

No. 25-332

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**In the Supreme Court of the United States**

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DONALD J. TRUMP, ET AL.,

*Petitioners,*

v.

REBECCA KELLY SLAUGHTER, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals for the District  
of Columbia Circuit**

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**BRIEF OF *AMICI CURIAE* PROFESSOR  
VICTORIA NOURSE AND LAWYERS  
DEFENDING AMERICAN DEMOCRACY  
SUPPORTING RESPONDENT**

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## QUESTIONS PRESENTED

(1) Whether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether *Humphrey's Executor v. United States*, 295 U. S. 602 (1935), should be overruled.

(2) Whether a federal court may prevent a person's removal from public office, either through relief at equity or at law.

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

Professor Victoria Nourse is the Ralph V. Whitworth Professor in Law at Georgetown University Law Center and Director of its Center on Congress and Democracy.<sup>2</sup> She is a former appellate litigator at the Department of Justice and an expert on Congress and its history.

Lawyers Defending American Democracy (LDAD) is a non-profit, non-partisan organization devoted to encouraging lawyers to help preserve and sustain the Constitution and the values on which our democracy depends, consistent with our distinctive professional responsibilities as members of the legal profession. LDAD's Board of Directors includes, among others, a retired state supreme court justice, a former state attorney general, retired partners and managing partners of major law firms, a corporate vice-president, a past general counsel of a major corporation, past presidents of two state bar associations, business entrepreneurs, and legal academics.

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<sup>1</sup> No counsel for a party authored the brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

<sup>2</sup> Professor Nourse also sits, part time, as Vice Chair of the United States Commission on Civil Rights, but nothing in this brief is written in her official capacity.

Both Professor Nourse’s and LDAD’s interest in this case is to submit historical material<sup>3</sup> to the Court pertaining to the creation of multimember commissions at the Founding. Amici respectfully urge the Court to consider this material in determining whether and how to overrule *Humphrey’s Executor*.

### SUMMARY OF ARGUMENT

Nothing in this brief rejects the basic premise that the President may remove executive officers in the Departments at will. It argues, however, that *Humphrey’s Executor* failed to recognize that independent commissions are old, not new. The conventional wisdom is that independent agencies have roots in the progressive era. This is incorrect. The Framers consistently turned to “independent” (their term), multi-member commissions as trustees in complex financial and commercial matters. Much of this history has only recently come to light, and for that reason, this Court should consider it in any judgment affecting *Humphrey’s Executor*.

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<sup>3</sup> Much of this historical material has not appeared in prior briefs because it has only recently been discovered by the readings of decades of early statutes. See Victoria Nourse, *The History of Multi-Member Commissions at the Founding, 1789-1840* (Oct. 20, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5628110](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5628110) [<https://perma.cc/RNB5-TDDD>].

## ARGUMENT

The first Congresses and Presidents routinely turned to multi-member commissions to manage the Nation’s early financial affairs. As Washington, Madison, and Hamilton all warned: the United States could not survive if its financial affairs were not managed equitably and without partisan influence.

The multi-member fiduciary commissions described in this Brief, spanning 1780–1840, cover various topics, from high finance to lowly land titles. In each instance, the commissions were charged in the name of the rule of law and equity, enjoined to act free of corruption, and required to put aside partisan or sectional bias. Importantly, the Founders consistently deployed the concepts of “independence” and “impartiality” to describe these multi-member commissions. Properly understood, these were “fiduciary” commissions—consistent with that term’s original meaning—because of their combined characteristics of discretion and impartiality.<sup>4</sup> Modern analysts define “independence” in terms of tenure protections and limiting presidential removal. The Founders had a broader idea: impartiality and fiduciary responsibility.

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<sup>4</sup> For the original understanding of the term “fiduciary,” see Randy Barnett & Evan D. Bernick, *The Letter and Spirit of the Law: A Unified Theory of Originalism*, 107 GEO. L. J. 1, 18-23 (2018).

This brief furnishes details on four key commissions, and the Appendix provides an illustrative list of a dozen more.

I. INDEPENDENT COMMISSIONS, CREATED BY THE FIRST CONGRESSES AND PRESIDENTS, WERE COMMONLY USED TO MANAGE COMPLEX MATTERS OF STATE AT THE TIME OF THE FOUNDING.

At least *four* different independent commissions (all of a “fiduciary” character) were created in the waning years of the Articles of Confederation and under the first Congresses: (A) the Revolutionary War Debt Commissions; (B) the Sinking Funds; (C) the Direct Tax Commissions; and (D) the Land-Title Commissions.

A. Congress and President Washington turned to an independent commission to settle the States’ Revolutionary War debts.

The fall of the Articles of Confederation and the rise of the Constitution of 1789 have two things in common. First, both arose—in no small part—by the raging debate over settling the debts States incurred during the Revolutionary War.<sup>5</sup> Second, both the Confederation-

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<sup>5</sup> See, e.g., James Madison, Origin of the Constitutional Convention (c. Dec. 1835), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/99-02-02-3189> [<https://perma.cc/UP6U-UE7J>] (“It was seen that the public debt rendered so sacred by the cause in which it had been incurred remained without any provision for its



Congress and the First Congress uniformly turned to independent commissions to resolve that monumental task.<sup>6</sup>

1. *Revolutionary War Debt Commissions began under the Articles of Confederation.*

Multimember boards—especially of a financial and fiduciary character—are older than the Constitution itself. Indeed, under the Articles of Confederation, Congress created at least three separate “Boards” to address the Revolutionary War debt.<sup>7</sup> This practice was consistent with the Articles of Confederation, which specifically provided that “commissioners” could issue

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payment. The reiterated and elaborate efforts of Cong. to procure from the States a more adequate power to raise the means of payment had failed.”); Thomas Jefferson, Account of the Bargain on the Assumption and Residence Bills (c. 1792), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-17-02-0018-0012> [https://perma.cc/G2FS-3HGA] (“[Hamilton’s] look was sombre, haggard, and dejected beyond description. Even his dress uncouth and neglected. . . . He opened the subject of the assumption of the state debts, the necessity of it in the general fiscal arrangement and it’s indispensable [sic] necessity towards a preservation of the union . . .”).

<sup>6</sup> Compare Act of May 7, 1787, 32 Journals of the Continental Cong. 262 (Roscoe Hill, ed. 1936) with Act of Aug. 5, 1790, ch. 38, 1 Stat. 178.

<sup>7</sup> Act of Feb. 20, 1782, 22 Journals of the Continental Cong. 83–86 (Gaillard Hunt, ed., 1914); Act of Oct. 13, 1786, 31 Journals of the Continental Cong. 779–781 (John C. Fitzpatrick, ed. 1934); Act of May 7, 1787, 32 Journals of the Continental Cong. 262 (Roscoe Hill, ed. 1936).

“final and decisive” judgments in state-conflicts “without favour [sic], affection, or hope of reward.”<sup>8</sup>

**a. The 1782 Act.** The first Board<sup>9</sup> went to great lengths to ensure fundamental fairness and impartiality. Different states—using different methods of valuation—could not (“with any degree of certainty”) “produce that equal justice so desirable in this important object.”<sup>10</sup> To allow “proper allowances for particular circumstances,” each State was represented by a commissioner<sup>11</sup> with “full power and authority *finally* to settle the accounts between the State for which he shall have been nominated, and the United States.”<sup>12</sup>

Meetings of the commissioners were public.<sup>13</sup> Commissioners were given fixed salaries,<sup>14</sup> and required to swear an oath to use their “best skill and judgment, without favor or affection.”<sup>15</sup> Congress authorized the commission to call witnesses and take testimony.<sup>16</sup>

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<sup>8</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2.

<sup>9</sup> Act of Feb. 20, 1782, 22 Journals of the Continental Cong. 83 (Gaillard Hunt, ed., 1914).

<sup>10</sup> *Id.*, at 83.

<sup>11</sup> *Id.* Commissioners were nominated by the Confederation’s Superintendent of Finances and confirmed by each State individually. *See id.*, at 84.

<sup>12</sup> *Id.*, at 85 (emphasis added).

<sup>13</sup> *Id.*, at 86.

<sup>14</sup> *Id.*, at 85 (“a salary of fifteen hundred dollars per annum”).

<sup>15</sup> *Id.*, at 86.

<sup>16</sup> *Id.*

Congress also gave the commissioners tenure protections: each was replaceable only “upon [his] death, refusal, or inability to act.”<sup>17</sup>

**b. The 1786 Act.** The intervening statute was passed in October of 1786.<sup>18</sup> The new Board was composed of just three commissioners.<sup>19</sup> It not only took sworn testimony,<sup>20</sup> but it also received depositions<sup>21</sup> and nontestimonial evidence<sup>22</sup> on the states’ indebtedness.

**c. The 1787 Act.** The 1786 Board lasted less than a year. Given the historical backdrop of financial turmoil (in large part, over the Revolutionary War debts), it is not hard to see why.<sup>23</sup> In May of 1787, the Confederation’s Congress again resolved itself to (re)addressing the looming debt-crisis.<sup>24</sup> The 1787 Act borrowed from both earlier statutes. Commissioners were required to

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<sup>17</sup> *Id.*, at 84.

<sup>18</sup> Act of Oct. 13, 1786, 31 Journals of the Continental Cong. 779-781 (Roscoe Hill, ed. 1936).

<sup>19</sup> *Id.*, at 779–80.

<sup>20</sup> *Id.*, at 780.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (“[T]he said board may receive such other evidence as shall be satisfactory to them.”).

<sup>23</sup> Shay’s Rebellion was in full force. *See, e.g.*, Letter from Henry Lee to James Madison (Oct. 19, 1786), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0056> [<https://perma.cc/N25P-5WZQ>] (detailing the ongoing “seditio[n]” in Massachusetts).

<sup>24</sup> Act of May 7, 1787, 32 Journals of the Continental Cong. 262 (Roscoe Hill, ed. 1936).

take oaths swearing “faithfully and impartially to perform the duties of the Office.”<sup>25</sup> They were to apply “principles of general equity.”<sup>26</sup> Their salaries were fixed by statute, and they held their office for a term of a year and a half.<sup>27</sup>

Congress departed from the previous Boards in one significant respect: it created two Boards instead of one.<sup>28</sup> The first Board, comprised of five commissioners appointed by the Treasury Board, were dispatched to the states to take evidence for “the purpose of stating the Accounts of the States . . . against the United States.”<sup>29</sup> Then, the second Board, of just three commissioners, was to receive the accounting from the first and resolve the debt “finally,” and “on uniform and equitable principles.”<sup>30</sup> “[T]he determination of a majority of the [second] Board . . . shall be *final and conclusive*.”<sup>31</sup>

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<sup>25</sup> *Id.*, at 266.

<sup>26</sup> *Id.*, at 265.

<sup>27</sup> *Id.*, at 266.

<sup>28</sup> *Id.*, at 262, 264.

<sup>29</sup> *Id.*, at 262.

<sup>30</sup> *Id.*, at 264.

<sup>31</sup> *Id.*, at 265–66 (emphasis added).

2. *The Revolutionary War Debt Commissions were reinstated and expanded post-ratification of the Constitution of 1789.*

The First Congress, under the newly ratified Constitution of 1789, met on March 4th. Just over four months later, in August, it ratified the 1787 Commission (originally passed under the Articles of Confederation, now under Article I).<sup>32</sup> The only major change was to comply with the Appointments Clause: any commissioner appointed to fill a vacancy was to be made by the President, with confirmation by the Senate.<sup>33</sup>

In the summer of 1789, Congress was debating the scope of the President's power over the Executive branch. No one voiced constitutional doubts about the Revolutionary War Debt commission, including Madison. If such bodies were unconstitutional, the existence of such a powerful independent commission should have raised significant concern. If the intent was for the commission to be under the executive branch, it would have been housed inside a Department, such as Treasury, to maintain a "chain of dependence" to the

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<sup>32</sup> See Act of Aug. 5, 1789, ch. 6, 1 Stat. 49. The First Congress did not explicitly ratify the Act of May 7, 1787, but did so by reference in the 1789 Act.

<sup>33</sup> *Id.*, § 1, at 49. See NAT'L ARCHIVES: FOUNDERS ONLINE, Editorial Note to Letter from Robert Barnwell to George Washington (Apr. 27, 1789), <https://founders.archives.gov/documents/Washington/05-02-02-0114> [<https://perma.cc/N6QH-QPZA>] (explaining the need to appoint a commissioner quickly).

President (a term associated with Madison’s statements on presidential removal).<sup>34</sup> Instead, the First Congress reenacted the structure passed in 1787, keeping that commission intact, without placing it under any Executive office.

One year later, Congress (for now the fifth time) debated and enacted a multi-member commission to resolve the debt. The June 1790 debate centered on the commission’s structure. The bill as reported to the House included a clause proposing “that the Secretary and Comptroller of the Treasury be associated with the three Commissioners already appointed.”<sup>35</sup> Elbridge Gerry of Massachusetts moved that the words “Secretary and Comptroller of the Treasury should be struck out.”<sup>36</sup> He explained that the proposal would yield sectional imbalance: the Comptroller was from South Carolina, as was an existing Commissioner, giving South Carolina (a debtor state) double representation.<sup>37</sup> Theodore Sedgwick, also from Massachusetts, objected that adding commissioners would mean further delay.<sup>38</sup> John Vining of Delaware offered substitute lan-

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<sup>34</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) (quoting Madison).

<sup>35</sup> See 2 DEBATES AND PROCEEDINGS OF CONGRESS 1682, 1683 (June 1, 1790) (Gales & Seaton, eds. 1834).

<sup>36</sup> *Id.* (statement of Elbridge Gerry).

<sup>37</sup> *Id.* (statement of Elbridge Gerry).

<sup>38</sup> *Id.* (statement of Theodore Sedgwick).

guage to “bring this business into the Treasury Department, under the supervision of the Secretary of the Treasury and Secretary of State.”<sup>39</sup> James Madison agreed.<sup>40</sup> Gerry argued that the Vining substitute language was “unconstitutional[]” inasmuch as it would “interfer[e] with the right of the President and the Senate in making the appointments.”<sup>41</sup> Ultimately, “Mr. Gerry’s idea was finally adopted by the House.”<sup>42</sup>

The 1789 and 1790 debates on the debt commission were set against a skepticism—shared among many of the Framers—about the boards-systems persisting under the Articles of Confederation. In 1780, Alexander Hamilton, for instance, bemoaned the Confederation Congress’s “bad plan” “of appointing boards”:

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<sup>39</sup> *Id.* at 1684 (statement of John Vining).

<sup>40</sup> *Id.* at 1684 (statement of James Madison) (referring to the board as a practice of the former “[c]onfederation” government).

<sup>41</sup> *Id.* at 1684 (statement of Elbridge Gerry). Gerry may have been under the impression that Vining’s language permitted the House (as opposed to the Senate) to appoint Commission members. (We have been unable to locate Vining’s precise text).

<sup>42</sup> *Id.* Madison had a partisan reason to add commissioners because he believed that Virginia had been maltreated by it. See NAT’L ARCHIVES: FOUNDERS ONLINE, Editorial Note to Letter from William Davies to James Madison (May 8, 1790), <https://founders.archives.gov/documents/Madison/01-13-02-0137> [<https://perma.cc/Q45K-88ZA>] (explaining why Madison was “zealous” on the subject of Virginia’s state debt and discussing the controversy over the April 1790 report charging Virginia with mishandling its debt).

Boards partake of a part of the inconveniencies of larger assemblies. Their decisions are slower[,] their energy less[,] their responsibility more diffused. They will not have the same abilities and knowlege [sic] as an administration by single men. . . . All these reasons conspire to give a preference to the plan of vesting the great executive departments of the state in the hands of individuals.<sup>43</sup>

Despite this critique, Hamilton himself defended the structure of a multimember commission to resolve the remaining Revolutionary War debt, a commission that he would later dub as independent.

While Secretary of the Treasury, Hamilton proposed in January of 1790 that “a final adjustment of [the States’] accounts” (to replace the 1787 Commission) should be left “under the superintendence of commissioners.”<sup>44</sup> Importantly, under his plan, authority was placed with “commissioners, vested with equitable *discretion*, and *final* authority” not with the President,

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<sup>43</sup> Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-02-02-0838> [https://perma.cc/UDQ4-UHKJ].

<sup>44</sup> Alexander Hamilton, Report Relative to a Provision for the Support of the Public Credit (Jan. 9, 1790), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001> [https://perma.cc/DK9S-SQ7D].



nor one of his Officers, nor Hamilton himself, as Secretary of the Treasury.<sup>45</sup>

The final Commission bore similarities to its predecessors. The Act provided that “a board, to consist of three commissioners, be, and hereby is established to settle the accounts between the United States, and the individual states.”<sup>46</sup> A determination by a commission “majority” on such claims, “shall be *final* and *conclusive*.”<sup>47</sup> Commissioners had the power to take evidence,<sup>48</sup> and decide upon “principles of general equity.”<sup>49</sup> They were bound by an oath: to “faithfully and *impartially* execute the duties of their office.”<sup>50</sup> Commissioners had a limited term of office, and the Presi-

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<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> Act of Aug. 5, 1790, ch. 38, 1 Stat. 178.

<sup>47</sup> *Id.*, § 1, at 178 (emphasis added).

<sup>48</sup> *See id.*, § 3, at 179.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, § 2, at 179.

dential commission documents appointing the commissioners reflected that limited term.<sup>51</sup> In the 18<sup>th</sup> century, limited terms without reference to removal were seen as protection from removal.<sup>52</sup>

The Revolutionary War Debt Commission was an important body, treated by Congress and the President as independent from the great Departments. The power of the purse was involved and the sums of money tremendous: Hamilton estimated that the state debts amounted to over \$ 25 million<sup>53</sup> (more than \$ 880 million today). In 1791 appropriations legislation, the Commission was listed separately from the other three

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<sup>51</sup> *Id.*, § 9, at 179 (“[T]he powers of the said commissioners shall continue until the first day of July, [1792], unless the business shall sooner be accomplished.”). For the commission documents, see Christine Chabot, *The Interstitial Executive: A View from the Founding* (Oct. 29, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5673491](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5673491) [<https://perma.cc/KB5S-ATDM>].

<sup>52</sup> Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 19–20 (2021); Jed Shugerman, *Indecisions of 1789*, 171 U. PA. L. REV. 753, 826–34 (2023).

<sup>53</sup> E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790*, 321 (1961).

Departments.<sup>54</sup> Commissioners were paid well: appropriations for the commission's operations were higher than the salaries of officials in the War Department.<sup>55</sup>

In 1794, North Carolina requested the Commission's papers, but Hamilton, then acting as Secretary of the Treasury, refused on the basis of the Commission's independence from his oversight.<sup>56</sup> Responding to the request, he acknowledged that "[t]he Papers of the Commissioners are deposited in the Treasury," but emphasized that "[t]he Treasury is . . . the mere Depository of the Proceedings of distinct and *Independant* [sic] Officers, charged with a special and delicate Trust."<sup>57</sup> Thus, nothing short of "the Interference of a Legislative Act" of Congress—indeed, *not* the Presi-

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<sup>54</sup> "For defraying all other incidental and contingent expenses of the civil list establishment . . . of the three several departments, namely, Treasury, State, War, and of the general Board of Commissioners . . ." Act of Dec. 23, 1791, ch. 3, § 1, 1 Stat. 226, 227.

<sup>55</sup> *Id.* ("For the like compensations to the members of the Board of Commissioners, for the settlement of the accounts between the United States and the individual states, including clerks and attendants, thirteen thousand one hundred dollars."); *id.* ("For the like compensations to the Secretary and officers of the department of War, nine thousand six hundred dollars.").

<sup>56</sup> See Letter from Alexander Hamilton to Benjamin Hawkins (Mar. 12, 1794), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-16-02-0114> [<https://perma.cc/9T7F-XH39>].

<sup>57</sup> *Id.* (emphasis added).

dent—would cause him to remit the Commission’s documents, records, and other effects.<sup>58</sup> Moreover, his reference to the commissioners as “*distinct*” and “*Independent*” highlights his view (and the virtue) of independence in major financial matters on which the nation depended.

Hamilton disavowed knowledge of the actual principles that the Commission employed in arriving at its decisions.<sup>59</sup> Yet he declared:

[F]rom what I do know of the State of things with a full conviction of there being as much disposition on their part of *doing as much justice as possible*, I can entertain no doubt that the settlement which they made was essentially artificial and the result of a thousand compromises of principle.<sup>60</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; Alexander Hamilton, The Defence [sic] of the Funding System (c. July 1795), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-19-02-0001> [<https://perma.cc/M8XJ-KDSU>] (“I am not in the secret of the principles or maxims by which the Commissioners were governed.”).

<sup>60</sup> Hamilton, The Defence [sic] of the Funding System, *supra* note 59.

Multimember commissions are far older than recognized in *Humphrey's Executor*.<sup>61</sup> Indeed, the Revolutionary War Debt Commissions demonstrate that independent commissions are older than the Constitution itself. Such fiduciary commissions persisted despite general concerns about boards under the Articles of Confederation and despite the removal debate of 1789. They persisted because of the need for impartiality in a nation desperate to put its financial situation in good order, and avoid charges of faction or corruption.

It may seem odd that the Commission was charged in the name of justice, equity and impartiality—values associated with courts. Contemporaries sometimes called the commissioners “judges.”<sup>62</sup> But this settlement commission was clearly different than a court. The Commission had the kind of discretion to achieve “equitable” outcomes that courts of law do not hold. After all, large sums of money were involved.<sup>63</sup> Hamil-

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<sup>61</sup> Cf. *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) (comparing the Federal Trade Commission, by way of historical example, to the Interstate Commerce Commission and the Court of Claims).

<sup>62</sup> See, e.g., Letter from Beverley Randolph to James Madison (June 4, 1790), reprinted by NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-13-02-0167> [<https://perma.cc/T9JL-CYPK>].

<sup>63</sup> Discretionary power is one of the characteristics of fiduciary relationships. See Barnett, *supra* note 4.

ton—who devised the body—insisted upon the commissions’ “special and delicate Trust,”<sup>64</sup> one that required a “thousand compromises of principle.”<sup>65</sup> This was not a description of a court of law; it was a description of a fiduciary institution vested with considerable discretion.

B. Several Congresses and Presidents affirmed the power of the independent Sinking Fund to settle the debt over decades

In January 1790, Hamilton proposed another “independent” commission of “trustees”: the Sinking Fund.<sup>66</sup> This institution would become crucial in managing America’s finances over several decades.<sup>67</sup> Hamilton

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<sup>64</sup> See Letter from Alexander Hamilton to Benjamin Hawkins (Mar. 12, 1794), *supra* note 56.

<sup>65</sup> Hamilton, The Defence [sic] of the Funding System, *supra* note 59.

<sup>66</sup> Hamilton, Report on the Public Credit, *supra* note 44; see, e.g., Letter from Alexander Hamilton to John Adams (Dec. 21, 1790), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-20-02-0271> [https://perma.cc/SL9T-HLYS] (referring to the “Trustees of the Sinking Fund”); Letter from Alexander Hamilton to Benjamin Lincoln (Feb. 1, 1791), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-08-02-0001> [https://perma.cc/W997-4KXH] (same); Alexander Hamilton, Report on the Public Debt and Loans (Jan. 23, 1792), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-10-02-0124-0001> [https://perma.cc/45J7-X9SR] (same).

<sup>67</sup> Hamilton took this idea from a British practice proposed by Prime Minister William Pitt who called Britain’s sinking fund “independent.” See HENRY ADAMS, THE LIFE OF ALBERT GALLATIN 296

envisioned that the commissioners would “discharge . . . the existing public debt, either by purchases of stock in the market, or by payments on account of the principal . . . .”<sup>68</sup> As Hamilton explained in his public credit report, debt purchases were to be made under the “superintendence of commissioners, vested with equitable discretion and final authority.”<sup>69</sup> In August of that year, Congress agreed to Hamilton’s plan. President Washington approved, and a five-member Commission<sup>70</sup> was birthed, comprised of the Secretary of the Treasury, Secretary of State, Vice President, the Attorney General, and the Chief Justice.<sup>71</sup>

The statute provided the Commissioners with broad discretion, stating that the Commission shall “cause the said [debt] purchases to be made in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act.”<sup>72</sup> Active

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(1879) (on Pitt’s inspiration). On the longevity of the commission, *see* Nourse, *supra* note 3.

<sup>68</sup> Hamilton, Report on the Public Credit, *supra* note 44.

<sup>69</sup> *Id.*

<sup>70</sup> Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

<sup>71</sup> It was not entirely unprecedented to ask Cabinet officers to sit on such commissions. *See* Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (authorizing the Secretary of State, the Secretary of the Department of War, and the Attorney General, or “any two of them,” to issue letters patent); Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250 (1792) (authorizing the inspection of coinage by the Chief Justice, Secretary and Comptroller of the Treasury, Secretary of State, and Attorney General).

<sup>72</sup> Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

congressional supervision followed: the Commission was to give a “full and exact report” of the purchases and timing . . . within the first fourteen days of each session.”<sup>73</sup> Unlike the war-debt Commission, the Sinking Fund would be directly entrusted with monetary funds.<sup>74</sup>

Given the importance of this financial endeavor, one might expect Hamilton to have recommended that he, as Treasury Secretary, or some other executive officer oversee the Sinking Fund. Instead, Hamilton did the opposite. He called for an independent, five-member commission to wield this power. He argued that “the Vice-President . . . or President of the Senate, the Speaker of the House of Representatives, the Chief Justice, Secretary of the Treasury[,] and Attorney-General” should act as the Fund’s commissioners.<sup>75</sup> Hamilton imagined that the Sinking Fund would exist indefinitely, holding monies borrowed “in trust,” and “continue so vested, until the whole of the debt shall be discharged.”<sup>76</sup> The Commission was to have unfettered discretion: the commissioners could take any action as “shall appear to them most adviseable [sic],” bounded only by statutory mandates.<sup>77</sup> As in the Revolutionary War Debt Commission, the sinking fund was given a

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<sup>73</sup> *Id.*, § 3, at 186–87.

<sup>74</sup> Hamilton, Report on the Public Credit, *supra* note 44.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*



“public trust”: in all instances, the Fund had to pay “due regard to the equal benefit of the several states.”<sup>78</sup>

The decision to vest at least *some* of the Fund’s authority in constitutional officeholders not accountable to the President (namely, the Chief Justice and the Vice President) reinforces Congress’s view of the Fund as a board of trustees, not as lower-level functionaries subject to the President’s control. Hamilton shared this view, consistently using the term “trustees” in describing the Commissioners.<sup>79</sup> So, too, did prominent members of the commissions, like Attorney General Edmund Randolph,<sup>80</sup> and Chief Justice John Jay.<sup>81</sup>

The commission’s independence was accepted by those otherwise opposed to Hamilton’s plans and politics. Jefferson and his Cabinet were eager to replace Federalist officers. And, yet, they recognized the independence of the sinking fund. Albert Gallatin, Jefferson’s Secretary of the Treasury, wrote to Jefferson that

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<sup>78</sup> Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186.

<sup>79</sup> *See supra* note 66.

<sup>80</sup> Letter from Edmund Randolph to John Jay (Mar. 21, 1792), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jay/01-05-02-0200> [<https://perma.cc/22KC-GJ5Z>] (referring to the “trustees of the sinking fund”).

<sup>81</sup> Letter from John Jay to John Adams (Mar. 23, 1792), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-21-02-0079> [<https://perma.cc/GN63-T3GL>] (referring to the “Trustees of the sinking Fund”).

“The Statement to be made by the [Commissioners] of the sinking fund is directed to be made annually *by law*: two of that board, the Vice Prt. & Chief justice are officers *independent* of the Presidt.”<sup>82</sup> Gallatin doubted whether the fund would reduce the debt,<sup>83</sup> but he explained that he could not as Secretary of the Treasury attack it because the fund “was viewed as a check on that officer,”<sup>84</sup> meaning the Secretary of Treasury. Put differently, Gallatin did not have the final say over matters committed to the Fund’s discretion.<sup>85</sup>

The Sinking Fund lasted nearly four decades, with Congress routinely and uniformly deferring to its independence and expertise.<sup>86</sup> Its ranks boasted the who’s-who of early American politics: Future Presidents from James Madison to James Monroe sat on these commissions in their capacity as Cabinet secretaries.<sup>87</sup> Presidents Jefferson and Monroe mentioned the sinking

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<sup>82</sup> Albert Gallatin, Remarks on the Draft (Nov. 21, 1802), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-39-02-0017-0004> [<https://perma.cc/GMB7-Q7FJ>] (emphasis added to the word “independent,” in the original “by law”).

<sup>83</sup> HENRY ADAMS, THE LIFE OF ALBERT GALLATIN 270 (1879).

<sup>84</sup> *Id.*, at 296.

<sup>85</sup> *Id.*

<sup>86</sup> *See* App. B, *infra*.

<sup>87</sup> *See, e.g.*, Report of the Commissioners of the Sinking Fund (Feb. 7, 1803), *in* 2 AMERICAN STATE PAPERS: FINANCE 23 (William S. Hein & Co. 1998) [hereinafter AMERICAN STATE PAPERS] (Madison signing); *id.* (Feb. 5, 1812), at 528 (Monroe signing).

fund in their state of the union addresses.<sup>88</sup> Chief Justice John Marshall signed their reports,<sup>89</sup> as did a host of Vice Presidents, secretaries of state, attorneys general, and secretaries of the treasury over decades including well known figures of the early republic: from Aaron Burr to William Pinkney to John Quincy Adams to John C. Calhoun.<sup>90</sup> John Quincy Adams's diaries confirm that Chief Justice Marshall attended these meetings and issued legal opinions to the Commission when requested,<sup>91</sup> as did his predecessor, Chief Justice

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<sup>88</sup> President Thomas Jefferson, State of the Union Address (Dec. 2, 1806), *reprinted in* H. Journal, 9th Cong., 2d Sess., 466 (1806); President James Monroe, State of the Union Address (Dec. 2, 1817), *reprinted in* H. Journal, 15th Cong., 1st Sess., 9 (1817).

<sup>89</sup> *See, e.g.*, Report of the Commissioners of the Sinking Fund (Feb. 5, 1807), *in* 2 AMERICAN STATE PAPERS 227 (Marshall signing).

<sup>90</sup> Report of the Commissioners of the Sinking Fund (Feb. 7, 1803), *supra* note 87 (Aaron Burr signing); *id.* (Feb. 5, 1812), *supra* note 87 (William Pinkney signing); *id.* (Feb. 5, 1820), *in* 3 AMERICAN STATE PAPERS 473 (John Quincy Adams signing); *id.* (Feb. 8, 1826), *in* 5 AMERICAN STATE PAPERS 299 (John C. Calhoun signing).

<sup>91</sup> Diary of John Quincy Adams (Oct. 19, 1818), *reprinted by* PRIMARY SOURCE COOP., <https://www.primarysourcecoop.org/publications/jqa/document/jqadiaries-v30-1818-10-p405--entry19?navmode=chronological> [https://perma.cc/B6UZ-UCZW] ("Mr[.] Wirt was undecided, but inclined to the opinion of Mr[.] Crawford. It was proposed that Mr[.] Wirt should write to take the opinion of Chief Justice Marshall."); Diary of John Quincy Adams (Feb. 7, 1818), *reprinted by* PRIMARY SOURCE COOP., <https://www.primarysourcecoop.org/publications/jqa/document/jqadiaries-v30-1818-02-p304--entry7?navmode=chronological> [https://perma.cc/P86Q-M6VP] (reporting Chief Justice Marshall's presence at a sinking fund meeting).

John Jay.<sup>92</sup> Even President Jackson, no friend of the Bank’s constitutionality, seemed to have nothing but praise for the Fund. As he put it, it was “the commissioners of the sinking fund,” not he as President, who were “invested with the full authority to purchase the debt.”<sup>93</sup>

The Commission’s multi-member status was an essential feature of its independence. By design, the President could not force his policy preferences unless he obtained agreement from three members, a majority voting bloc. If the President removed commissioners from duties on the commission,<sup>94</sup> that would violate the statute, changing the commission’s structure. For example, if the President removed the Attorney General from his seat on the Commission, there would be no one

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<sup>92</sup> See Letter from John Adams to John Jay (Mar. 21, 1792), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-21-02-0078> [<https://perma.cc/NGX6-XVPH>] (requesting Chief Justice John Jay’s attendance to address “[a] difference of opinion [between] the Trustees of the Sinking Fund”); Letter from John Jay to John Adams (Mar. 23, 1792), *reprinted by* NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-21-02-0079> [<https://perma.cc/2KBD-UNJ2>] (providing his legal opinion on the authority of the “Trustees”).

<sup>93</sup> President Andrew Jackson, State of the Union Address (Dec. 4, 1832), *reprinted in* H. Journal, 22d Cong., 2d Sess., 8, 13 (1832); *see also* President Andrew Jackson, State of the Union Address (Dec. 3, 1833), *reprinted in* H. Journal, 23d Cong., 1st Sess., 11, 18 (1833) (referencing the “power given to the Commissioners of the Sinking Fund”).

<sup>94</sup> Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1842 (2023).

who could replace him because, under the terms of the statute, the replacement had to be the Attorney General. Removal reduced the number of commissioners contrary to the office Congress “established by law.”<sup>95</sup>

The Sinking Fund was a “fiduciary” institution in the strictest sense of that term, as the commission held the nation’s finances, and its public credit, in trust for the nation. Over decades, Congresses and Presidents deferred to its structure without constitutional complaint. Although the commission’s members took the oath of judges, they had the discretion of fiduciaries. It is in this sense that Hamilton proposed the commission as “independent” of the presidency.

C. Congress and President Adams turned to independent commissions to implement the Nation’s first direct tax.

At the turn of the 18th Century, the United States feared war with France. Congress and the President determined that they needed to tax the people to pay for the war. In July 1798, Congress enacted and the President approved an extraordinarily detailed statute requiring every person in the United States to value their property in a list to be filed with assessors to determine their tax.<sup>96</sup> As Professor Nicholas Parrillo has

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<sup>95</sup> U.S. CONST., art. 1, sec. 2, cl. 2 (offices “shall be established by law.”).

<sup>96</sup> See Act of July 9, 1798, ch. 70, § 9, 1 Stat. 580, 586 (“[A]ll persons owning or possessing any dwelling-houses, lands or slaves

written, this tax law “proved to be the federal government’s largest non-military endeavor, as measured by the number of federal officials involved, of the Constitution’s first two decades.”<sup>97</sup>

The 1798 direct tax act divided the states into assessment divisions.<sup>98</sup> The President was to name commissioners for each assessment division within a state, and these nominees were subject to Senate confirmation.<sup>99</sup> Since states were divided into anywhere from three to eleven divisions, the statute demanded several commissioners within each state. The statute directed those commissioners to immediately meet as a board: “a majority of the commissioners. . . shall, and are hereby declared to be a board competent to transact and discharge any business or duties enjoined by this act.”<sup>100</sup>

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. . . to deliver separate written lists, specifying in one list, the dwelling-houses; in another, the lands; and in a third, the slaves.”).

<sup>97</sup> Nicholas R. Parrillo, *Nondelegation, Original Meaning, and the Early Federal Taxation: A Dialogue with My Critics*, 71 DRAKE L. REV. 367, 375 (2024).

<sup>98</sup> Act of July 9, 1798, ch. 70, § 1, 1 Stat. 580, 580–83.

<sup>99</sup> Professor Parrillo reports that the blank commissions provided that the Commissioners served “at pleasure.” 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, 1327–28 nn.177–78 (2021).

<sup>100</sup> Act of July 9, 1798, ch. 70, § 4, 1 Stat. 580, 584.

Congress needed a uniform tax, and the commissions were necessary to achieve that uniformity. Albert Gallatin, future Secretary of the Treasury, was critical of the original bill. He worried that “[a]ssessors will assess in different places on different principles.”<sup>101</sup> He asked: What assurance did citizens have that assessors in Philadelphia would “assess their houses according to their real value?”<sup>102</sup> And what assurance did they have that the valuations in the “Alleghany [sic] mountains” would be similar?<sup>103</sup> The solution: Commissions. “Unless Commissioners were employed to adjust the various assessments which are made, no equality of taxation could be expected.”<sup>104</sup>

People generally do not like to pay taxes. Congress understood that, if people were to comply, the process had to be fair and impartial. They charged the administrators in the language of fiduciaries. Commissioners were given broad discretion to raise or lower valuations “as shall appear just and equitable.”<sup>105</sup> In return, Congress required trust: before the commissioners were to

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<sup>101</sup> Statement of Rep. Albert Gallatin (May 30, 1798), 5 Annals of Cong. 1848, 1848–49.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Act of July 9, 1798, ch. 70 § 22, 1 Stat. 580, 589 (“The commissioners shall have the power to revise, adjust and vary, the valuations of lands and dwellinghouses in any assessment district, by adding thereto, or deducting therefrom, such a rate per centum, as shall appear to be just and equitable.”)

“enter on the discharge of the duties,” they were to “take and subscribe, before some competent magistrate, an oath or affirmation, truly, faithfully and *impartially* to discharge *their trust* . . . .”<sup>106</sup>

By contrast, the Secretary of the Treasury was given limited powers over the commissions. This was a matter of the “power of the purse,” and Congress was specific. The Secretary could request and receive reports of the commission’s activities.<sup>107</sup> He could devise “the forms of [the] lists” that citizens were to file, and their “abstracts” as required by the Act.<sup>108</sup> He could “reduce the number of assessment districts” or assessors if they appeared too great in number.<sup>109</sup> But it was left to the commissioners to set the rules. Commissioners were “required to establish all such regulations, as to them, or a majority of them, shall appear suitable and necessary, for carrying this act into effect.” Those rules were “*binding* on each commissioner and assessor, in the performance of [their] duties.”<sup>110</sup>

The Secretary of the Treasury, Oliver Wolcott, affirmed his limited authority over the commissions in a letter to one commission: “I do not consider myself au-

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<sup>106</sup> *Id.*, § 2, at 583 (emphasis added).

<sup>107</sup> *Id.*, §§ 5, 22, at 584, 589.

<sup>108</sup> *Id.*, §§ 16, 21, at 588–89.

<sup>109</sup> *Id.*, § 7, at 585.

<sup>110</sup> *Id.*, § 8, at 585 (emphasis added).



thorized to control the decisions of the Commissioners.”<sup>111</sup> He defended vast deference to the commissioners in setting equitable valuation standards:

there may be danger that the opinions of the Assessors will be so variant as greatly to increase the labor of the Commissioners in equalizing the valuations, as directed by the twenty second section of the act; for a proper decision on this point, *I however repose entire confidence in the judgment and discretion of the Commissioners.*<sup>112</sup>

The tax commissions, like the revolutionary war debt commission and the sinking fund, were charged in the language of impartiality, discretion, and trust. All these statutes speak of equity and impartiality. None use the word “court.” Equity, at the time, was defined as fairness beyond the law’s rigidity, suggesting that the Commission had far more discretion than a typical court. Professor Parrillo writes that, in one case, the commissions changed valuations by 100 percent.<sup>113</sup> Unlike courts, these bodies were charged with reaching

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<sup>111</sup> Letter from Oliver Wolcott Jr. to Isaac Alexander (Oct. 7, 1799), Box 20, Folder 13, (Oliver Wolcott Jr. Papers, Connecticut Historical Society).

<sup>112</sup> Parrillo, *A Critical Assessment*, *supra* note 99, at 1372 (quoting Oliver Wolcott, Jr., U.S. Dep’t of Treasury, Circular [to the Commissioners for Assessing Direct Tax] 1 (Aug. 7, 1798) (Oliver Wolcott, Jr. Papers, Box 21, Folder 17, Connecticut Historical Society)) (emphasis added).

<sup>113</sup> *Id.* at 1307.

compromises across the breadth of individual states, some vaster than the size of Great Britain.<sup>114</sup>

The direct tax and its administration did not steal unannounced on those familiar with the constitution's Founding. The Framers accepted this arrangement. John Adams, as President, signed the 1798 Act into law. The direct tax was imposed on everyone in the country, men of high import included. John Jay, former Chief Justice, and then Governor of New York, provided a lengthy list of property.<sup>115</sup> Despite his opposition to the law's "disgusting particularities," Thomas

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<sup>114</sup> Virginia was roughly one-third larger than the islands of Great Britain and Ireland. Thomas Jefferson, Notes on the State of Virginia (c. 1787), *reprinted by* LIBR. OF CONG., <https://tile.loc.gov/storage-services/service/gdc/lhbc/04902/04902.pdf> [<https://perma.cc/MN2C-GVMV>].

<sup>115</sup> Inventory of John Jay's Property (Nov. 8–9, 1798), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jay/01-06-02-0359> [<https://perma.cc/KH4H-9HP3>].

Jefferson dutifully paid his tax.<sup>116</sup> Ultimately, as President, he kept the commissions in place to complete their job.<sup>117</sup>

D. Several Congresses and Presidents turned to commissions to settle the Louisiana Purchase.

The Louisiana Purchase nearly doubled the United States landmass, transforming the nation. Allergic to taxes, President Jefferson hoped to pay down the national debt by land sales. But there was a problem. Many land-claimants held title in the new territory under grants from foreign governments, such as France and Spain. If these settlers were to be “loyal citizens of the United States rather than agitators for secession or

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<sup>116</sup> See Letter from Thomas Jefferson to Edmund Pendleton (Jan. 29, 1799), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-30-02-0458> [<https://perma.cc/7SB8-FMF2>] (particularities); Thomas Jefferson, Memorandum Books (c. 1800), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/02-02-02-0010> [<https://perma.cc/5Y9P-GBVG>] (“My direct tax to the U.S. is as follows . . .”).

<sup>117</sup> See Letter from Albert Gallatin to Thomas Jefferson (June 30, 1803), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-40-02-0484> [<https://perma.cc/5DGU-YUMM>] (detailing the progress in collecting the direct tax in various states as part of a plan to discontinue and retrench the federal work force).

annexation by a foreign sovereign, they needed to hold valid title to their lands.”<sup>118</sup>

In 1803, Congress enacted a template for resolving land titles, and for selling public lands, which would be carried over to land commissions from Ohio to Indiana, Florida to Michigan, and Illinois to Arkansas.<sup>119</sup> Rather than grant territorial governors’ power to resolve these claims, Congress chose three member boards, each in designated areas in the territory. Typically, the President was to name the register of the land office and “two other persons,” to form a commission in designated areas.<sup>120</sup> These “commissioners,” were to “ascertain[] the rights of persons claiming” title under the Act.<sup>121</sup>

Congress described the commission’s responsibilities in the same language of impartiality we have seen before. Upon appointment, commissioners repeated the legislatively required oath that they would “*impartially* exercise and discharge the duties imposed on

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<sup>118</sup> See JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 120 (2012).

<sup>119</sup> See Act of Mar. 3, 1803, ch. 27, 2 Stat. 229. For similar acts, see, e.g., Act of Mar. 3, 1807, ch. 47, § 2, 2 Stat. 446, 447 (Illinois); Act of Apr. 25, 1808, ch. 67, 2 Stat. 502–04 (Michigan); Act of June 13, 1812, ch. 99, 2 Stat. 748–52 (Missouri).

<sup>120</sup> See Act of Mar. 3, 1803, ch. 27, § 6, 2 Stat. 229, 230.

<sup>121</sup> *Id.*

me . . . .”<sup>122</sup> Commissioners were to decide claims in a “summary manner,” with the power to “administer oaths and examine witnesses.”<sup>123</sup> Commissioners were vested with discretion to do “justice and equity” in resolving claims.<sup>124</sup> The commissions’ determinations, “shall be final.”<sup>125</sup>

Albert Gallatin, Jefferson’s Secretary of the Treasury, confirmed that the commissioners’ authority was broad. As Professor Mashaw writes: “Gallatin described the commissioners as ‘the sole judge[s] of what should be considered’ and as ‘court[s] without appeal for the purpose of which they were initiated.’”<sup>126</sup> Territorial records show that the commissions, at least in some cases, created “a system of rules for the government of its proceedings” to effectively carry out its duties, and published them to the public.<sup>127</sup>

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<sup>122</sup> *Id.* § 6, at 230–31. Clerks, by contrast, only swore to “truly and faithfully enter and record all minutes, proceedings and decisions of the board,” without reference to impartiality. *Id.*, at 231.

<sup>123</sup> *Id.*, § 6, at 231.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L. J. 1636, 1719 (2007) (quoting Letter from Albert Gallatin to Parke Alton (Aug. 9, 1810)).

<sup>127</sup> Letter from Ephraim Kirby to the President (Apr. 7, 1804), reprinted by 5 THE TERRITORIAL PAPERS OF THE UNITED STATES 316 (Clarence E. Carter, ed. 1937).

On more than one occasion, Gallatin wrote to Jefferson about legal questions arising from the commissions' work. On March 14, 1807, for example, a controversy arose over the interpretation of the 1807 Act, and what it meant when it said that commissions should apply the law and customs of the French and Spanish governments. Gallatin went to some lengths to explain the precise legal issue to President Jefferson, but concluded that it was "discretionary" on the executive whether to "send instructions" to the Commissioners. Gallatin concluded:

If it be decided to give no instructions on that point, the reason to be assigned must be that the determination of the Commissioners being now made final invests them with a judicial character.<sup>128</sup>

Later, on March 29 of 1807, President Jefferson adopted that construction:

[T]he board of Commissioners, being a judiciary tribunal, I should think it proper to leave them to the law itself as their instructions, on the meaning of which they are competent to decide,

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<sup>128</sup> Letter from Albert Gallatin to Thomas Jefferson (Mar. 14, 1807), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/99-01-02-5280> [<https://perma.cc/39GM-LH8H>].

and, being on the spot, are better informed of the nature of those claims than we are.<sup>129</sup>

Questions concerning the commission's work extended into the Madison Administration. The Board of Commissioners of Opelousas in Louisiana had issued "general principles of decision."<sup>130</sup> Gallatin believed that the Board misinterpreted the statute by granting a form of French title termed a "requete." Gallatin could not reverse the commissions' decisions on title, as these were final.<sup>131</sup> He explained that the [statutory] provision making the decision of the Commissioners "final," "superceded" prior statutory language requiring that the commissioners "conform in their decisions" to the wishes of the Treasury Secretary and President.<sup>132</sup>

After this lengthy explanation, Gallatin asked Madison:

[W]hat ought to be done or can be done. The President may remove the Commissioners, which will

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<sup>129</sup> Letter from Thomas Jefferson to Albert Gallatin (Mar. 29, 1807), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/99-01-02-5382> [<https://perma.cc/2PGX-SB7F>].

<sup>130</sup> Letter from Albert Gallatin to James Madison (May 7, 1811), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/03-03-02-0360> [<https://perma.cc/98X5-V3C4>].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

effectually cure the evil; or a letter may be written in his name expressive of his disapprobation, which may perhaps produce some effect.<sup>133</sup>

President Madison chose not to remove the commissioners; he sent a letter of disapprobation instead, repeating Gallatin's arguments.<sup>134</sup>

## CONCLUSION

In the earliest days of the nation, Presidents signed into law multi-member commissions that the Founders themselves called "independent." These Presidents affirmed Congress's constitutional authority under the necessary and proper clause to create "fiduciary" bodies charged with "impartiality" in matters requiring the Nation's trust. None were courts of law, even though they were charged in some cases with legal matters. All were designed in similar terms, marrying equity to discretion and finality. To the extent that *Humphrey's Executor* depends upon an incomplete history, this Court has before it the opportunity to elucidate the Founders' intent for independent commissions as manifested in

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<sup>133</sup> *Id.*

<sup>134</sup> Letter from Albert Gallatin to Levin Wailes, William Garrard, & Gideon Fitz (May 24, 1811), *reprinted by* 9 THE TERRITORIAL PAPERS OF THE UNITED STATES 934 (Clarence E. Carter, ed. 1937) (Gallatin writes that he has been directed by Madison to write a letter of "disapprobation").



the early days of the Republic. That historical understanding provides powerful support for respondent's position.

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## **APPENDIX**

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App. 1

**APPENDIX A: STATUTES OF VARIOUS MULTI-MEMBER COMMISSIONS**

This Appendix contains a non-exhaustive list of statutes that address multi-member domestic commissions at or around the time of the Founding.

COMMISSION TO REVIEW PATENT PETITIONS  
(1790)

Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 109–10 (requiring a petition for a patent to be sent to the Secretary of State, Secretary of War, and Attorney General).

COMMISSION TO PLAN THE SEAT OF THE GOVERNMENT  
(1790)

1. Act of July 16, 1790, ch. 28, §§ 2–3, 1 Stat. 130 (authorizing the President to appoint three commissioners to define a district “for the permanent seat of the government” and empowering commissioners to carry out such task).

2. Act of Mar. 3, 1791, ch. 17, 1 Stat. 214, 215 (amending the original statute but not with respect to the roles of the commissioners).

3. Act of May 6, 1796, ch. 21, §§ 1, 4, 1 Stat. 461 (authorizing the commissioners to borrow funds, subject to express limitations, and requiring commissioners to provide semi-annual account reports to the Secretary of the Treasury).

App. 2

COMMISSION TO INSPECT COINAGE  
(1792)

Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250 (directing coins made at the mint to be annually “assayed under the inspection of” the Chief Justice, Secretary and Comptroller of the Treasury, Secretary of State, and Attorney General).

BANKRUPTCY COMMISSION  
(1800)

Act of April 4, 1800, ch. 19, § 2, 2 Stat. 19, 21 (authorizing a district court to appoint three “good and substantial” persons to be bankruptcy commissioners of the bankrupt).

INDIAN AFFAIRS COMMISSION  
(1800)

Act of Jan. 17, 1800, ch. 5, §3, 2 Stat. 6 (referencing commissioners for “facilitating a friendly intercourse” with Indian tribes”).

COMMISSION TO EXAMINE MILITARY HOSPITAL  
EMPLOYMENTS AND PROMOTIONS  
(1799)

Act of Mar. 2, 1799, ch. 27, § 9, 1 Stat. 721, 722–23 (authorizing the physician-general to call a medical board to examine candidates for employment or promotion at military hospitals).

App. 3

COMMISSION TO ESTABLISH A CANAL IN WASHINGTON  
(1809)

Act of Feb. 16, 1809, ch. 17, §§ 1–2, 2 Stat. 517, 517–18 (appointing a board of commissioners to assist in establishing a canal in Washington and requiring commissioners to call a meeting of stockholders).

COMMISSION TO MAKE A TURNPIKE ROAD  
(1809)

Act of Mar. 3, 1809, ch. 31, §§ 1–2, 2 Stat. 539 (appointing a board of commissioners for the making of a turnpike road from Mason’s Causeway to Alexandria and empowering commissioners to carry out such task).

COMMISSION TO MAKE TURNPIKE ROADS  
(1810)

Act of Apr. 20, 1810, ch. 26, §§ 1–2, 2 Stat. 570, 570–71 (appointing a board of commissioners for the making of turnpike roads in the District of Columbia and empowering commissioners to carry out such task).

COMMISSION OF NAVY HOSPITALS  
(1811)

Act of Feb. 26, 1811, ch. 26, §§ 1 3, 5, 2 Stat. 650, 650–51 (appointing the Secretary of the Navy, Secretary of the Treasury, and Secretary of War to the Commissioners of Navy Hospitals and requiring certain fines and pension allowances to be paid to them).

App. 4

COMMISSION TO RUN THE DISTRICT OF COLUMBIA  
(1812)

Act of May 4, 1812, ch. 75, § 1, 2 Stat. 721, 721–23 (providing for the running of the District of Columbia by a mayor, board of aldermen, and board of common council).

COMMISSION FOR THE NAVY  
(1815)

Act of Feb. 7, 1815, ch. 35, § 1, 3 Stat. 202 (authorizing the President to appoint three officers to the board of commissioners for the navy).



## **APPENDIX B: SINKING FUND STATUTES**

This Appendix contains a non-exhaustive list of statutes relating to the sinking fund.

1. Act of May 26, 1824, ch. 192, 4 Stat. 73 (authorizing the President to borrow 5 million dollars and requiring the Commissioners of the sinking fund to pay for the interest on the new debt).

2. Act of Mar. 3, 1821, ch. 38, 3 Stat. 635 (authorizing the President to obtain a loan of 5 million dollars and the Commissioners of the sinking fund to pay for the interest on this new debt).

3. Act of Mar. 3, 1817, ch. 87, 3 Stat. 379 (appropriating 10 million to the Sinking Fund, and providing that the Secretary of the Treasury shall provide these sums to the “commissioners of the sinking fund”).

4. Act of Mar. 3, 1817, ch. 85, 3 Stat. 377 (authorizing the Commission to destroy certain Treasury Notes “under such regulations and securities” as the Commissioners determine with the “approbation” of the President).

5. Act of Act of Mar. 3, 1815, ch. 87, 3 Stat. 227 (authorizing the President to obtain a loan for over 18 million dollars, and providing that the Commissioners of the sinking fund pay the interest on this new debt).

6. Act of Dec. 23, 1814, ch. 16, 3 Stat. 159 (increasing the duties on various items of trade and providing

## App. 6

that the duties are to remain collected during “the present war” to allow for the paying down of debt through an “adequate sinking fund”).

7. Act of Mar. 2, 1811, ch. 34, § 2, 2 Stat. 656, 657 (duty to pay interest); Act of Feb. 11, 1807, ch. 12, § 4, 9 Stat. 416 (appointment of agents in Amsterdam and London).

8. Act of Apr. 18, 1806, ch. 50, § 2, 3 Stat. 405, 406 (restricting commissioners from purchasing certain kinds of debt).

9. Act of Nov. 10, 1803, ch. 1, § 1, 5 Stat. 245 (expanding the Sinking Fund to pay French debt); Act of Apr. 29, 1802, ch. 32, §1-6, 8 Stat. 167, 170 (continuing Sinking Fund).

10. May 3, 1796, ch. 44, 1 Stat. 488 (providing that the Commissioners of the sinking fund, with the approval of the President shall borrow up to 5 million dollars to be applied to the payment of the debt, and that the Commissioners may sell stock in the Bank of the United States to pay for the debt per regulations set by the Treasury).

11. Act of Mar. 3, 1795, ch. 45, § 10, 1 Stat. 433, 435-36 (continuing Sinking Fund Commission’s role in managing repayment of debt).

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12. 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).