

## Book Reviews

### JEFFERSON'S FOUNDING OF THE DEMOCRATIC PRESIDENCY

Jeremy Bailey: *Thomas Jefferson and Executive Power* (Cambridge, UK: Cambridge University Press, 2007. Pp. 280. \$74.10.)

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In the post-September 11<sup>th</sup> world of American politics, executive power, especially the so-called prerogative power, has reemerged as a constitutional problem, garnering attention within both public debate and scholarly journals. But, where, in the past, the preoccupation with the problem of the presidency centered on the “modern” or “imperial” presidency’s departure from the founders’ intentions, a generation of study has also made problematic our previous assumptions about those very intentions. Specifically, Harvey Mansfield’s *Taming the Prince* uncovered a theoretical tradition of strong executive power that informed the founders’ presidency, and David Nichols’s *The Myth of the Modern Presidency* continued this line of argument, showing the centrality of presidential power in the Constitution over and against those scholars who claimed the modern presidency a novel twentieth-century phenomena. Nonetheless, even if we accept the continuity of its strength in the Constitution, as Jeffrey Tulis suggested twenty years ago in *The Rhetorical Presidency*, the democratic presidency seems a distinctly twentieth-century phenomena. Jeremy Bailey suggests otherwise, arguing that Thomas Jefferson offers a consistent vision of executive power that, unlike the Hamiltonian tradition that preceded him, locates its strength in democratic consent. Moreover, Bailey contributes to current concerns about prerogative by connecting Jefferson’s vision of a democratic presidency to Jefferson’s heretofore problematic but important notions of executive prerogative.

Until Bailey’s book, scholars’ acceptance of Jefferson’s supposed belief in a weak presidency has rested uncomfortably with their acceptance of Jefferson as the founder of the “extra-constitutional” notion of executive prerogative. Either scholars were wrong in attributing both views to Jefferson, or Jefferson was wrong in holding both views. Bailey persuasively shows that for Jefferson, so far from contradicting his belief in a weak executive, his notion of an extra-constitutional presidential prerogative grounded in democratic consent, follows from his consistent vision of a strong—because it was democratic—presidency. That is, Bailey challenges Henry Adams and

scholars who have followed him in viewing Jefferson as an “accidental” Hamiltonian in the presidency, a man who exercised strong presidential power despite his belief in a weak presidency. It would not be too strong to say that Bailey’s Jefferson contributes not just to our understanding of the American presidency and to our understanding of presidential prerogative, but he also makes all scholars rethink their understanding of Jefferson. Until Bailey’s book, the opinion of Henry Adams—that Jefferson, in principle, believed in a weak presidency—had shaped Jeffersonian scholarship, in part because no alternatives existed. For instance, Bailey argues that, as much as Bruce Ackerman in *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* realized the importance of 1800 in changing the way Americans thought of the presidency, Ackerman’s continued reliance on the traditional scholarly account of Jefferson’s principles caused Ackerman to fail to see that such a change had been Jefferson’s intent all along. Ackerman assumed instead that, like all the scholars before him, he had stumbled into the strong and democratic presidency. In short, Bailey’s Jefferson stands alone against Henry Adams’s Jefferson, and wins.

For Bailey, Jefferson understands the president as unifying and embodying the will of the nation. As the single nationally elected officer, the president represents the national will or, to paraphrase Jefferson, because only the president can command a view of the whole ground, only the president represents the whole nation. Bailey shows the centrality for Jefferson of the Twelfth Amendment’s reform of the presidential election system. Truly to claim to represent the national will, a president’s election could not encounter the flaw in the Constitution that had developed in 1800. Thus, Bailey argues that what he calls at one point the “Aaron Burr Amendment” was “part of Jefferson’s larger project to transform presidential power” (213). For Bailey, what Jefferson means by this unification and embodiment of national will is, however, more than what we now associate with presidential leadership. Jefferson’s president not only unifies national will, he also educates it. What Bailey characterizes as Jefferson’s “declarations of principle” acquires a significance that has not yet been fully understood. These declarations contribute to and, to some degree, constitute the public’s education. For instance, Jefferson transformed the inaugural address so that it could become a tool by which to refine, educate, and transform public opinion.

Bailey suggests that the “declarations of principle” not only educate public opinion, they also, by shaping public opinion, help to control and delimit executive power. They distinguish acceptable from unacceptable uses of executive power. Such delimiting is necessary because Jefferson has also significantly freed the executive from the limits of the Constitution. Bailey’s observation about the relation between the president and the Constitution—manifested in the thought and actions of Jefferson—is the most shocking claim in the book. Prior to Bailey’s book, it had been accepted among scholars that Jefferson accepted and advocated executive prerogative

in certain extraordinary circumstances when necessary to preserve the constitutional order. In those circumstances, the executive becomes, in the words of one scholar, a “criminal” whose actions must be understood as outside the legal or constitutional order and who must now “throw” himself on the people for a pardon. Thus, Jefferson empowers the people to come to a direct and unalloyed judgment about the necessity of executive prerogative. Bailey does not depart much from this standard opinion insofar as he argues that Jefferson thought the people must judge the executive’s unconstitutional actions directly and in the full knowledge that they were unconstitutional. But Bailey joins this conventional opinion to Jefferson’s notion of a “transformative” presidency and suggests that presidential actions outside the constitutional order that seek the public good will be and even should be relatively routine rather than extraordinary. For Jefferson, Locke’s notion of an executive power that is “always-in-being” becomes transformed into an executive power of “constant agency.” Where the common scholarly opinion suggests that Jefferson’s extra-constitutional prerogative still constrains because it is allowed only when certain failings in the law have made it necessary, Bailey suggests that “the democratized prerogative can be used to effect a positive public good in addition to preventing a negative harm” (20). Jefferson’s president both represents and actuates the national will not only within the Constitution but even, or especially, outside it. As Bailey writes, “The president embodies the will of the nation by unifying and directing it, so the president must be willing to temporarily set aside the law in order to effect the public good” (260).

In a certain way then, Bailey’s Jefferson solves one of the puzzles at the heart of Jefferson’s intellectual and political life. How did the same man who advocated frequent constitutional change, who was invoked by Madison in *Federalist* #49 doing so, and who had his doubts about the Constitution, become a partisan of strict construction? This paradox is especially problematic given Jefferson’s famous and persistent complaints about the difficulty of changing the Constitution as it stood. The democratic presidency solves this difficulty. By articulating, representing, and actualizing the national will—even or especially the national will as it stands in opposition to the current understanding of the government’s national power under the Constitution—the new president represents the frequent and more regularized constitutional change for which Jefferson wished. It is precisely this connection between presidents and constitutional change which made, as Bailey shows in the book, the two-term limit so important to Jefferson. The national will and the underlying constitutional commitments must be refreshed periodically by new men in the office. Each new president becomes a symbol of the nation’s new constitutional wants. And this means that, in a certain sense, Jefferson’s partisanship for strict construction follows from his interest in overcoming the binding nature of the Constitution. Only if the old Constitution is understood not to empower presidents to represent the national will would new presidents speak directly to

the people, articulating for them a full constitutional understanding that both empowered and limited their actions. In fully articulating Jefferson's notion of presidential prerogative, Bailey has cast new and important light on the debate about the proper way of handling its necessity. Often cited as a healthy alternative to the Hamiltonian notion of a prerogative power that is implied in the Constitution itself—the latter notion seems vaguely to inform John Yoo and others' articulation of a "unitary executive"—Bailey's fuller presentation of Jefferson's argument should make us pause before we rush headlong to its embrace. Precisely because it is placed outside the Constitution and, one might argue (although Bailey does not), precisely because it is rooted in and judged directly by democratic consent, the exercise of Jeffersonian prerogative becomes more commonplace than we might expect. So far from limiting prerogative because we are uncomfortable with the excesses that follow from its constitutionalization, Jeffersonian prerogative seems to invite it that much more often. Although Bailey's Jefferson would claim that the danger of excessive prerogative is controlled by its being judged by popular consent, Locke's suggestion that the people "are very seldom or never scrupulous or nice" in the matter of prerogative would seem to suggest that popular judgment is not a sufficient control. And where Bailey rightly claims that Jefferson's principle offers us an important alternative to the modern practice of presidential power insofar as it removes its justification under the Constitution routinely made by current presidents, Bailey does not sufficiently acknowledge that the constitutional justification is buttressed by a more fundamental democratic justification. Presidents claim the power to ignore or even subvert the laws because of their *constitutional* station as the sole representatives of the *public good*.

What Bailey would characterize as the Jeffersonian claim has not been discarded; it has simply been supplemented by the Hamiltonian constitutional claim. Or, in other words, the authority that presidents claim under the rubric of democratic consent is much more fundamental and much more problematic constitutionally than the authority they claim under the Constitution. Of course, there is something tremendously important in Jefferson's emphasis on democratic consent—but that consent should be sought in the people's acceptance of the temporary abandonment of their Constitution, as Lincoln sought it, rather than in the obfuscation of the importance of the Constitution itself. However, this is not to contest Bailey's depiction of Jefferson; Bailey's understanding of Jefferson's executive power is so persuasive that it changes the question from what Jefferson actually thought to whether he was right about what he actually thought.

—Benjamin A. Kleinerman