

THE TRADITIONAL VIEW OF HAMILTON'S  
FEDERALIST NO. 77 AND AN UNEXPECTED  
CHALLENGE: A RESPONSE TO  
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It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to *displace* as well as to *appoint*.<sup>1</sup>

The unitary executive theory is one of the most controversial legal theories of recent memory. The theory posits that the Vesting Clause of Article II grants all of the executive power to the President, except where express grants of executive authority are made to other institutions or denied to the government as a whole. Broadly, the theory has two strands—a foreign policy strand and a domestic policy strand—both of which enhance the President's inherent powers, even absent statutory grants of authority. Even though the Constitution is silent regarding removing executive officers and abrogating treaties, both the domestic and foreign policy strands contend that the Vesting Clause grants the President these powers.<sup>2</sup>

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1. THE FEDERALIST NO. 77, at 407 (Alexander Hamilton) (J.R. Pole ed., 2005) (emphasis added).

2. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 568–69 (1994). For a summary of the development of the unitary executive theory, see JOHN P. MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION (2008); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).

To be sure, scholars associated with one strand of the theory do not always agree with scholars supporting the other strand, but it is important to notice that each rests on two related normative and originalist propositions. First, the unitary executive is good for democracy because it avoids many of the difficulties citizens have in holding unelected officials—especially high-ranking executive officers—accountable to their wishes.<sup>3</sup> Second, unitary theorists insist that the Framers created a unitary executive because they recognized this principle. Because Alexander Hamilton made the argument from democratic theory in *The Federalist*, thereby connecting these two propositions, no Framers is more important for unitary theory.

There is a significant problem, however, with the domestic strand of the unitary argument, at least with regard to the President's power to remove federal executive officers. In *Federalist* No. 77, Alexander Hamilton wrote, "[t]he consent of that body [the Senate] would be necessary to *displace* as well as to appoint."<sup>4</sup> Hamilton's comment raises the following question: If Hamilton is the founder of the unitary executive theory, why did he write that the President would have to share the removal power with the Senate?

The traditional view is that the author of that passage was insufficiently Hamiltonian. That is, Publius-Hamilton either made a sloppy mistake or tried to understate executive power to sell the Constitution. Further, for unitary theorists, the crucial historical point is not what Hamilton said in 1788 (that is, prior to the Constitution's ratification), but what the first Congress did after ratification. Indeed, the argument for unilateral presidential removals carried the day in the so-called Decision of 1789,<sup>5</sup> and Hamilton, according to the standard history of those events, supported that development.<sup>6</sup> Still, with regard to Ham-

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3. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 728–31 (1988) (Scalia, J., dissenting); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42–45 (1995).

4. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 1, at 407 (emphasis added).

5. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1021 (2006).

6. The question arose in 1789 when Congress created the State Department and decided that the President possessed the power to remove federal executive branch officers unilaterally. In the House, James Madison made the most coherent and important argument for presidential removals. See *id.* at 1040.

ilton in 1788, either interpretive explanation poses problems for the unitarian project,<sup>7</sup> and particularly for originalists taking the unitarian position. As a methodological matter, it seems somewhat strange for originalists to prefer post-ratification materials with concrete implications for winners and losers over pre-ratification materials.<sup>8</sup>

There have been two recent challenges to the traditional view. In 2008, I argued in the *American Political Science Review* that Hamilton meant what he wrote in *Federalist* No. 77.<sup>9</sup> Broadly, and throughout his career, Hamilton hoped to institutionalize a steady and expert administration of the laws.<sup>10</sup> Accordingly, he wanted to shield executive officers against unilateral presidential removals; Senate consent would be necessary to *remove* as well as to *appoint*. In other words, Hamilton was not an ally of unilateral presidential removal powers prior to ratification.<sup>11</sup> The traditional view is half right: It correctly understands Hamilton's 1788 position, but it misunderstands Hamilton's post-ratification position. Hamilton's post-ratification writings do *not* establish that he ever veered from the position he first took in *The Federalist*.

Seth Barrett Tillman proposes a different solution to the Hamilton puzzle. Like me, Tillman also argues that Hamilton meant what he said in 1788. Tillman argues, however, that the

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7. If we grant that Hamilton understated the powers of the President in an effort to sell the Constitution, or if Hamilton simply got it wrong, how then do we distinguish the reliable Hamilton from the unreliable Hamilton? Even if it is possible for us to make this distinction today—and I believe it is—the remaining problem for unitary theorists would be proving that contemporaries of Hamilton were also able to make that distinction. If the public in 1788 was unable to make this distinction, it might be argued that the original understanding was that put forward by Hamilton in *Federalist* No. 77: The Senate is part and parcel of the removal process.

8. See Calabresi & Prakash, *supra* note 2, at 558–59 (arguing that pre-ratification debates are more informative than post-ratification discussions for determining original public meaning).

9. Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453 (2008).

10. See, e.g., THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 1, at 386–90.

11. Professor David M. Driesen reaches a similar conclusion regarding *Federalist* No. 77, especially with regard to Hamilton's emphasis on stability. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 102 (2009). I do not, however, go as far as Driesen to argue that Hamilton's position best reflects original intent. See *id.* at 103–04. Madison and Jefferson, for example, did not support the position I attribute to Hamilton. For Jefferson's position, see JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 168 (2007).

traditional view misunderstands Hamilton's position. According to Tillman, when Hamilton wrote "[t]he consent of [the Senate] would be necessary to *displace* as well as to *appoint*,"<sup>12</sup> he was not addressing who had the power to *remove* executive branch officers, but who had the authority to *replace* them. In other words, *displace* equals *replace*. Under Tillman's proposed interpretation, the traditional view is wrong, and Hamilton's 1788 statement is no longer a puzzle because replacing an executive officer, like an initial appointment to a vacant office, would obviously require the Senate's approval. According to Tillman, Publius-Hamilton's *Federalist* No. 77 never directly addressed removals *per se*. Accordingly, even if Hamilton supported unilateral presidential removals in 1789 (the traditional view, and a point I contest actively in my 2008 article), it would not establish that Hamilton had changed his mind.<sup>13</sup>

Tillman's new view and my own are both scholarly outliers. Both reject the current scholarly consensus. Either interpretation, however, would offer an important corrective in the ongoing high-stakes contest about the scope of executive removal powers. If Tillman is correct, his Article would be not only an interpretative coup, but also a declaration of independence for modern unitary theorists who seek to justify presidential removal powers, and, perhaps, to expand presidential powers more generally.<sup>14</sup> If, on the other hand, my view is correct, then constitutional scholars (or, at least, originalists) should reassess the current division of authority between the President and Senate with regard to executive branch removals, and perhaps more generally as well.

Given how important our modern debates about the limits of presidential authority are, Tillman's Article also provides a timely opportunity to focus our attention on more general methodological issues. Before we determine whether Hamilton

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12. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 1, at 407 (emphasis added).

13. See Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149, 152-54 (2009).

14. To be sure, Tillman explicitly writes that his Article is neutral with regard to modern debates about removal powers. See *id.* at 150 & n. 3. That is, Tillman means only to say that Hamilton's *Federalist* No. 77 was silent about the President's power to remove. Therefore, Tillman's interpretive position is compatible with at least two different conclusions regarding removal (President-only, or joint Senate-presidential action).

meant what he said, and how it matters to us today, we must first decide how to go about interpreting Hamilton's words. There are, it seems, three possible methods.

I. EVIDENCE PRIOR TO AND CONTEMPORANEOUS  
WITH THE TEXT

The first method would be to read the text of *Federalist* No. 77 in light of contemporaneous usage. As Tillman is the first to notice, dictionaries from the time, and perhaps other writings from the period, reveal that *displace* in 1788 could have meant *replace*.<sup>15</sup> This point, although compelling, would be more convincing if Tillman could find evidence that Hamilton actually had used this second meaning of *displace* in some of his other writings. A simple search of Hamilton's writings reveals that Hamilton used *displace* at least once before 1788 and again in early 1789.<sup>16</sup> Consider the following:

Here a power of a most extraordinary and dangerous nature is conferred. There must be an end of all liberty where the prince is possessed of such an exorbitant prerogative as enables him, at pleasure, to establish the most iniquitous, cruel, and oppressive courts of criminal, civil, and ecclesiastical jurisdiction; and to appoint temporary judges and officers, whom he can *displace* and change as often as he pleases.<sup>17</sup>

In another place, Hamilton wrote:

It has been said that Judge Yates is only made use of on account of his popularity, as an instrument to *displace* Governor Clinton, in order that at a future election some one of the great families may be introduced. Let this surmise be candidly considered. It is admitted that Judge Yates is now a

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15. See *id.* at 154, n. 15 (collecting definitions of *displace* in contemporaneous English and American dictionaries).

16. I searched the twelve volumes of THE WORKS OF ALEXANDER HAMILTON (Henry Cabot Lodge ed., 1904). A more accurate inquiry would require searching the individual volumes of the more comprehensive THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1961). I also performed a search for *replace* and noticed that Hamilton almost always uses this word to deal with money or troops. If a more extensive word study revealed that Hamilton consistently used *replace* in this narrow way, it could mean that he used *displace* to mean *replace* for other replacements, which would be a point in Tillman's favor.

17. ALEXANDER HAMILTON, *Remarks on the Quebec Bill* (June 15, 1775), reprinted in 1 THE WORKS OF ALEXANDER HAMILTON, *supra* note 16, at 181, 184 (emphasis added).

popular character; and it will not be doubted that he is a man of sense and integrity. If *he conducts himself with propriety*, it is not to be imagined that, with the addition of the influence which will naturally flow from the possession of the office, he will be less able, at the end of three years, to maintain his ground against any *partial* combinations which may have been formed against him, than he now is to succeed against the accumulated weight of a twelve-years' administration. Nothing, therefore, can be more far-fetched or strained than the supposition that such a design, as is mentioned, is entertained. It is evidently a mere artifice to destroy the effect of Judge Yates' general good character on the minds of his fellow-citizens, and to divert his friends from exerting themselves in his behalf.<sup>18</sup>

It would be difficult to read *displace* as *replace* in the first example. Here, it would make less sense to say "replace and change" than it would to say "remove and change." The second example is not as clear, and could be read either way. On the one hand, and in Tillman's favor, it would be impossible for Yates to be governor without *replacing* Clinton, so it could be that Hamilton used *displace* to mean *replace*. But, on the other hand, the point Hamilton is trying to correct is that Yates was not meant to replace Clinton in the fullest sense. That is, the charge is that the proponents of Judge Yates mean to use the humble Yates—who, like Clinton, was regarded as the friend of the yeoman—as the *first step* in electing a member of one of the wealthy families. According to the logic of the charge, the primary objective of Yates's supporters is defeating Clinton, not having Yates as governor. Hamilton counters by appealing to the advantage of incumbency: Because Yates would likely be reelected, it makes no sense for antidemocrats to support Yates in order to introduce one of the great families. While it is technically possible that *displace* means *replace* in this passage, reading it as *remove* seems to better capture Hamilton's counterargument about incumbency.

Neither of these two examples settles the question against Tillman. It is possible that Hamilton used *displace* to mean *replace* in the second example or elsewhere. But Tillman's argu-

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18. ALEXANDER HAMILTON, *To the Patriotic Electors of the State of New York* (1789), reprinted in 2 THE WORKS OF ALEXANDER HAMILTON, *supra* note 16, at 113, 118 (first emphasis added).

ment would be more persuasive if he could find such an instance in Hamilton's writings. There is another important example that brings Hamilton's use of *displace* into focus, but it appears over a decade later and is therefore best addressed within the framework of the second interpretive method for understanding Hamilton's comment in *The Federalist*.

## II. POST-1788 EXAMPLES

A second possible approach to solving the puzzle is to ask whether Hamilton later clarified his confusing statement. Hamilton, after all, had several opportunities after 1788 to defend presidential removal powers. One opportunity came in 1801, when Thomas Jefferson articulated a doctrine of broad presidential removal powers to justify his removal of Federalist officeholders.<sup>19</sup> Instead of defending Jefferson's position, Hamilton apparently criticized it.<sup>20</sup> Arguably, such criticism could validate the traditional reading of *Federalist* No. 77: Hamilton objected to unilateral presidential removals. But the obvious partisan character of Hamilton's position illustrates the problems with looking to post-1788 examples to determine what Hamilton meant in *The Federalist*. Can we succeed in efforts to disentangle post-1788 partisan or institutional calculation from Hamilton's intent in 1788?

Such efforts would be difficult—at least for any single political moment—but not impossible, particularly where we can find a common thread connecting otherwise apparently disparate historical moments. Consider three other events.

The first is Hamilton's odd silence when Congress addressed the issue during the congressional debates associated with the Decision of 1789, in which Congress implicitly affirmed that the President has a unilateral removal power. If Hamilton did not mean what he said in 1788, this would have been a good op-

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19. BAILEY, *supra* note 11, at 157–66.

20. See Bailey, *supra* note 9, at 458–59 (“Hamilton did not come to Jefferson's aid with a sweeping defense of executive power; instead, it is possible that he commissioned a surrogate to criticize presidential removals . . .”). An instance I do not examine is the footnote in the 1802 edition of *The Federalist* to which several scholars point as evidence of Hamilton's conversion to strong removal powers. Tillman has shown the difficulties with this argument. See Tillman, *supra* note 13, at 167 n.38.

portunity to let others know.<sup>21</sup> But he did not, or at least not publicly. Of course, he was known to be a leading candidate for the Secretary of Treasury, so perhaps it would have been awkward for him, even without his comment in *The Federalist*, to engage in a public defense of presidential removal powers. But on the other hand, his silence is complicated by the following set of facts: In the House debates, a key opponent of the presidential removal powers, William Loughton Smith of South Carolina, appealed to Hamilton's comment in *The Federalist*. Pointing to "[a] publication of no inconsiderable eminence, in the class of political writings on the constitution," Smith argued, "there can be no doubt of the power of the senate in the business of removal. Let this be as it may, I am clear that the president alone has not the power."<sup>22</sup> It is well known that Smith acted as Hamilton's mouthpiece a few months later in the debates over Hamilton's *Report on Credit*, and again in 1794, during debates over foreign policy.<sup>23</sup> Although these details do not prove anything about Hamilton's silence, they do force us to wonder whether Hamilton remained silent because Smith was making his arguments for him. Put another way, Hamilton's public silence, in light of the debate on the House floor, may mean that he agreed with Smith's interpretation—the traditional reading—of *Federalist* No. 77.

To be fair, there are complications even in raising such a question. First, shortly after the House debate, Smith wrote a letter to Edward Rutledge stating that "Publius" conveyed a message through Congressman Egbert Benson to the effect that Publius had changed his mind.<sup>24</sup> Second, Smith's preferred position was that officers could be removed by impeachment

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21. Because this debate occurred before the rise of parties, such a statement from Hamilton would have all the more importance for later scholars.

22. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, at 861 (Charlene Bangs Bickford et al. eds., 1992) (reproducing a June 16, 1789 extract from THE CONGRESSIONAL REGISTER); see also 1 ANNALS OF CONG. 456–57 (1789).

23. See Letter from Alexander Hamilton to Charles Cotesworth Pinckney (Oct. 10, 1792), in 12 THE PAPERS OF ALEXANDER HAMILTON 543, 545 n.4 (Harold C. Syrett ed., 1967); see also RON CHERNOW, ALEXANDER HAMILTON 458–59 (2004); GEORGE C. ROGERS, JR., EVOLUTION OF A FEDERALIST: WILLIAM LOUGHTON SMITH OF CHARLESTON, 1758–1812, at 194 (1962).

24. Letter from William Loughton Smith to Edward Rutledge (June 21, 1789), in 69 S.C. HIST. MAG. 6, 8 (1968).



only,<sup>25</sup> but Hamilton's position in *The Federalist* was that the Senate would need to approve removals (or replacements, if Tillman is correct). Third, Smith continued his opposition to presidential removals even after he had received word of Hamilton's purported switch.<sup>26</sup>

Smith's letter indicating that Publius-Hamilton had changed his mind is often cited by unitary theorists who conclude that, even if Hamilton meant what he said in *The Federalist*, he quickly changed his mind thereafter. As Tillman has argued, however, the evidentiary value of this letter is debatable.<sup>27</sup> More important, the claim of any conversion experience by Hamilton would only confirm the conclusion that Hamilton's original understanding of energy in the executive did not include a place for unilateral presidential removal powers. One might think that this "fact" would preclude any originalist from subscribing to a unitary theory of the removal power, unless they reach for Tillman's escape hatch. Furthermore, unitary theorists of the originalist variety need to answer other questions about Hamilton's alleged conversion: If Hamilton was at that time a defender of strong removal powers, why did he not correct Smith in a way that would correct the *public* record? Why did he not actively support Madison, who was leading the pro-removal coalition in the House? Hamilton's silence again suggests ambivalence toward unilateral removal.

The second event is Hamilton's public campaign in 1800 against John Adams. Hamilton circulated a letter that both criticized Adams for disregarding foreign affairs advice of his cabinet and endorsed Charles C. Pinckney for the presidency,

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25. Letter from William Loughton Smith to Edward Rutledge (Aug. 9, 1789), in 69 S.C. HIST. MAG. 13, 18 (1968).

26. Compare Letter from William Loughton Smith to Edward Rutledge (June 21, 1789), *supra* note 24, at 8 (reporting Hamilton's alleged change of opinion), with Letter from William Loughton Smith to Edward Rutledge (Aug. 9, 1789), *supra* note 25, at 18 (stating Smith's objections to presidential removals).

27. Tillman calls this letter "triple hearsay." Tillman, *supra* note 13, at 164. There is also another complication for those who look to this letter as evidence of Hamilton's conversion to supporting presidential removal powers. Smith credited Hamilton's switch to Hamilton's being "Candidate for the office of Secretary of Finance." See Letter from William Loughton Smith to Edward Rutledge (June 21, 1789), *supra* note 24, at 8 (raising the possibility that Hamilton's switch was motivated by personal or institutional calculation).

instead of Adams, the candidate of Hamilton's party.<sup>28</sup> Hamilton's goal was surely political, for he meant to end Adams's chances for reelection. But Hamilton was also making an argument about the proper relationship between the President and cabinet officials. At first glance, Hamilton seems to concede that President Adams could remove executive officers at his pleasure: "As the President nominates his Ministers, and may *displace* them when he pleases, it must be his own fault if he be not surrounded by men, who for ability and integrity deserve his confidence."<sup>29</sup>

Before discussing the importance of this seeming concession, we should return to Tillman's argument and notice Hamilton's use of *displace*. It is clear that *displace* cannot mean *replace* here because the President may not replace without the consent of the Senate; precisely the inverse of Tillman's reading of *Federalist* No. 77. And what of the concession? One possible reading is that Hamilton's concession was actually an acknowledgment that a particular legislative construction of the Constitution was victorious, but not a concession of the prudence of presidents actually removing officers. Further, even if we grant that Hamilton conceded the existence of the formal power in this sentence, Hamilton devotes many more pages to arguing why presidents should not use it.<sup>30</sup> In other words, the first time a President fired a cabinet member, Hamilton did not side unequivocally with presidential removal powers.

The third event is Hamilton's alleged endorsement of presidential removal powers in his 1793 defense of Washington's Neutrality Proclamation. In articulating a doctrine of strong presidential authority in international affairs, Hamilton based part of his argument on the differences between the Vesting Clauses of Articles I and II. As he put it, the differences suggest

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28. See ALEXANDER HAMILTON, *Letter from Alexander Hamilton, Concerning the Public Conduct and Character of John Adams, Esq. President of the United States* (1800), reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON 169, 214–15 (Harold C. Syrett ed., 1977).

29. *Id.* at 214 (emphasis added).

30. This point is reinforced by consideration of the context: Adams did not appoint his own cabinet but instead retained Washington's cabinet; the men Adams fired were Hamilton's cronies and were, from Adams's perspective, undermining presidential authority. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 539, 736–41 (1993).

that there is a larger grant of executive power to the President, so exceptions to the grant ought to be construed narrowly. In the passage most often cited as evidence for the position that Hamilton changed his mind, Hamilton alluded to the removal power as an example of such an interpretation:

With these exceptions the EXECUTIVE POWER of the Union is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate. The power of removal from office is an important instance.<sup>31</sup>

What is important to notice is that Hamilton's concession to presidential removal powers does not settle whether Hamilton really changed his mind. Read carefully, Hamilton's point is that Congress had endorsed his interpretive principle—that exceptions to the Article II Vesting Clause should be read strictly—in its 1789 decision on the removal power. This is not to say, however, that Congress's particular application of that general principle to the removal power was correct. Hamilton could have believed that the Vesting Clause grants executive power to the President without also agreeing that the removal power is an executive power.<sup>32</sup> Another alternative is that Hamilton sacrificed his position regarding removals to win the debate about the treaty power, which was the major point of contention in 1793. But this conclusion would return us to the question of why Hamilton was opposed to presidential removals in the first place. Again, Hamilton was not as clear as he could have been.

This point comes into focus when compared to another enigmatic statement in Hamilton's executive essays in *The Federalist*. In *Federalist* No. 69, Hamilton assures readers that the power to recognize ambassadors is "more a matter of dignity than of authority."<sup>33</sup> But Hamilton himself wrote otherwise in

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31. ALEXANDER HAMILTON, PACIFICUS NO. 1 (1793), reprinted in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 8, 13 (Morton J. Frisch ed., 2007).

32. The problem with the argument from the Vesting Clause is that it does not provide a way to determine whether a power is "executive." See U.S. CONST. art. II, § 1, cl. 1. It could be that deciding whether the removal power is an executive power is precisely the point of contention.

33. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 1, at 371.

1793, when defending Washington's Neutrality Proclamation.<sup>34</sup> As he put it in 1793, the symbolic function in foreign policy is often indistinguishable from legal powers. If, for example, the United States is bound by a treaty with France, and France undergoes a change in its form of government, the question of receiving a new ambassador involves determining whether the existing treaty with France is still binding. So, if Hamilton later corrected himself by clearly articulating why receiving an ambassador must signify the President's authority to conduct foreign policy, why did he not do the same with the comment regarding presidential removal powers?

### III. HAMILTON'S THEORY OF EXECUTIVE POWER IN *THE FEDERALIST*

The final method by which one could interpret Hamilton's comment is suggested by Tillman's argument about Hamilton's "plan for and the purpose of *The Federalist*."<sup>35</sup> This approach would consider Hamilton's *displace* comment in *Federalist* No. 77 within his famous presentation of executive "energy," taking into account the relative importance of that presentation in the larger argument of *The Federalist*. In other words, understanding what Hamilton meant by his comment in *Federalist* No. 77 requires understanding what he meant by energy in the executive as well as what role he envisioned for energy in the constitutional order. I disagree with Tillman on this point.

Hamilton explains in *Federalist* No. 70 that "[e]nergy in the executive is *a* leading character in the definition of good government."<sup>36</sup> This statement implies that there are *other* leading characters and corresponds to an argument made by James Madison about the structure of the Constitution. In *Federalist* No. 37,

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34. HAMILTON, *supra* note 31, at 14–15 ("The right of the Executive to receive ambassadors and other public Ministers may serve to illustrate the relative duties of the Executive and Legislative Departments. This right includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to [be] recognised or not: And where a treaty antecedently exists between the UStates and such nation that right involves the power of giving operation or not to such treaty. For until the new Government is *acknowledged*, the treaties between the nations, as far as regards *public* rights, are of course suspended.").

35. Tillman, *supra* note 13, at 153.

36. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 374 (emphasis added).

Madison explained that a key difficulty the Constitutional Convention faced was balancing the necessary characteristics of any good government, energy and stability, with the republican principles demanded by the American people.<sup>37</sup> From the standpoint of *The Federalist*, then, there is a natural tension between energy and stability on the one hand and republican principles on the other. The view put forward by *The Federalist* is that energy requires rule by the One with an adequate tenure (the President); stability requires rule by the Few with long duration of office (the Senate); and republican principles demand rule by the Many with a short duration of office (the House).<sup>38</sup>

If it is given that energy in the executive is a requirement for good government, Hamilton need only show its ingredients. As Hamilton explains in *Federalist* No. 70, the four ingredients are unity (a single executive), duration (four-year term and eligibility for reelection), a fixed salary, and competent powers.<sup>39</sup> But Hamilton goes further, showing how two ingredients, unity and duration, would be compatible with republican principles, in that they would allow the electorate to hold presidents accountable for their actions.<sup>40</sup> This part of Hamilton's argument is well known and is the basic argument made by modern defenders of strong presidential removal powers.<sup>41</sup>

But what is less discussed (even when noticed) is that Hamilton's treatment of duration also includes considerations of stability. In *Federalist* No. 72, Hamilton defends the Constitution's lack of a term limit for the President.<sup>42</sup> Before he lists his reasons against presidential term limits, he notes "the intimate connection between the duration of the executive magistrate in office, and the stability of the system of administration."<sup>43</sup> To speak of a system of administration is to say that the executive is more than the presidency. Or, as Hamilton observes:

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37. THE FEDERALIST NO. 37 (James Madison), *supra* note 1, at 193–94.

38. *See id.*

39. *See* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 1, at 374.

40. *See id.* at 374–80; THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 1, at 384.

41. *See* Morrison v. Olson, 487 U.S. 654, 729–31 (1988) (Scalia, J., dissenting); Calabresi, *supra* note 3, at 42–45.

42. THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 1, at 386–87.

43. *Id.* at 386.

To reverse and undo what has been done by a predecessor is very often considered by a successor, as the best proof he can give of his own capacity and desert; and, in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing, that the dismissal of his predecessor has proceeded from a dislike to his measures, and that the less he resembles him the more he will recommend himself to the favor of his constituents.<sup>44</sup>

Up to this point, it could be argued that Hamilton seems to have in mind the likelihood that a President will seek to execute the laws differently than did his predecessor, and that this tendency will undermine administration. But notably Hamilton writes that the source of this tendency is that the change of presidents is “the result of public choice.”<sup>45</sup> This statement suggests that some other presidential election scheme—some alternative to public choice—would not suffer this defect. It also suggests that stability, in addition to republican responsibility, should be part of executive energy. In the next sentence, Hamilton shows how this tendency toward instability will affect not only administration but also the administrative offices:

These considerations, and the influences of personal confidences and attachments, would be likely to induce every new president to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government.<sup>46</sup>

This passage offers a crude but important reason for the absence of a term limit: fewer presidents would mean fewer removals.<sup>47</sup> More abstractly, Hamilton suggests that energy and republican accountability are not the only considerations in de-

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44. *Id.*

45. *Id.*

46. *Id.*

47. Under this reading of *Federalist* No. 72, to the extent that Hamilton was concerned about too many removals, there remains a problem. Why would Hamilton be concerned about too many presidents resulting in too many removals if he also believed that the Senate would be required to remove as well as to appoint? There are, I think, two possible solutions. The first would be Tillman’s suggestion that Hamilton did not mean *remove* by *displace*, which would admit the possibility that the President had an independent removal power. The second, which is not necessarily opposed to the first, is that Hamilton simply did not know what would happen with regard to the removal power and meant in both passages to confine it.

signing a proper executive. Rather, the executive must be composed with an eye toward stability.

Read this way, Hamilton's understanding of executive energy is fully consistent with his otherwise puzzling comment in *Federalist* No. 77. As the beginning of *Federalist* No. 77 indicates, Hamilton's comment about displacing officers reflects his larger worry that "steady administration" would be subjected to electoral revolution. If the Senate were given a share of the power, then executive officers would likely attempt to survive changes in presidents by seeking favor in the Senate. Such a prospect would attract men with the expertise necessary for sound administration. Read in light of Hamilton's concern for stability in executive administration, and not only in light of the connection between unity and responsibility, the disputed language in *Federalist* No. 77 seems to confirm that Hamilton was no supporter of unilateral presidential removal powers.

One virtue of the third approach is that in addition to adding depth to the first approach, it may help us understand post-1788 developments, some of which were discussed above. For example, this reading of *The Federalist* sheds light on a step in the argument in Hamilton's letter against John Adams. In that document, Hamilton wrote with an eye to the motivations of cabinet members. Or, as he put it, one "fact" was "understood to be admitted[:] . . . [N]either of the dismissed Ministers had given any new or recent cause for their dismissal."<sup>48</sup> But Hamilton went further, arguing that Adams's "measure [was] wrong, both as to mode and substance."<sup>49</sup> Regarding the mode, Hamilton commented on the relationship between the President and members of the cabinet:

A President is not bound to conform to the advice of his Ministers. He is even under no positive injunction to ask or require it. But the Constitution presumes that he will consult them; and the genius of our government and the public good recommend the practice.<sup>50</sup>

In *The Federalist*, Hamilton had observed that the Opinion in Writing Clause was a "mere redundancy" since it grew from the

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48. HAMILTON, *supra* note 28, at 222.

49. *Id.* at 214.

50. *Id.*

right of “the office.”<sup>51</sup> But as Hamilton put it in *The Federalist*, Adams’s refusal to consult his cabinet was dangerous because even the “greatest genius,” even a Washington, “will occasionally overlook obstacles which ordinary and more phlegmatic men will discover.”<sup>52</sup> But more than indicative of a character flaw, Adams’s *method* would lessen the prospects for future effective administration, because “[t]he stately system of not consulting Ministers . . . will tend to exclude from places of primary trust, the men most fit to occupy them.”<sup>53</sup> Just as the presidency must be worth the efforts of would-be presidents, the administration must be worth the while of would-be department heads. Adams’s example of not consulting, and then firing, members of his cabinet would discourage the very best men—men like Hamilton—from leaving private life for executive office.

#### CONCLUSION

I should reiterate that Tillman’s position and my own are not incompatible insofar as Tillman’s interpretation of Hamilton’s use of *displace* in *Federalist* No. 77 does not speak to *removal*. If Tillman is correct, then we simply do not know what Hamilton believed about the removal power, at least in 1788. If Tillman is wrong and the traditional view is correct, then *Federalist* No. 77 still provides significant evidence, contemporaneous with the Constitution’s ratification, to question the unitary position even if Hamilton changed his mind after ratification (and I doubt that he did). Finally, other passages in *The Federalist* and elsewhere in Hamilton’s subsequent writings indicate that Hamilton was no simple unitarian. These complications make it all the more important for scholars to understand precisely what Hamilton meant by energy in the executive and to take seriously the third approach that I have outlined for understanding Hamilton’s views.

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51. THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 1, at 396.

52. HAMILTON, *supra* note 28, at 214.

53. *Id.* at 215.