having dozens of persons travel to the seat of government to present their claims, the likelihood that witnesses not themselves making claims would need to be interviewed, and the ever-present possibility that adjudication remote from the site of the claim would promote fraudulent petitions.<sup>130</sup>

*F. Using the President's Political Authority*

As the claims processing for Saint Domingo refugees and victims of the Whiskey Rebellion reveal, Congress did not constantly seek to wrest power from the President in order to exercise its own political authority over administrative officials. Political accountability can be constructed on a presidential base as well. The President's electoral pedigree was different in kind from either the Senate's or the House of Representatives', but equally legitimate.

These considerations, along with the functions involved, explain the extremely general language used in establishing the Departments of War, Navy, and Foreign Affairs (soon renamed State and Foreign Affairs). Nor were these the only occasions on which Congress used direct accountability to the President as the principal device for assuring administrative accountability to the political branches. When Congress came to exercise its power to regulate commerce with the Indian tribes, for example, it basically ceded the regulatory authority to the President.<sup>131</sup> The statute granted licensing power to the superintendents of the Indian Department, who were instructed to issue licenses to trade with Indian tribes to "any proper person."<sup>132</sup> Licensees were required to post bond, which they forfeited, along with their licenses, if they violated the "regulations or restrictions"<sup>133</sup> governing trade and intercourse

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130. But we should not imagine that Congress early or easily gave up its desire to retain strong political controls over money claims against the United States. Floyd Shimomura found that an essentially legislative model of claims adjudication persisted from colonial times until the Civil War. While Congress used state authorities, administrative officials, and the federal courts as "commissioners" to find facts and make recommended decisions—and overwhelmingly acceded to the recommendations made—it nevertheless generally maintained final authority to approve or disapprove disbursements. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 *LA. L. REV.* 625, 627-52 (1985).

131. An Act To Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).

132. *Id.* § 1.

133. *Id.* § 2.

with the Indian tribes. But no rules and regulations were specified in the statute. Instead, the superintendents and the licensees were instructed to comply with such regulations as the President should promulgate. Moreover, the President was given the authority to waive the necessity for a license and to “make such order respecting the tribes surrounded in their settlements by the citizens of the United States . . . [as] he may deem . . . proper.”<sup>134</sup>

Congress’s satisfaction with presidential administration with respect to Indian tribes may simply have mirrored its judgment concerning executive authority with respect to the War and State Departments. From the political perspective of the late eighteenth century, commerce with the Indian tribes may have seemed less like regulating interstate commerce than like some combination of the exercise of the war and foreign affairs powers. Essentially standardless regulatory authority may have been given to the President because Congress understood Indian affairs to be an executive—meaning political—function, but was not sure which executive department should take on the task.

Indeed, Congress delegated broadly to the President whenever war or foreign affairs were involved.<sup>135</sup> In other cases the rationale for delegating broad authority to the highest political official of the government is not always

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134. *Id.* § 1. Similarly, broad authority was given to the President to set up a system of “factories” for trading with Indian tribes. An Act for Establishing Trading Houses with the Indian Tribes, ch. 13, 1 Stat. 452 (1796). These factories were public trading houses that stocked such goods and supplies as the trading agent (a presidential appointee) thought useful. The statute was not, however, so large and loose as some of the other statutes dealing with Indian affairs. The trading houses were severely limited in what they could buy from the Indians, and traders were forbidden to trade on their own account.

135. Perhaps on the belief that it had no authority over ambassadors or other foreign ministers, Congress simply appropriated \$40,000 per year that the President could draw upon “for the support of such persons as he shall commission to serve the United States in foreign parts.” An Act Providing the Means of Intercourse Between the United States and Foreign Nations, ch. 22, § 1, 1 Stat. 128, 128 (1790). And, when the country was under threat from the French, Congress seemed satisfied to empower the President to do whatever was necessary, including: building whatever fortification the public safety might require, An Act Supplementary to the Act Providing for the Further Defence of the Ports and Harbors of the United States, ch. 37, § 1, 1 Stat. 554, 555 (1798); building ships if he thought them necessary, An Act To Authorize the President of the United States To Cause To Be Purchased, or Built, a Number of Small Vessels To Be Equipped as Gallies, or Otherwise, ch. 39, § 1, 1 Stat. 556, 556 (1798); discontinuing the statutory ban on trade with France if it desisted from violating American neutrality, An Act To Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 53, § 5, 1 Stat. 565, 566 (1798); or, alternatively, if belligerence continued, authorizing the capture of French warships by licensing privateers, An Act Further To Protect the Commerce of the United States, ch. 68, § 1, 1 Stat. 578, 578 (1798).

obvious.<sup>136</sup> Although the President was politically accountable for carrying out these far-flung statutory grants of authority, Congress could hardly have expected either Washington or Adams to do all these things themselves. The power to sub-delegate authority has always been presumed,<sup>137</sup> save in those circumstances when the statute by text or context made clear that action should be taken only by the named officer. In reality, these broad delegations of authority were delegations to other administrators who would be accountable to the President—to the extent that he had the time and resources to supervise them.

### G. Boards of Eminent Officers

When not borrowing the political legitimacy of the presidency for administrative tasks, Congress occasionally pursued a similar purpose by allocating authority to boards or committees of top-level appointees. The Chief Justice, the Secretary and Comptroller of the Treasury, the Secretary of State, and the Attorney General were to inspect the coinage at the mint.<sup>138</sup> The President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General were designated commissioners for

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136. Statutes empowered the President to borrow up to twelve million dollars on the account of the United States, An Act Authorizing a Loan of Two Million of Dollars, ch. 4, 1 Stat. 404 (1794); An Act Making Provision for the Reduction of the Public Debt, ch. 47, 1 Stat. 186 (1790); An Act Making Provision for the Debt of the United States, ch. 34, § 2, 1 Stat. 138, 139 (1790); to launch a subscription for the Bank of the United States, An Act To Incorporate the Subscribers to the Bank of the United States, ch. 10, § 11, 1 Stat. 191, 196 (1791); to furnish Native American tribes with domestic animals and farming implements, An Act To Regulate Trade and Intercourse with the Indian Tribes, and To Preserve Peace on the Frontiers, ch. 46, § 13, 1 Stat. 743, 746-47 (1799); An Act To Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 9, 1 Stat. 329, 331 (1793); to create a government in the Mississippi Territory, An Act for an Amicable Settlement of Limits with the State of Georgia, and Authorizing the Establishment of a Government in the Mississippi Territory, ch. 28, § 3, 1 Stat. 549, 550 (1798); and to determine when and where it was appropriate to build hospitals for sick and disabled seamen, An Act for the Relief of Sick and Disabled Seamen, ch. 77, § 4, 1 Stat. 605, 606 (1798).

137. *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839), for example, treats it as axiomatic that powers delegated to the President can be exercised by his subordinates without even a showing that the President had sub-delegated the authority to act.

138. An Act Establishing a Mint, and Regulating the Coins of the United States, ch. 16, § 18, 1 Stat. 246, 250 (1792).

the federal debt.<sup>139</sup> And allocation of public lands in the territories involved the combined action of the Secretaries of Treasury, State, and War.<sup>140</sup>

Perhaps the strangest board of eminent political appointees was that created by the first statute authorizing the issuance of patents.<sup>141</sup> Section 1 of that statute makes the Secretary of State, Secretary of War, and the Attorney General into the Patent Office. Applications were to be filed with the Secretary of State who also kept the records. The Attorney General was then to make a recommendation on patent availability and, upon approval of the patent by any two of the three eminences, the Attorney General also prepared the letters patent. But the patent was not official until it was signed by the President and the great seal of the United States was affixed by the Secretary of State. As the Supreme Court noted much later,<sup>142</sup> this function was quasi-judicial and represented, however awkwardly, America's first flirtation with the independent commission.<sup>143</sup>

An awkward arrangement turns comical when the reader gets to section 7 of the statute, which provides various fees for recording the application, filing the documents, preparing the patent papers, and affixing the seal of the United States, all to be paid individually to the officer who carried out the duty. That the underpaid Attorney General got two dollars for preparing the letters patent is not perhaps too strange. But I cannot imagine Jefferson, the Secretary of State, receiving fifty cents for filing the patent application, a dime for filing every sheet of patent specifications "containing one hundred words,"<sup>144</sup> and one dollar for affixing the great seal of the United States, without at least a smile.<sup>145</sup>

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139. An Act Supplementary to the Act Making Provision for the Debt of the United States, ch. 38, § 6, 1 Stat. 281, 282 (1792).

140. An Act Regulating the Grants of Lands Appropriated for Military Services, and for the Society of United Brethren, for Propagating the Gospel Among the Heathen, ch. 46, § 2, 1 Stat. 490, 491 (1796).

141. An Act To Promote the Progress of Useful Arts, ch. 7, 1 Stat. 109 (1790).

142. *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 363 (1888).

143. "Independence" here signifies that the Patent Office was not in a department and that the ex-officio commissioners were designated by statute. Presumably the Patent Office was also to be free to adopt criteria for evaluating patentability and to exercise its judgment in particular cases free from presidential direction. The Patent Office was not, however, independent in some of the senses we often associate with contemporary independent agencies, such as balanced bipartisan representation, fixed and staggered terms of office, and removal only for cause.

144. An Act To Promote the Progress of Useful Arts § 7.

145. Having fixed the President's salary at the princely sum of \$25,000, Congress apparently felt that his signature on the patent need not be separately recompensed. The system was

*H. Patterns of Political Accountability*

Several patterns emerge from a review of Congress's structuring of political accountability in the Federalist period. First, Congress emphatically did not imagine that all federal administrative activities should be performed by officials lodged in departments and accountable directly and exclusively to the President. The bank was a hybrid public-private corporation, and the Post Office was only nominally accountable to the Treasury, which itself had independent reporting obligations to both Houses. The Attorney General had no department, and the U.S. Attorneys, although nominally in the State Department, were virtually independent actors. Commissions outside of departments were used for a number of functions, ranging from oversight to managing the public debt to ruling on claims for patents or disaster relief. Moreover, Congress gave departmental officials below the level of the Secretary, particularly in the Treasury, independent responsibilities that were not subject to the Secretary's direction or control.

Second, far from self-executing, many early statutes not only required public administration, they were almost devoid of policy direction. Moreover, even highly specific statutes, like the revenue laws, were neither self-executing nor self-interpreting. As we shall see in the next Part, administrative officials filled in the details both by general rules and by the adjudication of countless claims and disputes.

In short, Congress in the period from 1789 to 1801 created neither a single model of hierarchically organized administration nor a regime of self-executing laws that needed little more than judicial enforcement. But that hardly means that it was inattentive to political control of administration. It means only that Congress had a broader and more complex vision of how such control might be exercised. Administrators could be bound more closely to Congress itself, as was the Treasury Department, in ways other than through statutory specificity. Congress could monitor behavior by reviewing petitions as well as by demanding reports. Broad grants of authority could be lodged in the President, who had an independent political base, or in other high officials of considerable political authority. Integrity might be assured by requiring that boards or commissions of notables act together, or through internal checks and balances, or by political oversight. Congress understood not only that political

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changed in 1793 to put the patent office in the State Department. The Secretary of State was given a patent clerk who was compensated by a flat fee of thirty dollars for processing each application. An Act To Promote the Progress of Useful Arts; and To Repeal the Act Heretofore Made for That Purpose, ch. 11, § 11, 1 Stat. 318, 323 (1793).



accountability could be structured in a host of ways, but also that forms of accountability beyond political control were available.

### III. MANAGERIAL OR BUREAUCRATIC ACCOUNTABILITY

Managerial or bureaucratic accountability is normally thought of in terms of getting people to do their jobs. Its principal purpose is governmental effectiveness or efficiency, not political responsiveness or the protection of private rights. Nevertheless, as I noted at the beginning of this Article, managerial or bureaucratic controls can serve all three purposes. My interest here is in the techniques that were developed in the Federalist period for assuring attention to duty by both high- and low-level administrative officials. I lump these techniques into four major categories: supervisory control, the nurturing of loyalty to common purposes, positive economic incentive, and penalties.

#### *A. The Limits of Supervisory Control*

Supervisory control of executive action at the very top—that is, any matter involving the head of a department—was both informal and powerful.<sup>146</sup> Although John Adams's long absences from the seat of government interrupted the pattern, Washington early established the basic principle that departmental secretaries were essentially deputies or assistants to the President. Notwithstanding the political and regional balance in Washington's first cabinet, which included two Virginia Republicans, Jefferson and Randolph, in the four major offices, it was clear to everyone that the program to be implemented was the President's program. While Jefferson politicked shamelessly against Washington's policies through proxies, he (mostly) carried them out as Secretary of State. When he found himself no longer able to do so, he resigned.

Washington imposed his will through a consistent style of broad consultation, independent judgment, and continuous oversight. He saw his cabinet ministers almost daily, corresponded with them ceaselessly, and continuously requested their views. Moreover, he seems to have reviewed

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<sup>146</sup> See WHITE, *supra* note 26 at 35-56 (citing a circular from Thomas Jefferson to the heads of departments explaining Washington's practices and indicating that he was adopting them as his own).

virtually all significant correspondence going out of any department that expressed the position of the United States government.<sup>147</sup>

Although unity of policy could be maintained in the environment of a capital in which Washington and his major deputies worked almost within hailing distance of each other, monitoring and managing officers of lesser rank in the field was quite a different matter. When Thomas Jefferson took office in 1801 the federal civilian establishment numbered roughly 3000 officers. But only 150 of those were located in the capital. The others had to be managed by correspondence and inspection in an age in which communication and transportation were not only difficult but hazardous. There is much evidence of effort on the part of capital-based superiors to instruct and oversee field personnel. Audits, reports, and field inspections were all carried out to some degree and in some departments, most prominently the Treasury. But the results of these labors were uncertain.

Looking at the early system of annual audits in the General Land Office, for example, Matthew Crenson reported:

The department would appoint some respected citizen who lived in the vicinity of a district land office to take a day off from his private labors and look in on the affairs of the register and receiver. Frequently, the examiner was a friend and political ally of both officers, and it was not uncommon for him to know nothing at all about the proper manner in which to conduct the business of a land office. The report which he sent to Washington was, in most cases, completely useless.<sup>148</sup>

In one of the earliest articles on American administrative law, Ernst Freund seemed to anticipate Crenson's later criticism of early internal control mechanisms and to suggest that they persisted throughout the nineteenth century. Freund noted that under the American system courts are unwilling and unable to review matters of discretion or questions of expediency, a situation of which he approved. For in his view it would "be dangerous to vest

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147. For further description of Washington's management style, see Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1474-90 (1997), which interprets Washington's actions as the beginnings of a long history of presidential defense of the chief executive's prerogative to appoint, remove, and direct all executive personnel.

148. MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* 88 (1975).

such a power in the courts.”<sup>149</sup> He preferred internal administrative review, but he questioned the adequacy of contemporary administrative organization:

The question of expediency must be reviewed with the same freedom with which it was originally considered, and therefore must be left to other administrative authorities: there is necessary, in other words, administrative control, and this is impracticable where the administration is not organized with a view to its exercise.<sup>150</sup>

Despairing of the capacity of Congress to limit discretion by statutory specificity, Freund concluded with the following understated lament: “Some provision for reviewing questions of expediency will, therefore, remain a desideratum of American administrative law.”<sup>151</sup>

Leonard White provided a more sanguine account of the capacity of central administrators outside of the Land Office<sup>152</sup> to control the activities of widely dispersed officers.<sup>153</sup> In the fields of foreign and Indian affairs the Secretary of State and the Secretary of War commonly provided consular officials and territorial governors (who were the Commissioners of Indian affairs in their territories) with instructions concerning general policy as well as detailed directions concerning actions to be taken or avoided. And at the Treasury, Hamilton ran a notoriously tight ship.<sup>154</sup> The indefatigable Secretary of the

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149. Ernst Freund, *The Law of Administration in America*, 9 POL. SCI. Q. 403, 419 (1894).

150. *Id.*

151. *Id.* at 419-20.

152. On the Land Office inspection system in the Federalist period, White agreed with Crenson, see LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801-1829*, at 523 (1951), as did Malcolm Rohrbough, see MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837*, at 3-25 (1968). But Rohrbough's account also describes a rapid improvement in internal control mechanisms as the Land Office became a major site of federal activity in the period following the Land Office Act of 1800 and the Louisiana Purchase. ROHRBOUGH, *supra*, at 26-70.

153. WHITE, *supra* note 26, at 199-209.

154. Hamilton's detailed control of tax collectors charged with collecting the revenue on distilled spirits may have contributed to the Whiskey Rebellion. In a circular issued in May of 1791, Hamilton required that inspectors visit all distilleries, inspect them at least twice a day, and file weekly reports with the Treasury containing detailed information on each distillery's operations. Although Hamilton viewed his inspection requirements as reasonable because the inspectors could not indiscriminately inspect all the houses and buildings owned by people engaged in the liquor business, the distillers—no friends to the tax in the first

Treasury prepared extensive forms and procedures to be used by collectors and others—procedures that were eventually codified in the Collection Act of 1799.<sup>155</sup> He issued dozens if not hundreds of circulars and instructions.<sup>156</sup> And he acted vigorously to stamp out the view that the collectors’ oath to uphold the laws of the United States meant that they should uphold their own construction of the laws rather than the Secretary’s or to rely on private lawsuits to settle matters of interpretation. Hamilton viewed the latter techniques as vexatious to the parties involved and totally unsuited to the needs of trade.<sup>157</sup> As a consequence, field officials often corresponded with the Secretary seeking his opinion about doubtful or novel cases. Hamilton’s instructions and rulings are thus the predecessors of the thousands of pages of IRS regulations and revenue rulings with which every modern tax attorney is familiar.

Congress reinforced supervisory authority in numerous provisions specifying that lower-level officials were subject to the superintending instruction of higher-level administrators.<sup>158</sup> Statutes establishing higher offices, such as, the Secretary of the Treasury, specified that their occupants were “to superintend the collection of the revenue.”<sup>159</sup> Lower-level tax collectors were later instructed that the imposts that they collected “shall be received, collected, accounted for, and paid under and subject to the superintendence, control and direction of the department of the treasury, according to the authorities and duties of the respective officers thereof.”<sup>160</sup>

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instance—found inspectors on their doorsteps twice a day more than a little annoying. CHERNOW, *supra* note 91, at 343.

155. An Act To Regulate the Collection of Duties on Imports and Tonnage, ch. 22, 1 Stat. 627 (1799).
156. A small sample of Hamilton’s Treasury circulars is included in 3 *THE WORKS OF ALEXANDER HAMILTON* 537-70 (John C. Hamilton ed., New York, J.F. Trow 1850). Other examples appear in 5 *THE WORKS OF ALEXANDER HAMILTON* 49 (Henry Cabot Lodge ed., 1904); 6 *THE WORKS OF ALEXANDER HAMILTON* 340 (Henry Cabot Lodge ed., 1904); and LAURENCE F. SCHMECKEBIER, *THE CUSTOMS SERVICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 8 (1924).
157. Treasury Circular of July 20, 1792, *reprinted in* 3 *THE WORKS OF ALEXANDER HAMILTON*, *supra* note 156, at 557; *see also* LYNTON K. CALDWELL, *THE ADMINISTRATIVE THEORIES OF HAMILTON & JEFFERSON: THEIR CONTRIBUTION TO THOUGHT ON PUBLIC ADMINISTRATION* 50 (1944).
158. WHITE, *supra* note 26, at 204-05.
159. An Act To Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65-66 (1789).
160. An Act Laying Duties on Licenses for Selling Wines and Foreign Distilled Spirituous Liquors by Retail, ch. 48, § 4, 1 Stat. 376, 378 (1794).

And, again, in an apparent effort to negate the notion that deputy postmasters were independent entrepreneurs, the organic act establishing the Post Office said of the Postmaster General: "He shall also have power to prescribe such regulations to the deputy postmasters, and others employed under him, as may be found necessary, and to superintend the business of the department . . ."<sup>161</sup>

To modern eyes this constant attention to the supervisory authority of top-level administrators is a bit puzzling. For us hierarchy is the essence of bureaucracy, and administrative departments are self-evidently bureaucratic organizations. This was, however, not the case in antebellum America. While an office was not heritable property as it had sometimes been in England, subordinates hardly held the well-regulated positions that emerge from modern civil service legislation. Indeed, the question of whether a particular person was an "officer" or a "contractor" was a much-vexed and often-litigated question.<sup>162</sup> Moreover, as with the United States Attorneys, Congress did not always intend that administrative superiors have powers of direction. And, as in the case of the Treasury Department, Congress was quite capable of distinguishing between the power to direct and the power to remove. In this legal and political climate, attention to the establishment of supervisory authority by statute was surely prudent.

Crenson may be correct that the audit system and inspection capacities of the central government were relatively weak. Hence, the power to supervise and direct lower-level officials did not necessarily carry with it the capacity to do so. But the far-flung actions of the postal and revenue officers stimulated thousands of early Americans to complain. As we have seen, those complaints were often sent in the form of petitions to Congress, which then referred them to the appropriate administrative official for a recommendation.<sup>163</sup> Complaints from the field thus provided one way that officers at the center could monitor the actions of personnel on the periphery. Lower-level officials were also sometimes subjected to internal departmental control through systems of

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161. An Act To Establish the Post-Office and Post Roads Within the United States, ch. 7, § 3, 1 Stat. 232, 234 (1792).

162. See, for example, Justice Marshall's opinion in *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747).

163. Congress rarely investigated administrative matters itself. Save in the period 1793-1797, when Republicans controlled the House and established some standing committees to try to wrest political control of the national agenda from Federalist departmental secretaries, departments were the principal sources of administrative and policy information in their respective domains. These Republican attempts at government by the House were generally viewed as inept and unsuccessful. See HARLOW, *supra* note 86, at 148-64.

internal appeal specified by statute. Field officers charged with collecting taxes on carriages, land, and dwellings, for example, were subject to two levels of internal appeal.<sup>164</sup> The usually reliable Goodnow was thus doubly and spectacularly wrong when he claimed that American law never imagined that lower-level tax officials were subject to instruction and supervision by superiors, and that administrative appeal was unknown.<sup>165</sup>

A dissatisfied applicant could also seek exemption or remission of the carriage tax by pursuing an action in a district court—a rare early provision for statutory judicial review. The court’s review was limited to facts and matters that had been raised in the internal review proceedings. The appeal to the Comptroller concerning public accounts has already been mentioned, and a similar appeal system was provided to the Postmaster General for those having unpaid claims against the Post Office.<sup>166</sup>

### *B. Promoting Loyalty*

The loyalty of administrative personnel was secured in three major ways. Perhaps the most ubiquitous (then and now) is the oath of office in which the officer swears both to uphold the laws of the United States and to carry out the duties of the specific office to which he or she is appointed. The effectiveness of the oath, beyond the threat value of the penalties often attached to failure to live up to it, is difficult to gauge.<sup>167</sup> For many the oath itself may have had

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164. An Act To Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, §§ 18-19, 1 Stat. 580, 588 (1798); An Act Laying Duties on Carriages for the Conveyance of Persons; and Repealing the Former Act for that Purpose, ch. 37, § 3, 1 Stat. 478, 479 (1796).

165. 1 FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* 151 (New York, Putnam 1893).

166. Indeed, provisions for internal administrative review of lower-level determinations became so common that, by the early twentieth century, commentators described them as establishing a new system of adjudication seldom found in state law or practice. Harold M. Bowman, *American Administrative Tribunals*, 21 *POL. SCI. Q.* 609, 612-14 (1906).

167. That oath-taking was a serious business is evidenced by the penalties levied on some officers who either failed to take their oath or failed to report to their superiors that they had done so. *See, e.g.*, An Act To Regulate the Collection of Duties on Imports and Tonnage, ch. 22, § 20, 1 Stat. 627, 641-42 (1799); An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, § 6, 1 Stat. 199, 200 (1791); An Act Making Provision for the Debt of the United States, ch. 34, § 11, 1 Stat. 138, 142 (1790). And this was an age in which to be accused of violating one’s oath virtually required that a gentleman seek satisfaction from the accuser, perhaps in the form of a duel. For an extensive treatment of dueling as a cultural practice,

serious loyalty-reinforcing power. But, beyond moral force, oaths were often backed by bonds that might be forfeited should the official falter in his duties. I will return to oaths, therefore, when I look at the penalties and forfeitures that could attend their violation.<sup>168</sup>

The other two techniques were the avoidance of conflicts of interest and Washington's famous reliance on "character" as the basis for appointments. Conflict of interest provisions were common in early statutes creating departments and offices and appear in relatively predictable places. Treasury Department officials were forbidden from engaging in "the business of trade or commerce."<sup>169</sup> Customs officials could not own ships;<sup>170</sup> collectors of duties on spirits could not buy or sell liquor;<sup>171</sup> and Indian agents could not maintain commercial relations with the Indians.<sup>172</sup> Violation of these provisions often carried substantial fines, forfeitures, and disqualification from further office-holding.

Insulating officers from the temptation of putting personal above public interest is obviously important. But it does not by itself ensure energy, prudence, or integrity in administration.<sup>173</sup> Nor does it assist markedly in legitimizing the actions of administrators who, of necessity, bring the law's

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see JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* 159-98 (2001). On the other hand, it seems unlikely that the majority of oath-takers in the Federalist administrations of 1789-1801 were of the high social class to which the *code duelo* applied.

168. See *infra* Section III.D.

169. An Act To Establish the Treasury Department, ch. 12, § 8, 1 Stat. 65, 67 (1789).

170. An Act To Regulate the Collection of Duties on Imports and Tonnage, ch. 22, § 86, 1 Stat. 627, 695 (1799).

171. An Act Making Further Provision for Securing and Collecting the Duties on Foreign and Domestic Distilled Spirits, Stills, Wines and Teas, ch. 49, § 14, 1 Stat. 378, 380 (1794).

172. An Act To Regulate Trade and Intercourse with the Indian Tribes, and To Preserve Peace on the Frontiers, ch. 46, § 11, 1 Stat. 743, 746 (1799); An Act To Regulate Trade and Intercourse with the Indian Tribes, and To Preserve Peace on the Frontiers, ch. 30, § 11, 1 Stat. 469, 471-72 (1796); An Act for Establishing Trading Houses with the Indian Tribes, ch. 8, § 3, 1 Stat. 452, 452-53 (1796).

173. Indeed, Alexander Hamilton urged Congress to repeal the conflict of interest provision that prevented customs officers from investing in United States bonds. In Hamilton's opinion the only influence that bond-holding might have on these officers was to make them more diligent in collecting the taxes out of which they could be repaid. Alexander Hamilton, Report on the Improvement and Better Management of the Revenue of the United States (Jan. 31, 1795), in 18 *PAPERS OF ALEXANDER HAMILTON* 217, 223-24 (Harold C. Syrett ed., 1973).

burdens concretely to bear on private citizens. Appointing agents of fit character was an attempt to do both.

By appointees with “fitness of character,” George Washington meant people who, because they already had the respect of their fellows, would help to engender respect for the new national government.<sup>174</sup> This meant that almost all field personnel were appointed from residents of the state and often the locality in which they would serve. Washington sought counsel widely in determining whether proposed appointees were of fit character and expected his cabinet officers to do likewise. Moreover, it was generally agreed that officers would be removed only for incompetence. Washington viewed the appointments power as a way of binding the country together by having the government represented by local notables who demonstrated competence in their offices. Presumably good character would also assure conscientious attention to official duties.

The degree to which these ideals were carried out in practice or produced an efficient civil service is uncertain.<sup>175</sup> The Post Office, which had the largest number of employees, was a source of constant complaint for its inefficiency or worse. President Washington complained often of delays and misdirection of his correspondence and reprimanded the Postmaster at Alexandria:

Sir: The letters enclosed, were sent up to your Office yesterday afternoon, and were returned to me. It is not the first, nor second time I have been served in this manner; but it may be considered as evidence of the inattention with which the duties of your Office are discharged.<sup>176</sup>

Finding that his letters were being opened and read by inquisitive deputy postmasters or contract carriers, Washington wrote to Hamilton, “About the middle of last Week I wrote to you; and that it might escape the eye of the Inquisitive . . . I took the liberty of putting it under a cover to Mr. Jay.”<sup>177</sup>

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174. WHITE, *supra* note 26, at 258–59 (describing Washington’s practices, which were carried forward by his Federalist successors).

175. For a study emphasizing the excesses of Federalist office-holders, see CARL E. PRINCE, *THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE* (1977).

176. Letter from George Washington to The Postmaster at Alexandria (Aug. 4, 1798), *quoted in* WHITE, *supra* note 26, at 192.

177. Letter from George Washington to Alexander Hamilton (Sept. 1, 1796), *quoted in* WHITE, *supra* note 26, at 191.



Jefferson similarly complained of “the infidelities”<sup>178</sup> of the post office and was warned by his friend Elbridge Gerry just after his inauguration that sending letters through the post was likely to “betray all the secrets of the chief magistrate.”<sup>179</sup>

The post office was not alone in failing to live up to the highest ideals of public administration. Suits against customs officers for excessive zeal in collection or failure to turn over funds to the United States were, in later years, quite common,<sup>180</sup> and Congress gave relief by private bills to petitioners who had been damaged by “incompetent” administration.<sup>181</sup>

In addition, the Federalists’ conception of fitness of character included the notion that appointees should be well-disposed toward the government of the United States. In the context of the times this often meant that the appointee was a good Federalist. For this was an era in which political disagreement was regularly interpreted as disagreement about the fundamental principles upon which the new government was to be based. Jeffersonian Republicans continuously accused Hamilton, Washington, and Adams of designs to overthrow the Constitution and establish a monarchy. Federalists viewed Jefferson and his Republican allies as conspirators eager to bring the terror of the French Revolution to American shores.

As a consequence, fitness of character was often operationalized as a political test that rewarded adherence to Federalist doctrines. And, Federalist appointees sometimes exploited office for partisan purposes. The most notorious example may be the degree to which deputy postmasterships were given to Federalist printers. These printer-postmasters found their dual occupations useful in circulating Federalist newspapers and broadsheets, sometimes without paying the postage. They were also accused of delaying or misplacing Republican publications that had been consigned to them for

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178. Letter from Thomas Jefferson to John Taylor (Nov. 26, 1789), *quoted in* White, *supra* note 26, at 191.

179. Letter from Elbridge Gerry to Thomas Jefferson (n.d.), *quoted in* WHITE, *supra* note 26, at 191.

180. See Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 206-09 (1991).

181. See, e.g., An Act for the Relief of Thomas Jenkins and Sons, ch. 3, 6 Stat. 13, 14 (1794). The owners of the ship *Hero* had paid excessive tonnage and customs duties because the ship had been improperly, and therefore, invalidly, registered by a customs officer. Ships bearing invalid registration papers were treated as foreign and paid the higher duties levied on foreign vessels.

delivery through the mails.<sup>182</sup> In short, internal control of the federal bureaucracy through a character test at appointment was hardly a foolproof means for insuring efficient, even-handed, or even honest administration.

### C. *Pecuniary Benefits*

The complaints about postmaster-printers highlights a feature of Federalist administration and office-holding that was central to the difficulties of exercising managerial or bureaucratic control in the early Republic. Not only were the government's agents acting at a distance from their superiors, but also a huge proportion of them were part-timers who were paid at piece rates or on the basis of a percentage of revenues collected. These officers were not the full-time, salaried, career civil servants of modern imagination, but occupied some hybrid category that fused salaried employment, independent local standing, and private entrepreneurship.

At one level this system of discrete payment for specified official actions, or commissions on revenues generated, was simply a measure of economy. Customs and excise tax collectors, federal marshals, and deputy postmasters were spread across the country in areas of both large and minimal population and commerce. Outside of major cities there was often not enough work to justify a full-time salaried employee. Even the Attorney General was a part-timer and not provided with so much as a clerk until 1818.<sup>183</sup>

Paying on a piece rate or by commission also tended to promote energy in office. Officers who failed to act did not get paid. To be sure, paying on commission or at piece rates was to some degree a holdover from the period in which offices were treated as a species of property.<sup>184</sup> But judicially enforceable property rights in office died out in the colonies and were never a part of the federal system.<sup>185</sup> Instead these forms of payment were recognized for their incentive value, whatever their history. For example, Tench Coxe, U.S. Commissioner of Revenue, wrote to Alexander Hamilton that "it was more easy to excite [the tax collectors'] attention and Vigilance and to animate their

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182. PRINCE, *supra* note 175, at 183-207.

183. An Act To Regulate and Fix the Compensation of the Clerks in the Different Offices, ch. 87, § 6, 3 Stat. 445, 447 (1818).

184. Karen Orren, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 STUD. AM. POL. DEV. 60, 65 (1994).

185. See DAVID H. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION: THE DEVELOPMENT OF THE PUBLIC EMPLOYMENT RELATIONSHIP* 19-20, 52-53 (1971).

exertions by an addition to their Commissions (at least in part) than to their salaries."<sup>186</sup> And Hamilton's papers are full of pleas to the Congress to allow the Treasury some discretion in calibrating salary, commission, and piece rate payments to better incentivize the collection of revenue.

Congress seems rarely to have granted this discretion (the compensation of whiskey tax collectors mentioned earlier was an exception). Early statutes are replete with provisions for fixed payments for particular acts, as in the original patent statute, or for fixed-rate commissions. Federal marshals, for example, were paid for specific services—so much for serving a summons, so much for empanelling a jury, and so on.<sup>187</sup> Letter carriers, who were generally employed only in cities, were authorized to collect two cents per letter delivered, not from the Treasury, but from the recipient of the correspondence. If those receiving letters had their mail held at the post office, they were required to pay the deputy postmaster personally a penny for each piece of mail collected.<sup>188</sup>

Deputy postmasters were also paid commissions—a percentage of the postage fees that they collected—the percentage to be determined by the Postmaster General.<sup>189</sup> Customs officers got a share of ship registration fees<sup>190</sup> as well as a percentage of duties collected (again with a cap on total commissions).<sup>191</sup> Moreover, enforcement personnel responsible for prosecuting violators of tax statutes,<sup>192</sup> the Auctioneering Act,<sup>193</sup> and many other statutes were entitled to a share of the fines or forfeitures collected.

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186. Letter from Tench Coxe, U.S. Comm'r of Revenue, to Alexander Hamilton, Sec'y, Dep't of the Treasury (July 25, 1792), in 12 THE PAPERS OF ALEXANDER HAMILTON 85, 88 (Harold C. Syrett ed., 1967).

187. A table of marshals' fees as of 1799 is reprinted in WHITE, *supra* note 26, at 412.

188. An Act To Establish the Post-Office and Post-Roads Within the United States, ch. 23, § 15, 1 Stat. 354, 360 (1794).

189. *Id.* These commissions were set by statute with special higher caps for cities like Philadelphia and New York.

190. An Act Concerning the Registering and Recording of Ships or Vessels, ch. 1, § 25, 1 Stat. 287, 297-98 (1792); An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for Other Purposes, ch. 11, § 31, 1 Stat. 55, 64 (1789).

191. An Act Relative to the Compensations of Certain Officers Employed in the Collection of the Duties of Impost and Tonnage, ch. 23, § 1, 1 Stat. 416, 416 (1795).

192. An Act Making Further Provision for Securing and Collecting the Duties on Foreign and Domestic Distilled Spirits, Stills, Wines and Teas, ch. 49, § 1, 1 Stat. 378, 378-79 (1794); An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, § 44, 1 Stat. 199, 209 (1791); An Act To Provide More Effectually for the Collection of the Duties Imposed by

Pecuniary incentives for naval officers and crew were particularly attractive. Capture of an armed foreign vessel produced a reward of half the ship's value to the officers and crew of the captor. If the captured ship had greater firepower than the American vessel, the American officers and crew received one hundred percent of the value of the prize.<sup>194</sup>

The line between officers and entrepreneurs was further blurred by the multiple provisions enlisting private parties in the enforcement of federal law or policy. Dozens of statutes contained provisions for sharing the proceeds of prosecution with informants in so-called *qui tam* actions.<sup>195</sup> And the United States followed the standard international practice of issuing letters of marque to private vessels, licensing them to seize enemy vessels and their cargos as prizes. Like the naval officers and crew, these privateers were paid by giving them a share of the proceeds from auctioning off the seized vessel and her cargo.

The problem with these pecuniary rewards for private enforcement is getting the incentives right. Energy can be too energetic—privateers tended not to make nice distinctions between friend and foe, and were sometimes hard to restrain once peace broke out. And, informer's suits could be used for personal harassment or to corrupt public officers through collusion between informant

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Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels, ch. 35, § 69, 1 Stat. 145, 177 (1790); An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, § 38, 1 Stat. 29, 48 (1789).

193. An Act Laying Certain Duties upon Snuff and Refined Sugar, ch. 51, § 21, 1 Stat. 384, 389 (1794).
194. An Act in Addition to the Act More Effectually To Protect the Commerce and Coasts of the United States, ch. 62, § 3, 1 Stat. 574, 574 (1798).
195. *See, e.g.*, An Act To Regulate the Collection of Duties on Imports and Tonnage, ch. 22, § 90, 1 Stat. 627, 697 (1799); An Act To Alter and Amend the Act Intituled "An Act Laying Certain Duties upon Snuff and Refined Sugar," ch. 43, § 14, 1 Stat. 426, 429 (1795); An Act Laying Duties Upon Carriages for the Conveyance of Persons, ch. 65, § 10, 1 Stat. 373, 375 (1794); An Act To Regulate Trade and Intercourse with the Indian Tribes, ch. 19, § 12, 1 Stat. 329, 331 (1793); An Act To Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels § 69; An Act To Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 3, 1 Stat. 137, 138 (1790); An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States § 38. *Qui tam* actions were a standard feature of English common law, but seemed to have been imported into the United States at the national level only by statutory provision. The standard, almost uniform, reward was one-half of any recovery to the *qui tam* litigant or informer.

and enforcer. Both privateering<sup>196</sup> and qui tam enforcement<sup>197</sup> were later largely abandoned.

*D. Bonds, Forfeitures, and Criminal Penalties*

Judged by the statutes of the Federalist period, administrators were often expected to be supervised by lawsuits. Instead of providing disciplinary machinery within bureaus for the hierarchical control of wayward administrators, Congress peppered the early federal statutes with fines, penalties, and forfeitures.<sup>198</sup> The range of penalties was enormous. A deputy postmaster who destroyed or misappropriated mail containing a monetary payment faced the death penalty.<sup>199</sup> Tax commissioners who failed to show up for any meeting held in furtherance of the Land Tax Act of 1798 were subject to a fine of \$10.<sup>200</sup> Port officials who accepted a bribe faced a \$2000 fine and

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196. On the system of prizes and its abolition, see RICHARD HILL, *THE PRIZES OF WAR: THE NAVAL PRIZE SYSTEM IN THE NAPOLEONIC WARS, 1793-1815* (1998); CHRISTOPHER MCKEE, *A GENTLEMANLY AND HONORABLE PROFESSION: THE CREATION OF THE U.S. NAVAL OFFICER CORPS, 1794-1815* (1991); DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL* (1999); and FRANCIS R. STARK, *THE ABOLITION OF PRIVATEERING AND THE DECLARATION OF PARIS* (1897).

197. See STARK, *supra* note 196; Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81. Qui tam practice has not died out entirely. It continues under the False Claims Act, and citizen enforcement actions are now a major feature of environmental litigation. On modern uses of qui tam, see Ann M. Lininger, *The False Claims Act and Environmental Law Enforcement*, 16 VA. ENVTL. L.J. 577 (1997); Mariame Lavelle, *Congress Gropes with Whistleblower Law*, NAT'L. L.J., Apr. 27, 1992, at 7; and Richard B. Schmitt, *Honesty Pays Off: John Phillips Fosters a Growing Industry of Whistle-Blowing*, WALL. ST. J., Jan. 11, 1995, at A1. Citizen enforcement still has its detractors. See Robin Kundis Craig, *Will Separation of Powers Challenge "Take Care" of Environmental Suits?: Article II, Injury-in-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001); Ara Lovitt, Note, *Fight for Your Right To Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853 (1997).

198. Although Congress was highly attentive to the punishment of official misbehavior, it neglected to provide penalties for those who attempted to corrupt officials who remained virtuous. That neglect gave rise to the confusing case of *United States v. Worrall*, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766), which is often cited for the proposition that there is no federal common law of crime, but which in fact imposed a fine and incarceration on the defendant who attempted to bribe a revenue officer.

199. An Act To Establish the Post-Office and Post-Roads Within the United States, ch. 23, § 16, 1 Stat. 354, 360-61 (1794).

200. An Act To Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, § 6, 1 Stat. 580, 584 (1798).

disqualification from holding all future offices under the United States.<sup>201</sup> Federal marshals derelict in their census-related duties could be fined \$800,<sup>202</sup> and a collector of duties on spirits who was guilty of “oppression or extortion” could be fined \$500 and/or jailed for six months.<sup>203</sup>

Fines were made more easily collectible by the provision for bonds or sureties, both of which were often required before administrators were eligible to take up their positions. Some of these bonds were impressive. The collector of the Port of Philadelphia was required to post a bond of \$60,000,<sup>204</sup> and the Treasurer of the Bank of the United States was required to pony up no less than \$50,000.<sup>205</sup> Occupants of lesser positions sometimes posted substantial bonds as well, for example, \$20,000 for a United States marshal,<sup>206</sup> up to \$10,000 for diplomatic consuls,<sup>207</sup> and up to \$2000 for land surveyors.<sup>208</sup>

The bonds also facilitated recovery of funds from dispersed officials who collected taxes or collected fees for postage. These officers were required to file regular accounts (often quarterly) and, after deducting their commissions, fees, and expenses, to remit surpluses to the Treasury. If they failed to file their accounts or make their remittances, their supervisors were authorized to bring suit.<sup>209</sup> Once again *qui tam* actions were often provided by statute as a means

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201. An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, § 35, 1 Stat. 29, 46 (1789).

202. An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 2, § 3, 1 Stat. 101, 102 (1790).

203. An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, § 39, 1 Stat. 199, 208 (1791).

204. An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States § 28.

205. An Act To Incorporate the Subscribers to the Bank of the United States, ch. 10, § 7, 1 Stat. 191, 194 (1791).

206. An Act To Establish the Judicial Courts of the United States, ch. 20, § 27, 1 Stat. 73, 87 (1789).

207. An Act Concerning Consuls and Vice-Consuls, ch. 24, § 6, 1 Stat. 254, 256 (1792).

208. An Act To Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, § 24, 1 Stat. 580, 589 (1798).

209. An Act To Establish the Post-Office and Post-Roads Within the United States, ch. 23, § 24, 1 Stat. 354, 364-65 (1794) (authorizing suits by the Postmaster General against deputy postmasters who failed to render account); An Act To Establish the Post-Office and Post Roads Within the United States, ch. 7, § 24, 1 Stat. 232, 238-39 (1792) (same); *see also* An Act

of recovering from wayward officials.<sup>210</sup>

*E. Assessing Managerial Control*

Public administration was not a conceptual category until one hundred years after the signing of the U.S. Constitution. But Congress, the President, and Department heads were attentive, almost hyper-attentive, to assuring accountability of federal administrators for the performance of their duties. Some of the techniques deployed were characteristic of what was understood as the “law of officers” at English common law and in the colonies—including oaths, bonds, forfeitures, criminal penalties, and *qui tam* actions. But because federal law was generally not thought to incorporate the common law,<sup>211</sup> most of the Federalist law of officers had to be created by statute.

Moreover, Congress and the Federalist administrations of Washington and Adams adapted English and colonial practices to American conditions. Property in office, a common European practice, was thought to lead to corruption and oppression.<sup>212</sup> The Federalists, therefore, devised incentive payments—commissions and fees—to promote energy, but sought to limit excessive zeal by capping the officials’ total returns and leaving all officers subject to removal. The Federalist period also witnessed increasingly strenuous efforts to build internal control through instructions, audits, and inspections. And the innovative development of internal administrative appeals helped to harness external private interest to internal supervisory control. Even so, the power of the government to command both allegiance and obedience was suspect to say the least. Washington’s remedy was to build loyalty, both of officers to their duty and citizens to their government, by borrowing the local authority of persons of high standing or reputation. Indeed, as Martin Shefter

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To Establish the Post-Office of the United States, ch. 43, § 22, 1 Stat. 733, 739 (1799) (same); An Act To Provide More Effectually for the Settlement of Accounts Between the United States and Receivers of Public Money, ch. 20, § 1, 1 Stat. 512, 512 (1797) (authorizing suits by the Comptroller of the Treasury against revenue officers who failed to remit receipts).

210. See, e.g., An Act for Establishing Trading Houses with the Indian Tribes, ch. 13, § 3, 1 Stat. 452, 452-53 (1796) (concerning violations of Indian trading laws by Indian agents); An Act To Incorporate the Subscribers to the Bank of the United States § 8 (concerning illegal activities by officials of the Bank of the United States); An Act Providing for the Enumeration of the Inhabitants of the United States, ch. 2, § 3, 1 Stat. 101, 102 (1790) (concerning a marshal’s failure to file census returns).

211. See, for example, the discussion of *United States v. Worrall*, *supra* note 198.

212. On property in and sale of offices in France and England, see JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688-1783*, at 16-20 (1988).

has argued, deploying a “regime of notables” may have been the only feasible alternative in a state with both weak parties and a weak bureaucracy.<sup>213</sup>

The idea of office remained ambiguous. Part-timers paid by fees or commissions, and apparently expecting to be policed by criminal penalties, often at the initiative of private parties, are not a professionalized, hierarchically organized civil service. But the beginnings of some such idea can be glimpsed in Congress’s extensive provision for supervisory control by departmental superiors, audits to assess performance, and conflict of interest rules to separate public functions from private interests. Moreover, the limited utility of courts and lawsuits as a remedy for certain forms of official non- or mal-feasance became obvious before the Federalists left the Presidency. In 1793 Congress substituted an administratively issued distress warrant for a lawsuit when excise officers failed to render their accounts,<sup>214</sup> a provision that later gave rise to the first procedural due process claim ever to reach the U.S. Supreme Court.<sup>215</sup>

Even if criminal pursuit of wayward officials was too ponderous to provide effective reinforcement of managerial controls, that does not demonstrate that lawsuits of all kinds were of little or no use in shoring up the accountability of administrative officials. And, although the record of judicial review in the Federalist period is thin, there is enough to suggest that legal accountability in court may have played an important role in making Federalist administrators accountable to law.

#### IV. COURTS, LEGAL ACCOUNTABILITY, AND JUDICIAL REVIEW

Louis Jaffe, in his classic treatise on judicial review of administrative action, argued that judicial review was limited and uncertain in the United States until the early twentieth century. In his view, “[t]he Supreme Court of the [1870s, 1880s, and 1890s] appears to have entertained considerable doubt, in the absence of statutory provision, as to the propriety of judicial control of ‘executive’ action.”<sup>216</sup> And, because Congress had enacted few specific statutory

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213. Martin Shefter, *Party, Bureaucracy, and Political Change in the United States*, in *POLITICAL PARTIES: DEVELOPMENT AND DECAY* 211, 213 (Louis Maisel & Joseph Cooper eds., 1978).

214. An Act for Enrolling and Licensing Ships or Vessels To Be Employed in the Coasting Trade and Fisheries, and for Regulating the Same, ch. 8, § 29, 1 Stat. 305, 315 (1793).

215. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

216. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 337 (1965).



review provisions, “doubt” presumably pervaded the field.<sup>217</sup> Frederic P. Lee echoed Jaffe’s analysis and laid the problem at the doorstep of inadequate common law remedies. Lee wrote, “The right to collateral review through the relatively unimportant common law remedies, such as trover, detinue, assumpsit, and replevin, against executive officers who had acted in excess of their jurisdiction, was not questioned. But could their actions be directly reviewed by the courts through mandamus, injunction or appeal?”<sup>218</sup> The answer seemed to be no, unless the action was “purely ministerial,” meaning that there was a clear legal duty that provided the official no scope for the exercise of discretion.<sup>219</sup> The general picture that emerges from most of the secondary literature is that judicial review of administrative action in the early Republic was limited and, where present, deferential.<sup>220</sup>

It is true that writ review was quite limited, and because we see modern judicial review as the successor to common law writ review, the movement from older to contemporary forms seems to imply a massive broadening of judicial control. There is much truth in this notion, but not the whole truth. To better assess the relationship between legal accountability and judicial review in the Federalist period, we need to pay close attention to how both courts and government operated. The adequacy of judicial remedies must be determined in the context of what government was doing and how it affected private interests. Moreover, during this period Congress deployed the federal and state

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217. Although rare, provisions for damage actions against administrative officials were sometimes provided by statute. See, e.g., An Act Repealing, After the Last Day of June Next, the Duties Heretofore Laid upon Distilled Spirits Imported from Abroad, and Laying Others in Their Stead; and also upon Spirits Distilled Within the United States, and for Appropriating the Same, ch. 15, § 38, 1 Stat. 199, 208 (1791) (concerning suits for negligence by collectors of excise taxes on spirits); An Act To Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels, ch. 35, § 49, 1 Stat. 145, 170 (1790) (concerning suits against port officials who improperly seized goods). And, I previously noted the availability of a pure judicial review remedy when a taxpayer had failed to get relief through the multiple internal appeals in the Treasury under the statute providing for excise taxes on carriages and land.

218. Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 291 (1948).

219. Many commentators tend to lump the whole of the nineteenth century together as an age of judicial deference to administrative judgment. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 16 (1983); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 797 (1986).

220. A review and critique of this view appears in Woolhandler, *supra* note 180.

courts in somewhat novel ways. Congress seems to have presumed that officers could and would be sued in state courts in common law actions and that they would be pursued through *qui tam* actions as well. And Congress provided liberally for criminal penalties for dereliction of duty. Finally, legal control of administration by courts included not only post hoc review of the legality of official action but also the insertion of courts into administration – sometimes making them the administrators.

*A. Those “Unimportant” Common Law Actions*

Judicial review of administrative action is desirable to the extent that administrators take (or refrain from) action affecting individual legal rights or interests. The more government regulates our activities or defines by statute the scope and structure of our property interests, the greater the need for judicial review to protect private rights. But if government is limited in its activity, limited judicial review may still be adequate – even robust. And, to a considerable degree, this is the case in the early decades of the American Republic.

As we have seen, federal governmental activities included the collection of customs and excise taxes, regulation of immigration and navigation, the establishment and running of the postal service, the granting of public lands to veterans and others, and the conduct of military affairs, including trade with belligerents and with Indian tribes. The federal government also issued patents and copyrights, provided disaster relief, and engaged in proprietary functions such as running seamen’s hospitals, building and maintaining lighthouses, and carrying the mails. Frederic Lee’s “relatively unimportant common law remedies” provided a remarkable array of means for both direct and collateral attack on many of these sorts of official actions.

Common law actions had the capacity to provide substantial relief with respect to the activities of the most numerous federal agents – tax collectors and postal officials. Any seizure or impoundment of property by revenue officers under the tax statutes could be tested by one of a number of common law writs – *trover*, *detinue*, *assumpsit*, and so on. Official immunity was nonexistent. The officers’ only defense was that they were carrying out their statutory responsibilities. That defense put at issue the legality of official conduct, thus subjecting it to judicial review. Similar actions were available against postal officials who lost or damaged items consigned to the mails. The propriety of official action with respect to land patents and invention patents could be tested collaterally by various forms of property actions or in suits for patent infringement. Cases that largely postdate the Federalist period show

that litigants were remarkably resourceful in deploying these common law devices.<sup>221</sup>

Eighteenth-century Americans seemed to believe in the efficacy of these forms of action, including the imposition of criminal penalties, as means for making officials legally accountable. Even before the Constitution of 1787 was adopted, for example, as the Continental Congress reluctantly appointed officers to implement national legislation, it began to recognize the dangers of this fledgling executive power without judicial restraint. On August 14, 1786, Charles Pinckney of South Carolina proposed the institution of a “federal Judicial Court for trying and punishing all officers appointed by Congress for all crimes, offences, and misbehaviour in their Offices.”<sup>222</sup> As would also be true after 1789, Pinckney’s understanding of calling officers to account was through statutes making various derelictions of duty into crimes and the prosecution of those crimes in court.

Moreover, the debates surrounding the ratification of the Constitution reveal that Americans valued common law actions and criminal prosecutions, subject to trial by jury, as protections against the depredations of federal officials. Objections were made in virtually every state to the failure of Article III to provide for jury trials in federal courts for civil cases.<sup>223</sup> And while jury trial was valued for other reasons, protection from federal officialdom was raised in incendiary terms. A writer styling himself a “Democratic Federalist” had this to say in an article in the *Pennsylvania Packet*:

Suppose, therefore, that the military officers of Congress, by a wanton abuse of power, imprison the free citizens of the United States of America; suppose . . . that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift—suppose, I say, that they commit similar or greater indignities, in such cases a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same; but what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizens, and who will perhaps sit at the distance of many hundred miles from the place where

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221. See *id.* at 216-21.

222. 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 497 (John C. Fitzpatrick ed., 2005).

223. See DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 10-19 (1971).

the outrage was committed? What refuge shall we then have to shelter us from the iron hand of arbitrary power?<sup>224</sup>

Like the Democratic Federalist, most opponents of a lower federal judiciary tended to focus on the potential for federal courts to extend and enhance federal power rather than constrain it. They understood that federal courts might as easily side with federal officers as with citizens. Federal courts would thereby become an effective instrument of oppression rather than protectors of individual rights. That is why the anti-Federalists were so outraged by the failure of the Constitution to include a jury trial requirement in Article III. And they felt somewhat betrayed when the First Congress turned immediately to the business of establishing a federal judicial branch that included federal trial courts. Madison and others supporting the Constitution had favored the use of state courts as trial courts with only an appeal to the Federal Supreme Court.<sup>225</sup>

Many of the people making these complaints seemed to be thinking not of suits by citizens against federal officers, but of enforcement actions by federal officers against citizens. And here judicial review would be fulsome, generally *de novo*. In suits to enforce federal law, the courts would be triers of both fact and law; administrators would merely be litigants. Hence the focus on the jury as a means of avoiding the potential bias of a national judiciary.

The Judiciary Act of 1789 allayed the critics' fears to some degree. Each state was given its own district judge who was required to be a resident of that state. Both in district court proceedings and in the circuit courts, which consisted of the district judge and at least one Supreme Court Justice, the laws of the several states were to be regarded "as rules of decision"<sup>226</sup> (unless, of course, overridden by superior federal law). Except in equity and admiralty cases, trials would be before a jury chosen from the locality and assembled in accordance with local practice.<sup>227</sup> Jury decisions were protected by providing only for review by writ of error,<sup>228</sup> rather than an appeal, which would encompass issues of both law and fact. Localization was carried further by prohibiting any person from being arrested or tried in any civil action "in any

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224. Letter from "A Democratic Federalist," PA. PACKET, Oct. 23, 1787, reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION: 1787-1788, at 154 (John Bach McMaster & Frederick D. Stone eds., Phila., Historical Soc'y of Pa. 1888).

225. THE FEDERALIST NO. 45 (James Madison).

226. An Act To Establish the Judicial Courts of the United States, ch. 20, § 34, 1 Stat. 73, 92 (1789).

227. *Id.* § 29.

228. *Id.* § 25.

other district than that whereof he is an inhabitant.”<sup>229</sup> The Act also protected locals against the creation of collusive federal jurisdiction by the assignment of negotiable instruments to out-of-state residents.<sup>230</sup> Moreover, in large classes of cases the state courts’ jurisdiction remained concurrent with federal courts.<sup>231</sup> General federal question jurisdiction resided only in the Supreme Court in cases appealed from state supreme courts.<sup>232</sup>

Yet the federal judiciary in the Federalist period was a major instrument for the extension of federal governmental power. The charges of federal judges to federal grand juries were often the occasion for lecturing the public on Federalist constitutional principles.<sup>233</sup> Mining the record and minute books kept by the court clerks, along with a host of other documentary sources, Dwight F. Henderson described how energetically the federal trial courts asserted the supremacy of treaties over state law and of national laws and courts over state laws and courts.<sup>234</sup> Moreover, it is probably the case that Hamilton’s successful efforts to promote commerce and agriculture by reestablishing national credit would have been much less effective without federal courts to enforce the revenue laws.<sup>235</sup>

Whether the lower federal judiciary was also an instrument of oppression—save in prosecutions under the Alien and Sedition Laws—is uncertain. That it was in those cases is abundantly clear.<sup>236</sup> At the least, Federalist judges might be criticized for using their offices to further Federalist political ambitions.<sup>237</sup>

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229. *Id.* § 34.

230. *Id.* § 11.

231. Numerous federal statutes confirmed the jurisdiction of state and local courts. *See, e.g.*, An Act To Establish the Post-Office of the United States, ch. 43, § 28, 1 Stat. 733, 740-41 (1799) (authorizing suits for violation of the postal laws to be brought in any state or territorial court or before justices of the peace).

232. *Id.* § 25.

233. *See, e.g.*, Case of Fries, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5126).

234. HENDERSON, *supra* note 223, at 55-63, 100-03.

235. In debates on the Federal Judiciary Act, South Carolina Congressman William L. Smith asserted that it “would be *felo da se* to trust the collection of the revenue of the United States to the state judicatures.” 1 ANNALS OF CONG. 830 (Joseph Gales ed., 1834); *see also* 1 *id.* at 844 (statement of Rep. Madison) (arguing that state courts “are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation”).

236. *See, e.g.*, Kathryn Preyer, United States v. Callender, *Judge and Jury in a Republican Society, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 173 (Maeva Marcus ed., 1992).

237. *See* PRINCE, *supra* note 175, at 238-67.

But what can we say about how the state and federal courts functioned as protectors of individual rights? How did they treat actions that, in one form or another, sought to review the legality of official action in the earliest years of the Republic?

Most of the reported cases that would allow us to say something definitive about that question postdate the Federalist era. But the evidence that we do have offers a perspective that counters the notion that administrative action in the early Republic was mostly free from legal oversight. To the contrary, being a federal administrative agent may have been legally quite treacherous. Perhaps the most interesting story that emerges from judicial decisions in the Federalist period is that of William Bingham.

In 1776, the Committee of Correspondence of the Second Continental Congress sent the twenty-four-year-old Bingham to Martinique as a “special agent” to attempt to procure arms and other supplies for Washington’s army, to promote the American cause, to recruit privateers, and, acting undercover, to nudge France into the American camp.<sup>238</sup> Bingham seems to have been quite successful in gaining the confidence of the French governor, Bouillé, and in securing some much needed supplies. But he was neglected by his faraway bosses in the Continental Congress. Bingham ran up large debts to creditors that the Congress should have paid and rapidly found himself in other legal and political difficulties on the island.<sup>239</sup> In particular, the good ship *Pilgrim*, an American privateer, became a source of endless trouble, and embroiled Bingham in litigation lasting twenty-five years.

The *Pilgrim* captured the *Hope of Arundel* near Portugal. A prizemaster conducted the *Hope* to Martinique, where it stopped for food and water in route to Massachusetts.<sup>240</sup> The *Hope’s* captain claimed that she was a Danish vessel carrying Portuguese goods and hence not a lawful prize.<sup>241</sup> Because the French admiralty courts in Martinique disclaimed authority to consider cases of American capture, the French governor at the island consulted with Bingham as a representative of the U.S. government. Bingham took depositions from William Carlton (the prizemaster who had sailed the *Hope* to Martinique) and the *Hope’s* captain, and gave these depositions to the French court. Despite the

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238. ROBERT C. ALBERTS, *THE GOLDEN VOYAGE: THE LIFE AND TIMES OF WILLIAM BINGHAM, 1752-1804*, at 11, 16-17, 19, 21-24 (1969).

239. *Id.* at 58-59, 68-70, 77-78.

240. If this seems a peculiar route, consult a tradewind chart for the North Atlantic.

241. Denmark and Portugal were neutral powers and their ships and cargoes were not lawful prizes unless engaged in activities that violated their neutrality.

court's self-proclaimed jurisdictional limits, it ruled that the capture was illegitimate. Bingham and the French governor together decided that the ship should be given back to its captain, but that the cargo on board—flour—should be sold, because there was a shortage on the island. Bingham arranged the sale of the flour and used the proceeds to repair the captured *Hope* and pay other expenses. He then credited the rest “to the account of the commercial committee of [the Continental] Congress ‘until the claim of the real owner in Europe is made clear and manifest.’”<sup>242</sup>

It is unclear to what extent Bingham was required or pressured to take the action he did. The precise division of responsibility between Bingham and the French governor in deciding to seize the ship is impossible to determine. Bingham first suggested to the Continental Congress that he took the initiative to seize the ship, but then emphasized that the governor directed the action.<sup>243</sup> Whoever was the initiator of the seizure, the Cabot family, owners of the *Pilgrim*, demanded that Bingham should pay them the value of the *Hope* and its cargo.

The litigation began with an action of trover filed by Carlton, the prizemaster, in Massachusetts state court. Bingham reacted by getting Bouillé to put an entry in the record that, as Governor, he had ordered everything that happened in Martinique. Bingham then asked his boss—the Continental Congress—to get the suit dismissed. The latter responded by passing a resolution suggesting a suspension of the case until it could be heard by the French courts, whose jurisdiction had by this point changed. Several months later, Congress passed a second resolution applauding Bingham's work and promising to pay the costs of any legal suits. Although these resolutions failed to stop the Massachusetts proceeding, the second resolution was entered into evidence, and, in 1784, a jury found in Bingham's favor.<sup>244</sup>

Nine years later, the Cabots relaunched their attack, bringing two federal suits against Bingham: one for the flour and one for the *Hope*. The *Pilgrim*'s captain filed separate suits for the ship and the flour. The latter two suits were

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242. Letter from William Bingham to Comm. for Foreign Affairs, Cont'l Cong. (Feb. 2, 1779), quoted in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 555 (Maeva Marcus ed., 1998) [hereinafter COURT DOCUMENTARY HISTORY].

243. 6 COURT DOCUMENTARY HISTORY, *supra* note 242, at 555 n.9. Bingham's biographer gives a slightly different account, implying that Bingham alone intervened and returned the vessel to its captain because it appeared to be neutral property illegally seized, before selling the cargo at the French governor's wishes. ALBERTS, *supra* note 238, at 78-79.

244. The foregoing account is drawn from 6 COURT DOCUMENTARY HISTORY, *supra* note 242, at 554.

stayed pending the outcome of the Cabots' suit for the flour. Based on the Continental Congress's resolutions, the Attorney General Edmund Randolph determined that the federal government was responsible for defending Bingham, but its efforts on Bingham's behalf were unavailing. After the judge excluded much evidence favorable to Bingham, including the congressional resolutions, the jury found for the Cabots. Bingham appealed to the Supreme Court. The judgment against him was reversed in 1795.<sup>245</sup>

But the Cabots were not finished. They pursued their separate action seeking the value of the *Hope*, and from here forward the judicial record is murky.<sup>246</sup> After a return to the Supreme Court on a question of whether the circuit court had sufficiently established diversity jurisdiction,<sup>247</sup> the Cabots won at trial by default when the U.S. attorney failed to show up to defend the suit.<sup>248</sup> However, it appears that on the default Bingham only lost his \$30,000 bond. The Cabots were not satisfied. They pressed their claims again in state courts in 1799, based on new evidence that the *Hope* was indeed British but carrying forged Danish papers, and therefore a fair prize.<sup>249</sup>

Bingham lost again. He urged his lawyers to try to get back to the Supreme Court on a writ of error, but it is unclear whether he succeeded in doing so. Bingham was particularly concerned to appeal because, as his biographer explained, he "had always been sure that Congress, having officially accepted responsibility for his actions in Martinique, would reimburse him for a lost judgment; but now he had reason to fear that a Republican Congress would refuse to honor the claim of a Federalist."<sup>250</sup> Sometime shortly after Bingham's death in 1804, his estate paid the Cabots to finally settle the suit.

There are many loose ends to the story of Bingham's unhappy history in state and federal courts in the *Pilgrim* affair. The court records and reports of the period have the usual fragmentary quality, and to the eyes of a modern lawyer it is a puzzle how the Cabots got into state and federal court so many times on essentially the same claims.<sup>251</sup> However, the point is not to understand

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245. See 6 *id.* at 555-63.

246. The volume of the *Court Documentary History* that would cover this case has not yet been published.

247. See *Bingham v. Cabot (Bingham II)*, 3 U.S. (3 Dall.) 382 (1798).

248. ALBERTS, *supra* note 238, at 366.

249. *Id.* at 366-67.

250. *Id.* at 418.

251. Apparently the actions in state and federal court were considered sufficiently distinct that one did not preclude the other. The Cabots were careful both to sue separately for the ship



the intricacies of eighteenth- and early-nineteenth-century procedure, but to notice that far from being remediless, private citizens objecting to official action by an agent of the United States had ample legal weapons at their disposal. There is surely some element of harassment here as well: Bingham's biographer believed that the Cabots were after Bingham's land holdings in Maine, which were attached in a number of the suits and valued by the Massachusetts sheriff at absurdly low prices.<sup>252</sup>

Other federal officials were not so bold as William Bingham. *Olney v. Arnold*<sup>253</sup> tells a similar story of the vagaries of a federal officer in state court, and of the thin protection offered him by the availability of appeal to the Supreme Court. But the facts of the dispute reveal that the risks of litigation made him cautious in the exercise of his authority.

Jeremiah Olney was the first collector of customs in Providence, Rhode Island.<sup>254</sup> Olney seems to have enforced the collection laws with great exactness and to have been at cross purposes with a number of Providence merchants.<sup>255</sup> He and Arnold, the defendant in error, had been involved in prior litigation in 1791. Arnold had defaulted on a bond that he had given for payment of duty, and Olney brought suit on the bond. That suit was settled, but in 1792 Arnold defaulted on another bond. This case went to trial through the U.S. Attorney and after trial the jury decided for the government. Because Arnold failed to pay that judgment, the customs statutes disqualified him from any longer

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and the cargo and to change the form of action from trover to assumpsit in later litigation. See *Bingham v. Cabot (Bingham I)*, 3 U.S. (3 Dall.) 19, 24, 38, 40-42 (1794). How the Cabots managed to pursue three cases in the Massachusetts courts nevertheless remains obscure.

252. ALBERTS, *supra* note 238, at 365-67. One should not get too misty-eyed about William Bingham himself. Although harassed by litigation in relation to his efforts as an agent on behalf of the United States, Bingham was not an impeccunious official abandoned by his government. The Cabots were after his land in part because it represented plum holdings—two million acres, nearly one-ninth of the territory of the state of Maine. Bingham's activities in Martinique helped to launch his career as a trader and speculator, which made him at one point the richest man in America, a business partner of Robert Morris, a confidant of Alexander Hamilton, Speaker of the House of Representatives of the Pennsylvania legislature, and a United States Senator. A staunch Federalist, Bingham was a person of precisely the "character" that Federalist administrations might seek out to bear the administrative burdens of the new nation.
253. 3 U.S. (3 Dall.) 308 (1798).
254. William Bradford, Jr., Notes for Argument in the Supreme Court (Feb. 4, 1794), in 6 COURT DOCUMENTARY HISTORY, *supra* note 242, at 158, 158-61.
255. Olney was also a solid Federalist from an old Rhode Island family, connected to Washington via military service, and President of the Rhode Island Society of the Cincinnati. See WHITE, *supra* note 26, at 305-08.

posting bond for customs duty. Hereafter duties would have to be paid up front, before the goods were sold. To avoid this difficulty, Arnold began transferring his interests in goods to other ships or to other individuals so that bonds could be posted in their names.

Olney was uncertain how to proceed in the face of Arnold's transparent subterfuge. Apparently to avoid the possibility of personal liability for improperly denying bond to a third party fronting for Arnold, Olney, for a time, allowed third-party ships to post bond for Arnold. He also sought advice from higher authority. Alexander Hamilton informed Olney that Arnold's actions evidenced an intent to evade the collection laws and that this intent was sufficient to justify refusal to accept the credit or bond of any of Arnold's transferees. Hamilton also promised that should the collector then be sued successfully for damages, it would be incumbent upon the federal government to indemnify him, as long as he had acted "with due caution and upon sufficient ground of probability."<sup>256</sup>

Olney, however, remained concerned about his own liability and requested that a statute be passed to clarify the appropriate course of action before he refused bonds from the third parties who were shipping Arnold's cargo. Hamilton reiterated the indemnification pledge, and Olney then refused the next bond offer from a third party, a man named Dexter. In negotiations with Dexter, Olney took the position that he would continue to refuse bonds until Arnold finally satisfied his prior debt.

Nevertheless, Olney ultimately accepted Dexter's bond. But neither he nor Arnold was satisfied, and they both filed suit against Olney. An exchange of letters between Hamilton, Olney, and the local U.S. Attorney reveal that it was agreed that the U.S. Attorney would defend the case and that the federal Treasury would pay the legal costs.<sup>257</sup>

The Court of Common Pleas for the County of Providence originally held for Olney on the ground that his acts were justified under the customs laws of the United States. The Rhode Island Superior Court disagreed and remanded. After trial, a Rhode Island jury gave judgment for the plaintiffs and assessed damages with costs against Olney. The U.S. Supreme Court affirmed, reviewing on a writ of error.

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256. Letter from Alexander Hamilton to Jeremiah Olney (Sept. 19, 1792), *in* 7 COURT DOCUMENTARY HISTORY, *supra* note 242, at 567-68.

257. *See* 7 COURT DOCUMENTARY HISTORY, *supra* note 242, at 570 n.28 (quoting Letter from Alexander Hamilton to Jeremiah Olney (Nov. 27, 1792); Letters from Jeremiah Olney to William Channing (Nov. 28, 30, Dec. 6, 8, 1792); Letter from William Channing to Jeremiah Olney (Dec. 3, 1792)).

Virtually all of the discussions of counsel reported in the *U.S. Reports* deal with the jurisdictional question of whether the case was properly before the Supreme Court. Why Olney lost on the merits and whether he was ever reimbursed by the Treasury remain a mystery. But Olney's caution in the face of the ever-present prospect of litigation before local juries is surely understandable. The Olneys of the world made dozens of decisions every day that might land them in court, facing personal liability for simple mistakes.

In at least a few cases Congress recognized that these federal officials were at some considerable risk. As noted earlier, the Collection Act of 1789 tried to discourage baseless suits against federal officials by allowing them to recover double their costs if the plaintiff lost his suit. Moreover, the court was allowed to absolve the defendant by finding reasonable cause for a seizure, even if a jury verdict had declared it illegal.<sup>258</sup> Congress placed a similar provision in the 1799 Act regulating collection of tonnage duty.<sup>259</sup> And in 1792 Congress absolved United States Attorneys of costs if they failed to obtain a conviction, provided that there was reasonable cause for commencing the lawsuit.<sup>260</sup>

The quantitative significance of litigation against federal officials in the Federalist period is difficult to assess. The reported decisions in federal cases reveal few suits against officers, but this is surely less than the tip of the iceberg. Most lower federal court decisions were not reported, and, as Bingham and Olney's stories reveal, plaintiffs might easily have preferred state court actions. Because these actions were in the form of private writs against individuals not named in their official capacities, and in jurisdictions with sketchy case reporting,<sup>261</sup> any attempt at quantification is virtually hopeless. One should surely be skeptical, however, that Bingham or Olney were peculiarly unlucky officers or that federal officials were unaware of the threat that any action they took affecting person or property might put them before a

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258. An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, § 36, 1 Stat. 29, 47-48 (1789).

259. An Act To Regulate the Collection of Duties on Imports and Tonnage, ch. 22, 1 Stat. 627 (1799).

260. An Act for Regulating Processes in the Courts of the United States, and Providing Compensations for the Officers of the Said Courts, and for Jurors and Witnesses, ch. 36, § 5, 1 Stat. 275, 277-78 (1792).

261. There was some reporting of state supreme court (Pennsylvania and North Carolina) and Virginia High Court of Chancery decisions in the Federalist period. But reports of even the highest court of a state in major commercial jurisdictions like New York, Massachusetts, New Jersey, Maryland, and South Carolina post-date 1801. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 118-19 (1971).

local judge and jury—where their only defense would be that they had acted entirely properly pursuant to the laws of the United States.

*B. The Courts as Administrative Tribunals*

While Congress left judicial review primarily to common law actions for damages, it provided for access to courts by statute in several situations that effectively made courts into administrators. One example is a 1790 statute that seems to have been the national government’s first foray into health and safety regulation.<sup>262</sup> In addition to some highly specific requirements concerning food, water, and medicine chests aboard sailing vessels, that statute required that the master of a ship remain in port if the mate or first officer and a majority of the crew felt the ship was unseaworthy. In order to put to sea, the master was required to petition a district judge, if present, and if not, a justice of the peace. The judicial officer was instructed to appoint three skillful mariners in the town to examine the vessel and make a report on its condition. The judge or justice of the peace was then given final authority to decide whether the ship was fit to sail and, if not, what actions needed to be taken by the master to make it seaworthy.

Indeed, contrary to modern fastidiousness about saddling courts with “nonjudicial” business, Congress in the early years of the Republic seemed to have little hesitation in using courts or judicial personnel<sup>263</sup> as administrators, or to “commandeer” state judicial resources. The seaworthiness statute was hardly unique. The First Naturalization Act specified that any free white person who resided in the United States for two years could become a citizen upon application to any common law court of record in the state where he had resided for at least one year. The court was instructed to admit such persons to citizenship if they established “good character.”<sup>264</sup> The courts were also given

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262. An Act for the Government and Regulation of Seamen in the Merchant Service, ch. 29, 1 Stat. 131 (1790).

263. The varied duties of federal marshals, including taking the census, have already been mentioned. Clerks of the district court were also the copyright office. An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned, ch. 15, § 3, 1 Stat. 124, 125 (1790).

264. An Act To Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).

the highly political function of certifying the breakdown of local law enforcement as a predicate for the President to call out the state militia.<sup>265</sup>

In a more ministerial role, federal courts were used to make records for ultimate administrative determinations. A 1790 statute providing for the mitigation or remittance of tax penalties allowed persons seeking relief to petition the judge in the district where the fine had been levied and pray for mitigation or remittance. But the judge did not decide the case. He only held a hearing and created a record that was then transmitted to the Secretary of the Treasury, who was given the power to mitigate or remit if “in his opinion the [fine] was incurred without wilful negligence or any intention of fraud.”<sup>266</sup>

While the federal courts seemed content with their immigration and tax collection administrative duties, they balked when assigned the task of making initial determinations in veterans’ disability pension cases. The difference between the Pension Act, to which the Justices objected, and the remission and immigration statutes, which appear less controversial, lies in the articulation of the judicial and executive roles under these various schemes. The Act establishing the remissions system only required the courts to collect information to be forwarded to the Secretary of the Treasury; the latter was the sole decisionmaker.<sup>267</sup> And in immigration petitions the courts were the sole decisionmakers. By contrast, the first Pension Act, passed on March 23, 1792, required federal circuit courts not only to hear the claims of veterans applying for pensions, but also to decide eligibility and amount, before forwarding the information to the Secretary of War. The Secretary of War could then overturn the courts’ decisions in case of “imposition or mistake,” and was required to report the final result to Congress, which might re-decide the case by private bill.<sup>268</sup> The Justices objected to the constitutionality of the Pension Act because,

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265. An Act To Provide for Calling Forth the Militia To Execute the Laws of the Union, Suppress Insurrections and Repel Invasions, ch. 28, §§ 2-3, 1 Stat. 264, 264 (1792).

266. An Act To Provide for Mitigating or Remitting the Forfeitures and Penalties Accruing Under the Revenue Laws, in Certain Cases Therein Mentioned, ch. 12, § 1, 1 Stat. 123, 123 (1790).

267. *Id.* (stating that the statute’s purpose was “to provide for mitigating or remitting the forfeitures and penalties accruing under the revenue laws, in certain cases therein mentioned”).

268. An Act To Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and To Regulate the Claims to Invalid Pensions, ch. 11, § 4, 1 Stat. 243, 244 (1792).

they argued, any decision subjected to revision by the Secretary of War, and perhaps Congress, could not be considered judicial.<sup>269</sup>

A new pension law, passed while the Supreme Court delayed decision on the first in *Hayburn's Case*, apparently addressed the Justices' constitutional concerns.<sup>270</sup> The new law took decisionmaking authority out of the hands of judges. District courts were to collect evidence, but to make no decision on eligibility or amount. Rather, they would, as in tax remission cases, merely forward the information to the Secretary.<sup>271</sup>

The use of courts as administrative tribunals to make initial or recommended decisions seems analogous to the modern role of the administrative law judge. Federalist Congresses provided late-eighteenth-century Americans with trial-type process for presenting factual claims, not by creating a new corps of administrative hearing officers, but by using courts, both state and federal, that were already available. And it marks, perhaps, the beginnings of a tradition that has persisted in American administrative law—the identification of fair individualized decisionmaking with judicialized or trial-type procedure.

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269. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (reprinting objections to the law stated by the circuit courts for the districts of Pennsylvania, New York, and North Carolina); see also *Hayburn's Case*, in 6 COURT DOCUMENTARY HISTORY, *supra* note 242, at 34–36. The concerns of five of the six Supreme Court Justices were also expressed in letters to President Washington. 1 AMERICAN STATE PAPERS: MISCELLANEOUS 49–53 (1792) (collecting these letters, and others, expressing objections to the Pension Act).

270. *Hayburn's Case*, in 6 COURT DOCUMENTARY HISTORY, *supra* note 242, at 33, tells a story of Congress responding to judicial concerns in changing the process for getting on the pension list. However, the title of the new law—An Act To Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and To Regulate the Claims to Invalid Pensions—suggests a rather different purpose.

The real jurisdictional problem in *Hayburn's Case* itself is difficult to pinpoint. The modern interpretation seems to be that the case's principal importance lies either in its recitation of the Justices' concerns with the avoidance of nonjudicial business or in their rejection of the Attorney General's "standing" to bring a mandamus action to correct a circuit court error in which the United States was not a party (or if it were a party, should have been understood to be on the other side). Susan Low Bloch, however, has made an interesting case for the view that the real problem may have been that the Court did not think that the Attorney General had been authorized to bring suit in such a case by either of the appropriate authorities—Congress or the President. Low Bloch, *supra* note 103, at 590–618.

271. An Act To Regulate the Claims to Invalid Pensions, ch. 17, 1 Stat. 324 (1793).

### C. *Judicial Review in the Federalist Period*

Contemporary administrative lawyers presume that judicial review will be available, in the words of the Administrative Procedure Act (APA), to persons “adversely affected or aggrieved”<sup>272</sup> by governmental action or inaction, unless some special considerations limit reviewability. Review is impersonal; it targets a bureau or an office, not an individual. And the normal remedy is injunction—mandatory or prohibitory—or declaratory judgment. Plaintiffs must generally prove that the official action was unreasonable, not just incorrect. Damages against the government or an official are special and limited remedies, available only when specifically provided by statute.

Federalist practice turns these standard understandings inside out. Actions were personal, against the individual; damages were a normal remedy; and office-holding carried no special immunity from suit. Officers could plead their statutory authority as a defense, but if the court—or jury—thought them wrong on the law or the facts, liability followed.

Both systems of judicial review seem symbolically appropriate to their respective periods. Contemporary administrative law sees judicial review as a means for controlling administrative action by full-time, salaried officials whose identities merge with their offices to represent the government. The rule of law as practiced in courts entails keeping these officials within the bounds of their official discretion, while avoiding judicial trespassing on an administration’s delegated power to make policy or Congress’s power to control expenditures.

But in the early Republic, office-holding was an ambiguous station. Offices were often populated by part-time incumbents who were paid on commission or by fees for piece-rate work. Many simultaneously pursued other occupations and operated in their official and private capacities out of the same premises. They were, in short, citizens, who also carried out certain public functions. The rule of law entailed careful attention to keeping these identities separate. As a private citizen, the officer was subject to the usual requirements of the common law. Statutory authority might provide a special defense, not because officers were officers and were due judicial deference, but because they had in fact carried out the statutory duties assigned to them.<sup>273</sup>

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272. 5 U.S.C. § 702 (2000).

273. For a similar account of the legal position of officers in the early Republic, see GOODNOW, *supra* note 18, at 396-98.

Yet, however symbolically appropriate, the question of the adequacy of Federalist judicial remedies remains. Judicial remedies may both over- and under-deter and their scope of application may prove either too limited or too broad.

To take the breadth issue first, is Frederic Lee correct that common law remedies left too much official action outside the scope of effective judicial review?<sup>274</sup> In the Federalist period my hesitant conclusion is “not really.” Taxation was the most consistently coercive administrative activity.<sup>275</sup> There, common law remedies were multiple,<sup>276</sup> and as discussed earlier, they were reinforced by systems of administrative appeal, followed in at least one case by statutorily provided judicial review.<sup>277</sup> Common law remedies also seem reasonably well-suited to policing the service activities of the Post Office, to trying out land office titles, or to challenging invention patents.

Pursuit of governmental largesse (for example, veterans’ pensions, naturalization, or disaster relief) and defense of government entitlements (such as licenses to trade with Indian tribes) seem less well protected by reliance on common law forms of action. Yet these interests had other judicial and congressional protections. Courts decided naturalization issues themselves and assembled the records in pension cases. And the robust petition process may have provided greater remedial avenues for those whose claims were denied by relief-dispensing commissions than would be provided today – as the finality of the Special Master’s findings pursuant to the 9/11 compensation fund statute amply demonstrates.<sup>278</sup>

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274. Lee, *supra* note 218.

275. Seizures pursuant to embargo legislation entailed essentially the same common law remedies as seizure or detention of goods under the tax laws, and ship seizures as prizes by the navy or privateers had to be ratified in court.

276. Because customs officers acted coercively by techniques such as seizing property, holding goods in shoreside warehouses, refusing to return or release bonds, or holding ships in port, a host of standard common law actions – trespass, trader, debt, detinue, assumpsit, or the like – were available to test the legality of the official action.

277. See *supra* notes 162-164 and accompanying text.

278. The September 11th Victim Compensation Fund of 2001 is part of the Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (codified at 49 U.S.C. § 40,101 note (Supp. I 2001)). A written finding by the Special Master administering the fund is “final and not subject to judicial review.” *Id.* § 405(b)(3).



Moreover, while national licensing was not a significant activity in the Federalist period,<sup>279</sup> Indian traders had a clear judicial remedy for license revocation. Revocation entailed forfeiture of the trader's bond, which required that the Superintendent of Indian Affairs put the trader's bond in suit. If the trader prevailed in the forfeiture action his license was restored.<sup>280</sup>

Although the scope of judicial remedies in relation to the scope and form of governmental action may have been adequate, the form of review may nevertheless have been problematic. *Bingham* and *Olney* suggest that there may have been a serious problem with the free use of damage actions to control official conduct. As Peter Schuck has argued in the context of modern constitutional tort litigation, getting the incentives right is tricky.<sup>281</sup> Damage actions can simultaneously overdeter and undercompensate. And we see some recognition of the overdeterrence problem in Congress's provision in revenue statute instructions to hold the collector harmless if the court certified that his actions, though unfounded, were nevertheless reasonable.

Still this move from what Ann Woolhandler has characterized as a model of *de novo* review in damage actions, to something like an error or clearly erroneous approach through the provision of a reasonableness defense,<sup>282</sup> highlights the potential awkwardness of judicial review via common law actions. And, as would later become evident in land-patent litigation, review via an action of ejectment entailed a severely limited judicial inquiry, what Woolhandler labeled a *res judicata* model, in which factual and legal errors that were not jurisdictional were immune from investigation.<sup>283</sup> Whether this limited review of land patents was appropriate is a story for another day. The development of the administrative system for titling western lands, and disputes concerning land patents, began in the Federalist period. But that system became a truly major administrative activity and legal morass after

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279. Ship licenses and passports were really just certificates which were required to be issued if proper documentation was presented. There is no evidence of controversy over these matters in the Federalist period and, because the statutes imposed mandatory duties, this is one arena in which *mandamus* would have been available.

280. An Act To Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).

281. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 59-81 (1983).

282. Woolhandler, *supra* note 180.

283. *Id.* at 226-27. Indeed, Frederic Lee's complaint about inadequate remedies is based on one particular Supreme Court decision in a California land dispute. *United States v. Ritchie*, 58 U.S. (17 How.) 525 (1854).

Federalist administrations had given way to administration by Jeffersonian Republicans.<sup>284</sup>

## V. REFLECTIONS ON FEDERALIST ADMINISTRATIVE LAW

Imagine the development of administrative law as a waltz, a three-step pattern repeated over and over again. First, something happens in the world. Second, public policymakers identify that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation. Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative fit within existing understandings of what it means to be accountable to law.

I do not mean by this simple schema to suggest that I take American institutional history or the development of administrative law as some process of “liberal,” “progressive,” or “whiggish” design in which social forces demand change and law responds to effectively meet these new demands.<sup>285</sup> The three-step dance can be, and has been, embellished in different periods in many ways, and it can be perceived and described from a multitude of perspectives. The preceding pages represent an exercise largely in historical institutionalism,<sup>286</sup> one focused predominately on governmental practices rather than on ideology, culture, social or economic forces, or political strategies, to name but a few alternative modes of proceeding.

Yet, it seems to me, this three-step process of building and binding administrative capacity can be seen throughout United States history. It provides the structure of our conventional understandings, for example, of “Old Court” reaction to Progressive Era state regulation and of the emergence of the Administrative Procedure Act in response to New Deal initiatives. It is also particularly obvious in the Federalist period. The new thing in the world was the United States of America itself and the problem at hand was to create a government. To borrow the title of John Rohr’s well-known book, the Federalist period was a period in which policymakers at all levels had to learn

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284. See ROHRBOUGH, *supra* note 152, at 180-99.

285. On this form of legal history, its strengths, weaknesses, and alternatives, one can hardly do better than Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

286. The canonical explication of this approach is KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

how to “run a constitution.”<sup>287</sup> And, while there was a hole in the Constitution where administration might have been, that same Constitution made clear commitments to republicanism, limited government, and the protection of citizens’ rights. Since the machine would not run of itself, the men who ran it would have to be bound by law to respect both the democratic will as expressed through the political branches and the rights of citizens, either through preexisting legal actions or new ones that the Congress could create.

The government that the Federalists built and bound calls into question the notion that national administration and administrative law became of significant interest only in the late nineteenth century. From the very beginning national actions were not limited to subsidies and patronage, or more broadly to defense and development, nor did Congress attempt to run the government without the aid of administration. Within the first few years of the founding, for example, Congress had initiated programs that we would now characterize as welfare state activity: veterans’ disability pensions, the establishment and operation of seamen’s hospitals, and the provision of relief to persons suffering from “disasters” brought about through no fault of their own. Indeed, these three programs have features that closely correspond to modern welfare state provisions. Veterans’ disability pensions still take the form of disability ratings of the sort contemplated by the first pension act. The seamen’s hospital program, by financing provision of medical care through a tax on seamen’s wages, anticipated the contributory social insurance financing of our now-massive old-age survivors disability and health insurance programs. And disaster relief responded to moral premises that undergird both the Social Security system and need-based assistance to the “deserving poor.”

Nor was regulation ignored. Regulation of health and safety found expression in the regulation of the seaworthiness of vessels and the application of state quarantine laws to arriving ships. Commerce was regulated by the licensing of vessels for access to the Bank’s fisheries, by granting patent monopolies, and by licensing trade with the Indian tribes. To be sure, none of these operations was large, but each required the development of administrative techniques that would generate both a capacity for implementation and sources of control and accountability.

The big operations, those governmental functions involving a substantial number of federal employees and reaching into a large proportion of communities, were revenue collection and the operation of the Post Office. The

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287. JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* (1986).

crucial novelty of the tax system in the Federalist period is that it, more than any other national function, established the coercive authority of the United States in the domestic sphere, operating through its own officers. And, as we have noted, the expectation of resistance prompted Congress to develop the administrative system for tax collection in much greater procedural and structural detail than with respect to other federal activities. The significance of the postal system as an aspect of early nation-building has only recently been emphasized. But just as the tax system helped to establish the citizens' responsibility to respect the authority of a national administration, the postal system generated a shared sense of that citizenship by facilitating the development of a shared language of political discourse.<sup>288</sup>

These developments would be of little significance were it the case, as Gordon S. Wood once declared, that the Federalist period was "the most awkward decade in American history, bearing little relation to what went on immediately before or after."<sup>289</sup> But, as Richard R. John and Christopher J. Young put it, Wood's approach to history tended

to obscure the distinction between ideological commitments and institutional outcomes. In so doing, it minimizes the institutional momentum set in motion with the establishment of the federal government in 1789 and understates the extent to which administrative mechanisms originating in the Federalist era continued to shape public policy long after Jefferson's victory in the election of 1800.<sup>290</sup>

Administration could have these effects because much of the law that Congress adopted in the Federalist period was not, as Lowi and Bryce had claimed, a self-executing and highly specific set of behavioral rules enforceable in court. Federalist programs required administration, and the officials who did the administering were hardly automatons rigidly following the prescriptions of detailed congressional statutes. Congress did not delegate with abandon, and as we have seen, some of its statutes are almost comic in their attention to detail. Nevertheless, very broad authority was devolved upon the President and his delegates to develop appropriate policy. Some of these

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288. See JOHN, *supra* note 116; John & Young, *supra* note 115.

289. Gordon S. Wood, *Framing the Republic, 1760-1820*, in 1 THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE 229, 341 (Bernard Bailyn et al. eds., 1977).

290. John & Young, *supra* note 115, at 101-02. A more extensive discussion of the modern institutional literature that features governmental institutions as explanatory in their own right is provided in John, *supra* note 23.

delegations were so broad that one might wonder whether a twenty-first-century court would be able to find any standards guiding the exercise of administrative authority. The President rapidly became a part of administration, not just because of his removal power, but because Congress put him in charge of a host of administrative functions. One might imagine George Washington rejecting some of these delegations of authority, explaining that his executive function was to “see that the laws are faithfully executed,” not to implement them himself.

Along with the empowerment side of administration, Congress and federal administrators gave significant thought to the structuring of administrative accountability. Congress made sophisticated distinctions between the political accountability system for the War, Navy, and State Departments and the one applicable to the Treasury, the Post Office, and the Attorney General. And although the Constitution spoke only in terms of departments, Congress experimented with independent boards and commissions and established Post Office operations outside of any departmental structure.

These early statutes also showed substantial attention to the structuring of internal bureaucratic controls and accountability, but hardly on a single model. The single-headed Post Office, with supervisory authority lodged firmly in the Postmaster General, was an attempt to structure a hierarchical organization with effective control over widely dispersed personnel.<sup>291</sup> The major officers in the Treasury had similar supervisory responsibility over lower-level employees and apparently greater supervisory success. But hierarchy in the Treasury was not strictly observed. Certain officers also had independent responsibilities within the fiscal system and checked and balanced each other both by their division of functions and the requirement that two or more often act together to receive, hold, or disperse the monies of the United States. The Treasury structure of checks and balances was replicated lower down in the hierarchy by statutory provisions establishing the independent authority of, and requiring joint action by, customs collectors, naval officers, and surveyors at the point of payment of customs duties.

Meanwhile, law enforcement was given a radically coordinate structure that reflected a compromise between the needs for law enforcement capacity in the national government and the lively concern in the states about the potential for abuse represented by the federal court system and the prosecution of federal

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291. In Leonard White's description of the Post Office, “[t]he laxness and indifference of deputies . . . [was] progressively more marked as the miles stretched away from Philadelphia.” WHITE, *supra* note 26, at 187.

crimes. Federal law was enforced in substantial part via state courts, prosecuted by U.S. Attorneys with little centralized guidance from the Attorney General, or indeed anyone else, and supplemented by citizen “informers.” And when prosecuted in federal courts, the enforcement of federal law was still in the hands of local juries.

The President, the heads of departments, and others were given extensive rulemaking authority and large classes of private claims—for remission of taxes, payments on contracts with the Post Office, veterans’ disability pensions, and disaster relief—were subject to individualized administrative adjudication and administrative appeal. But save for those claims that used courts as commissioners, and therefore borrowed judicial procedures for finding facts, there seems to have been little legislative, and no judicial, attention to the processes by which rules were promulgated or cases decided. The proceduralism that dominates post-APA legal thinking in administrative law is almost wholly absent, except in the internal rules and practices adopted by the various departments or ad hoc commissions, and perhaps in the use of merchant arbitrators to value goods and to report on the seaworthiness of vessels.

Congress expected political and bureaucratic accountability systems to be supplemented by judicial control of administration. But judicial review in the Federalist period was quite unlike our contemporary practice, which emphasizes access to prohibitory and mandatory injunctions and declaratory judgment. Federalist Congresses relied instead on criminal penalties, bonds, *qui tam* enforcement, and the preexisting broad opportunities for common law damage actions. Where we see judicial review as a relatively unified and statutorily prescribed practice of holding government accountable to law, Federalist Congresses, administrators, and courts accepted and constructed a variegated set of highly particularized common law remedies against individuals. Appellate review within departments may have been more like modern judicial review than were the available remedies against federal officials in court.

Federalist administrative law is thus both familiar and strange. Its overall accountability structure—its attention to political, managerial, and legal accountability—remains serviceable in organizing thought about the shape of modern administrative law. But many of its specific techniques—piece rate or commission payments, bonds and *qui tam* actions, common law damage remedies, and the like—are now considered minor topics when analyzing how the modern administrative state is empowered and constrained.

To be sure, we can find modern analogues for many of these techniques. The civil service statutes now allow incentive awards for exemplary service; all federal officials take an oath of office; bonds are sometimes required; and the

qui tam action persists in a narrow class of cases along with citizen enforcement actions in contemporary environmental statutes. There are still criminal penalties for certain forms of malfeasance by federal officials.<sup>292</sup> Advisory committees are, perhaps, a modern, much more highly regulated, analogue of merchant assessors of the seaworthiness of ships. The contemporary emphasis on alternative dispute resolution finds some resonance in the arbitration procedure for determining the value of goods subject to customs duties. We also now contract out a host of functions on a piece rate or commission basis, including the collection of back taxes.

But viewing these modern analogues as developing in some straight line from Federalist administrative practice is anachronistic. The creators of Federalist administrative law were simply making do with the fiscal, human, and intellectual resources available to them. As such, the largest categories of federal officials were attached to the government in a contractual or quasi-contractual capacity, living off fees and commissions, not government salaries. State, local, and private actors were commandeered into federal activities in ways that produced a sort of collaborative administration that allowed the federal government to trade on the social standing or local legitimacy of nonfederal implementers. There was no core career civil service hired on the basis of merit or professional qualifications and promoted on performance. The idea of agencies as expert administrators—indeed the very idea of public administration—lay far in the future.

Lacking an institutionalized Congress of standing committees and subcommittees to provide political oversight of administrative functions, Federalist institutional designers relied on broad delegations to a President who was trusted by almost everyone, close association by Congress with the Treasury (the government's most important department), ad hoc congressional investigations of particular events, and the information provided by the incessant petitioning of ordinary citizens. Lacking even the idea of expert administration by career civil servants, they concocted a mixture of positive and negative incentives—political, legal, economic, and social—to manage federal officials in the interest of energetic and responsible administration. Practicing what Dicey later preached, Congress seldom sought to constrain public administration by special public law forms of legal action,

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292. There are criminal penalties for attempting to bribe them as well, a feature of maladministration that caused serious embarrassment when it appeared that the Federalist Congress had neglected to make it a crime. *See* *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (1798).

but relied instead on criminal penalties and common law actions against officials whose public and private personas were rather thoroughly confused.

The danger of anachronism in giving meaning to the practices of our Federalist past may be nowhere better illustrated than in the contrast between the contemporary jurisprudence of the Supreme Court as it polices against national “commandeering” of state implementing resources and the vision of state enforcement of federal law that prevailed during the Federalist period. As Max Edling’s recent study of the ratification debates details, the use of state enforcement was then viewed as a means of restraining the power of the federal government. Federalists constantly sought to reassure anti-Federalists that there would be no large national coercive power through either a standing army or a large civil administrative establishment. Moreover, Edling connects these concerns back to pre-revolutionary debates that link enforcement authority to the consent of the governed. The enforcement of British law by British troops was viewed as cutting off the consent of colonials who, although unrepresented in Parliament, could nevertheless provide consent both through acquiescence and through participation in the enforcement of law by local officials.<sup>293</sup> On this account, commandeering was a device for strengthening democracy and preserving state authority.

The temptations of originalism are many. We look to the past to understand who we are, to justify our normative commitments, and to give meaning to the present. The past is the repository of our cultural and intellectual resources. Mr. Justice Holmes put it in his usual trenchant, aphoristic style: “[H]istoric continuity with the past is not a duty, it is only a necessity.”<sup>294</sup>

In law, of course, there is a duty as well—at least for courts. Our contemporary notions of the rule of law insist that administrators, too, explain deviations from past practice and adhere to general normative positions until changed through appropriate processes. But, in my view, we do not honor the memory of the creative and struggling patriots who first taught us to run our Constitution by deploying their ideological rhetoric as fixed constitutional principle, or by attempting to derive straightforward normative lessons from an almost certainly selective view of their practices and a necessarily incomplete view of their understandings.

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293. EDLING, *supra* note 72, at 101-28.

294. OLIVER WENDELL HOLMES, Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C.C. Langdell (June 25, 1895), in COLLECTED LEGAL PAPERS 138, 139 (1920).



If this survey of the development of Federalist administrative law has demonstrated anything, it is the wonderfully various, innovative, and experimental approach that our Federalist forbearers took when constructing a national administration. Federalist administrative architects deployed few of the legal and structural tools that we now associate with the guidance and constraint of the modern American administrative state—particularly administrative law’s contemporary emphasis on transparency, procedural forms, centralized managerial controls, and judicial oversight of the reasonableness of administrative actions. Perhaps it is only in the ambiguities and tensions that emerged in the late-twentieth-century constitutional jurisprudence between presidential and congressional political authority over administration that we see a Federalist administrative law deeply similar to our own. Except that in the Federalist period those inconclusive debates were played out in Congress rather than in the Court.

Yet the Federalists’ administrative law project, in broad outline, parallels our own. The legislation, political struggles, and administrative practices of the Federalist period reflect the emergence of a culture of governance whose guiding ideal was of government according to law. When forging the basic departmental structure of government and debating the appropriate forms for particular pieces of legislation, early Congresses were attentive both to constitutional principle and to alternative techniques for legal control of administration—ranging from lawsuits, to hierarchical superintendence, to administrative appeals, to required audits and reports. Administrative practice sought to reinforce top-down controls over a dispersed and contracted-out federal workforce in the interest of equality before the law, not just efficacy in administration. Control of administrative discretion emerged immediately as a central and persistent issue for these institutional designers and operators, and they gave that concern almost equal billing with the urgent need to create an effective government, virtually from the ground up.

Using the tools that came to hand, Federalist Congresses, administrators, and courts struggled to combine techniques of political, managerial, and legal accountability into a system of administrative governance that was simultaneously responsive, effective, and respectful of citizens’ rights. They built administrative capacity while binding it to republican politics and existing understandings of the rule of law. They were hardly always successful. But getting the balance right was the preoccupation of the institutional designers who created Federalist administrative law. It remains ours today.