

The President as Enforcer of the Law

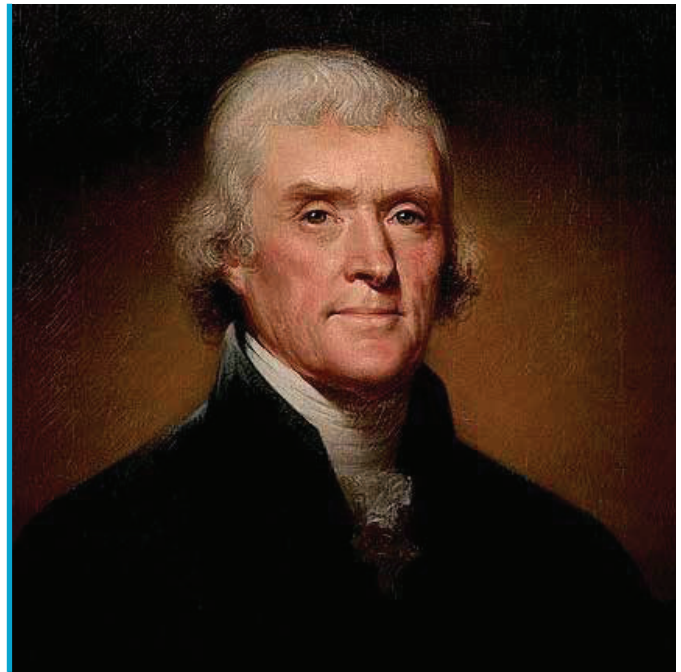
By David Marion, Ph.D.

Among the deficiencies of the Articles of Confederation singled out for attention by delegates like James Madison at the Constitutional Convention was the absence of an independent ‘National Executive’ (Resolution 7 of the Virginia Plan). The fact that the President is commonly referred to as the Chief Executive is striking evidence of the significance attached to the law enforcement or ‘execution’ responsibilities of the President. The clarity that marks the designation of the president as Chief Executive, however, is in stark contrast to the ambiguity regarding both the scope of the President’s duties as Chief Executive and the powers that he may employ to carry out those duties.

Article II of the Constitution provides few details when it comes to the President’s responsibilities and powers as Chief Executive. While the first words of Article I declare that Congress’ powers are limited to those “herein granted,” most of which are then set out in Section 8, Article II begins with the sweeping declaration that “the executive power shall be vested in a President of the United States.” Sections 2 and 3 of Article II identify various powers and duties entrusted to the President, but mostly in very general terms (e.g., “The President shall be Commander in Chief of the Army and Navy”). Considering that abuses of executive power constituted the bulk of the evidence used to justify the Declaration of Independence, it would be reasonable to expect the Constitution to contain a highly detailed description of the responsibilities and powers entrusted to the President, along with specific restrictions on the exercise of those powers. In the case of the legislative department, for example, the Framers not only laid out specific powers in Section 8 (Article I), but took care to identify specific limitations on the use of legislative powers in Section 9 (e.g., “No bill of attainder or ex post facto law shall be passed;” “No Tax for Duty shall be laid on

Articles exported from any State”).

Many scholars have argued that the general expectation that Washington would be the first



President accounts for the absence of greater specificity in Article II. According to this theory, the delegates were prepared to trust Washington to give proper definition to the presidency. To say that Washington was a self-conscious President is an understatement. He understood the full significance of the precedents that he would establish for the nation and for all the Chief Executives who would follow him. He appointed accomplished public figures to Cabinet posts (e.g., Thomas Jefferson and Alexander Hamilton) and invited a full hearing on matters of national interest, such as the establishment of a Bank of the United States, before finally endorsing any proposal. Although unsuccessful in his attempt to secure an advisory opinion from the Supreme Court on the Franco-American Treaty of 1778, the fact that he solicited the advice of judicial officials is evidence of the significance he

attached both to the effective administration of the nation's affairs and to being above reproach when it came to the exercise of his powers. The care with which he approached his duties also is reflected in his use of the veto power. Always cautious about appearing to be ruling on the basis of his own "will," Washington employed the veto power only twice and reserved its use for occasions when he believed Congress had transcended the limits of the Constitution.

Washington never underestimated the difficulties involved in establishing and preserving a respectable rights-oriented republic. He feared anarchy as much as he loathed governmental tyranny. He freely used his powers to help shape a healthy social culture for the new country. His Farewell Address was an exercise in civic education. The same concern for instilling and reinforcing good habits or "virtues" on the part of the people can be seen in his forceful response to the so-called "Whiskey Rebellion." While Washington's decision to lead federalized militia troops to enforce compliance with an excise tax on whiskey clearly fell under his duties as Chief Executive, it is hard not to conclude that his stern response was designed not only to restore order, but to remind all Americans of the importance of law abidingness. For Washington, the role of the Chief Executive included both the execution of federal laws and the cultivation of respect for the legal system.

America's evolution into a more thoroughly democratic nation was accompanied by changes in institutions such as the presidency as well as the party system. While Washington traced his powers to the Constitution, many later Presidents pointed to their election by the people as the most important source of their power. The first President to do this in a dramatic way was Andrew Jackson. Embittered by Congress's decision to overlook him in favor of John Quincy Adams in the contested election of 1824 that ended up in the House of Representatives, Jackson stressed his identification with ordinary Americans rather than the "gentry" class in the elections of 1828 and 1832.

In contrast to prior Presidents, Jackson advertised himself as the champion of the

interests of "the many" against institutions and policies that protected "privileged" interests. The most prominent target of this reformist strategy was the Bank of the United States. Portraying the Bank as a corrupt institution that favored the moneyed class, Jackson vetoed legislation that would have extended the Bank's charter and then moved its funds to state institutions. This action elicited a censure resolution in the Senate, which in turn prompted a "protest message" in which Jackson reminded Congress that the President, as the "direct representative of the people," was not obligated to defer to another department's interpretation of the Constitution.

Jackson subscribed to a broad construction of presidential authority at the same time that

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he sought to restrain the expansion of federal power. He used the veto power more often, and exercised more control over subordinate administrative officials, than any of his predecessors. He used the authority of his office to effectuate the removal of Native Americans to territories west of the Mississippi River. Although always attentive to the impact of the federal government's actions on the states, Jackson did not favor nullification or secessionism. When South Carolina declared a national tariff void, Jackson denied that states had such power and threatened to send troops to enforce the national law.

If Jackson combined his popularity and powers to advance his reformist agenda, it is possible to point to popular Presidents who have

been content to be preservationists. Dwight D. Eisenhower, a well-respected World War II Army general, exercised such restraint as Chief Executive that some historians have viewed him as a “do-nothing” President. His restraint reflected a political philosophy that valued individual freedom, minimal government control of the economy, and a national government of limited aims. His first message to Congress included a recommendation that \$5 billion be cut from the budget submitted by the departing Truman Administration. His reservations about extensive national involvement in housing, education, and agriculture also extended to civil rights. He repeatedly declared his desire to avoid using federal troops to enforce the Supreme Court’s decision in *Brown v. Board of Education* (1954).

Eisenhower valued “partnership” and collaboration both with members of Congress and with state officials.

If Eisenhower did not seek to extend the powers of the national government or the presidency, he also did not avoid using those powers when necessary to protect national interests. He supported the St. Lawrence Seaway project that linked the Atlantic Ocean with the Great Lakes and proposed substantial improvements in the national highway system. While he believed the states were responsible for managing the everyday affairs of the people, he would not tolerate civil unrest or disrespect for the Constitution and decisions of the courts. Citing his constitutional duty, he sent federal troops to Little Rock, Arkansas to enforce school desegregation. Once the initial debate over the Brown decision settled down, he proposed a federal civil rights bill in 1956 that focused on voting rights, and called for the creation of a civil rights commission and a Civil Rights Division in the Justice Department. Eisenhower’s vision

was of an orderly and respectful America, where all persons were treated as equals and given an opportunity to control their own destiny.

By contrast with Eisenhower, President John Kennedy subscribed to a progressive political philosophy when it came to govern-



President John Kennedy subscribed to a progressive political philosophy when it came to government involvement in areas such as education, housing, and the economy.

ment involvement in areas such as education, housing, and the economy. Also in contrast to Eisenhower, Kennedy boldly announced in his Inaugural Address that his presidency marked a new era in American history (“the torch has been passed to a new generation of Americans”). An ambitious legislative program matched the high-toned rhetoric of his inaugural address and speeches to the American people in 1961 and 1962. A coalition of Southern Democrats and Republicans, however, kept his legislative successes to a minimum. He succeeded in setting ambitious goals for the space program and securing passage of important housing and employment bills, but his education and medicare legislation stalled and he was hesitant to propose new civil rights initiatives. Kennedy was not averse, however, to using executive orders to secure important domestic objectives and he gave Robert Kennedy, the Attorney General, the go-ahead to use the powers of the Justice Department to challenge segregationist

practices. The man-on-the-moon program, the Peace Corps, and the far-reaching civil rights and Medicare/Medicaid legislation that followed his assassination, were symbolic of the new social order that he envisioned at the time of his inauguration.

The Chief Executive role has undergone a dramatic transformation since Washington's presidency. The democratization of the election process has encouraged Presidents to appeal to their popular mandate, and not merely to the words of the Constitution, when justifying personal agendas. At the same time, the American people expect more from the national government today than at the time of the Founding. These expectations have inflated not only the responsibilities, but also the powers of America's Chief Executives. One thing, however, has not changed: the strength and respectability of James Madison's constitutional system continue to depend on the exercise of good judgment and self-restraint by all public officials, including Presidents.

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