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Interring the Unitary Executive

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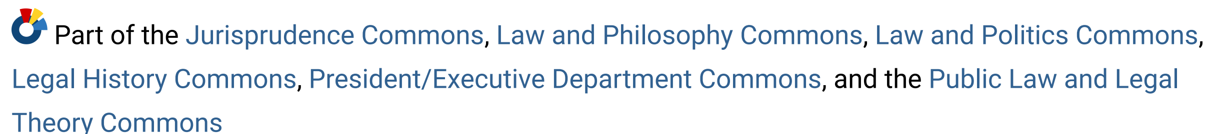
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INTERRING THE UNITARY EXECUTIVE

*Christine Kexel Chabot**

The President's power to remove and control subordinate executive officers has sparked a constitutional debate that began in 1789 and rages on today. Leading originalists claim that the Constitution created a "unitary executive" President whose plenary removal power affords her "exclusive control" over subordinates' exercise of executive power. Text assigning the President a removal power and exclusive control appears nowhere in the Constitution, however, and unitary scholars have instead relied on select historical understandings and negative inferences drawn from a supposed lack of independent regulatory structures at the Founding. The comprehensive historical record introduced by this Article lays this debate to rest. It makes clear that the Founding generation never understood the unitary executive to be part of our Constitution. This Article establishes that nonunitary, independent structures were not only present at the Founding, but that they pervaded regulatory statutes passed into law by the First Federal Congress and President George Washington.

Unitary executive theory and its requirements of absolute accountability to the President stand at odds with the independence and tenure protections afforded to scores of unelected officials who run our government. Unitary scholars insist that Article II's Vesting and Take Care Clauses require the Supreme Court to erase longstanding precedent allowing tenure protections for heads of multimember, independent agencies such as the Federal Reserve and the Federal Trade Commission. Some unitary scholars have also extended these objections to tenure protections for administrative law judges and a multitude of other inferior officers. The Roberts Court has become increasingly receptive to unitary arguments and appears poised to invalidate tenure protections applicable to wide swaths of the administrative state.

This Article demonstrates that unitary scholars and judges have rested their ar-

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guments on deficient understandings of Founding-era history. Their failure to recognize the independent structure of the Sinking Fund Commission—a Founding-era agency proposed by Alexander Hamilton and passed into law by President Washington and the First Congress—is just the tip of the iceberg. Unitary jurists have also missed scores of early statutory provisions that repeated nonunitary aspects of the Sinking Fund Commission's structure and required autonomous actors to reinforce the President's duty to take care that the laws be faithfully executed. The First Congress repeatedly delegated control over executive officers, as well as significant executive discretion, to independent judges and lay persons whom the President could not remove or replace. This body also chose a nonunitary framework when it dispersed executive decisions amongst multiple officers and required these officers to check actions taken by the President and each other. These laws belie the conventional originalist view that the Constitution vests complete control over the exercise of executive power in the President of the United States. Independent regulatory structures have been with us since the beginning, and originalism provides no occasion for the Court to declare them unconstitutional now.

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INTRODUCTION

This Article addresses one of "the oldest and most venerable debates" in constitutional and administrative law[1]: whether the Constitution established a "unitary [e]xecutive" President whose "plenary" removal power affords her "exclusive control over" subordinate officers'

1 *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3 (2008).

exercise of "executive power."[2] Leading originalists claim that Article II's Vesting and Take Care Clauses require executive officers to be removable by, and thus accountable to, a unitary executive President.[3] But the text of Article II does not expressly grant the President a removal power or exclusive control over subordinate officers.[4] As a result, unitary scholars have placed heavy emphasis on select historical understandings and negative inferences drawn from a supposed lack of independent regulatory structures at the Founding.[5] This Article dismantles the unitary construct by introducing a comprehensive historical record that conventional arguments have largely overlooked. It shows that the First Federal Congress and President George Washington enacted scores of independent regulatory structures in the Founding era. This new historical evidence resolves the unitary executive debate. It establishes that the Founding generation never understood the unitary executive to be part of our Constitution.

In the absence of the historical evidence introduced by this Article, conventional originalist arguments have led the Supreme Court to the brink of establishing the most powerful presidency in history. In *Seila Law LLC v. Consumer Financial Protection Bureau*,[6] a majority of the Court all but adopted unitary arguments from Justice Scalia's dissent in *Morrison v. Olson*[7] when it invalidated tenure protections for the head of Congress's newest administrative agency, the Consumer Financial Protection Bureau (CFPB). The logic of the majority's opinion bodes ill for the independence of multimember agencies and a multitude of inferior officers,[8] and *Seila Law* portends a judicial assault on

2 Morrison v. Olson, 487 U.S. 654, 705, 724 n.4, 727 (1988) (Scalia, J., dissenting); *accord* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1201–02 (1992).

3 *See* CALABRESI & YOO, *supra* note 1, at 3–4.

4 *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1338 (2006) (dubbing the large gap with respect to subordinate officers a "hole in the Constitution where administration might have been").

5 *See* Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 859 (2018) ("There were . . . no independent agencies in . . . eighteenth-century . . . North America."); CALABRESI & YOO, *supra* note 1, at 53 (pointing out that none of the statutes creating Founding-era commissions described them "as being independent"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 661 (1994) ("Nor did any statute even hint that the officers and institutions created therein were to be free from presidential control.").

6 140 S. Ct. 2183 (2020).

7 *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

8 Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 85 (noting that the *Seila Law* majority "might well be taken to have thrown the independence of most of the current independent agencies . . . into grave doubt").

the administrative state that will rival the Court's siege on New Deal legislation in the 1930s.[9]

While the *Seila Law* majority grounded its unitary arguments in originalism, its historical analysis attempted to plug a gaping textual hole in the Constitution with a lone artifact from the Founding Era: the First Congress's Decision of 1789.[10] The Court failed to recognize that structural provisions approved in the Decision of 1789 became law in but three of the ninety-four public acts passed by the First Congress and reflected but one aspect of executive power: removal. The myopic approach adopted in *Seila Law* misapprehends the original understanding of executive power and the Take Care Clause's prohibition on executive decisions that operate above the law. This Article provides what until now has been missing from the unitary arguments adopted by the *Seila Law* majority and supporting literature: a comprehensive account of nonunitary structures approved by the First Congress. This work comes not to dispute the unitary executive but rather to bury it.

By scouring every public act passed by the First Congress, my research recovers the entirety of nonunitary structures enacted in the shadow of the newly minted Constitution. This Article identifies seventy-one sets of early statutory provisions[11] that contradict the conventional originalist view of the unitary executive and understanding that the President must have plenary removal power to maintain "complete control" over subordinates' exercise of "executive power[]."[12] The First Congress, a body which included several Framers of the Constitution, repeatedly enabled independent exercises of significant executive power that fell outside of the President's complete control and removal power. This body granted nonremovable judges and lay persons significant executive discretion as well as supervisory power over executive officers. The First Congress also rejected a top-down chain of command when it dispersed significant executive power amongst multiple officers and required them to check actions taken by the President and each other. Later Congresses continued to repeat these independent structures in related legislation. This evidence shows that

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9 Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7–8 (2017).

10 *Seila L.*, 140 S. Ct. at 2197 (noting "the First Congress's recognition of the President's removal power" when the "'first executive departments were created' in 1789" (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010)).

11 *See infra* Appendix. Fifty of these provisions were passed by the First Congress, and twenty-one of these provisions repeated the same structures in follow-on legislation passed in the Federalist era.

12 *Morrison*, 487 U.S. at 709 (Scalia, J., dissenting); *accord* Calabresi & Rhodes, *supra* note 2, at 1201–02.

initial regulatory laws of the United States routinely incorporated non-unitary structures to ensure compliance with the law in ways that the President could not.

As Ganesh Sitaraman noted in the *Harvard Law Review*, the *Seila Law* majority's originalist understanding of the unitary executive rests on a selective history and omits an important counter example,[13] which I introduced in an earlier work,[14] and which since has been dubbed the "Decision of 1790."[15] In this decision, Alexander Hamilton, the First Congress, and President Washington created an independent Sinking Fund Commission that could be trusted to exercise sovereign power to "pay the Debt[ ]"[16] without unlawfully diverting appropriated funds to politically expedient uses.[17] Alexander Hamilton argued that the Sinking Fund and other measures offered in "support of the Public Credit" comprised "'a matter of high importance to the [national] honor and prosperity' of the United States,"[18] and urged Congress to entrust the Commission's disposition of funds to a five-member board controlled by three Commissioners whom the President could not remove.[19] The First Congress and President Washington ultimately enacted a Commission comprised of the Secretary of the Treasury (Alexander Hamilton), Secretary of State (Thomas Jefferson), President of the Senate /Vice President (John Adams), the Attorney General (Edmund Randolph), and the Chief Justice (John Jay).[20] By law the President was powerless to disburse funds for repayment of debt unless at least three Commissioners independently agreed to such action.[21]

13 Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 387 n.278 (2020) (citing Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020)); *see also* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1484 n.232 (2021) (citing Chabot, *supra*, at 3, 6).

14 Chabot, *supra* note 13.

15 Brief for Court-Appointed Amicus Curiae at 35–36, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422) (citing Chabot, *supra* note 13).

16 U.S. CONST. art. I, § 8, cl. 1.

17 Chabot, *supra* note 13, at 4–5.

18 *Report Relative to a Provision for the Support of Public Credit, [9 January 1790]*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001 [https://perma.cc/E3SY-Z324] (quoting 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 117 (1826)).

19 *Id.* (proposing a Commission comprised of the Chief Justice, Vice President, Speaker of the House, Secretary of the Treasury, and Attorney General).

20 Act of August 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

21 *Id.*

Three critical elements[22] of the Sinking Fund Commission's independent structure limited the President's control over the Commission and prevented him from unlawfully diverting funds appropriated for payment of debt. First, the Commission assigned executive repayment decisions to an independent Chief Justice and Vice President whom the President could not remove or replace. The assignment of executive power to nonremovable officers violates the formal unitary requirement of removal at will. Second, the President could not control the Commission by removing a cabinet officer such as the Secretary of State, because the ensuing vacancy would merely shift the controlling, third vote to an independent Chief Justice or Vice President.[23] Third, the Commission's multimember structure promoted independence and prompted officers such as the Secretary of the Treasury and Secretary of State to check each other instead of carrying out a unified policy set by the President. The second and third elements of the Commission's independent structure underscore the limited function that removal power served on the Commission. The holistic approach taken by this Article paints an even more devastating picture for unitary arguments. If the Sinking Fund Commission were the only independent structure created by the First Congress, the historical record might tempt the Justices to cherry pick evidence[24] and favor the Decision of 1789 over the Decision of 1790. Further, recent research by Jed

22 *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 787, 791–95 (2013) (noting that tenure protection and multimember structure are elements of independence).

23 *See* Brief for Court-Appointed Amicus Curiae at 35–36, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422).

24 Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. (forthcoming Mar. 2023) (manuscript at 8) (on file with author) (explaining that the conventional understanding of the Decision of 1789 reflects the textualists' problem of "find[ing] [one's] friends in a large party"). *See generally* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2180–81 (2022) (Breyer, J., dissenting) (noting that "historical evidence" will often "leave[] ample discretion" to favor one's preferred outcome and that the Court's historical analysis "demonstrates" these "very pitfalls"). Some unitary scholarship omits the Sinking Fund Commission entirely. *See, e.g.*, MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020) [hereinafter Wurman, *In Search*]; Calabresi & Prakash, *supra* note 5, at 646–47 (surveying the "creation and operation of the Treasury Department, the Post Office, and the U.S. Attorneys" "[r]ather than examining every statute creating executive officers"). *But cf.* CALABRESI & YOO, *supra* note 1, at 53 (arguing that the President controlled the Commission because it had a majority of "executive branch members" who were "removable at will"); Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 CATO SUP. CT. REV. 157, 179–80 [hereinafter Wurman, *Removal Power*] (arguing the same); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 279–80 (2015) (explaining that Congress "expressly authorized the [P]resident to approve the [C]ommissioners' decisions" to purchase debt in the form of U.S. securities,

Shugerman presents new reasons to question unitary understandings of the Decision of 1789[25] and calls out for a more complete historical record. If the First Congress did not clearly recognize a unitary theory when it established the initial departments of government, then what happened in the rest of the laws it passed?

Leading objections to the unitary executive have relied on pre-ratification evidence[26] as well as select Founding-era practices related to Treasury[27] or aspects of independence in select law enforcement or adjudicative functions.[28] Jerry Mashaw's leading 2006 survey offered a

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although removal provisions for the chief justice were "less clear"); Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1339–40 (2019) (arguing that both approval and removal ensured presidential control of the Sinking Fund Commission). As noted below, these arguments fail to recognize that the Commission's overall structure afforded the President only *partial* control of the Commission's executive decisions.

25 Shugerman, *supra* note 24, at 4 (stating that a "careful and rigorous study of the original debates and letters from 1789" shows either "indecision[]" or "rejection of the unitary model").

26 *See infra* notes 64–66.

27 *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 120–23 (1994) (surveying Treasury and select "administrative" departments established at the Founding); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 73–74 (1983) (discussing how the first comptroller countersigned the Secretary of the Treasury's warrants for disbursement of funds); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 240–42 (1989) (same); LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 116–22 (1948) (noting different functions within Treasury).

28 *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–309 (1989) [hereinafter Krent, *Executive Control*] (reviewing qui tam actions and other independent exercises of prosecutorial power in the Founding Era); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 632 (describing early statutes allowing "independent prosecutors"); Harold J. Krent, *Limits on the Unitary Executive: The Special Case of Adjudicative Function*, 46 VT. L. REV. 86, 103 (2021) [hereinafter Krent, *Limits*] (discussing independent judges who helped resolve claims of invalid pensioners and private patent referees); Shugerman, *supra* note 24, at 52–53 (noting early statutory provisions that allowed deputy marshals to be removed by judges); Jed Shugerman, The Decisions of 1789 Were Anti-Unitary: An Originalism Cautionary Tale 44–54 (Aug. 15, 2021) [hereinafter Shugerman, Cautionary Tale] (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597496 (discussing background on independent prosecution and early statutes allowing courts to remove executive officers who committed certain offenses); Brief for Jed H. Shugerman as Amicus Curiae Supporting Court-Appointed Amicus Curiae at 21-24, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422) (noting removal-by-judiciary provisions); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1291–304 (2018) (discussing use of qui tam actions to monitor conduct of revenue, census, treasury, and postal officers).

"snapshot" of key independent structures from the "Federalist administrative state."[29] In his later book, however, Mashaw ultimately concluded that his historical research was "inconclusive" on the unitary executive debate,[30] and unitary scholars subsequently dismissed questions that Mashaw and other scholars raised based on Founding-era practices.[31] At most, unitary scholars suggested that shared decision-making requirements such as having multiple officers countersign Treasury warrants represented "isolated deviations from . . . unitary executive theory."[32] Past scholarship on Founding-era practices thus reached a stalemate after trading examples of unitary and nonunitary structures.

This Article breaks the stalemate by moving beyond examples. It considers the entire corpus of independent structures that were passed by the First Congress as well as follow-on legislation that repeated these

29 Mashaw, *supra* note 4, at 1269. Mashaw's survey offers examples from early Congresses and raises important questions about unitary theory. *See id.* at 1278–79 (noting the first Collection Act's requirements collection officers "act in unison to accomplish a number of tasks"); *id.* at 1280 (describing valuation of imported goods by private merchants under the first Collection Act); *id.* at 1281–82 (noting the Spirits Acts' provisions allowing lay persons to sue for neglect of official duty); *id.* at 1301–02 (noting the Patent Board and "commissioners for the federal debt" and mint); *id.* at 1315, 1317–18, 1318 n.210 (noting that early Congresses enacted dozens of "provisions for sharing the proceeds of prosecution with informants"); *id.* at 1317 (noting that early Congresses enacted five judicially imposed fines or punishments for executive officers as well as five bond requirements); *id.* at 1331–33 (noting use of courts as "administrative tribunals" in remission and pension cases); *see also* Jerry L. Mashaw, *Center and Periphery in Antebellum Federal Administration: The Multiple Faces of Popular Control*, 12 U. PA. J. CONST. L. 331, 342–43 (2010) (reiterating evidence of bonds, "qui tam" actions against officers, and use of merchants to resolve "disputes about valuation"). This Article extends Mashaw's research, introduces a comprehensive record of nonunitary structures passed by the First Congress, and addresses this evidence in light of the current unitary debate under *Seila Law*.

30 JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 324 n.14 (2012) (resting this conclusion on "ambiguous" historical evidence as well as "shifting" conceptions of the unitary executive).

31 CALABRESI & YOO, *supra* note 1, at 43–46 (dismissing Lessig/Sunstein's argument that Treasury and the Post Office were not "executive" departments); *id.* at 51–52 (presuming that the President had power to "direct and control" "private law enforcement through the bringing of qui tam actions"); *id.* at 52–53 (dismissing Mashaw's arguments about independent aspects of the Sinking Fund, Patent, and Mint Commissions). While Mashaw briefly noted the President's inability to remove certain Commissioners, *see* Chabot, *supra* note 13, at 27–28, neither he nor Calabresi and Yoo addressed the independence created by the Commission's multimember structure and the need for Congress to grant the President a separate approbation power.

32 CALABRESI & YOO, *supra* note 1, at 57 (distinguishing statutes allowing the Comptroller of Treasury to "countersign warrants" for disbursement of funds and to make "final and conclusive" settlements of certain accounts (quoting Act of March 3, 1795, ch. 48, § 4, 1 Stat. 441, 442)).

structures in the Federalist era. The comprehensive historical record introduced by this Article reveals that independent structures were knowingly and continually woven into the regulatory fabric of the early Republic. These structures violated formal unitary requirements of removal at will and reflected early Congress's pragmatic recognition of removal's limited function. They cannot be considered isolated occurrences but instead reflected well-established and liquidated features of the original understanding of executive power.[33] Early Congresses required shared decisionmaking not only in countersigning requirements for Treasury but also in multiple pieces of legislation on the Sinking Fund Commission and in dozens of statutory sections governing collection of duties at the most important ports in the United States.[34] And for geographically distant and often inferior officers farther down the chain of command, early Congresses repeatedly enlisted independent private parties and judges to police officers' revenue— and census—collection duties in ways that the President could not be expected to monitor or address through the removal power.[35] This body also authorized independent deputies to act as marshals and awarded lay persons and judges whom the President could not remove or replace significant executive discretion over law enforcement as well as preliminary adjudicative decisions similar to those assigned to inferior officers today.[36] These laws show that early Congresses never understood the Constitution to create a President whose plenary removal power afforded him complete control over law execution. Instead, the early Congresses passed statute after statute designed to ensure compliance with the law by repeating independent and nonunitary elements of the Sinking Fund's structure.

This Article proceeds in three Parts. Part I sets forth the textual and precedential origins of today's unitary executive theory. Part II provides what has heretofore been missing from this debate: a comprehensive historical analysis of independent regulatory structures enacted at the Founding. Part III evaluates this evidence in light of new constitutional doubts that *Seila Law* and *Free Enterprise Fund v. Public Company Accounting Oversight Board*[37] have raised, with particular emphasis on independent multimember agencies and inferior officers. This Article's comprehensive analysis illuminates the unprecedented reach of the unitary executive theory adopted by the Roberts Court.

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33 *See, e.g.*, William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 (2019) (discussing James Madison's theory of liquidation and understanding textual "indeterminacies could . . . be settled by subsequent practice").

34 *See infra* Appendix, Table 1.

35 *See infra* Appendix, Table 2.

36 *See infra* Appendix, Table 3.

37 561 U.S. 477, 488 (2010).

Key opinions by Chief Justice Roberts emphasize the lack of accountability in "novel" regulatory structures invalidated by the Court: "double for-cause" tenure protections in *Free Enterprise*[38] and tenure protections for a "single" agency head in *Seila Law*.[39] At the same time these opinions ignored the legal novelties inherent in the Court's constitutional holdings. *Free Enterprise* was the first time that the Court invalidated statutory for-cause tenure protections for inferior officers, and *Seila Law* was the first time the Court invalidated for-cause tenure protections applicable to an agency head.[40] The strong unitary arguments adopted in *Free Enterprise* and *Seila Law* suggest that it will only be a matter of time before the Court extends these rulings and cancels tenure protections for heads of multimember agencies as well as administrative law judges and other inferior officers.[41]

The Court's originalist, unitary assumptions fail to account for alternative forms of accountability that have pervaded independent regulatory structures since the Founding. Early Congresses repeatedly relied on multimember or shared decisionmaking structures to ensure accountability to the law in ways removal could not. Early Congresses knowingly rejected complete presidential control when they enlisted independent deputy marshals, judges, and lay persons to help execute the laws. The Founding-era history unearthed in this Article counsels against expansive originalist challenges to independent structures that permeate our current government. Originalism provides no occasion for the Roberts Court to convert its recent holdings into a wrecking ball designed to take out large portions of the administrative state.

38 *Id.* at 488, 496–97 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 697 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

39 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S.Ct. 2183, 2201 (2020).

40 *See infra* subsection I.A.3. The Court's latest decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), "mark[ed] a significant shift" to a related requirement that a "principal officer[]" review "final adjudicative decisions" made by a tenure-protected inferior officer. Jennifer Mascott & John F. Duffy, *Executive Decisions After Arthrex*, 2022 SUP. CT. REV. 225, 228.

41 The Fifth Circuit Court of Appeals has already taken important steps in this direction. Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022) (declaring multi-layer tenure protections for inferior officers serving as SEC Administrative Law Judges (ALJs) unconstitutional).

I. THE LEGAL AND HISTORICAL ORIGINS OF UNITARY EXECUTIVE THEORY

A. *The Text and Judicial Interpretations of Article II*

1. Text of the U.S. Constitution

Though unitary scholars often trace presidential removal back to an understanding that the King of England possessed the "power to remove most officers at will,"[42] the President that emerged from the Constitutional Convention was never intended to possess the complete set of powers held by the King. The "Committee of Detail and the Convention addressed and allocated . . . significant royal prerogative[s]" and expressly assigned many of those prerogative powers to Congress rather than the President.[43] In particular, Article II, section 4 ultimately assigned an express removal power to Congress: it provided that "[t]he President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[44] Nowhere in the sparse text of Article II did the Constitution expressly grant the President a parallel removal power. Article II merely vested "[t]he executive Power" in "a" single, elected President and required the President to "take Care that the Laws be faithfully executed."[45]

Unlike the King, the President was not empowered to create executive offices. This function instead fell within Congress's power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the sovereign powers of the United States.[46] Once Congress created an office, Article II's Appointments Clause granted the President a constrained-at-best role in filling these offices: in general the President may appoint officers only with the advice and consent of the Senate, with an exception providing that the President is but one of three bodies in which Congress by law vests appointment of an inferior officer.[47]

These provisions left a huge gap regarding the termination and control of both offices and officers. Congress's power to create offices allowed it to limit either the office or officers who serve in the office to

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42 MCCONNELL, *supra* note 24, at 162.

43 *Id.*

44 U.S. CONST. art. II, § 4.

45 *Id.* art. II, § 1, § 3.

46 *Id.* art. I, § 8; MCCONNELL, *supra* note 24, at 154 ("The Necessary and Proper Clause implicitly grants Congress the power to create offices . . . .").

47 U.S. CONST. art. II, § 2, cl. 2.

a fixed term of years,[48] but this understanding left further questions about the President's role. It did not address whether the President had the power to remove an officer before the end of a term fixed by statute, whether Congress could limit the President's removal power to specified causes such as malfeasance or neglect, or whether the President possessed exclusive power to supervise executive officers.

Unitary scholars have invoked a variety of preratification materials and clauses to support understandings that Article II assigns an indefeasible removal power to the President. The "prevailing view" has been a "residual theory": it holds that in the absence of constitutional language to the contrary "all executive-type powers" including removal and other powers "traditionally exercised by the British monarch" are vested in "the president" under Article II.[49] Ilan Wurman has argued that preratification understandings of removal power from England and America should instead be understood as part of a "thick" "executive power" that Article II's Vesting Clause assigns to the President.[50] Michael McConnell charts yet a different course and argues that the Take Care Clause is an "indefeasible" source of "supervisory authority" for which "the power of removal is essential."[51] These unitary theories uniformly reject restrictions on removal of principal officers.[52] Some unitary scholars have extended these arguments to challenge the Court's earlier accommodation of tenure-protected inferior officers[53]

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48 Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1789 (2006) ("Congress can limit an office's duration and the tenure of officers.").

49 Wurman, *Removal Power*, *supra* note 24, at 162; *see also* Calabresi & Prakash, *supra* note 5, at 597 (explaining that in addition to structure, "a host of historical and textual arguments persuade us that the President must also have a removal power"). The independent structures identified in this Article are also inconsistent with arguments that Article II affords the President a distinct and complete power to "direct" executive action. *See, e.g.*, Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 353 (1989).

50 Wurman, *Removal Power*, *supra* note 24, at 166; Wurman, *In Search*, *supra* note 24, at 107–40 (explaining that the appointment and removal powers are "incidental" to or "derivative" of law execution, and thus an inherent part of a "thick" view of "executive power" that Article II vests in the President).

51 MCCONNELL, *supra* note 24, at 262.

52 Wurman, *Removal Power*, *supra* note 24, at 164 (stating that residual understandings of "removal power seems to have included the high officers"); *id.* at 166–67 (same conclusion supported by thick understanding of law execution); MCCONNELL, *supra* note 24, at 167 (arguing that removal applies to officers with "significant discretionary authority").

53 Morrison v. Olson, 487 U.S. 654, 724 n.4 (1988) (Scalia, J., dissenting) (explaining that Article II "does not require that [the President] have plenary power to remove inferior officers"); *see also* Myers v. United States, 272 U.S. 52, 150 (1926) (Brandeis, J., dissenting) (arguing that it is "within the power of Congress" to limit the President's power to remove "inferior officers"—a category which "probably includes ninety-nine out of a hundred . . .

by arguing that "any officer with significant discretionary authority" must "be removable at will."[54] This requirement would seem to reach inferior officers or other officials exercising "significant authority pursuant to the laws of the United States"[55] and has aligned with recent challenges to tenure protections for inferior officers who serve as administrative law judges.[56]

Strong unitary claims stand in tension with other preratification evidence of textual meaning. Julian Mortenson's exhaustive research on the meaning of "executive power" reveals a "thin"[57] understanding pursuant to which the President is an empty vessel with mere power to "execute" or "carry out" the law established by Congress and the President.[58] Unitary arguments also fail to account for important structural limitations identified in recent scholarship addressing the Take Care Clause. The Take Care Clause imposes on the President a separate duty to ensure that the "[l]aws be faithfully executed,"[59] and subjects

lucrative offices in the government" (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1544, at 356 (Thomas M. Cooley ed., Boston, Charles C. Little & James Brown 2d ed. 1851) (1833))).

54 MCCONNELL, *supra* note 24, at 167; Calabresi & Rhodes, *supra* note 2, at 1166 n.53 (citing Kendall v. United States, 37 U.S. (12 Pet.) 524, 612–13 (1838), and distinguishing unitary theory's application to "discretionary exercises of executive power by subordinate[]" officers from "ministerial tasks"); *see also* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1069 n.305 (2006) (arguing that the "best reading of the Decision [of 1789] is that it applies to all executive officers, however appointed"); *cf.* Wurman, *Removal Power*, *supra* note 24, at 182 (noting "unanswered question[s]" regarding the President's power to remove "inferior officers").

55 Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018); *see also id.* at 2059–61 (Breyer, J., concurring in the judgment in part and dissenting in part) (arguing that decision to categorize ALJs as "officers" might lead to challenges to ALJs' tenure protections under Article II).

56 Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022) (holding "statutory removal restrictions" with "two layers of for-cause protection" for "SEC ALJs" unconstitutional without deciding whether this flaw would support vacatur of the SEC's decision); Fleming v. U.S. Dep't of Agric., 987 F.3d 1093, 1113 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) ("[I]t is unconstitutional to insulate Agriculture ALJs with two layers of removal protection."); Jennifer L. Mascott, *"Officers" in the Supreme Court:* Lucia v. SEC, 2018 CATO SUP. CT. REV. 305, 312 (predicting that Solicitor General's briefs challenging "for-cause tenure protections for ALJs at independent agencies" in *Lucia* would "set the stage" for "future challenges").

57 Wurman, *Removal Power, supra* note 24, at 166–67.

58 Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1278 (2020). "The word 'execute' meant to perform; to complete; to carry out; to implement; to bring into being; or simply to do. . . . Execution thus meant success in creating something new, often with a flavor of subordination to instructions from somewhere else." *Id.* at 1311–12; MCCONNELL, *supra* note 24, at 166 ("[P]owers imparted by the Vesting Clause are subordinate to laws passed within the scope of Congress's enumerated powers . . . .").

59 U.S. CONST. art. II, § 3.

the President to the law.[60] Andrew Kent, Ethan Leib, and Jed Shugerman have marshaled considerable preratification evidence that the Framers "sought to bind the President to a requirement of faithful execution,"[61] and that this requirement "may also restrict the President's power to dismiss officials for primarily self-protective purposes against the public interest."[62] Further, unitary arguments omit pluralistic understandings of executive power, and the textual argument that Article II does not vest "executive power" power in the President "alone" or use other language making executive power exclusive to the President.[63] Finally, unitary claims fail to account for preconstitutional offices affording term-of-years and good-cause tenure protections,[64] state constitutional practices inconsistent with a thick understanding that "executive power" necessarily includes appointments and removal powers,[65] and a recent comprehensive analysis showing that "Blackstone did not list removal power among the royal prerogative powers," and "[i]nstead . . . offered more evidence that offices could be protected from removal."[66]

Given the scholarly debate as to whether the constitutional text or preratification understandings established a unitary executive, it is easy

60 Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 280 (2009) (explaining that "[t]he prohibition on the [executive powers of] suspending and dispensing" with laws "was encoded in Article II's requirement that the President must 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)).

61 Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2188 (2019).

62 *Id.* at 2189–90; *cf.* Wurman, *Removal Power*, *supra* note 24, at 164 (explaining that "[t]he Take Care Clause would not limit the extent" to which Article II's Vesting Clause grants the President indefeasible removal power).

63 Jed Shugerman, *Vesting*, 74 STAN. L. REV. (forthcoming 2022) (manuscript at 7–8) (on file with author) ("[T]he word 'vest' generally meant a simple grant of powers without the constitutional significance of exclusivity or indefeasibility that the unitary theorists have imputed to it.").

64 *See* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 227 (2021) (explaining that Parliament approved a "five member[]" "commission for auditing public accounts" in which "commissioners were to hold their offices during good behavior"); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 20 (2021) (noting British ministerial offices held for a "term of years"); *id.* at 43–44 (describing good cause protections in pre-ratification Virginia laws for warehouse inspectors and New York laws for prison officials); U.S. CONST. art. II, § 1 (granting the President and Vice President four-year terms).

65 Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 339, 347–48 (2016) (explaining that the Massachusetts and Connecticut Constitutions' vesting "executive power" in governors did not preclude state legislatures from assigning appointments of officers away from governors).

66 Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANS. 125, 173 (2022).

to understand why Alexander Hamilton and James Madison both articulated nonunitary understandings of the President's constitutional removal power when they wrote *The Federalist* papers. Alexander Hamilton argued that the President's removal power would mirror the Appointments Clause and require the Senate to approve the President's removal of an officer.[67] James Madison initially shared Hamilton's view on senatorial approval,[68] and in *The Federalist* Madison explained that the "republic" would be "administered by persons holding their offices during pleasure for a limited period, or during good behavior."[69] Madison further explained that "[t]he tenure of the ministerial offices generally will be a subject of legal regulation."[70] In light of Hamilton's and Madison's initial understandings of Article II, the history that follows in this Article should come as no surprise. Before turning to the complete historical record and understandings of the First Congress, however, this Article will provide an overview of how the Supreme Court has interpreted Article II. Only in recent decades has the Court arrived at a much more unitary version of executive removal power than the one first recognized by both Madison and Hamilton.

2. Judicial Precedent

The Supreme Court has a long history of deferring to statutory tenure protections passed by Congress.[71] This tradition runs all the way back to Chief Justice Marshall's 1803 decision in *Marbury v. Madison*.[72] The validity of a five-year statutory tenure protection was a cen-

67 THE FEDERALIST NO. 77, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For a competing view of Hamilton's statement, see Seth Barrett Tillman, *The Puzzle of Hamilton's* Federalist *No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 149–54 (2010) (arguing that Hamilton's reference to senatorial approval of a "displaced" officer referred only to confirmation of a successor).

68 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791: DEBATES IN THE HOUSE OF REPRESENTATIVES: FIRST SESSION: JUNE–SEPTEMBER 1789, at 846 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter 11 DHFFC] (showing that Madison "[a]t first glance . . . imagined that the same power which appointed officers should have the right of displacing them").

69 THE FEDERALIST NO. 39, *supra* note 67, at 237 (James Madison).

70 *Id.* at 238.

71 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2224 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (explaining that "[t]hroughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to . . . legislation" agreed to by the political branches); *cf.* Myers v. United States, 272 U.S. 52, 106–77 (1926) (rejecting senatorial approval of President's removal); Bowsher v. Synar, 478 U.S. 714, 726 (1986) (stating that "Congress cannot reserve for itself the power of removal of an officer" who executes laws).

72 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

tral assumption of the case: otherwise there would have been no occasion for Marbury to file a lawsuit seeking delivery of his commission.[73] Both Marbury's decision to seek judicial relief and Chief Justice Marshall's opinion occurred on the heels of the Founding and reflected a basic understanding that the Constitution allowed Congress to pass nonrevocable tenure protections. Other nineteenth-century decisions followed suit: in *United States v. Perkins*, the Court validated Congress' decision to "limit and restrict the power of removal" for inferior officers "as it deems best for the public interest,"[74] and in *Ex parte Hennen* it recognized a judicial removal power over inferior clerks appointed by courts.[75]

This is not to say that the President's removal power was beyond controversy. But in the nineteenth century, "almost no one contested" the "removal" protections in statutes such as the Interstate Commerce Act,[76] and leading disputes focused on more extreme restrictions requiring the Senate to approve presidential removals.[77] These contests played out in the political branches (and even led to Andrew Johnson's impeachment)[78] without a definitive resolution by the courts. In two decisions issued around the turn of the century, the Court construed statutory tenure protections narrowly and required Congress to "speak in clear terms to create" limitations on the President's removal power.[79] It decided both matters "as cases of statutory interpretation"[80]

73 *Id.* at 162 (explaining that "the law creating the office[] gave the officer a right to hold [his commission] for five years, independent of the executive" and was "not revocable"); Manners & Menand, *supra* note 64, at 25 (explaining that "[a]t the time," it was "widely accepted" "that absent statutory or constitutional language to the contrary" "a term-of-years office foreclosed executive removal").

74 United States v. Perkins, 116 U.S. 483, 485 (1886) (validating removal limitations for a naval cadet-engineer and found that Congress "may limit and restrict the power of removal" of inferior officers).

75 *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 261 (1839) (explaining that the clerk of court's office was "held at the discretion of the Court" as "power to appoint a clerk was vested exclusively in the District Court").

76 Manners & Menand, *supra* note 64, at 58.

77 *Id.* at 60–61.

78 Parsons v. United States, 167 U.S. 324, 340 (1897) (recounting Johnson's impeachment).

79 Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1171–72 (2013); *Parsons*, 167 U.S. at 335–36, 342 (construing four-year commission as a "limitation . . . subject . . . to the power of the President to remove" and distinguishing *Marbury* as a case involving an office in the District of Columbia); Shurtleff v. United States, 189 U.S. 311, 318 (1903) (holding that the right to remove customs appraisers was not "taken away in plain and unambiguous language" by statute that specified causes for removal without fixing a term of office).

80 Vermeule, *supra* note 79, at 1172.

and avoided ruling on the constitutional aspects of the President's removal power.[81]

The Court finally entered the constitutional fray in 1926, when Chief Justice Taft declared unconstitutional a requirement that the Senate approve the President's decision to remove a postmaster in *Myers v. United States*.[82] Before *Myers*, "the Court had never struck down a statute on the ground that it unconstitutionally regulated the President or executive branch."[83] Chief Justice Taft grounded his pathbreaking opinion in a key Founding-era episode—the First Congress's Decision of 1789. As he explained, the "exact question" addressed in the Decision of 1789 "was whether [Congress] should recognize . . . the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate."[84] The Chief Justice adopted the First Congress's construction of Article II when he invalidated a statute that required the Senate to approve the President's removal of a postmaster.[85]

Myers had a limited reach. Just nine years later, the Court validated for-cause tenure protections for officers who served fixed terms on the Federal Trade Commission (FTC) in *Humphrey's Executor v. United States*.[86] The Federal Trade Commission Act granted the President unilateral power to remove a Commissioner so long as cause for termination existed,[87] and thus it did not present the same concerns as earlier disputes in which the President was required to obtain the Senate's consent for removal.[88] The Court also based its decision on an understanding that the Commissioners performed "quasi-judicial" and "quasi-legislative" functions and were not "purely executive officers" who might be required to answer more directly to the President.[89] At the same time, *Humphrey's* acknowledged that the Commission also carried out certain executive functions, including a footnote that addressed part of the Act "authoriz[ing] the President to direct an investigation and report by the commission in relation to alleged violations

81 *Parsons*, 167 U.S. at 334–35 (finding it "unnecessary" to determine the President's "constitutional power" over removals); *Shurtleff*, 189 U.S. at 314.

82 Myers v. United States, 272 U.S. 52, 106–77 (1926).

83 Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2077 (2022).

84 *Myers*, 272 U.S. at 114. The postmaster was an inferior officer whose appointment was confirmed by the Senate. *Id.* at 173–74.

85 *Id.* at 176.

86 Humphrey's Ex'r v. United States, 295 U.S. 602, 627–28 (1935); *id.* at 622–23.

87 15 U.S.C. § 41 (1925–1926) ("[C]ommissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.").

88 *Myers*, 272 U.S. at 176.

89 *Humphrey's Ex'r*, 295 U.S. at 627–28.

of the anti-trust acts."[90] The Court swept the Commission's executive powers aside as "obviously collateral to the main design of the act" and rested its decision on the Commission's generally, but not entirely, nonexecutive nature.[91]

In *Morrison v. Olson*,[92] the Court switched rationales but continued to approve for-cause tenure protections. It adopted a balancing test and held that an independent counsel and inferior officer who exercised admittedly executive prosecutorial powers could be sheltered from removal at will.[93] A majority of the Court refused to find that "imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority."[94] Thus, even if the multimember structure approved in *Humphrey's* involved tenure protections for FTC Commissioners who exercised executive power, as the Court now suggested they did,[95] these restrictions would not be unconstitutional unless they "impede[d] the President's ability to perform his constitutional duty."[96] For-cause protections would still allow a President to meet her constitutional duty "to ensure the 'faithful execution' of the laws," moreover, as she would retain power to "control or supervise" an officer by removing that officer for "misconduct."[97] Only Justice Scalia would have invalidated the independent counsel's for-cause protections as inconsistent with the unitary executive established by the original meaning of Article II. He deemed for-cause protections a violation of Article II's requirement that the President retain "exclusive control over the exercise" of "executive power" by an independent counsel whom he also understood to be a principal officer.[98]

3. The Unitary Executive in the Roberts Court

The Court's 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[99] was the first time that a majority of the Court declared for-cause tenure protections unconstitutional. The

90 *Id.* at 628 n.*.

91 *Id.*; *see also* Wiener v. United States, 357 U.S. 349, 356 (1958) (rejecting the President's power to "remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees").

92 487 U.S. 654 (1988).

93 *Id.* at 691–92; *id.* at 711 (Scalia, J., dissenting) (decrying the "balancing test" adopted by the majority).

94 *Id.* at 691.

95 *Id.* at 689 n.28 ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." (citing Bowsher v. Synar, 478 U.S. 714, 761 n.3 (1986))).

96 *Id.* at 691.

97 *Id.* at 692.

98 *Id.* at 705.

99 561 U.S. 477 (2010).

Court characterized the Oversight Board as novel, because it involved a structure that nested the Board inside the Securities and Exchange Commission (SEC). Inferior officers on the Board enjoyed "more than one level of good-cause protection" and were "empowered to take significant enforcement actions . . . largely independently" of the SEC, while the SEC itself operated independently of the President.[100] In particular, inferior officers on the Board could be removed by the SEC "only 'for good cause shown,'"[101] and the Court also assumed that the President could remove SEC Commissioners only for good cause.[102] When the Court invalidated the Board's double for-cause protections to ensure adequate "[p]residential oversight,"[103] it traced the President's oversight and removal power back to the Founding. According to Chief Justice Roberts' majority opinion, "[s]ince 1789, the Constitution has been understood to empower the President to keep . . . officers accountable—by removing them from office, if necessary."[104] He nevertheless left intact the "limited restrictions on the President's removal power" that the Court had earlier approved in *Humphrey's Executor*, *Morrison*, and *Perkins*.[105]

Not until its 2020 decision in *Seila Law*, after more than two centuries of constitutional practice to the contrary, did the Court suggest that Article II prevents Congress from creating independent multimember agencies.[106] The precise arrangement considered in *Seila Law* was one step removed: an independent Consumer Financial Protection Bureau run by a single Director who could be removed only for "inefficiency, neglect of duty, or malfeasance in office."[107] The Bureau's single-headed structure, which the Court found to be nearly unique to the Bureau, arguably set it apart from traditional multimember independent agencies such as the FTC. The design was unitary because it entrusted significant executive decisions to a single head; at the same time the design was independent because the head also enjoyed for-cause protections from removal by the President. When faced with a Bureau chief that seemed accountable to neither the President nor the law, a majority of the Court found that this officer must be accountable to the President under a unitary executive theory. Chief Justice Roberts' majority opinion held that the Bureau "lacks a

100 *Id.* at 484, 504–05 (explaining that the Board had "significant independence in determining its priorities and intervening in the affairs of regulated firms").

101 *Id.* at 486 (quoting 15 U.S.C. § 7211(e)(6) (2018)).

102 *Id.* at 487 (stipulating that SEC heads were subject only to good cause removal).

103 *Id.* at 509.

104 *Id.* at 483.

105 *Id.* at 493–95.

106 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020).

107 *Id.* at 2193 (citing 12 U.S.C. §§ 5491(c)(1), (3) (2018)).

foundation in historical practice and clashes with constitutional structure by concentrating" significant executive "power in a unilateral actor insulated from Presidential control."[108]

The original meaning of Article II was front and center in the Court's embrace of the unitary executive and determination that the "President alone" must control all subordinate officers' exercise of executive power.[109] Chief Justice Roberts emphasized the understandings of the First Congress in his analysis: the "President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States.*"[110] The Court reiterated *Myers*' understanding that Article II "grants to the President" the "general administrative control of those executing the laws" through the removal power.[111] In determining what was settled by the First Congress, however, the Chief Justice based his analysis only on *Myers* and a handful of citations to the Decision of 1789 and related documents.[112] He omitted the Sinking Fund Commission and other independent structures enacted by the First Congress and President Washington.[113] The Chief Justice's historical analysis commanded only five votes, and Justice Kagan mounted a forceful rebuttal. She argued, in dissent, that the majority opinion "repudiates the lessons of American experience, from the 18th century to the present day."[114]

The majority's analysis of precedent also called into question tenure protections for multimember agencies and inferior officers. The Chief Justice's opinion reduced the precedent supporting for-cause protections to "two" isolated "exceptions."[115] *Humphrey's* allowed for-cause protections only in "multimember expert agencies that do not wield substantial executive power," and *Morrison* allowed for-cause protections "for inferior officers with limited duties and no policymaking or administrative authority."[116] The Chief Justice's narrow reading of precedent may have been necessary for this part of his opinion to attract the votes of Justices Gorsuch and Thomas. In an opinion joined

108 *Id.* at 2192 (Roberts, C.J., joined by Alito, Thomas, Gorsuch & Kavanaugh, JJ.).

109 *Id.* at 2197.

110 *Id.* at 2191–92.

111 *Id.* at 2197–98.

112 *Id.* at 2197 (discussing Madison's recollection of the First Congress's debate over removal power); Sunstein & Vermeule, *supra* note 8, at 86 (arguing that the *Seila Law* majority's opinion "does not work hard with the text and the history").

113 Sitaraman, *supra* note 13.

114 *Seila L.*, 140 S. Ct. at 2226 (Kagan, J., joined by Breyer, Sotomayor & Ginsburg, JJ., concurring in the judgment with respect to severability and dissenting in part).

115 *Id.* at 2199–2200 (majority opinion).

116 *Id.*

by Justice Gorsuch, Justice Thomas wrote separately to urge a broader stance against "the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure."[117] Invoking Justice Scalia's *Morrison* dissent, he decried *Humphrey's Executor* as being "devoid of textual or historical precedent for the novel principle it set forth."[118] Justice Thomas applauded the Chief Justice's opinion for "repudiat[ing] almost every aspect" of *Humphrey's Executor* and encouraged the Court to "repudiate what is left of this erroneous precedent" in a future case.[119]

It is unclear whether Justice Thomas's arguments to invalidate the FTC and other multimember independent agencies would attract five votes, and in *Seila Law* itself Justices Thomas and Gorsuch did not join the Chief Justice's opinion on remedy. Justices Kavanaugh and Alito and the Justices who joined Justice Kagan's dissent on the merits agreed with Chief Justice Roberts that the "constitutional violation would disappear" if the Court severed the Bureau chief's removal protections from the rest of the statute.[120] These Justices were careful to explain that their holding would not "foreclose Congress from pursuing alternative responses" such as "converting" the Bureau "into a multimember agency."[121] Their caveat suggests that a multimember, independent structure would stand on more secure constitutional footing than the single-headed structure invalidated in *Seila Law.* On the other hand, the majority's repudiation of for-cause protection for principal officers who wield significant executive power seemed to gut the theoretical basis needed to sustain multimember agencies such as the FTC. As Justice Thomas noted in his partial concurrence, the contemporary understanding that the FTC exercises executive power means that "*Humphrey's Executor* does not even satisfy its own exception."[122] The Court seems one step away from extending the logic of *Seila Law* and

117 *Id.* at 2218 (Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part).

118 *Id.* at 2216 (citing Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting)).

119 *Id.* at 2212.

120 *Id.* at 2209 (majority opinion); *id.* at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); *see also* Collins v. Yellen, 141 S. Ct. 1761, 2183–84 (2021) (Alito, J., joined in full by Roberts, C.J., Thomas, Kavanaugh & Barrett., JJ. and joined in relevant part by Gorsuch, J.) (invalidating restrictions on the President's power to remove the head of the Federal Housing Finance Agency (FHFA), "an agency led by a single Director").

121 *Seila L.*, 140 S. Ct. at 2211.

122 *Id.* at 2218 (Thomas, J., concurring in part and dissenting in part).

invaliding tenure protections for heads of multimember agencies such as the FTC and perhaps even the Federal Reserve.[123]

The Court's latest decisions also bode ill for inferior officers who enjoy tenure protections. In *Arthrex,* five Justices narrowed the scope of discretionary decisions that could be assigned to tenure-protected inferior officers serving as administrative patent judges. The Court required these adjudicative officers to fall within a unitary "chain of command"[124] and subjected their rulings to plenary review by a principal officer whom the President could remove at will.[125] In *Axon Enterprise, Inc. v. FTC,* the Court recently granted certiorari (on a jurisdictional issue) in a challenge to the constitutionality of FTC administrative law judges who serve as inferior officers with multiple layers of tenure protection.[126] *Axon* and the Fifth Circuit's recent decision to invalidate tenure protections for similarly situated SEC administrative law judges[127] may facilitate an eventual decision as to whether these administrative law judges fall within *Free Enterprise*'s ban on tenure protections for inferior officers who report to an independent review board. The Court's broad embrace of unitary executive theory seems to have opened the door for parties to challenge longstanding tenure protections for inferior officers.

While the Justices disagreed on the merits of recent cases, they reached broader methodological consensus on originalism and the importance of plumbing the historical record to identify the original understanding of Article II. In his majority opinion in *Seila Law,* Chief Justice Roberts reiterated that the First Congress's understandings and constructions "provide[] contemporaneous and weighty evidence of the Constitution's meaning."[128] Likewise, in her dissent, Justice Kagan recounted James Madison's understanding that "'a regular course of

123 *Cf. id.* at 2232 n.8 (stating that the Fed may "claim a special historical status"); CALABRESI & YOO, *supra* note 1, at 6 (bemoaning limitations on Presidents' ability to "determine the policies" by removing leaders of the independent "Federal Reserve Board" and "FCC, SEC, or FTC").

124 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 498 (2010)); *id.* at 1985 ("[U]nreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an inferior office.").

125 *See id.* at 1987.

126 Axon Enter., Inc. v. FTC, 986 F.3d 1173 (9th Cir. 2021), *cert. granted in part,* 142 S. Ct. 895 (2022) (mem.).

127 *See* Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022).

128 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (quoting Bowsher v. Synar, 478 U.S. 714, 723 (1986)).

practice' can 'liquidate [and] settle the meaning of' disputed or indeterminate constitutional provisions."[129] The Court's interpretive construct has prioritized the constitutional understandings reflected in statutes passed by a body that included many members who "had helped to compose or to ratify the Constitution itself,"[130] and assigned these sources a primary role in illuminating the metes and bounds of Article II. The Decision of 1789 and resulting legislation fall squarely within this framework and provide the conventional historical linchpin of arguments for a unitary executive.[131]

The problem is that a majority of the Supreme Court has derived a clear unitary command from what is at best a complicated historical record. As recounted by Jonathan Gienapp, the Decision of 1789 was occasioned by constitutional ambiguity and an underlying "silence" regarding a presidential removal power.[132] Further, Jed Shugerman has recently introduced new evidence that the Decision of 1789 does not prove nearly as much as the *Seila Law* majority assumed it did.[133] At best this episode establishes that the President possesses a unilateral removal power under Article II. It does not resolve the further questions left open by *Seila Law* and *Free Enterprise* or the fundamental ques-

129 *Id.* at 2229 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908)).

130 Chabot, *supra* note 13, at 24 (quoting DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 4 (1997)); *id.* ("Founding-era statutes incorporate, at least implicitly, Congress's and the President's interpretations of the Constitution with respect to the particular structure enacted."); Baude, *supra* note 33, at 61–62 (explaining that the First Congress's practices receive "privileged" status because they present evidence thought to "reflect" the Constitution's original meaning).

131 *See, e.g.*, Prakash, *supra* note 54, at 1067–68 ("After a great deal of high-level debate leading to the Decision of 1789 . . . Congress held that the Constitution granted the President the power to remove secretaries of the executive departments."); Wurman, *In Search*, *supra* note 24, at 140–42 (explaining that arguments leading up to the Decision of 1789 "are evidence that the Founding generation shared a 'thick' view of 'the executive power,'" which included a presidential removal power); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–52 (1989) (recounting how Chief Justice Taft's opinion in *Myers* considered "the understanding of the First Congress" in 1789 as a "contemporaneous understanding of the President's removal power"); *cf.* MCCONNELL, *supra* note 24, at 167 (explaining that one may find a parallel constitutional removal power in "logic of Article II and . . . the Take Care Clause"). Scholars who object to a congressional focus have overlooked critical evidence of executive support for nonunitary structures. Chabot, *supra* note 13, at 33–39 (describing Hamilton's proposal for an independent Sinking Fund Commission with a majority of members whom the President could not remove).

132 JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 133–37 (2018).

133 *See* Shugerman, *supra* note 24, at 4.

tion of whether Congress could by statute "limit or retract the Constitution's grant of removal authority to the President."[134] The provisions approved in this Decision became law in but three of the ninety-four public acts passed by the First Congress. Understandings of removal provisions for three principal officers fail to capture other ways in which Congress ensured accountability through shared decisionmaking structures in which subordinate and often nonremovable officials checked the President and each other. The Court's narrow focus also omitted important understandings reflected in early statutes that assigned significant executive discretion to independent deputy marshals as well as nonremovable judges and lay persons. The comprehensive historical record set forth in the section below recovers scores of nonunitary structures that have never been addressed by the Supreme Court.

II. NONUNITARY STRUCTURES APPROVED BY THE FIRST CONGRESS

A. *Evidence from the First Congress's Debates*

1. Officers that Will "[C]heck [E]ach [O]ther"[135] and Prevent Corruption Where the President Cannot

Almost all of the ink that has been spilled over the Decision of 1789 obscures an important fact: initial debates leading up to the First Congress's decision involved substantial arguments as to whether the Department of the Treasury should be run by a single Secretary or by a multimember Board.[136] On May 20, 1789, the House deliberated whether to "place this all-important Department in the hands of a single individual, or in a Board of Commissioners."[137] The discussion illuminated Representatives' concern over corruption and the President's inability to guard against the Secretary's wrongdoing. Rep. Gerry noted that a lone Secretary would have great "power to

134 Prakash, *supra* note 54, at 1073.

135 1 ANNALS OF CONG. 392–93 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison). The first two volumes of the Annals of Congress were also published in two separate editions with different pagination. Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 520 n.2 (1961). References in this Article refer to the edition with the running head "History of Congress."

136 Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1440 (2019) (explaining that the May 1789 "debate began with a brief deliberation about whether the Treasury office should be headed by a single individual or a multimember board"); Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 123 (2021) (noting Madison's arguments to "parcel[] out specific powers among officers").

137 1 ANNALS OF CONG. 384 (1789) (Joseph Gales ed., 1834) (statement of Rep. Gerry).

form and digest the accounts, and to control all the officers of the Department."[138] This arrangement would present an unacceptable risk of undetectable abuse, opined Gerry, given that the Secretary would collect great amounts of the United States' revenue from customs collectors presiding over some fifty seaports scattered throughout the United States:

> If [the Secretary] is disposed to embezzle the public money, *it will be out of the power of the Executive itself to check or control him in his nefarious practices.* The extension of his business to the collectors of at least fifty seaports, (over whom the naval officer can have no control, with respect to the money received,) *will furnish abundant opportunities for peculation.*[139]

In other words, if a "single officer" has "command of three or four millions of money," he will "possess[] a power very unsafe in a republic."[140] In addition to Rep. Gerry's concern over unchecked corruption, Rep. Trumbull suggested that a single Secretary "would be unconstitutional, as it would supercede in a great measure the interference of the Senate, who were appointed a council to advise The President in the execution of the government."[141] The constitutional objection gained no traction, most likely because the Constitution grants the Senate an advisory role in appointments but not day-to-day execution of laws. But no one on the other side suggested that a multimember Treasury Board would be unconstitutional, either. Representatives' main objections to a multimember structure focused on concerns that members of a Board would lack "responsibility for their conduct"[142] and would be "destitute of energy."[143]

While arguments for an individual Secretary of the Treasury prevailed, the single-headed structure prevailed only with the further understanding that the Secretary's conduct would be checked by other officers within Treasury. Representative Baldwin, who generally advocated for an energetic Secretary, objected to "unlimited authority" in the Secretary.[144] Instead he "hoped to see proper checks provided" by establishing the separate offices of "Comptroller, Auditors, Register,

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138 *Id.* at 384–85.

139 *Id.* at 385 (emphasis added).

140 *Id.* at 387.

141 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791: DEBATES IN THE HOUSE OF REPRESENTATIVES: FIRST SESSION: APRIL–MAY 1789, at 744–45 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992).

142 1 ANNALS OF CONG. 389 (1789) (Joseph Gales ed., 1834) (statement of Rep. Wadsworth).

143 *Id.* at 392 (statement of Rep. Baldwin).

144 *Id.*

and Treasurer."[145] This structure would limit the Secretary's role by placing the "settling of the accounts . . . in the Auditors and Comptroller; the registering [of] them . . . in another officer, and the cash in the hands of one unconnected with either."[146] These checks would render the treasury "safe," while at the same time allowing "great improvements . . . in the business of revenue."[147] Rep. James Madison endorsed Baldwin's proposal and favored multiple treasury offices "so constituted as to restrain and check each other."[148] Madison further wished, that "in all cases of an Executive nature," where the power to be exercised "was too great to be trusted to an individual, proper care should be taken so to regulate and check the exercise" of that power.[149] The First Congress thus embraced a nonunitary structure and the idea that multiple officers who shared executive power could check one another to ensure faithful execution of the law.

2. Uncertainty and the Construct of Presidential Removal

In June of 1789, the House's debate turned to the President's power to remove the Secretary of Foreign Affairs. Representatives recognized that the express language of Article II is silent on the precise question of presidential removal power,[150] and this gap led the House to debate four competing constructions of removal power. At one extreme Representatives argued that "Congress lacked power to supplement the text's provision for removal of officers though impeachment."[151] Second, some Representatives urged a "senatorial" construction,[152] in which removal mirrored appointments and required the Senate to approve the President's decision to remove a superior officer. At the other extreme Representatives urged a stronger executive power. The third and fourth constructions included understandings that the President could exercise a unilateral removal power by virtue of either congressional delegation (the "congressional[]" construction) or Article II itself (the "presidential[]" construction).[153]

In debates held in June and July of 1789, members of House argued that impeachment alone provided an inadequate guarantee of faithful law execution. They raised several policy arguments in favor

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145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* at 392–93 (statement of Rep. Madison).

149 *Id.* at 392.

150 *Id.* at 486 ("In the case of removal, the Constitution is silent . . . .") (statement of Rep. Lawrence).

151 Chabot, *supra* note 13, at 23 (citing GIENAPP, *supra* note 132, at 133–37).

152 Shugerman, *supra* note 24, at 5.

153 *Id.*

of an additional removal power in the President.[154] Such power could ensure a "decisive and sudden remedy" for misconduct such as "embezzling the public money."[155] Presidential removal power could also reach beyond impeachable offenses to address "insan[ity]," "vicious habits," "indolence," "odious and unpopular" action which fell short of a "positive offence against the law," or personal aggrandizement by actions "short of . . . treason."[156] After describing these additional grounds for presidential removal, Rep. Sedgwick asked of his opponents, "is there no way suddenly to seize the worthless wretch, and hurl him from the pinnacle of power?"[157] In what was likely the earliest reference to a headless fourth branch of U.S. government, Rep. Vining opined that a government in which the President did not have removal power would be "the most unreasonable thing in nature" and result in a "monster . . . without any head."[158]

Others argued that a presidential removal power amounted to "bad policy."[159] Several members of the House voiced concerns over "despotism,"[160] "tyranny,"[161] and the manner in which removal power might allow the President to evade the law. Rep. Smith, who argued that impeachment was the only constitutionally authorized mechanism for removal, worried that a future President might "misbehave" and apply removal power to "dangerous purposes."[162] According to Smith, a "President averse to a just and honorable war which Congress have embarked in" could pressure the Secretary of War to "waste . . . public stores" and cause "misapplication of the supplies" provided for war.[163] The President could "dragoon" the Secretary "into . . . compliance" with the President's unlawful "designs, by threatening him with a removal,"[164] whereas an officer "established on a better tenure" would dare to "defy the shafts of malevolence" and "Machiavelian policy" aimed at him by the President.[165]

154 GIENAPP, *supra* note 132, at 148–49 (noting appeal to "lessons derived from republican political theory").

155 11 DHFFC, *supra* note 68, at 851 (Ames).

156 1 ANNALS OF CONG. 460 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick).

157 *Id.*

158 *Id.* at 511 (statement of Rep. Vining).

159 GIENAPP, *supra* note 132, at 149.

160 1 ANNALS OF CONG. 490 (1789) (Joseph Gales ed., 1834) (statement of Rep. Page).

161 *Id.* at 489 (statement of Rep. Jackson).

162 *Id.* at 457–58 (statement of Rep. Smith).

163 *Id.* at 471–72.

164 *Id.* at 472.

165 *Id.*

The President's absolute control would be even more dangerous if it extended beyond the military to the nation's finances: when combined with "command of the military," "complete power over the man with the strong box," would allow the President to place "the liberties of America under his thumb."[166] If the President "finds the Secretary of Finance not inclined to second his" arbitrary "endeavors," the President "has nothing more to do than to remove him, and get one appointed of principles more congenial with his own. Then, says he, I have got the army; let me have but the money, and I will establish my throne upon the ruins of your visionary republic."[167] As noted by Jed Shugerman, these warnings reflected grave concerns about "dangers of presidential corruption and abuse of the removal power."[168]

The representatives supported their political arguments for and against presidential removal with competing arguments about constitutional meaning.[169] Rep. William L. Smith argued that impeachment was the only method of removal expressly authorized by the Constitution,[170] and even James Madison and Alexander Hamilton initially thought the Senate would be required to approve the President's removal of an officer.[171] During debates, Madison confessed "doubts" after "examining the constitution by its true principles"[172] and switched to an ostensibly presidential construction. He asserted that the President's removal power was part of the "[e]xecutive power" vested in him by Article II.[173] According to Madison, "no power could be more compleatly executive than that of appointing, inspecting and controuling those who had the immediate administration of the laws."[174] Madison also pointed out the President's duty "to take care that the laws be faithfully executed" required the President to possess the "power . . . necessary to accomplish that end."[175] Madison's final reference to separation-of-powers principles illustrates that he viewed unilateral removal power as a *construction* of the entire Constitution rather than a finding dictated by the sparse language of the Vesting

166 *Id.* at 488 (statement of Rep. Jackson).

167 *Id.*

168 Shugerman, *supra* note 24, at 42.

169 GIENAPP, *supra* note 132, at 149–52.

170 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834) (statement of Rep. Smith).

171 11 DHFFC, *supra* note 68, at 846 (showing that Madison "[a]t first glance . . . imagined that the same power which appointed officers should have the right of displacing them"); *see also* THE FEDERALIST NO. 77, *supra* note 67, at 458.

172 11 DHFFC, *supra* note 68, at 846.

173 1 ANNALS OF CONG. 496 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

174 11 DHFFC, *supra* note 68, at 846.

175 1 ANNALS OF CONG. 496 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

Clause. Citing the general "maxim" that "the three great departments of Government be kept separate and distinct," Madison argued that Congress "*ought*, consequently, to expound the Constitution so as to blend them as little as possible."[176] For Madison this maxim meant that Congress ought not extend the Senate's express role in confirming presidential nominees to a further power to approve presidential removals.

Madison further responded to objections based on the "danger of [removal] power vested in the President alone"[177] by considering the "checks under which [the President] lies in the exercise" of removal power.[178] Part of Madison's response turned on the understanding that the Constitution did not vest removal power solely in the President: it also offered impeachment "as a supplemental security for the good behaviour of the public officers."[179] Madison identified two distinct problems that had been raised with respect to presidential removal power: first, "improper continuance of bad men in office" and second, "the danger of displacing . . . good" officers.[180] Madison noted that impeachment could address both concerns by allowing removal of a bad officer, even if the bad officer was a President who committed "wanton removal of [a] meritorious officer[]."[181] The other part of Madison's response turned on the Appointments Clause. After removing a meritorious officer, he noted, the President could not by himself fill the vacancy "with some unworthy favorite."[182] Instead the President would be required to "consult the Senate" and obtain confirmation before appointing a successor.[183] Article II's Appointments Clause limited the President's use of removal power as a means to evade the law.[184]

The First Congress ultimately allowed the President a unilateral removal power over the Secretaries of Foreign Affairs, War, and Treasury, though scholars have never agreed whether Congress's decision "ultimately turned on a constitutional or congressional grant of removal power."[185] Jed Shugerman's recent research provides important context for the Decision of 1789: when the First Congress's bills moved from an express statutory grant of presidential removal power to mere

176 *Id.* at 497 (emphasis added).
177 *Id.*
178 *Id.*
179 *Id.* at 372.
180 *Id.* at 497.
181 *Id.* at 498.
182 11 DHFFC, *supra* note 68, at 897.
183 *Id.*
184 MCCONNELL, *supra* note 24, at 349–50 (noting how appointments process creates "slippage between a President's wishes and the fulfillment of those wishes").
185 Chabot, *supra* note 13, at 26 & n.166 (describing different views).

acknowledgement that the President might exercise such power,[186] previously overlooked historical background on congressional votes shows that at best the presidential construction commanded a *minority* of the House and Senate.[187] Some of the presidential construction's apparent supporters seem to have followed "a strategy of ambiguity . . . to win passage in the Senate."[188] Thus the complete historical record suggests that the First Congress's understandings reflected either "a series of indecisions" or "a rejection of the unitary model."[189] This evidence undermines arguments that ground a unitary executive President in the Decision of 1789.[190]

3. Approval of Nonunitary Structures for Acting or Inferior Officers

Beyond the ambiguity surrounding the Decision of 1789 itself, the initial statutes establishing the Departments of Foreign Affairs, War, and Treasury were enacted alongside many nonunitary structures. For Treasury in particular, the First Congress coupled presidential removal with a structure in which multiple officers would share responsibility and check each other to ensure faithful execution of laws.[191] Other open issues included Congress's ability to limit the President's removal power, specify terms of removal for inferior officers, and assign successors to exercise the powers assigned to the Secretaries of Foreign Affairs, War, and Treasury after presidential removal.

The Decision of 1789 did not resolve the further question of Congress's ability to restrict the President's removal of executive officers. Madison recognized Congress's power to "establish offices by law,"[192] which other Representatives tied to the Sweeping Clause's grant of power to make "all laws [which shall] be necessary and proper [for] carry[ing] into execution" the sovereign powers of the United States.[193] Early in the debates, Madison opined that power to establish offices also allowed Congress "to say upon what terms the office shall

186 Shugerman, *supra* note 24, at 19–20 (describing shift from proposal to declare Secretary "removable by the President" to statutory language describing contingency whenever the Secretary "shall be removed . . . by the President") (first quoting 11 DHFFC, *supra* note 68, at 1027; and then quoting Foreign Affairs Act, ch. 4, § 2, 1 Stat. 28, 29 (1789)).

187 *Id.* at 44.

188 *Id.* at 30.

189 *Id.* at 4.

190 *See, e.g.*, Prakash, *supra* note 54, at 1067–68.

191 *See supra* subsection II.A.1.

192 1 ANNALS OF CONG. 374 (1789) (Joseph Gales ed., 1834) (statement of Rep. Benson).

193 *Id.* at 561 (statement of Rep. Sylvester) (arguing that the Sweeping Clause empowers Congress to "create[] by law" offices not named in Constitution); *id.* at 512 (statement of Rep. Vining) (arguing that the Sweeping Clause allows Congress to grant removal power to the President).

be held, either during good behaviour or during pleasure."[194] Madison's initial allowance for good behavior tenure also aligned with his subsequent proposal for Comptroller of the Treasury.[195] Although the final Treasury statute did not fix a term of office or specify good cause tenure for the Comptroller, no one challenged Madison's call for independent judicial review as the ultimate check on the Comptroller's resolution of claims against private persons.[196]

Further, the First Congress recognized Congress's ability to vest power to remove inferior officers. Article II's appointments provisions contain an Exceptions Clause allowing Congress to "vest" the appointments of inferior officers "by [l]aw" in "the President alone, in the Courts of Law, or in the Heads of Departments."[197] These provisions gave rise to further debate about removal of inferior officers. In an objection to impeachment-only removal, Madison disfavored a constitutional construction that required all officers "from the Chief Justice down to the tide waiter" to "hold their offices by the firm tenure of good behaviour."[198] In response, Rep. Smith noted that "inferior officers might be removed" outside of impeachment, "because the Constitution had left it in the power of the Legislature to establish them on what terms they pleased; consequently, to direct their appointment and removal."[199] This seemed to cut against Madison's earlier statement about the "chain of dependence" that unilateral removal power would create over all levels of officers.[200] But here Madison repeated without objection the proposition that "the Legislature may vest the

194 *Id.* at 375 (statement of Rep. Benson); *see also id.* at 561 (statement of Rep. Sylvester) ("Those who have the power to create may also destroy.").

195 11 DHFFC, *supra* note 68, at 1080 ("[T]here may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of government."); Shugerman, *supra* note 24, at 44 (noting Madison's proposal for an "implied 'good behaviour' tenure for a relatively independent Comptroller").

196 1 ANNALS OF CONG. 612 (1789) (Joseph Gales ed., 1834) (urging that private persons aggrieved by the Comptroller's decisions be allowed to petition "an independent tribunal," the Supreme Court, for redress).

197 U.S. CONST. art. II, § 2, cl. 2.

198 1 ANNALS OF CONG. 547 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison). A tidewaiter is "an officer . . . who boards ships and watches the landing of goods." *Tidewaiter*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/tidewaiter [https://perma.cc/HLX3-NF77].

199 1 ANNALS OF CONG. 547 (1789) (Joseph Gales ed., 1834) (statement of Rep. Smith). Other Representatives suggested that the office vested with power to appoint an inferior officer would have power to remove. *Id.* at 484 (statement of Rep. Lawrence) (suggesting this default unless a "particular limitation was determined by the law"); *id.* at 517–18 (statement of Rep. White) (arguing that removal was incident to appointment power); *id.* at 544 (statement of Rep. Livermore) (same).

200 *Id.* at 499 (statement of Rep. Madison) ("[T]he lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.").

power of removal, with respect to inferior officers."[201] Although it has not been acknowledged by unitary scholars,[202] Madison's subsequent statement reflected a congressional approach to removal of inferior officers.

Madison's views aligned with those of other representatives who recognized Congress's ability to vest removal of inferior officers in actors other than the President. For example, when Rep. Baldwin argued against the proposition that the "power which appoints should have the power of removal also," he pointed to draft legislation on deputy marshals.[203] This legislation empowered marshals "to appoint . . . one or more deputies,"[204] who assisted the marshal and upon the marshal's death were authorized to "execute" the marshal's responsibilities "until another marshal shall be appointed and sworn."[205] The deputies were "removable from office by the judge of the district court."[206] Neither Rep. Baldwin nor anyone else objected to removal by an independent judge rather than the President or appointing marshal.[207] For Baldwin this provision was proof that removal need not follow appointments and reflected an acceptable construction of the Constitution.[208] The provision allowing the deputy marshal to be removed by judges was passed into law in September of 1789.[209] It allowed the deputy, who would count as an inferior officer or perhaps temporary agent when acting in a deceased marshal's stead, to execute the duties of the marshal's office under the control of federal judges and not the President alone.

Finally, statutes establishing Departments of Foreign Affairs, War, and Treasury all tied presidential removal power to nonunitary successorship clauses. These clauses empowered the *Secretary* of each department to appoint inferior officers,[210] and provided that these inferior

201 *Id.* at 548. He went on to note that "the Constitution vests the President with the power of removal in the case of superior officers." *Id.*; *see also* Myers v. United States, 272 U.S. 52, 255 n.21 (1926) (Brandeis, J., dissenting) (citing this passage in support of the understanding that "removal of inferior officers . . . had apparently been recognized in 1789 at the time of the great debate in the First Congress").

202 Prakash, *supra* note 54, at 1068–70 (noting "little discussion of inferior officers" without reporting this passage).

203 1 ANNALS OF CONG. 557 (1789) (Joseph Gales ed., 1834) (statement of Rep. Baldwin).

204 Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

205 *Id.* § 28.

206 *Id.* § 27.

207 1 ANNALS OF CONG. 557 (1789) (Joseph Gales ed., 1834).

208 *Id.*

209 § 27, 1 Stat. at 87.

210 Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (foreign affairs); Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50 (war); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 ("Assistant to the Secretary of the Treasury . . . shall be appointed by the . . . Secretary."). Both Houses

officers have final say over the "charge and custody of all records, books, and papers appertaining" to the Department whenever the President removed a Secretary.[211] Having the Secretary's hand-picked assistant retain Department records would seem to limit a Machiavellian scheme to oust a law-abiding Secretary and cover up existing Department records, as removal would automatically transfer Department records to a second officer who was understood to be loyal to the Secretary.[212] A President who wished to control the Treasury Department would be forced to seek senatorial confirmation of a new Secretary. These successorship provisions limited the President's ability to remove law-abiding officers, cover up records of the President's offense, and appoint new cronies who might be more willing to bend the law to the President's wishes.[213]

Debates leading up to the Decision of 1789 recognized and approved many nonunitary structures alongside departmental statutes thought to reflect a unitary executive. The discussion below shows that such independent and nonunitary structures pervaded regulatory statutes passed by the First Congress.

B. A Multitude of Early Regulatory Structures Were Inconsistent with a Unitary Executive President[214]

Founding-era statutes assigned executive power to nonremovable actors and reflected an understanding that presidential removal power played a limited role in effectuating subordinate officers' faithful execution of the law. The First Congress repeatedly relied on independent regulatory structures to monitor critical revenue decisions that the President's removal power could not be expected to reach. These provisions involved execution of laws that implemented core sovereign powers of the federal government, such as laying and collecting taxes

ultimately rejected an earlier draft that proposed to have the President appoint the assistant to the Treasury Secretary. 1 ANNALS OF CONG. 676 (1789) (Joseph Gales ed., 1834) (stating that the House "doth agree . . . to strike out" words providing that the "assistant to the Secretary of the Treasury shall be appointed by the President").

211 Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29; Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50; § 7, 1 Stat. at 67.

212 1 ANNALS OF CONG. 385 (1789) (Joseph Gales ed., 1834) (statement of Rep. Gerry) ("[I]nferior officers . . . appointed by the principal, will . . . consequently be men after his own heart.").

213 Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. (forthcoming 2023) (manuscript at 50–54) (on file with author) (describing Congress's power to "take steps" with respect to vacant offices "to ensure that the president cannot evade the Appointments Clause's ordinary strictures").

214 For an overview of all statutory provisions cited in subsections II.B.1–2, see *infra* Appendix.

and duties, paying the debt, and enumeration.[215] The First Congress's independent structures checked governmental officers and officials at all levels ranging from department heads such as the Secretary of the Treasury to inferior officers. The First Congress also authorized private parties and judges to perform discretionary executive acts. The acts ranged from matters affecting private property such as collection of customs duties to public matters such as paying the debt and conducting the census. Executive powers assigned to independent actors also spanned adjudicative functions, such as valuations used to determine customs duties, and law enforcement functions, such as prosecution of officers and private individuals who violated customs laws. Unlike the lengthy debates preceding statutes to establish initial departments of government, these statutes established independent structures without apparent doubts as to their constitutionality.

1. The First Congress Relied on Multiple Officers to Check Each Other in Discrete Revenue Decisions that the President Could Not Be Expected to Monitor

The unitary executive model posits a single, removable executive officer to carry out the President's will. To the extent multiple officers are involved, they operate as part of a hierarchical relationship and "chain of dependence" in which actions of inferior officers are controlled by superior officers and ultimately by the President.[216] This top-down model was reflected in some initial laws, such as the law establishing the Department of Foreign Affairs, which had a single Secretary assisted by an inferior officer known as a clerk.[217] But the unitary structure adopted for Foreign Affairs was a choice rather than a constitutional requirement. In key revenue laws, concerns over corruption loomed large and often turned on discrete decisions the President could not be expected to control through a removal power. Instead of relying on top-down control and the President's removal power, the First Congress instead adopted nonhierarchical structures that spread executive power out over multiple officers.

For example, James Madison understood treasury laws "parceling out specific powers among" subordinate executive officers to require

215 U.S. CONST. art. I, §§ 2, 8.

216 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (explaining that this chain requires that "'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the President on the community'") (quoting 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison)).

217 Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29.

these officers to "restrain and check each other."[218] As Blake Emerson has noted, legal "constraints on how . . . subordinate officers related *to one another* in the performance of their respective duties" meant that "the scope of the President's command authority over each of them would be limited by such subordinate checks."[219] Thus, shared decision-making requirements depart from the unitary model and its assumption that removal power yields absolute control over officers' execution of law. As Justice Kagan noted in her *Seila Law* dissent, "[i]t's easier to get one person to do what you want than a gaggle," and "[t]he same is true in bureaucracies."[220] She explained that a "multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director."[221] Shared decisionmaking therefore replaces hierarchy and presidential control with a different structure in which multiple actors ensured accountability to the law.

The First Congress ensured fidelity to statutory mandates by repeatedly requiring shared decisionmaking in which multiple officers checked each other. Its initial customs and treasury laws spurned hierarchical arrangements in favor of flat structures in which multiple officers shared decision-making power and had equal authority to approve or disapprove key decisions involving revenue. Leading unitary scholars have attempted to dismiss shared decision-making requirements for countersigning Treasury warrants as one of two possible "isolated deviations from unitary executive theory."[222] In reality, however, countersigning and other shared decision-making requirements were pervasive rather than isolated features of early revenue statutes. The First Congress repeatedly required multiple revenue officers to check each other in a manner designed to prevent error or corruption that would be impossible for the President to detect. These checks pervaded Founding-era statutes and provided an alternative to relying on the President as the exclusive guarantor of faithful execution.

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218 Emerson, *supra* note 136, at 123 (quoting 1 ANNALS OF CONG. 393 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison)).

219 *Id.*

220 *Seila L.*, 140 S. Ct. at 2243 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

221 *Id.*; *see also* Datla & Revesz, *supra* note 22, at 795 (stating that a "multimember agency structure" will "insulate[] the agency from the political preferences of a new President").

222 CALABRESI & YOO, *supra* note 1, at 57.

a. Collection Act

The Collection Act was passed in July of 1789, on the heels of the Foreign Affairs Act.[223] Congress had specified duties for a wide array of imported goods in an earlier statute, and the Collection Act created the regulatory officers and structure for collecting these duties.[224] Given that "customs duties provided virtually the whole of federal revenues" at that time,[225] it was critical to check opportunities for smuggling and corruption present at over fifty seaports scattered along the East Coast and supervised by over sixty initial collectors who were confirmed by the Senate and appointed by the President.[226] While according to their commissions these collectors served "during the Pleasure of the President,"[227] the remote nature of their collection work meant that the President himself had no real ability to monitor and detect official wrongdoing.[228] In cases like this, the "President's inability to observe directly an officials' actions imposes a constraint on [the] ability to use (or even credibly threaten) removal" and makes it doubtful that "removal does much" if any "work."[229] Thus it is hardly surprising that the First Congress refused to rely on the President as an exclusive means of controlling subordinate customs officers. This body instead required multiple officers to share responsibility for key aspects of revenue collection. The Act divided ports of the United States into myriad collection districts. Larger ports such as the cities of Philadelphia and New York had a "naval officer, collector and surveyor," whereas smaller districts may have included only collectors or only collectors and surveyors for certain ports.[230] The Act imposed joint revenue collection obligations in larger and more significant revenue districts staffed by both collectors and naval officers.[231]

Collecting duties required officers to record the nature and value of imported goods, estimate and receive payment of duties on these goods, and grant permits for unlading and delivery of goods for which

223 Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29, 29.

224 *Id.*

225 Mashaw, *supra* note 29, at 345.

226 MICHAEL N. INGRISANO, JR., THE FIRST OFFICERS OF THE UNITED STATES CUSTOMS SERVICE: APPOINTED BY PRESIDENT GEORGE WASHINGTON IN 1789, at 5 (1987).

227 *Id.* at 10.

228 *See* Beck, *supra* note 28, at 1295 (explaining that "[i]t would be extremely difficult for President Washington or Secretary Hamilton in New York to monitor" the "actions of dozens of customs officials scattered throughout the (then eleven) United States").

229 Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 41 (2013).

230 Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29, 29–35 (providing for collectors and naval officers at Portsmouth, NH; Boston, MA; Salem, MA; New York, NY; Philadelphia, PA; Baltimore, MD; Norfolk, VA; Charleston, SC; Savannah, GA).

231 *Id.* § 5.

duties had been paid. The Act assigned the collector a fundamental role in carrying out these duties: collectors would "receive all reports, manifests and documents made or exhibited to him by the master or commander of any ship or vessel," "make due entry and record in books . . . all such manifests and the packages, marks, and numbers contained therein," receive the entry of all "goods, wares and merchandise imported in such ships or vessels, together with the original invoices thereof," "estimate the duties payable thereon," "receive all monies paid for duties," and "grant all permits for the unlading and delivery of goods."[232]

In larger revenue districts with naval officers, the Act did not leave critical functions of recording imports, assessing duties, and granting permits up to a collector alone. Naval officers instead shared key aspects of collection duties with collectors. The Act directed naval officers to "receive copies of all manifests, to estimate and record the duties on each entry made *with the collector*, and to correct any error made therein, before a permit to unlade or deliver shall be granted."[233] The Act further required naval officers to "*countersign* all permits and clearances granted by the collector."[234] Section 14 also specified the naval officer's overlapping collection duties. It required naval officers to "examine" entries of goods "authenticated by the collector" and "*countersign*" permits granted "for the landing of any goods, wares or merchandise."[235] All of these provisions made it impossible for a single collector to carry out key revenue functions unless the naval officer agreed. The First Congress repeated this structure in the Registering Act of Sept. 1, 1789. The Act allowed U.S. citizens to register their ships in order to obtain lower duties on imported tonnage,[236] and all registration-related licenses, certificates, and permits issued by collectors had to be cosigned by naval officers.[237]

This shared responsibility to record imported goods, assess duties, and issue unlading and registration permits provided important checks. Before imported goods could be unloaded and delivered, two officers had to agree that records of imports and calculations of duties were accurate. Two officers had to sign off on permits for importation and ship registration. This feature not only limited recording errors,

232 *Id.* §§ 5, 7–8 (exceptions allowing individual officers to perform without a collector).

233 *Id.* § 5 (emphasis added); Mashaw, *supra* note 4, at 1278–79 (stating that this "combination of functions" seemed designed "to avoid corruption in revenue collection").

234 Act of July 31, 1789, ch. 5, § 5, 1 Stat. 29, 37 (emphasis added).

235 *Id.* § 14 (emphasis added).

236 Act of July 20, 1789, ch. 3, § 1, 1 Stat. 27, 27 (establishing that U.S. citizens' vessels paid a "rate of six cents per ton" rather than "thirty" to "fifty cents per ton").

237 Act of Sept. 1, 1789, ch. 11, § 32, 1 Stat. 55, 64.

but it also curbed temptation for officers to accept bribes in exchange for dishonest recording. Both collectors and naval officers were required to take "an oath or affirmation" to "truly and faithfully" perform the duties of their offices,[238] in addition to posting substantial bonds for the "true and faithful discharge of the duties of his office according to law."[239] The Act required the bonds to be filed with the comptroller of the Treasury and allowed the comptroller to sue "for the benefit of the United States" "upon any breach" of the true and faithful discharge conditions of the bond.[240]

Officers who discovered dishonest conduct by their peers had significant financial incentives to report it. A naval officer who took bribes or "connive[d] at a false entry" of imported goods, for example, could be sued "in the name of the United States, in any court proper" to try the matter,[241] and upon conviction would be required to "forfeit and pay a sum" between $200 and $2,000.[242] A portion of this forfeiture (or moiety) would be paid to the remaining collector and surveyor in equal parts.[243] The chance to recover part of these forfeitures was lucrative compared to the standard $2.50 to $0.20 fees collectors and naval officers received for each discrete entry and permit function they performed.[244] These provisions provided a disincentive for officers to hide one another's evasion of the customs laws, and joint collection duties made it difficult for officers to hide bribes or other collusion in which officers and private parties combined in efforts to evade customs laws.

The collectors and naval officers' equal power to control revenue decisions operated alongside hierarchical provisions subjecting the collectors' spending decisions, books, and payment of revenue to oversight by officers who would soon occupy the Department of Treasury.[245] Collectors likewise supervised surveyors with authority over persons who weighed and measured imports. But these top-down control mechanisms were unlikely to detect incompetence or localized fraud

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238 § 8, 1 Stat. at 37–38.

239 *Id.* § 28 (emphasis added).

240 *Id.*

241 *Id.* §§ 35–36. The general rule that suit could be brought by the collector did not apply "in cases of penalty relating to an officer of the customs." *Id.* § 36.

242 *Id.* § 35.

243 *Id.* § 35–38.

244 *Id.* § 29 (fees for collectors, naval officers, and surveyors).

245 *Id.* § 9 (requiring collectors, naval officers, and surveyors to submit "books, papers and accounts" and settle accounts with an "officer appointed by law to superintend the revenue of the United States"); *id.* § 5 (requiring collector to provide "at the public expense, and with the approbation of the principal officer of the treasury department, storehouses for the safe keeping of goods").

occurring between collection officers and ship commanders. For important ports, Congress instead chose to require multiple collection and naval officers to assume joint responsibility for key aspects of revenue collection. This structure provided independent incentives for officers to look over one another's shoulders and report peers who attempted to thwart revenue collection laws.

b. Treasury Act

The First Congress repeated nonunitary structures in the Treasury Department. Unlike the Department of Foreign Affairs, which had only a Secretary and Clerk, Congress created six officers to run Treasury. In addition to the Secretary, who was "head of the department," Treasury was staffed with "a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury."[246] Though these officers did not operate as equals on a multimember board, Congress granted each officer overlapping responsibilities for key functions of the department. These provisions denied the Secretary or any other single officer absolute power over U.S. funds and prevented the Secretary from taking key actions without the approval of other Treasury officers.[247]

Every disbursement of U.S. funds required approval of four separate officers. The Secretary was "to grant under the limitations herein established . . . all warrants for monies to be issued from the Treasury."[248] The Comptroller was then required to "countersign all warrants drawn by the Secretary."[249] Only after these two officers signed off on a warrant could it be recorded by the Register and then transmitted to the Treasurer, the lone officer with authority to make an ultimate disbursement of U.S. funds. Joint power over disbursements served to flatten the department's structure by denying the Secretary complete control over funds. These provisions afforded the Comptroller equal and independent power to countersign warrants issued by the Secretary, required the Register to make a separate record of the Secretary's and Comptroller's decisions, and did not allow anyone other than the Treasurer to touch the money that would be disbursed according to other officers' orders.

Money taken in by the Treasurer was also subject to oversight and recording by other officers. Receipts for monies "received by" the Treasurer were required to "be endorsed upon warrants signed by the

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246 Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65.

247 *See supra* note 27 (listing articles discussing independent aspects of Treasury).

248 § 2, 1 Stat. at 66.

249 *Id.* § 3.

Secretary" and recorded by the Register.[250] The Treasurer was also required to "submit to the Secretary of the Treasury, and the Comptroller, or either of them, the inspection of the monies in his hands" and "render his accounts to the Comptroller quarterly."[251] The Auditor and Comptroller shared responsibility for receiving and examining public accounts:[252] the Auditor had an initial duty "to receive all public accounts, and after examination to certify the balance," before transmitting these accounts "to the Comptroller for his decision thereon."[253] Any person "dissatisfied" with this audit could "within six months appeal to the Comptroller against such settlement."[254]

On top of these overlapping duties, officers in the Treasury Department retained financial incentives to turn in other officers who obtained any extralegal "emolument or gain for negotiating or transacting any business" of the Department.[255] The Act provided that "any other person than a public prosecutor" who "shall give information of such offense" was entitled to $1,500 or half of the penalty imposed upon the officer's conviction for wrongdoing.[256] This structure made it difficult for a single corrupt officer (or single officer acting at the behest of a corrupt President) to attempt to raid the Treasury, as other officers in the Department stood to profit by exposing the unlawful action.

c. Revenue Laws Passed in the Wake of the Treasury Act

In the 1790 legislation that replaced the original Collection Act, the First Congress continued to assign shared collection responsibilities to collectors and naval officers. Its reenactment of collectors' recording, assessing, and permitting functions again subjected collectors' decisions in important districts to the approval of naval officers. The Act required naval officers to "receive copies of all manifests" entered by the collector; estimate duties "*together* with the collector," and "*countersign* all permits" granted by the collector.[257] The collectors' and naval officers' shared duties continued in other provisions that required these officers "*jointly*" to estimate duties owed on goods not properly categorized as "sea stores,"[258] "*jointly*" to determine facts that

250 *Id.* §§ 4, 6.
251 *Id.* § 4.
252 *Id.* §§ 4, 6 (establishing that the Register had the additional obligation to "preserve" accounts "which shall have been finally adjusted").
253 *Id.* §§ 3, 5.
254 *Id.* § 5.
255 *Id.* § 8.
256 *Id.*
257 Act of Aug. 4, 1790, ch. 35, § 6, 1 Stat. 145, 154 (emphasis added).
258 *Id.* § 22 (emphasis added).

would allow exceptions and permits for goods originally "exported from the United States,"[259] and "*together*" to compare officers' records to owners' entries after delivery of goods was completed.[260]

Two further provisions allowed "the collector, naval officer and surveyor, or the major part of them" to prevent forfeitures if it "appear[ed]" to two or more officers' "satisfaction" that exonerating circumstances existed.[261] The Act also continued to funnel a portion of forfeitures to collection officers in cases where their peers were convicted for taking bribes.[262] These nonunitary provisions stood in contrast to other parts of the Act that assigned spending decisions on building and equipping of cutter boats directly to the President[263] and required the Secretary of the Treasury to approve collectors' decisions to provide and deploy row boats to aid in the detection of fraud.[264]

In 1791, the First Congress retained key nonunitary structures for updated duties imposed on imported spirits. The Spirits Act provided that updated "duties shall be collected in the same manner, by the same persons, [and] under the same regulations . . . as those heretofore laid."[265] This section thus incorporated earlier provisions of the Collection Acts (which applied to distilled spirits and other imports) and the nonunitary collection provisions described above. The Spirits Act imposed further shared responsibilities with respect to permitting,[266] searches and seizures,[267] and determinations that exporters were entitled to drawbacks in cases where the spirits were stolen or destroyed before they arrived at a foreign port.[268] This Act also incorporated provisions for appropriation of forfeitures to officers whose peers

259 *Id.* § 25 (emphasis added).

260 *Id.* § 32 (emphasis added).

261 *Id.* § 10 (allowing officers to prevent forfeiture if imported goods had been accounted for or that ship manifests were unavailable due to accidents or mistakes rather than fraud).

262 *Id.* §§ 66, 68.

263 *Id.* § 62.

264 *Id.* § 65; *cf.* § 6 (establishing Secretary's approbation of spending and collectors' submission of "fair and true accounts and records" to Treasury).

265 Act of Mar. 3, 1791, ch. 15, § 2, 1 Stat. 199, 199.

266 *Id.* § 9 (authorizing inspector to endorse collectors' permits for landing of spirits).

267 *Id.* § 32 (requiring a warrant for search and seizure of fraudulently concealed spirits to be executed by "officers of inspection . . . in the presence of a constable or other officer of the peace").

268 *Id.* § 57 (establishing that "examination and proof" that spirits were "taken by enemies or perished in the sea" and thus subject to allowances for exports was "left to the judgment of the collector of the customs, naval officer, and chief officer of inspection, or any two of them"); *cf. id.* (assigning certain determinations based on nonstandard proof of delivery to comptroller's final decision).

were convicted of taking bribes.[269] These nonunitary aspects of the Spirits Act operated alongside a more hierarchical scheme for domestic duties. The Act allowed the President to appoint (with senatorial confirmation) new district supervisors and subordinate officers known as inspectors to collect duties on spirits produced in the United States.[270] Given the First Congress's pervasive use of nonunitary structures elsewhere, its decision to adopt a hierarchical structure for domestic duties is best viewed as a congressional choice rather than a constitutional requirement.

d. Subsequent Amendments to Revenue Statutes

Congress's next major collection legislation was in 1799. The 1799 Act repealed most of the First Congress's legislation on collection of duties, "except as to the continuance of the officers appointed" under the earlier Acts.[271] Despite this repeal, the 1799 Act continued to impose duties and shared collection responsibilities from the original customs laws.[272] Major ports with both collectors and naval officers still required the collector to estimate duties "*together* with the naval officer" and to have the naval officer "*countersign*" permits granted by the collector.[273] Other provisions of the 1799 Act required joint decision determinations of the absence of fraudulent intent, in the case of missing manifests,[274] joint estimates of duties owed for goods in excess of proper sea stores,[275] joint admission of irregular proof of exported goods,[276] and joint determinations when certain false entries should be excused due to mistake or accident.[277] Finally, the 1799 Act still allowed officers to recover a portion of the moiety collected from other officers found guilty of taking bribes or other misconduct.[278] The

269 *Id.* § 2 ("subject[ing]" collection of duties "to the same forfeitures and other penalties, as those heretofore laid").

270 *Id.* § 4 (creating new offices of supervisor and inspector); *see also id.* § 16 ("[D]uties on spirits distilled within the United States[] shall be collected under the management of the supervisors of the revenue.").

271 Act of Mar. 2, 1799, ch. 22, § 112, 1 Stat. 627, 704.

272 The related domestic duties imposed by the Spirits Act did not fare as well. They were so unpopular that they led to the Whiskey Rebellion and ultimate repeal of these duties during the Jefferson administration. Act of Apr. 6, 1802, ch. 19, § 1, 1 Stat. 148, 148 (establishing that "internal duties" on "domestic distilled spirits . . . shall be discontinued"). *See generally* CAROL BERKIN, A SOVEREIGN PEOPLE: THE CRISES OF THE 1790S AND THE BIRTH OF AMERICAN NATIONALISM 78 (2017) (noting repeal).

273 § 21, 1 Stat. at 642 (emphasis added).

274 *Id.* § 24.

275 *Id.* § 45.

276 *Id.* § 81.

277 *Id.* § 84.

278 *Id.* §§ 88, 91.

shared decision-making responsibilities imposed by the Treasury Act also continued in full force and were left untouched by subsequent amendments in the Founding era.[279]

The overall record of revenue statutes passed in the Founding Era reflects a strong norm of shared decisionmaking in order to guard against corruption. Congress adopted nonunitary structures that required multiple officers to check each other in order to ensure compliance with revenue laws.

2. The Sinking Fund Commission's Multimember Structure Insulated It from Presidential Control

The First Congress used a multimember board to afford even greater insulation from presidential control when it established the five-member Sinking Fund Commission. The Commission was Alexander Hamilton's brainchild for a trustworthy mechanism to disburse funds that Congress allocated to repay U.S. debt. Hamilton's plan provided for open market purchases of U.S. securities as a discretionary means to both repay and stabilize the value of debt held in the form of U.S. securities.[280] By the late eighteenth century, sinking funds had a poor track record in England, as political actors typically "raided" funds "over and over for spending purposes other than debt redemption."[281] Hamilton's writings acknowledged this concern and repeatedly emphasized the need for "inviolable application" of funds set aside to pay the debt.[282]

To this end, Hamilton proposed, and the First Congress and President Washington enacted, a multimember Sinking Fund Commission. The Act did not allow the President to appoint Commissioners of his choosing and instead created a board that placed the following officers on the Commission ex officio: the Secretary of the Treasury (Alexander Hamilton), Secretary of State (Thomas Jefferson), President of the Senate/Vice President (John Adams), the Attorney General (Edmund

279 WHITE, *supra* note 27, at 119 ("The basic internal structure of the Treasury Department stood intact throughout the whole Federalist period . . . ."); Act of July 16, 1798, ch. 85, § 2, 1 Stat. 610, 610 (providing that naval "disbursements shall be made" by the Treasurer "pursuant to warrants from the Secretary of the Navy, countersigned by the accountant").

280 Chabot, *supra* note 13, at 34.

281 *Id.* at 38 (quoting Richard Sylla & Jack W. Wilson, *Sinking Funds as Credible Commitments: Two Centuries of US National-Debt Experience*, 11 JAPAN & WORLD ECON. 199, 205 (1999)).

282 *Id.* (quoting *Report on a Plan for the Further Support of Public Credit, [16 January 1795]*, NAT'L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton), https://founders.archives.gov/documents/Hamilton/01-18-02-0052-0002 [https://perma.cc/3X4N-UBK6]).

Randolph), and the Chief Justice (John Jay).[283] The President had no power to remove the Chief Justice or the Vice President from their underlying offices and thus no power to replace these officers' seats on the Commission. Further, the Chief Justice's good behavior tenure could exceed the President's four-year term and gave the President no guarantee of appointing a new Chief Justice to serve on the Commission. The President also had no power to choose a Vice President as, in the period before the Twelfth Amendment, the Vice President "attained office by being runner-up in the presidential election."[284]

By law the President was powerless to disburse funds for open market purchases unless at least three Commissioners independently agreed to such action.[285] The Commission's multimember structure gave each Commissioner equal voting power and prevented any single officer from disbursing funds unless at least two other Commissioners and the President also agreed to this action. This structure also dissuaded the three cabinet officers removable by the President (Hamilton, Randolph, and Jefferson) from adopting unified executive policies. Instead, they cast opposing votes and publicly dissented from open market purchases and policies approved by other members of the Commission and the President.

Sharp policy differences surfaced in a key episode in 1792, when Alexander Hamilton urged the Commission to make significant open market purchases in response to a market crash and financial panic.[286] While these purchases were designed to preserve the United States' future credit by stabilizing the value of existing U.S. securities, they also may have afforded an overly generous bailout to current debtholders who likely included some speculators.[287] Commissioners Randolph and Jefferson initially opposed Hamilton's proposed purchases, and Jefferson never agreed to Hamilton's proposed action on policy grounds.[288] Jefferson openly dissented from purchase decisions that were declared lawful by Chief Justice Jay and ultimately approved by a majority of the Commissioners and President Washington.[289] The Commission's multimember structure encouraged divergent rather

283 Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

284 Chabot, *supra* note 13, at 35–36 (citing U.S. CONST. art. II, § 1).

285 § 2, 1 Stat. at 186; *cf.* Act of Mar. 3, 1791, ch. 15, § 50, 1 Stat. 199, 210 (majority of supervisors in a district for collection of duties imposed on spirits may exercise single supervisor's power).

286 Richard Sylla, Robert E. Wright & David J. Cowen, *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 61, 78 (2009) (recounting additional purchases urged by Hamilton).

287 *See* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 131–33 (2021).

288 *Id.* at 133.

289 *Id.*

than unified policy views on the proper response to the stock market crash and financial crisis of 1792.

Despite the apparent independence facilitated by the Sinking Fund Commission's structure, some unitary scholars have argued that the President's ability to remove three of the five Commissioners served a unitary function and afforded President Washington control over the Commission's decisions.[290] They fail to recognize additional limits imposed by the Commission's inherent successorship provisions and the President's general inability to force the Commission to take action. Say, for example, that the President wanted the Commission to disburse funds for open market purchases, but only the Attorney General and the Secretary of the Treasury approved of this decision, while the Secretary of State and other Commissioners opposed it. If the President responded by removing the Secretary of State, the immediate effect of the vacancy would be to make the Commission even more independent and transfer the controlling third vote for this and all other currently desired purchases to the Vice President or Chief Justice.[291] The President would face an independent Commission that he could not force to act unless and until the Senate agreed to confirm a new Secretary of State. This structure was designed to impede purchases and prevent the President from forcing reluctant Commissioners to disburse funds when in their view such action was unwarranted. Indeed, it would make no sense to create a five-member commission if the goal was to effectuate the wishes of a single President. The independent multimember structure that Hamilton proposed here was plainly designed to accomplish something else: shelter from political control.

To further underscore the President's lack of power over the Commission's initial spending decisions, the Act assigned the President a separate power to approve disbursements to which the Commission had already agreed.[292] As I have explained earlier, if the initial

290 *E.g.*, CALABRESI & YOO, *supra* note 1, at 53 (explaining that "executive branch . . . entities" on Founding-era commissions "were obviously removable at will by the president").

291 *Cf.* Brief for Court-Appointed Amicus Curiae at 35, Collins v. Yellen, 141 S. Ct. 1761 (2021) (No. 19-422) (noting that a vacancy would shift the controlling vote to independent members of the Commission).

292 Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186. For other statutes requiring the President to approve or certify officers' acts, see Act of Aug. 7, 1789, ch. 9, 1 Stat. 53, 53–54 (requiring the Secretary of the Treasury's lighthouse contracts to be approved by President); Act of July 16, 1790, ch. 28, §§ 2–3, 1 Stat. 130, 130 (requiring "three commissioners" to establish the permanent seat of government "according to such plans as the President shall approve"); Act of Sept. 15, 1789, ch. 14, § 4, 1 Stat. 68, 68–69 (requiring the Secretary of State to "affix" seal to "all civil commissions" that "have been signed by the President of

disbursement decisions by cabinet members on the Commission were thought to reflect the President's will, then there would be no need for a separate provision allowing the President to approve or disapprove these decisions.[293] The Sinking Fund Commission's structure ensured that both the Commission and the President acted as checks on one another. Disbursement of funds could only occur when both the Commission and President agreed to such actions, and the President was powerless to act without separate approval of disbursements by the Commission.

Later Congresses repeated these multimember structures in subsequent legislation renewing the Sinking Fund Commission's ability to manage debt and establishing the Mint.[294] Multimember boards or commissions were commonplace in other domestic statutes passed by the First Congress.[295] The first Patent Act notably empowered a Patent Board comprised of Thomas Jefferson (Secretary of State) along with Edmund Randolph (Attorney General) and Henry Knox (Secretary of

the United States"); Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (providing that the "President . . . shall cause the seal of the United States to be . . . affixed" to letters patent).

293 Chabot, *supra* note 13, at 50. The President's power to approve Commission purchases renders nugatory unitary scholars' speculation that the President could control independent commissioners by discontinuing their executive roles on the Commission. CALABRESI & YOO, *supra* note 1, at 53 ("[N]onexecutive branch officers [such] as the chief justice and the president of the Senate could have been removed at will as members of these commissions . . . ."). Removing the Chief Justice or Vice President from the Commission would serve no purpose other than to prevent the Commission from taking action. It would never allow the President to force an unwanted purchase, as the statute's requirements that the Chief Justice and Vice President serve as ex officio Commissioners would still preclude the President from creating a vacancy in and appointing replacements to these underlying offices. *See* § 2, 1 Stat. at 186. Unsurprisingly, unitary scholars have never supported their speculation on this point with evidence of a time that President Washington removed an independent member from the Sinking Fund Commission or a judge that Congress assigned to perform executive duties. CALABRESI & YOO, *supra* note 1, at 42 (listing removals that did not involve judges or the Vice President in "seventeen civil cases").

294 Act of May 8, 1792, ch. 38, §§ 6–8, 1 Stat. 281, 282–83 (continuing Sinking Fund Commission's role in conducting open market purchases to repay the debt); Act of Mar. 3, 1795, ch. 45, § 10, 1 Stat. 433, 435–46 (obsolete provision continuing Sinking Fund Commission's role in managing repayment of debt); Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250 (1792) (inspection of coinage by the Chief Justice, Secretary and Comptroller of the Treasury, Secretary of State, and Attorney General).

295 Act of Aug. 5, 1790, ch. 38, § 1, 1 Stat. 178, 178 (expired provision establishing "a board . . . of three commissioners . . . to settle the accounts between the United States, and the individual states"); Act of Aug. 5, 1789, ch. 6, § 1, 1 Stat. 49, 49 (continuing "Board of Commissioners" established by "ordinance of the late Congress" to settle accounts); §§ 2– 3, 1 Stat. at 130 (creating "three commissioners" to establish the permanent seat of government "according to such plans as the President shall approve").

War)[296] to grant patents for any "sufficiently useful and important" inventions or discoveries.[297]

3. The First Congress Enlisted Judges and Private Parties to Check Executive Officers' Conduct[298]

The First Congress did not rely on executive officers alone to guard against misconduct. It also enlisted independent judges and private parties in policing officers' conduct and taking care that they executed the laws faithfully. As noted above, the Collection Act was passed on the heels of the Act establishing the Department of Foreign Affairs, and it placed great trust in collectors, naval officers, and surveyors. This Act included several nonunitary structures that enlisted private or judicial actors to ensure customs officers' faithful execution of customs laws. The First Congress repeated its structures enlisting private and judicial actors in a series of subsequent revenue statutes.

a. Collection Act

An initial provision required every collector, naval officer, and surveyor "give bond with one or more sufficient sureties," and make these bonds "payable to the . . . United States" and "conditioned for the *true and faithful discharge of the duties of his office according to law*."[299] At the time sureties were private individuals rather than companies.[300] The bond amounts were as high as $60,000 for the collector of Philadelphia and $50,000 for the collector of New York[301] (approximately 5–10 times the value of ships used to import goods)[302] and had to be provided "within three months" after the officer took office.[303] The Act further authorized the comptroller of treasury to sue for the amount of the bond "upon any breach" of the condition of faithful law execution.[304]

296 § 1, 1 Stat. at 110 (repealed 1793). The new patent legislation adopted in 1793 eliminated the Board but transferred contested decisions involving patent grants to a panel of private referees. Act of Feb. 21, 1793, ch. 11, § 9, 1 Stat. 318, 322–23 (repealed 1836) (providing that "interfering applications . . . shall be submitted to the arbitration of three persons" for a "final" decision as to "the granting of the patent").

297 § 1, 1 Stat. at 110.

298 For an overview of statutory provisions cited in subsection II.B.3, see *infra* Appendix.

299 Act of July 31, 1789, ch. 5, § 28, 1 Stat. 29, 44 (emphasis added).

300 *See infra* note 321 and accompanying text.

301 § 28, 1 Stat. at 44.

302 *See* Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1475 & n.155 (2019) (showing that at the high end vessels ranged in value from $6,000 to $12,000).

303 § 28, 1 Stat. at 44.

304 *Id.*; *see also* Kent et al., *supra* note 61, at 2176–77 (discussing historical use of bonds to ensure faithful execution); Manners & Menand, *supra* note 64, at 38–43 (same).

The bond amounts were high enough that it would be difficult for questionable or unscrupulous officers to obtain bonds through private sureties, even if the President were unaware of the problem or inclined to look the other way.

Later parts of the Act afforded further nonunitary provisions designed to ensure faithful law execution. Section 35 provided that customs officers convicted in court of "directly or indirectly" "bribe[s]" or "conniv[ing] at a false entry" regarding imported goods would pay a sum between $200 and $2,000.[305] The section further held that conviction in court would "forever disable[]" the officer "from holding any office of trust or profit under the United States."[306] Although this language was not quite as specific as later provisions in which the First Congress expressly allowed judges to "remove" or "forfeit" the office of persons convicted of certain wrongdoing, it has been interpreted as requiring removal from office upon conviction for bribery,[307] and it would generally preclude the President from reappointing the corrupt officer to this or another office of trust or profit.[308] Jed Shugerman has noted this and several other removal-by-judiciary provisions in his research.[309] Under these provisions, the President lacked exclusive power to remove or punish a misbehaving officer, as Congress supplemented executive control with judicially imposed punishments of removal and disqualification. This structure aligns with the Supreme Court's later decision that courts do not interfere with the President's Article II powers when they require officers to comply with the law.[310] Further, allegations of indirect bribes might require courts to make policy judgments and not merely collect evidence relevant to a bright-line violation of the law.[311] In such cases courts and not just the Presi-

305 § 35, 1 Stat. at 46; *id.* § 36 ("[A]ll penalties accruing by any breach of this act, shall be sued for . . . in any court proper to try the same.").

306 *Id.* § 35.

307 Maria Simon, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617, 1648 (1994) (stating that Section 35's "perpetual disqualification . . . strongly appears to have included removal").

308 Lessig & Sunstein, *supra* note 27, at 21 (explaining that pardons offer a "limited" power).

309 *See* Shugerman, Cautionary Tale, *supra* note 28, at 44 (citing Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67); *id.* at 51–54 (citing provisions including the Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46; Act of Mar. 3, 1791, ch. 15, §§ 39, 49, 1 Stat. 199, 208; Act of Mar. 3, 1791, ch. 18, § 1, 1 Stat. 215, 215).

310 Kendall v. United States, 37 U.S. (12 Pet.) 524, 612–13 (1838).

311 For example, a court might be asked to decide whether as a matter of policy a collector who imposed somewhat low duties after being treated to dinner by a local merchant should be found guilty of and fined for taking an indirect bribe.

dent could play a role in determining policies that would delineate appropriate boundaries between collection officers and the local merchants they regulated.

To augment this judicial remedy, section 38 of the Act provided bounties to private informers. This section allowed "any person" other than a collector, naval officer, or surveyor, to recover "half of [the] moiety" set aside for customs officers.[312] The moiety was a portion of money drawn from penalties, fines, and forfeitures, which included forfeitures imposed on officers convicted of taking bribes[313] as well as penalties for private parties who attempted to defraud revenue or conceal imported goods.[314] The award to private informers applied in "all cases" where amounts were recovered "in pursuance of information given" by the informer.[315]

The additional judicial remedy and payment to informers made great sense, given that bribery of customs officials was likely a clandestine breach of official duties. Even a diligent President would have been hard-pressed to detect wrongdoing by a far-flung officer at one of fifty-some seaports.[316] But a private person or lesser officer who knew of the wrongdoing had financial incentives to provide information of wrongdoing.[317] In cases of bribery this information would lead to the conviction, disability, and presumptive removal of the corrupt officer in addition to monetary penalties. Congress created similar incentives in two additional provisions that allowed informers or aggrieved parties to recover "in any court having cognizance thereof" forfeitures of $100–$200 "with costs" from customs officers who failed to post "a fair table of the rates" or charge fees at the levels specified by statute.[318]

312 § 38, 1 Stat. at 48. Bounties that officers might split with private informers were known as "moieties," and represented a "percentage share[] . . . of the forfeitures that federal law imposed for intentional evasion." NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT 1780–1940, at 221 (2013).

313 § 35, 1 Stat. at 46.

314 *Id.* §§ 25–27.

315 *Id.* § 38. Mashaw, *supra* note 4, at 1315 n.195, 1318 n.210 (listing this and other "provisions for sharing the proceeds of prosecution with informants").

316 Beck, *supra* note 28, at 1294–95 (noting use of informer and qui tam provisions to monitor remote revenue officers).

317 PARRILLO, *supra* note 312, at 226–27 (explaining that by the 1860s a "prevalent" pattern of enforcement under the "moiety system" started with a tip from a "clerk at an importing firm").

318 § 29, 1 Stat. at 45; Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (incorporating earlier registration provisions on "penalties and forfeitures").

b. Bonds and Judicially Imposed Removal and Fines in Additional Revenue Statutes

The First Congress again refused to leave faithful execution to the executive alone in a series of subsequent revenue statutes. It passed four additional provisions requiring officers to post bonds conditioned on faithful execution of laws, with private sureties assuming liability for officers' breach of this condition. These bond requirements applied to customs officers under a revised provision of the customs laws[319] as well as the U.S. Treasurer and marshals.[320] The Treasurer was required to "give bond, with sufficient sureties . . . in the sum" of $150,000 "with condition for the faithful performance of the duties of his office, and for the fidelity of the persons to be by him employed."[321] This provision accords with earlier understandings of the Treasurer's role as a check on corruption within the Treasury, and relies on private sureties to provide additional assurance of the Treasurer's faithful execution of laws. The Judiciary Act subjected marshals to $20,000 bonds[322] because they "handled the funds of the courts."[323] The normal practice was that "the candidate asked local businessmen and friends to pledge portions of the total. These bondsmen were financially liable for any mistakes or malfeasance of the marshal."[324] A final bond requirement passed by the First Congress required sureties to guarantee bonds for commissioners in charge of loans used to cover domestic debt.[325]

The First Congress also continued to pass statutory provisions that supplemented the President's removal power by subjecting misbehaving officers to judicially imposed penalties, including removal.[326] The Registering Act provided that any collector or surveyor convicted of knowingly or willfully making false registries or records would "forfeit

319 Act of Aug. 4, 1790, ch. 35, § 52, 1 Stat. 145, 171 (stating that "every collector, naval officer and surveyor shall . . . give bond with one or more sufficient sureties" in amounts up to $60,000).

320 Mashaw, *supra* note 4, at 1317 (noting early bond provisions).

321 Act of Sept. 2, 1789, ch. 12, § 4, 1 Stat. 65, 66.

322 Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (providing that a marshal "shall become bound for the faithful performance . . . with two good and sufficient sureties . . . in the sum of twenty thousand dollars").

323 Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 519 n.442 (2018) (quoting FREDERICK S. CALHOUN, THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789–1989, at 21 (1989)).

324 *Id.* (quoting CALHOUN, *supra* note 323, at 21).

325 Act of Aug. 4, 1790, ch. 34, § 12, 1 Stat. 138, 142 (stating that officers "shall also become bound with one or more sureties . . . in a penalty not less [than] five thousand . . . dollars, with condition for their good behaviour in their said offices").

326 *See* Shugerman, Cautionary Tale, *supra* note 28, at 51–54 (citing removal-by-judiciary statutes); *cf.* Prakash, *supra* note 48, at 1795 (characterizing some of these statutes as "contingent removal provisions").

the sum of one thousand dollars, and be rendered incapable of serving in any office of trust or profit under the United States."[327] The Act went on to refer to the latter punishment as a "disqualification" from office.[328] The Treasury Act similarly barred its officers from "carrying on the business of trade or commerce" or taking "emolument or gain for negotiating or transacting any business" in the Department.[329] Offending officers would be "deemed guilty of a high misdemeanor . . . and shall upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States."[330] In 1791, the First Congress extended the provision for judicial "removal from office" to inferior officers comprised of "all . . . of the clerks employed in the treasury department."[331]

The Spirits Act contained similar provisions for inspection officers convicted of wrongdoing. A first section provided that an officer "convicted of oppression or extortion in the execution of his office . . . shall . . . forfeit his office," in addition to fines and up to six months of imprisonment.[332] A second section provided that officers convicted of committing or colluding to commit various types of fraud or "embezzl[ing] the public money" would "forfeit the sum of one thousand dollars," "forfeit his office," and "be disqualified for holding any other office under the United States."[333] In addition to these provisions Congress retained judicially imposed monetary penalties (but not disqualification from office) in its 1790 revisions to customs statutes.[334]

c. Payments to Private and Sometimes Uninjured Informers Who Reported or Sued Misbehaving Officers

A final spate of statutory provisions paid or provided private actions in debt for informers who wished to check an officer's unlawful conduct. The 1790 updates to customs law continued to award a portion of penalties, fines, and forfeitures to informers who gave tips leading to these awards, which could be levied against private wrongdoers

327 Act of Sept. 1, 1789, ch. 11, § 34, 1 Stat. 55, 64–65; *id.* § 21 (explaining that "penalties and forfeitures inflicted" by this act "may be sued for, prosecuted and recovered in such courts").

328 *Id.* § 34.

329 Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67.

330 *Id.*

331 Act of Mar. 3, 1791, ch. 18, § 1, 1 Stat. 215, 215.

332 Act of Mar. 3, 1791, ch. 15, § 39, 1 Stat. 199, 208.

333 *Id.* § 49.

334 Act of Aug. 4, 1790, ch. 35, § 66, 1 Stat. 145, 175 (stating that officers convicted of taking bribes or conniving false entries "shall forfeit and pay a sum not less than two hundred, nor more than two thousand dollars for each offence").

as well as officers taking bribes.[335] And they continued to pay informers or aggrieved parties in cases where customs officers failed to post schedules of fees or demanded fees greater than those specified by statute.[336] The Treasury Act provided that "if any other person than a public prosecutor shall give information" of offenses such as taking gain for transacting business of treasury, and "a prosecution and conviction shall be had," then "one half the aforesaid penalty of three thousand dollars . . . shall be for the use of the person giving such information."[337]

Other provisions allowed private informers to bring qui tam actions on their own and without awaiting a public prosecutor's decision to file a claim against an officer who misbehaved or shirked his duties.[338] Many of these provisions have been discussed alongside other provisions that assign general prosecutorial power to private parties.[339] The striking thing about the subset of provisions noted here is that they allowed private parties to bring suits aimed at policing executive officers' conduct—and in some cases to enforce public rights without requiring that the party bringing the suit suffer personal injury. For example, the Enumeration Act required marshals of the districts of the United States to file enumeration returns "with the clerks of their respective district courts."[340] A marshal who failed to file such returns would forfeit $800 "for every such offence," and forfeited amounts were recoverable "by action of debt, information or indictment," with one "half" of the recovery "to the informer" unless the "prosecution [was] first instituted [by] the United States."[341] Thus, informers could bring private actions in debt to enforce public enumeration rights against marshals who failed to file census returns. The Act further required "judges of the several district courts" to "give this act in charge

335 *Id.* § 69.

336 *Id.* § 55.

337 Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67; *see also* Act of Mar. 3, 1791, ch. 18, § 1, 1 Stat. 215, 215 (extending Treasury Act provisions to "all . . . of the clerks employed in the treasury department"); Beck, *supra* note 28, at 1301–02 (citing An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 9, 1 Stat. 191, 196 (1791)) (noting statute that authorized informers to recover part of forfeitures occasioned by excessive loans involving government officials).

338 Krent, *Executive Control*, *supra* note 28, at 296–98.

339 Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 584 n.362 (2005).

340 Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102.

341 *Id.*; Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129, 129 (extending "all" the "penalties" set forth in the initial enumeration Act to Rhode Island). The provision allowing actions "by action of debt" enabled private parties to prosecute claims set forth in these statutes. Krent, *Executive Control*, *supra* note 28, at 297.

to the grand juries" "for the more effectual discovery of such offences."[342] These enumeration provisions offered a nonunitary enforcement scheme. They authorized private parties and grand juries to act in the absence of presidential direction and investigate and prosecute marshals who failed to carry out census duties.[343]

The Spirits Act afforded two private actions to promote faithful execution. In the first action, private parties could sue to recover damages inflicted by officers' neglect of duty. If "any of the said supervisors or other officers of inspection, shall neglect to perform any of the duties hereby enjoined upon them," "any person" who is "injured or suffer[s] damage . . . may have an action founded upon this act."[344] The injured person could "recover full damages . . . [along] with [the] costs of suit."[345] Neglect of duty is a concern traditionally included within the President's power to take care that laws are faithfully executed, and yet here the First Congress deputized private parties to police officers' neglect through lawsuits. The President again lacked sole responsibility for revenue officers' actions.

The second action afforded private parties a more general role in enforcing the revenue law against officers as well as private wrongdoers. Section 4 allowed persons "who shall first discover the matter or thing" whereby penalties or forfeitures shall be incurred to recover half of these amounts by "action of debt."[346] The Act provided for forfeitures against officers who were guilty of fraud[347] and fines and removal for officers guilty of "oppression or extortion in the execution of his office."[348] It also allowed forfeitures against private parties who interfered with collection of duties by "counterfeit[ing] or forg[ing]" certificates,[349] bribed or offered to bribe officers,[350] or obstructed collection officers.[351] Further, in cases where a private informer provided evidence that forfeitures were required, the Act imposed a "duty" on the "attorney of the district" to "institute or bring such information

342 § 3, 1 Stat. at 102.

343 For further discussion of how juries constrained officers' enforcement of the law, see Mashaw, *supra* note 29, at 342, 346 (explaining that "common law actions involv[ing] jury trial" "could provide substantial relief with respect to many federal administrative activities" such as "[s]eizure of property by revenue officers" and "[o]fficial immunity was non-existent").

344 Act of Mar. 3, 1791, ch. 15, § 41, 1 Stat. 199, 208–09.

345 *Id.*

346 *Id.* § 44.

347 *Id.* § 49.

348 *Id.* § 39.

349 *Id.* § 45.

350 *Id.* § 47.

351 *Id.* § 48.

accordingly."[352] Harold Krent notes that this provision stripped district attorneys of "independent discretion in determining whether to bring a criminal action" in cases where private parties provided "evidence of a criminal violation."[353] The law thus deputized private informers to seek monetary penalties against both lay persons and officers who violated the law, as well as actions designed to remove officers guilty of oppression or extortion.

d. Later Congresses Continued to Enact Similar Provisions

Later Congresses continued to enact similar provisions with respect to officer bonds, judicial removal, and private informer bounties or actions. Congress's amendments to the Treasury Act left intact bond requirements for the Treasurer and extended bond requirements to other officers such as paymasters and purchasing agents.[354] Its May 8, 1792, amendments to the Treasury Act extended the fine and removal penalties of the eighth section of the Treasury Act "to the commissioner of the revenue, to the several commissioners of loans, and to all persons employed in their respective offices, and to all officers of the United States concerned in the collection or disbursement of the revenues thereof."[355] Finally, while the First Congress was unable to establish a permanent Post Office, the Second Congress did so in a key piece of legislation passed in 1792.[356] The first permanent Post-Office Act afforded judicially imposed penalties for wayward deputy postmasters[357] and postal employees[358] as well as bounties for private informers.[359]

Later Congresses followed in the same vein. The 1799 amendments to the customs laws continued to authorize informers to recover fines in cases where collection officers did not post or adhere to the

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352 *Id.* § 44.

353 Krent, *Executive Control*, *supra* note 28, at 297.

354 Act of May 8, 1792, ch. 37, § 3, 1 Stat. 279, 280 (bond for paymaster).

355 *Id.* § 12. At the same time it "abolished" such requirements for clerks. *Id.*

356 *See* Mashaw, *supra* note 4, at 1293–95 (describing attempts to pass Post-Office legislation in the First and Second Congresses).

357 Act of Feb. 20, 1792, ch. 7, §§ 14–15, 1 Stat. 232, 236 (authorizing monetary forfeitures and disqualification from office for Deputy postmasters who were convicted of fraudulently demanding or receiving rate in excess of stipulated postage; authorizing monetary forfeitures for deputy postmasters who failed to account for bye letters).

358 *Id.* § 16 (authorizing removal by death for postal employees convicted of stealing postage containing bank notes and monetary penalties for lesser offenses); *id.* § 22 (authorizing monetary penalties for postal employees who unlawfully failed to deliver newspapers).

359 *Id.* § 25 (providing that persons informing and prosecuting for penalties could recover half of these amounts).

schedule of fees for their services.[360] Informers who provided information leading to bribery convictions could also recover part of the moiety drawn from the corrupt officer upon conviction, so long as the informer was not required to serve as a witness.[361] The 1800 enumeration statute also repeated earlier provisions allowing informers to bring "action[s] of debt" and recover part of the penalties imposed on marshals who shirked their census duties.[362] Early Congresses' repeated use of bonds, judicial removal, and informer rewards or actions allowed private parties and judges to provide an important means of reinforcing the President's Take Care power. Deviant officers who escaped presidential censure could still be checked by judges as well as private parties with financial incentives to ensure faithful execution of the laws.

C. The First Congress Assigned Significant Discretionary Executive Decisions to Independent Deputy Marshals, Lay Persons, and Judges

The First Congress empowered independent officers and private parties to execute the law by performing discretionary law enforcement and adjudicative functions. As noted above, Congress created an independent Sinking Fund Commission by placing two officers whom the President could not remove—the Chief Justice and the Vice President—on the Commission. Congress's decision to assign the Commission's executive duties to independent officials was not an isolated occurrence. Independent officials were commonly enlisted to assist in execution of laws. Unitary scholars have likely overlooked Congress's additional delegations as authorizations to subordinates who were not necessarily appointed as executive officers under Article II.[363] As Jennifer Mascott's comprehensive study of Founding-era appointments practices shows, however, persons who were not necessarily appointed as officers could sometimes perform discretionary executive functions.[364] Even if these delegations counted as temporary or limited authorizations that fell outside of the Appointments Clause, nonofficers' exercise of significant executive discretion would still implicate the President's role under Article II. For example, a person who fills in for

360 Act of Mar. 2, 1799, ch. 22, § 73, 1 Stat. 627, 680.

361 *Id.* §§ 88, 91 ("[I]n all cases where such penalties, fines and forfeitures shall be recovered in pursuance of information given to such collector . . . the one half of such moiety shall be given to such informer.").

362 Act of Feb. 28, 1800, ch. 12, § 3, 2 Stat. 11, 12.

363 *See, e.g.*, CALABRESI & YOO, *supra* note 1, at 43–54 (distinguishing examples of nonunitary statutes without addressing independent structures presented in this section).

364 Mascott, *supra* note 323, at 516 (explaining that deputy marshals and collectors "carried out governmental duties" similar to those executed by officers).

the Attorney General for an afternoon may not require an appointment to office, but this substitute could still raise accountability concerns under Article II if she were to make significant discretionary decisions on the Attorney General's behalf. The sections below describe multiple statutes in which the First Congress assigned significant executive discretion in the areas of law enforcement and adjudication to independent deputy marshals, lay persons, and judges.

1. Independent Deputy Marshals

The First Congress empowered independent deputies to serve as acting U.S. marshals. The U.S. Marshals Service boasts of being "the first federal law enforcement agency in the United States."[365] Marshals' duties as the "enforcement arm of the federal courts"[366] are executive in nature and historically included other executive duties such as collecting census data.[367] The first marshals served four-year terms and were generally subject to presidential controls of appointment and removal "at pleasure."[368] In the "case of [the] death of any marshal," a deputy who had been earlier appointed by the marshal would automatically "execute the same" duties in the marshal's name "until another marshal shall be appointed and sworn."[369] These acting deputies were "removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either."[370] This meant that a deputy who temporarily executed the same duties as a marshal accountable to the President would now answer to independent federal judges.

Members of the First Congress expressly noted that deputy marshals could be removed by judges in their removal debates,[371] and no one objected to the independence that would flow from the decision to assign removal power to federal judges. Removal by judges alone defeats the unitary executive argument that the President or superior officers must have *exclusive* control over executive actors. Further, the historical record precludes understandings that marshals would somehow retain concurrent removal power over deputies. Rep. Baldwin invoked draft legislation on deputy marshals in support of his argument

365 U.S. MARSHALS SERV., U.S. DEP'T OF JUST., FACT SHEET: U.S. MARSHALS SERVICE 2020 (2020), https://www.usmarshals.gov/sites/default/files/media/document/2020-Overview.pdf [https://perma.cc/E6LG-PVXH].

366 *Id.*; *see also* Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87.

367 Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102.

368 Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87.

369 *Id.* § 28.

370 *Id.* § 27; *see also* Shugerman, *supra* note 24, at 52–53 (noting that deputy marshals could be removed by judges).

371 1 ANNALS OF CONG. 557 (1789) (Joseph Gales ed., 1834).

that removal power did not always follow appointments power.[372] And statutory provisions allowing a deputy to serve in place of a dead marshal obviously did not include any understanding that a deputy could be removed by that marshal from beyond the grave.[373]

2. Early Collection Acts Authorized Private Merchants to Determine the Taxable Value of Imported Goods

The Collection Act included nonunitary provisions that enlisted private merchants to aid in execution of customs laws and ensure accurate valuation determinations. Three provisions authorized use of merchants to determine the taxable value of imported goods. While some goods were subject to specific duties (such as $0.18 per gallon of Madeira wine)[374] others were taxed "ad valorem" or according to their value (10% ad valorem duty on goods ranging from gunpowder to knee buckles).[375] Thus valuation was a key part of assessing duties, and collectors sometimes faced difficult valuation determinations that called for merchants' expertise.[376]

The first provision calling for merchant determinations involved goods that were "damage[ed]" or missing the "original invoice of their cost."[377] In such instances it was "lawful for the collector to appoint one merchant, and the owner or consignee another."[378] The merchants would then be "sworn or affirmed by the collector well and truly to appraise such goods," and the "duties upon such goods shall be estimated according to such valuation."[379] The Act provided a similar provision for "two reputable merchants, mutually chosen by the said collector, and owner or consignee" to "ascertain[]" the "value" of goods in cases where the collector suspected fraud and that goods were "not invoiced at a sum equal to that for which they have usually sold."[380] A final provision called for the "presence of two or more reputable merchants" in cases where the collector suspected fraud and opened packages of goods to see whether their contents agreed with entries reflecting their invoiced value.[381]

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372 *Id.*

373 § 28, 1 Stat. at 87 (noting that deputies served for marshals who died).

374 Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 25.

375 *Id.*; *see* PARRILLO, *supra* note 312, at 225 (noting different ways to set customs duties).

376 Mashaw, *supra* note 29, at 345 ("Valuation was the most contested issue in customs administration.").

377 Act of July 31, 1789, ch. 5, § 16, 1 Stat. 29, 41.

378 *Id.*

379 *Id.*

380 *Id.* § 22.

381 *Id.* § 23.

The merchants were private parties rather than officers who might have answered to the President. In fact, because the "merchants serv[ed] ad hoc," their actions of "deciding one another's liability" were taken with an eye toward their private and "common interest in keeping taxable values low."[382] Nevertheless, merchants played a key role in executing customs laws by providing valuation determinations that collectors were required to incorporate into their final assessments of duties. As Nicholas Parrillo documented, these valuation duties were ultimately transferred to "more full-time appraisers" and eventually "a board of career experts" in later versions of the customs laws.[383] The fact that the initial statute called for appraisal by two or more merchants underscores the discretion embodied in their valuation determinations. There would be no need for more than one merchant to provide a rote or ministerial calculation that involved no discretion. And acts of executive discretion by nonremovable actors seem to conflict with strong unitary theories advanced by some scholars.[384]

The First Congress repeated the nonunitary design elements of its initial customs law in subsequent legislation and continued to enlist private parties and federal judges in efforts to ensure accurate and faithful execution of the law. When the First Congress revised the customs laws in 1790, it reenacted three provisions requiring merchants to determine proper valuation of imported goods. As earlier, the merchants appraised goods that were damaged or missing an invoice,[385] or that appeared to be inaccurately invoiced.[386] Finally, they witnessed the opening of packages with potentially mislabeled goods.[387] As in the initial customs legislation, these determinations were key discretionary inputs into the collector's ultimate assessment of duties.

Private parties continued to play an important role in subsequent executive adjudications. In 1793, Congress assigned private parties fact finding functions in patent cases.[388] The 1799 amendments to the collection laws continued to assign private merchants significant roles in appraising goods that were damaged or missing invoices, certifying the condition of ships arriving in distress, and appraising goods and inspecting packages in cases of suspected fraud.[389]

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382 PARRILLO, *supra* note 312, at 226.

383 *Id.*

384 *See supra* note 54.

385 Act of Aug. 4, 1790, ch. 35, § 37, 1 Stat. 145, 166–67.

386 *Id.* § 46.

387 *Id.* § 47.

388 Amended Patent Act, ch. 11, § 9, 1 Stat. 318, 322–23 (1793) (explaining that "interfering applications . . . shall be submitted to the arbitration of three persons" for a "final" decision as to "the granting of the patent"); Krent, *Limits*, *supra* note 28, at 103–04 (citing statute).

389 Act of March 2, 1799, ch. 22, §§ 52, 60, 66–67, 1 Stat. 627, 665, 672, 677.

3. The First Congress Assigned Significant Fact-Finding Discretion to Judges in Remission Statutes

The First Congress turned to independent judges for discretionary determinations that could be used to adjust fines, penalties, or forfeitures that were imposed or impending based on asserted violations of customs laws or coastal trade regulations. A person facing monetary liability could petition "the judge of the district in which" the "fine, penalty or forfeiture . . . accrued."[390] In response, the judge was required to "inquire in a summary manner into the circumstances of the case" and give notice and "an opportunity of showing cause against the mitigation or remission" to both the party claiming the fine and the U.S. attorney for that district.[391] The Article III judge would then state and annex to the petition "the facts which shall appear upon such inquiry" and, ultimately, transmit the matter to the Secretary of the Treasury.[392]

The Secretary was empowered "to mitigate or remit" the "fine, penalty or forfeiture . . . if in his opinion the same was incurred without wilful [sic] negligence or any intention of fraud."[393] The Act also authorized the Secretary to "direct" any "prosecution" for recovery "to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just."[394] While this scheme left the ultimate mitigation or remission decisions up to the Secretary, judges played an important discretionary role in determining the evidentiary bases for the Secretary's holding that misconduct was or was not intentional. Kevin Arlyck's in-depth study of remission proceedings concludes that a judge's "responsibility was not simply ministerial; in determining the 'facts' of the incident, he had to make the same kind of credibility determinations he would in trying a case."[395] This "was especially true," explains Arlyck, because petitioners' "eligibility for remission turned entirely on their state of mind."[396] Further, while the Secretary may have on occasion "ben[t] over backward" to gather more evidence favorable to petitioner,[397] there was no formal mechanism for review of judges' findings that favored the petitioner.

The First Congress again passed a remission provision with a materially identical role for judges to "inquire" and find facts relevant to

390 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122.
391 *Id.*
392 *Id.*
393 *Id.*
394 *Id.*
395 Arlyck, *supra* note 302, at 1486.
396 *Id.*
397 *Id.* at 1490.

intentional wrongdoing in the Spirits Act.[398] These judicially managed fact-findings seem to reflect roughly the same level of significant authority of the United States exercised by administrative law judges in *Lucia*,[399] except that here the judges who found facts fell entirely outside of any chain of command related to a presidential removal power. These judges were instead supervised through the Secretary of the Treasury's review and incorporation of their initial factual determinations into final remission decisions.

Later Congresses continued to rely on independent judges for initial fact-finding determinations in executive adjudications. Congress replicated the structure of initial remission laws when it assigned judges fact findings duties with respect to pensions,[400] and updates to remission laws passed in 1797 and 1800 continued to assign district judges responsibility for factual findings made in the course of adjusting fines, penalties, and forfeitures.[401] In contrast to challenges to independent administrative law judges today, statutes in the Founding era frequently turned to independent Article III judges for initial determinations in executive branch adjudications.

4. The First Congress Repeatedly Assigned Public Prosecutorial Power to Private Parties

As noted above, the First Congress encouraged private parties to report officers' misconduct by paying informers a portion of proceeds stemming from conviction for wrongful conduct and by bringing qui tam actions against misbehaving officers. Sometimes the qui tam provisions applied to crimes committed by officers and private parties alike.[402] In other cases qui tam suits authorized private individuals to

398 Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 199, 209.

399 Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018) (explaining that ALJs with power to "'[r]eceiv[e] evidence' and '[e]xamine witnesses' at hearings," "critically shape the administrative record," and "prepare proposed findings" were officers who exercised significant authority of the United States (first quoting 17 C.F.R. §§ 200.14(a)(4), 201.111(c) (2018); and then quoting Freytag v. Comm'r, 501 U.S. 868, 873 (1991))).

400 Invalid Pensions Act, ch. 17, §§ 1–2, 1 Stat. 324, 324–25 (1793) (requiring the "judge of the district" to take "[a]ll evidence relative to Invalids . . . upon oath or affirmation" and to transmit to the Secretary of War for presentation to Congress); Krent, *Limits*, *supra* note 28, at 103–04 (noting a similar delegation to nonremovable judges in the preceding Invalid Pensions Act of 1792).

401 *See* Act of Mar. 3, 1797, ch. 13, § 1, 1 Stat. 506, 506; Act of Feb. 11, 1800, ch. 6, 2 Stat. 7, 7 (extending duration of 1797 Act).

402 Krent, *Executive Control*, *supra* note 28, at 297(discussing Spirits Act, ch. 15, § 44, 1 Stat. 199, 209 (1791)).

prosecute offenses committed by other private parties.[403] These provisions have been widely discussed because they call into question the unitary assumption that criminal law enforcement is a "'core' or exclusive executive power."[404] As noted by Harold Krent, these qui tam provisions enabled "private citizens" to "help[] enforce the criminal laws"[405] and reflected Congress's determination "that private individuals could don the mantle of a public prosecutor."[406]

Early qui tam actions brought by private parties disrupt the strong unitary model. As conceded by Saikrishna Prakash, the President's "control over popular prosecutions" by private parties "is not nearly as complete" as her control over official prosecutors, as the President "cannot order a private party to bring a prosecution or direct its conduct once begun."[407] Nor does a possible presidential power to subsequently "extinguish[] any privately brought qui tam actions"[408] make up for the initial lack of control over a private party's decision to bring a suit. These assignments of prosecutorial power to actors outside of the President's exclusive control represent another important nonunitary aspect of early laws.

* * *

Nonremovable lay persons and judges carried out important and discretionary executive functions under early regulatory statutes. While these statutes have often been overlooked because they did not involve persons appointed as executive officers, the assignment of the executive powers to lay persons and judges provides another example of independent regulatory structures at the Founding.

III. FOUNDING-ERA STATUTES INCORPORATED INDEPENDENT STRUCTURES TO CONSTRAIN THE PRESIDENT'S EXECUTION OF THE LAWS AND ALIGNED WITH *MORRISON*'S FUNCTIONAL UNDERSTANDING OF EXECUTIVE POWER

As set forth in Justice Scalia's classic dissent in *Morrison v. Olson*, the formalist view of the unitary executive vests "plenary" removal power and "exclusive control over the exercise" of "executive power"

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403 Prakash, *supra* note 339, at 584 n.362 (citing Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 131, 133; Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137–38); Lessig & Sunstein, *supra* note 27, at 20.

404 Krent, *Executive Control*, *supra* note 28, at 309.

405 *Id.* at 297; *see also id.* at 296 n.104 (listing early statutes).

406 *Id.* at 300.

407 Prakash, *supra* note 339, at 597.

408 CALABRESI & YOO, *supra* note 1, at 52.

in the President of the United States.[409] The *Seila Law* majority's embrace of this understanding[410] cannot be squared with the historical record of statutes passed by the First Congress. A whole host of Founding-era statutes, including the Sinking Fund legislation passed at the executive branch's bidding,[411] deprived the President of removal power and exclusive control over officials exercising executive power. These provisions were designed to ensure that executive power was carried out within the confines of the law and subject to an overarching constitutional duty of faithful execution.

The nonunitary understandings reflected in Founding-era statutes clash with contemporary unitary arguments for an unfettered presidential removal power. Consider, for example, Michael McConnell's reference to President Nixon's Saturday Night Massacre as an illustration of the President's removal power. In order to "get[] his way" and have Archibald Cox fired, Nixon forced the resignations of Attorney General Richardson and Deputy Attorney General Ruckelshaus in order to replace them "with a more pliant officer," Solicitor General Bork.[412] Nixon's ultimate goal was to thwart the law by shutting down Cox's investigation of Nixon's wrongdoing. Perhaps Nixon's actions could be explained as part of a residual removal power that Congress had not limited[413] and indeed affirmatively enabled by successorship provisions allowing Bork to act as Attorney General without senatorial confirmation.[414] Nixon's ability to force the resignations of Richardson and Ruckelshaus falls out outside of the legitimate law execution power that Article II grants the President, and McConnell does not attempt to explain how Nixon's actions could be justified un-

409 487 U.S. 654, 705, 724 n.4 (1988) (Scalia, J., dissenting).

410 The majority adopted the essence of Justice Scalia's dissent when it opined that the "entire 'executive Power' belongs to the President alone." Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020); *cf. id.* at 2216 (Thomas, J., concurring in part and dissenting in part) (quoting *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting)).

411 *See Report Relative to a Provision for the Support of Public Credit, [9 January 1790]*, *supra* note 18 (showing that Hamilton proposed the Sinking Fund in his role as Secretary of the Treasury).

412 MCCONNELL, *supra* note 24, at 348–49. An earlier controversy focused on President Andrew Jackson's removal of Treasury Secretary Duane for failure to make a discretionary but arbitrary and arguably unfounded withdrawal of funds from the Bank of the United States. Senator Henry Clay attacked Jackson's action as "a violation of the statute chartering the Bank." Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 692 (2009).

413 MCCONNELL, *supra* note 24, at 259 ("Residual . . . powers . . . may be exercised by the President without advance congressional authorization, but they are subordinate to exercises of Congress's enumerated powers.").

414 Nielson & Walker, *supra* note 213, at 52–55 (discussing Congress's power to prevent the President from evading confirmation).

der Take Care Clause. This example reflects a structure in which Congress has declined to limit the President's removal power rather than proof that Article II bars for-cause restrictions on prosecutorial officers as Independent Counsel. The for-cause tenure protections for the Independent Counsel amounted to far less independence than that held by numerous private prosecutors in the Founding era.[415] The First Congress frequently called on private and nonremovable parties to reinforce faithful execution of laws by acting as sureties for officers' bonds, seeking informer bounties, and bringing lawsuits seeking to fine and remove officers who violated the law.[416]

Tenure protections designed to check the President's unlawful exercise of power do not infringe on any legitimate power granted by Article II. For-cause protections for heads of multimember agencies ensure faithful execution by enabling independent agencies to prioritize the law over the President's immediate political wishes. For example, for-cause removal protections allow the Federal Reserve's Open Market Committee to abide by statutory mandates requiring the Committee to adopt a "long run" view and promote "stable prices,"[417] while ignoring presidential pressure to adopt unlawful short-term policies designed to heat up the economy and expand the money supply just before an election.[418] Likewise, when Congress created the FTC, it decided to shelter the Commission's expert decisions on competition and consumer protection policies from electoral cycles and an undesirable yo-yo effect for regulated firms. To effectuate this legal goal, Congress established the FTC as an independent, "multimember body of experts, balanced along partisan lines."[419]

The First Congress afforded materially identical protections when it created an independent, multimember Sinking Fund Commission that could be trusted to disburse funds according to law while resisting political pressure to divert money to unlawful uses. By design, the Commission's structure left the President powerless to force the Commission to approve open market purchases against the better judgment of a majority of its members.[420] The Commission's shared decision-making structure aligns with other independent structures approved by the First Congress. This body repeatedly required multiple

415 *See supra* subsection II.C.4.

416 *See supra* subsection II.B.3.

417 12 U.S.C. § 225a (2018).

418 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("[T]he Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.").

419 *Id.* at 2199 (majority opinion).

420 Chabot, *supra* note 13, at 43–46.

treasury and customs officers to sign off on important but discrete revenue decisions that the President could not have been expected to monitor or control through a removal power.[421]

The historical record also undermines challenges to tenure protections for inferior officers who operate farther down the chain of command. Current challenges focus on multiple layers of for-cause tenure protection for SEC and FTC ALJs in *Jarkesy* and *Axon*.[422] These ALJs are inferior officers who make initial determinations in executive adjudications before the SEC and FTC,[423] and they enjoy less tenure protection than the Article III judges who made initial remission determinations in executive adjudications during the Founding era.[424] Given that the First Congress was willing to assign initial remission determinations to nonremovable Article III judges,[425] the current use of for-cause tenure protections for ALJs who make initial adjudicatory determinations should not be understood to violate Article II.[426] Early Congresses repeatedly assigned initial discretionary executive acts to subordinates whom the President could not remove. The First Congress relied on private and nonremovable merchants to make initial valuation determinations in collection matters.[427] It also allowed deputy marshals who could be removed by judges to act for marshals who died in office.[428]

Independent structures from the Founding era should be understood as part of a broader system of checks and balances. The First Congress never authorized subordinate officials to operate completely beyond the President's control. Early practice instead aligned with the functional analysis from *Morrison*, and its requirement that independ-

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421 *See supra* subsubsections II.B.1.a–b.

422 *See* Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022); Axon Enter., Inc. v. FTC, 986 F.3d 1173 (9th Cir. 2021), *cert. granted in part*, 142 S. Ct. 895 (2022) (mem.).

423 Christine Kexel Chabot, *Sheep in Wolves' Clothing*, YALE J. ON REGUL.: NOTICE & COMMENT (May 23, 2022), https://www.yalejreg.com/nc/sheep-in-wolves-clothing/ [https://perma.cc/TZM2-BTCG].

424 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122; Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 199, 209.

425 Act of May 26, 1790, ch. 12 § 1, 1 Stat. 122, 122.

426 Mashaw, *supra* note 4, at 1333 ("[U]se of courts as administrative tribunals to make initial . . . decisions seems analogous to the modern role of the administrative law judge."). Mashaw's determination that courts performed only a "ministerial role" in remission determinations, *id.* at 1332, predated *Lucia*'s subsequent holding that administrative law judges exercise significant authority of officers of the United States. Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018). Under *Lucia*, judges who made initial remission determinations would seem to count as officers who exercised significant authority of the United States without being removable by the President. *Id.*

427 *See supra* subsections II.C.1–2.

428 Judiciary Act of 1789, ch. 20, §§ 27–28, 1 Stat. 73, 87.

ent structures do not "unduly trammel[]" powers "central to the functioning of the Executive Branch."[429] In some cases, Congress enabled, and the executive branch pursued, more hierarchical relationships, such as Hamilton's assertion of a statutory power to superintend customs officers' collection of revenue under the Treasury Act.[430] In other cases, Congress chose nonunitary arrangements in which the initial actions taken or policies pursued were determined by nonremovable officials. Many of these provisions still allowed the President or removable executive officers power to review the executive decisions that the First Congress assigned to multiple or independent actors in the first instance. For example, if private parties sued corrupt officers, the President would still retain power to pardon these offenses.[431] Collectors and the Secretary of the Treasury also made final assessment and remission determinations based on facts initially determined by nonremovable and independent merchants or judges.[432] These provisions suggest that power to review provides a constitutionally sufficient means of control over independent subordinates.

Even the Sinking Fund Commission, which represented perhaps the most independent structure of its time, still afforded the President partial control over the decisions of principal officers on the Commission. When it created the Commission, Congress required three removable members of the President's cabinet to sit alongside the Vice President and Chief Justice. While these cabinet members did not carry out a unified presidential policy on the Commission, they afforded the President a chance to have an appointee receptive to his views sit on the Commission. For example, the emergency purchases Hamilton urged the Commission to adopt in 1792 were ultimately approved by Washington and thus aligned with the President's views. The President's ability to have his views represented may have served a similar function to that of staggered or chair appointments available to Presidents today. As the Court noted in *Seila Law*, staggered and chair appointments afford the President partial representation on contemporary multimember independent agencies.[433]

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429 Morrison v. Olson, 487 U.S. 654, 691 (1988).

430 *Treasury Department Circular to the Collectors of the Customs, 20 July 1792*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-12-02-0058 [https://perma.cc/SH7D-7MNN] (citing Treasury Act).

431 U.S. CONST. art. II, § 2; Prakash, *supra* note 339, at 582.

432 *See, e.g.*, Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122 (allowing Secretary of the Treasury to make final remission decisions); Act of July 31, 1789, ch. 5, § 16, 1 Stat. 29, 41 (directing collectors to estimate duties based on valuations provided by private merchants).

433 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2204 (2020) (explaining that the CFPB's provisions allowing a single-Director with a five-year term would likely deprive some Presidents of an "opportunity to shape" the CFPB's leadership by appointing a new Director or a "chair or fellow members of a Commission or Board—who can serve as

Further, while the President's power to remove cabinet members of the Sinking Fund Commission did not allow him to force the Commission to make unwanted purchases (as removal would simply transfer the determinative third vote to an independent Vice President or Chief Justice), Congress granted the President additional power to approve disbursements authorized by a majority of the Commission.[434] This approbation power allowed the President immediate power to halt any disbursement of funds that he did not approve. In this case the President was empowered to block the Commission's action without taking the more drastic step of removing the three cabinet members on the Commission.

In *Collins*, despite an otherwise extremely formal and unitary analysis, Justice Alito's discussion of the Sinking Fund Commission left open the possibility of a functional exception for multimember agencies. When distinguishing the Commission from the single, independent Director of the FHFA, Justice Alito noted that the Commission was a "multi-member" agency that never "operated *beyond the President's control*," as three of the five Commissioners "were part of the President's Cabinet and therefore removable at will."[435] In making this distinction, Justice Alito did not (and could not) assert that the Sinking Fund Commission was subject to the President's complete as opposed to partial control. Justice Alito's functional analysis instead suggested that for-cause protections for a single FHFA Director resulted in an executive officer over whom the President did not even have partial control. The Court invalidated the FHFA's Director as a "unilateral actor insulated from presidential control" under a "straightforward application" of its "reasoning in *Seila Law*."[436] In *Seila Law*, the Court found that a materially identical "single-Director structure" rendered the head of the CFPB "accountable to no one": it allowed her to "dictate and enforce" policy with "no colleagues to persuade" and with "no boss or electorate looking over her shoulder."[437] These considerations all identify a higher level of autonomy in which a single, tenure-protected Director operated beyond the President's control. This level of autonomy exceeds the partial independence held by officers on the Sinking Fund Commission and other independent, multimember agencies in existence today.

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a check on the Director's authority and help bring the agency in line with the President's preferred policies").

434 Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

435 Collins v. Yellen, 141 S. Ct. 1761, 1785 n.19 (2021) (emphasis added).

436 *Id.* at 1784 (quoting *Seila L.*, 140 S. Ct. at 2192).

437 *Seila L.*, 140 S. Ct. at 2202–04.

CONCLUSION

Unitary theorists have long dismissed independent regulatory structures as constitutionally illegitimate creations that can be justified only by clinging to erroneous precedent. As Justice Scalia reiterated in *FCC v. Fox Television Stations, Inc.*, the "headless Fourth Branch" derives from "power that Congress has wrested from the unitary Executive" and not a valid construction of the Constitution.[438] In *Seila Law,* Chief Justice Roberts' majority opinion built on this understanding by limiting *Humphrey's Executor* and *Morrison* to narrow circumstances incapable of sustaining today's independent regulatory structures. These critiques all assume that independent regulatory structures lack a valid constitutional pedigree.

The history set forth in this Article shows the opposite to be true. My comprehensive analysis of statutes enacted by the First Congress shows that independent regulatory structures were woven into the initial legal fabric of our republic. The first statutes in the United States did not rely exclusively or even primarily on removal power and instead dispersed executive power amongst multiple officers designed to check one another. These statutes also authorized judges and private parties who could not be removed by the President to help execute the laws and take care that the laws be faithfully executed.

This Article provides unwelcome news for proponents of the unitary executive. The unitary structure that they have long imagined to be part of Article II clashes with Founding-era history. Committed unitary scholars will no doubt attempt to generate further distinctions, exceptions, and explanations to address the comprehensive historical record presented in this paper. Just look at the debate over nondelegation, where proponents of the conventional originalist view have clung to a sliver of the historical record while conjuring up a slew of special "exceptions" to accommodate the vast majority of open-ended delegations passed into law in the Founding era.[439]

For those interested in the empirical truth of original meaning, however, the historical record spells out a limited understanding of executive power that cannot be so easily set aside. Independent regulatory structures have been with us all along. A Supreme Court unwilling to acknowledge this fact risks establishing a unitary executive that sits above the law and possesses powers never dreamt of by the Framers.

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438 556 U.S. 502, 525–26 (2009).

439 Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 n.51 (2021) (explaining that "purported exceptions" to nondelegation "actually cover the very large majority of legislation enacted by Congress in 1789–99").

If the Court extends *Seila Law* to invalidate tenure protections for multimember agencies, it will be the Court, and not Congress, that creates a constitutional requirement which has "never before"[440] been part of our nation's history: the demonstrably false conclusion that the original understanding of Article II requires the President to possess unfettered removal power over all officers who execute the law.

440 *Seila L.*, 140 S. Ct. at 2211.

APPENDIX

TABLE 1: STATUTORY PROVISIONS REQUIRING MULTIPLE OFFICERS TO CHECK EACH OTHER (SUBSECTIONS II.B.1–2)

	Source	Provisions
1.	**Collection Act (July 31, 1789)**	Collectors and naval officers had joint responsibility to "estimate and record" duties and "countersign" permits for landing of goods. ch. 5, § 5, 1 Stat. 29, 37; *id.* § 14.
2.	**Collection Act (July 31, 1789)**	Collection officers were entitled to a portion of the forfeiture recovered in lawsuits brought against other collection officers. ch. 5, §§ 35–38, 1 Stat. 29, 46–48.
3.	**Collection Act (July 31, 1789)**	Comptroller of the Treasury was authorized to sue for the amount of an officer's bond "upon any breach" of the condition of faithful execution. ch. 5, § 28, 1 Stat. 29, 44.
4.	**Act of Aug. 5, 1789**	Continuing "Board of Commissioners" established by "ordinance of the late Congress" to settle accounts. ch. 6, § 1, 1 Stat. 49, 49.
5.	**Registering Act (Sept. 1, 1789)**	Collection officers had joint responsibilities for ship registration. ch. 11, § 32, 1 Stat. 55, 64.
6.	**Treasury Act (Sept. 2, 1789)**	Four separate officers were required to approve disbursement of funds from the Treasury Department. ch. 12, §§ 1–3, 1 Stat. 65, 65–66.
7.	**Treasury Act (Sept. 2, 1789)**	Receipts for moneys "received by" the Treasurer had to be "endorsed upon warrants signed by the Secretary" and recorded by the Register. The Auditor and Comptroller shared responsibility for receiving and examining public accounts, and the Register had the additional obligation to "preserve" accounts "which shall have been finally adjusted." ch. 12, §§ 4–6, 1 Stat. 65, 66–67.

TABLE 1 (CONT.)

8. Treasury Act (Sept. 2, 1789)	Officers in the Treasury Department retained financial incentives to turn in other officers who obtained any extralegal "emolument or gain for negotiating or transacting any business" of all the Department. Treasury officers who provided "information" leading to conviction of their peers were entitled to a $1500 share of penalties. ch. 12, § 8, 1 Stat. 65, 67.
9. Amended Collection Act (Aug. 4, 1790)	Naval officers were required to "receive copies of all manifests" entered by the collector; estimate duties "together with the collector," and "countersign all permits" granted by the collector. ch. 35, § 6, 1 Stat. 145, 154.
10. Amended Collection Act (Aug. 4, 1790)	The collectors and naval officers were required "jointly" to estimate duties owed on goods not properly categorized as "sea stores," "jointly" to determine facts that would allow exceptions and permits for goods originally "exported from the United States," and "together" to compare officers' records to owners' entries after delivery of goods was completed. ch. 35, §§ 22, 25, 32, 1 Stat. 145, 161, 162, 165.
11. Sinking Fund Act (Aug. 12, 1790)	At least three of five Sinking Fund Commissioners and the President had to independently agree to disbursement of funds for open market purchases. ch. 47, § 2, 1 Stat. 186, 186.
12. Patent Act (Apr. 10, 1790)	Two of three Patent Board members could grant patents for any "sufficiently useful and important" inventions or discoveries. ch. 7, § 1, 1 Stat. 109, 110.
13. Act of July 16, 1790	"[T]hree commissioners" were authorized to establish the permanent seat of government "according to such plans as the President shall approve." ch. 28, §§ 2–3, 1 Stat. 130, 130.
14. Act of Aug. 5, 1790	A "board . . . of three commissioners" was authorized "to settle the accounts between the United States, and the individual states." ch. 38, § 1, 1 Stat. 178, 178

TABLE 1 (CONT.)

15. Spirits Act (Mar. 3, 1791)	Officers shared responsibilities for permits, searches and seizures, and determinations that exporters were entitled to drawbacks in cases where spirits were stolen or destroyed before they arrived at a foreign port. ch. 15, §§ 9, 32, 57, 1 Stat. 199, 201, 207, 212.
16. Spirits Act (Mar. 3, 1791)	Officers whose peers were convicted of taking bribes would receive a portion of forfeitures. ch. 15, § 2, 1 Stat. 199, 199.
17. Mint Act (Apr. 2, 1792)	The Chief Justice, Secretary of the Treasury, Comptroller of the Treasury, Secretary of State, and Attorney General were authorized to inspect coinage. ch. 16, § 18, 1 Stat. 246, 250.
18. Amended Sinking Fund Act (May 8, 1792)	At least three of five Sinking Fund Commissioners and the President had to independently agree to disbursement of funds for open market purchases. ch. 38, § 6, 1 Stat. 281, 282.
19. Amended Sinking Fund Act (Mar. 3, 1795)	The five-member Sinking Fund Commission and the President were authorized to continue managing repayment of the debt. ch. 45, § 10, 1 Stat. 433, 435–36.
20. Act of July 16, 1798	The Treasurer could authorize naval disbursements "pursuant to warrants from the Secretary of the Navy, countersigned by the accountant." ch. 85, § 2, 1 Stat. 610, 610.
21. Amended Collection Act (Mar. 2, 1799)	Collection officers were required to jointly estimate duties and countersign permits and to act jointly when showing the absence of fraudulent intent, certifying missing manifests, estimating duties owed for goods in excess of proper sea stores, admitting irregular proof of exported goods, and when excusing certain false entries due to mistake or accident. ch. 22, §§ 21, 24, 45, 81, 84, 1 Stat. 627, 642, 646, 661, 689–92, 694.
22. Amended Collection Act (Mar. 2, 1799)	Officers were allowed to recover a portion of the moiety collected from other officers found guilty of taking bribes or other misconduct. ch. 22, §§ 88, 91, 1 Stat. 627, 695, 697.

TABLE 2: STATUTORY PROVISIONS ENLISTING NONREMOVABLE PRIVATE PARTIES AND JUDGES TO POLICE EXECUTIVE OFFICERS' CONDUCT (SUBSECTION II.B.3)

Source	Provisions
Initial Collection Laws	
23. Collection Act (July 31, 1789)	Every collector, naval officer, and surveyor had to "give bond with one or more sufficient sureties . . . conditioned for the true and faithful discharge of the duties of his office according to law" in amounts up to $60,000. ch. 5, § 28, 1 Stat. 29, 44.
24. Collection Act (July 31, 1789)	Upon conviction for bribes or "conniv[ing]" at false entries, courts could impose monetary penalties on collection officers and "forever disable[]" them "from holding any office of trust or profit under the United States." ch. 5, § 35, 1 Stat. 29, 46.
25. Collection Act (July 31, 1789)	Private informers could recover bounties upon conviction of customs officers. The award to private informers applied in "all cases" where amounts were recovered "in pursuance of information given" by the informer. ch. 5, § 38, 1 Stat. 29, 48.
26. Collection Act (July 31, 1789)	Informers or aggrieved parties could receive payments of forfeitures for customs officers' failure to take an oath of office, post "a fair table of the rates" or charge fees at the levels specified by statute. ch. 5, §§ 8, 29, 1 Stat. 29, 37–38, 45.
Additional Laws with Bond Requirements	
27. Treasury Act (Sept. 2, 1789)	The Treasurer was required to "give bond, with sufficient sureties . . . in the sum of one hundred and fifty thousand dollars . . . with condition for the faithful performance of the duties of his office, and for the fidelity of the persons to be by him employed." ch. 12, § 4, 1 Stat. 65, 66.

TABLE 2 (CONT.)

28. Judiciary Act (Sept. 24, 1789)	A marshal "shall become bound for the faithful performance . . . with two good and sufficient sureties . . . in the sum of twenty thousand dollars." ch. 20, § 27, 1 Stat 73, 87.
29. Amended Collection Act (Aug. 4, 1790)	Every collector, naval officer, and surveyor had to "give bond with one or more sufficient sureties" in amounts up to $60,000. ch. 35, § 52, 1 Stat. 145, 171.
30. Act of Aug. 4, 1790	Loan commissioners "shall also become bound with one or more sureties . . . in a penalty not less [than] five thousand, nor more than ten thousand dollars, with condition for their good behaviour [sic] in their said offices respectively." ch. 34, § 12, 1 Stat. 138, 142.
31. Amended Treasury Act (May 8, 1792)	The Act subjected paymasters to bond requirements and retained bond requirements for the Treasurer. ch. 37, § 3, 1 Stat. 279, 280.
Additional Laws Allowing Judicially Imposed Penalties Including Removal	
32. Registering Act (Sept. 1, 1789)	Upon conviction for knowingly or willful making false registries or records, courts could order any collector or surveyor to "forfeit the sum of one thousand dollars," and render them "incapable of serving in any office of trust or profit under the United States." ch. 11, § 34, 1 Stat. 55, 64–65; *see also id.* § 21.

TABLE 2 (CONT.)

33. Treasury Act (Sept. 2, 1789)	Officers who “carri[ed] on the business of trade or commerce” or took “emolument or gain for negotiating or transacting any business” in the Department could be found “guilty of a high misdemeanor.” “[U]pon conviction” these officers could be “removed from office” and “forever thereafter be incapable of holding any office under the United States.” ch. 12, § 8, 1 Stat. 65, 67.
34. Amended Collection Act (Aug. 4, 1790)	Officers convicted of taking bribes or conniving false entries would be required to “forfeit and pay a sum not less than two hundred, nor more than two thousand dollars for each offence [sic].” ch. 35, § 66, 1 Stat. 145, 175.
35. Enumeration Act (Mar. 1, 1790)	The Act required “judges of the several district courts” to offer forfeitures for failure to file census returns “in charge to the grand juries” “for the more effectual discovery of such offences [sic].” ch. 2, § 3, 1 Stat. 101, 102.
36. Revised Treasury Act (Mar. 3, 1791)	Judicial removal from office was extended to inferior officers comprised of “all . . . of the clerks employed in the treasury department.” ch. 18, § 1, 1 Stat. 215, 215.
37. Spirits Act (Mar. 3, 1791)	An officer “convicted of oppression or extortion in the execution of his office . . . shall also forfeit his office,” in addition to fines and up to six months of imprisonment. ch. 15, § 39, 1 Stat. 199, 208.
38. Spirits Act (Mar. 3, 1791)	An officer convicted of committing or colluding to commit various types of fraud or “embezzl[ing] the public money” would “forfeit the sum of one thousand dollars,” “forfeit his office,” and “be disqualified for holding any other office under the United States.” ch. 15, § 49, 1 Stat. 199, 210.

TABLE 2 (CONT.)

39. Post-Office Act (Feb. 20, 1792)	Postal employees convicted of stealing postage containing bank notes could be removed and punished by death; postal employees convicted of failure to deliver other postage could be fined and/or imprisoned. ch. 7, § 16, 1 Stat. 232, 236. A postal employee who unlawfully failed to deliver newspapers would forfeit a sum not exceeding fifty dollars. *id.* § 22.
40. Post-Office Act (Feb. 20, 1792)	Deputy postmasters who were convicted of fraudulently demanding or receiving rates in excess of stipulated postage would forfeit one hundred dollars and "be rendered incapable of holding any office under the United States;" deputy postmasters who failed to account for bye letters would forfeit sums equal to or up to one hundred dollars. ch. 7, §§ 11, 15, 16, 1 Stat. 232, 235–36.
41. Amended Treasury Act (May 8, 1792)	The Amendments extended judicially imposed fine and removal penalties to "the commissioner of the revenue, to the several commissioners of loans, and to all persons employed in their respective offices, and to all officers of the United States concerned in the collection or disbursement of the revenues thereof." ch. 37, § 12, 1 Stat. 279, 281.
Additional Laws Providing Payments to Private Parties Who Reported or Sued Misbehaving Officers	
42. Treasury Act (Sept. 2, 1789)	"[I]f any other person than a public prosecutor shall give information" of offenses such as taking gain for transacting business of treasury, and a "prosecution and conviction shall be had," then a $1500 penalty "shall be for the use of the person giving such information." ch. 12, § 8, 1 Stat. 65, 67.

TABLE 2 (CONT.)	
43. Amended Collection Act (Aug. 4, 1790)	The law awarded a portion of penalties, fines, and forfeitures imposed on misbehaving officers to informers who gave tips leading to these awards. ch. 35, § 69, 1 Stat. 145, 177.
44. Amended Collection Act (Aug. 4, 1790)	The law authorized payments to informers or aggrieved parties in cases where customs officers failed to post schedules of fees or demanded fees greater than those specified by statute. ch. 35, § 55, 1 Stat. 145, 173.
45. Enumeration Act (Mar. 1, 1790)	Informers could bring private actions in debt and recover "half" of penalties levied against marshals who failed to file census returns. ch. 2, § 3, 1 Stat. 101, 102.
46. Act of July 5, 1790	Extending "all" the "penalties" set forth in the initial Enumeration Act to Rhode Island. ch. 25, § 1, 1 Stat. 129, 129.
47. An Act to Incorporate the Subscribers to the Bank of the United States (Feb. 25, 1791)	Informers could recover part of forfeitures assessed against persons who agreed to excessive loans for the use or on account of the government of the United States. ch. 10, § 9, 1 Stat. 191, 196
48. Spirits Act (Mar. 3, 1791)	Private parties could sue to recover damages inflicted by officers' neglect of duty. The injured person could "recover full damages . . . together with costs of suit." ch. 15, § 41, 1 Stat. 199, 208–09.
49. Spirits Act (Mar. 3, 1791)	Private parties could recover a portion of forfeitures against officers who engaged in extortion, fraud, or embezzlement by "action of debt." ch. 15, §§ 39, 44, 49, 1 Stat. 199, 208–10.
50. Spirits Act (Mar. 3, 1791)	In cases where a private informer provided evidence that forfeitures were required, the Act imposed a "duty" on the "attorney of the district" to "institute or bring such information accordingly." ch. 15, § 44, 1 Stat. 199, 209.

TABLE 2 (CONT.)

51. Amended Collection Act (Mar. 2, 1799)	The law authorized payments to informers or aggrieved parties in cases where collection officers did not post or adhere to the schedule of fees for their services. ch. 22, § 73, 1 Stat. 627, 680.
52. Amended Collection Act (Mar. 2, 1799)	Informers who provided information leading to bribery convictions could also recover part of the moiety drawn from the corrupt officer upon conviction, so long as the informer was not required to serve as a witness. ch. 22, §§ 88, 91, 1 Stat. 627, 695, 697.
53. Amended Enumeration Act (Feb. 28, 1800)	Informers could bring "action[s] of debt" and recover part of the penalties imposed on marshals who shirked their census duties. ch. 12, § 3, 2 Stat. 11, 12.
54. Post-Office Act (Feb. 20, 1792)	Persons "informing and prosecuting for" pecuniary forfeitures against deputy postmasters could recover half of these amounts. ch. 7, § 25, 1 Stat. 232, 239.

TABLE 3: STATUTORY PROVISIONS ASSIGNING DISCRETIONARY EXECUTIVE DECISIONS TO INDEPENDENT DEPUTY MARSHALS AS WELL AS NONREMOVABLE PRIVATE PARTIES AND JUDGES (SECTION II.C)

Source	Provisions
	Adjudicative Power
55. Judiciary Act (Sept. 24, 1789)	The Act vested power to remove deputy marshals in "the judge of the district court, or the circuit court sitting within the district, at the pleasure of either." ch. 20, § 27, 1 Stat. 73, 87.
56. Collection Act (July 31, 1789)	A merchant appointed by the collector and a merchant appointed by the owner could "appraise" damaged goods, and the "duties upon such goods shall be estimated according to such valuation." ch. 5, § 16, 1 Stat. 29, 41.
57. Collection Act (July 31, 1789)	"[T]wo reputable merchants, mutually chosen by the said collector, and owner or consignee" could "ascertain[]" the "value" of goods in cases where the collector suspected a fraudulent invoice. ch. 5, § 22, 1 Stat. 29, 42.
58. Amended Collection Act (Aug. 4, 1790)	Merchants were to appraise goods that were damaged or missing an invoice, or that appeared to be inaccurately invoiced. ch. 35, §§ 37, 46–47, 1 Stat. 145, 166–67, 169–70.
59. Act of May 26, 1790	Judges were required to "inquire" into remission petitions and find facts relevant to intentional wrongdoing before transmitting the matter to the Secretary of the Treasury for an ultimate decision on remission of penalties. ch. 12, § 1, 1 Stat. 122, 122–23.
60. Sinking Fund Act (Aug. 12, 1790)	The Chief Justice and Vice President cast votes on disbursement of funds for open market purchases. ch. 47, § 2, 1 Stat. 186, 186.

TABLE 3 (CONT.)

61. Spirits Act (Mar. 3, 1791)	Judges were required to "inquire" into remission petitions and find facts relevant to intentional wrongdoing before transmitting the matter to the Secretary of the Treasury for an ultimate decision on remission of penalties. ch. 15, § 43, 1 Stat. 199, 209.
62. Amended Sinking Fund Act (May 8, 1792)	The Chief Justice and Vice President cast votes on disbursement of funds for open market purchases. ch. 38, § 6, 1 Stat. 281, 282.
63. Amended Patent Act (Feb. 21, 1793)	"[I]nterfering applications . . . shall be submitted to the arbitration of three persons" for a "final" decision as to "the granting of the patent." ch. 11, § 9, 1 Stat. 318, 322–23.
64. Invalid Pensions Act (Feb. 28, 1793)	The Act required the "judge of the district" to take "[a]ll evidence relative to Invalids . . . upon oath or affirmation" and to transmit a record of this evidence to the Secretary of War for presentation to Congress. ch. 17, §§ 1, 2, 1 Stat. 324, 324–25 (1793)
65. Amended Sinking Fund Act (Mar. 3, 1795)	The Act authorized Sinking Fund Commissioners including the Chief Justice and Vice President to manage repayment of the debt. ch. 45, §§ 9-10, 1 Stat. 433, 435–36.
66. Act of Mar. 3, 1797	Judges were required to "inquire" into remission petitions and find facts relevant to intentional wrongdoing before transmitting the matter to the Secretary of the Treasury for an ultimate decision on remission of penalties. ch. 13, § 1, 1 Stat. 506, 506.
67. Amended Collection Act (Mar. 2, 1799)	Private merchants had significant roles in appraising damaged goods, certifying the condition of ships arriving in distress, and appraising goods and inspecting packages in cases of suspected fraud. ch. 22, §§ 52, 60, 66–67, 1 Stat. 627, 665, 672, 677.

TABLE 3 (CONT.)

68. Act of Feb. 11, 1800	Extending provisions of the Act of March 3, 1797, that assigned district judges initial responsibility for factual findings made in the course of remitting fines, penalties, and forfeitures. ch. 6, 2 Stat. 7, 7.
Power to Prosecute Other Private Parties	
69. Act of July 20, 1790	Private parties could prosecute persons who illegally employed seamen. ch. 29, §§ 1, 4, 1 Stat. 131, 131, 133.
70. Indian Trade Act (July 22, 1790)	Private parties could prosecute persons who engaged in unlicensed trading with Native Americans. ch. 33, § 3, 1 Stat. 137, 137–38.
71. Spirits Act (Mar. 3, 1791)	Private parties could bring an "action of debt" against persons who counterfeited or forged collection certificates, bribed or offered to bribe or obstructed collection officers. ch. 15, §§ 44, 45, 47–48, 1 Stat. 199, 209–10.