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## Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829

**ABSTRACT.** In 1801 the Jeffersonian Republicans took charge of Congress, the presidency, and the national administration, determined to roll back the state-building excesses of their Federalist predecessors. In this effort they were partially successful. But the tide of history and the demands of a growing nation confounded their ambitions. While reclaiming democracy they also built administrative capacity.

This Article examines administrative structure and accountability in the Republican era in an attempt to understand the “administrative law” of the early nineteenth century. That inquiry proceeds through two extended case studies: the Jeffersonian embargo of 1807-1809 and the multi-decade federal effort to survey and sell the ever-expanding “public domain.” The first was the most dramatic regulation of commerce attempted by an American national government either before or since. The second began a land office business that dominated the political and legal consciousness of the nation for nearly a century. The embargo tested the limits of administrative coercion and revealed an escalating conflict between the necessities of regulatory administration and judicial review in common law forms. The sale of the public domain required the creation of the first mass administrative adjudication system in the United States and revealed both the ambitions and the limits of congressional control of administration in a polity ideologically devoted to assembly government.

Together these cases describe the early-nineteenth-century approach to a host of familiar topics in contemporary administrative law: presidential versus congressional control of administration, the propriety and forms of administrative adjudication, policy implementation via general rules, and the appropriate role of judicial review. Perhaps most significantly, both the embargo episode and the efforts to privatize the public domain demonstrate the singular importance of internal administrative control and accountability in maintaining neutrality and consistency in the application of federal law. This “internal law of administration” remains both a crucial and an understudied aspect of American administrative governance.

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*A great irony propels American political development: the search for more direct democracy builds up the bureaucracy.<sup>1</sup>*

## INTRODUCTION

When George Washington took office as President with John Adams as his Vice President, the United States had two executive officers—them. Twelve years later, Thomas Jefferson inherited a federal administrative establishment that included 3000 civilian employees and a substantial military force, supplemented by a significant number of private contractors.<sup>2</sup>

Federalist administrations and Congresses had been committed to building national capacities that would stitch a fragile union together with the threads of effective administrative governance. They moved forcefully to establish the Departments of War, State, and Treasury, to increase the reach of the postal service, to “nationalize” responsibility for the debts from the Revolutionary War, to establish a national bank and a sound national currency, to institute an effective system of taxation, and to create a national court system. They supported a strong army and navy and extended the preexisting system of publicly owned and managed trading “factories” to regulate trade with Indian tribes.

These state-builders were hardly inattentive to the need to control state power—politically, administratively, and legally. As they built administrative capacity, they also bound it.<sup>3</sup> But when creating a government to exercise the authority established by the new Constitution, the major official actors of the Federalist period did so mindful of the weakness of the national government under the Articles of Confederation and the feeble executive power provided in virtually all the post-Revolutionary state constitutions.<sup>4</sup> Federalists were ideological nationalists whose emphasis on national authority and executive leadership sometimes led their political opponents to brand them as monarchists. Whatever the truth of that claim, the Federalists lost their political mandate in the bitterly contested election of 1800—an election that

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1. JAMES A. MORONE, *THE DEMOCRATIC WISH* 1 (rev. ed. 1998).
  2. The classic study of Federalist administrative institutions and practices is LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* (1948).
  3. See generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations 1787-1801*, 115 *YALE L.J.* 1256 (2006).
  4. See ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION: 1775-1789* (1924); see also JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 120-23* (1979); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 127-96 (1969).

Jefferson later described as effecting a “revolution in the principles of our government.”<sup>5</sup> Convinced that the ascendancy of the Republican Party had saved the Republic,<sup>6</sup> Jefferson and his supporters subscribed to a “Republican” ideology that was anti-Federalist at almost every major point.

Republicans were strict constructionists who viewed the legitimate sphere of the national government as limited almost exclusively to war and foreign affairs. They were fiscally austere. They abhorred the national debt and the national bank that managed it. Republicans not only begrudged the expense of a standing army and navy; they viewed the Army, commanded by the President, as a threat to democracy itself. For them democratic governance resided in Congress, particularly in the House of Representatives, the national body closest to the people. Republicans hoped that the federal government could carry on its limited affairs and conduct its administration so softly and invisibly that citizens would hardly know that it existed.<sup>7</sup> In his first inaugural, Jefferson prayed for “a wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned.”<sup>8</sup> In short, Republicanism’s general answer to the problem of controlling and structuring administration was to eliminate administrators when it was possible and to restrict administrative discretion when it was not.<sup>9</sup>

The realities of governance would put these principles to a harsh test.<sup>10</sup> The early years of Jefferson’s first term were blessed with peace and prosperity, and Republican principles triumphed. Under Jefferson’s leadership Congress

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5. Letter from President Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 15 WRITINGS OF THOMAS JEFFERSON 212, 212 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).
  6. 1 HENRY ADAMS, HISTORY OF THE UNITED STATES 208 (N.Y., Charles A. Scribner’s Sons 1890).
  7. For a description of Jefferson’s hopes for both the substance and style of government at the beginning of his first term, see JOSEPH ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 169-228 (1996).
  8. President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), reprinted in 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 321, 323 (1911).
  9. For example, the elimination of internal taxes—alluded to obliquely in Jefferson’s message as taking bread “from the mouth of labor”—was motivated in substantial part by the reduction in federal offices that repeal promised. See Charlotte Crane, Pennington v. Coxe: A Glimpse of the Federal Government at the End of the Federalist Era, 23 VA. TAX REV. 417, 419-22 (2003).
  10. The most illuminating general history is probably still 1-4 ADAMS, *supra* note 6.

substantially reduced the military establishment, abolished internal taxes, and made progress toward retiring the national debt. Resistance to new federal programs reinforced the domestic authority of the several states—as did the repeal of the Judiciary Act of 1801, which had expanded the federal judiciary.<sup>11</sup>

But these idyllic circumstances did not last. Two forces militated against a passive national administration. The first was the rapid territorial expansion of the country. Settlers were pushing ever westward into the public domain—national public lands created by state cessions of western land claims to the federal government during the Confederation, and then by the Louisiana Purchase, the acquisition of the Floridas, and the establishment of the Pacific Ocean as the nation’s western boundary.

Following the end of the War of 1812, the stream of settlers from the east to the west side of the Alleghenies became a flood that put severe pressures on the American political and administrative systems. The public domain had to be surveyed, sold, and governed—a task that could be accomplished only by the federal government. Republican “small-government” orthodoxy fit awkwardly with an explosive expansion of national territory and population. Indeed, Jefferson viewed his own purchase of Louisiana, which helped to fuel westward expansion, as unauthorized without an amendment to the Constitution. He withdrew his proposal to request an amendment only out of fear that delay would prompt Napoleon to retract his offer of cession.<sup>12</sup> Not all Republicans agreed that the federal government lacked the power to annex foreign territory,<sup>13</sup> but the Louisiana Purchase would be only one of a series of actions from 1801 to 1829 that violated the principles of strict construction of national power to which Republicans were supposedly committed.

Franco-British rivalry also resumed in Jefferson’s second term—a competition that threatened both American commerce and American sovereignty. British and French naval vessels seized hundreds of American ships, and the British impressed thousands of American seamen. Jefferson met this challenge by resorting to commercial pressure—a cessation of all foreign trade. The commercial embargo that he substituted for military might

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11. An Act To Amend the Judicial System of the United States, ch. 31, 2 Stat. 156 (1802) (repealing An Act To Provide for the More Convenient Organization of the Courts of the United States, ch. 4, 2 Stat. 89 (1801)).

12. On Jefferson’s doubts, see *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898*, at 8-10 (Sanford Levinson & Bartholomew Sparrow eds., 2005).

13. See John Gorham Palfrey, *The Growth of the Idea of Annexation, and Its Bearing upon Constitutional Law. A Study Among the Records of Congress*, 13 HARV. L. REV. 371, 378 (1900) (noting that some Jeffersonian Republicans did not challenge the constitutionality of the government’s authority to annex foreign lands).

ultimately required the use of domestic coercive authority that was more aggressive and intrusive than the Federalists' hated Alien and Sedition Acts.<sup>14</sup> And when war finally came in 1812, it demonstrated that the Republican policy of avoiding the expense and political dangers of a professionalized military establishment had been a paradigmatic triumph of hope over experience.

Following the sobering events of the War of 1812, Republican administrators proposed and Republican Congresses authorized major reorganizations in many federal departments.<sup>15</sup> These reforms were designed to provide precisely that "energy" and system in the national administration that Republican ideology disdained. But with the Federalist Party no longer a threat, strict adherence to Republican principles had become less attractive for many Republicans. They were now relatively comfortable with a national government run by themselves. Even Jefferson, in his second inaugural address, declared that the surplus of federal revenue should "be applied *in time of peace* to rivers, canals, roads, arts, manufacturers, education, and other great objects within each State,"<sup>16</sup> a statement that would have fit easily in the collected works of Alexander Hamilton.

But strict construction remained official Republican dogma. In Jefferson's view, the application of federal monies to domestic activities within the states required a constitutional amendment. Thus framed as "we must do it, but we cannot," the issue of internal improvements vexed Congress and the country throughout much of the Republican period.<sup>17</sup> Other parts of Republican ideology also remained intact, and not just in the "Old Republican" wing of the party. After Jefferson left office, Congress increasingly insisted that it should play the major role both in policymaking and in the structuring and control of administration. Administrators were, if possible, to be kept on short fiscal and

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14. See Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801); Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800); Naturalization Act, ch. 54, 1 Stat. 566 (1798), *repealed by* Act of Apr. 14, 1802, ch. 28, § 5, 2 Stat. 153, 155.

15. These reorganizations are described in some detail in LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801-1829*, at 211-98 (1951).

16. President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *reprinted in* 1 RICHARDSON, *supra* note 8, at 378, 379.

17. The story of the internal improvements controversy has been told in a number of places. The most extensive account is perhaps Joseph Hibson Harrison, Jr., *The Internal Improvements Issue and the Politics of the Union, 1783-1825* (May 1954) (unpublished Ph.D. dissertation, University of Virginia) (on file with author). For other useful accounts, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829*, at 258-83 (2001); and WHITE, *supra* note 15, at 474-95. Developments in the states, where most of the action was, are discussed in GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION: 1815-1860* (Econ. History of the U.S. vol. 4, 1951) (describing the development of turnpikes and canals between 1815 and 1860).

statutory leashes. When the practicalities of administration demanded that these principles be abandoned, Congress was determined to oversee administration in a more substantial and systematic way than it had during the Federalist period.<sup>18</sup>

This clash between Republican ideological commitments and the realities of an expanding nation in a dangerous world produced many uneasy compromises. The Federalist administrative system was reformed and extended rather than reduced to insignificance. Congress reintroduced internal taxes when fiscal necessity demanded. It reauthorized the Bank of the United States and, following the debacle of 1812-1814, both strengthened and professionalized the Army and Navy. Survey and sale of the public lands shifted from being a secondary, revenue-raising function of the Treasury to occupying a position of major political and administrative prominence. Jefferson inherited two land offices that reported directly to the Secretary of the Treasury. John Quincy Adams, the last “Republican” President, bequeathed to Andrew Jackson a General Land Office, thirty-nine local land offices, and a system of administrative land claims commissioners whose adjudicatory output rivaled that of the judiciary.<sup>19</sup>

The land office expansion was merely symptomatic of the growth of national governmental activity with respect to Indian affairs, post offices, and post roads—indeed, anything having to do with the settlement of the West. A population of 5.3 million in 1800 more than doubled, to 12.9 million in 1830.<sup>20</sup> Public civilian employment nearly quadrupled, from slightly fewer than 3000 in 1801<sup>21</sup> to nearly 11,500 in 1831.<sup>22</sup> Technological innovation was also intruding. The steam engine and the cotton gin were giving a whole new complexion to transportation, manufacturing, agriculture, and—incidentally, but momentously—the question of slavery.

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18. For descriptions of structural and procedural changes that increased congressional oversight, see RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825* (1917); and WHITE, *supra* note 15, at 89-107.

19. On the extension and reform of the Federalist system of administration, see WHITE, *supra* note 15, at 546-59. The growth and operation of the land office business is discussed *infra* Part II.

20. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES*, H.R. DOC. NO. 93-78, pt. 1, at 8 (1975).

21. WHITE, *supra* note 15, at 255.

22. H.R. DOC. NO. 93-78, pt. 2, at 1103. A large amount of this growth was in the Post Office. The 903 post offices in 1800 had metastasized into 8004 by 1829. WHITE, *supra* note 15, at 303. These figures do not include contractors, but, as in the Federalist period, many officials remained part-timers paid by fees and commissions. On the ambiguities of office in the early Republic, see Mashaw, *supra* note 3, at 1304-19.

In some sense the history of Republican ideological retreat is an oft-told tale. Garry Wills's biography of James Madison describes his presidency as "carried by events toward a modernity he neither anticipated nor desired."<sup>23</sup> And Wills has suggested that we might agree with the bitter "Old Republican" John Randolph that the Republican Party had by the end of Madison's term won the hearts of the people by losing its soul.<sup>24</sup> Madison's successor, James Monroe, had a vision of the United States as a continental empire that generated a muscular foreign policy and spilled over into an increasingly nationalist domestic policy.<sup>25</sup> And the final "Republican" President, the one-time New England Federalist, John Quincy Adams, proposed a domestic program in his first message to Congress that was so energetic that his cabinet, presciently, urged him not to send it.<sup>26</sup>

But these developments should not be understood to suggest that Republican small-government ideology had little effect on the politics or policies of the Republican era. Republican Congresses extended the Federalists' regulation of merchant seamen's labor contracts<sup>27</sup> to fishermen<sup>28</sup> and even enacted some mild regulation of ocean-going passenger ships.<sup>29</sup> But it balked at proposed regulations to stem the rising death toll from bursting boilers on steamboats,<sup>30</sup> ended the system of Indian trading houses that had existed since the Confederation period,<sup>31</sup> and repealed the late-Federalist legislation regulating bankruptcy.<sup>32</sup> Congress also ended a largely successful experiment with federal promotion of smallpox vaccine distribution on the ground that it was an improper incursion into the police powers of the states.<sup>33</sup>

The election of the one-time Federalist John Quincy Adams might have been thought to signal an end to systematic Republican reticence to flex national muscles. But congressional Republicans almost instantly rebelled at

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23. GARRY WILLS, *JAMES MADISON* 159 (Am. Presidents Ser. vol. 4, 2002).

24. *Id.* at 151.

25. See GARY HART, *JAMES MONROE* 57-82 (Am. Presidents Ser. vol. 5, 2005).

26. See ROBERT V. REMINI, *JOHN QUINCY ADAMS* 78 (Am. Presidents Ser. vol. 6, 2002).

27. See An Act for the Government and Regulation of Seamen in the Merchants Service, ch. 29, 1 Stat. 131 (1790); Mashaw, *supra* note 3, at 1277-78.

28. See An Act for the Government of Persons in Certain Fisheries, ch. 2, 3 Stat. 2 (1813).

29. See An Act Regulating Passenger Ships and Vessels, ch. 46, 3 Stat. 488 (1819).

30. See H.R. REP. NO. 18-125, at 1-8 (1824).

31. See An Act To Abolish the United States' Trading Establishment with the Indian Tribes, ch. 54, 3 Stat. 679 (1822).

32. See An Act To Repeal an Act, Intituled "An Act To Establish an Uniform System of Bankruptcy Throughout the United States," ch. 6, 2 Stat. 248 (1803).

33. See CURRIE, *supra* note 17, at 295-301.

Adams's "national program"; little of his legislative agenda succeeded, and he was swept away in the next election by antipathy to—in Andrew Jackson's words—the "splendor and magnificence of the government," which "must end in consolidation and then in despotism."<sup>34</sup> Given Republican parsimony, one might wonder what Jackson was talking about, but this political rhetoric had power then, as now.<sup>35</sup> Small government remained the ideological preference of the people, however much events pressed presidents (and sometimes Congresses) to abandon the true faith.

Managing enormous, indeed explosive, growth in territory, population, and commerce, while maintaining the idea of a small and frugal national government, put serious strains on the efficacy of administration. Administration was demanded, but Congress was loath to fund it. The insistence on congressional control introduced both inefficiencies and local politics into national administrative organization and functioning.<sup>36</sup> And as federal officialdom expanded numerically and spread across a vast territory, the administrative and legal control mechanisms employed in the Federalist period often proved either inadequate or counterproductive.

This Article examines how administrative structure, organization, and technique were challenged by the most important developments of the Republican period—the threats posed by belligerent and powerful foreign states and the dramatic westward expansion of the United States. I concentrate on only two areas of national policy and administration: the embargo of 1807–1809 and the sale and settlement of the public domain. Many other areas of national administration obviously were also affected by territorial and population growth as well as by the reluctant realization that America could not remain aloof from the fratricidal competition among European sovereigns. The size and organization of the military, the management of Indian affairs, and the organization of the Post Office are chief among them. But an investigation of the embargo's implementation and of the sale of the public

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34. REMINI, *supra* note 26, at 78–87.

35. Which is not to say that the rhetoric had the same meaning. On the relationship of small-government ideology to the idea of "systematic corruption" in early American politics, see John Joseph Wallis, *The Concept of Systematic Corruption in American History*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY* 23 (Edward L. Glaeser & Claudia Goldin eds., 2006).

36. Congressional control and localism were particularly evident in the development of the Post Office, notwithstanding the considerable degree of administrative autonomy achieved by certain strong-willed postmasters general. For general treatments of the development of the postal service and its relation to Congress, see DOROTHY GANFIELD FOWLER, *UNMAILABLE: CONGRESS AND THE POST OFFICE* (1977); and RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1995).

domain is sufficient to illustrate how administrative law struggled during the Republican period to structure effective political control of administration, to maintain centralized administrative control of distant and multiplying federal officials, and to accommodate external legal control in the courts. It also illustrates weaknesses in the administrative system and what then passed for “administrative law” that would take many decades to repair.

Indeed, given (1) the lack of systematic procedures for either rulemaking or administrative adjudication, (2) the ambiguous nature of public office in an administration often peopled by part-time officials who were paid by fees and commissions, and (3) the dominance of damage actions against these “officers” as the modality of “judicial review,” one might sensibly object to the use of “administrative law” as a descriptor. But in my view this narrower vision of the field allows a focus on differing and malleable techniques to obscure more fundamental and enduring goals. As I have argued elsewhere, administrative law has three generic tasks: to structure the accountability of administration to the political branches of the government, to regulate the internal processes of administrative decision-making, and to provide means for testing the legality of administrative action.<sup>37</sup> The means by which law pursues these goals shift across both time and space. But to confine administrative law’s domain by attending to contemporary techniques and preoccupations may lead us to misunderstand the significance of administrative law in prior historical periods,<sup>38</sup> in foreign systems,<sup>39</sup> and perhaps in our own contemporary practice.

Part I explores the administration of the embargo of 1807–1809. This grand experiment had many interesting moments for a student of administrative law. Among others, it featured stunning delegations of discretionary authority both to the President and to lower-level officials, as well as heroic struggles by the President and the Secretary of the Treasury to unify administration. The embargo also generated massive resistance, often through the medium of a “judicial review” conducted in the form of jury trials. The history of the

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37. See Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES LEGAL SCHOLARSHIP, Mar. 2005, <http://www.bepress.com/ils/iss6/art4>. This tripartite division hardly originates with me. It appears in very nearly the same form in the first major treatise on administrative law in the United States. See FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 371-72 (1905).

38. See Mashaw, *supra* note 3, at 1260-66.

39. Perhaps the most famous misunderstanding in all of administrative law is A.V. Dicey’s belief that remedies in specialized courts created an administrative law in France that was antithetical to the rule of law. See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 329-30 (9th ed. 1939). For a discussion and refutation of Dicey, see CECIL THOMAS CARR, *CONCERNING ENGLISH ADMINISTRATIVE LAW* 22-23 (1941).

embargo thus has much to teach us about early understandings of the nondelegation doctrine, about the crucial importance of the “internal law” of administration, and about the limits of administrative power in a legal world in which judicial enforcement was the norm, jury trials were standard, and official immunity was nonexistent.

While Part I explores a brief but dramatic episode in the nation’s regulatory history, Part II examines a governmental function—the sale of public lands—that dates to the colonial period and that continues today, primarily in the attenuated but voluminous form of mineral leases, timber sales, and grazing rights. And while the discussion of the embargo focuses on presidential power, administrative rulemaking, and judicial review, the analysis of public land sales in the Republican era features large-scale administrative adjudication and the modalities of congressional control of administration. Together these two stories sketch a picture of what “administrative law” was like in a period before that term existed and in which the dominant political actors might well have considered it ideologically suspect.

## I. THE EMBARGO

Most administrative lawyers have been taught to believe that the Interstate Commerce Act of 1887<sup>40</sup> was the first great national experiment in economic regulation.<sup>41</sup> It was not. Eighty years earlier, a Republican President and an overwhelmingly Republican Congress embarked on a much grander experiment—the embargo of 1807-1809. Indeed, the scope of the embargo and the powers that it gave the executive branch over American commerce make the Interstate Commerce Act’s attempts at regulating the railroad industry seem almost pathetic by comparison. And while the embargo is generally treated as a dramatic episode in the early political history of the nation,<sup>42</sup> the administrative significance of the embargo’s massive attempt at economic regulation is less well known.<sup>43</sup>

While the embargo’s legal technique was regulation of commerce, it was motivated by foreign policy concerns. From the Founding of the Republic, the

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40. Ch. 104, 24 Stat. 379 (repealed 1978).

41. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439 (2d ed. 1985); see also 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).

42. Classic treatments include WALTER WILSON JENNINGS, *THE AMERICAN EMBARGO 1807-1809* (1921), and LOUIS MARTIN SEARS, *JEFFERSON AND THE EMBARGO* (1927).

43. The major exception, as usual, is WHITE, *supra* note 15, at 423-73.

British Navy had harassed American shipping through seizures and through the impressment of American seamen. And Franco-British belligerence often led to French interference with American shipping as well. By 1807, a combination of British Orders in Council and decrees by the Emperor Napoleon had made virtually any U.S. vessel on the high seas fair game for the British or French navies, or for privateers acting under British or French authority.<sup>44</sup>

This systematic interference with American neutral commerce would clearly have justified a declaration of war by the United States. But declaring war against the world's greatest naval power, or the world's greatest land force, or both at once, hardly seemed prudent for the fledgling United States. Indeed, the Jefferson Administration's reductions in the military establishment had made war virtually infeasible.<sup>45</sup> Yet to accept British and French depredations on American commerce was as insufferable as war seemed imprudent. The alternative, promoted jointly by Jefferson and by Madison, his Secretary of State, was an embargo on all transport of goods from U.S. ports to foreign destinations.<sup>46</sup>

The embargo of 1807-1809 was novel in two separate senses. First, it was novel as a matter of foreign policy because the nation had never before experimented with such an extensive form of peaceful coercion.<sup>47</sup> Nonimportation statutes and temporary or limited embargoes respecting a particular nation were relatively common, but Jefferson proposed a complete embargo on all foreign commerce with no fixed term. His purpose was "to

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44. On the run-up to the embargo, see Thorp Lanier Wolford, *Democratic-Republican Reaction in Massachusetts to the Embargo of 1807*, 15 *NEW ENG. Q.* 35, 37-40 (1942).

45. In early 1802, Congress fixed the strength of the Army at about 3350 officers and men, see WHITE, *supra* note 15, at 213, and discharged the remainder with a modest bonus, see An Act Fixing the Military Peace Establishment of the United States, ch. 9, 2 Stat. 132 (1802). The Republicans' fear of a standing army led to a reluctance to fund the military establishment, which fell particularly heavily on the Navy. See WHITE, *supra* note 15, at 265-69.

46. Although Jefferson's name is forever associated with the embargo policy, Wills has argued that Madison, Jefferson's great friend, may have seized on the idea earlier, and he certainly supported it as tenaciously as did Jefferson. See WILLS, *supra* note 23, at 51, 53, 61-62, 99, 123-24.

47. This is not to say that embargoes and nonimportation acts did not have a venerable history in pre-Revolutionary America. Limited embargoes had been used against the Stamp Act and the English Revenue Acts. Moreover, nonimportation followed by nonexportation was the crucial weapon used by the First Continental Congress in its attempt to shift British public opinion in favor of repealing the "insufferable acts" that led eventually to the American Revolution. See Paul Leicester Ford, *The Association of the First Congress*, 6 *POL. SCI. Q.* 613 (1891). These colonial embargoes were, of course, directed only at Great Britain, not at all foreign commerce.

keep our seamen and property from capture, and to starve the offending nations."<sup>48</sup> The first purpose, if the embargo could be put into effect, would surely be successful.<sup>49</sup> American maritime assets could not be captured on the high seas if they were all in port.

Starving the offending nations was surely more problematic, but not wholly implausible. British and French colonies in the Caribbean were highly dependent upon American trade for most of the necessities of life,<sup>50</sup> and the dependence of British manufacturers on American cotton and other commodities was significant.<sup>51</sup> There is substantial evidence both that the embargo dramatically curtailed foreign trade and that the negative economic impact on Great Britain was greater than the admittedly harsh effects on American commerce, agriculture, and manufacturing.<sup>52</sup> The embargo was ultimately a political, not an economic, failure.<sup>53</sup>

Second, the embargo was a commercial regulatory experiment of equal or greater novelty. Mercantilist trade regulation by the great European powers had long subjected their commerce to pervasive governmental control. And states and localities in the United States heavily regulated internal commerce for a host of purposes.<sup>54</sup> But mercantilist regulation was designed to promote commerce, not to stop it in its tracks. And commercial regulation under the states' general police power was an exercise of an authority implicitly denied to the national government by its establishment as a government of enumerated powers.

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48. Letter from President Thomas Jefferson to Albert Gallatin, Sec'y of the Treasury (Apr. 8, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 27, 27.
49. This was the only purpose mentioned in Jefferson's message to Congress proposing the first embargo statute. ROBERT M. JOHNSTONE, JR., JEFFERSON AND THE PRESIDENCY: LEADERSHIP IN THE YOUNG REPUBLIC 268 (1978).
50. For one account of the extent and content of trade between New England and the Caribbean, see RICHARD PARES, *YANKEES AND CREOLES* (1956). Canadian exports could, and did, fill some of the gap created by the embargo, but not all of it. See James Duncan Phillips, *Jefferson's "Wicked Tyrannical Embargo,"* 18 *NEW ENG. Q.* 466, 471-72 (1945).
51. Many commentators, perhaps Henry Adams chief among them, viewed the embargo as doomed from the start by the improbability that it would seriously coerce the continental powers. See 4 ADAMS, *supra* note 6, at 288, 344. Careful examination of the effects on British manufacturers, however, suggests that the embargo was economically significant, if not politically efficacious. See SEARS, *supra* note 42, at 277-301.
52. This argument is developed in substantial detail by Jeffrey A. Frankel, *The 1807-1809 Embargo Against Great Britain*, 42 *J. ECON. HIST.* 291 (1982).
53. See SEARS, *supra* note 42, at 73-142.
54. See generally WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (exploding thoroughly the myth that "laissez faire" was the dominant practice of nineteenth-century American governance).

Indeed, preexisting federal regulation of ship-borne commerce simply adopted state inspection and quarantine laws by making compliance with state regulations a requirement for clearing into or out of U.S. ports.<sup>55</sup> And federal “licensing” of vessels was really only a certification requirement that facilitated customs collection<sup>56</sup> or provided a necessary condition for the receipt of federal subsidies.<sup>57</sup> Moreover, unlike the “association” embargoes of the colonial period—which had been carefully tailored to sectional interests, adopted by agreement, and enforced by local persuasion, publicity, and social ostracism<sup>58</sup>—the laying and enforcement of Jefferson’s embargo would entail executive implementation authority of enormous reach and coercive force. To stop all commerce with foreign nations was to impair, if not to imperil, the livelihood of most citizens of the United States.<sup>59</sup> Resistance was inevitable. The Jefferson Administration and Congress quickly discovered that effective implementation of a general embargo required draconian administrative authority.

#### A. A Statutory History of the Embargo

The initial Embargo Act,<sup>60</sup> passed three days before Christmas of 1807, was brief and to the point. No ships or vessels in the ports of the United States were to be cleared for any foreign port save by the explicit direction of the President. The President was given the authority to issue “such instructions to the officers of the revenue, and of the navy and revenue cutters of the United

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55. See An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796); 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. See 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, 1 Stat. 29 (1789).
  57. See An Act Concerning Certain Fisheries of the United States, and for the Regulation and Government of the Fishermen Employed Therein, ch. 6, 1 Stat. 229 (1792).
  58. For an excellent, brief description of the association embargoes, see DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774, at 73-87, 103-24 (1974).
  59. For a detailed account of the embargo’s drastic effects on one important port, Salem, Massachusetts, see Phillips, *supra* note 50.
  60. An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States (Embargo Act), ch. 5, 2 Stat. 451 (1807). The embargo policy was drafted in the White House and passed in extraordinary haste. Jefferson forwarded his message to Congress on December 18, 1807, and the Senate, suspending its rules, passed the embargo the same day. The House followed suit three days later. See BURTON SPIVAK, JEFFERSON’S ENGLISH CRISIS: COMMERCE, EMBARGO, AND THE REPUBLICAN REVOLUTION 102-04 (1979).

States, as shall appear best adapted for carrying the same into full effect.”<sup>61</sup> Registered vessels of the United States were allowed to engage in coastal trade within the United States itself, provided that the owner, master, consignee, or factor of the vessel gave a bond equal to double the value of the vessel and its cargo, guaranteeing that the ship’s cargo would be re-landed in some port of the United States, “dangers of the seas excepted.”<sup>62</sup>

As we shall see, the provisions for presidential authorization to sail to foreign ports and the exception for dangers of the seas would generate significant administrative and legal complications. Even more troublesome, the initial Embargo Act failed to provide any penalties (other than bond forfeiture) or enforcement mechanisms.

Merchants flocked to customs officials to exchange their foreign registrations for coastal licenses.<sup>63</sup> The likely intent to evade the embargo was obvious. The new year had hardly begun, therefore, before Congress returned to the embargo question.<sup>64</sup> The supplementary legislation made the embargo applicable to vessels exclusively in the coastal trade and to fishing vessels as well. Any violation of the statute subjected the guilty parties to forfeiture of the ship and its cargo, or, if these were unavailable, to a fine equal to double their combined value. In addition, any master or commander of a ship, or any other person who was knowingly involved in a prohibited foreign voyage, would be subject to fines of between \$1000 and \$20,000. Moreover, owners of ships violating the embargo would thereafter be denied all credit for duties payable to the United States, and masters or commanders of such ships would no longer be able to give any acceptable oath or affirmation before any collector of the customs of the United States. These disabilities would effectively deny the offending parties the ability to pursue their livelihoods.<sup>65</sup> Enforcement could be

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61. Embargo Act § 1.

62. *Id.* § 2.

63. SPIVAK, *supra* note 60, at 163.

64. See An Act Supplementary to the Act, Intituled “An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States,” ch. 8, 2 Stat. 453 (1808) [hereinafter First Supplementary Act].

65. An owner who could not give a bond for the payment of customs duties would be virtually excluded from foreign trade. Until goods were sold or delivered, owners or factors seldom had the wherewithal to pay their customs duties. The common practice was to give bond for the duties whereupon the goods were released to be sold or delivered. In effect, the merchant was given a loan for the amount of the duty, secured by his bond. Virtually every customs document required an oath or affirmation by the master of the vessel. A master whose oath was no longer acceptable could no longer serve as a master. Many of the details of customs collection were established in the First Congress. See An Act To Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on

had in federal court, revenue officers were granted up to one-half the value of forfeited vessels and cargos, and vessel owners or masters were remitted to the administrative system for relief from forfeitures or penalties that were used for relief from customs duties generally.<sup>66</sup>

Two months later, Congress acted again to preempt further techniques of evasion. The second supplementary statute applied the embargo to small, unregistered vessels and also to any exportation carried out on land as well as by sea.<sup>67</sup> This statute also required merchants to document their re-landing of goods at an American port by obtaining a certificate from the collector of customs of that port. In its only ameliorating action, Congress responded to the complaints of merchants with goods stranded abroad by giving the President authority to authorize a voyage solely for the purpose of recovering those goods.<sup>68</sup>

Congress was then close to adjournment. But before it left, it passed two more embargo statutes. The first authorized the President to suspend the operation of the embargo in whole or in part “in the event of such peace or suspension of hostilities between the belligerent powers of Europe, or of such changes in their measures affecting neutral commerce, as may render that of the United States sufficiently safe, in the judgment of the President of the United States.”<sup>69</sup>

Should these happy circumstances fail to materialize, the administration was to have yet more authority. In another “supplementary” statute, Congress provided that no ship was to receive clearance to leave any port unless it had been loaded under the direct supervision of the revenue officers.<sup>70</sup> Furthermore, there was to be no clearance from any harbor adjacent to foreign ports without the specific authorization of the President himself. All naval

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Goods, Wares and Merchandises Imported into the United States, ch. 5, 1 Stat. 29 (1789); see also First Supplementary Act, *supra* note 64, 2 Stat. 453.

66. For a description of the system for providing relief from customs duties, see Mashaw, *supra* note 3, at 1279, 1332.

67. An Act in Addition to the Act, Intituled “An Act Supplementary to the Act, Intituled an Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States,” ch. 33, §§ 1-4, 2 Stat. 473, 473-74 (1808) [hereinafter Second Supplementary Act].

68. *Id.* § 7.

69. An Act To Authorize the President of the United States, Under Certain Conditions, To Suspend the Operation of the Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States, and the Several Acts Supplementary Thereto, ch. 52, 2 Stat. 490, 490 (1808).

70. An Act in Addition to the Act Intituled “An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States” and the Several Acts Supplementary Thereto, and for Other Purposes, ch. 66, 2 Stat. 499 (1808) [hereinafter Third Supplementary Act].

vessels and revenue cutters were authorized to stop and examine any United States ship if there were “reason to suspect [it] to be engaged in any traffic or commerce, or in the transportation of merchandise of either domestic or foreign growth or manufacture, contrary to the provisions of this act.”<sup>71</sup>

While naval vessels and revenue cutters needed “reason to suspect” that a violation was in progress, the collectors of customs were empowered “to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever *in their opinions* the intention is to violate or evade any of the provisions of the acts laying an embargo.”<sup>72</sup> Collectors were to refer such cases to Washington, and the detained vessel could be released only upon a decision by the President. Moreover, collectors were authorized to seize “any unusual deposits” of goods “in any of the ports of the United States” that were “adjacent to territories, colonies or provinces of a foreign nation.”<sup>73</sup> Authority to seize or detain vessels on “suspicion,” or on an official’s “opinion” that the vessel intended to violate the embargo laws, or to seize deposits of goods viewed as “unusual” was, to put it mildly, a remarkable grant of administrative discretion.

Even these extreme provisions proved unavailing. Having returned from its recess, in January 1809, Congress passed its penultimate embargo legislation: the so-called Enforcement Act.<sup>74</sup> Under this statute, all preexisting penalties and forfeitures were applied to anyone aiding and abetting the violation of the embargo. Informers were given a bounty of half of the fines resulting from their information. Ships now could not be loaded without an explicit permit from the collector of the port and were required to be loaded under his supervision. Collectors were to deny a permit if, in their “opinion,” there was “an intention to violate the embargo, or whenever they shall have received instructions to that effect by the direction of the President of the United States.”<sup>75</sup>

The Enforcement Act went on to specify evidentiary provisions making the government’s proof easier when it sought forfeitures or penalties, and the defendant’s proof more difficult when it sought to justify going to a foreign port because of capture or distress. Indeed, these latter facts had to be proved

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71. *Id.* § 7.

72. *Id.* § 11 (emphasis added).

73. *Id.* § 12.

74. An Act To Enforce and Make More Effectual an Act Intituled “An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States,” and the Several Acts Supplementary Thereto (Enforcement Act), ch. 5, 2 Stat. 506 (1809).

75. *Id.* § 2.

by the testimony of every living member of the vessel's crew.<sup>76</sup> Collectors were given authority to seize any goods on land or sea when "there is reason to believe that they are intended for exportation" or "apparently on their way towards the territories of a foreign nation, or the vicinity thereof, or towards a place whence such articles are intended to be exported."<sup>77</sup>

The statute also purported to give collectors virtual immunity from suit for actions designed to prevent violations of the embargo, as long as they were carrying out the statute or any general rules or instructions issued by the President. Anyone who sued a collector and lost would be required to pay the collector treble the cost of the suit.<sup>78</sup> And, in perhaps the most spectacular provision of the statute, Congress gave the President the authority to

employ such part of the land or naval forces or militia of the United States, or of the territories thereof as may be judged necessary . . . for the purpose of preventing the illegal departure of any ship or vessel, or of detaining, taking possession of, and keeping in custody any ship or vessel, or of taking into custody and guarding any specie, or articles of domestic growth, produce or manufacture, and also for the purpose of preventing and suppressing any armed or riotous assemblage of persons, resisting the custom-house officers in the exercise of their duties, or in any manner opposing the execution of the laws laying an embargo, or otherwise violating, or assisting and abetting violations of the same.<sup>79</sup>

Having given the President all these powers, they took from him, at his request, the authority to give permission to recover goods stranded in foreign ports.<sup>80</sup>

In combination, the various embargo statutes made virtually everything that moved in commerce in the United States potentially subject to seizure. Collectors of revenue, naval personnel, and the masters of revenue cutters could stop sea and land transports on mere suspicion, or on forming the "opinion," that violation or evasion of the embargo was intended. No ship could be loaded without a permit, and then only under the watchful eye of a federal official. The President could use the full force of the Army, Navy, and militias not just to suppress insurrection, but simply to prevent the violation of

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76. *Id.* § 7.

77. *Id.* § 9.

78. *Id.* § 10.

79. *Id.* § 11.

80. *Id.* § 14.

any provision of the embargo statutes. Virtually nothing could be loaded or moved in commerce without a permit or a license, often backed by a huge bond.<sup>81</sup> Permission to load or move goods was subject to the apparently unconstrained discretion of the permitting authorities.

This was regulatory authority of astonishing breadth and administrative discretion of breathtaking scope. That such an administrative system would raise constitutional doubts and provoke stiff resistance was inevitable. Indeed, Congress's willingness to go to these extremes suggests the level of resistance that the embargo and its implementation encountered. Resistance triumphed. Only three months after adopting its most draconian enforcement provision, Congress repealed the embargo and substituted a much milder regime of nonimportation.<sup>82</sup>

### *B. The Constitution and Republican Constitutional Principles*

There is little doubt that the embargo, as established by statute and carried out in practice, violated virtually every constitutional principle that the Jeffersonian Republicans held dear. Limited government was clearly out the window, as was congressional control of administrative authority. Administrative powers of coercion were to be applied on the basis of suspicion or opinion, backed by the Army, the Navy, or presidentially controlled militias. Henry Adams concluded:

[T]he embargo and the Louisiana purchase taken together were more destructive to the theory and practice of a Virginia republic than any foreign war was likely to be. Personal liberties and rights of property were more directly curtailed in the United States by embargo than in Great Britain by centuries of almost continuous foreign war . . . [E]ven the Secretary of the Treasury and the President admitted that it required the exercise of most arbitrary, odious, and dangerous powers.<sup>83</sup>

Were federal statutes providing this level of administrative regulatory authority constitutional? From the perspective of 1808, the question was far from fanciful. A broad swath of contemporary opinion urged the embargo's

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81. See, e.g., *id.* § 4.

82. See *An Act To Interdict the Commercial Intercourse Between the United States and Great Britain and France, and Their Dependencies; and for Other Purposes*, ch. 24, 2 Stat. 528 (1809).

83. 4 ADAMS, *supra* note 6, at 273-74.

invalidity. The proponents of unconstitutionality were, to be sure, strange political bedfellows. They included radical Republicans, who clung to a compact or confederation theory of the Constitution, and New England Federalists, many of whom were willing to jettison their traditional beliefs in both broad national power and the need for an energetic executive in the service of protecting New England's commerce from the embargo's devastating effects.<sup>84</sup> Charles Warren, in his classic history of the Supreme Court, stated that "[t]he Embargo Law was a far more extreme exercise of Congressional power than either Republicans or any one else had believed possible under the Constitution."<sup>85</sup> And Justice Joseph Story, who argued in favor of the constitutionality of the embargo in the only case that straightforwardly addressed the issue, later wrote that he considered the embargo "a measure[] which went to the utmost limit of constructive power under the Constitution."<sup>86</sup>

Others have seen the constitutional concerns as less serious. After canvassing the constitutional arguments that were put forward in Congress when the various embargo statutes were being discussed, David Currie has concluded that the arguments in favor of the embargo's validity were "overpowering by modern standards" and that they "had been consistently accepted since the Government was first established."<sup>87</sup>

Currie's position echoes Judge John Davis's opinion in *United States v. The William*.<sup>88</sup> Davis, a staunch Federalist, found the embargo constitutional not only as a regulation of commerce, but also as an exercise of the war powers, as a preparation for war under the Necessary and Proper Clause, and as appropriate to carrying out the general purposes of the Constitution and to protecting the inherent sovereignty of the nation.<sup>89</sup>

The opinion in *The William*, which reads as if written by Chief Justice John Marshall in one of his more unguarded moments, upheld Federalist principles of judicial supremacy but dashed the New England Federalists' hopes for quick relief from the embargo. For Republicans, Davis's ruling was both a blessing and an embarrassment. Their embargo had been upheld, but viewing the court's pronouncement as conclusive violated deeply held Republican

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84. For a general discussion, including extensive citation of the newspaper commentary at the time, see 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835*, at 316-65 (1928).

85. *Id.* at 342.

86. 1 WILLIAM W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* 185 (Boston, Little & Brown 1851).

87. CURRIE, *supra* note 17, at 155.

88. 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700).

89. *See id.* at 616-23.

principles. Jefferson never accepted the idea that judicial review settled constitutional or statutory issues with finality, and Republican attacks on the authority and independence of the federal judiciary were a hallmark of his presidency.<sup>90</sup> The decision in *The William* thus produced the odd spectacle of Republicans clasping a Federalist judge's decision to their bosoms, while Federalist opponents of the embargo continued to deny the embargo's constitutionality.<sup>91</sup>

### C. Administration and Its Control

The implementation of the embargo, like any system of administrative implementation under the American Constitution, was subject, at least in theory, to three forms of control: political control by elected officials; administrative control through hierarchal supervision; and legal control through judicial review. All three are of considerable interest. Resistance, while far from universal, was widespread. Hence, the enforcement powers that Congress so freely granted had to be employed with vigor. Could compliance be effected while maintaining political, bureaucratic, and legal oversight that was consistent with conventional understandings of democracy and the rule of law?

#### 1. Political Control

The Constitution divides political control of administration between the President and Congress, but the embargo almost represented what we might currently call pure "presidentialism."<sup>92</sup> Congress retained political control neither through statutory specificity nor through political oversight. The embargo statutes, as we have seen, provided remarkably broad grants of enforcement discretion both to the President and to enforcement personnel. The President was granted almost unlimited authority to decide specific cases, to direct the activities of lower-level personnel, and to suspend the operation of the embargo (with such exceptions as he deemed prudent). And during the short period that the embargo was in effect, Congress devoted itself primarily

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90. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 111-266 (2005); RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE EARLY REPUBLIC* 3-107 (1971).

91. See 1 WARREN, *supra* note 84, at 316-65.

92. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (providing a description and defense of this form of administration in the modern administrative state).

to enhancing the administrative powers of the President and others,<sup>93</sup> not to investigating or overseeing their practices. This was clearly contrary to basic Republican principles and to congressional practice in most areas of administrative action during the Republican period.

Broad delegation of authority reduced political accountability to Congress but enhanced accountability to the President. Political control thus operated more in accordance with Federalist than with Republican principles. President Jefferson proposed the embargo policy and took full responsibility for it. He was active in the development of subsidiary policies for implementing the scheme, and supplementary legislation to strengthen the embargo was consistently enacted at his request. When the embargo ultimately became intolerable to the people, they laid the blame firmly at Jefferson's door.<sup>94</sup>

At the same time, Congress may be said to have failed in its critical constitutional role of providing a check on executive power. Leonard Levy has had a notoriously gloomy view of Jefferson as a civil libertarian, but it is hard to argue with his statement that

[o]n a prolonged, widespread, and systematic basis, in some places lasting nearly a year, the armed forces harried and beleaguered the citizenry. Never before or since did American history exhibit such a spectacle of derangement of normal values and perspectives.

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... This was the only time in American history that the President was empowered to use the army for routine or day-to-day execution of the laws.<sup>95</sup>

Moreover, Congress gave this extraordinary power to a President who was far from squeamish in pursuing his objectives under the embargo legislation. In their studies of the embargo, Leonard White and Burton Spivak have pointed out numerous instances in which Secretary of the Treasury Albert Gallatin's sounder judgment softened Jefferson's more aggressive tendencies.<sup>96</sup> Jefferson was prepared, for example, to countenance guilt by association, urging that anyone from a town that was "tainted with a general spirit of

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93. Not only the original Embargo Act but also its many amendments were generally requested and drafted by the administration. See SPIVAK, *supra* note 60, at 156-75.

94. Henry Adams described the Republicans in Congress as almost in a panic as they abandoned Jefferson's scheme and made him suffer the indignity of signing the repeal statute. See 4 ADAMS, *supra* note 6, at 272-89.

95. LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 119, 137 (1963).

96. See SPIVAK, *supra* note 60, at 139-42; WHITE, *supra* note 15, at 423-73.

disobedience” be debarred from any permit to carry on commerce unless the applicant demonstrated that he had never said or done anything himself in support of resistance to the embargo.<sup>97</sup> He requested that prosecutors allow him to judge personally whether the death penalty should be sought for convicted violators of the embargo’s prohibitions. He believed that there would be too many to be punished with death and he wanted to decide who should be marked as examples and who should simply suffer long imprisonment.<sup>98</sup> Wills, perhaps, has gone too far in concluding that “Jefferson had set up a state terrorism that made the Alien and Sedition prosecutions under Adams look minor by comparison.”<sup>99</sup>

But Wills has not gone much too far with respect to what Jefferson was prepared to do. The crucial fact of the matter, of course, is that Jefferson was not permitted to do everything that he was prepared to do. As we shall soon see, the courts put some significant limits on the administration of the embargo. More importantly, for current purposes, Congress did not give the President quite all the authority that he wanted. While Congress was willing to give the President or the enforcement officers authority to seize provisions that were “unusual” when delivered to places near the border with Canada or Spanish Florida, Jefferson wanted authority to make such seizures anywhere in the United States. That particular request was never made to Congress because Gallatin assured Jefferson that it “could not pass.”<sup>100</sup> And Congress balked when Gallatin proposed that all civil suits against collectors should be tried only in federal court, that a Treasury Department ruling that a seizure was “reasonable” should protect collectors from damages, and that the President should have authority to use state militias for enforcement without authorization from the governors who were the militia’s commanders.<sup>101</sup>

Even so, it was often suggested in Congress that the embargo legislation, particularly the President’s power to suspend it, was an unconstitutional

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97. Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Nov. 13, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 193, 194.

98. Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Sept. 9, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 160, 160. Jefferson apparently believed that resistance to the embargo should be considered treason. Nothing in the statutes attempted to make such conduct treasonable, however, and Jefferson’s position was vigorously rejected by Justice Livingston in *United States v. Hoxie*, 26 F. Cas. 397, 399-400 (C.C.D. Vt. 1808) (No. 15,407); *see also* 1 WARREN, *supra* note 84, at 352-53.

99. WILLS, *supra* note 23, at 54.

100. WHITE, *supra* note 15, at 430.

101. *See* SPIVAK, *supra* note 60, at 175-76.

delegation of legislative authority to the executive branch.<sup>102</sup> That argument never prevailed, but it surely had some merit, for the suspension power was not just a power to suspend upon the finding of certain facts, but a power to suspend with such “exceptions” as the President thought prudent. This was very close to an authority to rewrite the legislation. This nondelegation argument, of course, had the weakness of all such claims. What Congress gave it could also take away. The suspension power itself was only available when Congress was not in session, and it became inoperative under the statute twenty days after Congress had returned to Washington. And although Jefferson would have pressed on with the embargo indefinitely, and Madison might have followed suit, when enforcement of the embargo became too unpopular, Congress repealed the President’s authority.

## 2. *The System of Administrative Control*

The embargo legislation obviously required thousands of individual decisions by customs collectors, naval officers, and U.S. Attorneys in the various federal districts. In addition, the statutes seemed to give the President a personal responsibility for granting permits and reviewing seizures. How were all of these decisions to be made in an effective, orderly, and consistent fashion? Revenue officers, naval officers, and U.S. Attorneys in the field were subject to radically different conditions in differing parts of the country. And every case was certain to offer some unique aspects based on its peculiar facts. Moreover, state personnel—governors, legislatures, and militia—also took some part in the enforcement of the embargo. What sort of administrative system could unify the actions of all these disparate and dispersed actors?

The first problem was what to do about the discretion that Congress had vested in the President himself. The initial Embargo Act prohibited any vessel from leaving for a foreign port unless “under the immediate direction of the President of the United States.”<sup>103</sup> Merchants read this provision as allowing the President to dispense exemptions at will, and applications poured in from every quarter. The virtual impossibility of sorting legitimate requests from evasion schemes drove Jefferson and Gallatin toward a highly restrictive interpretation of the statute. Because an unrestrained power to exempt vessels from the embargo would have defeated its purposes, Jefferson decided that Congress must have meant that he was to provide exceptions only when a voyage by a private vessel was necessary to carry on “public” (apparently

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102. See CURRIE, *supra* note 17, at 148–50.

103. Ch. 5, § 1, 2 Stat. 451, 452 (1807).

meaning “governmental”) business. Gallatin duly put a notice to this effect in various newspapers.<sup>104</sup>

Even with this restrictive interpretation, the President’s dispensing power turned out to be an embarrassment. John Jacob Astor, who had personal and financial connections to Jefferson and Gallatin (and later to James Monroe and Henry Clay, among others),<sup>105</sup> received permission from the President to clear his vessel, the *Beaver*, from New York to carry home a distinguished Chinese mandarin who was stranded in the United States. Alas, it turned out that this mandarin was an ordinary Chinese man dressed up in finery. The embarrassment became more acute when it was revealed that Astor turned a profit of \$200,000 on the voyage.<sup>106</sup>

Given the President’s restrictive interpretation of his initial dispensing authority, few permits were issued, and merchants who had goods stranded in foreign ports felt aggrieved. They wrested from Congress a more targeted provision authorizing the President to permit voyages solely for the purposes of recovering goods already owned by American interests but located in foreign ports.<sup>107</sup> A remarkable number of merchants turned out to have property abroad. Before Congress repealed this authority, at Jefferson’s request, 594 vessels had been allowed to sail to foreign ports. Many of them failed to return, “gladly forfeiting bond for the freedom and profits of the neutral trade.”<sup>108</sup> The value of the property authorized to be brought back under these permits was approximately \$7 million.<sup>109</sup> And although Gallatin, in conjunction with the President, limited permissions largely to the recovery of goods in the West Indies, the volume of trade done under these permits was a substantial impediment to the embargo’s success.<sup>110</sup>

But as an administrative matter, assuring fairness and consistency in the President’s determinations was a small problem. The permits issued from a single source, the President, who had his policy advisor, the Secretary of the Treasury, close at hand. Regulating the behavior of customs collectors and naval officers was a much more challenging task. Gallatin rose to it with his usual energy. During the first eleven months of the fifteen-month embargo,

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104. See SPIVAK, *supra* note 60, at 160.

105. For a description of Astor’s political connections and influence, see JOHN DENIS HAEGER, *JOHN JACOB ASTOR: BUSINESS AND FINANCE IN THE EARLY REPUBLIC* (1991).

106. See WHITE, *supra* note 15, at 429 n.24 (citing ROBERT GREENHALGH ALBION, *THE RISE OF NEW YORK PORT, 1815-1860*, at 197 (1939)).

107. Second Supplementary Act, *supra* note 67, § 7, 2 Stat. at 475.

108. MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 888 (1970).

109. WHITE, *supra* note 15, at 430.

110. See SEARS, *supra* note 42, at 66-67.

Gallatin issued 584 circulars or letters of instruction to enforcement personnel concerning the implementation of the embargo.<sup>111</sup> The major problem was the coasting trade. Stopping coastal traffic starved Americans, not Englishmen. Thus it had to be permitted unless, in the statutes' terms, a collector believed that there was an intent to evade the embargo. But in an era of sailing ships, weather often diverted vessels from their intended course. And just off the coast lay dozens of British vessels capable of "capturing" American merchantmen and taking them to a British port in the West Indies. Virtually everything seemed suspicious when ending up in a foreign port could, under the statute, be excused if it resulted from the "perils of the sea."

The collectors clearly needed guidelines, and Gallatin supplied them. For example, in a circular of April 28, 1808, collectors were told that they might find that there was an intent to evade the embargo based upon: (1) the declarations of the parties or the suggestions of others; (2) unusual shipments in terms of quantity or price, or in particular provisions, such as timber and lumber, naval stores, and all articles consumed in the West Indies; (3) former known evasions by the persons seeking permits; or (4) known business connections with agents of foreign nations.<sup>112</sup> Because the West Indies received virtually everything it consumed from somewhere else, that provision alone would make almost every shipment suspicious. But Gallatin went on to assure the collectors that these four grounds were not exclusive and that they should "detain, investigate and refer in all doubtful cases."<sup>113</sup>

As time went by, hundreds of questions arose, which required further circulars and instructions. For example, how much of the cargo of a vessel needed to be "suspicious" to justify detention? The Treasury adopted a rule that suspicious cargo could only make up one-eighth of the value of the total in the vessel.<sup>114</sup> Gallatin also tried to unify practice by adopting a presumption that any collector's decision to detain a vessel was justified. Jefferson had delegated to Gallatin the authority under the statute to decide whether a collector's preliminary judgment to detain should be confirmed, and Jefferson instructed Gallatin that whenever he was doubtful, he should consider the President as voting for detention. Moreover, in Jefferson's view, the suspicious

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111. NOBLE E. CUNNINGHAM, JR., *THE PROCESS OF GOVERNMENT UNDER JEFFERSON* 119 (1978). Gallatin's circulars and instructions are collected in a manuscript volume in the National Archives entitled "*Circulars, Office, Secretary of the Treasury, September 14, 1789, to February 21, 1828, 'T.'*"

112. Albert Gallatin, Circular of Apr. 28, 1808 (on file with author) [hereinafter Gallatin, Circular of Apr. 28, 1808]; see also WHITE, *supra* note 15, at 435.

113. Gallatin, Circular of Apr. 28, 1808, *supra* note 112.

114. SPIVAK, *supra* note 60, at 167.

character of a shipment, or of the activities of a vessel, could be better determined by an official on the spot than by someone working from a paper record. As a general rule, therefore, he thought that Gallatin should rely on the judgment of the collector who had made the original detention.<sup>115</sup>

While the general rule, “when in doubt, detain,” seemed to unify practice, the determination to routinely confirm detentions delegated discretion to the collectors. And under the provisions of the embargo acts, only their decisions to detain were referred to the President, or to his delegate, the Secretary of the Treasury;<sup>116</sup> grants or permits were not. There was little reason to believe that collectors around the country, personal differences aside, would behave in a unified fashion. In New England, revenue and naval officers met with armed resistance. Some were killed and several resigned.<sup>117</sup> It hardly seemed likely that those who stayed on in this environment would be as energetic in interdicting trade as those working in states where the population was more supportive of the President’s program. And in every instance, collectors had to consider whether the persons with whom they were dealing were likely to sue. Collectors were individually liable for any damages from an improper detention.<sup>118</sup> Six months into the embargo experiment, Gallatin despaired of the effectiveness of the detention system. He wrote to Jefferson, “Since the collectors will not place themselves in a position to be sued, we must let the vessels go, and depend on [naval] force to enforce the embargo.”<sup>119</sup>

White has concluded that collectors and U.S. Attorneys by and large did their duty. But the personnel available to implement the embargo were simply inadequate to prevent smuggling when that meant policing the hundreds of harbors and inlets along the whole eastern seaboard.<sup>120</sup> Moreover, resistance was supported in New England by judges, juries, and elected officials. We will consider the judicial situation shortly, but the political opposition to the embargo in New England was sufficient in itself to impede implementation.

The unpopularity of the embargo had not only helped to put Federalists back into control of some New England legislatures, but had also spurred open talk of cessation from the Union and the establishment of a New England Confederacy. In Warren’s words:

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115. See WHITE, *supra* note 15, at 436-37.

116. See Third Supplementary Act, *supra* note 70, § 11, 2 Stat. at 501.

117. See SEARS, *supra* note 42, at 143-96.

118. See *infra* text accompanying notes 202-215.

119. SPIVAK, *supra* note 60, at 173.

120. See WHITE, *supra* note 15, at 443-56.

Every attack which Virginia had made, from 1798 to 1800, upon the Alien and Sedition Laws was now re-echoed in Massachusetts and Connecticut. The most radical doctrines advanced in the Virginia-Kentucky Resolutions of 1798-1799 were adopted and strengthened. Jefferson's own arguments as to the rights of a State and of the people to disregard unconstitutional laws were now turned against him.<sup>121</sup>

State governors were given two opportunities to stifle enforcement of the embargo. The first was a blunder by Jefferson. In an attempt to make the determination of when coastal trade was "suspicious" more palatable to local interests, Jefferson wrote to all of the state governors authorizing them to issue permits for the importation of provisions, particularly flour, when it was necessary for the sustenance of their state populations. This was a move in the direction of Republican principles, the decentralization of authority, but Gallatin feared that it would be the end of effective enforcement of the embargo.<sup>122</sup> If the governors could clear shipments of basic foodstuffs, much of the trade with the British and French West Indies might proceed unimpeded by the embargo.

The Treasury Department struggled to gain some control over the flour issue. Gallatin first transmitted instructions to the various collectors that shipments of flour and other similar provisions were to be considered a cause for detention, and he called for weekly information on imports and exports to be relayed to the Treasury Department.<sup>123</sup> The collectors were somewhat confused: Was any shipment of flour a *prima facie* cause for detention, or was it merely strong evidence that a ship was suspicious? And what ports were covered? Gallatin sent seemingly inconsistent responses to the collectors.<sup>124</sup>

This ad hoc system of writing individual letters was unsustainable; Gallatin needed to provide more detailed instructions on whether and to what extent

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121. 1 WARREN, *supra* note 84, at 358.

122. See Letter from Albert Gallatin, Sec'y of the Treasury, to President Thomas Jefferson (May 23, 1808) (on file with author). In any event, most governors behaved responsibly. Only Governor Sullivan of Massachusetts issued permits for the transport of flour to all comers, to merchants both inside Massachusetts and in other states. Sullivan did not break the embargo himself, but his activities were a scandal that hampered compliance everywhere.

123. See Albert Gallatin, Circular of May 6, 1808 (on file with author) ("[The President] perceives no necessity at present for the transportation of flour and similar articles from one port of the Chesapeake and its waters to another port on the waters of the same bay; or from any port whatever to ports in the Chesapeake; Delaware or Hudson; or to any other places which export such articles.").

124. Compare Letter from Albert Gallatin, Sec'y of the Treasury, to John Shee, Collector of Phila. (May 17, 1808) (on file with author), with Letter from Albert Gallatin, Sec'y of the Treasury, to Charles Simons, Collector of Alexandria (May 12, 1808) (on file with author).

flour should be considered a cause for detention if the interpretive guidelines were to have any force. On May 20, 1808, Gallatin issued a circular to all the collectors moderating the ban on flour shipments but giving some more specific criteria for action:

[I]t seems that moderate shipments of flour and provisions not exceeding in value one eighth part of the amount of the bond, cannot, when no other cause of suspicion occurs, be considered alone, as either intended or calculated to evade the Embargo. I think therefore that such shipments to such an extent, to places to which similar articles have been usually exported from your Districts may be allowed, particularly when made on vessels regularly trading between the two places; provided always that you have no other reason to believe that there is an intention to evade or violate the Embargo. Some latitude may also be given in the case of vessels belonging to other ports and now in your District, which had actually laden or purchased their cargoes, and . . . under no suspicion whatever. This letter must be considered as explanatory of the circular of the 6th instant, and not as altering the instructions contained in the circular of [the] 28th to which you will be pleased strictly to adhere.<sup>125</sup>

Notwithstanding these efforts at controlling local prejudices, the collectors retained very significant discretion to respond to the political climate of their region when deciding whether to detain a ship. “Unusual shipments” of flour were to be considered a sufficient cause for detention, and no flour at all was to be transported to any “other place[] which export[s] such articles.”<sup>126</sup> But “moderate shipments” were to be allowed if they were usually exported from the collector’s district. How was a collector supposed to interpret “unusual,” “moderate,” “usually exported,” or “some latitude”?

Meanwhile, Jefferson tried to rein in the most conspicuously lenient governor.<sup>127</sup> In a letter to Governor Pinckney on July 18, 1808, he demanded that all shipments of flour be considered *prima facie* suspicious to ensure that the decisions by the collectors were as consistent as possible. But he then gave the governors their second chance at nullification. The provisions of the 1809 Enforcement Act authorized the President to use the Army and the militia to

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125. Albert Gallatin, Circular of May 20, 1808 (transcription on file with author).

126. Gallatin, *supra* note 123.

127. See Letter from President Thomas Jefferson to Governor Charles Pinckney (July 18, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 102, 102-03.

enforce the embargo.<sup>128</sup> This statutory authorization was, as has been noted, extraordinary. A Federalist Congress in 1792 had authorized presidential resort to the militia in the case of invasion, insurrection, or opposition to the execution of the laws that was too powerful to be suppressed by the usual means. But a federal district judge had to certify the breakdown of civil authority.<sup>129</sup> In 1809, by contrast, a Republican Congress passed a statute that, on its face, gave the President the authority to call out the militia for the ordinary enforcement of the law whenever he thought it necessary.

On Gallatin's advice, Jefferson decided that the governors, who were the commanders of the state militias, should exercise this authority. Given the political resistance to the embargo, as well as the enormous resistance to the Enforcement Act, this was surely prudent. Jefferson asked the governors to pick officers from their state militias to be in charge of detachments that might be called upon by federal officers to enforce obedience to the embargo.<sup>130</sup> New England again resisted. The Governor of Connecticut responded to the Secretary of War that he had no authority to carry out the President's instructions under the Connecticut Constitution and that the President had no authority to direct him under the U.S. Constitution. The Governor reported his actions to the Connecticut legislature in a speech favoring state interposition in response to unconstitutional federal statutes. The legislature promptly adopted a statute prohibiting any state official from lending any assistance to the enforcement of the embargo.

In Massachusetts, Governor Sullivan had been succeeded by Levi Lincoln, who had served in Jefferson's cabinet as Attorney General. Lincoln acquiesced to Jefferson's request, appointing militia officers whom he believed to be reliable. His legislature rewarded him with a resolution of censure and formally petitioned Congress for repeal of the embargo as an unconstitutional imposition on the civil liberties of American citizens and an invasion of the authority of the states. Lincoln wrote to Jefferson that he feared impeachment.<sup>131</sup>

Yet implementation of the embargo was not an administrative failure. Although it was not successful in coercing Britain or France, the embargo managed to coerce—or perhaps one should say regulate—American commerce.

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128. Enforcement Act, ch. 5, § 11, 2 Stat. 506, 510 (1809).

129. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264.

130. WHITE, *supra* note 15, at 466 (quoting Jefferson's letter to the governors via the Secretary of War).

131. For discussion of the Connecticut and Massachusetts responses to the Enforcement Act, see DUMAS MALONE, JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809, at 651-55 (Jefferson & His Time vol. 5, 1974).

As White has put it, “The major administrative question was whether the government possessed a system strong enough, reliable enough, and equipped with the necessary legal authority and physical power to enforce the embargo. The record showed that such a system existed . . . .”<sup>132</sup> The concentration of administrative discretionary power necessary for success—the authority to refuse to allow anything to move in commerce on suspicion of the motives of the mover—was, however, politically intolerable. The fifteen-month experiment collapsed. Administrative powers of this level of coercive force were not seen again until the Civil War.

Notwithstanding its oppressiveness, the embargo system was not lawless. Authority emanated from Congress, not from some executive assertion of independent war powers. Congress added authority only incrementally as prior authorizations proved inadequate. The administrators at the top struggled mightily to develop clear standards and to impose consistency on the efforts of widely dispersed officials. Some “democratization” of authority through delegation to the states was attempted even though it threatened to wreck the system. And the courts were not excluded from participation in enforcement or in the review of official action. Indeed, White’s conclusion that enforcement was effective might well have proved much too optimistic had the embargo continued for a longer period. For, as we shall see, the available system of judicial review—that is, court enforcement of criminal sanctions and common law actions against officials—had the capacity to derail effective administration where the embargo was unpopular.

The most impressive contribution to lawfulness came, however, from the system of internal control established by the Treasury. Contrary to Henry Adams’s proclamation that Jefferson “assumed the responsibility for every detail of [the embargo’s] management,”<sup>133</sup> the President could not micromanage the particulars of enforcement. Though the statutory power to execute the laws was often given to the President, much of the content of the enforcement policies came from the Treasury Department and, in particular, from Gallatin.<sup>134</sup> For every embargo statute, Gallatin sent instructions to the field, highlighting the particularly relevant provisions of the statute, providing a standardized set of interpretations, directives, and instructions, and

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132. WHITE, *supra* note 15, at 472.

133. 4 ADAMS, *supra* note 6, at 251.

134. See Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Apr. 19, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 29, 29-30 (delegating authority to Gallatin to develop enforcement rules); Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Aug. 11, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 121, 122 [hereinafter Letter of Aug. 11, 1808] (same).

authorizing the exercise of local discretion when necessary.<sup>135</sup> Some of those missives transmitted instructions from the President. Others revealed close consultation between Gallatin and Jefferson. Many were issued simply on the delegated authority of the Secretary.<sup>136</sup>

The Treasury Department was also in daily correspondence with the collectors. Specific questions regarding permits, detentions, and interpretations of the embargo laws were sent to Gallatin, who responded with binding advisory letters<sup>137</sup> (in which he often referenced recent circular letters<sup>138</sup>). While

135. A more detailed discussion of the content of these instructions is provided below. See generally Albert Gallatin, Circular of Dec. 31, 1807 (on file with author) [hereinafter Gallatin, Circular of Dec. 31, 1807] (creating interim rules after the ambiguity of the initial 1807 Embargo Act); Albert Gallatin, Circular of Mar. 21, 1808 (on file with author) [hereinafter Gallatin, Circular of Mar. 21, 1808] (creating rules for and transmitting specific instructions with respect to section 7 of the second supplementary act); Gallatin, Circular of Apr. 28, 1808, *supra* note 112 (providing detailed instructions and detention procedures for the supplementary act of April 25, 1808); Albert Gallatin, Circular of Jan. 16, 1809 (on file with author) (providing formal instructions for the Enforcement Act).
136. Compare, e.g., Gallatin, Circular of Dec. 31, 1807, *supra* note 135 (“You are instructed by the President . . .”), Albert Gallatin, Circular of Mar. 12, 1808 (on file with author) [hereinafter Gallatin, Circular of Mar. 12, 1808] (“The President of the United States will immediately take into consideration the seventh section of the act in order that some general rules may be adopted for its execution.”), Gallatin, *supra* note 123 (“[T]he President considered ‘unusual shipments,’ particular of flour & other provisions, of lumber and of Naval Stores, as sufficient cause for detention of the vessel.”), and Albert Gallatin, Circular of Jan. 14, 1809 (on file with author) [hereinafter Gallatin, Circular of Jan. 14, 1809] (“The President gives the following instructions . . .”), with Gallatin, Circular of Apr. 28, 1808, *supra* note 112 (“I now proceed to give some additional instructions . . .”), Albert Gallatin, Circular of May 18, 1808 (on file with author) (using similar language), and Albert Gallatin, Circular of Nov. 15, 1808 (on file with author) (“It appears to me . . .”). Indeed, Jefferson instructed Gallatin several times that he was in the best position to make decisions and should proceed without consultation. See, e.g., Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (May 6, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 52, 53; Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (May 27, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 5, at 66, 66; Letter of Aug. 11, 1808, *supra* note 134, at 122.
137. See Letter from Albert Gallatin, Sec’y of the Treasury, to Enoch Sawyer, Collector of Camden (Feb. 26, 1808) (on file with author) (“I have deemed it proper to furnish you with copies of those letters, and at the same time to request that you will consider them as intended for your government.”).
138. See, e.g., Letter from Albert Gallatin, Sec’y of the Treasury, to Gabriel Christie, Collector, & John Brice, Deputy Collector (Apr. 1, 1808) (on file with author) (answering a question in correspondence by referencing an earlier circular); Letter from Albert Gallatin, Sec’y of the Treasury, to Charles Simms, Collector of Alexandria (May 23, 1808) (on file with author) (same); Letter from Albert Gallatin, Sec’y of the Treasury, to Jas Gibbon, Collector of Richmond (May 30, 1808) (on file with author) (correcting the collector’s interpretation of a circular letter).

the majority of these letters consisted of short opinions approving or disapproving of detentions, the collectors often wrote to the Treasury Department for assistance on how to proceed with special cases, for detailed instructions in enforcing new legislation, and to suggest appointments to Customs House positions. In combination, the Treasury's circulars and correspondence attempted to ensure both informed and uniform implementation by: (1) creating a system of information collection; (2) delegating authority to the collectors to take specific additional enforcement measures; and (3) providing guidelines to unify practice. In addition, a centralized appeal and oversight system provided some relief from official errors and held field personnel administratively accountable.

*a. Information-Gathering*

Jefferson and Gallatin realized at a very early stage that it would not be possible to issue general guidelines for the detention of vessels without more specific information about what kinds of violations were occurring in the field. Thus, through circulars, Gallatin standardized forms and procedures for the collection, transmission, and gathering of information on permits, detentions, and forfeitures.<sup>139</sup> This system of information-gathering would prove to be essential both in holding the customs officials accountable and in ensuring that new rules and regulations would be developed to address new threats.

For example, after the second supplementary embargo statute (which applied the embargo to both small unregistered vessels and to any exportation carried out on land) was passed on March 12, 1808, Gallatin issued a circular requiring the various officials to transmit information to the Treasury about what types of vessels in each district might be exempted from bonding requirements without endangering the enforcement effort.<sup>140</sup> Later correspondence provided more specific instructions detailing what types of

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139. See Albert Gallatin, Circular of Mar. 12, 1808, *supra* note 136 (requiring customs officials to transmit data about vessels excepted under the second supplementary act); Gallatin, *supra* note 123 (requiring collectors to transmit to the Treasury a weekly statement of vessels laden with articles of domestic produce, the type and quantity of the produce on board, and their destination—the purpose of which was to collect better data on what constituted an “unusual shipment” for detention); Gallatin, Circular of Jan. 14, 1809, *supra* note 136 (transmitting forms for the different types of bonds and certificates and for the various types of vessels under the Embargo Act).

140. Gallatin, Circular of Mar. 12, 1808, *supra* note 136.

boats should be considered safe or dangerous<sup>141</sup> and what factors collectors should consider in finding an “intent to evade” the embargo.<sup>142</sup>

The information sent by each district called Gallatin’s attention to specific tactics being used to evade the embargo and allowed the Treasury to respond. For instance, in late 1808, the Treasury received information that many vessels had begun taking one-third more flour on board than was permitted by their loading certificates. Once off the coast, these merchantmen sold the flour to waiting foreign vessels.<sup>143</sup> Using this information Gallatin instructed the collectors to initiate spot checks on vessels that had already completed loading their cargo and had received permission to depart.<sup>144</sup>

Thus, although there was no public notice-and-comment period prior to the issuance of the Treasury’s guidelines, Jefferson and Gallatin were not running a two-man show. The input of the local customs officials was indispensable. As information accumulated from the field, instructions from Washington became more and more detailed.<sup>145</sup>

### *b. Specific Delegations of Authority*

Even so, Gallatin recognized the necessity of delegating authority to the collectors and, indeed, of permitting them to delegate further. They were, for example, authorized to employ a corps of “temporary inspectors” in small ports who could grant clearances and provide certificates recognizing the landing of cargos. These personnel were also authorized to permit vessels to provide a general bond rather than specific bonds for each departure, if they were

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141. See Letter from Albert Gallatin, Sec’y of the Treasury, to John Shee, Collector of Phila. (Mar. 26, 1808) (on file with author).

142. See *supra* note 112 and accompanying text.

143. See Albert Gallatin, Circular of Nov. 12, 1808 (on file with author).

144. *Id.*; see also Letter from Albert Gallatin, Sec’y of the Treasury, to Thomas Forster, Collector of Presyne Isle (July 28, 1808) (on file with author) (warning of evasions on the Canadian border).

145. See, e.g., Letter from Albert Gallatin, Sec’y of the Treasury, to Allen McLane, Collector of Balt. (Apr. 15, 1808) (on file with author) (“The practice adopted by you in relation to special bonds . . . is certainly correct, and you will observe by my Circular of the seventh of this month that all the collectors have been directed to conform to the same rule.”); Letter from Albert Gallatin, Sec’y of the Treasury, to John Shee, Collector of Phila. (May 9, 1808) (on file with author) (asking the collector to communicate what articles might be safely added to the list of permitted articles so that the Treasury “may thereby be enabled to adopt some additional rules”).

confident that the ships were employed only in the coastal trade.<sup>146</sup> Similarly, although the initial Embargo Act gave the President the authority to issue “such instructions to the officers of the revenue, and of the navy and revenue cutters of the United States, as shall appear best adapted for carrying the same into full effect,”<sup>147</sup> much was subdelegated, first to Gallatin and through him to the collectors.<sup>148</sup> Hence, though the captains of revenue cutters received their commissions directly from the Treasury Department, the collectors were responsible for the general operation of each port’s revenue cutters, including how they should be stationed, organized, and deployed. Indeed, in 1809, collectors were given authority to contract for and direct additional “fast sailing vessels” if they thought it necessary to stop evasions.<sup>149</sup> And although the supplementary act of April 25, 1808, barred the departure without presidential permission of any vessel having cargo on board for any district adjacent to the

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146. Gallatin, Circular of Apr. 28, 1808, *supra* note 112. This circular also provided detailed instructions for (1) the sixth section of the Act, which forbade the departure of any vessel having a cargo on board for any district adjacent to the territory of a foreign nation, Third Supplementary Act, *supra* note 70, § 6, 2 Stat. at 500; and (2) what collectors should consider in finding “an intent to evade” the embargo, *see* Gallatin, Circular of Apr. 28, 1808, *supra* note 112; *see also* Albert Gallatin, Circular of Apr. 7, 1808 (on file with author); Albert Gallatin, Circular of Apr. 29, 1808 (on file with author) [hereinafter Gallatin, Circular of Apr. 29, 1808] (authorizing payment of twenty cents per clearance to compensate temporary inspectors); Letter from Albert Gallatin, Sec’y of the Treasury, to Gabriel Christie, Collector of Balt. (Jan. 9, 1808) (on file with author).

147. Ch. 5, § 1, 2 Stat. 451, 452 (1807).

148. *See* Letter from Albert Gallatin, Sec’y of the Treasury, to Jeremiah Olney, Collector of Providence (July 23, 1808) (on file with author) (providing that the commanding officers of the gunboats were to be governed by general rules established by the several collectors).

149. Albert Gallatin, First Circular of Jan. 16, 1809 (on file with author) (“You are hereby authorized by the President in conformity with the 13th Section of the act of 9th instant to hire for a term not exceeding six months, and to arm and employ a fast sailing vessel of the dimensions and draft of water best calculated for the object but not exceeding one hundred and thirty tons. The vessel may be commanded by a master, first and second mate, whom you will nominate to me, but in the meanwhile appoint and employ, and who will be paid at the same rate as a similar officer on board the Revenue Cutters: the crew not to exceed twenty five men, and the vessel to be armed with guns or cannonades and muskets, in the best manner which you can provide. She is intended principally to prevent escapes of vessels from your District; and when not wanted for that purpose, to cruize as you may direct.”); *see also* Albert Gallatin, Second Circular of Jan. 16, 1809 (on file with author) (“You will be pleased to report the result of your inquiry, stating particularly the construction, dimensions, draft of water, and price of such vessel or vessels, also whether guns or cannonades for arming them can be obtained, and at what price.”).

territory of a foreign nation,<sup>150</sup> Gallatin authorized the collectors in districts adjacent to foreign nations to grant permission when they saw fit.<sup>151</sup>

The second supplementary act of March 12, 1808, which exempted vessels departing to recover personal property abroad, also demanded individualized determinations of the legitimacy of these recovery voyages.<sup>152</sup> Under Gallatin's instructions, the collectors were given authority to receive applications stating the value and type of property to be imported and proof of possession, and, when warranted, to grant permission to vessels of a tonnage proportionate to the type of property intended to be imported.<sup>153</sup> Through such delegations and subdelegations, the political authority of the President was rapidly bureaucratized and brought under the (sometimes tenuous) control of Treasury regulations.

*c. Interpretive Guidelines*

The primary purpose of the Treasury's massive issuance of circulars and interpretive correspondence was not to gain local knowledge or to delegate authority, but to guide the exercise of discretion by widely dispersed enforcement personnel. Gallatin's important circular of April 28, 1808, describing how collectors were to form their "opinions" of when there was "an intent to evade," has already been mentioned.<sup>154</sup> Those instructions were then constantly updated as new information was received and further statutes were passed. Following a provision of the 1809 Enforcement Act,<sup>155</sup> for example, the Treasury provided new rules on what constituted "an intent to evade" that superseded the circular of April 28, 1808. The new rules—issued under an express statutory power of the President to direct detentions<sup>156</sup>—were harder

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150. Third Supplementary Act, *supra* note 70, § 6, 2 Stat. at 500.

151. See Gallatin, Circular of Apr. 29, 1808, *supra* note 146; Letter from Albert Gallatin, Sec'y of the Treasury, to George Hoffman (Apr. 29, 1808) (on file with author).

152. Second Supplementary Act, *supra* note 67, § 7, 2 Stat. at 475.

153. See Gallatin, Circular of Mar. 21, 1808, *supra* note 135. There were two exceptions to this grant of discretion: (1) the vessel could not exceed the rate of one ton for each \$100 of the value of the property; and (2) in any cases in which the collector doubted whether there was an intent to evade the embargo, the application had to be referred to the Treasury Department. See *id.*; see also Albert Gallatin, Circular of July 1, 1808 (on file with author) (providing more specific rules for granting permission to vessels seeking to bring back personal property into the United States under section 7 of the second supplementary act).

154. See *supra* note 112 and accompanying text.

155. Ch. 5, § 10, 2 Stat. 506, 509 (1809).

156. The absence of this authority from earlier statutes had important legal consequences. See *infra* notes 182-189 and accompanying text.

edged, expressly forbidding certain types of shipments, thus directing rather than guiding the formation of the collectors' "opinions."<sup>157</sup>

*d. Internal Accountability for Seizures and Forfeitures*

The first supplementary act, passed on January 9, 1808,<sup>158</sup> provided that all penalties and forfeitures incurred by the embargo might be mitigated or remitted in the manner prescribed for customs duties generally.<sup>159</sup> Petitions for relief were to be transmitted to the Secretary of the Treasury who, under the Enforcement Act,

shall thereupon . . . have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof if, in his opinion, the same shall have been incurred without willful negligence, or any intention of fraud in the person or persons incurring the same; and to direct the prosecution . . . to cease . . . upon such terms or conditions as he may deem reasonable and just.<sup>160</sup>

Aggrieved merchants, masters, shippers, or ship owners might, therefore, obtain relief directly from the Secretary.

These petitions also provided information to the central officials concerning the behavior of the field personnel. It is unclear from the general correspondence and circular letters whether the Treasury had a standardized system for sanctioning malfeasance, but it seems that an informal one existed. If the charges leveled in a petition were serious enough, Gallatin asked for an explanation.<sup>161</sup> And while Gallatin monitored the actions of the collectors, they exercised oversight and control over lower-level officials. Correspondence between Gallatin and the collectors reveals that surveyors and inspectors, for example, were required to send regular reports to the collectors regarding the

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157. See Gallatin, Circular of Jan. 14, 1809, *supra* note 136.

158. First Supplementary Act, *supra* note 64, 2 Stat. 453.

159. See Act of Mar. 3, 1797, ch. 13, 1 Stat. 506.

160. § 10, 2 Stat. at 509. For examples of such petitioners, see Letter from Albert Gallatin, Sec'y of the Treasury, to J. Bennet, Collector of Bridgetown (Feb. 16, 1808) (on file with author); Letter from Albert Gallatin, Sec'y of the Treasury, to John Shee, Collector of Phila. (Mar. 3, 1808) (on file with author); and Letter from Albert Gallatin, Sec'y of the Treasury, to Enoch Sawyer, Collector of Camden (May 16, 1808).

161. See Letter from Albert Gallatin, Sec'y of the Treasury, to Berry Wild, Deputy Collector of Boston (Nov. 16, 1808) (on file with author) (asking for the collector's response to a charge of partiality in issuing permits).

boarding and searching of vessels, the confiscation of illegal cargo, and the investigation of smuggling activities.<sup>162</sup>

Collectors at different ports also engaged in some forms of “peer review.” They corresponded regularly to coordinate the enforcement of the laws. Coordinated action became increasingly important with the passage of the third supplementary act of April 25, 1808, which required a certificate of landing each time a vessel entered into a port, to ensure that the ship had not illegally loaded or unloaded cargo along the way.<sup>163</sup> In part because of the infeasibility of organizing the certificates of landing through the Treasury Department, the management of these certificates fell to the collectors at the various ports acting in concert.<sup>164</sup>

### 3. *The Role of Judicial Review*

Legal control of the embargo’s administration was divided between the federal and state courts. Enforcement suits—that is, suits for bond forfeitures, penalties, and the forfeiture of vessels and their cargo—were pursued in federal court. Suits against federal officials for illegal conduct were largely brought in state court as common law actions of trespass, replevin, and the like. In both situations, the legality of administrative action was at issue. Customs collectors or naval officers could detain ships because they intended to violate or had violated the embargo statutes. But the ship and its cargo were not forfeited, nor would other penalties attach, unless the U.S. Attorney for the district brought an action against the vessel or the owner and prevailed on the merits. The judgment in that action would determine, at least implicitly, whether the official detention or seizure had been proper. Similarly, officials sued in trespass, or under some other writ, for detaining a vessel or its cargo could only escape liability by pleading their legal authority under the embargo statutes. Because they had no immunity, the legality of their acts would be determined by trying out their defenses on the merits. These relatively straightforward approaches to determining the legality of official conduct were complicated,

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162. See Letter from Albert Gallatin, Sec’y of the Treasury, to Enoch Sawyer, Collector of Camden (Mar. 31, 1808) (on file with author) (noting that the bonds contemplated by the embargo acts must be taken by the collector himself and that the surveyors were not authorized to clear vessels until the collector did so).

163. See Third Supplementary Act, *supra* note 70, 2 Stat. 499; Letter from Albert Gallatin, Sec’y of the Treasury, to Allen McLane, Collector of Wilmington (Dec. 30, 1807) (on file with author) (stating that the certificate of landing for goods transported in the coastal trade should be produced within four months).

164. See Letter from Albert Gallatin to Enoch Sawyer, *supra* note 162 (requiring collectors to give the names of suspicious vessels to other collectors).

however, by divisions of authority, both between federal and state courts and between judges and juries. And these divisions made lawsuits a particularly potent threat to the financial well-being of enforcement personnel, particularly collectors.

*a. The Embargo and the Federal Judges*

Thomas Jefferson was famously distrustful of the federal judiciary.<sup>165</sup> He viewed it as antidemocratic and as the last stronghold of Federalist ideology. And notwithstanding Judge Davis's opinion sustaining the constitutionality of the embargo legislation, Jefferson also believed that the federal courts obstructed the embargo's implementation.<sup>166</sup> But a look at the reported cases suggests that the judges were relatively evenhanded in their approach. Moreover, their involvement in embargo litigation foreshadowed the development of some important principles of contemporary administrative law.

Several Supreme Court decisions concerning the embargo were unhelpful to the administration, but it is hard to view them as legally unjustified. For example, in *Durousseau v. United States*,<sup>167</sup> the government sued to secure forfeiture of a bond guaranteeing that a ship would land and discharge its cargo at a U.S. destination. The ship landed in Havana and the master claimed to have been driven there by weather. The Spanish government refused to allow the ship to clear port without selling its cargo. When it returned empty, the United States moved to have its bond declared forfeit. The lower court ruled for the government. In its view, the bond guaranteed that the ship would land its cargo in an American port unless it was lost by "dangers of the sea," not unless it was sold in a foreign port where the ship had been driven by those dangers. The Supreme Court reversed. It was of course true that the owner had obtained the benefit of selling the cargo in a foreign port where prices were dramatically higher than at home. But having been driven there by the weather and forced to sell by a foreign power, the owner could not be said to have violated his agreement.<sup>168</sup>

The Supreme Court upheld technical defenses by ship owners in other cases as well. In *The Sloop Active v. United States*,<sup>169</sup> a fishing vessel loaded with

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165. See ACKERMAN, *supra* note 90, at 111-268 and sources cited therein.

166. See 1 WARREN, *supra* note 84, at 325-38.

167. 10 U.S. (6 Cranch) 307 (1810).

168. *Accord* United States v. Hall, 10 U.S. (6 Cranch) 171 (1810).

169. 11 U.S. (7 Cranch) 100 (1812).

provisions was stopped after leaving the wharf but before having cleared the harbor. Although the vessel had no permit to sail, the Court would not affirm the lower court's decision in favor of forfeiture. The embargo statute made it an offense to leave "port" on an unlicensed foreign voyage. The sloop *Active* had left the wharf, but it had not yet cleared the port.

*Otis v. Bacon*<sup>170</sup> was cut from the same cloth. The Court reviewed a Massachusetts Supreme Judicial Court determination that a collector was liable for conversion for detaining a ship and its cargo. The collector argued that section 11 of the statute of April 25, 1808,<sup>171</sup> authorized detention if in his opinion the vessel intended to violate the embargo, and he was of the opinion that it had so intended. However, the vessel in question had arrived at a U.S. destination and had obtained a permit to unload before the collector seized it. Under the statute, collectors were authorized to detain vessels "ostensibly bound with a cargo to some other port of the United States," but that they believed were in fact headed for a foreign destination.<sup>172</sup> In the Court's opinion, a ship that had arrived at its destination and obtained a permit to unload could not be "ostensibly bound" anywhere. Hence, the collector had acted outside of his authority.

It is not hard to understand why an administration struggling to implement the embargo would view decisions like these as unfriendly. And perhaps they were. But the Court was interpreting a penal statute with harsh forfeiture provisions. It was certainly not an aberration for the Court in interpreting such legislation to demand that the actions of the defendant or alleged violator satisfy all the conditions of the statute before liability attached.

Moreover, the Supreme Court decided several cases that gave comfort to the administration. In *Brig James Wells v. United States*,<sup>173</sup> for example, the Court required that the exemption for dangers of the seas be demonstrated by clear and positive evidence. The Court obviously viewed as inherently suspicious the story that a vessel bound from New York to St. Mary's, Georgia, would be forced by wind, wave, and a leaky hull to put in at St. Bart's in the Lesser Antilles. The tradewinds in those latitudes blew from the east, not from the west.

And in a pair of cases, the Court also gave a very expansive reading to the collectors' discretion in detaining a vessel on the "opinion" that it intended to

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170. 11 U.S. (7 Cranch) 589 (1813).

171. Third Supplementary Act, *supra* note 70, § 11, 2 Stat. at 501.

172. *Id.*

173. 11 U.S. (7 Cranch) 22 (1812).

violate the embargo. In *Crowell v. McFadon*,<sup>174</sup> the plaintiff argued that the collector could rely on his opinion in a suit for damages only if he could demonstrate that there were some reasonable grounds for forming that opinion. The Court ignored this sensible argument, holding that the collector had the authority to seize if he had an honest opinion of the vessel's nefarious intent.

*Otis v. Watkins*<sup>175</sup> was to like effect. The plaintiff there argued that a collector must exercise reasonable care in seeking information to form his opinion of a vessel's intentions. In discussing his claims, the Court, per Justice Livingston, stated:

The jury are told that it was the collector's duty to have used reasonable care in ascertaining the facts on which to form an opinion.

. . . But the law exposes his conduct to no such scrutiny. If it did, no public officer would be hardy enough to act under it. If the jury believed that he honestly entertained the opinion under which he acted, although they might think it incorrect and formed hastily or without sufficient grounds, he would be entitled to their protection.<sup>176</sup>

It is perhaps understandable that the Court would take this broad view of the collector's authority in the context of a damage action tried before a Massachusetts jury. Not only was Massachusetts notoriously unsympathetic to the embargo, but the Chief Judge of the Massachusetts Supreme Judicial Court had often stated his opinion, extrajudicially, that the embargo was unconstitutional.<sup>177</sup> Indeed, on one occasion the U.S. Supreme Court had to reverse the Massachusetts court three times in the same case in order to provide legal protection for a hapless collector.<sup>178</sup>

Nevertheless, the idea that administrative discretion could be legally exercised, not only incorrectly, but hastily and without a rational basis, troubled Chief Justice Marshall. He filed a separate opinion noting that the statute under which the collector had acted required a collector who detained a vessel on his own suspicion to hold it "until the decision of the President of the United States, be had thereupon."<sup>179</sup> In Marshall's view, "[i]t follow[ed]

174. 12 U.S. (8 Cranch) 94 (1814).

175. 13 U.S. (9 Cranch) 339 (1815).

176. *Id.* at 355-56.

177. See 1 WARREN, *supra* note 84, at 341-42.

178. See *Otis v. Walter*, 24 U.S. (11 Wheat.) 192 (1826) (constituting the third round in the imbroglio).

179. *Watkins*, 13 U.S. (9 Cranch) at 356 (opinion of Marshall, C.J.).

necessarily from the duties of forming an opinion and of communicating that opinion to the president for his decision in the case, that reasonable care ought to be used in collecting the facts to be stated to the president and that the statement ought to be made.”<sup>180</sup> On that basis, Marshall believed that the trial judge’s instruction to the jury “that it was the duty of the collector, as collector, to have used reasonable care in ascertaining the facts on which to form an opinion” was not erroneous.<sup>181</sup>

Although, as *Watkins* illustrated, the general principle was surely not established as of 1815, Marshall seemed to have held a view that now forms the core of judicial review of administrative action: discretion is always conferred on administrators on the implicit assumption that it will be reasonably exercised. But, of course, administrators no longer have to defend themselves, save in very rare instances, in state court damage actions before hostile juries.

The most important case concerning the embargo, other than the decision on its constitutionality, was also not decided by the Supreme Court. *Ex parte Gilchrist*<sup>182</sup> involved one of the Treasury’s early instructions to collectors that the President considered vessels loaded with provisions to be suspicious and subject to detention. Acting on this instruction, the collector at Charleston refused to grant clearance to a vessel loaded with rice and ostensibly bound for Baltimore. The collector had stated publicly that in his personal opinion the vessel was not suspicious but that he was bound by presidential instructions to detain it. Armed with this admission, the owner brought a mandamus action in the circuit court to require the collector to grant a clearance.

Justice Johnson, for the circuit court, granted the mandamus, holding that President Jefferson’s instructions to the collector had been unauthorized. In Johnson’s view, the statute required the collector to exercise his own judgment in forming an opinion. Nothing in the statute gave the President the authority to direct the collector’s judgment (in fact, that authority would not appear explicitly until the Enforcement Act in 1809<sup>183</sup>). Without saying so directly, Johnson in effect held that the President had no inherent authority to direct lower-level officials in the exercise of their discretion under a statute—at least when the statute itself seemed to demand that the lower-level officer exercise his own judgment based on the facts and circumstances of the particular case. And in ringing tones he declared that “[t]he officers of our government, from the highest to the lowest, are equally subjected to legal restraint; and it is

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180. *Id.* at 358.

181. *Id.*

182. 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420).

183. Ch 5, § 2, 2 Stat. 506, 507 (1809).

confidently believed that all of them feel themselves equally incapable, as well from law as inclination, to attempt an unsanctioned encroachment upon individual liberty.”<sup>184</sup>

In his holding, Johnson foreshadowed a number of subsequent opinions, most famously the Supreme Court’s determination concerning President Truman’s instructions to his Secretary of Commerce in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>185</sup> But, at the time, the decision was something of a political bombshell. The Federalist press praised it to the skies. The Republican press attacked Johnson so relentlessly that he felt compelled to defend himself in print twice over the ensuing months.<sup>186</sup>

The President was outraged at this usurpation of his authority by a judge—even one whom he had appointed. He immediately demonstrated his contempt for the finality of judicial interpretation.<sup>187</sup> Jefferson secured an opinion from his Attorney General, Caesar A. Rodney, that controverted Johnson’s statement of the law.<sup>188</sup> Jefferson then distributed Rodney’s opinion widely to the press and to the collectors of revenue. The latter were instructed to ignore Johnson’s opinion and to follow the President’s instructions. The press reported that collectors were following the Attorney General’s opinion rather than Johnson’s. But Gallatin was not so sure. *Mandamus* was the least of the collectors’ litigation worries. Recognizing that liability in damages was a much larger problem, Gallatin wrote to Jefferson, “we cannot expect that the collectors generally will risk all they are worth in doubtful cases.”<sup>189</sup>

### *b. Juries and Judges in Federal and State Courts*

Gallatin’s fear that collectors would be swayed by the prospect of suit in state court was far from fanciful. He had proposed legislation protecting collectors by putting all embargo-related litigation in the federal courts and by

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184. *Gilchrist*, 10 F. Cas. at 356.

185. 343 U.S. 579 (1952).

186. For discussion of *Gilchrist* and the reactions to it, see 1 WARREN, *supra* note 84, at 324-38.

187. Jefferson’s consistent position was not that the judiciary had no final authority to determine the meaning of laws, including the Constitution, for purposes of deciding particular cases, but that this power was shared equally with the other branches of government when they were carrying out their constitutional functions. See DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 151-52 (Jefferson & His Time vol. 4, 1970); 1 WARREN, *supra* note 84, at 264-67.

188. See Letter from C.A. Rodney, Attorney Gen., to President Thomas Jefferson (July 15, 1808), reprinted in 1 AM. L.J. 429, 433-39 (1808).

189. 1 WARREN, *supra* note 84, at 338 (quoting Gallatin).

providing immunity from a suit for damages if the collector obtained a Treasury certification of the reasonableness of his actions. Congress responded by providing only that collectors would be protected if they were carrying out the statute or any general rules or instructions issued by the President. This left it to state courts and state-empanelled juries to determine the validity of the collector's defense. That collectors would view this defense as a thin reed is surely understandable. State courts had gone so far as to issue injunctions and writs of mandamus against collectors ordering them to release detained vessels.<sup>190</sup> And juries refused to convict many who evaded the law, even when the cases were tried in federal court. John Quincy Adams wrote to W.B. Giles concerning the situation in Massachusetts: "There may be impediments to execution (of the laws) besides those known to the Constitution. . . . [T]he District Court, after sitting seven or eight weeks and trying upward of forty cases, has at length adjourned. Not one instance has occurred of a conviction by jury."<sup>191</sup>

The problems that Gallatin and Adams identified involved a complex and changing set of legal relations between federal and state jurisdictions and between judges and juries in the determination of law and fact. In the implementation of the embargo, these questions interacted to make successful judicial enforcement problematic at best and to render energetic administrative enforcement hazardous to an officer's pocketbook. We will consider enforcement first, then official liability.

Enforcement in federal court was of two types: libels in admiralty for forfeiture of ships and cargos, and civil actions for the forfeiture of bonds and civil penalties. The difference was highly consequential. Admiralty actions were tried by the court without a jury; civil actions were jury trials. Douglas Jones investigated the results of enforcement actions in Massachusetts in 1808 and 1809.<sup>192</sup> All were in the court of Judge Davis, the Federalist judge who had so strongly endorsed the constitutionality of the embargo in *The William*.<sup>193</sup> In cases decided by Davis alone, most resulted in conviction, either by judicial determination after trial or because the defending parties pleaded "no contest."

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190. See WHITE, *supra* note 15, at 458-59.

191. 3 WORTHINGTON CHAUNCEY FORD, WRITINGS OF JOHN QUINCY ADAMS 287-88 (N.Y., MacMillan 1809).

192. See Douglas Lamar Jones, "The Caprice of Juries": *The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307 (1980).

193. See *supra* notes 88-91 and accompanying text.

Federal juries during the same period brought in twelve convictions while awarding fifty-three acquittals.<sup>194</sup>

Given these numbers, a legal struggle over the reach of admiralty jurisdiction and the role of juries in admiralty and in civil actions was predictable. A number of technical arguments were available. The famous admiralty provisions of section 9 of the Judiciary Act of 1789 reserved “to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.”<sup>195</sup> And even before encountering issues concerning the enforcement of the embargo of 1807-1809, the Supreme Court had been given two major opportunities to try to draw the boundary between admiralty and the common law.<sup>196</sup> According to that jurisprudence, admiralty jurisdiction applied to offenses against navigation acts when (1) the suit was in rem (i.e., based on a seizure of property); (2) the offense occurred wholly on water; and (3) the legislation imposed only civil penalties.

Under these criteria, respondents seeking a common law jury trial could argue as a factual matter that the offense involved was partially land-based or took place on inland waters that did not qualify at that time as within the maritime jurisdiction of the federal courts. They could argue as a legal matter that the embargo was intended as criminal legislation. Indeed, there was respectable opinion that admiralty practice itself included jury trials because English practice, from which ours was drawn, treated violations of revenue, trade, or navigation statutes as offenses tried by jury in the Court of Exchequer.<sup>197</sup> The creation of new vice-admiralty courts that could try such cases without a jury was one of the crucial grievances that set the colonies on the course to revolution.<sup>198</sup>

The role of the jury in civil cases at common law was also hotly contested. In colonial practice juries had frequently decided issues of both law and fact.<sup>199</sup>

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194. Jones, *supra* note 192, at 326 n.68; *see also* 3 FORD, *supra* note 191, at 287 (noting that there were no jury convictions in 1808).

195. An Act To Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789).

196. *See* United States v. The Schooner Betsey & Charlotte, 8 U.S. (4 Cranch) 443 (1808); United States v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796); *see also* United States v. Schooner Sally, 6 U.S. (2 Cranch) 406 (1804).

197. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 349-50 (photo. reprint 1970) (N.Y., O. Halsted 1826).

198. *See* AMMERMAN, *supra* note 58, at 64-67.

199. *See* Mark DeWolfe Howe, *Juries as Judges of the Criminal Law*, 52 HARV. L. REV. 582, 605-06 (1939); *see also* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 3-4 (1975) (describing juries as deciding law); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 592 (1993) (noting that juries in the colonies were “the chief

By 1808 that situation was in transition, with judges increasingly claiming the authority to instruct juries on the law.<sup>200</sup> This more general legal dispute about the role of the jury also affected legal struggles in embargo cases. Samuel Dexter, for example, the losing attorney on the constitutional issue in *The William*, continued to argue the constitutional question to juries in common law enforcement proceedings, notwithstanding Judge Davis's threat to hold him in contempt.<sup>201</sup> And, of course, general jury verdicts did not distinguish between findings of law and those of fact. There is no way to know how many of those Massachusetts jury acquittals or refusals to indict were based on the juries' opinion that the embargo was an unconstitutional infringement of liberty of commerce.

While jury nullification made enforcement of the embargo difficult in federal courts, the liability of federal officers responsible for enforcement was wholly in the hands of juries and was tried almost exclusively in state courts. Officers had no immunity for legal or factual error unless it was provided by statute. And although the Judiciary Act of 1789 provided for removal jurisdiction, it did not provide the federal courts with either general federal question jurisdiction or special jurisdiction for suits against federal officers.<sup>202</sup> Hence, most common law actions against enforcement officials in state court were not removable. Moreover, as Justice Johnson had held in *Ex parte Gilchrist*, instructions from superiors, including the President, would not protect an officer found to lack authority under the statute.<sup>203</sup>

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assessors of legal claims and the primary enforcers of legal rights for their communities"). As John Adams put it, "It is not only [a juror's] right but his Duty . . . to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court." John Adams, *Adams' Diary Notes on the Right of Juries* (Feb. 12, 1771), in 1 LEGAL PAPERS OF JOHN ADAMS 228, 230 (L. Kinvin Wroth & Hillier B. Zobel eds., 1965).

200. An important case to this effect was decided in Massachusetts in 1808. See *Coffin v. Coffin*, 4 Mass. (3 Tyng) 1 (1808); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 141-43 (1977).
201. See 1 WARREN, *supra* note 84, at 345 n.2. Warren had the legal context wrong, but the basic story is apparently correct. See Jones, *supra* note 192, at 321 n.49.
202. The one exception during the Jeffersonian period was a provision in the 1815 Non-Intercourse Act permitting removal to federal court of suits against revenue officers for conduct involving the enforcement of that statute. An Act To Prohibit Intercourse with the Enemy, and for Other Purposes, ch. 31, § 8, 3 Stat. 195, 198 (1815).
203. See 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420). In this, Johnson was following recent Supreme Court precedent, see *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), a circumstance that may partially explain Jefferson's appeal to his Attorney General, rather than to the Supreme Court, for an opinion.

In January 1809, in section 10 of the Enforcement Act, Congress made a halting step toward moving judicial review out of the context of state court damage actions and into federal court jurisdiction free of jury determination. Persons aggrieved by seizures of ships or property were given a special action in federal court against the seizing officer to seek release of their property via summary process. Prevailing petitioners recovered their goods; losers paid the collector treble his court costs.<sup>204</sup>

This potentially expeditious procedure might have enticed parties into federal court. But note what the statute omitted. Federal court jurisdiction was not exclusive; common law actions in state court remained available. And in those actions the statute merely allowed the collector to “plead the general issue, and give this act and the instructions and regulations of the President *in evidence*, for his justification and defence.”<sup>205</sup> Gallatin’s proposals for exclusive federal jurisdiction and for Treasury determination of reasonable grounds for seizure were rejected by a Congress that, in the same statute, authorized the President to enforce the law by using the Army or state militias. Attachment to state court protection of private rights against federal administrators remained strong.

The risk to collectors, and to their willingness to enforce the law, was thus hardly a figment of Gallatin’s imagination. We have already encountered William Otis, who had to appeal to the Supreme Court three times to avoid liability in just one case.<sup>206</sup> White has also recounted the travails of David Gelston,<sup>207</sup> appointed collector for the port of New York in 1802. While gaining \$37,000 through his share of the value of seized property during his eighteen years of service, he lost \$107,000 in only one of the lawsuits brought against him complaining of wrongful seizures. Gelston was known as a vigilant officer but hardly a swashbuckling wielder of the sword of federal authority. One congressional report said that “[w]hile any thing was left to the discretion or judgment of Mr. Gelston, he inquired, examined, reported, but made no seizure.”<sup>208</sup>

The only remedy for officers like Otis and Gelston when found personally responsible by state courts was to throw themselves on the mercy of Congress. But the claims committees were not necessarily merciful and were always slow.

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204. See Enforcement Act, ch. 5, § 10, 2 Stat. 506, 509-10 (1809).

205. *Id.* (emphasis added).

206. See *supra* notes 170, 175, 178 and accompanying text. Otis was so harassed that at one point he fled the country. See WHITE, *supra* note 15, at 156 n.31.

207. See WHITE, *supra* note 15, at 153-56.

208. H.R. DOC. NO. 169-1, at 1 (1818).

In response to one of Gelston's claims for reimbursement, Congress delivered the following dictum:

While the Government has important rights which are to be duly regarded, the citizen has his rights, which should not be overlooked nor forgotten in our zeal to enforce the laws. If an officer will wantonly and without probable cause seize upon the property of an individual who is engaged in carrying on a lawful commerce, he ought to be made to respond in the courts of justice for the injury inflicted, without the most remote prospect that he will be remunerated by the Government whose laws he has violated by oppressing one of her citizens.<sup>209</sup>

This in a case in which Gelston had lost in court because of a key witness's refusal to testify and had appealed to Congress without substantiating records because they were lost when the British burned Washington in 1814. In other instances, Gelston, or rather his estate, belatedly obtained some congressional relief. Having left office in 1820, his accounts were finally settled in 1842.<sup>210</sup>

In the face of these obvious disincentives to energetic official action, why did the system of judicial review of federal official action by juries in state common law damage actions persist? A modern answer might emphasize the peculiar incentive structure of federal officeholding. Collectors like Otis and Gelston, along with scores of other officials, were compensated wholly or in part by fees and commissions. This system incentivized diligence and promoted action. The prospect of damages for malfeasance, by promoting caution, made the incentives symmetrical—more or less.

But the better explanation probably lies in history and political ideology. The jury was a bulwark of protection against official oppression for colonial Americans subjected to rule from afar. The Crown could manipulate admiralty court jurisdiction to avoid juries and protect officers, as it had done in the Stamp Act.<sup>211</sup> But as long as common law courts remained open, juries could provide a check on arbitrary officials.<sup>212</sup>

This history informed the Anti-Federalist opposition to a federal judiciary and shaped the provisions of the Judiciary Act of 1789, not to mention the Sixth and Seventh Amendments, which preserve state court jurisdiction and the right to jury trial.<sup>213</sup> Jeffersonian Republicans were the direct descendants

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209. H.R. REP. NO. 23-276, at 2 (1834), *quoted in* WHITE, *supra* note 15, at 155.

210. *See* WHITE, *supra* note 15, at 155 & n.29.

211. OLIVER M. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* 212 (1951).

212. HORWITZ, *supra* note 200, at 28.

213. *See* Mashaw, *supra* note 3, at 1322-24 and sources cited therein.

of the Anti-Federalists. While Federalist Congresses had made some movement toward protecting officials from damages when their acts, although illegal, were taken with probable or reasonable cause,<sup>214</sup> Republican Congresses were ideologically inclined to distrust both executive discretion and judicial judgment. Jefferson could lead them to compromise their ideological commitments to experiment with the embargo—a regime that ultimately authorized the exercise of administrative discretion of a breadth and force almost unique in American history. But Congress balked when asked to limit official accountability to the people through jury trial.<sup>215</sup>

#### *D. The Embargo and the Development of Administrative Law*

Several important developments have already been mentioned: the extreme “presidentialism” of the embargo system; Justice Johnson’s insistence that Congress’s statutory allocation of decisional authority trumped any inherent power of the President to instruct subordinates; Jefferson’s “nonacquiescence” in Johnson’s ruling; Chief Justice Marshall’s tentative development of the idea that the conferral of administrative discretion implicitly demanded reasoned and reasonable exercise of that discretion; and the potentially devastating effect of judicial review of federal official conduct in the form of state common law actions tried before local juries.

At a more general level, the embargo experience demonstrates a recurring pattern in the competition between administration and legality. The law can often function only through administration. But administrative discretion is at war with law. And both courts and administrators instinctively seek to bring discretion under control. Courts faced with claims of individual rights are loath to find that the law is powerless in the face of administrative malfeasance. Administrators, because of the imperatives of responsible administration, shrink from unconstrained discretion vested in themselves and fear the centrifugal effects of discretion vested in subordinates. If for no reason other than self-protection, they often seek to establish guidelines for their own discretionary judgments. And they inevitably construct supervisory routines and modes of instruction to bend peripheral discretion toward centralized control.

This tendency to make discretion answerable both hierarchically and legally is prominent in the story of the embargo’s implementation. Jefferson was given

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<sup>214.</sup> *Id.* at 1330.

<sup>215.</sup> Protection from state courts, but not from juries, was provided for customs collectors in 1817. See An Act To Continue in Force an Act, Entitled “An Act Further To Provide for the Collection of Duties on Imports and Tonnage,” ch. 109, 3 Stat. 396 (1817).

enormous statutory discretion under the embargo statutes, but one of his first acts was to issue an interpretation limiting his own authority.<sup>216</sup> He delegated much of his decisional authority to Gallatin, as Secretary of the Treasury, but with a clear default rule for doubtful cases. And Gallatin energetically employed the system of Treasury circulars and instruction letters that Alexander Hamilton had pioneered in the early years of national revenue collection<sup>217</sup> to guide the actions of collectors scattered throughout the ports of the eastern seaboard.

But internal administrative attempts at lawfulness, at creating an internal law of administration through administrative direction, almost inevitably run afoul—at some point—of the external understanding of the law in Congress or in the courts. During the embargo episode, Congress complied to a large degree but still resisted some requests for authority that grew out of what the administrators viewed as administrative imperatives. These instances of congressional recalcitrance largely involved the administration's request for protection from the other guardian of lawfulness, the judiciary.

Here real conflict arose. The courts demanded strict conformity with statutes in the prosecution of forfeiture actions. And Justice Johnson resisted the unifying authority of presidential direction when he believed that the statute provided no such authority. Jefferson's nonacquiescence in the court's ruling reveals for the first time in American administrative history the critical question that lies at the core of our idea of the rule of law in a government of separated powers: when implementation of law is divided between administrators and courts, whose understanding of the law should prevail? The participants in this early struggle over the meaning of government according to law could no more definitively resolve that question than others have been able to do in the subsequent two centuries.

The judicial instinct to cabin administrative discretion is evident in Chief Justice Marshall's prescient equation of administrative legality with reasonableness and reason-giving. Marshall's view—that a statute conferring discretion and subjecting it to executive review implicitly contained at least a requirement to give reasons for the action when the actor was called to account in court—was, however, ahead of its time. His colleagues were focused instead on authority to decide—what Richard Stewart famously labeled the

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216. In sharply limiting the scope of a recently passed statute by news release, Jefferson perhaps initiated the practice of presidential "signing statements" that a recent ABA report credits to his protégé James Monroe. See TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS'N, REPORT 7 (2006).

217. See Mashaw, *supra* note 3, at 1307.

“transmission belt” theory of legality.<sup>218</sup> Revenue officials and U.S. Attorneys could in some instances plead the “reasonableness” of their actions to a judge who might hold them harmless in a damage action or on a motion for court costs even though their conduct had been unauthorized or their prosecution unsuccessful.<sup>219</sup> But these were exceptional statutory provisions that apparently suggested no general principle of “reasonableness” to the legal mind of the early nineteenth century.

At the same time, experience with the enforcement of the embargo provided graphic evidence of the potential for jury trials and common law damage actions to defeat effective administration. Congress surely understood this potential; Gallatin pointed it out in the administration’s request for protective legislation. Congress’s refusal to provide protection for federal officials from state courts and common law juries tells us something about the understanding of governance according to law in the Republican era—but what?

I suggested earlier that the answer lay in the role of the jury as a buffer between citizens and officials in Anti-Federalist and Republican ideology. That is surely a partial answer. But the role of the common law as the ultimate protector of individual liberty was hardly the partisan prejudice of Jeffersonian Republicans, or indeed of early-nineteenth-century Americans. A.V. Dicey famously proclaimed as late as 1939 that subjecting officials to the common law’s requirements in ordinary courts was the very essence of maintaining the rule of law in England and in countries, like the United States, that derived “their civilisation from English sources.”<sup>220</sup>

The Republican Congress that rejected Gallatin’s pleas was part of a legal world that was not ours. That legal world seems to have had no categories within which to work out a system of judicial review that “balanced” the demands of administrative efficiency against judicial protection of private rights to produce a nuanced approach to judicial control of administrative action. That is, perhaps, why Marshall’s suggestion that a collector’s opinion about a ship’s intentions might be reviewed for reasonableness and might require reasons, while utterly familiar and routine for us, seems to have attracted no support among his colleagues.<sup>221</sup> A claim of public authority was simply a special defense that might be offered by an “official” sued as a private

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218. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676 (1975).

219. See Mashaw, *supra* note 3, at 1330.

220. DICEY, *supra* note 39, at 330.

221. See *supra* notes 179-181 and accompanying text.

individual. If the official acted correctly, he had legal authority to act and was protected. If he made a mistake, he had no authority and was liable.

No one imagined that suit could be brought against the United States or the Treasury Department for the actions of a local revenue collector. Congress's tepid response to Gallatin's request for a Treasury-authorized reasonableness defense for collectors—a statutory, nonexclusive, federal court remedy to release impounded property—provided an action that was still to be brought against the officer individually. Relief against the government was provided only via internal administrative appeal to the Secretary for release of property or remittance of a forfeiture.

This system of common law remedies could underprotect private rights as well as disable administration. For while the system of common law remedies produced *de novo* review via jury trials in the enforcement of the embargo, in the public lands context, to which we shall soon turn, common law remedies in the form of property actions tended to make the decisions of administrative tribunals final. Judicial review was limited to claims of lack of jurisdiction. And here, once again, reasonableness was irrelevant.

This “jurisdictional” approach was not confined to public lands cases. *United States v. Morris*<sup>222</sup> arose out of the nonimportation statute that superseded the embargo. Morris was a U.S. Marshal for the Southern District of New York who had been ordered by the U.S. District Court for the District of Maine to sell certain goods and chattels that had been condemned in an enforcement action in that court. However, before Morris could sell the goods and remit the proceeds to the United States (to be shared between the United States and the collector and the surveyor for the port of Portland), the Secretary of the Treasury granted the ship owner's petition for a remission of the forfeiture. Morris then returned the vessel and its cargo to its owners.

The collector and surveyor brought suit against Morris, on their own behalf and on behalf of the United States, seeking the value of the vessel and cargo. Morris responded by pleading both “the general issue and a special plea in justification, that the forfeitures had been remitted by the Secretary of the Treasury.”<sup>223</sup> The plaintiffs responded that the Secretary of the Treasury had no authority to remit a forfeiture after the judgment of a district court and that, in any event, Morris's plea could not be effective because he had not indicated the justification and the factual basis for the Secretary's approval of the owner's petition for remission. The district court held for Morris, and the Supreme Court affirmed.

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222. 23 U.S. (10 Wheat.) 246 (1825).

223. *Id.* at 248.

Justice Thompson's opinion for the Court made clear that the statute providing the Secretary with authority to remit remained effective as long as the forfeited goods had not been sold and their proceeds distributed. More important for our purposes, Thompson thought that the grounds upon which the Secretary had acted were irrelevant and, therefore, need not have been pleaded by Morris in his answer. In Thompson's words:

It is not competent for any other tribunal, collaterally, to call in question the competency of the evidence, or its sufficiency, to procure the remission. The Secretary of the Treasury is, by the law, made the exclusive judge of these facts, and there is no appeal from his decision. . . . If the plea, by setting out the warrant at large, contains, as I have endeavoured to show, an averment, that a statement of facts had been transmitted to the Secretary by the proper officer, as required by the law, it was all that was necessary. This gave the Secretary cognisance of the case, and which was sufficient to give him jurisdiction. But what effect that statement of facts would, or ought to have, upon his *opinion*, whether the forfeiture was incurred without wilful negligence, or any intention of fraud, is a matter that could not be inquired into.<sup>224</sup>

This case, along with the embargo cases denying that collectors needed reasonable grounds for their opinions when seizing vessels, suggests a judicial tendency to treat administrators by strong analogy either to legislatures or to courts. If administrators acted within their authority, they were like legislatures, which did not need to give reasons for their determinations, or like coordinate tribunals, reviewable only for jurisdictional error. But the hapless official who was shown to have misgauged his authority had the same liability as a private party.<sup>225</sup>

Some non-barking dogs are worth considering as well. While the popular and judicial consideration of the constitutionality of the embargo focused on congressional power to act under the Commerce Clause, the war powers provisions, the inherent sovereignty of the nation, and the Necessary and Proper Clause, little attention (save in Congress<sup>226</sup>) was given to the constitutionality of delegating sweeping powers to the President to waive the

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224. *Id.* at 284-85.

225. Exceptions to this system were occasionally provided by statute. For example, limited protection was afforded revenue officers who enforced the Non-Intercourse Acts accompanying the War of 1812. See An Act To Prohibit Intercourse with the Enemy, and for Other Purposes, ch. 31, § 8, 3 Stat. 195, 198 (1815).

226. See CURRIE, *supra* note 17, at 148.

application of the embargo's prohibitions in particular cases or to suspend its operations in whole or in part. The summary seizure powers of collectors and naval officers and the ex parte review of those seizures by the President or his delegate seem not to have been challenged as due process violations.

The lack of due process concerns may be easily explained. Summary seizure of property for violation of revenue or navigation acts was customary in England, in the colonies, and in the states and the national government after the Revolution.<sup>227</sup> Indeed, it is customary today.<sup>228</sup> And, as we have seen, under the embargo there were ample post-seizure opportunities for an aggrieved owner to try both facts and law before a court, either in an enforcement or in a damage action. The necessities of enforcement easily justified ex parte administrative action.

As a theoretical matter, the nondelegation issue may be of more moment. Although that principle is honored much more in the breach than in the observance,<sup>229</sup> somewhat similar presidential powers to regulate wages and prices have faced stiff nondelegation challenges in times of both war<sup>230</sup> and peace.<sup>231</sup> But as a practical matter, the issue never came up except in Congress. Jefferson never exercised the suspension power. Disappointed petitioners for a presidential waiver neither wanted to attack the constitutionality of the President's authority nor had standing to complain of permission granted to others. Plaintiffs pursuing collectors for damages seem to have been content to challenge the way discretion was exercised, not the constitutionality of delegating that discretion in the first instance. And nothing in the Marshall Court's jurisprudence suggested that a nondelegation claim would receive a particularly hospitable reception.

In *The Cargo of the Brig Aurora v. United States*,<sup>232</sup> the Court upheld a delegation, under the subsequent Non-Intercourse Acts, of presidential authority to determine by proclamation whether Great Britain and France had revoked or modified their edicts such that "they shall cease to violate the

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227. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 272-80 (1855).

228. See, e.g., *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350 (1978) (describing the power to collect taxes by levy as "essential" to the tax system).

229. Cass Sunstein's quip that the nondelegation doctrine has had only one good year in the Supreme Court and over 200 bad ones is surely apt. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

230. See *Yakus v. United States*, 321 U.S. 414 (1944).

231. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

232. 11 U.S. (7 Cranch) 382 (1813).

neutral commerce of the United States.”<sup>233</sup> Justice Johnson’s opinion for the Court dismissed as almost frivolous the notion that Congress could not make the operation of a statute depend upon a condition while delegating to the President the determination of whether that condition had occurred.<sup>234</sup> But the Non-Intercourse Acts did not provide the President with the authority to pick and choose among the provisions that would be suspended or extended.

The only other nondelegation case decided by the Marshall Court is hardly more instructive. *Wayman v. Southard* upheld a delegation of authority to the courts to adopt rules and procedures to govern their own operations.<sup>235</sup> While articulating the idea that Congress could not delegate to others “powers which are strictly and exclusively legislative,” Marshall stated baldly that “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”<sup>236</sup> In typical fashion, Marshall made no attempt to distinguish between powers that were exclusively legislative and those that were not, nor did he bother citing *The Cargo of the Brig Aurora*. While Currie’s studies of constitutional debates in late-eighteenth- and early-nineteenth-century Congresses reveal that those debates were punctuated by repeated assertions of the nondelegation principle,<sup>237</sup> the early Supreme Court maintained an almost studied indifference to protecting Congress from itself.

Of the administrative law developments engendered by the embargo experiment, Johnson’s opinion and Jefferson’s nonacquiescence in it perhaps excite the greatest interest from twenty-first-century administrative lawyers. The “unitary executive” debate and the virtues or vices of “presidential administration” are hot topics for us and seem destined to remain so.<sup>238</sup> Johnson’s opinion suggests an understanding of the President’s inherent directive power that is decidedly unfriendly to strong unitarianism. Congress had lodged discretionary authority in the collectors and there it would stay until changed by statute, as it was in the 1809 Enforcement Act. As Kevin Stack has recently argued, Johnson’s position is supported by congressional practice

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233. *Id.* at 383 (citing An Act To Interdict the Commercial Intercourse Between the United States and Great Britain and France, and Their Dependencies; and for Other Purposes, ch. 24, 2 Stat. 528, 530 (1809)).

234. *Id.* at 388.

235. 23 U.S. (10 Wheat.) 1 (1825).

236. *Id.* at 42-43.

237. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 73-74, 109, 146-49, 160, 186-87, 244-48, 255 (1997); CURRIE, *supra* note 17, at 148, 152-53, 313.

238. See Kevin M. Stack, *The President’s Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263 (2006), and sources cited therein.

both then and now and by persuasive concerns for maintaining an appropriate balance between legislative and executive authority.<sup>239</sup>

Jefferson's refusal to accept the Court's position was equally consistent with presidential claims of authority throughout American history. At the time, the Federalist press denounced Jefferson's actions as further evidence of his disrespect for the law, his intent to destroy judicial independence, and the tyranny of the embargo.<sup>240</sup> To be sure, Jefferson's position, supported by Attorney General Rodney's opinion, directly contradicted Marshall's dicta in *Marbury v. Madison*<sup>241</sup> that mandamus would lie against even the highest national officers to require the performance of nondiscretionary duties. But these statements were dicta, and Johnson did not even cite *Marbury* in *Gilchrist*.<sup>242</sup>

Rodney's opinion, however, did cite *Marbury*—for the proposition that the 1789 Judiciary Act had, albeit unconstitutionally, conferred original mandamus jurisdiction on the Supreme Court, not on district or circuit courts.<sup>243</sup> And Johnson, in one written defense of his opinion, came very close to conceding this point.<sup>244</sup> So Jefferson and Rodney had a reasonable, if technical, argument that collectors could legally ignore writs of mandamus issued to them by lower federal courts.

But that technical jurisdictional argument sidesteps the larger issues of the constitutional position of the President in executing the law. Does the President have inherent constitutional authority to direct lower-level officials' actions under any statute, not just those explicitly delegating enforcement responsibility to the President himself? Should a President, or any responsible administrator for that matter, comply with lower court interpretations of the law with which he disagrees?

On the latter question one might certainly argue that the administration's most appropriate path would have been an appeal to the Supreme Court. But such an appeal would have taken months, and might have taken years. Meanwhile collectors needed instruction about whether to follow the presidential directives contained in Gallatin's circulars or their own opinions concerning statutory interpretation. A directive maintaining the administration's

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239. See *id.* at 316–22.

240. See 1 WARREN, *supra* note 84, at 331–33.

241. See 5 U.S. (1 Cranch) 137, 168–71 (1803).

242. See 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420).

243. 1 WARREN, *supra* note 84, at 330; Letter from C.A. Rodney to President Thomas Jefferson, *supra* note 188, reprinted in 1 AM. L.J. 429, 435 (1808).

244. 1 WARREN, *supra* note 84, at 335.

power of direction, under the relatively extreme circumstances of the embargo, was at least prudent and probably essential. Nor was Jefferson simply waging ideological warfare against the judiciary.

Jefferson explained the necessity for uniform rules, and his specific reasons for rejecting Johnson's position in *Gilchrist*, in a letter to Governor Pinckney.<sup>245</sup> The letter emphasized crucial rule of law values that are as familiar today as Jefferson seemed to believe they should have been then. First, Congress could not anticipate all of the ways in which the embargo might be evaded. Administrative discretion was necessary. But if that discretion were left to the collectors individually, the law would not be uniformly enforced; citizens would be treated unequally and, indeed, might be subjected to biased

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245. Jefferson wrote:

The Legislature having found, after repeated trials, that no general rules could be formed which fraud and avarice would not elude, concluded to leave, in those who were to execute the power, a discretionary power paramount to all their general rules. This discretion was of necessity lodged with the collector in the first instance, but referred, finally, to the President, lest there should be as many measures of law or discretion for our citizens as there were collectors of districts. In order that the first decisions by the collectors might also be as uniform as possible, and that the inconveniences of temporary detention might be imposed by general and equal rules throughout the States, we thought it advisable to draw some outlines for the government of the discretion of the collectors, and to bring them all to one tally.

With this view they were advised to consider all shipments of flour *prima facie*, as suspicious. . . .

But your collector seems to have decided for himself that, instead of a general rule applicable equally to all, the personal character of the shipper was a better criterion, and his own individual opinion too, of that character.

You will see at once to what this would have led in the hands of a[] hundred collectors . . . and what grounds would have been given for the malevolent charges of favoritism with which the federal papers have reproached even the trust we reposed in the first and highest magistrates of particular States . . . . The declaration of Mr. Theus, that *he* did not consider the case as suspicious, founded on his individual opinion of the shipper, broke down that barrier which we had endeavored to erect against favoritism, and furnished the grounds for the subsequent proceedings. The attorney for the United States seems to have considered the acquiescence of the collector as dispensing with any particular attentions to the case, and the judge to have taken it as a case agreed between plaintiff and defendant, and brought to him only formally to be placed on his records. But this question has too many important bearings on the constitutional organization of our government, to let it go off so carelessly. I send you the Attorney General's opinion on it, formed on great consideration and consultation. It is communicated to the collectors and marshals for their future government.

Letter from President Thomas Jefferson to Governor Charles Pinckney, *supra* note 127, at 102-04.

administration. Unified control by hierarchical superiors was therefore essential. Second, these principles of the constitutional organization of the government should not be treated as having been decided finally in a lawsuit that seemed to have been arranged between the parties, rather than after the serious consideration reflected in the enclosed opinion by Attorney General Romney.

The President bore the responsibility under the statutes and the Constitution for effective and uniform enforcement of the law. And Gallatin was energetically attempting to carry out that responsibility. From their perspective, controlling and guiding lower-level exercises of discretion was the essence of effective, impartial, and lawful administration. Most administrators would agree. Hence, executive nonacquiescence in the decisions of one or several lower court decisions, pioneered by Jefferson in the administration of the embargo, has persisted—along with dire predictions that it undermines rather than reinforces the rule of law.<sup>246</sup>

The broader issue of presidential directive authority remains similarly vexed. Arguably, the Supreme Court had already decided this question in *Little v. Barreme*.<sup>247</sup> But while the Court's opinion clearly established that an executive direction cannot, through misconstruction of a statute, immunize official action that would otherwise be unlawful, the misconstruction in that case was very clear. The statute authorized the seizure of vessels sailing to French ports, not vessels sailing from them, as the seized vessel had been. The seizing officer, by way of defense, offered specific instructions from the President that covered vessels both going and coming. Hence, while the officer had made a further mistake, seizing a Danish vessel thinking it to be American, the Court concluded that his actions could not have been justified even if the vessel had been of American origin.<sup>248</sup> By contrast, the instructions that Jefferson provided under the Embargo Act could have been read as simply narrowing the discretion of customs officials by telling them on what basis to form an opinion that a vessel intended to violate the embargo. There is surely a much stronger argument that the President had an inherent authority to provide that sort of direction.

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246. See, e.g., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990); see also Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339 (1991).

247. 6 U.S. (2 Cranch) 170 (1804).

248. See *id.* at 178-79.

Note, moreover, that the historical record seems barren of any claim of inherent executive authority to regulate foreign commerce, even though the embargo was motivated entirely by foreign affairs concerns and was explicitly justified as a substitute for war. Jefferson never claimed that the initial embargo statute—combined with the Take Care Clause or his powers as Commander in Chief—authorized him to deploy whatever means necessary to make it effective. Instead he returned to Congress again and again to seek additional authority—and to divest himself of permit authority (to repatriate goods in foreign ports) that he felt compelled to exercise but that threatened effective enforcement. One wonders what Jefferson and his contemporaries would make of the twenty-first-century claims of executive prerogative emanating from George W. Bush’s White House.<sup>249</sup>

In any event, the repeal of the embargo signaled not only the end of that experiment, but also the eclipse of virtually any form of “presidentialism” in administration for the remainder of the Jeffersonian-Republican period. Jefferson lost his power to lead Congress and his party before he left office.<sup>250</sup> His Republican successors seem never to have had it. The Republican Party had always been a loose ideological grouping subject to factional strife and regional tensions. And its dedication to limited government at the national level meant that the usual carrots and sticks—patronage and support for local projects at national expense (or exclusion from those electoral benefits)—were largely unavailable to Republican presidents seeking to maintain party unity.

Jefferson had been successful largely through charm and reputation. But none of his successors had his stature or his social skills, and, in any event, they were operating in a changed environment. New states expanded the membership in Congress beyond the limits of dinner-table diplomacy. And the intense competition for the favor of the party nominating caucus among presidential hopefuls further fractured Congress into warring camps. Indeed, because that competition often involved cabinet secretaries, who were also dependent on Congress for authority and funding, loss of power in Congress translated rapidly into loss of presidential control over the executive branch. Political control of administration shifted to Congress and its committees.<sup>251</sup>

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249. E.g., U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 1-3, 28-36 (Jan. 19, 2006), <http://www.fas.org/irp/nsa/dojo11906.pdf>.

250. On the closing months of Jefferson’s second term, see generally MALONE, *supra* note 131, at 527-670.

251. The dynamics of power in Congress and in the executive branch during the Jeffersonian-Republican period are ably dissected in JAMES STERLING YOUNG, *THE WASHINGTON COMMUNITY, 1800-1828*, at 213-49 (1966).

While the President and the Treasury worked out implementation of the embargo using the broad authority granted by a compliant Congress, that same Treasury (and after 1812, its General Land Office) sold the public lands pursuant to detailed federal statutes and subject to intense oversight by an ever more vigilant Congress.

## II. BUREAUCRATIZING LAND

Beyond desires for limited government and noncoercive implementation—desires much in evidence in the resistance to the embargo—Republicans prized two further principles that were highly salient to all administration: congressional control of policy, and governmental economy. Acting on the first yielded highly detailed legislation, constant legislative revision of ineffective policies that could not be modified by administrative action, and incessant congressional demands for reports on administrative costs and implementation. Honoring the second led to underfunding, understaffing, and enormously time-consuming accounting requirements.<sup>252</sup> In combination, these legislative tendencies made administration tedious, tardy, and inflexible. When put in the early-nineteenth-century context of a rapidly expanding population and territory, a rudimentary transportation system, and a citizenry imbued with the “frontier spirit,” faithful execution of Congress’s laws disposing of public lands took on some of the characteristics of *Mission: Impossible*.

Surveying and selling the public lands were the largest and most difficult administrative tasks of the Republican era. The “public domain,” as it came to be called, was the result of state cessions of their land claims beyond the Alleghenies, the Louisiana Purchase, the Spanish cession of the Red River Basin, and the acquisition of East and West Florida. All together this public domain represented a vast reservoir of potential national wealth and provided a crucial outlet for the growth of the American population. It also posed a political and administrative challenge of the first importance.

Alexander Hamilton had viewed the public lands primarily as a source of revenue and only secondarily as an opportunity for national expansion.<sup>253</sup> But

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252. White has discussed numerous examples of the administrative problems created by Republican congressional parsimony. See WHITE, *supra* note 15, at 188-89, 204-05, 235-36, 294, 400.

253. Hamilton’s report to the House of Representatives on July 20, 1790, stated:

[I]n the formation of a plan for the disposition of the vacant lands of the United States, there appear to be two leading objects of consideration: one, the facility of advantageous sales, according to the probable course of purchases; the other the accommodation of individuals now inhabiting the western country, or who may

revenue from land sales was disappointing in the Federalist period,<sup>254</sup> and the rapid development of the agrarian West, which would almost surely be a stronghold of Republican political sentiment, was not high on the list of Federalist political priorities. Jeffersonian Republicans took a very different view. Parceling out the public domain to settlers implemented Jefferson's vision of a nation of virtuous small farmers.<sup>255</sup> And land sales could not only make up for some of the revenue loss from the repeal of internal taxes, but could also produce government revenue without government coercion. The sale of public lands might simultaneously secure the Republican dream of an agrarian republic with an invisible government and no public debt.

Selling off the public domain was crucially important for other reasons as well. Settlers were hardly waiting for the national government to get its act together. They were moving west. If these settlers were to be loyal citizens of

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hereafter emigrate thither. The former, as an operation of finance, claims primary attention; the latter is important, as it relates to the satisfaction of the inhabitants of the western country.

Alexander Hamilton, Plan for Disposing of the Public Lands (July 20, 1790), in 1 AMERICAN STATE PAPERS, PUBLIC LANDS 4, 4 (Walter Lowrie ed., Wash., D.C., Duff Green 1834), available at <http://memory.loc.gov/ammem/amlaw/lwsp.html>. Hamilton's plan was oriented primarily at making sales attractive to large purchasers. He imagined that most sales would take place at a General Land Office located in the national capital. While some tracts would be set aside for small purchasers, he envisioned sale of whole townships, ten miles square, or in other quantities that might be sold by special contract. *Id.*

Hamilton also suggested that controversies over rights or claims be determined by commissioners of the General Land Office who were specially appointed for this purpose. Their decisions would be final. His plan called for general statutory authorization to be filled in by rules adopted by the General Land Office and published in the official gazette of each state, and in a territorial gazette if one existed. He cautioned Congress that the commissioners would be responsible for carrying out the general policies or principles of the legislation, but that Congress should "leave room for accommodating to circumstances which cannot, beforehand, be accurately appreciated; and for varying the course of proceeding, as experience shall suggest to be proper." *Id.* at 5. He worried that there would be "obstructions and embarrassments" in the execution of the land laws if Congress attempted to legislate "at greater precision and more exact detail." *Id.* The first Treasury Secretary's emphasis on sales of large tracts, administrative adjudication of claims, and broad executive policy discretion are in some sense the antithesis of Republican principles.

254. In 1800, for example, the last year of Federalist administration, only 67,800 acres of public lands were sold. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, H.R. DOC. NO. 93-78, pt. 1, at 430 (1975).
255. There is some question whether the policies adopted for the sale of the public domain primarily benefited small landholders rather than speculators who wanted to assemble larger tracts for investment. For an analysis of the role of speculation in the Midwest and the South, see PAUL W. GATES, LANDLORDS AND TENANTS ON THE PRAIRIE FRONTIER (1973) [hereinafter GATES, LANDLORDS]; and Paul Wallace Gates, *Private Land Claims in the South*, 22 J. S. HIST. 183 (1956) [hereinafter Gates, *Land Claims*].

the United States rather than agitators for secession or annexation by a foreign sovereign, they needed to hold valid title to their lands under a secure patent from the national government. If the U.S. government could not provide them with a valid claim to their property, they would surely be interested in some alternative governmental arrangement that could do so.

Systematic surveying, sale, and titling of public lands also had military and foreign affairs implications. Settlement needed to be expanded, but it also needed to be limited to those lands where Indian titles had been cleared. Failure to do so would provoke skirmishes—perhaps large-scale Indian wars. The fledgling American government had also promised hundreds of thousands, perhaps millions, of acres of “bonus lands” to veterans of the Revolutionary War, a crucial incentive for enlistment and service in an army chronically incapable of meeting its payroll.<sup>256</sup> And making good on these bonus promises was an important way to people the frontier with an already trained militia. Veteran settlers would be useful as a defense against Indian raids and as a buffer on the frontiers with Great Britain in the North and with Spain and France in the South and West.

Finally, land hunger was epidemic in the early nineteenth century. Eastern farmers, who had exhausted the fertility of their lands, and recently arrived immigrants both wanted to move west. So did the veterans who had been promised substantial land bounties that had never been received. Men of means and influence were also eager to speculate in western lands. If the government could not satisfy the desires of all these citizens clamoring for the sale of public lands, it would be a political failure of considerable moment.

The United States needed both an effective land policy and an efficient administrative system. It lacked both. The usually reliable and always interesting Henry Adams said in his biography of Gallatin: “The details of organization of the land system . . . implied much labor and minute attention, but they are not interesting, and they may be omitted here.”<sup>257</sup> For Adams’s biographical purposes, he may have been correct, although the importance of land office business to his subject when he served as Secretary of the Treasury

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256. See An Act To Revive and Continue in Force, an Act in Addition to an Act Intituled “An Act in Addition to an Act Regulating the Grants of Land Appropriated for Military Services and for the Society of the United Brethren for Propagating the Gospel Among the Heathen,” and for Other Purposes, ch. 30, § 4, 2 Stat. 236, 236 (1803); An Act in Addition to an Act Intituled “An Act Regulating the Grants of Land Appropriated for Military Services, and for the Society of the United Brethren for Propagating the Gospel Among the Heathen,” ch. 13, § 5, 2 Stat. 14, 15 (1800) [hereinafter 1800 Land Grant Act].

257. HENRY ADAMS, *THE LIFE OF ALBERT GALLATIN* 299 (Phila., J.B. Lippincott 1879).

can hardly be overstated.<sup>258</sup> But if one is interested in the life of the country and the development of its administrative systems, Adams's omission should not be repeated. As one historian asserted in another context, "[W]ho will say that the operations of the land office at Marietta or at Zanesville are less worthy of the work of the historian than are events like the taking of Fort Ticonderoga or the battle of Bunker Hill?"<sup>259</sup>

### A. Land Policy

Colonies that had sold public lands for revenue had generally used a flexible system. Their land offices or surveyors were given considerable discretion to negotiate the size of parcels sold and the price and terms of the sales. Following the advice of a report in which Jefferson had had a conspicuous role, the Continental Congress in 1785 adopted a much more bureaucratic approach. No land was to be sold until substantial parts of the public domain were surveyed. Surveyors were to use the range, township, and section system based on meridian lines that had been the general practice in New England. Land was to be sold in large lots at fixed prices and only at public auction.<sup>260</sup> Through meticulous surveying and carefully recorded transfers, a sturdy system of land titles would bring stability and prosperity to the American West. As Edward Everett said in 1856, by this system "[t]he superficies of half a continent is thus transferred in miniature to the bureaus of Washington."<sup>261</sup>

Everett should have said "was *eventually* transferred." The original system was ambitious, but its implementation was glacial. The Continental Congress compromised its policy almost immediately by selling large, unsurveyed tracts

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258. Very early in the administration of the land office business as established by Congress in 1800, Gallatin complained that the necessity to give opinions to field officers and to "examine and correctly to decide every doubtful case which may occur in the execution of the land law" was making it impossible for him to carry out his other duties as Secretary. But he did so for twelve years before Congress saw fit to provide any relief. MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837*, at 48-49 (1968).

259. Louis Pelzer, *The Public Domain as a Field for Historical Study*, 12 IOWA J. HIST. & POL. 568, 575 (1914), *quoted in* ROHRBOUGH, *supra* note 258, at x.

260. For a description of the development of the 1785 ordinance, see PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM 1785-1820*, at 41-65 (1910).

261. EDWARD EVERETT, *The Uses of Astronomy, Address on the Occasion of the Inauguration of the Dudley Astronomical Observatory* (Aug. 28, 1856), *in* THE USES OF ASTRONOMY 1, 25 (N.Y., Ross & Tousey 1856), *available at* <http://www.hti.umich.edu/cgi/t/text/text-idx?c=moa;idno=AAN1277.0001.001>.

to land company speculators. But even with this attempt to jump-start sales, the opening of the public domain failed to keep pace with actual settlement. Settlement on lands in which Indian claims had not been extinguished by treaty or purchase created constant conflict. To keep the peace, the government twice sent the Army to remove squatters and burn their improvements—creating enormous resentment and only partially stemming the tide of illegal settlement.<sup>262</sup>

Preoccupied by other matters, Congress did not return to the land sales issue until well after the Constitution was ratified. Meanwhile no sales were made under the 1785 ordinance. The new Congress apparently did not fault the original system. Its 1796 land statute<sup>263</sup> was quite similar to the 1785 ordinance and equally slow in getting anything to market. The law required that seven ranges be surveyed before any sales were allowed, and it maintained the large tract, fixed-price system. Most settlers could not afford to buy a large tract at two dollars per acre, nor were speculators terribly interested at that price.

Congress's solution in 1800<sup>264</sup> was to keep the price at two dollars, but to make sales on credit. To facilitate sales, it set up a system of four land offices in the West near the places where land was to be sold. Each office had a register to handle the details of surveys and the platting and registration of claims, and a receiver to handle the money.<sup>265</sup> Continuing the Federalist system for paying officers, the register and receiver were put on commission and further compensated by fees for various activities connected with the sale of the land.<sup>266</sup> But the implementation of public land sales as a serious national enterprise would fall to Republican Congresses and administrations.

The credit system boosted sales but created an administrative and political nightmare. Land could be bought for one-quarter down, with three subsequent payments that did not begin for two years. This approach fueled speculation by both settlers and investors. Buyers were confident that they could make the land pay, or resell it at a profit, before the second installment came due. Many

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262. See TREAT, *supra* note 260, at 46, 372-74.

263. An Act Providing for the Sale of the Lands of the United States, in the Territory Northwest of the River Ohio, and Above the Mouth of Kentucky River, ch. 29, 1 Stat. 464 (1796) [hereinafter 1796 Northwest Act].

264. See An Act To Amend the Act Intituled "An Act Providing for the Sale of the Lands of the United States, in the Territory Northwest of the Ohio, and Above the Mouth of Kentucky River," ch. 55, 2 Stat. 73 (1800) [hereinafter 1800 Northwest Amendments].

265. *Id.* §§ 1, 6.

266. See An Act Regulating the Grants of Land, and Providing for the Disposal of the Lands of the United States, South of the State of Tennessee, ch. 27, 2 Stat. 229 (1803) [hereinafter 1803 Land Act].

turned out to be wrong. The government thus rapidly created thousands of individual debtors who would have to be pursued for the remainder of their payments or be required to forfeit their land claims if they failed to pay. Vigorous enforcement against impecunious settlers with problematic national loyalties, and often with considerable “sweat equity,” was politically unattractive to say the least.<sup>267</sup>

Debt was in one sense the biggest land policy issue from 1800 to 1820. In 1804 Gallatin urged Congress to eliminate the credit system, sell land in smaller lots, and lower the prices.<sup>268</sup> Others, including special congressional committees empanelled to study the problem, recommended the same thing.<sup>269</sup> Congress, ever eager to promote sales and settlement and pressured by both territorial governments and speculators, simply retained the credit system and provided relief to debtors, usually by extending the time for payment.<sup>270</sup>

Multiple rounds of debt relief were rationalized on two grounds. First, because locals would not bid for their neighbors’ forfeited land, and indeed would be persecuted by so-called claims clubs if they did,<sup>271</sup> it was not clear in any event that the government could collect much from forfeiture sales. Moreover, debtors claimed that they were the victims of government policy. After all, Congress had enacted the embargo and authorized the War of 1812, both of which had undermined commerce. It had also failed to pacify Indian tribes on the frontier and was implicated in the virtual collapse of the financial system by its failure to recharter the first Bank of the United States.

As a consequence, the United States was selling land, but it was not collecting much revenue. In 1820 nearly half of the sales price for all lands sold in the prior twenty years remained outstanding.<sup>272</sup> This of course assumes that the government actually knew how much was owed. In a series of relief acts, Congress had, among other things, allowed claimants to pay partial amounts

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267. See BENJAMIN HORACE HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 82-100 (1924).

268. See Albert Gallatin, *Alterations of the Laws for the Sale of Public Lands* (Jan. 2, 1804), in 1 *AMERICAN STATE PAPERS, PUBLIC LANDS*, *supra* note 253, at 166, 167-68.

269. See Report of the House Committee on Public Lands, *Credit on Public Lands* (Apr. 5, 1806), in 1 *AMERICAN STATE PAPERS, PUBLIC LANDS*, *supra* note 253, at 265, 266. A similar recommendation was made by a special Senate committee at the time of the adoption of the 1812 statute, which established the General Land Office and reorganized the land office business. See *Revision of the Laws for the Sale of Public Lands* (Feb. 19, 1812), in 2 *AMERICAN STATE PAPERS, PUBLIC LANDS*, *supra* note 253, at 367, 367-69.

270. For an example, see *An Act To Suspend the Sale of Certain Lands in the State of Ohio, and the Indiana Territory*, ch. 28, 2 Stat. 378 (1806).

271. On the history and actions of claims clubs, see EVERETT DICK, *THE LURE OF THE LAND* 59-67 (1970).

272. For further treatment of the history of the credit system, see TREAT, *supra* note 260, at 125-42.

on their claims subject to interest and penalties based upon the degree to which they were delinquent.<sup>273</sup> And a new statute changing the terms of these indulgences appeared almost every year. The sheer computational challenge of keeping up with all these individual debtors, who dribbled in minute amounts for past due payments, tended to overwhelm both the local land offices and the Treasury officials who tried to oversee the system.<sup>274</sup>

The Secretary and other officials in the Treasury were given some relief in 1812 when Congress established a General Land Office with a commissioner to oversee the whole operation.<sup>275</sup> And no new sales on credit were allowed after 1820. Even so, Congress was compelled to provide additional debt relief in a series of acts from 1821 to 1832, at which point the last of the credit problems created between 1800 and 1820 were finally resolved.<sup>276</sup>

While credit had boosted sales, and purchasing interest at every auction was intense, parcels were slow to come on the market. Congress had agreed by treaty to honor claims based on French and Spanish grants, and it recognized by statute prior titles from colonial or state governments as well as “preemptive rights” for those who had settled lands prior to survey.<sup>277</sup> Lands could not, therefore, be finally surveyed and sold until the validity of existing private claims was determined. This turned out to be incredibly burdensome.<sup>278</sup> The British, Spanish, and French governments used different land systems, and the latter two permitted highly informal grants. Records were lost, and forgery and perjury were hardly unknown.<sup>279</sup> One student of the claims process in the Mississippi Territory estimated that there were twenty-three different types of

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273. See An Act To Extend the Time for Making Payment for the Public Lands of the United States in Certain Cases, ch. 36, 2 Stat. 591 (1810).

274. See ROHRBOUGH, *supra* note 258, at 31.

275. See An Act for the Establishment of a General Land-Office in the Department of the Treasury, ch. 68, 2 Stat. 716 (1812).

276. See ROHRBOUGH, *supra* note 258, at 137-56.

277. See An Act Respecting Claims to Land in the Territories of Orleans and Louisiana, ch. 36, 2 Stat. 440 (1807). Most of the relevant treaties and acts of cession relevant to private land claims in the Republican period and earlier are collected in E.J. BALDWIN, LAWS OF THE UNITED STATES, RESOLUTIONS OF CONGRESS UNDER THE CONFEDERATION, TREATIES, PROCLAMATIONS, SPANISH REGULATIONS, AND OTHER DOCUMENTS RESPECTING THE PUBLIC LANDS (Wash., D.C., Gales & Seaton 1828).

278. See TREAT, *supra* note 260, at 198-229 (describing, among many other things, the forty-year history of the settlement of the claims of “a few settlers” in Illinois and Michigan).

279. On the widespread frauds employed in making private land claims, see DICK, *supra* note 271, at 13-17.

claims available to parties pursuant to grants from Britain, Spain, and Georgia.<sup>280</sup>

Congress recognized that the territorial courts could not make decisions on all of these claims. It therefore created the nation's first large-scale administrative adjudication process, about which much more will be said later. Suffice it for now to note that this system, while it did heroic duty, only mitigated the delays. Delay provoked more settlers to "squat" on the public domain with no formal title. Informal settlement, in turn, generated new demands for "preemptive rights" that Congress often granted, thus creating more claims to be adjudicated.<sup>281</sup>

So-called bounty lands for veterans added a further layer of complication.<sup>282</sup> Special plots of land had been set aside as military bounty lands or exclusive military reserves. But these often had to be shifted as surveyors came back to report that this or that military reserve consisted largely of swamp or otherwise useless property. The distribution process was also complex. Veterans needed first to obtain a warrant, issued by the Secretary of War on a finding that the veteran satisfied whatever service criteria were specified for a land bounty. These specifications had been altered many times as Congress tried to deal with recruitment needs, both in the Revolutionary era and in the War of 1812. After receiving a warrant, the veteran then needed to turn the warrant into a deed or patent by "locating" the claim on eligible military reserve property. If the "location" was proper—that is, it was on surveyed lands free of other claims—the government issued a patent. The system was so difficult to administer that Revolutionary War claims were still being settled in the 1850s.

Part of the problem was that every military bounty policy seemed to generate individual or wholesale injustice and a demand for further remedial legislation. For example, in the War of 1812, Congress made bounty land available only to noncommissioned officers who enlisted between the ages of eighteen and forty-five and served under national rather than state authority.<sup>283</sup> This was a perfectly sensible recruitment policy. The Army needed able-bodied men, and the militias, when under state command, were unreliable at best. The rewards for commissioned officers were thought to be sufficient without land bounties. But when the time came to claim bounties, these and other

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280. R.S. Cotterill, *The National Land System in the South: 1803-1812*, 16 *MISS. VALLEY HIST. REV.* 495, 496 (1930).

281. See ROHRBOUGH, *supra* note 258, at 200-05.

282. On the system of military bounty lands, see HIBBARD, *supra* note 267, at 116-35; and TREAT, *supra* note 260, at 230-62, from which this description is taken.

283. See TREAT, *supra* note 260, at 247.

limitations collapsed under the weight of attractive petitions from disqualified veterans.

Abigail O'Flyng, for example, petitioned Congress for a bounty warrant and alleged the following facts: her husband and three sons had all served in the War of 1812, but all were disqualified under the existing criteria; her husband enlisted when he was over forty-five, and one son enlisted when he was under eighteen. In addition, her two sons who had been killed in battle had both received battlefield commissions. In short, this patriotic family had provided four soldiers, two of whom had been killed, and none of whom qualified for a bounty.<sup>284</sup> Responding to worthy petitions and to political pressures, Congress had by 1855 provided bounty lands for anyone who had at least fourteen days' service in any prior war.<sup>285</sup>

### *B. Administration*

Administering the laws for the disposition of the public domain was a superficially straightforward administrative task. First, uniform rules needed to be established for surveys, land sales, recording of titles, and accounting. Second, a system was required for the adjudication of private claims. Third, the public domain needed to be surveyed and put up for sale. Fourth, sales had to be recorded, moneys collected, and land patents issued. Finally, as with any administrative system, some means had to be established to determine whether the officials who were carrying out these tasks were doing their jobs accurately, efficiently, and honestly.

On another level, the tale of the administration of the public lands is a story of high politics and low farce, of individual heroics and massive corruption, and, perhaps most importantly, of the clash between the frontier mentality of western settlers and the legal and bureaucratic imperatives of the Treasury and the General Land Office. For Congress demanded technical exactitude from Land Office administrators but resisted hiring, compensating, and provisioning field personnel.<sup>286</sup> And it yielded repeatedly (and almost

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<sup>284</sup>. See 29 ANNALS OF CONG. 846 (1816).

<sup>285</sup>. See An Act in Addition to Certain Acts Granting Bounty Land to Certain Officers and Soldiers Who Have Been Engaged in the Military Service of the United States, ch. 207, 10 Stat. 701 (1855).

<sup>286</sup>. See Compensation of Registers and Receivers of the Public Lands (Feb. 24, 1824), in 4 AMERICAN STATE PAPERS, PUBLIC LANDS, *supra* note 253, at 7 (Asbury Dickins & James C. Allen eds., Wash., D.C., Gales & Seaton 1859); Compensation of the Surveyors General and Their Clerks (Jan. 16, 1827), in 4 AMERICAN STATE PAPERS, PUBLIC LANDS, *supra* note 253, at 874, 874-76 (Asbury Dickins & James C. Allen eds., Wash., D.C., Gales & Seaton 1859).

universally) to the demands of western settlers and speculators who could not, or simply refused to, abide by the requirements of existing statutes and regulations.<sup>287</sup>

### 1. *Establishing Uniform Policies*

As with modern administrative systems, uniform policy was pursued through statutory specificity, administrative rulemaking, and specific interpretations of the rules and statutes by high-level administrators, often in response to inquiries from the field.<sup>288</sup> And as with all such attempts to unify administrative action, these techniques were only partially successful.

#### a. *Statutory Specificity*

Beginning with its first post-Constitution land statute on May 18, 1796,<sup>289</sup> and continuing throughout the period under study, Congress struggled to be precise. It instructed its surveyors in great detail on marking the corners of townships, running section lines, marking the section corners with marks different from those used for the township corners, numbering sections, and so on.<sup>290</sup> Deputy surveyors were required by statute to mark a tree near each corner of each section with the number of the section and, over it, the number of the township.<sup>291</sup> Congress instructed them to “carefully note” in their field books the type and description of the corner trees and the numbers marked.<sup>292</sup> And it demanded that surveyors make measurements only with chains “containing two perches of sixteen feet and one half each, subdivided into twenty-five equal links,” and that these chains “be adjusted to a standard to be kept for that purpose.”<sup>293</sup>

Statutes specified when surveyed lands were to be sold, where, and under whose authority. Notice of the sale was required to be given in at least one newspaper of each state and territory two months prior to the sale, and sales at

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287. See generally DICK, *supra* note 271, at 1-69 (providing a splendid account of the very human side of the survey and sale of the public lands in the pre-Jacksonian period).

288. See, e.g., *Frauds in Land Warrants* (Apr. 12, 1808), in 18 ANNALS OF CONG. 2080 (1808).

289. 1796 Northwest Act, *supra* note 263, 1 Stat. 464.

290. See An Act Concerning the Mode of Surveying the Public Lands of the United States, ch. 14, 2 Stat. 313 (1805).

291. 1796 Northwest Act, *supra* note 263, § 2, 1 Stat. at 466.

292. *Id.*

293. *Id.*

different places could not take place less than one month apart. No land was to be sold for less than two dollars an acre, and terms were set for payment and receipt of the monies. Patents were to be issued only after receipt of the purchase price.<sup>294</sup> Forfeiture and resale were decreed if the money was not paid. Special requirements were made for the keeping of accounting books and for reports to the Secretary of the Treasury.<sup>295</sup> Congress tried to cover all contingencies, and in detail.

Revisions were constantly required. When the specified places of sale turned out to be too far from the buyers, Congress opened four new land offices.<sup>296</sup> When tracts offered for sale turned out to be too large, Congress authorized sales of half sections.<sup>297</sup> When it was discovered that errors in the original surveys had produced sections that did not contain 640 acres, surveyors were given new instructions.<sup>298</sup> When sales for cash (really, one-half down and a year to complete payment) failed to attract buyers, Congress initiated the credit system, along with its much more elaborate accounting system.<sup>299</sup> These requirements included the almost comically detailed provision that

the Registers of the Land Offices respectively, shall also note on the book of surveys, or original plot transmitted to them, every tract which may be sold, by inserting the letter A on the day when the same is applied for, and the letter P on the day when a receipt for one-fourth part of the purchase money is produced to them, and by crossing the said letter A on the day when the land shall revert to the United States, on failure of the payment of one-fourth part of the purchase money within three months after the date of application.<sup>300</sup>

Yet, recognizing that the complex accounting provisions in the statute might nevertheless be inadequate, Congress authorized the Secretary of the Treasury

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294. 1800 Northwest Amendments, *supra* note 264, § 5, 2 Stat. at 75-76.

295. *Id.* § 6.

296. *See id.*

297. *See* An Act Making Provision for the Disposal of the Public Lands in the Indiana Territory, and for Other Purposes, ch. 35, 2 Stat. 277 (1804) [hereinafter Indiana Territory Land Act].

298. Congress later declared by statute that inaccurate surveys would be considered accurate. *See* An Act Concerning the Mode of Surveying the Public Lands of the United States, ch. 14, 2 Stat. 313 (1805).

299. *See* 1800 Northwest Amendments, *supra* note 264, §§ 4-5, 7, 2 Stat. at 74-76.

300. *Id.* § 8.

to prescribe such further regulations “as to him may appear necessary and proper.”<sup>301</sup>

*b. Administrative Regulation*

And so, in statute after statute, Congress attempted to plug holes and solve problems created by its earlier efforts. But statutory specificity simply was not up to the job of instructing officials in the field.<sup>302</sup> The Treasury, and later the General Land Office, had to fill in the gaps with general regulations and with specific advice. For example, the statute requiring that trees mark the corner of townships imagined that nature would provide one at the exact spot that the surveyors’ chains indicated. Nature was not so kind, and an early regulation authorized surveyors to put a post at the true corner of the township and then mark two “witness” or “bearing” trees.<sup>303</sup> Detailed descriptions and compass bearings to the posts in the surveyors’ field notes presumably would allow the post subsequently to be located and properly identified. And, of course, trees did not always exist anywhere near the township corners. Regulations permitted the use of stone markers where the region supplied them.<sup>304</sup> On the prairie land of Indiana, additional regulations prescribed the use of posts surrounded by mounds of earth. The township corner mound was to be six feet square and three feet high; the mound at a section corner was to be only 2.5 feet across and 2.5 feet high. When the surveyors got further west, even posts were almost impossible to obtain. Surveyors were instructed to bury charcoal in a hole at the exact corner beneath a section or township mound. One story, perhaps apocryphal, tells of a surveyor who, in terrain completely devoid of wood or stones, stuck a burned matchstick at each corner of a section and entered in his day book that he had set charred sticks of the best available timber.<sup>305</sup>

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301. *Id.* § 11.

302. Congress seems belatedly to have recognized this truism when it stated that “[i]n all legislation, much must necessarily be left to construction, and the sound discretion of those charged with the administration of the laws.” H.R. REP. NO. 18-130, at 1 (1824).

303. For a description of surveying difficulties, see DICK, *supra* note 271, at 21-23.

304. Some of these regulations are collected in W.W. LESTER, DECISIONS OF THE INTERIOR DEPARTMENT IN PUBLIC LAND CASES AND LAND LAWS PASSED BY THE CONGRESS OF THE UNITED STATES TOGETHER WITH THE REGULATIONS OF THE GENERAL LAND OFFICE (Phila., H.P. & R.H. Small 1860). Lester reproduced, for example, the Manual of Instructions for surveyors as revised through 1855. *See id.* at 703-24.

305. The tale of the matchsticks is from GIFFORD PINCHOT, BREAKING NEW GROUND 81 (1947). Other examples are from DICK, *supra* note 271.

There seems to have been no particular process for adopting these general rules or regulations, which were issued as circulars or letters to the various local land offices or to the surveyors. While the land office personnel—the register and receiver in each office and the clerks they employed—doubtless attempted to follow the Treasury or General Land Office instructions, deputy surveyors in the field were sometimes a different matter. These “officers” were contract help, paid by the mile surveyed and operating under extreme conditions imposed by terrain and weather as well as by Indian tribes that sometimes took a dim view of their activities. Many made valiant efforts under extremely trying circumstances. Others defrauded the government. In Gladwin County, Michigan, the survey crew apparently did its work entirely from a hotel room, and the government had to spend \$50,000 to resurvey the 150 townships that this resourceful crew had so imaginatively plotted.<sup>306</sup>

Of course, problems with surveys were not the only, or even the most numerous, issues that arose from gaps or unrealistic requirements in the statutes or, indeed, from the attempt to apply general rules to specific cases. Faced with issues that their instructions seemed not to cover, field personnel inundated the Treasury and the General Land Office with inquiries. Malcolm Rohrbough’s well-known book, *The Land Office Business*, is based in large part on an analysis of the correspondence between field offices and the seat of government from 1789 to 1837.<sup>307</sup> According to Rohrbough’s bibliography, the general circulars sent from the General Land Office comprise four folders. Correspondence sent and received is contained in 156 volumes—excluding correspondence concerning private land claims, which was incessant. The correspondence between the Secretary of the Treasury and the Commissioner of the General Land Office alone occupies an additional fifteen volumes. One can only marvel at Rohrbough’s diligence (or that of his graduate students) and at the extraordinary efforts made to unify federal land policy by authoritative interpretation from the center to the periphery in the first three decades of the nineteenth century.

## 2. *Adjudicating Private Claims*

### a. *The Statutory System*

Although the surveyors had the utmost difficulty in reducing territory marked by rivers, swamps, mountains, and almost impenetrable underbrush to

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306. See DICK, *supra* note 271, at 24-30.

307. See ROHRBOUGH, *supra* note 258.

plats composed of the six-mile-square townships and one-mile-square sections that Congress demanded, the congressional concern for systematic and accurate surveying was well placed. The alternative system, used principally by Virginia prior to the cession of its public lands to the United States (and subsequently with respect to the Virginia Military Reserve), generated endless litigation. Under that system, settlers “located” lots by choosing tracts of land and having them surveyed by whatever boundaries (e.g., rivers, streams, bridges, or trees) came to hand. The results were inaccurate surveys and overlapping claims that took years to resolve.<sup>308</sup> Real property cases were the largest single category of substantive nonconstitutional cases on the Supreme Court’s docket between 1815 and 1835. And many of these cases resulted from Virginia grants made in Kentucky prior to cession or on the lands it reserved for Revolutionary War veterans.<sup>309</sup> Land claims often took years to unravel and involved highly complex questions of conflict of laws, statutory interpretation, the relationship between common law and statute, and the interplay of state, national, and international law.<sup>310</sup>

While the congressional survey scheme avoided many of the problems that plagued the Virginia system, it could not itself be implemented until preexisting claims of right to parts of the public domain were adjudicated. As previously mentioned, those claims were premised on grants from Spain, France, and Britain; grants from colonies and states with western land holdings prior to their cession to the United States; transfers from Indian tribes; and prior settlement without any assertion of title from a preexisting sovereign. Given the experience of the Supreme Court and the lower federal courts with land controversies and the inadequate resources of the territorial courts, Congress was under no illusion that judicial resolution of these claims was feasible. There were nearly 10,000 private claims in the Louisiana

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308. Paul Gates has reported Humphrey Marshall’s estimate that all the lands in Kentucky had been granted at least four times as well as his concern that sorting out the “infinite of conflicting claims” had “retarded [Kentucky’s] population—obstructed her improvement—distracted her people—impaired her morals—and depreciated the value of her rich soil, throughout the country.” GATES, *LANDLORDS*, *supra* note 255, at 14 (quoting 1 H. MARSHALL, *HISTORY OF KENTUCKY* 152–53 (Frankfurt, Ky., S. Robinson 1824)).

309. See G. EDWARD WHITE WITH THE AID OF GERALD GUNTHER, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35*, at 753–78 (History of the Supreme Court of the U.S. Nos. 3–4, 1988).

310. See *id.* For a discussion of several such cases, see GEORGE L. HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15*, at 590–603 (History of the Supreme Court of the U.S. No. 2, 1981).

Territory alone.<sup>311</sup> Alabama, Arkansas, Florida, Mississippi, and Missouri had at least another 6000 claims that were confirmed.<sup>312</sup>

Faced with private claims that were both voluminous and complex, Congress chose to establish a “commissioner” system in the hope that administrative adjudication could do speedily and effectively what judicial adjudication could not. Although this system ultimately accomplished its goals and laid the basis for an adjudicative process in the Land Office that persisted for decades, the trials and tribulations of the administrative adjudicators were many and varied.

And disappointed applicants never tired of petitioning Congress for relief. A perusal of the congressional materials preserved for this period in the *American State Papers* reveals a colossal number of documents related to public lands and particularly to private claims.<sup>313</sup> A substantial number of these documents are the reports of commissioners on private claims. A greater number (by several orders of magnitude) are petitions or congressional actions on petitions for relief from statutory requirements, legislative confirmation of claims, grants of preemptive rights, authority to withdraw erroneous locations of claims, and so on.<sup>314</sup> Many of these petitions were from individuals, but they also originated with land companies, towns, and states. Thus, while private claims were heard by commissioners, Congress was often the final arbiter.<sup>315</sup>

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311. Harry L. Coles, Jr., *Applicability of the Public Land System to Louisiana*, 43 *MISS. VALLEY HIST. REV.* 39, 51 (1956).

312. Gates, *Land Claims*, *supra* note 255, at 203.

313. For these materials, see 1-3 *AMERICAN STATE PAPERS, PUBLIC LANDS*, *supra* note 253; 4 *AMERICAN STATE PAPERS, PUBLIC LANDS*, *supra* note 253 (Asbury Dickins & James C. Allen eds., Wash., D.C., Gales & Seaton 1859); and 5 *AMERICAN STATE PAPERS, PUBLIC LANDS*, *supra* note 253 (Asbury Dickins & John W. Forney eds., Wash., D.C., Gales & Seaton 1860).

314. For an example of one of the many special statutes granting relief to individuals, see An Act in Addition to the Act Intituled “An Act Regulating the Grants of Land Appropriated for the Refugees from the British Provinces of Canada and Nova Scotia,” ch. 35, 2 Stat. 242 (1801).

315. Appeals to Congress persisted long after the claims commissions had completed their work. A House committee in 1836 complained that

[e]very succeeding year brings forth new and additional applicants, produced by the circumstances of speculators and companies, in various States of the Union, becoming interested by purchase in those grants, as well as by the multiplication of heirs of some of the original grantees. By these and other causes, the claimants are becoming more imposing from their wealth, numbers, and influence, yearly.

Gates, *Land Claims*, *supra* note 255, at 191.

*b. Claims Adjudication in Practice*

The claims adjudication process began in the Confederation period with the Continental Congress's resolution to provide for the recognition of claims by French settlers in the Illinois Territory. Congress authorized the territorial governor to recognize claims based on prior legitimate authority and, if a settler's legal title was inadequate, to allocate 400 acres per family to citizens who had settled there prior to 1783. The governor was to award these latter "donation lands" by lot and to examine titles otherwise presented. When titles were confirmed, land was to be laid out by survey at the claimants' expense. This general process sounded simple enough, but it was forty years before the final claims were resolved.<sup>316</sup>

The first official recognition of the complexities of the private claims powers seems to have occurred on February 18, 1791, when President George Washington laid Governor Arthur St. Clair's initial report on the Illinois claims before Congress. The Governor reported that claimants had appeared not only with some evidence of French governmental grants, but also with claims pursuant to Indian transfers and to a multitude of grants made by various Virginia officials when the territory had been a part of Virginia's western lands. These latter grants included executive awards by two different Virginia administrators and hundreds more provided by civil courts that Virginia had established in its western territory. St. Clair reported that the administrators' authority to make land grants was uncertain. As far as he could ascertain, the Virginia courts' authority was nonexistent.

St. Clair hardly knew what to do. Many of the claimants had been settled in this location for years and had improved the property upon which they made claims. Many also provided substantial aid to the United States during the Revolutionary War, both as suppliers of goods and services and as veterans of various militias. Yet virtually no written records existed to establish the time of their settlement or to evidence grants from the French government. Most of the Virginia grants were wholly without authority (and had been issued for the corrupt purpose of collecting fees from the grantees).<sup>317</sup> Moreover, following a royal proclamation in 1763, transfers by Indian tribes to individuals were not recognized.<sup>318</sup>

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316. The elaborate history of the resolution of these French settlement claims in the Northwest Territory, described below, is set out in some detail in TREAT, *supra* note 260, at 198-229.

317. *See id.*

318. Only the sovereign could extinguish Indian title by purchase or treaty, and in many places it was a criminal offense to accept such transfers. *See* MARSHALL HARRIS, ORIGIN OF THE LAND TENURE SYSTEM IN THE UNITED STATES 155-78 (1953). Congress passed a host of statutes

In short, these were often worthy claimants. But they were unable to prove their titles or claims by the application of the property law that St. Clair had been instructed to follow, or to establish the prior residency and citizenship requirements for donation lands. A host of other circumstances suggested the need for further legislation recognizing yet other types of claims, and St. Clair made a long list of recommendations to Congress.<sup>319</sup>

Congress responded, thus setting the stage for a continuing series of adjudications, further recommendations, and further legislation that stretched over four decades. Over time, as Congress broadened the categories of claimants and as time passed, records became scarcer and even less reliable. Speculators and other opportunists entered the picture, and perjury was practiced on a massive scale.<sup>320</sup> All in all, the adjudicatory process for determining land claims in the Northwest Territory did not get the land claims adjudication process off to an auspicious start.

Part of the problem had been a confusion of congressional purposes. It was unclear whether, in dealing with early claims in the Northwest Territory, Congress was primarily actuated by fiscal, legal, or benevolent motives.<sup>321</sup> Congress seemed intent on raising revenue and was loath to recognize rights to property that it might otherwise sell. Yet the United States clearly had an obligation under treaties with Great Britain and France (and later Spain), and under the agreements by which Virginia and other states ceded their western

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authorizing purchases or gifts to extinguish Indian claims. *See, e.g.,* An Act To Make Further Appropriations for the Purpose of Extinguishing the Indian Claims, ch. 43, 2 Stat. 291 (1804). These treaty negotiations often involved high politics and serious issues of war or peace. *See, e.g.,* REMINI, *supra* note 26, at 88-100 (describing multiyear negotiations with the Creeks concerning their lands in Georgia).

319. *See* Land Claimants in the Northwestern Territory (Feb. 18, 1791), *in* 1 AMERICAN STATE PAPERS, PUBLIC LANDS, *supra* note 253, at 13.

320. *See* DICK, *supra* note 271, at 14-15.

321. Adjudicatory mechanisms established for other territories or other purposes were occasionally less ambiguous. For example, in 1798, Congress provided for donations of property to Canadian refugees who had aided the United States in the Revolution and had been forced to flee their homes in Canada as a result. *See* An Act for the Relief of the Refugees from the British Provinces of Canada and Nova Scotia, ch. 26, § 4, 1 Stat. 547, 548 (1798). Here the purpose was clearly altruistic, and the procedures were reasonably well tailored to that end. Criteria were set out for qualification, and applicants were instructed to produce evidence of their entitlement before any judge of the United States or of any state. That evidence was then sent to the Secretary of War, who, along with the Secretary and Controller of the Treasury, examined the evidence and provided a quantity of land "in proportion to the degree of [the individual's] respective services, sacrifices and sufferings, in consequence of their attachment to the cause of the United States." *Id.* The most deserving were allowed 1000 acres; the least, a distribution of 100. The administrators were also allowed to single out particularly meritorious cases and make recommendations for larger grants. *See id.*

lands to the nation, to honor preexisting claims based on grants by those sovereigns.<sup>322</sup> Congress also wanted to provide benefits to citizens who had performed some service for the United States or who had a strong moral claim based on settlement and improvement of their properties.

After 1800, when Republican Congresses came to deal with private land claims in the Indiana and Mississippi Territories and in Louisiana and the Floridas, they clearly had learned something from the debacle in the Northwest Territory. Special commissioners, sometimes the register and receiver of the local land offices and sometimes special presidential appointees, were empowered to adjudicate claims under much more specific criteria. The commissioners were given full authority to compel attendance at hearings, to administer oaths, to examine witnesses, and to decide the cases “according to justice and equity.”<sup>323</sup> In some cases the commissioners’ decisions were made final. In others they were, at least nominally, only a recommendation to Congress, which made a final disposition.<sup>324</sup> But as a matter of practice, Congress confirmed virtually all claims that were ruled upon favorably by the commissioners.<sup>325</sup> Time limits were set within which claims were to be presented to the commissioners, and, according to the statutes, claims not presented by that time were forever barred.<sup>326</sup>

Again, this all sounds reasonably straightforward, but of course it was not. Many records were lost or unavailable, and parol evidence generated the usual problems of perjury and fraud.<sup>327</sup> In addition, the land systems of France,

322. See sources cited *supra* note 277.

323. Indiana Territory Land Act, *supra* note 297, § 4, 2 Stat. at 278-79.

324. See 1803 Land Act, *supra* note 266, 2 Stat. 229.

325. Gates, *Land Claims*, *supra* note 255, at 190.

326. For the major variations on the private claims process, see An Act for Ascertaining Claims and Titles to Land Within the Territory of Florida, ch. 129, 3 Stat. 709 (1822); An Act for Ascertaining the Titles and Claims to Lands in that Part of the Louisiana [Territory] Which Lies East of the River Mississippi and Island of New Orleans, ch. 67, 2 Stat. 713 (1812); Indiana Territory Land Act, *supra* note 297; and 1803 Land Act, *supra* note 266.

327. Issuance of fraudulent French and Spanish titles was a particular problem in the Louisiana and Florida Territories. See DICK, *supra* note 271, at 15-16. A local commentator in 1850 had this to say about the scramble for property in Louisiana after its transfer to the United States:

Claims and evidences of title were to be raked up from old records, musty documents, antiquated titles, concessions, settlement-rights, transfers, entails, and every species of oral and written evidence of title, real and factitious.

Claims of this character were eagerly sought by the land speculator, and as freely produced by the needy creole, and the avaricious fabricator. An active commerce sprung up between the artful land-jobbers and the docile, unlettered settler; titles, complete and incomplete, were multiplied in endless variety.

Spain, and Great Britain were quite different. And, of course, some of the “British” practice was actually in the form of grants from colonies, such as Georgia or Virginia, that had their own peculiarities.<sup>328</sup> In short, these were difficult cases that required energetic investigation and considerable linguistic and legal skill. But Congress, with its usual parsimony, was hesitant to provide adequate pay or support for its land commissioners. As George Graham pointed out to the Senate in response to its request for a report on the causes of delay in adjusting land claims in part of Louisiana, it was impossible to obtain the services “of individuals qualified by their independence of character and discriminating powers of mind, to adjust these claims speedily and satisfactorily, unless a more adequate compensation for their services [was] given.”<sup>329</sup>

And, of course, as long as claims could not be settled, lands could not be surveyed and public sales could not be conducted. Meanwhile, the settlers marched inexorably westward, entering lands by purchase from a land office when they could, and by illegal occupation when they could not. The adjudication of private claims was thus a sort of perpetual motion machine. The more claims the commissioners had to determine, the longer it took to generate surveyed lands for sale, and the more “illegal” settlers arrived to press even more private claims.

Congress clearly had a soft spot for settlers with defective claims. It relaxed the evidentiary requirements for proof when the rules excluded too many claimants,<sup>330</sup> and it authorized awards of lands to whole categories of claimants

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Gates, *Land Claims*, *supra* note 255, at 185 (quoting J.W. Monette, *Early Spirit of the West* (pt. 2), 8 DEBOW'S REV. 407, 409 (1850)).

Apparently, the commissioners were appropriately skeptical because Congress passed a special statute permitting suits in the territorial courts to establish claims rejected for fraud or forgery. See *An Act for the Disposal of Certain Tracts of Land in the Mississippi Territory, Claimed Under Spanish Grants, Reported by the Land Commissioners as Antedated, and To Confirm the Claims of Abraham Ellis and Daniel Harregal*, ch. 22, 2 Stat. 526 (1809).

328. Congress occasionally adopted special state rules explicitly. See *An Act Authorizing Patents To Issue for Lands Located and Surveyed by Virtue of Certain Virginia Resolution Warrants*, ch. 31, 2 Stat. 437 (1807).

329. George Graham, *Causes of the Delay in Adjusting the Land Claims in the District of St. Helena in Louisiana* (Dec. 22, 1823), in 3 AMERICAN STATE PAPERS, PUBLIC LANDS, *supra* note 253, at 550, 551.

330. See *An Act Supplementary to an Act Intituled “An Act for Ascertaining and Adjusting the Titles and Claims to Land, Within the Territory of Orleans, and the District of Louisiana,”* ch. 39, § 4, 2 Stat. 391, 392 (1806).

that the commissioners had previously disqualified.<sup>331</sup> The rules changed so often that Congress ordered the collection and arrangement in one volume of all laws, resolutions, treaties, and proclamations related to the public lands to be distributed to the land offices and the claims commissioners.<sup>332</sup>

Having a copy of the statutes was surely useful, but the laws were not self-interpreting. The Louisiana land commissioners were instructed to decide “according to the laws and established usages and customs of the French and Spanish governments.”<sup>333</sup> Gallatin was sufficiently confused about exactly what this meant, and how this criterion related to other statutes that Congress had passed on the same subject, that he despaired of providing any interpretation for the commissioners. He finally transmitted copies to the registers without any interpretation or instructions concerning the law’s meaning.<sup>334</sup> In any event, the commissioners took testimony from leading citizens of the territory concerning prior usages and customs and used this testimony as their guide to French and Spanish law.<sup>335</sup> A later compiler of the French and Spanish land laws stated, however, that he had examined the reports of the various boards of commissioners from their inception to 1829 and that he had found very few references to French or Spanish law or custom. The uniform rules that he had uncovered seemed to him to consist largely of common law principles.<sup>336</sup>

Settlers with no figment of a legal title might have been ignored, and Congress sometimes passed “get tough” statutes that criminalized settlement without title and disqualified illicit settlers from ever gaining a patent. The President was authorized to use whatever military force was necessary to remove them unless they obtained a temporary residency permit from the

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331. See An Act Regulating the Grants of Land in the Territory of Michigan, ch. 34, § 2, 2 Stat. 437, 438 (1807).

332. See An Act Providing for the Printing and Distributing of Such Laws of the United States, as Respect the Public Lands, ch. 33, 2 Stat. 589 (1810).

333. An Act Respecting Claims to Land in the Territories of Orleans and Louisiana, ch. 36, § 4, 2 Stat. 440, 441 (1807).

334. Coles, *supra* note 311, at 52 n.46.

335. See REPORT OF THE REGISTER AND RECEIVER OF THE LAND DISTRICT SOUTH OF RED RIVER IN LOUISIANA, UPON THE LAND CLAIMS SITUATED BETWEEN THE RIO HONDO AND THE SABINE, H.R. DOC. NO. 19-50, at 3-7 (1826).

336. See Letter from Joseph M. White to Henry Clay, Sec’y of State (Feb. 4, 1829), in 5 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 253, at 631 (Asbury Dickins & John W. Forney eds., Wash., D.C., Gales & Seaton 1860).

relevant land office.<sup>337</sup> But these statutes were almost impossible to enforce, and Congress, in the end, generally provided relief from them.<sup>338</sup>

The massive entrance of settlers onto the unsurveyed public domain created the political necessity of providing them with some sort of preemptive right to purchase when surveys were finally accomplished. For example, the House of Representatives of the Mississippi Territory petitioned Congress in 1808 to grant preemptive rights to

that great number of persons, many of whom are heads of families [who had] emigrated to that territory within the last twelve months, under an expectation that, on their arrival, lands of the United States might be procured by purchase; but the sales being protracted, and the lands not likely to be exposed to sale within a short time, they were constrained either to settle on the lands of the United States or seek a residence within the Spanish lines.<sup>339</sup>

In this case, the House Committee on Public Lands, recognizing that granting such rights would “be offering an inducement to future intrusion, and be giving support to a practice liable to many abuses,” recommended that preemptive rights not be provided.<sup>340</sup>

But Congress passed thirty-two special or temporary preemption statutes between 1799 and 1838,<sup>341</sup> along with general preemption acts in 1830, 1832, and 1838.<sup>342</sup> Occupancy or cultivation was usually required for a preemptive claim but, by custom, they had taken many forms—from building a house and raising a corn crop, to harvesting sugar, to marking trees for clearing and nothing else (sometimes called “tomahawk rights”).<sup>343</sup> Even if a settlor’s preemptive claim was defective, it was likely to be recognized by neighbors and enforced by conspiracy when the land was put up for sale. Neighbors refused to bid against each other and banded together to intimidate outsiders who might have had the temerity to bid on an already “settled” parcel.<sup>344</sup>

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337. See *An Act To Prevent Settlements Being Made on Lands Ceded to the United States, Until Authorized by Law*, ch. 46, 2 Stat. 445 (1807).

338. See DICK, *supra* note 271, at 50-69.

339. Pre-emption Titles in the Mississippi Territory (Nov. 21, 1808), in 1 AMERICAN STATE PAPERS, PUBLIC LANDS, *supra* note 253, at 546, 546.

340. *Id.*

341. See LESTER, *supra* note 304, at 64-65.

342. See ROHRBOUGH, *supra* note 258, at 200-20.

343. See DICK, *supra* note 271, at 5.

344. See *id.* at 50-69.

The statutes providing for land commission adjudication of private claims made those determinations final against the United States, but not against third party claimants. These latter claims would have to be fought out in the courts.<sup>345</sup> When settlers lost their preemption certificates to claimants with superior legal title, Congress at least refunded the certificate holders' payments toward receiving a patent.<sup>346</sup> The mass administrative justice dispersed by the commissioners on private claims may not have satisfied the formal procedural and evidentiary criteria for trials in the courts of law. But an ever-vigilant Congress seems to have been determined to ensure that if justice was skewed, it was mostly skewed in favor of claimants. Federal statutes confirming commission awards virtually never rejected a positive finding and often made special provisions to qualify those whose claims had been rejected.<sup>347</sup>

*c. Adjudicatory Process Before the Land Commissioners*

The public lands statutes dealt with the determination of private claims in a fairly consistent fashion. Each statute provided for the appointment of private claims commissioners, stated in general terms the law to be applied by them, and specified whether their decisions were final or only tentative until confirmed by Congress. The commissioners were empowered to call and swear witnesses and to receive evidence as in a court of law. Statutes instructed them how notice was to be given of their proceedings and about the time period within which claims might be filed and adjudicated.

A common requirement was that the claimant provide

notice in writing, stating the nature and extent of his claims, together with a plot of the tract or tracts claimed, and . . . also, on or before [the required date] deliver to the said register, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other

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345. When adverse claimants appeared brandishing Spanish papers on one side and British documents on the other, commissioners were sometimes instructed to await judicial resolution, 1803 Land Act, *supra* note 266, § 6, 2 Stat. at 232, or to refer the matter to the Secretary of the Treasury, An Act for Ascertaining Claims and Titles to Land Within the Territory of Florida, ch. 129, § 4, 3 Stat. 709, 717 (1822).

346. An Act in Addition to an Act, Intituled "An Act Regulating the Grants of Land and Providing for the Disposal of the Lands of the United States, South of the State of Tennessee," ch. 46, § 1, 2 Stat. 400, 400 (1806).

347. See, e.g., An Act To Confirm Certain Claims to Lands in the District of Jackson Courthouse, in the State of Mississippi, ch. 146, 4 Stat. 408 (1830); see also Harry L. Coles, Jr., *The Confirmation of Foreign Land Titles in Louisiana*, LA. HIST. Q., Oct. 1955, at 1.

written evidence of his claim, and the same shall be recorded by the said register, in books to be kept for that purpose.<sup>348</sup>

Boards of commissioners were to appoint a clerk for the purpose of recording, “in a book to be kept for the purpose, perfect and correct minutes of the proceedings, decisions, meetings and adjournments of the boards, together with the evidence on which such decisions are made.”<sup>349</sup> In some cases, the statutes provided for an appearance by either a specially appointed agent or a U.S. Attorney to represent the interest of the United States.<sup>350</sup>

The clerks were also required to “prepare two transcripts of all the decisions made by the said commissioners in favor of the claimants to land.”<sup>351</sup> When signed by the commissioners, these transcripts were to be submitted to the Surveyor General and to the Secretary of the Treasury, and any claims upon which a favorable commission decision had been made were not to be disposed of until a final decision by Congress. A similar requirement applied to rejected claims, but here the commissioners were to include the “substance of the evidence adduced in support” of the claims and “such remarks thereon as they may think proper.”<sup>352</sup> That report was to be sent to the Secretary of Treasury and presented to Congress at its next ensuing session. The greater degree of formality and completeness for reports on rejected claims seems to suggest, once again, the congressional interest in assuring that justice was done to private claims petitioners.

Yet notwithstanding this considerable attention to commission structure and process, federal legislation left a substantial number of questions to be resolved by administrative rule or practice. What were the formal requirements for stating a claim? Were witnesses required to appear, testify, and be cross-examined by the commissioners or representatives of the United States? Or could testimony be provided by letter, affidavit, or in some other form? What sorts of documentary evidence of a grant or title were acceptable? Could parol evidence substitute when documents were missing? Could claimants be represented by attorneys or others? What sorts of findings and reasons were expected from commissioners when they decided a case?

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348. 1803 Land Act, *supra* note 266, § 5, 2 Stat. at 230.

349. *Id.* § 6.

350. *See, e.g.*, An Act Supplementary to the Act Intituled “An Act Regulating the Grants of Land, and Providing for the Disposal of the Lands of the United States, South of the State of Tennessee,” ch. 61, § 4, 2 Stat. 303, 304 (1804).

351. Indiana Territory Land Act, *supra* note 297, § 4, 2 Stat. at 279.

352. *Id.*

As might be expected, the treasury secretaries, and later the commissioners of the General Land Office, were active participants in developing adjudicatory policies. For example, on September 8, 1806, Gallatin sent two documents to the private claims commissioners for St. Louis. The first contained a series of substantive directions concerning the interpretation and application of the statute authorizing the adjudication of claims in that territory. The second provided procedural instructions concerning the organization of the commissioners' reports of claims decisions and the factual and legal matters that were to be included in these "transcripts" for each decided claim. But recognizing that not everything could be controlled by central directive, Gallatin concluded by suggesting that the commissioners include such other matters as would in their judgment inform Congress about the facts and circumstances surrounding their decisions.<sup>353</sup> And in his correspondence Gallatin described the commissioners as "the sole judge[s] of what should be considered" and as "court[s] without appeal for the purpose of which they were initiated."<sup>354</sup>

The reports of the various commissions only hint at the procedures that they employed. They often contain a paragraph or two on each claim stating the evidence in very summary form and the basis for the commission's decision in a generally conclusory fashion. From these documents, one can discern that the commissioners were accepting all manner of evidence, including official certificates and grants, affidavits of interested parties and witnesses, and live testimony before the commissions themselves. Given the difficulties of travel and communication on the frontier, it seems likely that much of this work was done "on the papers" rather than in hearings involving live testimonial evidence. And while enterprising "country lawyers" set themselves up near land offices to represent claimants, the commissioners' reports have very little in them that one would characterize as legal argument. The reports were meant to satisfy Congress and Treasury officials, not a reviewing court.

### 3. *Administrative Oversight and Enforcement*

#### a. *Audit and Inspection*

The statutes establishing the land offices in the field and the commissioner system for adjudicating claims required periodic reporting, usually quarterly,

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353. See BALDWIN, *supra* note 277, at 986-88.

354. Letter from Albert Gallatin, Sec'y of the Treasury, to Parke Alton (Aug. 9, 1810) (on file with author).

but sometimes monthly, to the Treasury Department, or later to the General Land Office.<sup>355</sup> But in any such system, there is always the question of whether the report represents reality. Examination at the seat of government could uncover inconsistencies in the reports or mathematical errors, of which there were many. But were the land offices holding public auctions in the fashion prescribed by statute? Did their entries accurately reflect what had happened at the auctions? Did the officers properly conduct private sales of unsold parcels? Was there collusion, favoritism, bribery, or extortion?

None of these things could be determined from the face of the reports. And field inspections of the land offices in the early years of public land sales were not very useful.<sup>356</sup> They were carried out by locals deputized for the purpose, persons who not only had no training, but who were often friends or associates of the land office personnel.

In 1816 Treasury Secretary Alexander J. Dallas reformed the audit system. He deputized one of the clerks of the General Land Office in Washington to go into the field to examine all of the land offices. This examiner could use the same inspection methods in each office and compare the quality of their operations. And upon returning to Washington, he also could convey an enormous amount of useful, informal information to the central office that might not be contained in, or appropriate for, written reports. All written reports would be made available to Congress and would likely show up in the press.<sup>357</sup>

This vastly superior system resulted in many reforms, but it required some additional expenditures for the travel expenses of the clerk. And whenever money was involved Congress wanted to exercise close supervision over administration. The ever-vigilant House of Representatives demanded a report from the Secretary of the Treasury concerning

the manner in which the several land offices of the United States were examined prior to the 1st of January, 1818, the names and places of residence of the persons by whom such examinations were made, the respective compensation allowed to each individual so employed, and the whole expense thereof to the United States; and, also, that he report the manner in which the same duty has been performed since the said 1st January, 1818, together with the names, professions, stations, and place of residence, of the persons who have been appointed to make such examinations, what offices each was appointed to examine, the

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355. See, e.g., 1800 Northwest Amendments, *supra* note 264, § 9, 2 Stat. at 77.

356. See Mashaw, *supra* note 3, at 1305-06.

357. See WHITE, *supra* note 15, at 523-27.

reports made by each, the accounts presented for their respective services, the amount of money allowed to, or drawn or retained by, each of them; whether any of them have, during the said period, been allowed, or received, any other compensation from the Government; if so, how much, and for what service rendered or duty performed, and whether some plan may not be devised whereby the same duty may be performed with equal advantage and less expense to the Government[. . .].<sup>358</sup>

The new Treasury Secretary, William H. Crawford, sent all of this information to Congress along with a defense of the new system.<sup>359</sup> Congress was satisfied, and the new system of audit continued.

*b. Settling Accounts and Enforcing Payment*

Auditing the books and inspecting the offices was one thing; collecting the money that was due to the United States for the sale of public lands was quite another. Republican Congresses had in effect continued the system of settling accounts that dated from the Federalist period. The Controller of the Treasury was responsible for enforcement—that is, to ensure that officers, in this case the receivers of the Land Department, submitted their accounts. When accounts were in arrears, the Controller’s only remedy was to bring suits against them or on their surety bonds. Indeed, if reports had never been submitted, two lawsuits were required, one to produce the account, and a second to pursue any deficiency.

Under this cumbersome system, some accounts in the General Land Office remained unsettled for a decade.<sup>360</sup> In part this resulted from the complex

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358. Examination of the Several Land Offices (Jan. 28, 1822), in 3 AMERICAN STATE PAPERS, PUBLIC LANDS, *supra* note 253, at 452, 452 (internal quotation marks omitted).

359. In Crawford’s words:

When a different person is employed to examine each office, the judgment which is formed of the manner and style in which the books are kept will depend upon the intelligence, the prejudices, or partialities, of the different examiners; but, when the same person examines a number of offices, the same intelligence is exercised in each case, exempt, too, from partiality or prejudice, when the examiner is not a neighbor or connexion of the officer. The impression produced upon the officers themselves by the mode which has been practised since 1815, prove, incontestably, its superiority over the other. An examination now is not a matter of form.

*Id.* at 453.

statutory requirements for accounting records. A fiscally austere Congress was loath either to relax the accounting requirements or to give the auditing departments sufficient personnel to deal with the accounts that flooded in as the land office business exploded. But the requirement that personnel be policed by lawsuit certainly did not aid the Controller in clearing the backlog.

Gallatin had recognized that the system was inadequate as early as 1801,<sup>361</sup> but Congress did not provide reforms until 1817. And that statute merely centralized the audit function and provided additional staff.<sup>362</sup> Collection still occurred through court action. Finally, in 1820,<sup>363</sup> Congress applied to all receivers of public monies the enforcement procedure that had been used against delinquent collectors of excise taxes as early as 1793.<sup>364</sup>

Under this “new” summary procedure, the Controller, or a specially appointed collection agent, could issue a distress warrant to any U.S. Marshal against any officer who had failed to render his accounts or remit money as prescribed by law. The warrant permitted summary forfeiture of the collector’s bond and seizure and sale of any other of the officer’s properties necessary to settle the debt<sup>365</sup>—a process that gave rise to the first-ever due process case decided by the Supreme Court.<sup>366</sup> Additional statutes in 1823 and 1828 permitted further administrative relief, withholding the salary of officers whose accounts were in arrears and dismissing them from the public service for failure to submit quarterly returns.<sup>367</sup> As a result of these reforms, most of the

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360. Letter from Joseph Anderson, Comptroller of the Treasury, to Benjamin Huger, Chairman of the Comm. of Unsettled Balances (Mar. 14, 1816), in 3 AMERICAN STATE PAPERS, FINANCE 125, 127 (Walter Lowrie & Walter S. Franklin eds., Wash., D.C., Gales & Seaton 1834) (“The accounts of the General Land Office are greatly in arrears; some of them remain unsettled from seven to ten years. These accounts are intricate, and generally very large; from ten to fifteen days is required for the best accounting clerks to examine one of them.”).

361. Letter from Albert Gallatin, Sec’y of the Treasury, to President Thomas Jefferson (Nov. 1801), in 1 ALBERT GALLATIN, THE WRITINGS OF ALBERT GALLATIN 63, 68 (Henry Adams ed., Phila., J.B. Lippincott & Co. 1879).

362. See An Act To Provide for the Prompt Settlement of Public Accounts, ch. 45, 3 Stat. 366 (1817).

363. See An Act Providing for the Better Organization of the Treasury Department, ch. 107, 3 Stat. 592 (1820).

364. Mashaw, *supra* note 3, at 1319 n.214.

365. See 3 Stat. 592.

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

367. See An Act To Prevent Defalcations on the Part of the Disbursing Agents of the Government, and for Other Purposes, ch. 2, 4 Stat. 246 (1828); An Act Concerning the Disbursement of Public Money, ch. 9, 3 Stat. 723 (1823).

substantial collections of land offices found their way into the Treasury or were used for its purposes.<sup>368</sup>

#### 4. Congressional Reports and Investigations

Congressional control of administration was a major part of Republican dogma. And as the previous discussion illustrated, Republican Congresses tended to practice what they preached. The reporting and recording requirements for claims determinations and the exquisitely specific surveying statutes are cases in point.<sup>369</sup> But, as we have seen, Republican Congresses inevitably had the same difficulties as Federalist Congresses in constraining administrators' discretion by statute. On some major issues, such as how to adjudicate private land claims, Congress could do no better than to instruct the commissioners to honor the government's treaty and cession commitments, to adjudicate in accordance with the law of the place and time of an alleged grant, and to confirm or deny claims on the basis of "justice and equity."<sup>370</sup> Uniformity in the interpretation of the applicable laws and the elaboration of the notions of "justice and equity" would have to come from Treasury and Land Office instructions.

Over time even Republican Congresses came to recognize the need to tolerate administrative discretion. For example, many recording errors in locating claims resulted from the necessarily inexact surveys of the public domain and the incorrect or missing marks of the surveyors. When a buyer discovered that his land had been misrecorded in the land office, the register, operating under highly specific statutory instructions, had no authority to correct the error. The buyer's only recourse was to petition Congress for a special statute authorizing the correction,<sup>371</sup> and many such statutes appear in the *Statutes at Large* prior to 1819.<sup>372</sup> In that year, Congress finally authorized

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368. Because there were few available banks in the western territories, the United States also used land offices, and other offices that received funds, as disbursing agents by drawing drafts upon their accumulated funds to pay the country's debts. For general discussion of the accounting system and its reform, see WHITE, *supra* note 15, at 162-82.

369. On similar attempts to increase fiscal control by more specific appropriations, and on the partial success of those efforts, see *id.* at 108-16.

370. Indiana Territory Land Act, *supra* note 297, § 4, 2 Stat. at 278.

371. See, e.g., An Act To Prescribe the Mode in Which Application Shall Be Made for the Purchase of Land at the Several Land-Offices; and for the Relief of Joab Garret, ch. 11, 2 Stat. 556 (1810).

372. In part because of the highly specific way in which it legislated, Congress had to return again and again to the issue of the survey and sale of the public lands. The lists of the public acts of Congress contained in the second, third, and fourth volumes of the *Statutes at Large*

the registers and receivers of land offices to make corrections upon the application of purchasers. The only statutory guidance was that buyers provide “testimony satisfactory to the register and receiver of public moneys.”<sup>373</sup>

At the same time, the Jeffersonian-Republican period saw Congress come into its own as an overseer of administrative departments. The *American State Papers* document hundreds of congressional requests for information, often—as we saw in the case of payments to land office inspectors—in highly detailed form.<sup>374</sup> As the Federalists had before them, Republican presidents and heads of departments generally complied with these requests.<sup>375</sup> And all departments filed annual reports with Congress accompanying the annual message of the President.

While Republican Congresses used many ad hoc and special investigative committees, the Republican period saw the institutionalization of Congress in ways that permitted it to exercise more continuous and informed oversight over government operations. By 1816 the House had established six standing committees on expenditures—one each for the Departments of State, Treasury, War, Navy, and the Post Office, and one on public buildings. This institutionalization was a part of Henry Clay’s general campaign to empower Congress “to take control of the government.”<sup>376</sup> The House also had standing committees that dealt with matters of general legislation concerning these departments. Republican Congresses thus divided congressional work into roughly the authorization and appropriations functions that have lasted until

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reveal that Congress passed over 250 public lands statutes between 1800 and the close of the second session of the twenty-second Congress in 1833. See 2 Stat. at iii-xxxviii; 3 Stat. at iii-xxxix; 4 Stat. at iii-xxxix.

373. An Act Providing for the Correction of Errors in Making Entries of Land at the Land Offices, ch. 98, 3 Stat. 526, 526 (1819).
374. See, e.g., Amount of Emoluments and Allowances to the Registers and Recievers of Land Offices, Exclusive of Salary (May 1, 1826), in 4 AMERICAN STATE PAPERS, PUBLIC LANDS, *supra* note 253, at 773 (Asbury Dickins & James C. Allen eds., Wash., D.C., Gales & Seaton 1859); Compensation of Registers and Receivers of the Public Lands, *supra* note 286, at 8; Compensation of the Surveyors General and Their Clerks, *supra* note 286, at 874.
375. One example of an exception was President Monroe’s refusal to send certain papers to the House concerning charges against a naval officer and a political operative stationed in Peru. See President James Monroe, Message to the House of Representatives (Jan. 10, 1825), in 2 RICHARDSON, *supra* note 8, at 278.
376. RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 216 (1917). While internal congressional and party politics were also involved, here as elsewhere, congressional structure responded to the need to monitor administrative action. See Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSP. ON POL. 495 (2003), available at [http://journals.cambridge.org/article\\_S1537592703000367](http://journals.cambridge.org/article_S1537592703000367).

the present time. But unlike Congresses of the twenty-first century, Republican Congresses of the early nineteenth century had no staff to do much of the detail work. As a consequence, while the committees on expenditures labored mightily to contain the costs of the national government, they found it impossible to inquire carefully into departmental accounts and still discharge their general legislative duties.<sup>377</sup>

Even so, after Jefferson left office, Republican Congresses attempted, with some success, to shift the balance of power with respect to the political control of administration away from the department heads and the President and toward Congress and its committees. Moreover, a number of the reports and inquiries that populate the *American State Papers* reveal that casework was becoming a substantial congressional activity, and one that kept individual members in relatively continuous contact with executive departments. White, for example, has reported the contents of a letter written by Representative John McLean:

During the last winter, I never was more industriously engaged than in attending to the private business of others, when the house was not in session. There were three western mails a week, by which my principal letters were received—these often amounted to between 30 and 40, generally on business, which required my attention at the different offices.<sup>378</sup>

Political control of administration was thus becoming not only a means by which Republican Congresses monitored the implementation of their general political preferences, but also a means by which private interests sought executive favor, or at least consideration, through the auspices of congressional representation.

### 5. *Judicial Review and the Public Lands*

The position of the officials deciding public lands claims was almost the opposite of those enforcing the embargo, who labored under the ever-present threat of a common law damage action tried before a local jury. To be sure, land office personnel had no official immunity either. But for reasons both practical and legal, errors of fact or law in determining private land claims or issuing land patents seldom, if ever, put their patrimony at risk.

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<sup>377</sup>. See WHITE, *supra* note 15, at 105 & n.62.

<sup>378</sup>. *Id.* at 101.

One practical reason was that claimants wanted the land, not damages, and officials had no title to the public domain, legal or equitable. Lawsuits pursued specific remedies rather than damage actions—sometimes mandamus, injunction, or ejectment against officials in those rare cases when they were in possession, but almost always ejectment against another claimant in possession. This practical desire to pursue specific relief rather than damages, even when an officer was the possessor, was facilitated by a legal peculiarity. As then-Professor Antonin Scalia demonstrated nearly four decades ago, sovereign immunity had no effect on public lands litigation until the twentieth century.<sup>379</sup> There was simply no discussion of sovereign immunity in the Supreme Court opinions involving public lands actions seeking specific remedies against federal officers,<sup>380</sup> notwithstanding the obvious fact that the only party that could hold or transfer title or possession was the United States.

A second practical consideration was the availability of relief from Congress. As noted earlier, when claimants had a reasonable moral case, but a weak legal one, Congress habitually intervened to provide relief. Congressional petitions were rendered even more attractive by a second legal consideration: the extremely narrow scope of review that the courts were prepared to exercise in public lands cases. There was no statutory provision for review of the commissioners' decisions on private land claims, which meant that review by appeal or on a writ of error was unavailable.<sup>381</sup> Moreover, most commission decisions affirming title required congressional confirmation. After Congress acted, the courts simply declined to review a legislatively settled claim directly.<sup>382</sup> Collateral attacks on the validity of a patent might be raised by a third party claimant in an action for ejectment, or by way of defense when the holder of a patent sought to eject a third party in possession.<sup>383</sup> But, as Ann Woolhandler has argued, the courts treated the patent decisions of the land office as the decisions of a coordinate tribunal that could be attacked only for jurisdictional error.<sup>384</sup>

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379. See Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 882-909 (1970).

380. *Id.* at 885.

381. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 226 (1991).

382. See *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644, 663 (1876).

383. See, e.g., *Matthews v. Zane's Lessee*, 9 U.S. (5 Cranch) 92 (1809) (concerning a contest between two buyers who purchased the same parcel from two different land offices). *Matthews* might be considered an example of either or both.

384. See Woolhandler, *supra* note 381, at 216-19.

This restrictive approach to judicial review broke down in the late nineteenth century under the twin assaults of judicial expansion of the idea of jurisdictional error<sup>385</sup> and of appeals to the courts' equitable powers to remedy "mistakes, injustice, and wrong,"<sup>386</sup> for example, by the device of a constructive trust. But review then mutated into a form of the nonstatutory judicial review of government action that is familiar to contemporary administrative lawyers,<sup>387</sup> rather than into the pursuit of errant officials for damages at common law.<sup>388</sup>

### C. Public Lands Policy and the Development of Administrative Law

Here as elsewhere, Congress's attempt to eliminate implementing discretion by statutory specificity was doomed. Public lands statutes either hamstrung administration or failed to eliminate the need for administrative policy judgment, or they produced both effects at once. Their 250 (often highly specific) public lands statutes notwithstanding, Republican Congresses created a vast system for the survey and sale of nearly half a continent that demanded significant development of administrative policy and an unprecedented exercise of administrative adjudicatory authority. As Scalia put it in his 1970 article, "In the present age, it is difficult to apprehend the former magnitude and importance of public-lands law. Our present society contains no institution, with the possible exception of the federal income tax, whose importance . . . remotely approximates the dominating influence of the public lands during the nineteenth century."<sup>389</sup>

Given the impossibility of developing all this law by statute, and the obvious limitations of judicial oversight in a system of judicial review that emphasized the authoritativeness of the decisions of administrative land tribunals, public lands law was developed largely through administration. How did the techniques of policy development and claims adjudication in the Treasury and the General Land Office contribute to the development of American administrative law?

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385. *Id.* at 219.

386. *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 84 (1871).

387. Indeed, by their sheer bulk, land office decisions were probably the most common subject of judicial review proceedings in the federal courts by the end of the nineteenth century. Scalia has remarked that they attained a volume that in 1970 might have been described as "habeas corpus proportions." Scalia, *supra* note 379, at 884.

388. See Woolhandler, *supra* note 381, at 197-98.

389. Scalia, *supra* note 379, at 882.

From the viewpoint of a twenty-first-century administrative lawyer there is something (indeed, there are several things) constitutionally problematic about the whole land office adjudicatory process. Begin with Article III. What justifies the wholesale transfer of the determination of private claims from the courts to administrative commissions?

The “public rights” nature of these controversies is hardly obvious.<sup>390</sup> To be sure, the implicitly adverse party is the United States. But unlike other contemporaneous administrative adjudications—veterans’ disability claims,<sup>391</sup> customs and excise appeals,<sup>392</sup> or the issuance of military land warrants<sup>393</sup>—private land claims often invoked standard sources of property law, domestic and foreign. Some, of course, were claims based on federally conferred statutory preemption rights or were claims to grants of “donation” or “bonus” lands. But the central concern of the early land commissioners was the adjudication of private claims based upon the British, French, Spanish, or state property laws.

Nor will it really do to suggest, pursuant to the Supreme Court’s 1980s-era jurisprudence on the propriety of delegations of adjudicatory jurisdiction, that these private law claims were merely incidental to a public law regime<sup>394</sup> and made no significant inroads into the overall allocation of the judicial power under the Constitution.<sup>395</sup> The determination of claims to real property was legally and economically the most significant business of the courts, both federal and state, during this period. The use of commissions rather than courts for public lands determinations was motivated by the volume of cases that would have to be decided, not by their insignificance.

There is also the matter of the Fifth Amendment’s demand that no person be deprived of life, liberty, or property without due process of law. When due process protections are required, a neutral decider is a fundamental element of a constitutionally adequate hearing. Could due process possibly countenance adjudication of private land claims by government employees (usually the

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390. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (articulating the “public versus private rights” test for determining what claims are required to be heard in Article III courts).

391. See Mashaw, *supra* note 3, at 1332-33.

392. See *id.* at 1313.

393. These adjudications were handled by a clerk in the War Department who was part of the general staff. See WHITE, *supra* note 15, at 235-36.

394. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

395. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

register and receiver of each local land office) who were removable at will, and who were paid on commission for sales of the very public lands at issue?<sup>396</sup>

There are some more or less plausible ways of sidestepping these issues. The claims commissions were initially established in territories, not states, and the application of the Constitution to territories, other than the provision giving Congress plenary authority over them, was problematic.<sup>397</sup> Territorial judges, for example, failed to fit the Article III model. They served for terms of years and were sometimes appointed by the President alone without senatorial approval. The use of non-Article III courts in the territories was approved by the Supreme Court as early as 1828.<sup>398</sup> Hence, even if land claims had been put in “the courts,” they would have initially been in non-Article III territorial courts.

This consideration may explain why issues of the constitutionality of the claims commissions seem never to have been raised when Congress considered their establishment. But this explanation is not fully persuasive. Many in Congress did believe that the Constitution applied in the territories and objected on both separation of powers and individual liberties grounds to the treaty concluding the Louisiana Purchase and to the statute establishing the government for the Orleans Territory.<sup>399</sup> Moreover, the territorial dodge fails to explain why no constitutional objections seem to have been made to the private claims commissions after the territories became states.<sup>400</sup> And reviewing courts’ characterization of the commissions as coordinate tribunals, whose judgments could not be attacked as long as they had exercised power within their statutory jurisdiction, fairly cried out the question, “But how can these bodies, consistent with Article III, be considered courts?”

Part of the answer lies, perhaps, in anachronism. The Article III question, for example, jumps out at us, but it seemed not to trouble lawyers of the early

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396. See *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (holding an indirect financial interest sufficient to disqualify an adjudicator under the Due Process Clause).

397. See *CURRIE*, *supra* note 17, at 109-14.

398. See *Am. Ins. Co. v. Canter*, 26 (1 Pet.) U.S. 511 (1828).

399. See *CURRIE*, *supra* note 17, at 109-14.

400. In some cases, jurisdiction was belatedly transferred to federal courts. For example, the federal district court for Missouri took the place of the Louisiana claims commissions in 1824, see *An Act Enabling the Claimants to Lands Within the Limits of the State of Missouri and Territory of Arkansas To Institute Proceedings To Try the Validity of Their Claims*, ch. 173, 4 Stat. 52 (1824), although Missouri became a state in 1821. This statute also substituted the territorial court of Arkansas as the private claims adjudicator in that territory. *Id.* But the General Land Office was still adjudicating private claims based on foreign titles at least as late as 1920. INST. FOR GOV'T RESEARCH, *THE GENERAL LAND OFFICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 74 (1923).

nineteenth century. The implication is that separation of powers had a different meaning for them. One possible understanding of that difference would suggest that early-nineteenth-century public lawyers were concerned with separating legislative from implementing powers, but they viewed the choice of implementing institutions, whether courts or administrators, as firmly within Congress's discretion.<sup>401</sup>

To be sure, in the Supreme Court's first full dress consideration of the congressional power to prescribe summary administrative enforcement—a challenge to the 1820 statute authorizing the use of distress warrants for the collection of debts owed to the United States by federal officers—the Court stated clearly that Congress could not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”<sup>402</sup> Yet, the Court went on, there were “matters, involving public rights”<sup>403</sup> that could be put within the jurisdiction of the courts, or not, as Congress deemed proper. The Court gave the sole example of “[e]quitable claims to land by the inhabitants of ceded territories,”<sup>404</sup> noting that it had been “repeatedly decided” that these decisions by executive officers were “conclusive, either upon the particular facts involved . . . or upon the whole title.”<sup>405</sup>

It is far from clear, of course, why the Supreme Court in the mid-nineteenth century was so firmly of the view that public lands cases fell into the “public rights” category. Twentieth-century commentators have suggested that grants of public lands were viewed as privileges—like veterans' benefits, patents, or the use of the mails—that were wholly the creature of public law.<sup>406</sup> But this seems an odd view of adjudications pursuant to treaties and statutes that bound the United States to recognize claims of private ownership according to the law of the place and time of transfer to the claimant. What counts as a “vested right” is a vexed question, but it has never been doubted that title to real property qualifies.

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401. See Woolhandler, *supra* note 381, at 215 & nn.92-93.

402. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

403. *Id.*

404. *Id.* This characterization of land claims as “equitable” may also explain why no Seventh Amendment jury trial issue was perceived with respect to the claims commissions.

405. *Id.* (citing *Burgess v. Gray*, 57 U.S. (16 How.) 48 (1853); and *Foley v. Harrison*, 56 U.S. (15 How.) 433 (1853)).

406. Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 *BUFF. L. REV.* 765, 798 (1986). Earlier commentators had taken a similar view. See *id.* at 798 n.161.

Gordon Young has suggested that the answer may lie in the propensity of nineteenth-century courts to think of certain functions, including determination of claims to the public domain, as “executive” or “administrative” and entitled to almost total judicial deference.<sup>407</sup> On this view the land claims process simply would not be recognized as “judicial” business that should raise Article III concerns. But this too is problematic. As Woolhandler has emphasized, the Supreme Court repeatedly described the public lands decisions as coming from a coordinate tribunal.<sup>408</sup> That was why the decisions were final unless the tribunal lacked jurisdiction.

A quite different interpretation is possible. From the viewpoint of the first quarter of the nineteenth century, claims adjudication was standard legislative business—when the claims were against the United States. As late as 1832, John Quincy Adams complained that private bills seeking monetary relief consumed half of Congress’s time, to the detriment of both that body and the public.<sup>409</sup> Yet when claims involved a substantial class of persons, such as those applying for relief, Congress often set up commissions to decide the worthiness of claims of particular individual petitioners.<sup>410</sup> Examples include a statute, as early as 1794, appropriating funds for the relief of U.S. residents who had fled the insurrection in Santa Domingo,<sup>411</sup> and the statute providing relief for property lost, captured, or destroyed by the enemy in the War of 1812.<sup>412</sup> These claims commissions not only set precedents that affected the development of the American welfare state;<sup>413</sup> they were also precedents for the use of commissions, rather than courts or Congress, to decide voluminous claims to be paid out of public monies.

The establishment of relief commissions was far from uncontroversial. When the first such statute—a bill to relieve those whose property was damaged or destroyed by insurgents in the Whiskey Rebellion—was being

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407. See *id.* at 800-01.

408. See Woolhandler, *supra* note 381, at 216-19.

409. See *Hearing on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 49 (1942) (quoting John Quincy Adams).

410. For a general description of these various relief efforts, see 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 (1998).

411. 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).

412. An Act To Authorize the Payment for Property Lost, Captured, or Destroyed by the Enemy, While in the Military Service of the United States, and for Other Purposes, ch. 40, 3 Stat. 261 (1816).

413. See generally Landis, *supra* note 410.

debated, Representative Giles complained that the commission “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>414</sup> Similar complaints were made by John C. Calhoun concerning the relief bill following the War of 1812. As a matter of good administration (meaning good Republican administration), Calhoun argued, the power to adjudicate claims should remain with Congress rather than be delegated to a commission.<sup>415</sup> In short, from a congressional perspective, when institutional arrangements were still often debated in constitutional terms, the problem may have been perceived not as a choice between administrative adjudicators and courts, but as a choice between administrative and congressional determinations. Article III was not the potential problem; it was the appropriate role of Congress under Article I.

To be sure, the decision of private land claims according to law was rather different from deciding compensation claims under relief statutes proceeding on the assumption that claimants had no legal claim on the Treasury. Yet in many cases, Congress—at least nominally—kept the final decision of private land claims for itself, even though it was incapable of acting on them expeditiously. A proposal to create a special commission to exercise final authority over claims decided by local commissioners, but left in limbo by congressional inaction, died for want of support in the twentieth Congress.<sup>416</sup> And the history of federal legislation concerning the grounds for asserting private claims suggests that the contemporary image of a private land claim was not quite our conventional image of a battle over legal title. Congress recognized claims based on prior legitimate authority (grants by other sovereigns), but it also provided “bonus lands” for military personnel, and “donation lands” for settlers whose legal title was inadequate. Squatters were given preemption rights, and Congress instructed its commissioners to decide in accordance with “justice and equity,” not just the law.

Moreover, while the granting of a private land claim did not provide a right to appropriated funds, it established a right to property that would otherwise have been part of that great national storehouse of potential revenue called “the public domain.” In that sense the United States was a real party in interest in relation to these claims in much the same way that it was pursuant to relief statutes that authorized the granting of public funds as compensation for private losses. Hence, while from the perspective of the Supreme Court the

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414. 4 ANNALS OF CONG. 1001 (1794).

415. Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 297 n.26 (2003).

416. S. DOC. NO. 20-22, at 5 (1828).

land commissioners' decisions were the decisions of a coordinate tribunal, those viewing the commissioners from Capitol Hill may have seen these officials more as wilderness agents of Congress, deciding claims that Congress would have decided for itself, if it had had the time and manpower.

These hypotheses are all, of course, quite speculative. The easy acceptance of the constitutional propriety of administrative adjudication of private claims to the public domain thus remains something of a mystery. Perhaps, as John Dickinson has suggested, the lack of a unified vision of administrative law and judicial review of administrative action in the nineteenth century simply obscured certain issues that we now see as critical.<sup>417</sup> As Scalia has argued in his analysis of the puzzling lack of sovereign immunity talk in public lands cases, the courts saw these cases simply as public lands cases with their own particular and highly evolved jurisprudence.<sup>418</sup> By the time the Article III question was raised in *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>419</sup> the public lands cases were examples of what the law was, not troubling exceptions to some broad constitutional principle that made administrative adjudication problematic. If that is the explanation, one might wonder, when perusing the tortured twentieth-century jurisprudence of Article III from *Crowell v. Benson*<sup>420</sup> to *Commodity Futures Trading Commission v. Schor*<sup>421</sup> and beyond, whether the utilization of general categories like "administrative adjudication" or "the executive branch" in modern legal analysis is a major advance.<sup>422</sup>

We need not belabor the due process issue. *Murray's Lessee* answers it by treating the due process and Article III questions as the same.<sup>423</sup> The question of due process was a question of whether the Constitution required judicial process. And we know already that the Court answered, "No."<sup>424</sup>

True, the analysis in *Murray's Lessee* was premised on a finding that summary administrative means for collecting debts from revenue officers were ubiquitous in England and in the several states, and that Congress had provided such a procedure as early as 1798. Such a long pedigree could,

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417. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 56 (1927).

418. See Scalia, *supra* note 379, at 881-82, 909-13.

419. 59 U.S. (18 How.) 272 (1855).

420. 285 U.S. 22 (1932).

421. 478 U.S. 833 (1986).

422. See Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees,"* 30 WM. & MARY L. REV. 375 (1989).

423. See 59 U.S. (18 How.) at 275.

424. See *id.* at 277-80.

perhaps, not be provided for administrative adjudication of private land claims. Yet the provision of commission adjudication of land claims dated back to the Confederation period, and that seems to have been sufficient for the *Murray's Lessee* Court. Remember, the administrative adjudication of public lands cases was the sole example that the Court provided in support of its proposition that Congress could choose where to put the adjudication of "public rights."<sup>425</sup> In short, *Murray's Lessee* reveals a legal consciousness that seemed not to contain the modern legal category of "administrative due process." The question was simply one of which process applied: administrative, judicial, or perhaps legislative.

## CONCLUSION

The "great irony of American political development" with which this Article began was much in evidence in the Jeffersonian-Republican period. Thomas Jefferson and his followers understood democracy in a communitarian sense that emphasized the virtue of small-scale governments in which the people could be directly involved. He repeatedly suggested that the most important institutional development for protecting democracy would be to divide the country into wards.<sup>426</sup> On this view, representative assemblies were merely a necessary inconvenience, the distant, national government a threat to democracy, and a powerful national administration almost the definition of tyranny.

Yet the two national activities that I have reviewed in some detail show the Jeffersonian Republicans trapped by James Morone's irony into energetic assertions of national power and the multiplication of national offices. War, after all, is probably the greatest state-builder of all. Wartime demands for energy, unity, and obedience, and for speedy policy development and implementation, almost always enhance national administrative capacity. Jefferson reduced the Army and Navy and substituted an embargo for war not only out of necessity, but also to protect democracy from the threat of a large military establishment and of the taxing and collecting bureaucracy that would be necessary to support it. Yet as Henry Adams concluded, this attempt to

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425. *Id.* at 284.

426. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA query 19 (Paris, 1784), reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 280 (Adrienne Koch & William Peden eds., 1944); see also Letter from Thomas Jefferson to Governor John Tyler (May 26, 1810), reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra*, at 604, 604-05; Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra*, at 661, 662.

protect democracy by substituting economic coercion for war produced a level of executive oppression and limitation of citizens' rights exceeding that to be found in European regimes that were almost constantly at war. The delegations of discretion to the President, and to lower-level officials to act on the basis of "opinion," in the embargo legislation approached the level of sovereign prerogative.

The disposition of the public domain produced similar and longer-lasting results. The sale of western lands in sections and half sections was part of the Republican dream of populating the expanding nation with yeoman farmers who would demand to be self-governing and who would provide a counterweight to the mercantile interest of the eastern seaboard. Yet land sales fueled massive speculation and colossal instances of corruption. More importantly, for our purposes, such sales demanded the creation of a national administrative machinery that reached into every corner of the expanding national territory. The independent, private landowner may have been the bulwark of democracy, but producing stable private titles required a national administrative effort of enormous proportions. Land had to be bureaucratized in order to be sold, and disputes about ownership demanded the creation of America's first system of mass administrative adjudication.

To be sure, the Jeffersonian Republicans were reluctant nationalists. But, that is the irony of their state-building. They could starve national administration for funds and personnel, and they did. But in the end they could not avoid leaving a national administration that was larger in relation to the country's population than the one that they had inherited from those state-building Federalists who preceded them.

The story of administrative capacity, action, and practice in the Republican era is not, however, merely a story of reluctant state-building. It is also a story about how the accountability mechanisms for binding administrative power to both law and political oversight developed along with administration itself. And the story of administrative accountability in the Republican era emphasizes means of internal administrative control that are often ignored, or given only scant attention, by modern administrative lawyers.

The preponderance of modern administrative law scholarship and commentary focuses on the institution of judicial review. Judicial review clearly existed, but in the Republican era it seemed largely to demonstrate that institution's capacity for either impertinence or irrelevance. Impertinence, because subjecting officials to personal liability in *de novo* proceedings before local juries was a formula for timid administration. And criminal trials before those same local juries, the standard means of enforcement of administrative orders, could derail implementation whenever resistance to national policy was substantial. Legal accountability can be too strong as well as too weak. But jury

control, even nullification, seemed to cast legal control in a local and popular form that was not too strong for Republicans however much it might inhibit energetic administration.

By contrast, as we saw in relation to the review of the determinations of private claims commissions, judicial review could also be weak to the point of virtual irrelevance. "Judicial review" in the Jeffersonian-Republican era seemed to be crystallizing into bipolar modalities. "Common law" review in suits for damages or through defenses in criminal prosecutions was *de novo* and highly intrusive; the more "public law"-oriented review via prerogative writs was limited to a search for "jurisdiction" or "authority" that avoided consideration of the question that dominates twenty-first-century substantive judicial review – the reasonableness of administrative action.

There is no irony in the Republicans' emphasis on controlling administration through statutory specificity and congressional oversight. Representative assemblies were central to their understanding of democracy in a republic. Assembly control over administration was thus a democratic imperative. The only irony here is that effective congressional control tends to demand both increased bureaucratization of administration and the bureaucratization of Congress itself. In order to exercise control, Congress needed information, and its demands for reports and audits pressed administration toward formality, record-keeping, and caution. The ever-present prospect of being called to account for the propriety of one's actions demands not only that square corners be turned, but also that those turnings be documented for subsequent inspection. If modern bureaucracy is drowning in red tape, that tape stretches back at least to the Republican era. And, of course, in order to do anything with this information, Congress had to bureaucratize itself. Federalist practice and Republican theory emphasized the assembly as a committee of the whole deliberating about the common good. Administrative oversight demanded specialized committees with knowledge of the relevant fields and time to pursue necessary information.

As we have seen, statutory specificity could only do so much, and Republican Congresses could not really process all the information that they demanded administrators to provide.<sup>427</sup> They did not have the staff. And parsimonious Republican legislators could not be expected to ramp up the administrative expenses of Congress as an economy measure (even though it might have been). Yet they began the institutionalization of Congress through

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427. Even with the establishment of a committee to deal only with private land claims, Congress simply could not keep up with the land office business. As early as 1828, recommendations were being made to create an administrative tribunal to take over the work of the Committee on Private Land Claims. See S. DOC. NO. 20-22, at 5 (1828).

a committee system that has balkanized legislative decision-making from that time forward. General democratic deliberation had not deteriorated by the end of the Republican era into modern “iron triangles” of clients, bureaus, and congressional subcommittees, but in the name of assuring the democratic accountability of administration, that process had begun.

Finally, if one looks carefully at the Republican era, the most prominent and successful accountability mechanisms were the internal controls exercised by departments over officers in the field and the systems of checks and balances within departments. Customs collectors, land office commissioners, and land surveyors took cues from congressional legislation and oversight. And revenue collectors lived in fear of litigation. But the consistency, propriety, and energy of administrative implementation was made accountable primarily to high-ranking officials in the Treasury and the General Land Office. These were the sources of instruction, interpretation, audit, and oversight that counted in the day-to-day activities of administrative officials. Given the level of internal activity designed to guide and control lower-level officials, one can hardly doubt the seriousness of the enterprise. Given the ubiquity of field officers’ requests for direction, this “internal law” of administration seems to have been relatively successful.<sup>428</sup> Similar arguments might easily be made today.<sup>429</sup> Strangely enough, modern administrative lawyers hardly study this element of administrative law at all.<sup>430</sup> I should hasten to add that the “internal law of administration” that was so much in evidence in the studies of the embargo and the sale of the public domain was not an exercise in “presidentialism” of

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428. This is not to say that these internal efforts at legality and consistency were uniformly successful. The problem of inconsistent valuation and classification of goods in the customs houses was a constant complaint in later periods and produced a series of reforms and reconstituted appeals processes in the Jacksonian era. See LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861*, at 178-81 (1954).

429. Edward Rubin has argued recently that internal or bureaucratic accountability is the only “accountability” worthy of the name. Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 52 (Michael W. Dowdle ed., 2006).

430. I count myself a modest exception. See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 *CORNELL L. REV.* 772 (1974). 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, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW: GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 1-23 (1903). For the view that the efforts 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, see WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982).

the sort that is now quite popular.<sup>431</sup> Presidential involvement, indeed micromanagement, was evident in the implementation of the embargo. But that distinguished the embargo episode from virtually all the rest of Republican-era administration. Although Jefferson's administrative interventions were transparent and energetic, reinforcing democracy via presidential control was not a part of the intellectual toolkit of Jeffersonian Republicans. Assembly government was democracy. The President was picked by the electoral college, or not infrequently by the House of Representatives, after a campaign in which presidential hopefuls espoused no platform and hardly showed themselves to the people. Indeed, given the limitations on the franchise, the President as a representative of the people only became plausible with the reforms in election law and the consolidation of national political parties that were ushered in by Andrew Jackson and his Democratic successors.

Nor did the Jeffersonian Republicans understand administration as a function to be performed by independent experts insulated from politics. That idea, too, came later. Yet certain functions within departments were made independent from the control of the "political" executive officers from the earliest days of the Republic.<sup>432</sup> The Auditor in the Treasury Department, for example, determined the legality of all expenditures, subject to an appeal on disallowed claims to the Comptroller. Neither officer was subject to direction by the Secretary of the Treasury or the President, although the Auditor or Controller could, of course, be removed.<sup>433</sup> Similar divisions of authority extended to field operations. Transactions in the local land offices were in the general charge of the register but subject to the independent authority of the receiver with respect to monetary receipts and disbursements.<sup>434</sup> Control of administration through internal checks and balances would become even more

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431. This approach sometimes takes the form of an assertion of the constitutional necessity for a so-called unitary executive and sometimes merely a call for greater presidential responsibility for policymaking. On the unitary executive debate, see the sources cited in Mashaw, *supra* note 3, at 1267 n.25, 1271 n.32. On the political accountability advantages of presidential responsibility, see Kagan, *supra* note 92.

432. See Mashaw, *supra* note 3, at 1284-85.

433. This understanding continued during the Jeffersonian period, see WHITE, *supra* note 15, at 164, and was forcefully confirmed early in Martin Van Buren's tenure as President, see S. DOC. NO. 25-265, at 8-9 (1837) (presenting a correspondence between the Auditor and Secretary of the Treasury, in which the Secretary acknowledged that he had no power to reverse the Auditor or Controller on matters of accounts).

434. See An Act for Changing the Compensation of Receivers and Registers of the Land Offices, ch. 123, 3 Stat. 466 (1818); An Act for Transferring the Claims in the Office of the Commissioner to the Third Auditor of the Treasury Department, ch. 124, 3 Stat. 466 (1818). On the improvement in internal control mechanisms in the General Land Office, see ROHRBOUGH, *supra* note 258, at 26-70.

prominent soon after the last Jeffersonian-Republican President gave way to the “Democracy” of Andrew Jackson.<sup>435</sup>

This idea of a quasi-independent, but internally responsible, administrative bureaucracy continues to have attraction for those who are skeptical of the efficacy of governmental accountability through either judicial review or the polarized politics of electoral institutions.<sup>436</sup> The efforts of men like Albert Gallatin in the Republican era make clear that this vision of self-restraining administration is something more than a mere pipe dream.

To be sure, autocrats of all stripes prefer to control the behavior of underlings. And the competition for effective control between principals and agents in all organizations now sets the agenda for a healthy proportion of the economic and legal scholarship on the governance of private business organizations, and for political scientists who analyze institutional design from the perspective of the subfield of positive political theory. But in these contexts, control of administration is either normatively dubious (autocracy) or assumed to be virtuous (principal-agent theory). Is an “internal law of administration” similarly disconnected from democratic and rule of law values that would give it more claim to our attention than a realist or realpolitik account of the true (and perhaps sorry) state of the administrative state?

That could be, of course—just as willful politicians or judges can warp the systems of political and legal accountability that structure, monitor, and constrain administrative action from outside administration. But that is surely not the system of internal administrative accountability that has been described in these pages. Central control and instruction of field officers implementing the embargo and the government’s public lands policies strongly reinforced democratic commitments to assembly government. Treasury and Land Office circulars and manuals began with the statutes and sought to unify interpretation around the understandings of those high-level personnel who had the greatest association with the legislative process—indeed, who often drafted the statutes. And the statutory independence of certain functions within departments was respected.

Moreover, Jefferson’s singular nonacquiescence in one judicial interpretation of the embargo statutes was premised precisely on the necessity to assure rule of law values—consistency in application and the avoidance of local or partisan bias. Instead of asserting executive prerogative, Jefferson

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435. For a discussion of the new Jacksonian approach to bureaucratic responsibility through organizational design, see MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* 104-39 (1975).

436. For a brief recent discussion of this point, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2356-64 (2006).

validated his position by seeking and obtaining an explicit power to direct field personnel in the Enforcement Act. In a similar vein, the Treasury sought and obtained summary enforcement power against delinquent officers in order to reestablish public control over public funds, and it revised and bureaucratized its audit procedures with respect to local land offices to assure conformity with federal statutes and implementing regulations.

These observations, of course, only begin to explore the questions of normative appropriateness and effective institutional design that would illuminate the often invisible world of internal administrative law. The experiences of the Republican period recounted here can, at most, provide some support for the idea that internal administrative law is important—a legal world too often ignored by an administrative law focused almost entirely on external control and accountability. A fuller account of these matters must await another day. But it is perhaps not too audacious to conclude that Jeffersonian-Republican practices reflect an additional irony: political actors ideologically committed to the avoidance of national administrative capacity nevertheless provided us with some attractive models of what politically responsible and legally accountable administration might look like. They did so by building internal capacities for administrative control.