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From the SelectedWorks of Seth Barrett Tillman

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Extract from Jeremy D. Bailey, *The Jeffersonian Executive: More Energetic, More Responsible, and Less Stable, in Extra-Legal Power and Legitimacy* (2013), citing Bailey-Tillman Exchange on Federalist No. 77

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Evidence from *The Federalist* and early constitutional development supports this interpretation, and provides a way for us to understand the early debates concerning executive power. *The Federalist* numbers on the Senate and the presidency include essays that explicitly associate the Senate with stability and the president with energy. In the disputed No. 62, Hamilton or Madison goes out of his way “to trace the mischievous effects of a mutable government” (399) and concludes that all governments must possess “a certain portion of order and stability” (401). In No. 63, Hamilton or Madison argues that the examples of Sparta, Rome, and Carthage prove “the necessity of some institution that will blend stability with liberty.” Likewise, in No. 70, Hamilton famously argues, “Energy in the executive is a leading character in the definition of good government” (447). After having demonstrated this point with appeals to history and good sense, he writes that the question is not whether we want energy in the executive but how we get it (448). In each example, the authors of *The Federalist* go out of their way to show how the stability of the Senate and energy in the executive will serve the chief republican principle, responsibility.

After ratification and before parties, the first debate about executive power turned on this tension between responsibility and stability. This is the 1789 debate concerning the removal power. It is well known that Madison defended giving the president the power to remove executive officials, but what is less noticed is that Madison grounded his argument on what he called the primary principle of the Constitution, “responsibility.”<sup>38</sup> This would seem to be an obvious point, but Hamilton had argued differently in *The Federalist*. In his essays on the executive, Hamilton argued that the president would share the power with the Senate in order to give stability to the executive branch.<sup>39</sup> Madison disagreed. As he explained in a letter to Edmund Pendleton, the position that the Senate would share the removal power with the president would be a change from the “most responsible member of the government” (the president) to the most “unresponsible” (the Senate).<sup>40</sup> For

separation of powers without thinking about the officials who will inhabit the office. This means that the features of institutional design with regard to mode of selection and tenure are crucial and may even liberate the study of separation of powers from the grip of law reviews. Although I quibble with his interpretation of the importance of virtue, I should say that he and I both seem to be interested in the way that the motivating character, or principle, of the office relates to its function. Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore: The Johns Hopkins University Press, 2009), 265. See also George Thomas, *The Madisonian Constitution* (Baltimore: The Johns Hopkins University Press, 2009), 18 – 20.

<sup>38</sup> I discuss this in greater detail in Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, *Am. Pol. Sci. Rev.* 102 (2008): 453 – 65 .

<sup>39</sup> On the debates surrounding Hamilton’s No. 77, see Seth Barrett Tillman, “The Puzzle of Hamilton’s *Federalist* No. 77,” and Jeremy D. Bailey, *The Traditional View of Hamilton’s *Federalist* No. 77*, *Harv. J. L. & Pub. Pol’y* 33 (2010): 149 – 85.

<sup>40</sup> Madison to Edmund Pendleton, June 21, 1789, in James Madison: Writings, ed. Jack Rakove (New York: Library of America), 456–57.