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Harold H. Bruff

University of Colorado Law School

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PLACING YOUR FAITH IN THE CONSTITUTION

Harold H. Bruff*

Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (Cambridge U. Press 2007). Pp. 296. \$29.99.

John Yoo, *Crisis and Command: The History of Executive Power from George Washington to George W. Bush* (Kaplan Publg. 2009). Pp. 544. \$29.95.

Garry Wills, *Bomb Power: The Modern Presidency and the National Security State* (Penguin Press 2010). Pp. 288. \$27.95.

Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale U. Press 2008). Pp. 558. \$60.00.

Our constitutional law regarding the separation of powers is quite indeterminate, leaving much scope for the free play of politics and the evolution of institutions. Hence, it is probably beneficial that the Supreme Court has injected itself into interbranch controversies only episodically. Nevertheless, lawyers and scholars often succumb to the temptation to convert their policy preferences into constitutional arguments because a doctrine that gains constitutional status trumps ordinary politics. This impulse can be quite sincere - it is easy to treat the Delphic text of the Constitution as a mirror reflecting one's own values. A consequence is the generation of "law office history," the bending of constitutional history to fit the advocate's desired outcome.¹ I write to review three books that typify this practice and its drawbacks, and one that reveals the advantages of an approach that hews more closely to the historical evidence.

All four books analyze presidential power, and all four confront a basic dilemma that has persisted from the framing of the Constitution to today. The problem is that the framers, lacking any experience with a republican chief executive, wrote a very sketchy and incomplete description of the powers of the presidency into Article II of the Constitution. Interpreters soon began trying to fill in the blanks. Their arguments fell into two broad camps. Friends of a powerful executive followed the lead of Alexander Hamilton, who asserted that the phrase vesting the "executive power" in the President constituted a substantive grant of all powers that could be styled executive in nature. The competing arguments of James Madison and Thomas Jefferson concluded that presidential actions should rest on more explicit constitutional or statutory authority than the Vesting Clause.

* Charles Inglis Thomson Professor of Law, University of Colorado at Boulder

1. Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 554 (1995).

Today, the fiercest Hamiltonians argue for very broad executive power to act unilaterally, either without seeking statutory authority or even in contravention of statutory command.² The fiercest Madisonians are unwilling to recognize broad “inherent” presidential powers; therefore, they argue that the President must generally rest content with authority that the Constitution grants explicitly or that Congress chooses to confer by statute.³ There is also a group of “pluralist” scholars in the middle (including me), who say “it depends.”⁴ Pluralists tend to support presidential power to take initiatives not authorized by statute, but would recognize the legitimacy of statutory override.⁵

The first book to be considered here is a fine history that makes a contribution without outrunning the facts. In *Thomas Jefferson and Executive Power*,⁶ Jeremy Bailey successfully embarks on a quite interesting and original project. He wants to save the reputation of Thomas Jefferson from a charge of inconsistency that dates from the work of Henry Adams. The charge is well known: that Jefferson held a Madisonian theoretic view of a weak and limited presidency, but abandoned his principles in practice in favor of a vigorous exercise of the office. Bailey examines Jefferson’s statements and actions over an extended period beginning with the Revolutionary War and finds that Jefferson developed an original and consistent view of the nature of executive power.

Bailey argues persuasively that what mattered to Jefferson was that the executive be both strong and tied to the support of the people, whose will he embodied in office. As Bailey points out, this overall stance was an important bridge from the elite presidency of the Federalists to the more democratic one from Jackson to the present. Jefferson’s subtle mind fleshed out this general goal in an interesting way. He thought that the explicit constitutional powers of the President should indeed be narrowly construed, in part so that the people could understand them easily. No Hamiltonian building of castles on the Vesting Clause for him. Yet on great occasions, the President could invoke a principle of executive prerogative that traced from the work of John Locke. This prerogative theory was that sometimes the President might need to act outside the law, or even contrary to it. In that case, to give legitimacy to his actions, the President must appeal to the legislature and the people to ratify the actions taken. The advantage this formulation provided for Jefferson was that the powers of the executive were usually limited, but could expand temporarily as needed.

To some extent, Bailey overstates his case - or perhaps I should say that Jefferson

2. See e.g. John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (U. Chi. Press 2005).

3. For a thoughtful approach, see the work of Louis Fisher, for example, *The Constitution and 9/11: Recurring Threats to America's Freedoms* (U. Press Kan. 2008); *Constitutional Conflicts between Congress and the President* (5th rev. ed., U. Press Kan. 2007). See also David Gray Adler et al., *The Constitution and the Conduct of American Foreign Policy* (David Gray Adler & Larry N. George eds., U. Press Kan. 1996).

4. See generally Harold H. Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* (Carolina Academic Press 2006); Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (U. Chi. Press 2009); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

5. See generally Harold H. Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* 84-111 (U. Kan. Press 2009).

6. Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (Cambridge U. Press 2007).

overstated his. For it remains true that Jefferson's words could point one way while his actions pointed another. This was true in his responses to the Barbary pirates, when he quite disingenuously explained himself to Congress. It was also true in his enforcement of the Embargo Act of 1807, when his very vigorous executive actions outran his more limited general conception of the office. Bailey, focusing on Jefferson's various rhetorical appeals to the people, somewhat slights the facts of both episodes. But this is a minor sin for Bailey, whether or not it was for Jefferson. What this great President most drew back from - just as he instinctively drew back from open controversy - was the question of whether his theory was more Hamiltonian than he could ever bring himself to admit. The best example is Louisiana, when he suppressed his own constitutional doubts about power, avoided any Hamiltonian arguments that could set bad general precedents, and fell back on Lockean prerogative.

Whether Jefferson liked it or not, though, the Louisiana precedent stands as an exercise of broad executive power that has been invoked ever since by Hamiltonians. Jefferson wanted to preserve both his Purchase and his principles. His defense of Louisiana attempted to place his own faith in the Constitution - his own particular theory of executive power that embodied his political values. It should never surprise us that presidents would try to do that. The great ones succeed, at least to some extent. Jefferson's theory about his powers remains part of our dialogue about the office. Bailey has very helpfully brought this theory to new and clarified prominence.

Scholars who try to place their own faith in the Constitution, as opposed to describing how presidents have done so, can only gaze at Jefferson in envy as they try to convince us that what they wish were true has always been so. Two recent books from scholars at opposite ends of the political spectrum have advanced their competing visions of the executive. John Yoo's *Crisis and Command: The History of Executive Power from George Washington to George W. Bush*⁷ and Garry Wills's *Bomb Power: The Modern Presidency and the National Security State*⁸ use similar techniques to support radically different conclusions about the desirability of strong executive power. Both books are works of "advocacy history," and both proceed by the technique of selective storytelling, recounting episodes from our rich constitutional history that support their respective theses and largely ignoring contrary ones.⁹

Yoo, who is more Hamiltonian than Hamilton, was a principal legal adviser to the recent Bush administration. He believes in very broad executive power that can routinely override statutes in the realms of foreign policy and war.¹⁰ His book tries to provide historical undergirding for his theories by arguing that in times of crisis, strong presidents have taken independent actions with beneficial effects for the nation. In general, that is true, but Yoo's account largely leaves out the contributions of Congress and the courts, perhaps because some of those contributions have limited presidential power. He also greatly understates the level of uncertainty about and distrust of

7. John Yoo, *Crisis and Command: The History of Executive Power from George Washington to George W. Bush* (Kaplan Publg. 2009).

8. Garry Wills, *Bomb Power: The Modern Presidency and the National Security State* (Penguin Press 2010).

9. Walter Isaacson, *Who Declares War?* 159 N. Y. Times BR1 (Jan. 24, 2010).

10. See generally Bruff, *supra* n. 4, at 105-108.

executive power that the framers exhibited and that the tentative nature of Article II of the Constitution displays.¹¹ Nor does he admit that the presidents from the framing generation (Washington through Monroe) were all usually cautious in both their theories and practices of executive power.¹² When Yoo's theories became the legal policy of the Bush administration, the result was the inversion of Jefferson's approach - an executive that ignored both the legislature and the people in pursuit of its unilateral and secret Hamiltonian vision.

Garry Wills writes to deplore this vision. His rather "overheated" account agrees with Yoo that the modern presidency wields broad power in what Wills calls a "National Security State" marked by secrecy and unilateral action.¹³ He attributes these developments to the existence of nuclear weapons and the culture of secrecy that grew up around them. He makes rather too much of this - the cold war would have taken place even were we armed with only conventional weapons of mass destruction. In any event, focusing on the nuclear age allows Wills to recount executive abuses of power that anyone would deplore; for example, the witch hunt against Robert Oppenheimer. He also has an interesting revisionist account of the Cuban Missile Crisis, in which he stresses the recklessness of Kennedy administration policy as both a cause of the crisis and a constraint on Kennedy's options once it began. A more balanced account of the nuclear age would have stressed some of the ways that Congress has limited presidential adventuring (admittedly, with only indifferent success) and some of the ways that executive power has succeeded in protecting the Nation, most importantly in the containment policy that cornered the Soviets until they collapsed. In the end, Wills has a litany of laments but no clear prescription for how to repair the damage he perceives.

The fourth book for us to consider explores a more limited aspect of executive-congressional relations. In Steven G. Calabresi and Christopher S. Yoo's, *The Unitary Executive: Presidential Power from Washington to Bush*,¹⁴ the focus is on the extent of presidential powers to remove and supervise subordinate executive officers and the validity of congressional efforts to limit these powers. As their title suggests, Calabresi and Yoo adhere to the "unitary executive" theory, which strives to maximize the individual political responsibility that the framers placed in the President by ensuring that presidential control flows down into the heart of the bureaucracy. Calabresi and Yoo are especially opposed to congressional power to create independent regulatory commissions with members protected against presidential removal except for cause.¹⁵ Thus, they envision a simpler organization chart for the executive branch than the one

11. Jack Rakove, *John Yoo on Why the President Is King*, Wash. Post B1, B5 (Jan. 10, 2010).

12. See H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Essay in Constitutional Interpretation* (Carolina Academic Press 2002).

13. George Perkovich, *Not Just a Bigger Weapon: The Atomic Bomb Blasted Away the Constitution's Checks and Balances*, Wash. Post B6 (Feb. 7, 2010).

14. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale U. Press 2008).

15. For a condensed presentation of their theory, see Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 Vand. L. Rev. En Banc 103 (2009), <http://www.vanderbiltlawreview.org/articles/2009/11/Calabresi-Yoo-Remove-Morrison-v.-Olson-62-Vand.-L.-Rev.-En-Banc-103-2009.pdf>; my response is Harold H. Bruff, *Bringing the Independent Agencies in from the Cold*, 62 Vand. L. Rev. En Banc 63 (2009), <http://www.vanderbiltlawreview.org/articles/2009/11/Bruff-62-Vand-L-Rev-En-Banc-63.pdf>. This online roundtable is available at www.vanderbilt.edu/lawreview/enbanc/roundtable.

that exists, with a hierarchical relationship between the President and everyone who executes the law. This does not mean, however, that they espouse broad inherent substantive powers for the President, for example, in war making; they do not.¹⁶ Because their theory is relatively modest in intention, the constitutional stakes are reduced.

The initial hurdle that a unitary executive theory faces is the constitutional text, which says little about the internal characteristics of the executive branch. After vesting the “executive power” in “a President,”¹⁷ Article II charges him to “take Care that the Laws be faithfully executed,”¹⁸ presumably by subordinates, from whom he may demand an “Opinion, in writing”¹⁹ about their duties. Nothing is said about removal of officers except for the impeachment clauses, which vest that power in Congress. In addition, among the powers of Congress is the architectural half of the Necessary and Proper Clause, authorizing Congress to enact statutes for “carrying into Execution” the powers assigned to the other two branches.²⁰ Congress has busily employed its architectural power, creating the agencies and the officers who staff them. It has not limited presidential removal of the cabinet secretaries, but has often done so for members of the independent regulatory commissions and for inferior officers and employees of many kinds. For its part, the Supreme Court says that Congress may limit removal unless doing so would “impermissibly interfere with” presidential supervision of law execution.²¹

Professors Calabresi and Yoo begin by endorsing “departmentalism,” the proposition that each of the three branches may legitimately interpret the Constitution in the performance of its duties. This is correct - each branch does just that every day. In fact, all four of the books discussed here display departmentalism in many contexts. The question is, when the branches disagree, who prevails? For issues related to the unitary executive, Calabresi and Yoo think the president should win. In the absence of other textual support, they place great stress on the Vesting Clause as a substantive grant of power to the President to supervise execution. Calabresi and Yoo know that their Hamiltonian position is traditionally contested by a Madisonian response that stresses congressional power over architecture. With the framers a bit at odds on this question, Calabresi and Yoo offer a solution that is drawn from the behavior of the first forty-three presidents.

The main project of *The Unitary Executive* is to show that all of our presidents have followed the unitary executive theory in the official positions they have taken, with only minor and soon-regretted exceptions. Herein lies the main contribution of the book, and it is substantial. Through a painstaking review of statements made by presidents large and small, Calabresi and Yoo show that presidents have consistently insisted on their power to remove subordinates. Of course, this is not very surprising because presidents rarely concede an absence of any power they might need. Calabresi and Yoo find much less material to offer regarding presidential statements about their power to

16. Calabresi & Yoo, *supra* n. 14, at 411-12.

17. U.S. Const. art. II, § 1, cl. 1.

18. *Id.* at § 3.

19. *Id.* at § 2, cl. 1.

20. *Id.* at art. I, cl. 18.

21. *Morrison v. Olson*, 487 U.S. 654, 685 (1988).

direct subordinates, in part because presidents simply do that all the time with only occasional questions arising within the executive about its appropriateness.

There is, however, a departmentalist answer to all this. Congress has insisted on its own interpretation of presidential powers of removal and direction. Congress presents its interpretations both informally in oversight of executive actions and formally in bills presented to the President for signature or veto. The overall outcome of this contest between the branches has been that presidents have acquiesced in congressional power to restrict removability of most officers, and Congress has acquiesced in presidential powers to direct officers for whom it has not restricted removal. This outcome, which appears to be stable, is not obviously deplorable. Let me explain it in practical terms.

Presidents have routinely signed bills that restrict their removal powers by creating independent agencies or officers with tenure protections, often protesting the incursion on their powers as they did so. As Calabresi and Yoo concede, a president usually concentrates on increasing executive power either generally or for especially favored matters, and a concession to Congress on a relatively minor issue of removal may advance that project.²² Once these agencies and officers have been created, it is generally not in the President's political interest to confront Congress by trying to remove or supervise them. In fact, one reason so little is known about the law of removal is that political considerations tend to dominate legal ones. That is, a cabinet member who has an independent political base may be quite safe from removal; an independent commissioner who causes a scandal can be informally and successfully pressured to leave office.²³ In general, though, presidents do not actively try to supervise the independent agencies in ways not supported by such explicit statutory powers as determining their budgets and designating their chairs. The game is not worth the candle.

For cabinet departments and other nonindependent agencies, the limits of presidential direction are generally understood to be as follows. First, since Congress routinely grants authority to administer statutes to these officers, not the President, they must make the formal decisions. The President is free to direct them to make a particular decision and, if they resist for legal or policy reasons, to remove and replace them,²⁴ but the President may not exercise statutory authority granted to these officers himself. Presidents also issue executive orders that require the agencies to consult with the White House about the costs and benefits of their proposed regulations; Congress has acquiesced in these orders.²⁵

Thus, the power to supervise the executive branch is shared between the President and Congress in ways that are compromised and are based more on history than on grand theory. The advantages and disadvantages of this arrangement are known. To a pluralist, the arrangement is within constitutional limits, its messiness being offset by the benefits

22. See Calabresi & Yoo, *supra* n. 14, at 172 (discussing Lincoln).

23. For an exploration of these factors, see Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher Yoo*, 12 U. Pa. J. Const. L. 593 (2010).

24. Calabresi and Yoo recount the famous story of President Andrew Jackson's removal of Secretary of the Treasury William Duane as an example of this relationship. Calabresi & Yoo, *supra* n. 14, at 105-122.

25. Peter M. Shane & Harold H. Bruff, *Separation of Powers Law: Cases and Materials* 511-539 (2d ed., Carolina Academic Press 2005).

of the creative tension that results from involving both political branches in oversight of the executive agencies.

Calabresi and Yoo reject the desirability of this power sharing in favor of the benefits of clean and strong lines of political accountability to the President. Here they must envision a world that does not currently exist—their promised land of a new and improved federal government. What they do not do, however, is paint any detailed picture of the altered landscape, of the practical differences they envision if the unitary executive is endorsed by the Supreme Court. Would newly empowered presidents seize the reins of power and bring the unwieldy bureaucracy under control? It is quite unclear that presidents can do much more to control the bureaucracy than they now attempt. The fact that President Obama felt the need to create various “czars,” his own new bureaucracy to control the bureaucracy, reveals the serious practical limits to comprehensive control by the President himself.

Disadvantages to a more unitary presidency are easy to imagine. Would a more politicized bureaucracy return us to the bad old days of the spoils system of the nineteenth century? Would presidents issue *ukases* to agencies that far outran their own command of the law and policy questions involved? In the end, Calabresi and Yoo ask the reader to take a leap of faith that a unitary executive would be better for the nation than the existing plural model. I am too skeptical of proposals to reform our giant and complex bureaucracy to take that leap with them.

Nor can I share the faith of either John Yoo or Garry Wills. The accounts in all three books are too partial to be persuasive. Even Jeremy Bailey focuses a bit too much on his protagonist, and not enough on the interplay of Jefferson’s assertions of power with the actions of the other two branches. We need more historical analyses that look at the contribution of all three branches to our law of presidential power, because all three have in fact played important roles in developing it. Such an approach can have the disciplining effect of revealing what our national experience teaches rather than fortifying the predispositions that we have brought to the inquiry.
