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## JEFFERSON AND EXECUTIVE POWER

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### INTRODUCTION

While not considered by scholars to fall among the top two or three of our nation’s greatest Presidents, Thomas Jefferson consistently ranks in the top five. He no doubt owes some of his high standing to his achievements before and after his time in office. He drafted the Declaration of Independence, founded the University of Virginia, and served as governor of his state and envoy to France. He was an architect, scientist, farmer, and inventor. Yet, Jefferson was a bundle of contradictions, so much so that historian Richard Ellis titled a recent biography “American Sphinx.”<sup>1</sup> Jefferson was perhaps our nation’s most eloquent spokesman for human freedom, but at the same time kept slaves and allegedly fathered illegitimate children with one of them. As Leonard Levy has shown, he was a master of rhetoric in defense of civil liberties, but also did not hesitate to employ the powers of government to pursue critics or opponents.<sup>2</sup> He criticized the growth of federal power, yet his embargo against the European powers exercised it to limits rarely seen in American history. He demanded responsible, effective government, but

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<sup>1</sup> See JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* (1997).

<sup>2</sup> See generally LEONARD W. LEVY, *JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE* (1963).

suffered from migraine headaches that prevented him from fulfilling his duties at times of high stress, both as governor and as President.<sup>3</sup>

Nowhere are these contradictions sharper than with regard to Jefferson's views on executive power. He waged a war of resistance against Hamilton's financial system and, upon leaving government, launched the first American political party to oppose the Washington administration. Jefferson sought to reduce the size of bureaucracy and the military, lower taxes, enhance majority rule, and center the nation in his vision of an agrarian republic. His election has been characterized as rescuing the nation "from the threat of monarchic subversion."<sup>4</sup> In today's current atmosphere of elite opposition to the Bush administration, modern-day critics turn to Jefferson for ammunition against claims of executive authority.<sup>5</sup>

As on other issues, however, Jefferson said one thing about presidential power, but did another. Jefferson expanded executive authority and strengthened the Presidency by resisting the courts, buying Louisiana, and managing Congress. His actions run counter to the straw-man image of Jefferson as the opponent of executive power sometimes depicted by critics. This was not lost on his contemporaries. Alexander Hamilton, for one, wrote that when they served together in the Washington administration, Jefferson "was generally for a large construction of the Executive authority" and was "not backward to act upon it in cases which coincided with his views."<sup>6</sup> Hamilton meant this as a compliment. Historian Henry Adams would conclude in his magisterial work that Jefferson exercised presidential power "more complete than had ever before been known in American history."<sup>7</sup>

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<sup>3</sup> The two magisterial collections of works covering the Jefferson Presidency are 4 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: FIRST TERM, 1801-05* (1970) [hereinafter MALONE, FIRST TERM], and 5 DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: SECOND TERM, 1805-09* (1974) [hereinafter MALONE, SECOND TERM], and the first four volumes of HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA* (Antiquarian Press Ltd. 1962) (1889-1891). Helpful works also include DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* (1994); FORREST McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* (1976); Ralph Ketcham, *The Jefferson Presidency and Constitutional Beginnings*, in *THE CONSTITUTION AND THE AMERICAN PRESIDENCY* 5-27 (Martin L. Fausold & Alan Shank eds., 1991); Gary J. Schmitt, *Thomas Jefferson and the Presidency*, in *INVENTING THE AMERICAN PRESIDENCY* 326-46 (Thomas E. Cronin ed., 1989).

<sup>4</sup> JAMES W. CEASER, *PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT* 89 (1979).

<sup>5</sup> See, e.g., David Gray Adler, *Constitution, Foreign Affairs and Presidential War-Making: A Response to Professor Powell*, 19 GA. ST. U. L. REV. 947, 1003-16 (2003); Louis Fisher, *A Constitutional Structure for Foreign Affairs*, 19 GA. ST. U. L. REV. 1059, 1069-76 (2003).

<sup>6</sup> Letter from Alexander Hamilton to James A. Bayard (Jan. 16, 1801), in 25 *THE PAPERS OF ALEXANDER HAMILTON* 319, 320 (Harold C. Syrett ed., 1977).

<sup>7</sup> 2 ADAMS, *supra* note 3, at 204.

This sense of contradiction proceeds from a false assumption. Many believe that Jefferson favored a weak executive because he sought a limited national government. The two ideas, however, need not conflict. Jefferson favored a national government of limited constitutional powers balanced by states that retained significant sovereignty. In his draft of the Kentucky Resolves against the Alien and Sedition Acts, Jefferson argued that the Union represented only a compact between the states, rather than a national government representing one people.<sup>8</sup> But within that framework he favored a clean separation of powers that made each branch of government supreme in its own sphere. For those matters properly classified as executive in nature, the President would govern, subject only to the explicit exceptions and power-sharing set out in the Constitution. Jefferson did not let that belief in the separation of powers prevent him from marking a major innovation in presidential power – that of the President as party leader – which allowed him to advance a national program by coordinating the activities of the executive and legislative branches. Jefferson would also follow Locke’s view, that the executive could act outside the Constitution to protect the national interest in moments of great crisis or opportunity.

Jefferson’s conception of the executive power was not just the product of circumstance, but went back many years. As governor of Virginia during the Revolution, when British forces had American troops on the run, Jefferson came to appreciate matching an executive’s power to its responsibilities. In discussing proposals for Virginia’s new constitution, Jefferson had argued that the executive power did not reach as far as the British Crown’s prerogatives, but at least included the power to enforce the laws and other powers not in their nature judicial or legislative. During the Constitutional Convention, Jefferson had advised friends that the Constitution should create an independent executive branch. “I think it very material to separate in the hands of Congress the Executive and Legislative powers,” he wrote.<sup>9</sup> “The want of it has been the source of more evil than we have ever experienced from any other cause.”<sup>10</sup> As Secretary of State, Jefferson believed that control over foreign relations was one of those executive powers, from which the Senate’s role in treaty-making was only a narrow exception. “The transaction of business with foreign nations is executive altogether,” Jefferson wrote, except for the functions given to the Senate, which were “to be construed strictly” in favor of the President.<sup>11</sup> While he had urged Madison to write against Hamilton as

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<sup>8</sup> See Drafts of the Kentucky Resolutions of 1798 (Nov. 17, 1798), in 8 THE WORKS OF THOMAS JEFFERSON 458, 458 (Paul Leicester Ford ed., 1904).

<sup>9</sup> Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 678, 679 (Julian P. Boyd ed., 1955).

<sup>10</sup> *Id.*

<sup>11</sup> Thomas Jefferson, Opinion on the Powers of the Senate (Apr. 24, 1790), in 6 THE WORKS OF THOMAS JEFFERSON 49, 50 (Paul Leicester Ford ed., 1904).

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Helvidius,<sup>12</sup> Jefferson had agreed with the rest of Washington's cabinet that the President, not Congress, should proclaim the nation's neutrality during the outbreak of the wars between Britain and France.

Jefferson entered office after one of the bitterest presidential campaigns in American history. Jefferson considered the Federalists to be monarchists who had designs to duplicate the corrupt political and economic system of eighteenth-century Great Britain. In the election of 1800, Jefferson's Republican party had swept Federalist majorities out of Congress and ejected John Adams from the Presidency. Jefferson had tied in the Electoral College with his party's vice presidential candidate, Aaron Burr, even though Jefferson was the true choice of his party for President. Under the rules of the Electoral College, each elector voted for two candidates, with the Vice President simply the runner-up. The tie threw the election into the lame-duck Congress, where Federalists entertained various schemes to deny Jefferson the Presidency, including swinging it to Burr or refusing to choose any President at all. Hamilton apparently feared Burr more than Jefferson, and Federalists eventually gave Jefferson the victory. The Constitution would later be amended to require electors to vote separately for President and Vice President.<sup>13</sup>

Jefferson would later call the election the "revolution of 1800," one that was "as real a revolution in the principles of our government as that of 1776 was in its form."<sup>14</sup> The election of 1800 was probably more significant because it represented the transfer of power from one political party to another without fighting or bloodshed, a rare thing in those days. In his inaugural address, Jefferson famously said "We are all republicans: we are all federalists" to underscore the belief in representative government shared by all Americans.<sup>15</sup> Once in office, though, Jefferson pursued an agenda to reverse much of the Federalists' system. Central to his program was unraveling the Hamiltonian financial system by reducing government expenditures, thereby retiring the national debt, and cutting taxes. This would pull the heart out of the network of financiers, stock-jobbers, and bureaucracy, and would reorient the country toward agriculture, Western expansion, and a limited national government. Jefferson's attack on the Federalists as monarchists did not reject executive power, but instead criticized executive corruption of the legislature, a traditionally English problem which Republicans believed (perhaps accurately)

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<sup>12</sup> Letter from Thomas Jefferson to James Madison (July 7, 1793), *in* 7 THE WORKS OF THOMAS JEFFERSON 436 (Paul Leicester Ford ed., 1904) ("Nobody answers him, & his doctrines will therefore be taken for confessed. For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public.").

<sup>13</sup> *See* U.S. CONST. amend XII.

<sup>14</sup> Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 12 THE WORKS OF THOMAS JEFFERSON 135, 136 (Paul Leicester Ford ed., 1905).

<sup>15</sup> Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* 9 THE WORKS OF THOMAS JEFFERSON 193, 195 (Paul Leicester Ford ed., 1905).

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that Hamilton was attempting to transplant on American soil. Jefferson would not hesitate to expand presidential power to achieve his desired results, but his successes in the first term would create the conditions for the setbacks of the second.

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This Article argues that Jefferson's success as Chief Executive is closely intertwined with his broad conception of presidential power. Part I describes Jefferson's vigorous use of the powers of his office in domestic affairs to reaffirm the independence of the executive branch and to control all law enforcement. Part II focuses on the central purpose of the executive power, to respond quickly and decisively to unforeseen crises and emergencies in foreign affairs. It is here that Jefferson made his claim to greatness by purchasing Louisiana even though he believed the purchase unconstitutional. Part III explains that the Jefferson administration's worst policy, the embargo of the second term, was not the product of unilateral executive authority, but rather was the implementation of congressional statutes. The Conclusion illustrates the link between poor outcomes and a narrow view of presidential power by examining the performance of Jefferson's successor, James Madison.

## I. JEFFERSON'S USE OF THE EXECUTIVE POWER

### A. *Personnel*

Jefferson's first steps in undoing the Federalist system occurred in the areas of personnel and law enforcement. Jefferson introduced the idea that the members of his cabinet, and most of the subordinate executive officials subject to presidential appointment, should hail from his party. Washington had sought the best characters for his cabinet, hence the selection of Jefferson for Secretary of State, and Adams had kept on Washington's advisers.<sup>16</sup> Jefferson chose only Republican leaders for his cabinet, and particularly relied on Madison as Secretary of State, who had been present at the creation of the party, and Albert Gallatin as Treasury Secretary, who had been the Republican floor leader in the House.<sup>17</sup> Jefferson did not immediately turn out all other employees of the federal government and appoint party supporters instead, but gradually replaced half by the end of the first term.<sup>18</sup> He had no problem refusing to sign the commissions of officers who received "midnight appointments" at the end of Adams' term<sup>19</sup> (one of them leading to the foundational Supreme Court decision in *Marbury v. Madison*<sup>20</sup>) or having his

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<sup>16</sup> See McDONALD, *supra* note 3, at 37.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 36.

<sup>19</sup> See *id.*

<sup>20</sup> 5 U.S. (1 Cranch) 137 (1803).

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majorities in Congress repeal the Judiciary Act of 1801,<sup>21</sup> which had created several new judgeships with Federalist occupants.

Jefferson's effort to bring Republicans into government represented more than a recognition that politics are made by people. It created an alternative path for presidential control of the executive branch. Washington had relied on the formal constitutional principle that he was personally responsible for fulfilling the Constitution's injunction that the executive take care to faithfully execute the laws. All officials within the executive branch were there to assist him in carrying out that constitutional duty and, hence, must be within his direct control. Jefferson supplemented this principle with the discipline of party politics. His appointees enforced administration policies not only because Jefferson was the constitutional head of the executive branch, but also because he was the head of their political party.

By the end of his administration, Jefferson had given two-thirds of executive offices to members of his party. Jefferson became the inventor, though not the most ruthless practitioner, of the spoils system.<sup>22</sup> Some states, such as Connecticut, became the subject of "a general sweep" of Federalists out of national office while others witnessed a steady replacement.<sup>23</sup> Jefferson's action can only partially be explained by a desire to reward the party faithful after the election. He believed the executive branch represented the people as much as the legislature, and so wanted Republicans to have the same share of offices as they had of the popular vote.<sup>24</sup> Underlying this view is the understanding that executive officers did more than just robotically execute the law, but that they made policy choices as well. Today we accept with little controversy the practice of Presidents choosing their own party members for most important government positions; that is thanks to Jefferson. But that Jefferson had to rely on partisan considerations in appointments suggests that simply relying on formal constitutional control over the executive branch is not enough to ensure presidential control.<sup>25</sup>

#### B. *Law Enforcement*

Jefferson's was the first strong voice for presidential equality with the other branches in law enforcement. One of the most hated pieces of Federalist

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<sup>21</sup> See MCDONALD, *supra* note 3, at 50.

<sup>22</sup> See MARC LANDY & SIDNEY M. MILKIS, PRESIDENTIAL GREATNESS 65 (2000). *But see* MCDONALD, *supra* note 3, at 37 ("Jefferson had no intention of introducing into the national government what would later be called the spoils system, the notion that members of the victorious political party had a right to patronage and jobs simply because they had won an election.").

<sup>23</sup> *See id.*

<sup>24</sup> *See id.*

<sup>25</sup> See MCDONALD, *supra* note 3, at 34-36; *see also* LANDY & MILKIS, *supra* note 22, at 65; MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 680 (1970).

legislation was the Alien and Sedition Acts of 1798, which had made it a crime to defame or libel the government (with truth as a defense). In response, Jefferson had secretly drafted with Madison the Kentucky and Virginia Resolves, suggesting that States could take action against unconstitutional federal laws. Parts of the Act expired at the end of the Adams administration, but Jefferson proceeded to pardon the ten individuals convicted under the law and ordered all prosecutions dropped. Jefferson was unmoved by the fact that the courts had upheld the constitutionality of the Acts. In a letter to Abigail Adams explaining his actions, Jefferson asserted that the executive and judiciary are “equally independent” in reviewing the constitutionality of the laws.<sup>26</sup> “You seem to think it devolved on the judges to decide on the validity of the sedition law,” he wrote.<sup>27</sup> “But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them.”<sup>28</sup>

Jefferson believed that each branch had the right to interpret the Constitution and to fulfill its unique duties accordingly. The courts can view a law as constitutional and allow cases under it to go forward, but the President can hold a different view from the courts, and refuse to bring prosecutions against those who violate the law and pardon those already convicted.<sup>29</sup> According to Jefferson, “the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution.”<sup>30</sup> Independent interpretation of the law, by each branch applied within its own “sphere,” allows the different parts of the government to check each other. Allowing the courts to interpret the Constitution to bind the other branches, Jefferson wrote Abigail Adams, “would make the judiciary a despotic branch.”<sup>31</sup> While Jefferson did not challenge the courts’ right to interpret the Constitution or review the constitutionality of statutes, he denied that the judiciary’s thinking bound the President in the exercise of his own responsibilities.<sup>32</sup>

Jefferson’s vision of the President’s responsibilities to the Constitution went even beyond the veto. Jefferson thought that Presidents ought to use the veto only when they were fairly certain that Congress had passed an unconstitutional law. In contrast to Washington, he appeared to think that the Constitution allowed the President to veto laws because he disagreed with Congress’s policy choices. On the other hand, Jefferson viewed his right to

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<sup>26</sup> 10 THE WORKS OF THOMAS JEFFERSON 88 n.1 (Paul Leicester Ford ed., 1905) (reprinting a letter from Thomas Jefferson to Mrs. John Adams dated September 11, 1804).

<sup>27</sup> *Id.* at 89 n.1.

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 88 n.1.

<sup>30</sup> *Id.* at 89 n.1.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.*

interpret the Constitution as extending beyond the President's role in the legislative process. As the Alien and Sedition Acts episode shows, he did not believe a President was obligated to enforce laws which he believed violated the Constitution. Similarly, Jefferson would not have expected the courts to feel bound by the views of the President and Congress on the constitutionality of the laws which they enact.

### C. *Judges*

Relations with the judicial branch plagued the Jefferson administration, and the administration responded with an aggressive use of the constitutional tools at its disposal. Jefferson, at times, thought of the courts as the last remaining redoubt of his Federalist opponents. “[T]hey have retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased.”<sup>33</sup> Jefferson did not share modern notions of respect for judicial independence or deferring to judicial decision of important social issues. Instead, he believed that it was wholly appropriate for the executive and legislative branches to alter the personnel of the judicial branch in order to change the outcome of its decisions. Jefferson felt no unease in having Congress repeal new judgeships, postpone Supreme Court terms, and in his most ambitious effort, remove judges in an effort to influence the judiciary's direction. In 1803, Republicans in the House impeached district judge John Pickering of New Hampshire, who was not only a Federalist but also happened to be crazy and a drunk.<sup>34</sup> In 1804, the Senate voted that Pickering's conduct satisfied the “high crimes and misdemeanors” standard and removed him from office.<sup>35</sup> Jefferson had written the House to pass along complaints about Pickering and to ask Congress to perform its constitutional functions.

Pickering's impeachment and removal were only target practice for bigger game. Justice Samuel Chase had infuriated Republicans with his political outbursts on the bench, which included an attack on universal manhood suffrage and the Judiciary Act of 1803.<sup>36</sup> Jefferson wrote a letter to a Maryland congressman suggesting impeachment: “Ought this seditious and official attack on the principles of our Constitution, and on the proceedings of a State, to go unpunished?”<sup>37</sup> His majorities in Congress obliged, beginning impeachment proceedings on the day the Senate convicted Pickering.<sup>38</sup> During the proceedings, they explicitly announced their plans to impeach all of the Federalist Supreme Court Justices because they were out of step with the

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<sup>33</sup> Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 10 THE WRITINGS OF THOMAS JEFFERSON 301, 302 (Albert Ellery Bergh ed., 1907).

<sup>34</sup> See MCDONALD, *supra* note 3, at 51.

<sup>35</sup> See *id.* at 80.

<sup>36</sup> See *id.* at 81.

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* at 82.

sweeping Republican election victories. Refusing to convict, the Senate established the precedent that it would not use impeachment to interfere with judicial decisions. Jefferson's attack on the judiciary is conventionally understood as a defeat, and in terms of constitutional principle perhaps it was. In terms of immediate politics, however, Jefferson came out ahead. After its decision in *Marbury*, the Supreme Court would not invalidate another law passed by Congress until *Dred Scott* a half-century later.<sup>39</sup> The challenge to the judiciary effectively removed any threat that the federal courts posed to Jeffersonian legislation or presidential actions. Instead, the Marshall Court devoted itself to upholding the powers of the national government against those of the States, defending rather than challenging the prerogatives of Congress. Jefferson's expanded views of the Presidency's rights against the judiciary, while turned back by the Senate in the end, helped him achieve the legislative successes that made his Presidency a success.

Jefferson's confrontation with the courts gave birth to yet another broad invocation of executive power. While Washington had refused to disclose treaty documents to the House, Jefferson launched executive privilege in its more modern form by withholding information from the courts. The occasion was the Burr conspiracy. In 1805, Aaron Burr (after killing Alexander Hamilton in a duel<sup>40</sup> and being dropped from the ticket after one term as Vice President) hatched a scheme to launch a military expedition in the American southwest. Depending on the account one believes, Burr either sought to attack Spanish possessions and bring them into the United States, or to detach territories from the United States and create for himself an independent empire, or some combination of the two. Burr had several private dinners with Jefferson at the White House while he secretly advanced his plans in Washington. One of the co-conspirators, General James Wilkinson, turned against Burr as he was forming his troops, arrested him and other plotters, and sent them to Washington for trial.

Burr was prosecuted for treason before Chief Justice John Marshall, sitting as a federal trial judge in Virginia.<sup>41</sup> Burr's defense sought information in Jefferson's possession, including reports on the conspiracy sent to Jefferson and the orders issued by the President in response. Marshall issued a subpoena to Jefferson for the documents. Jefferson on principle refused to acknowledge the court's right to force the executive to produce information. He explained to the federal district attorney that a court's subpoena could not override the Constitution, which "enjoins his constant agency" in leading the American

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<sup>39</sup> See *id.* at 81.

<sup>39</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1856).

<sup>40</sup> See MCDONALD, *supra* note 3, at 85.

<sup>41</sup> *Id.* at 133. See generally John C. Yoo, *The First Claim: The Burr Trial*, *United States v. Nixon*, and *Presidential Power*, 83 MINN. L. REV. 1435 (1999).

people.<sup>42</sup> Returning to his consistent view that the separation of powers required independence for each branch of government, Jefferson argued that the executive would become subordinate to the judiciary “if he were subject to the *commands* of the latter, & to imprisonment for disobedience.”<sup>43</sup> Proposing an argument that President William Clinton would float, unpersuasively, before the Supreme Court, Jefferson argued that responding to the commands of the judiciary, “keep[ing] him constantly trudging from north to south & east to west,” would prevent him from fulfilling his presidential duties.<sup>44</sup> Jefferson refused to appear in person and said that he would be “the sole judge” of what government documents to make public.<sup>45</sup> As a compromise, he sent a limited set of papers to the U.S. attorney and ordered him only to release portions needed in the interests of justice.<sup>46</sup> Marshall did not pursue the subpoena any further, and Burr and his co-conspirators were acquitted.<sup>47</sup> Jefferson achieved the reverse of the outcome with impeachment. His short-term political wishes were frustrated – he had virtually told Congress that Burr was guilty of treason in a special message – but he established the first true precedent for executive privilege.

## II. THE PURPOSE OF THE EXECUTIVE POWER IN FOREIGN AFFAIRS

Jefferson had an equally expansive view of presidential power in the field of foreign relations. It was here that fans of Jefferson can make their strongest claim for his inclusion in the list of the greatest American Presidents. Jefferson used his powers as Commander-in-Chief to wage a successful offensive against the Barbary States<sup>48</sup> – inspiring the verse “to the shores of Tripoli” in the anthem of the U.S. Marine Corps.<sup>49</sup> His most important presidential act, however, involved a purchase rather than a cannon shot. Jefferson bought Louisiana from Napoleon at a fire-sale price and doubled the size of the American republic. Jefferson had to rely on an expansive view of executive power to carry out the deal and overcome his own doubts about its constitutionality. Jefferson’s success abroad, however, would prove to be the undoing of his second term. His overzealous efforts to keep the United States

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<sup>42</sup> Letter from Thomas Jefferson to George Hay, United States Dist. Attorney for Va. (June 20, 1807), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 26, at 403, 404.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Letter from Thomas Jefferson to George Hay, United States Dist. Attorney for Va. (June 17, 1807), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 26, at 400, 401.

<sup>46</sup> See MCDONALD, *supra* note 3, at 133.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* at 61.

<sup>49</sup> See, e.g., United States Marine Band, *The Marines’ Hymn*, on FROM FIFE AND DRUM . . . : MARINE BAND RECORDINGS 1890-1988 (Altissimo! 2007) (“From the halls of Montezuma to the shores of Tripoli . . .”).

out of the European wars would produce a flood of unsuccessful attempts at enforcement and a widespread disregard for the law.

A. *War*

Despite his Republican attacks on the executive, Jefferson did not seek to withdraw the President's powers on the field of war. Jefferson had planned to reduce the federal budget by cutting the military to the bone,<sup>50</sup> but events caused him to depend on the navy built by the previous Federalist administration. The immediate cause was relations with the Barbary pirates.<sup>51</sup> Although history remembers them as pirates, they were in fact autonomous regions – Algiers, Tripoli, and Tunis – within the Ottoman Empire, joined by an independent nation, Morocco.<sup>52</sup> Their leaders attacked the shipping of other nations, seized cargos and ships, and sold captured sailors into slavery. Since the days of the Continental Congress, the United States had essentially paid bribes, in the form of tribute (amounting to \$10 million under Washington and Adams), to the Barbary nations to allow American shipping to proceed unhindered.<sup>53</sup> Jefferson's accession to the Presidency coincided with demands for higher payments and the impressment of a U.S. Navy frigate, the U.S.S. *George Washington*, by the Dey of Algiers as a courier vessel.<sup>54</sup>

Jefferson had long disliked the policy of paying tribute to the Barbary nations, and he decided to send the Navy to stop the insults to American shipping. In a meeting on May 15, 1801, the cabinet unanimously agreed that Jefferson should send a squadron to the Mediterranean as a show of force.<sup>55</sup> No one in the cabinet, including Madison and Gallatin, believed the President had to seek congressional permission to order the mission. The only legislative authority, if it could be called that, was a statute enacted on the last day of the Adams Administration requiring that at least six existing frigates (American frigates at this time were the best in the world) be kept in "constant service" – an effort to prevent Jefferson from reducing the navy to zero.<sup>56</sup> Jefferson and his cabinet thought the statute could be read to allow the President to send a "training mission" to the Mediterranean.<sup>57</sup> The cabinet also agreed that the President had constitutional authority to order offensive military operations,

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<sup>50</sup> See MCDONALD, *supra* note 3, at 42-43.

<sup>51</sup> See *id.* at 77-78.

<sup>52</sup> See ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 208 (1976).

<sup>53</sup> For a useful discussion of the Barbary pirates, see GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 45-67 (1997); SOFAER, *supra* note 52, at 208-24; Schmitt, *supra* note 3, at 336-37; Montgomery N. Kosma, *Our First Real War*, 2 GREEN BAG 2D 169 (1999).

<sup>54</sup> See SOFAER, *supra* note 52, at 209.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 210.

<sup>57</sup> CASPER, *supra* note 53, at 61.

should a state of war already be in existence because of the hostile acts of the Barbary powers. “The [executive] cannot put us in a state of war,” Gallatin said, “but if we be put into that state either by the decree of Congress or of the other nation, the command & direction of the public force then belongs to the [executive].”<sup>58</sup> Jefferson and his advisors clearly believed the Constitution only required Congress to declare war to undertake purely offensive operations against a nation with which the United States was at peace – a view narrower than the one shared by all postwar American presidents.<sup>59</sup> As Abraham Sofaer has observed, Jefferson and his advisors assumed they had the authority for the expedition simply by virtue of Congress’s creation of the naval forces that made it possible<sup>60</sup> – a position no different from that taken by President Washington in the Indian wars.<sup>61</sup>

Jefferson was clear on this in his orders to the naval commanders, though less than forthcoming with Congress. The Secretary of the Navy ordered Captain Richard Dale to proceed to the Mediterranean and if he found that any of the Barbary States had declared war on the United States, to “chastise their insolence” by “sinking, burning or destroying their ships & Vessels wherever you shall find them.”<sup>62</sup> Dale could impose a blockade, which he did to Tripoli, and take prisoners.<sup>63</sup> His orders went well beyond simply protecting American shipping from attack. Upon arriving in Tripoli, and discovering that the Bashaw of Tripoli had declared war, Dale issued orders to his squadron to attack any and all Tripolitan vessels. On a re-supply mission to Malta in August 1801, the 12-gun schooner *Enterprise* under the command of Lieutenant Andrew Sterett encountered a 14-gun Tripolitan corsair.<sup>64</sup> The *Enterprise* fought for three hours, killed half the enemy’s crew, and after capturing the enemy vessel, cut down its masts, threw its guns overboard, and set it adrift.<sup>65</sup> Sterett could not keep the corsair because he was on the outward leg of his re-supply mission. Sterett’s action produced broad approval in the United States and a joint resolution from Congress applauding the crew.<sup>66</sup>

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<sup>58</sup> Thomas Jefferson, The Anas (May 15, 1801), in 1 THE WORKS OF THOMAS JEFFERSON 163, 365-66 (Paul Leicester Ford ed., 1904).

<sup>59</sup> See JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 143-73 (2005).

<sup>60</sup> SOFAER, *supra* note 52, at 210.

<sup>61</sup> See RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 92-123 (1975).

<sup>62</sup> Letter from Samuel Smith to Captain Richard Dale (May 20, 1801), in 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS 465, 467 (1939).

<sup>63</sup> *Id.*

<sup>64</sup> See Kosma, *supra* note 53, at 174.

<sup>65</sup> *Id.* (“The *Enterprise* sustained no material damage, and not a single man was wounded.”).

<sup>66</sup> *Id.*

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Jefferson chose to portray his orders differently in his first message to Congress in December 1801. He claimed he had not authorized offensive operations, that Sterett had acted in self-defense, and that the *Enterprise* had released the corsair because Congress had not authorized offensive operations. “Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel, being disabled from committing further hostilities, was liberated with its crew.”<sup>67</sup> While some scholars have viewed Jefferson’s words as presidential acceptance of Congress’s control over war, Jefferson did not accurately represent Sterett’s offensive attack, Sterett’s decision to release the captured warship, or the nature of the orders to Captain Dale, nor did he reveal his thinking or that of his cabinet when those orders were cut. Jefferson asked Congress to authorize offensive operations. During the subsequent congressional debates, no one questioned the constitutionality of Jefferson’s orders to the Mediterranean squadron, and several congressmen argued that the President had the power to begin offensive operations because of the existing state of war. Congress ultimately chose to delegate broad powers to Jefferson to take whatever military measures he thought necessary as long as war continued with Tripoli.<sup>68</sup>

Jefferson’s message to Congress presents an example of a President’s rhetoric not matching his actions, since he claimed a constitutional limitation on presidential power which neither he nor his cabinet had previously thought important. On the other hand, Jefferson did not act as aggressively as Presidents today. His orders to attack Tripoli responded to a declaration of war by the enemy. Nevertheless, Jefferson had sent American forces into a hostile area, ordered them to undertake offensive actions, and had no plausible congressional authorization at the time. He could justify his orders on the ground that Congress had created the forces and that a state of war already existed between the United States and Tripoli, the position taken by Jefferson’s cabinet in early 1801. In a published criticism of Jefferson’s message, Hamilton agreed with the logic of Jefferson’s cabinet. According to Hamilton, no congressional permission to use force was necessary once a state of war already existed: “[W]hen a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already *at war*, and any declaration on the part of Congress is nugatory: it is at least unnecessary.”<sup>69</sup> Hamilton had things right as a matter of international law at the time, and most agree that he was correct on the Constitution. Presidents should not have to wait to seek authorization from Congress when another nation has already attacked or declared war upon the United States.

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<sup>67</sup> President Thomas Jefferson, President’s Message (Dec. 8, 1801), in 7 *Annals of Cong.* 11, 12 (1801).

<sup>68</sup> See Act of Feb. 6, 1802, ch. 4, 2 Stat. 129, 130 (1802).

<sup>69</sup> The Examination Number 1 (Dec. 17, 1801), in 25 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 6, at 444, 456.

American efforts to solve the Barbary problem produced another form of warfare, covert action. Shortly after the dispatch of the squadron to the Mediterranean, the American consul at Tripoli suggested aiding the brother of the ruling Pasha to take over the government.<sup>70</sup> In August 1802, Madison authorized American naval and diplomatic personnel to cooperate with the brother, and in May 1804, the cabinet voted to provide him with \$20,000.<sup>71</sup> The American consul at Tunis provided another \$10,000, helped the pretender to the throne to assemble a makeshift, mercenary army, and ordered the Navy to covertly transport him to Tripolitan territory. This force succeeded in capturing one of Tripoli's major cities in 1805, forcing a peace treaty with the United States that freed American prisoners, granted privileges to U.S. trade and shipping, and ended the war.<sup>72</sup> While Jefferson's actions certainly fell within Congress's broad authorization to "cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in [the President's] opinion, require,"<sup>73</sup> the President chose not to inform Congress of these secret measures until six months after the peace treaty was signed. No one objected to the constitutionality of the President's actions, and Congress even bestowed on the brother a tidy sum for his cooperation.<sup>74</sup> Jefferson would set the precedent for future covert action, taken without specific legislative approval, against threats to national security. Congress's main check remained the power of the purse.

Jefferson acted swiftly during another military confrontation, this time with Great Britain. On June 21, 1807, the British warship *H.M.S. Leopard* stopped the smaller American frigate *U.S.S. Chesapeake* as it was leaving the port of Norfolk, Virginia.<sup>75</sup> The *Leopard* was under orders to search for naval deserters on American vessels.<sup>76</sup> When the American captain refused to allow the search, the *Leopard* fired on the unprepared ship, killing three and wounding eighteen, and then removed four alleged deserters.<sup>77</sup> The attack provoked outrage throughout the country and prompted demands for war.<sup>78</sup> Without consulting Congress, which was not in session, Jefferson ordered all American waters closed to British warships.<sup>79</sup> He re-directed funds to build up the defenses of New York, Charleston, and New Orleans.<sup>80</sup> He ordered the purchase of significant amounts of military stores and ammunition, including

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<sup>70</sup> SOFAER, *supra* note 52, at 217.

<sup>71</sup> *Id.* at 218.

<sup>72</sup> *Id.* at 220.

<sup>73</sup> Act of Feb. 6, 1802, ch. 4, 2 Stat. 129, 130 (1802).

<sup>74</sup> See SOFAER, *supra* note 52, at 221.

<sup>75</sup> McDONALD, *supra* note 3, at 135.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 136.

<sup>80</sup> SOFAER, *supra* note 52, at 172.

materials to construct one hundred gunboats.<sup>81</sup> Jefferson, however, did not want war and sent orders to James Monroe in London to demand reparations and punishment of the *Leopard's* commander.<sup>82</sup> When Congress convened in October, Jefferson did not claim that the purchases were legally authorized, but instead sought after-the-fact approval because the “emergencies threatening us” justified his actions.<sup>83</sup> Here, Jefferson did not just rely on his status as Commander-in-Chief, but on the power to act in moments of crisis to defend the nation, even in areas like spending which the Constitution had specifically given to Congress. Congress agreed and voted overwhelmingly to appropriate the funds that Jefferson had already spent.<sup>84</sup>

#### B. *The Louisiana Purchase*

While full of daring exploits, war with the Barbary pirates was not the central concern of American national security policy. America’s future depended on relations with Great Britain, France, and Spain, which held the key to neutrality and westward expansion. Spain owned New Orleans, which controlled western exports using the Mississippi River. Without access to the Mississippi, it would take longer to transport goods overland from Ohio to the east than it would to sail from New York to London. The British Empire was America’s primary trading partner, receiving about fifty percent of its exports, while the Royal Navy effectively controlled the Atlantic. France was also an important trading partner – Americans had become rich trading goods to the antagonists during the latest round of European wars – and controlled Louisiana to the West. Played differently, the United States could have been drawn into the Napoleonic wars, which could have proven disastrous (as the War of 1812 would show), and found itself a nation hemmed into the eastern seaboard.

It is here where Jefferson’s claim to presidential greatness truly rests. His purchase of Louisiana unlocked this difficult situation. He avoided war with France, Britain, and Spain, and doubled the size of the nation. He made possible the fulfillment of Republican political economy and foreign policy: to conquer the territory to the west without war, open up the settlement of the West by controlling the Mississippi, and maintain America’s status as a

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<sup>81</sup> *Id.*

<sup>82</sup> McDONALD, *supra* note 3, at 135-36.

<sup>83</sup> Thomas Jefferson, President’s Annual Message (Oct. 27, 1807), in 10 *Annals of Cong.* 14, 17 (1807), stating:

I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us; and I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done, if then assembled.

<sup>84</sup> See BRADFORD PERKINS, *PROLOGUE TO WAR: ENGLAND AND THE UNITED STATES 1805-1812*, at 140-48 (3d prtg. 1968); SOFAER, *supra* note 52, at 172-73 (reporting that the vote was 124-2 in favor of the appropriation).

neutral, which allowed it to profit handsomely in exports and trade. Jefferson above all else wanted to avoid involvement in the European wars, which would have brought the expansions in government spending and power desired by Federalists. The Louisiana Purchase opened up the possibility that Jefferson's "empire of liberty" would be continent-wide. But it required Jefferson to put aside his vision of strict constitutional construction and adopt a broad vision of executive power, one that permitted the nation to take advantage of this great opportunity.

Although not just the product of luck, the Louisiana Purchase must have seemed like the intervention of Fortune in the fate of the Americans. The retrocession of Louisiana from Spain to France (France had lost the territory to Spain at the end of the Seven Year's War) encouraged Napoleon to think of restoring an American empire.<sup>85</sup> But France's expedition to restore control in Santo Domingo (the present day Dominican Republic), lost to Toussaint L'Ouverture's slave rebellion, failed completely.<sup>86</sup> Another mission to occupy Louisiana could not leave port due to winter ice.<sup>87</sup> Matters came to a head in late 1802 when Spanish officials closed the port of New Orleans to American shipping while they awaited the hand-over of the territory to France.<sup>88</sup> Jefferson decided to send envoys to Paris to buy New Orleans and West Florida (which today comprises the portions of Mississippi and Alabama that lie along the Gulf of Mexico, along with parts of Florida and Louisiana), and Congress secretly appropriated \$2 million for the purchase.<sup>89</sup> Federalists wanted to use force to invade New Orleans and West Florida first, and then negotiate from a position of strength.<sup>90</sup>

When American ministers arrived in France, they received a gift. Napoleon decided to sell not just New Orleans, but the whole Louisiana territory, and turn his dreams of conquest back to Europe. Robert Livingstone, the first ambassador on the scene, did not even believe the offer was genuine. When James Monroe arrived, they quickly decided to exceed their instructions and buy all of Louisiana for about \$15 million.<sup>91</sup> The Louisiana Purchase was an undoubted success for the United States and for Jefferson. It doubled the size of the United States, gained permanent control of the Mississippi and New Orleans, and removed France and Spain as serious threats to American national security in the West. "This removes from us the greatest source of danger to our peace," Jefferson wrote to his son-in-law when news of the treaty arrived

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<sup>85</sup> See MALONE, FIRST TERM, *supra* note 3, at 240.

<sup>86</sup> See *id.* at 271-72.

<sup>87</sup> *Id.* at 272.

<sup>88</sup> *Id.* at 240.

<sup>89</sup> *Id.* at 271.

<sup>90</sup> The events surrounding the purchase are described in *id.* at 239-332; McDONALD, *supra* note 3, at 53-73; ROBERT W. TUCKER & DAVID C. HENDRICKSON, EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON 87-171 (1990).

<sup>91</sup> See MALONE, FIRST TERM, *supra* note 3, at 302.

in the United States.<sup>92</sup> Jefferson's ranking as one of America's greatest Presidents was assured on that day.

But in order to buy Louisiana, Jefferson had to change his vision of the Constitution. Initially, Jefferson had believed the Constitution did not permit the acquisition of new territory or its incorporation into the Union as new States. Even before he had sent Monroe to France, Jefferson had raised doubts before his cabinet about the constitutionality of adding territory to the Union. Surprisingly, the Constitution has no express provision providing for the addition of territory. Article IV, section 3 gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>93</sup> Some argue that this Clause assumes the addition of new property in the future, but as Gary Lawson and Guy Seidman point out, this interpretation runs counter to the text of the Clause and its placement in the Constitution.<sup>94</sup> It describes the power to make rules and dispose of property, but it does not empower the government to add new territory in the first place. It could be read to apply only to the territory of the United States as it existed in 1789, such as the Northwest Territory.<sup>95</sup>

Jefferson also doubted whether new territory, even if added, could become States.<sup>96</sup> The Constitution provides for the addition of new States, upon the approval of Congress, and it prohibits the formation of new States from existing States without their consent. Jefferson apparently worried that this provision applied only to existing states. His attorney general, Levi Lincoln, advised that the boundaries of existing states be enlarged first to include the Louisiana Purchase because of this understanding.<sup>97</sup> As Lawson and Seidman argue, the Admissions Clause,<sup>98</sup> as it is known, is the most likely ground for the constitutionality of the Louisiana Purchase.<sup>99</sup> It places limitations on the creation of states from existing states, but it places no restriction on the creation of states from anything else, such as new territory. It merely declares that "[n]ew states may be admitted by the Congress into this Union."<sup>100</sup>

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<sup>92</sup> *Id.* at 284 (quoting a letter from Thomas Jefferson to Thomas Mann Randolph, dated July 5, 1803).

<sup>93</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>94</sup> GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 28-29 (2004).

<sup>95</sup> *Id.*

<sup>96</sup> *See* MALONE, *FIRST TERM*, *supra* note 3, at 311.

<sup>97</sup> *Id.* at 312.

<sup>98</sup> U.S. CONST. art. IV, § 3, cl. 1.

<sup>99</sup> LAWSON & SEIDMAN, *supra* note 94, at 73-75.

<sup>100</sup> U.S. CONST. art. IV, § 3, cl. 1.

Jefferson and his cabinet, however, sought refuge in a position that was “virtually indistinguishable” from Hamilton’s arguments in the debates over the Neutrality Proclamation and the Jay Treaty.<sup>101</sup> Gallatin argued that:

1st. That the United States as a nation have an inherent right to acquire territory.

2d. That whenever that acquisition is by treaty, the same constituted authorities in whom the treaty-making power is vested have a constitutional right to sanction the acquisition.

3d. That whenever the territory has been acquired, Congress have the power either of admitting into the Union as a new state, or of annexing to a State with the consent of that State, or of making regulations for the government of such territory.<sup>102</sup>

In other words, the federal government had powers that included the sovereign rights held by all other nations, even if they were not explicitly set out in the Constitution. Gallatin claimed, as had Hamilton, that the treaty power vested the national government with the ability to exercise these inherent national powers. Gallatin’s opinion concluded that the people had implicitly delegated to the national government the authority to acquire territory by vesting it with the powers to make war and treaties, and to govern the territories. This is a broad reading of the executive power because it would allow the President and Senate together to exercise power that is nowhere set out in the Constitution, but must be deduced by examining the rights of other nations in their international affairs. As the primary force in treaty-making, this power would benefit the President.

This was strong drink for a man who believed the Constitution did not allow a national bank. Nevertheless, Jefferson accepted Gallatin’s reasoning, though he predicted that new territory would enter the Union as a matter of “expediency” rather than constitutional principle.<sup>103</sup> Perhaps he felt he was making a small compromise when only New Orleans was on the table. When Jefferson learned that Livingston and Monroe had succeeded beyond his wildest dreams, he could not escape his constitutional quandary. To John Dickinson, he admitted that “[o]ur confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, & still less of incorporating it into the Union.”<sup>104</sup> He confessed that “[a]n amendment to the Constitution seems necessary for

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<sup>101</sup> MALONE, FIRST TERM, *supra* note 3, at 312.

<sup>102</sup> Letter from Albert Gallatin to Thomas Jefferson (Jan. 18, 1803), *in* 1 THE WRITINGS OF ALBERT GALLATIN 111, 113-14 (Henry Adams ed., 1879).

<sup>103</sup> Letter from Thomas Jefferson to Albert Gallatin (Jan. 1803), *in* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 26, at 3 n.1.

<sup>104</sup> Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), *in* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 26, at 28, 29.

this.”<sup>105</sup> Jefferson did not limit himself to private letters to friends, but expressed his views to his close ally in the Senate, John Breckinridge of Kentucky, in August of that year: “The Executive in seizing the fugitive occurrence which so much advances the good of the country, have done an act beyond the Constitution.”<sup>106</sup>

Jefferson initially believed that if the Executive were to violate the Constitution for the public good, it would best be done publicly and with the support of the other branches. He would ask Congress to support the unconstitutional act. “The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it.”<sup>107</sup> Jefferson believed it was best to openly admit the violation of the Constitution and seek popular support, which he believed was healthier for the constitutional system. “[W]e shall not be disavowed by the nation,” he predicted, “and their act of indemnity will confirm & not weaken the Constitution, by more strongly marking out its lines.”<sup>108</sup> Jefferson even went so far as to personally draft at least two constitutional amendments adding the Louisiana territory to the Union.<sup>109</sup>

Events, however, forced Jefferson from the luxury of his strict constructionist beliefs. Shortly after he wrote to Dickinson and Breckinridge, Jefferson received a dispatch from Livingston in Paris that Napoleon was having seller’s remorse. Livingston reported that Napoleon would seize any delay or request for changes as an opportunity to renounce the agreement. Jefferson worried that the delay of a constitutional amendment would give France the opening it needed, though both Madison and Gallatin thought France would not back out (no one in the cabinet thought a constitutional amendment was necessary either). Jefferson sent letters asking that constitutional objections to the treaty be dropped, and that “nothing must be said on that subject which may give a pretext for retracting; but that we should do sub-silentio what shall be found necessary.”<sup>110</sup>

Jefferson’s most remarkable exchange came with Senator William Cary Nicholas. Nicholas warned that any public statement by Jefferson against the

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<sup>105</sup> *Id.*

<sup>106</sup> 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 26, at 7 n.1 (reprinting a letter from Thomas Jefferson to John C. Breckinridge dated August 12, 1803).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.* at 3-12.

<sup>110</sup> *Id.* at 8 n.1 (reprinting a letter from Thomas Jefferson to John C. Breckinridge dated August 18, 1803); *see also id.* (reprinting a letter from Thomas Jefferson to Thomas Paine dated August 18, 1803) (“I infer that the less we say about constitutional difficulties respecting Louisiana the better, and that what is necessary for surmounting them must be done sub-silentio.”).

constitutionality of the Purchase might sink the treaty in the Senate. Jefferson agreed that “[w]hatever Congress shall think it necessary to do, should be done with as little debate as possible, & particularly so far as respects the constitutional difficulty.”<sup>111</sup> While he could not resist the opportunity to restate his belief that the Constitution did not envision the addition of new states from territory outside the borders of 1789, he confined himself to private letters.<sup>112</sup> The opposite construction, advanced by his cabinet and by Nicholas too, would allow the United States to add “England, Ireland, Holland, &c into it.”<sup>113</sup> Broad rules of interpretation, Jefferson warned, would “make our powers boundless” and would render the Constitution “a blank paper by construction.”<sup>114</sup> Jefferson claimed that when faced with a choice between two readings of the Constitution, “the one safe, the other dangerous, the one precise, the other indefinite,” he would choose the “safe & precise” and instead “ask an enlargement of power from the nation, where it is found necessary.”<sup>115</sup>

Henry Adams was not without justification when he concluded that Jefferson made the Constitution into exactly that “blank paper.”<sup>116</sup> If Jefferson had not given the powers of the executive a Lockean cast, he would have endangered the Louisiana Purchase. Perhaps it is a sign of Jefferson’s political genius that he remained flexible enough to take advantage of this great national opportunity. His decision did not just reflect his political dexterity, but also his broader vision of presidential powers. Jefferson’s view, when put to the test, even went beyond that of Washington. Our first President had established the legitimacy of the national government by always keeping his energetic executive within its constitutional bounds. Jefferson drew more directly upon Locke’s theory of the executive’s prerogative to act beyond the Constitution when necessity demands it.<sup>117</sup> In his letter to Breckenridge, Jefferson dismissed constitutional objections to the Louisiana Purchase by comparing his position to that of a guardian who exceeds his authority in the best interests of his ward.<sup>118</sup> He had to seize the opportunity “which so much advances the good of the country.”<sup>119</sup> Similarly, in response to the firing on the *Chesapeake*, Jefferson again exceeded his constitutional powers on the ground that the emergency required it. In both cases, Jefferson claimed that unforeseen circumstances, produced by either necessity or opportunity,

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<sup>111</sup> Letter from Thomas Jefferson to William Cary Nicholas (Sep. 7, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 26, at 10.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See 2 ADAMS, *supra* note 3, at 204-05.

<sup>117</sup> See MAYER, *supra* note 3, at 253.

<sup>118</sup> 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 26, at 7 n.1 (reprinting a letter from Thomas Jefferson to John C. Breckinridge dated August 12, 1803).

<sup>119</sup> *Id.*

required him to exceed his legal powers to protect the greater good. Following Locke, Jefferson looked for ratification for his ultra vires decisions – “an indemnity,” as he wrote to Breckenridge<sup>120</sup> – from the people through their representatives in Congress.<sup>121</sup>

Jefferson explained his embrace of the prerogative more completely a year after leaving office. In a private letter, he addressed the question of “whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law.”<sup>122</sup> Jefferson thought the question was “easy of solution in principle,” though could be “sometimes embarrassing in practice.”<sup>123</sup> Jefferson’s easy answer was that there could be a more important good than keeping solely to his legal authorities:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.<sup>124</sup>

Jefferson followed with examples of military necessity: Washington destroying private property during the Revolutionary War to gain a tactical advantage; Jefferson as Governor of Virginia seizing men and material to defend the state from invasion.<sup>125</sup> Even more interesting was Jefferson’s invocation of the prerogative to defend his Presidency. One such instance was the possibility of purchasing the Floridas, even though Congress had made no appropriation – the implicit reference to Louisiana was obvious.<sup>126</sup> “Ought the Executive, in that case . . . to have secured the good to his country, and to have trusted to their justice for their transgression of the law?”<sup>127</sup> Jefferson’s answer was yes.<sup>128</sup> Another example was the purchase of military supplies after the attack on the *Chesapeake*.<sup>129</sup> A third was General Wilkinson’s arrest of the Burr conspirators without trial or right of habeas corpus.<sup>130</sup> In all of

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<sup>120</sup> *Id.*

<sup>121</sup> See MAYER, *supra* note 3, at 253.

<sup>122</sup> Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 11 THE WORKS OF THOMAS JEFFERSON 146 (Paul Leicester Ford ed., 1905).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 146-47.

<sup>126</sup> *Id.* at 147.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 148.

<sup>130</sup> *Id.* at 148-49.

these, Jefferson believed, “a law of necessity and self-preservation was at stake, and rendered the *salus populi* supreme over the written law.”<sup>131</sup>

Acting beyond the written Constitution was not for the weak of heart or the low in status. Obeying the higher law of protecting the nation was a duty of the highest elected officers, not those “with petty duties.”<sup>132</sup> It could only be called upon during genuine moments of crisis, not when “consequences are trifling, and time allowed for a legal course.”<sup>133</sup> When less dangerous times were at hand, “overleaping the law” was worse than “a strict adherence to its imperfect provisions.”<sup>134</sup> During such times, the elected leader exposes himself to a sharp backlash if he misjudges popular opinion. “It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake.”<sup>135</sup> Jefferson trusts that his fellow Americans would be forgiving; they would “put themselves in his situation” and judge his decisions based on what he knew at the time.<sup>136</sup>

Three difficulties emerge from Jefferson’s adoption of Locke’s theory of executive prerogative. First, he did not explain when the nation’s security is truly at stake and triggers the prerogative. He admitted that it would sometimes prove difficult to identify the line between acting within the law and invoking the prerogative,<sup>137</sup> but he compared the judgment needed to that of a good officer who knew when to act as he thought best because his orders did not anticipate an unforeseen case or extreme results. One clear case is protecting the nation from attack, as in the example of the Revolutionary War, the Burr conspiracy, and the *Chesapeake* affair. But Jefferson did not limit the executive’s prerogative to just self-defense; he also approved actively seizing opportunity to advance the nation’s interests. Jefferson believed that a President could act decisively, even without congressional approval, to acquire foreign territory like Florida or Louisiana.

Second, Jefferson did not make clear how the good officer was to “throw himself on the justice of his country and the rectitude of his motives” for approval of his actions.<sup>138</sup> In some situations, Jefferson believed that seeking congressional ratification after the fact was enough. But with the Louisiana Purchase, he never introduced the constitutional amendments he believed necessary to expand the Union. If anything, he appeared to believe that both the President and Congress were committing an illegal act, and that both had to

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<sup>131</sup> *Id.* at 148.

<sup>132</sup> *Id.* at 149.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

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appeal to the people as a whole for approval. Jefferson ultimately looked to public opinion as the judge of extraordinary uses of presidential power.

Third, Jefferson left unmarked the source of the prerogative. One possibility is that an emergency power is inherent in the executive, which would be in keeping with the line of thought begun by Machiavelli. The second is that the power rests outside the Constitution entirely, akin to Locke's view. The former approach might require the President to seek approval after-the-fact from Congress when he goes beyond the existing law, but perhaps for political rather than constitutional reasons. This has the virtue of not having to bless presidential actions that are necessary but illegal. Viewing the prerogative as resting outside the Constitution relieves us of stretching the law so drastically to permit more freedom of action. But it also requires us to accept that executive decisions can be both necessary and illegal, and it forces Presidents to run the risk of violating the law in order to protect the national interest. Only Presidents faced with the most imminent and serious emergencies or possessed of the surest feel for public opinion will survive. Throughout most of his Presidency, Jefferson could claim both. In Louisiana, he reached a bargain that secured the nation's prosperity and safety for generations. Until his second term, Jefferson seemed to act unerringly in line with popular wishes. But he lost his touch at the end in his quest to maintain an embargo of the European powers, risking both the existence of the Union and its safety from foreign entanglement. That was not the product of his constitutional powers, but rather a result of ideological blinders combined with the political powers of the office, at which he continued to be a master.

### III. THE EUROPEAN EMBARGO

Jefferson's position that the President had an independent right to interpret and enforce the law, and was not bound by the conclusions of the other branches, was his most profound contribution to the theory of presidential power. His embrace of the Lockean prerogative was his most practical contribution because it allowed him to buy Louisiana. Jefferson's most striking expansion of the political aspect of the office was his transformation of the President into a party leader.<sup>139</sup> As head of his party, which held majorities in both the House and Senate throughout his Presidency, Jefferson could coordinate policy in both the executive and legislative branches. He never vetoed a bill on policy grounds, and never had to, because legislation inevitably reflected his wishes.

It is not obvious that party government should lead to a stronger President. During the contest over the election of 1800, John Marshall voiced the opposite concern. Jefferson, he predicted, would "embody himself in the

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<sup>139</sup> See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 18 (Randall W. Bland et. al eds., 5th rev. ed. 1984) ("What we encounter in Jefferson for the first time is a President who is primarily a party leader, only secondarily Chief Executive.").

House of Representatives.”<sup>140</sup> His status as leader of the majority party in Congress would “increase his personal power,” Marshall thought, but would lead to the “weakening [of] the office of the President.”<sup>141</sup> Jefferson’s political control relied on his personal gifts and character. When not present in his successors, Congresses would control Presidents rather than vice versa.<sup>142</sup> Madison and Monroe would depend on their selection by the party’s caucus in Congress for their nomination to the Presidency, and John Quincy Adams would depend on its actual votes when the election of 1824 went to the House of Representatives.<sup>143</sup> Jefferson, however, was able to maintain his control of the party without diminishing the power of the Presidency. If anything, the former enhanced the latter in a way that would only be realized again under the Presidency of Woodrow Wilson.

Unlike Wilson, however, Jefferson initially approached partisan politics with a measure of ambivalence. The Republican party, in the words of Richard Hofstadter, was the “party to end parties.”<sup>144</sup> Jefferson thought of parties as a temporary measure to combat what he perceived as Hamilton’s “monocratic” efforts to unbalance the Constitution by aggrandizing the executive at the expense of Congress and the states.<sup>145</sup> Once his party had won the 1800 elections, he believed, the need for the Republican party might disappear.<sup>146</sup> Jefferson viewed parties as ultimately unnecessary because the Constitution embodied different interests in each branch of government – the popular interest in the House of Representatives, the aristocratic in the Presidency.<sup>147</sup> With the Federalist party destroyed, harmony and balance would return to the political system, as intended by the Constitution.<sup>148</sup> He never intended to establish the stable political system we have today, with two parties competing for control of government by altering their platforms to capture the majority of the vote.<sup>149</sup>

Once in office, Jefferson found use of the party irresistible. He accomplished effective party government through a combination of formal

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<sup>140</sup> Letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), in 6 THE PAPERS OF JOHN MARSHALL 46, 46 (Charles F. Hobson ed., 1990).

<sup>141</sup> *Id.*

<sup>142</sup> See CORWIN, *supra* note 139, at 19 (asserting that Marshall’s prediction “was justified by events when . . . party leadership passed to feebler hands”).

<sup>143</sup> *Id.*

<sup>144</sup> RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 151 (1969).

<sup>145</sup> LANDY & MILKIS, *supra* note 22, at 43.

<sup>146</sup> *Id.* at 42.

<sup>147</sup> *Id.* at 43.

<sup>148</sup> *Id.* at 42.

<sup>149</sup> See *id.* at 41-44; Harvey C. Mansfield, Jr., *Thomas Jefferson*, in AMERICAN POLITICAL THOUGHT: THE PHILOSOPHIC DIMENSION OF AMERICAN STATESMANSHIP 23, 49 (Morton J. Frisch & Richard G. Stevens eds., 1971).

respect for Congress and informal political influence. Formally, Jefferson gave great deference to Congress's institutional place.<sup>150</sup> He ended the practice of appearing in person to deliver the President's annual message to Congress, a practice that would await Woodrow Wilson for revival.<sup>151</sup> According to his great biographer, Dumas Malone, Jefferson rid the Presidency of any hints of monarchism which might awe Congress or the people – no more grand parties, carriage rides, and thanksgiving days.<sup>152</sup> He often sent recommendations to Congress for legislation in a deferential tone, and portrayed himself simply as the instrument of the legislative will. In a letter to Dr. Benjamin Rush, Jefferson called himself “but a machine erected by the constitution for the performance of certain acts according to the laws of action laid down for me.”<sup>153</sup> Jefferson ended any Hamiltonian talk of using “corruption” to allow the executive branch to manage its programs through the legislature.

Informally, however, Jefferson experimented with his position as head of the Republican party to expand his political leadership. His first tool was social.<sup>154</sup> Jefferson regularly entertained congressmen at small dinners, at which he appeared wearing homespun cloth and slippers, with the food prepared by his French chef and accompanied by fine French wines.<sup>155</sup> While he performed terribly before large groups, Jefferson was dazzling in these small settings. He led discussions that ranged over art, architecture, science, music, and so on.<sup>156</sup> Jefferson and his companions also left room for discussions of public policy, and by the end the President invariably led them to his desired result.<sup>157</sup>

Jefferson's second tool was organizational. While Jefferson did not introduce the horse trading, lobbying, and working of the press that is the stuff of the modern office of legislative affairs, he relied on Gallatin, who had been the Republican House floor leader, to manage his program in Congress.<sup>158</sup> Congressmen did not resent Gallatin's involvement in legislative affairs. Jefferson's involvement in legislation went as far as influencing the selection of congressional leaders who were responsible for carrying out the Republican

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<sup>150</sup> MAYER, *supra* note 3, at 236.

<sup>151</sup> *Id.*

<sup>152</sup> See MALONE, *FIRST TERM*, *supra* note 3, at 93.

<sup>153</sup> MAYER, *supra* note 3, at 237 (quoting a letter from Thomas Jefferson to Dr. Benjamin Rush, dated June 13, 1805).

<sup>154</sup> *Id.*

<sup>155</sup> See McDONALD, *supra* note 3, at 39.

<sup>156</sup> *Id.*

<sup>157</sup> See *id.* (“In any event, Jefferson's guests were usually overwhelmed: few congressmen were immune to the president's personality, and most returned to the congressional pit with renewed faith in his wisdom and virtue.”); see also MAYER, *supra* note 3, at 238.

<sup>158</sup> McDONALD, *supra* note 3, at 39.

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party agenda. Republicans created a congressional caucus that could present a unified party front in the legislature.<sup>159</sup> They were aided in their efforts by the steady deterioration of the Federalist party, which proved itself unable to compete with the rivals in political organization and campaigning and never again won the Presidency or majorities in Congress.

Political coordination between the executive and the congressional majority resulted in significant delegations of authority to Jefferson. In the area of appropriations, for example, the Republicans had criticized the Federalists for excessive deference to the executive branch, but soon followed their ways. Under the Articles of Confederation, Congress had proven incapable of managing the nation's finances, and under the new Constitution, Congress looked to the executive branch to gather information and develop expertise. Under the Washington administration, the Treasury Department developed estimates for annual expenditures, and Congress responded by voting appropriations for the operations of the entire government in a few lump sums. The very first appropriations act, for example, provided for all civilian employees and military expenses in a single sentence, and practice for the following three years followed the same pattern.<sup>160</sup> Executive branch officers exercised significant discretion on spending, going so far as to transfer funds from one account to another (known today as reprogramming of funds) without the direct approval of Congress. Sometimes, executive branch officials even entered into obligations before appropriation had been made and sought congressional funding after the fact, as Washington did to pay for the costs of the military expedition against the Whiskey Rebellion.<sup>161</sup> In 1793, Republican criticism of these practices prompted a House investigation into Hamilton's alleged mixing of funds and proposals for his censure, which were defeated, and led to efforts to demand specificity in appropriations similar to line-items in today's spending bills.<sup>162</sup>

Jefferson's role as party leader influenced his position as head of the administrative state, at least insofar as one existed in the early nineteenth century. One of Washington's most important achievements was to clarify that the President headed the executive branch and that the department secretaries served as his assistants. Jefferson, who had served in that role as Secretary of State, did not alter that structure. He made significant changes, however, in the bureaucracy. Whereas Washington had sought to appoint only the "first characters" to federal office, the Adams administration had filled lower positions with members of the Federalist party, especially once it became clear that the Republicans would win the 1800 elections. Jefferson continued the practice of favoring his own, in some cases sweeping out an entire state's federal officers, in other cases allowing attrition to do the job, but always

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<sup>159</sup> See CORWIN, *supra* note 139, at 18-19.

<sup>160</sup> See CASPER, *supra* note 53, at 80.

<sup>161</sup> See *id.* at 87.

<sup>162</sup> See *id.* at 86-87.

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replacing Federalists with handpicked Republicans.<sup>163</sup> Jefferson viewed executive branch officials as representatives of the people as well, and believed that Republicans should hold at least as many offices as their share of the popular vote.<sup>164</sup> The spoils system was an important way to make sure the bureaucracy and the President were of one mind on policy.

Close coordination between the executive and legislative branches can lead to unity and harmony, but it can also lead to disaster. It can lead the majority party to ignore dissenting opinions or to place excessive faith in its own judgment. It can render ideological blinders bigger and darker. It can make it harder to change a doomed policy. The President's control of the majority party in Congress can make him more stubborn in the face of setbacks rather than more flexible. All of these problems become acute during times of single-party control of both branches of government because Congress is likely to engage in broader delegation of its powers to the President. Delegation expands the President's legal powers, but it also increases his political risks as he assumes more responsibility and accountability for the success of policy.

Jefferson's failure in his second term came about as a direct result of his successes in the first. The administration had succeeded in keeping the nation out of the European contest for supremacy without increasing defense spending or entering any alliances. It had solved the western issue by purchasing New Orleans and the Louisiana territory. Jefferson could rest satisfied that he had assured America's future growth and security without incurring the heavy expenses, infrastructure, and bureaucracy needed for a more vigorous national defense. To Jefferson, war was the great enemy, particularly for republics, because it called for the powerful governments, higher taxes, and more spending that had corrupted Europe. At the same time, Jefferson sought the traditional national goals of territorial expansion and larger export markets. The Louisiana Purchase showed that he could have both, that he could follow the traditional reason of state, but reject the usual tools – force and coercion – of Europe.<sup>165</sup> He understandably drew the lesson that the United States could remain neutral, trade freely with Europe, and expand its borders without joining sides or building a navy. As professors Tucker and Hendrickson have observed, Jefferson was the first statesman to seriously attempt “to conquer without war.”<sup>166</sup>

Jefferson's success came about because of a short lull in the struggle between Britain and France. Peace allowed him to avoid a military establishment. But the looming specter of war forced Napoleon to give up his plans for a Franco-American empire and to sell Louisiana. Once war broke out again, Jeffersonian policies could not survive. Napoleon's Continental System subjected any ships transporting goods with Great Britain to seizure; Britain

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<sup>163</sup> See *supra* notes 22-25 and accompanying text.

<sup>164</sup> LANDY & MILKIS, *supra* note 22, at 65.

<sup>165</sup> See TUCKER & HENDRICKSON, *supra* note 90, at 14-17.

<sup>166</sup> *Id.* at 18.

retaliated with an order allowing the capture of any ships carrying goods to and from France. This threatened the booming trade that the United States had carried on with those countries and their American colonies. Even with the outbreak of hostilities, the United States profited handsomely in the carrying trade between Europe and the New World. Thanks to British naval warfare against France and Spain and the wartime diversion of Britain's own seamen from commerce, the American merchant marine's registered tonnage grew from 558,000 tons in 1802 to 981,000 by 1810, a level it would not reach again for a century.<sup>167</sup> Jefferson was quite clear about America's interest: for the United States to "become carriers for all parties as far as we can raise vessels" so that the New World could "fatten on the follies of the old."<sup>168</sup> Export was critical to Republican ideology, because foreign markets would soak up the output of the virtuous yeoman farmers of the West.

Reversing Britain's and France's anti-trade policies revealed a gap between Jefferson's ends and his means. He had no means available to coerce these nations into accepting free trade. The United States did not have the army or navy to pressure Britain or France. Nor was Jefferson willing to alter his goal of free trade. If he was unwilling to build a military, Jefferson would have to pick sides. The obvious choice was Great Britain. Great Britain received fifty percent of U.S. exports, and the Royal Navy was the only real military threat to the United States. But Jefferson's ideology would not allow him to consider an alliance with the British against the French. Jefferson's love for all things French and his deep suspicions of Great Britain are well-known. Even when the French had taken back Louisiana and put plans into action for its military occupation, Jefferson would not seriously entertain seeking British help to take New Orleans. When his envoys had negotiated a peace treaty with Britain after the *Chesapeake* attack, Jefferson refused to send it to the Senate (another sign of presidential power in foreign affairs) even though it guaranteed favorable trade terms. British impressment of American sailors and demands that the United States reject trade with France were too much for the President to accept.

Jefferson instead chose a radical, untried tool: an economic embargo on both warring nations. Its objects seem almost quixotic today – to use a cutoff of American raw materials to force the warring parties to accept the principle of free shipping by neutrals. But Britain and France were locked in a contest to the death. Neither had been willing to give in to the other after years of war; it is difficult to believe that an American embargo would coerce either to make a concession favorable to its enemy. Predictably, the embargo failed. Neither France nor Britain accepted free trade. And to enforce the embargo, the power of the national government had to grow exponentially. Jefferson engaged in one of the most significant exercises of delegated power in American history:

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<sup>167</sup> *Id.* at 190.

<sup>168</sup> Letter from Thomas Jefferson to Edward Rutledge (July 4, 1790), in 6 THE WORKS OF THOMAS JEFFERSON, *supra* note 11, at 86, 88.

an attempt to prevent virtually all exports of American goods. It drove him to monitor the movement of all shipping in the country and the land-based transportation of goods near the borders. It required the seizure of property upon mere suspicion that it was meant for export. The embargo was akin to Prohibition, and it met with the same resistance. Jefferson's attempts to enforce the embargo made a ruin of his second term.

It should be clear, however, that the embargo does not support the spectacle of an executive run amok on its own constitutional power. At each step, Jefferson informally suggested and then received a delegation of power from Congress – each more expansive than the last. He took the plunge at a December 17, 1807, cabinet meeting when he decided to send a message to Congress calling for the embargo. Displaying an uncanny prescience, Gallatin the next day told the President he “prefer[red] war to a permanent embargo” because of the “privations, sufferings, revenue, effect on the enemy, politics at home, &c.”<sup>169</sup> Jefferson sent his special message to Congress that same day requesting a ban so as to protect American ships and sailors from capture by Britain or France.<sup>170</sup> Congress immediately fulfilled the President's request in the First Embargo Act, which prohibited any U.S. sea-going vessel from leaving a domestic port.<sup>171</sup> It allowed shipping between points within the United States, but only if the owner of the ship posted a bond equivalent to double the value of the goods, and allowed the President to approve individual voyages abroad.<sup>172</sup> Less than a month later, Congress passed a Second Embargo Act to expand the prohibition to coasting and fishing vessels, which apparently had picked up the trade with Canada and the West Indies.<sup>173</sup> In March 1808, Congress followed with the Third Embargo Act, which required higher bonds, enlarged the penalties for violation, and extended the embargo beyond shipping to any exports carried by sea or land.<sup>174</sup>

Resistance to the embargo was vigorous, but only in certain regions. While the middle states followed the law, New England – which was the seat of the Federalist party and depended on trade – became a hotbed of disobedience. Ships left Boston harbor at night in defiance of federal Treasury officials or moved to harbors with little official presence, while rafts of goods traveled across the border to Canada. Smugglers continued to evade weak customs officers in Baltimore and Georgia. Defiance of the law caused Jefferson to seek a drastic solution, the First Enforcement Act, in April 1808.<sup>175</sup> It required all vessels of any size in the nation to receive clearance to sail, and to load its

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<sup>169</sup> Letter from Albert Gallatin to Thomas Jefferson (Dec. 18, 1807), in 1 THE WRITINGS OF ALBERT GALLATIN, *supra* note 102, at 368 (Henry Adams ed., 1879).

<sup>170</sup> McDONALD, *supra* note 3, at 143.

<sup>171</sup> See Act of Dec. 22, 1807, ch. 5, 2 Stat. 451 (repealed 1809).

<sup>172</sup> *Id.* §2.

<sup>173</sup> See Act of Jan. 9, 1808, ch. 8, 2 Stat. 453.

<sup>174</sup> See Act of Mar. 12, 1808, ch. 33, 2 Stat. 473.

<sup>175</sup> See Act of Apr. 25, 1808, ch. 66, 2 Stat. 499.

cargo under the supervision of a federal treasury official. No ship with cargo could leave a port near foreign territory, for any reason, without the permission of the President himself. Congress authorized naval vessels and smaller gunboats to stop any vessel and search it if officials suspected an intent to evade the ban. Federal officials could seize domestic goods in any area near foreign territory until a bond was posted to guarantee their delivery within the country. Congress did not require warrants or any judicial review for the search and seizure of ships or goods on land.<sup>176</sup>

Historian Leonard Levy has charged the Enforcement Act with approaching the “precipice of unlimited and arbitrary power as measured by any American standard then known.”<sup>177</sup> Putting to one side the Fourth Amendment problems, which may not seem as sharp to those familiar with the modern administrative state, what remains of note is the level of presidential involvement.<sup>178</sup> Gallatin drafted each of the embargo and enforcement laws for Jefferson, who personally reviewed them and sent them on to congressional allies.<sup>179</sup> The embargo allowed any shipper to appeal to the President for an exception, and Jefferson personally reviewed each of these applications.<sup>180</sup> Jefferson personally drafted and issued guidelines for federal port officials to use in administering the embargo.<sup>181</sup> He was as strict as possible in exercising his discretion, ordering executive officers “to consider every shipment of provisions, lumber, flaxseed, tar, cotton, tobacco . . . as sufficiently suspicious for detention.”<sup>182</sup> If doubt arose, Jefferson instructed, “consider me as voting for detention.”<sup>183</sup> Through the detention act, the executive branch attempted to regulate the movement of all goods within the United States in its ports, on its waters, and in any territory near its borders.

As resistance to the embargo grew, the administration responded by tightening its grip. Smugglers in Lake Champlain, along the New York-Canada border, began to use large rafts to carry goods with armed guards.<sup>184</sup> Gunfire between smugglers and border guards broke out. Jefferson overreacted and issued an order declaring an insurrection and ordering the use of armed force to restore order.<sup>185</sup> This was the same act that Washington had

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<sup>176</sup> *Id.*

<sup>177</sup> LEVY, *supra* note 2, at 102.

<sup>178</sup> *Id.* at 104-05.

<sup>179</sup> *Id.* at 104.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 104-05.

<sup>182</sup> Letter from Thomas Jefferson to Albert Gallatin (May 6, 1808), *in* 1 THE WRITINGS OF ALBERT GALLATIN, *supra* note 102, at 385, 386.

<sup>183</sup> *Id.*

<sup>184</sup> LEVY, *supra* note 2, at 107.

<sup>185</sup> *See* Thomas Jefferson, Proclamation (Apr. 19, 1808), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 450 (James D. Richardson ed., 1896).

used during the Whiskey Rebellion.<sup>186</sup> Jefferson dispatched navy gunboats to patrol the lake, and the governors of New York and Vermont followed by sending the militia to the Champlain district.<sup>187</sup> Armed conflict occurred between smugglers and the militiamen, with some loss of life. The Jefferson administration often found it difficult to win the cooperation of local populations in enforcing the embargo. Juries often refused to convict violators, while cargo owners brought suits in state court against federal officials for damages. An effort to enable the states to allow ships to transport food between American cities failed as some governors could not resist the impulse to grant such exceptions liberally and ships used the permits to conceal voyages to other countries. When the Jefferson administration asked State governors to use their militias to enforce the law, they did so only reluctantly.

As smuggling grew, the administration turned to more military force. During the summer of 1808, Jefferson ordered the general use of the navy through the nation's seaboard and waterways to enforce the embargo.<sup>188</sup> Several U.S. Navy vessels essentially blockaded American ports while U.S. gunboats attempted to hunt down smuggling ships in rivers and lakes. While the administration succeeded in keeping the vast majority of the merchant marine in port, significant amounts of exports were still making it out of the country.<sup>189</sup> Gallatin despaired, and wrote Jefferson at the end of the summer recommending that the administration stop every vessel from moving anywhere in the country, and that federal officials have the power to seize or detain property anywhere in the country.<sup>190</sup> He even suggested that federal officials remove the rudders off all ships in harbor so they could not secretly sail off.<sup>191</sup> "Congress must either invest the Executive with the most arbitrary powers and sufficient force to carry the embargo into effect, or give it up altogether," the Treasury Secretary wrote.<sup>192</sup> The only alternative, Gallatin observed, was war, "[b]ut with whom?"<sup>193</sup> Jefferson agreed, and responded by proposing a Second Enforcement Act. Passed by Congress in January, 1809, it prohibited even loading a vessel with the intent to break the embargo, gave federal collectors the authority to refuse permission to load cargo on suspicion, delegated broader powers to detain vessels, and allowed federal officials to seize cargoes from any ship, wagon, or other vehicle upon suspicion they were

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<sup>186</sup> LEVY, *supra* note 2, at 108-09.

<sup>187</sup> *See id.* at 107.

<sup>188</sup> *Id.* at 114.

<sup>189</sup> LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801-1829*, at 451 (1951).

<sup>190</sup> *See* Letter from Albert Gallatin to Thomas Jefferson (July 29, 1808), in 1 *THE WRITINGS OF GALLATIN*, *supra* note 102, at 396, 398.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 399.

<sup>193</sup> *Id.*

heading abroad.<sup>194</sup> For the first time, Congress vested the President with the authority to call out the militia and the military to enforce the embargo laws, rather than just to suppress insurrections.

The administration soon made use of this power to call out the military to enforce the law in various ports throughout the nation. The systematic use of the military to enforce the laws throughout the nation remains unprecedented.<sup>195</sup> Aside from the Civil War, domestic use of the military has been targeted at localized disturbances, troops have been quickly withdrawn, and civilian government soon restored.<sup>196</sup> During the embargo, Jefferson deployed military forces throughout the nation for long periods, sometimes for more than a year. In Leonard Levy's words, Jefferson "had answered foreign attacks on American commerce by a steady siege against American commerce and by quartering troops among the American people."<sup>197</sup> Henry Adams claimed that "[p]ersonal liberties and rights of property were more directly curtailed in the United States by embargo than in Great Britain by centuries of almost continuous foreign war."<sup>198</sup> In light of these judgments, it should be no surprise perhaps that the embargo had a quick end. Within one month of the passage of the Second Enforcement Act, outright defiance of the embargo increased. Representatives from New England and New York rushed to overturn the embargo, which ended on Jefferson's last day in office.<sup>199</sup> Jefferson did not try to stop them.

The embargo had succeeded in its immediate aims, but failed in its grander objects. Jefferson had succeeded in drastically curtailing American exports to Europe. While a fair amount of smuggling occurred, most ships remained rotting in dock. Forcing Britain and France to change their policies on neutral shipping, however, failed utterly. Neither showed any intention of lifting its restrictions on American trade, and neither appeared to have suffered much economic distress. Relations toward the competing European powers would continue to bedevil American leaders until they chose the disastrous course of war. The embargo only achieved a reduction in the ability of American merchants and farmers to benefit from European disorder. Jefferson had expended significant resources, reduced civil liberties, and compromised his belief in a national government of limited powers, in order to achieve this limited effect. But what should be clear is that this was not the product of an executive drunk on its own constitutional powers. Instead, it came about through the cooperation of the President and Congress. Each expansion of the embargo, and the corresponding growth of government power to enforce it, was granted to the executive by legislative act. The embargo eventually came

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<sup>194</sup> See Act of Jan. 9, 1809, ch. 5, 2 Stat. 506.

<sup>195</sup> LEVY, *supra* note 2, at 119.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 120.

<sup>198</sup> 4 ADAMS, *supra* note 2, at 273.

<sup>199</sup> See McDONALD, *supra* note 3, at 159.

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to an end by a congressional enactment that took effect on Jefferson's last days in office. Rather than a cautionary tale about presidential power, the embargo disproves any ironclad link between executive power and reckless government policies. Jefferson showed that the President and Congress can agree too, and still lead the nation down a path leading to failure and waste.

#### CONCLUSION

Contrary to popular belief, Jefferson believed in an independent Presidency with inherent powers. He used them vigorously to the great benefit of the nation. Jefferson did not hesitate to exert direct control over the entire executive branch, challenge the courts over the right to interpret the Constitution, and use the military to advance foreign policy goals. He kept a firm control over foreign policy. Most importantly, Jefferson believed the President could act extra-constitutionally when the demands of necessity required. His belief in the Lockean prerogative allowed him to seize the great achievement of his Presidency, and that of the early Republic: the Louisiana Purchase. Domestically, Jefferson produced the innovation of the President as legislative leader. He introduced a close coordination of the executive and legislative branches, even going so far as to select the leaders of the Republican caucuses. His use of the political party to overcome the separation between the President and Congress allowed him to push through legislative policies with stunning speed.

Drawing the two branches closer together, however, would not prove an unadulterated blessing. With a conduit open between the two branches, power could flow in either direction. Once its founder left the Presidency, the Republican party shifted its weight of gravity toward the legislature, and away from the executive. The congressional caucus assumed the right to select the party's presidential nominee, justifying the nickname "King Caucus." Indeed, it was unclear whether congressional Democrats would select Madison or Monroe for the 1808 elections until Jefferson made his wishes known. This broke the Framers' effort to forge a direct relationship between the Presidency and the people, and to give the chief executive independence from Congress. A candidate chosen by a congressional party caucus would make commitments to legislative leaders to get elected, and would remain keenly conscious of congressional wishes if he wanted to get re-nominated. A President chosen by Congress would be unlikely to exercise his independent powers vigorously, nor stray far from the wishes of his party majority.

A President's weak view of his powers need not result in poor performance. During periods of stability and peace, a quiescent President may be more predictable and less meddlesome, though an energetic President might at least prevent Congress from counter-productive interference with the economy and society. Presidential modesty, however, may very well lead to failure in the face of emergency and war, the critical moments for which the executive is designed. While the need for the executive's constitutional powers may not be

compelling in times of peace, it would be a mistake to limit presidential power so as to prevent its exercise in time of emergency.

The Presidency of James Madison, Jefferson's collaborator and handpicked successor, bears this out. Madison is not commonly thought of as one of the nation's great executives, despite his role as the primary drafter of the Constitution and the Bill of Rights, one of the authors of the Federalist Papers, and a founder of the Democratic Party. Madison has left his fingerprints on almost every major decision of the nation's early decades. Yet, in polls of scholars, Madison ranks below Kennedy and Monroe, and just above Lyndon Johnson, as an average President, and would no doubt do far worse in popular opinion.<sup>200</sup>

Madison's low performance is attributable in part to his narrow view of his constitutional powers as President. Once in office, Madison remained deferential to congressional wishes, which led the nation to the precipice of disaster and to its most humiliating military defeats. The source of these setbacks was Madison's failure to chart a successful course between Great Britain and France. Congress, rather than Madison, decided foreign economic policy, the primary tool used to coerce the belligerents. Madison played almost no role in the shaping of the 1809 Nonintercourse Act, and he took no part in the framing of the 1810 Macon's Bill Number 2, which triggered an embargo in favor of the nation that first lifted its anti-trade laws. While the latter restored American exports, it effectively left U.S. international economic policy up to the decisions of Britain or France. Indeed, it allowed Napoleon to outmaneuver and embarrass the United States when he pretended to lift restrictions on American trade with the continent, causing Madison to cut off trade with Great Britain by mistake.<sup>201</sup> Neither bill caused either belligerent to change its ways.

Congress followed by driving the nation into an ill-conceived and disastrous war with Great Britain. The 1810 midterm elections sent to office a group of young Congressmen, which included Henry Clay of Kentucky and John Calhoun of South Carolina. Hailing from the growing western and southern States, they demonstrated their influence when the House elected Clay, a freshman member, to be its speaker.<sup>202</sup> Known as the "War Hawks,"<sup>203</sup> they welcomed a conflict with Great Britain, which they saw as the primary threat to American economic and territorial growth. They blamed the British for inciting an 1811 conflict between Indians, led by Tecumseh, and settlers of the Indiana territory, led by Governor William Henry Harrison. A war with Britain would remove the Indians, whose lines of support apparently led back to Canada, as an obstacle to western settlement. The War Hawks also believed

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<sup>200</sup> See PRESIDENTIAL LEADERSHIP: RATING THE BEST AND THE WORST IN THE WHITE HOUSE 11-12 (James Taranto & Leonard Leo eds., 2004).

<sup>201</sup> See PERKINS, *supra* note 84, at 223-60.

<sup>202</sup> DONALD R. HICKEY, THE WAR OF 1812: A FORGOTTEN CONFLICT 30 (1989).

<sup>203</sup> *Id.*

Canada to be lightly defended and easy to conquer as the next new American territory. Finally, Britain's impressment policies and trade restrictions were an insult to American honor and an effort to force the United States into the British mercantile system. "The independence of this nation is lost" if Britain's trade policies continued, said the young Calhoun, "[t]his is the second struggle for our liberty."<sup>204</sup> A conflict with Britain would be nothing less than a second war of independence.

At the same time, the United States was woefully unprepared for war. Madison displayed little leadership in convincing his own party to substantially increase the army or navy, and he did not clearly urge Congress toward war or peace. In his November, 1811 State of the Union message, Madison declared that Great Britain had made "war on our lawful commerce" and called upon Congress to put "the United States into an armor and an attitude demanded by the crisis."<sup>205</sup> Although the presidential message did not call for war with either Great Britain or France, members of Congress pushed toward a conflict with Great Britain. But they were unwilling to take the steps necessary to prevail, or even adequately defend the eastern seaboard from the mistress of the seas. Between December 1811 and April 1812, Congress increased the size of the regular army to 35,000 troops,<sup>206</sup> but primarily intended to rely on the state militias and short-term volunteers in the event of war. Even worse, Congress refused to authorize the construction of any new ships-of-the-line or even naval drydocks.<sup>207</sup> Instead, the Jeffersonians planned to rely on gunboats – the militia of the seas, in their view – to defend the coast.<sup>208</sup> When war broke out, the British would have three ships-of-the-line for every American cannon. To fund the war preparations, Congress refused to enact any new taxes, but instead passed legislation to borrow \$11 million, a pitifully small amount with which to take on the world's leading naval power.<sup>209</sup>

When Britain refused to negotiate a change in its impressment or trade policies in the spring of 1812, Congress demanded war. The Madison administration kept its own counsel and gave little sign whether it wanted war or peace. Clay and his supporters stepped into the vacuum. A more vigorous President would have prevented Congress from making such a disastrous mistake. The United States could have pursued three policies: war with Britain, war with France, or neutrality. Only war with Britain could directly threaten the nation's security, as she had the one navy in the world capable of reaching the United States in any strength. Britain had forces along America's

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<sup>204</sup> WALTER LAFEBER, *THE AMERICAN AGE: UNITED STATES FOREIGN POLICY AT HOME AND ABROAD SINCE 1750*, at 58 (1989) (quoting John Calhoun).

<sup>205</sup> James Madison, Third Annual Message (Nov. 5, 1811), in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897*, *supra* note 185, at 491, 494.

<sup>206</sup> HICKEY, *supra* note 202, at 33.

<sup>207</sup> *Id.* at 34.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 35. *See generally* LAFEBER, *supra* note 204, at 59-61.

northern border and Indian allies that could pressure the western frontier. Britain also happened to be the United States' largest trading partner, meaning that any conflict would eliminate the millions in trade between the two nations, and since Britain was likely to impose a naval blockade, would also end American trade with the rest of the world. Hopes of adding Canada to the Union were ill-founded, though they had obsessed Americans since the time of the Revolution. There was no real evidence beyond wishful thinking that a hodgepodge of American troops and militia could successfully invade and conquer Canada. Meanwhile, the United States had no serious defensive works and troops along the borders or the eastern seaboard, leaving the nation open to attack. The United States would declare war just as the balance of power was to change in Europe, with Napoleon suffering from his 1812 invasion of Russia, eventually freeing-up British veterans for service in the Americas.

With these balance of forces, the war went far better than the country could have realistically expected. Efforts to invade Canada were easily repulsed, with ill-prepared American armies surrendering, losing in battle to the British, or maneuvering fruitlessly in the Great Lakes region. State militias refused to leave their states, and the officer corps was for the most part inept. In the last year of the war, it was the British who would be invading the United States from Canada, but by the end neither side had made any progress. On the high seas, the United States won a few symbolic encounters, but for the most part the British kept a tight blockade on the East Coast. Success came only on the Great Lakes, where American sailors defeated their British counterparts (it was on Lake Erie where Oliver Hazard Perry declared "we have met the enemy and they are ours"), and in the campaigns against the Indians by Harrison and Andrew Jackson.<sup>210</sup>

After Napoleon abdicated in 1814, Britain sent its veterans against the United States. Castlereagh's government planned a three-pronged assault. It would invade from Canada to seize Maine and parts of New York, conduct diversionary harassment in the capital area, and send a strong force through the Mississippi to detach the territory of the Louisiana Purchase. If the plans had succeeded, the United States would have been shrunk short of its 1783 borders and would have been permanently hemmed in by British colonies and allies. The diversions alone humiliated the young nation by capturing Washington, D.C. and burning the government's buildings, including the White House and the Capitol. Madison and his wife barely escaped the arrival of British troops, which were only turned back by a stiff defense at Baltimore (the bombardment was described by Francis Scott Key in the "Star Spangled Banner"). The Canadian offensive went nowhere due to the lack of interest of the British commander and some well-timed American naval victories on his flank on Lake Champlain. At the Battle of New Orleans in December 1814, Jackson became a national hero by utterly defeating the redcoats at a cost of only

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<sup>210</sup> See generally LAFEBER, *supra* note 204, at 72-99, 126-58, 182-254.

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twenty-one American lives. It is a sign of America's good fortune that the nation survived the war with a return to the status quo.

A President who was independent of Congress could have resisted such a foolhardy war. Madison could have used his veto to block legislation increasing the military beyond the needs of defense, and he could have used his Commander-in-Chief power once Congress had declared war to conduct only a defensive strategy. Madison could have sought peace immediately, which was well within his grasp. Britain had repealed its discriminatory trade policies almost at the very moment that Congress had declared war. From the very start, the public justification for war had evaporated. Madison could have reached a peace agreement with little trouble.

Instead, Madison went along with what he viewed to be public sentiment, as represented by Congress, to wage a war that was not in the national interest. In his public messages, he left the question of war up to Congress. Madison surely presented a case against Great Britain in late 1811 and early 1812, but it was Congress that sought a war that would bring Canada within the United States and end British harassment of American trade and expansion. Madison deferred to the judgment of Congress where the role of the President is at its maximum. He compounded the mistake by exercising very little direct control of the war, and allowing incompetent generals to guide national policy until, by the end, it seemed almost no one in Washington was in charge. Had Jackson not prevailed at New Orleans, the United States might very well have been dismembered or at least had its westward expansion halted in its tracks.

Just as Jefferson demonstrated the possibilities of vigorous and independent presidential leadership, Madison showed the dangers of modesty and deference. Jefferson had used his office to grasp Louisiana, acting, so he argued, even beyond the Constitution. He had adopted the party system to wield an extraordinary influence over Congress and to achieve a unified national policy on numerous issues. Madison seemed to shrink within his diminutive shell as President. Where Jefferson had used the party to control Congress, Congress used the party to control Madison. He deferred to Congress on the wisdom of a disastrous war. He could not exercise effective control over his cabinet or generals once war began. Madison refused to use the powers of his office to pursue an independent course to avoid war. Contrary to popular misconceptions today, it is not always the President who harbors dreams of military adventures and Congresses who hold tight rein over the dogs of war. Under Madison, it was Congress who hoped to conquer and the President who went along. And because of it the nation suffered its worst battlefield defeats and came within an inch of losing its future.