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Seth Barrett Tillman



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# THE CONTESTED REMOVAL POWER, 1789–2010

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(2013)

# The Contested Removal Power, 1789–2010

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treated as executive prerogatives by British commentators." Ben Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793-1794*, ed. Morton Keller (Stanford: Liberty Fund, 2007), 63. It is also important to point out that this passage occurs right after Madison denies the applicability of the 1787 internal debate to the 1793 question about neutrality.

65. Ibid.

66. Ibid., 933.

67. Ibid.

68. Ibid., 934-935.

69. "Federalist No. 77," 313.

70. See Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793-1794*.

71. John Yoo, for example, argues that Hamilton obscured his views on executive power in *The Federalist* No. 69 in order to make the Constitution more palatable to moderates. John Yoo, *The Powers of War and Peace: The Constitution as Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2008). For a critical assessment of Hamilton's change of heart, see Jack Rakove, *Original Meanings: A Study of the Founding Fathers* (Ithaca: Cornell University Press, 1996), 287.

72. Seth Barrett Tillman, "The Puzzle of Federalist No. 77," *Harvard Journal of Law and Public Policy* (2010): 149-167.

73. William Smith (S.C.) to Edward Rutledge, June 11, 1787, in *20th Century American Correspondence*, 832.

74. "Federalist No. 70," 472.

75. Ibid.

76. "Federalist No. 71," 481.

77. "Federalist No. 72," 488.

78. Ibid., 487.

79. Ibid.

80. Ibid., 488.

81. "Federalist No. 77," 313.

82. Ibid., 315-316.

83. "Federalist No. 72," 488.

84. Harold Syrett, ed., *The Papers of Alexander Hamilton* (New York: Columbia University Press, 1962), 4: 164.

85. *DEBATES — Debates II*, 939.

37. *Ibid.*, 18.

38. *Ibid.*, 20, 29.

39. *Ibid.*, 31-33.

40. *Ibid.*, 50-52.

41. Seth Barrett Tillman, "The Puzzle of Hamilton's *Federalist* No. 77," *Harvard Journal of Law and Public Policy* 33 (2010): 166-167. For the traditional view, see the notes in Harold C. Stryer and Jacob E. Cooke, eds., *Papers of Alexander Hamilton*, 27 vols. (New York: Columbia University Press, 1961-1987), 4: 290.

42. Hamilton, "Pacifcus" No. 1, ed. Morton J. Frisch, *The Pacificus-Helvidius Debates of 1793-1794: Toward Completion of the American Founding* (Indianapolis: Liberty Fund, 2007), 13.

43. Hamilton, "Letter from Alexander Hamilton, Concerning the Public Conduct and Character of John Adams, Esq. President of the United States," October 24, 1800, *Papers of Alexander Hamilton*, 25: 169, 214-215.

44. *Ibid.*, 214, emphasis added. Notice that this passage undermines Seth Barrett Tillman's argument about Hamilton's use of *displace* in *Federalist* No. 77. 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. See Chapter 1: "The Decision of 1789."

45. 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.

46. This was itself a departure from another passage in *The Federalist*, where Hamilton had observed that the written opinions clause was a "mere redundancy" because it grew from the right of "the office." *Federalist*, No. 74. Cooke, 500.

47. *Papers of Alexander Hamilton*, 25: 216, 222, 226-227.

48. Lucius Junius Brutus [psend.], *Examination of the President's Reply to the New-Haven Remonstrance with an Appendix Containing the President's Inaugural Speech, the Remonstrance and Reply; Together with a List of Removals from Office and New Appointments Made Since the Fourth of March, 1801* (New York: George F. Hopkins, 1801).

49. *Papers of Alexander Hamilton*, 25: 418-419.