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978-0-521-86831-0 - Thomas Jefferson and Executive Power

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Thomas Jefferson and Executive Power

Citizens and scholars are again confronted with a question presented by necessity and the law: Because no law can anticipate every contingency, how can any set of laws remain fundamental and practical? How can discretion be made compatible with democratic consent?

Before he became president, Thomas Jefferson had devoted twenty-five years to this problem. Author of the Declaration of Independence, constitutional reformer, wartime governor, diplomat, and opposition leader, Jefferson arrived at a way to resolve the tension between contingency and a written constitution. This solution was an executive that would be both strong and democratic. Indeed, it would derive its strength, or its energy, from its democratic sources and present an alternative to Alexander Hamilton's understanding of executive power. Thus, Jefferson's Revolution of 1800 brought about a transformation of the presidency because the architect of that revolution had a plan for executive power. But this plan was itself subject to events, and Jefferson had to alter its course throughout his presidency. By revisiting Jefferson's understanding of executive power, we better understand Jefferson's presidency and more fully trace the development of modern executive power.

Jeremy D. Bailey is Assistant Professor of Political Science at the University of Houston. He was the co-winner of the 2004 APSA E. E. Schattschneider Award for best dissertation in American politics written in 2002 or 2003 and has received fellowships from the International Center for Jefferson Studies at Monticello and the Institute for Human Sciences in Vienna.

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JEREMY D. BAILEY

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Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521868310

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First published 2007

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Bailey, Jeremy D., 1974–

Thomas Jefferson and executive power / Jeremy D. Bailey.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-86831-0 (hardback)

1. Executive power – United States – History. 2. Jefferson, Thomas, 1743–1826.

3. United States – Politics and government – 1783–1809. I. Title.

JK511.B35 2007

352.23'50973 – dc22 2006036502

ISBN 978-0-521-86831-0 hardback

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Preface

The scholarly understanding of presidential power rests on two distinctions. The first distinction concerns the extent of the president's formal powers and the place of the presidency in the constitutional order. The other distinction contrasts the Founders' presidency against the modern presidency by emphasizing the extraconstitutional powers of twentieth-century presidents. The first distinction is often characterized as arising from the differences in the political thought of Alexander Hamilton and Thomas Jefferson, that is, between a generous and a narrow reading of the Constitution's grant of authority to the president. The second distinction supposes that the modern presidency escaped from the constraints imposed by the Founders' careful plan to separate and check power by looking beyond the Founders' Constitution for its resources and became, in some cases, precisely what the Founders tried to prevent.¹ Because recent presidents eagerly exploit the constitutional hinges that allow the presidency to be strong, and because they bolster this strength with extraconstitutional devices, it is easy to conclude that the current presidency is both Hamiltonian and modern. As this scholarly understanding of the presidency puts it, Hamilton's case for implied powers, with its broad reading of the vesting clause in Article One, opened the space for later presidents to claim, as Theodore Roosevelt did, that they possess any power, not forbidden by the Constitution, to act on behalf of the people and for FDR to argue that the presidency needs the institutional resources to secure rights under modern conditions.

¹ Raymond Tatalovich and Thomas S. Engeman, *The Presidency and Political Science: Two Hundred Years of Constitutional Debate* (Baltimore: The Johns Hopkins University Press, 2003), 214–29.

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But this formulation points to an obvious difficulty: how compatible is the seemingly democratic modern presidency with the Hamiltonian presidency? The modern presidency is both powerful and popular, but the one seems to undermine the other. Because elections have become more democratic, and because the science of polling allows, as Dick Morris taught us, “every day” to be “election day in modern America,” a president can be both caretaker and creature of the popular will. Yet presidents increasingly rely on secrecy and administrative fiat to pursue their ambitions. Presidents use executive orders to avoid working with Congress, and, since Watergate, presidents have asserted executive privilege while calling it something else. Among scholars and presidents, the current understanding of the war power is that the president, not Congress, is responsible for determining when the nation is at peace or war. At the same time, presidents appeal to the people to justify their policies and their extraordinary acts of executive power.

Moreover, several scholars have found that the modern and premodern classifications rest on an uneasy theoretical foundation. Harvey Mansfield Jr. has argued that the distinction between the Founders and the moderns fails to appreciate the extent to which the modern presidency grows out of the modern doctrine of constitutionalism, which allows the formal and informal presidency to occupy the same office.² And, as Stephen Skowronek has written, the distinction between the Founders’ presidency and the modern presidency fails to appreciate the more serious similarities among presidents who face similar political challenges, namely being associated with or opposed to a resilient or vulnerable regime.³ Twentieth-century presidents have new tools, but does this make them new?

More important, even though modern presidents employ methods in the spirit of the Hamiltonian presidency, they have not wholeheartedly embraced it. FDR, for example, appealed to Hamilton’s defense of national power only after discrediting Hamilton’s suspicion of democracy.⁴ Although Hamilton’s reputation as an opponent of democracy is perhaps undeserved, his reasoning in *The Federalist* No. 70 illustrates the dilemma for modern presidents: where is the president who would argue that if republican government is antithetical to an energetic executive, then it must mean that the republican form, not energy in the executive, must be discarded? Where is the president who will

² Harvey C. Mansfield Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore: The Johns Hopkins University Press, 1989); and David K. Nichols, *The Myth of the Modern Presidency* (University Park: Pennsylvania State University Press, 1994).

³ Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, MA: Harvard University Press, Belknap Press, 1993).

⁴ Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 1993), 21–51.

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say in public, as TR did in private, that the people's love of Jefferson is a discredit to his country?

The Problem with Inventing the Presidency

More than relics of a lost world, such questions force us to examine the heart of the modern presidency. Today, presidents use their elections to claim a mandate from the people; they claim that the Constitution confers upon them the ultimate power of defending the Constitution and therefore tacitly grants them the power to use any means to do so; they appeal directly to the people to get Congress to pass their proposals and to encourage executive officials to do their bidding; and they carefully cultivate public opinion in order to make these appeals more useful. These aspects of the modern presidency are well known and well studied, but they can be better understood with reference to their institutional origins. The case for mandates presumes a particular kind of presidential selection and would have been incomprehensible under the original Electoral College; the argument for the constitutionality of executive prerogative requires a particular understanding of the relationship between necessity and fundamental law; and appeals to the public had to first be defended as a legitimate, and useful, practice in democratic government. Even a quick reading of the Constitution and its interpretation in *The Federalist* reveals that none of these developments can be taken for granted. Rather, somebody had to invent them.

But, as scholars affiliated with American Political Development argue, such inventions come about at particular intersections between political and institutional paths.⁵ Or, as Karen Orren and Stephen Skowronek put it, instead of searching for “prime movers and master organizing mechanisms,” scholars would do well to present “more circumspect specifications of order.”⁶ Put differently, the functional bias behind the question of who invented a particular institutional reform should be replaced by less normative and more historically subtle investigations of the interaction between established commitments, institutional rules, and new politics – what Orren and Skowronek call “intercurrence.”⁷ Consider, for example, the rival explanations of the apportionment scheme in the U.S. Senate. According to one interpretation, equal apportionment reflects the sovereign status

⁵ Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004); Keith E. Whittington and Daniel P. Carpenter, “Executive Power in American Political Development,” *Perspectives on Politics* 1 (2003): 495–513.

⁶ Orren and Skowronek, *Search*, 16.

⁷ *Ibid.*, 112–18.

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of the states.⁸ According to another, the apportionment scheme grew out of the primary concern for the size of the Senate, which was paramount because the Senate was meant to be an elite body in the style of the House of Lords.⁹ But if Frances E. Lee and Bruce I. Oppenheimer are to be believed, such functional accounts should be replaced by one more attentive to “path dependency.”¹⁰ For these scholars, equal apportionment arose because small-state delegates at the Constitutional Convention assembled a coalition that managed to protect equal apportionment by connecting it to past steps in the path: voting rules (which accorded each state one vote) and bicameralism (which presumed that one of the two houses of Congress be small) worked to the advantage of the small states and resulted in the Great Compromise. The same has been said of presidential leadership. Presidents can be agents of institutional change, yet the opportunities for change are confined by historical contingencies and previously traveled paths.

But, as the example of equal apportionment in the Senate suggests, the attractiveness of path dependency is also its danger. It can include rival, functional, interpretations even as it attempts to explain events as “historical contingencies.” Could equal apportionment remain a viable option without the previous commitment, held by some would-be advocates of proportionality in apportionment, that the ideal Senate was a small Senate?¹¹ At the same time, there is a second functional explanation for equal apportionment: some of Madison’s opponents insisted on equal representation because they shared a commitment to state authority, if only because the check on national authority would serve their respective interests.¹² In other words, equal apportionment in the Senate arose because the small states, with voting rules that were advantageous to their interests, exploited particular functional theories about what a senate should be.

All this is to say that the third president provides an important case study for those who study institutional development. More than any other president – with the possible exceptions of Madison and Wilson – Jefferson was a lifelong student of political change, and, with Madison, he was the founder of the nation’s first opposition party. Consequently, Jefferson had

⁸ *The Federalist* No. 62, p. 396.

⁹ Elaine K. Swift, *The Making of an American Senate: Reconstitutive Change in Congress, 1787–1841* (Ann Arbor: University of Michigan Press, 1996).

¹⁰ Frances E. Lee and Bruce I. Oppenheimer, *Sizing up the Senate: The Unequal Consequences of Equal Representation* (Chicago: University of Chicago Press, 1999).

¹¹ Daniel Wirls and Stephen Wirls, *The Invention of the United States Senate* (Baltimore: Johns Hopkins University Press, 2004), 71–103.

¹² David Brian Robertson, *The Constitution and America’s Destiny* (New York: Cambridge University Press, 2005), 132–49; David Brian Robertson, “Madison’s Opponents and Constitutional Design,” *American Political Science Review* 99 (2005): 225–43.

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to preside over a government that had undergone its first change of power, but the nature of that change was altered by how Jefferson wanted it to take place. Not a Framer of the Constitution of 1787, Jefferson had his own ideas about how to reconcile political change with constitutionalism. Consider, for example, his continued fascination with term limits: with the first transfer of power, Jefferson reconstructed the timing of the constitutional order itself by connecting presidential elections to constitutional transformation. Put differently, Jefferson reordered political time.

The Revolution of 1800 was thus a moment of opportunity, but, more than others, it had its limits because Jefferson's own project was confined by his attentiveness to his own place within it. With the exception of Washington, Jefferson was more aware than any other president of the importance of precedent, so his institutional transformations were almost always accompanied by an explanation. But, ever the revolutionary, he was famously enthusiastic about reform and suspicious of broad interpretations of the government's authority, so he attempted to combine electoral and institutional change with a strict construction of the law. A lifelong politician, however, he was forced to make compromises and seek alternative paths. Always subject to contingency, his political world required strategic choices, yet his writings and actions reveal a politician trying to find a theory of executive power that would be acceptable to republican theory and would not be undone by the events lawful republicans could not anticipate. Throughout his writing, then, runs the tension between a politician always conscious of the potential effect of his words and a theorist who wanted above all else to present coherence to future readers. Ideas and paths converged, partly because Jefferson had forged those paths.

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Acknowledgments

My first acknowledgments must be to my teachers at Rhodes College who introduced me to politics; to my teachers at Boston College who taught me how to read; and to my teachers at both who taught me why these things mattered. They know who they are. With regard to this book, some deserve special mention. Robert Scigliano introduced me to Jefferson and to *The Federalist*. I know that I will always find his gentle footsteps among those pages. Marc Landy was a probing yet cheerful dissertation advisor and showed me that I could both love democracy and admire what lies under the covers. Robert Faulkner always insisted that I say what I mean, and, more important, he showed me how to do it. New Englanders and democrats, they taught me to suspect the worst in Jefferson *and* hope for the best.

This work has benefited from the advice and support of many others. Richard Bense and Peter S. Onuf read the entire manuscript, offered timely words of encouragement, instructed me how to think about history, and were patient enough to save me from error again and again. Books by Henry Adams, Dumas Malone, Harvey Mansfield Jr., and Stephen Skowronek, have, as the following pages will show, influenced this work. Daniel Klinghard and Andrew Veprek were present in 1999 when this idea was formed in speech and thus shoulder some responsibility for it. Others who have read all or parts of this book and offered valuable suggestions include: Dennis Hale, Keith Quincy, Dan Sisson, Jim Headley, Joseph Wantuck, Robert Strong, and Don Brand. Deserving of special mention are the librarians and staff at the Library of Congress, the Alderman Library of the University of Virginia, the Robert H. Smith International Center for Jefferson Studies, and the Gumberg Library of Duquesne University. Research and preparation for this book were made possible by generous support from Boston College, the Institute for Human Sciences in Vienna, the International Center for Jefferson Studies

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at Monticello, Eastern Washington University, the National Endowment for the Humanities, and Duquesne University. Lew Bateman has been the model editor. Last, but perhaps most important, this work would have been impossible without the labors of the generations of editors who have made, and are making, Jefferson's papers available to the general public. Work on Jefferson can truly begin when they are finally finished.

Sections of Chapter 7 are published with the permission of the editors of the *Journal of Contemporary Thought*, Baroda, where they were originally published. Sections of Chapter 9 were published in *Presidential Studies Quarterly* 34 (2004), pp. 732–54, and are used with permission.

My mother and father, in their own ways, imparted to me the love of the written word. My wife, to whom this book is dedicated, sacrificed her mornings, demanded that I finish what I started, but always reintroduced me to the good life.

Abbreviations

Adams	Henry Adams, <i>History of the United States of America during the Administrations of Thomas Jefferson</i> (New York: Library of America, 1986)
Cappon	<i>The Adams-Jefferson Letters: The Complete Correspondence between Thomas Jefferson and Abigail and John Adams</i> , ed. Lester J. Cappon (Chapel Hill: The University of North Carolina Press, 1959)
<i>The Federalist</i>	Alexander Hamilton, James Madison, and John Jay, <i>The Federalist: A Commentary on the Constitution of the Unites States</i> , ed. Robert Scigliano (New York: Modern Library 2000)
Ford	<i>The Writings of Thomas Jefferson</i> , ed. Paul Leicester Ford, 10 vols. (New York: G. P. Putnam’s Sons, 1892–99)
Jefferson	Thomas Jefferson
L&B	<i>The Writings of Thomas Jefferson</i> , ed. Andrew A. Lipscomb and Albert Ellery Bergh, 20 vols. (Washington, DC: 1903–04)
Malone	Dumas Malone, <i>Jefferson and His Time</i> , 6 vols. (Boston: Little, Brown, 1948–82)
PTJ	<i>The Papers of Thomas Jefferson</i> , ed. Julian Boyd et al., 32 vols. (Princeton, NJ: Princeton University Press, 1950–2005)
Smith	<i>The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison, 1776–1826</i> , ed. James Morton Smith (New York: Norton, 1995)

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Washington	<i>The Writings of Thomas Jefferson</i> , ed. Henry A. Washington, 9 vols. (Washington, DC: 1853–54)
WTJ	<i>Thomas Jefferson: Writings</i> , ed. Merrill D. Peterson (New York: Library of America, 1984)