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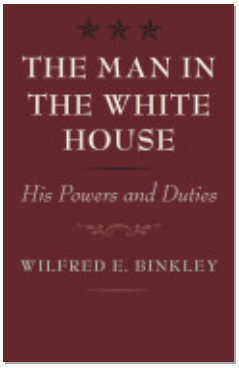
IX: The Chief Executive



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* IX

The Chief Executive

* NO DISTINCT executive organ, on a continental scale, was created when, in 1775, the responsibility for conducting the collective concerns of the thirteen Revolutionary states suddenly fell into the lap of the rather astonished Second Continental Congress, which had convened in May, 1775, for no such purpose. By sheer necessity the Congress assumed charge of the war and the other common concerns of the thirteen colonies still in uncertain transition into states. In so far as any semblance of the executive function was provided for at all, it was at first performed by *ad hoc* executive committees, a new one for each resolution or purpose until there were more than a hundred of them. The extraordinarily able John Adams is said to have served on ninety of these executive committees. Here, in embryo, was what, in due time, evolved into the national executive of the United States. Decade by decade usage, statute, even the personality of energetic presidents have conspired to concentrate executive responsibility at a precise point until President Truman could epitomize the culmination of the trend by the motto on his desk, "The buck stops here."

Within a month of the convening of the Second Continental Congress the transition of some of the executive committees into

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permanent boards had begun. The first of these, a Board of War and Ordinance, was appointed with John Adams at its head.[1] In December, 1776, Congress appointed a committee "to prepare a plan for the better conducting the executive business of Congress, by boards composed of persons, not members of Congress."[2] By 1778 the Treasury Office of Accounts had evolved out of the Finance Committee of Congress, and a similar transition resulted in several other boards. Then in 1781 Congress carried this evolution from committees to boards one step further to the establishment of four executive departments: Foreign Affairs, War, Finance, and the Marine. The framers of the Constitution eventually crowned this evolving executive system by the creation of the chief executive. The President and the First Congress under the Constitution enacted statutes re-establishing the first three of the four executive departments initiated by Congress under the Articles of Confederation—Foreign Affairs (soon to be renamed Department of State), War, and Treasury.

A fundamental purpose of the framers of the Constitution was the replacing of the feeble system of the Confederation with a vigorous government provided with an adequate executive. The imposing list of powers delegated to Congress in the eighteen clauses of the eighth section of Article One of the Constitution might have been but a futile gesture with only the shadowy executive provided by the Continental Congress. Hamilton expressed the consensus of the framers when he wrote in Article 70 of the *Federalist*,

> Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the

[1] George Bancroft, *History of the United States from the Discovery of the Continent* (1885), IV, 425.

[2] *Journal of the Continental Congress*, VI, 1041.

> community against foreign attacks. It is not less essential to the steady administration of the laws. . . .A feeble Executive implies a feeble execution of the government. A feeble executive is but another phrase for bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

There epitomized is the philosophy of the Founding Fathers of the Constitution with respect to the executive, a conceptual pattern certainly not less valid in the atomic age than in the infancy of the republic.

"He shall take care that the laws be faithfully executed"[3] is the characteristic economy of phrase with which the Constitution makes the president the chief executive of the United States. Let it be noted that the president is not directed literally to enforce the law himself. No president has ever done this, although Andrew Jackson may have been preparing to do so just before the Nullification impasse of 1832 was resolved by Clay's Compromise of 1833. The chief executive's responsibility is, of course, to see to it that the execution is done by those invested with that responsibility. The president's authority for seeing to the faithful execution of the laws derives from five sources: first, those powers conferred directly by the second article of the Constitution, which concerns the executive; second, the specific executive powers created by acts of Congress and vested in the president; third, the discretionary powers vested by statute in the numerous executive agencies of the national government; fourth, the power to enforce criminal statutes; fifth, the nondiscretionary or ministerial duties vested in the executive agencies concerning the performance of which the office has no choice and which it is the duty of the president to have faithfully performed.[4]

The executive powers enumerated in the preceding paragraph are all based squarely on specific authorization by the supreme

[3] Art. 2, sec. 3.

[4] E. S. Corwin (ed.) *The Constitution of the United States: Analysis and Interpretation* (1953), pp. 475–76.

law of the land, that is, upon the Constitution, treaties, and Federal statutes. But does the president possess still other executive powers than these? Can it be that the president has executive powers inherent in the very nature of his office, in short, prerogative power, such as an English monarch possesses? Alexander Hamilton evidently thought so and expounded it over the pen name, "Pacificus," in a controversy that arose in 1793 concerning President Washington's Proclamation of Neutrality in the war that had broken out between England and France. American citizens, sympathetic with France, even Jefferson and Madison, condemned the Proclamation as a violation of the Treaty of Alliance with France made during the Revolutionary War and moreover as a usurpation by the President of the legislative power of Congress to declare war.

Hamilton plunged into the constitutional controversy, making much of the argument that the Constitution is quite specific and detailed as to the powers of Congress, limiting them specifically to the "legislative powers herein granted,"[5] whereas it vests the executive power, without qualification, in the president by the sweeping clause, "The executive power shall be vested in a President of the United States of America."[6] "The general doctrine of our Constitution then is," Hamilton argued, "that the executive power is vested in the President, subjected only to the exceptions which are expressed in the instrument." Hamilton also pointed out that the president's oath of office pledges him to "execute the office" not just "the law."[7]

Half a century after Hamilton's investing the president with prerogative power through constitutional exegesis, a keen exponent of the dogma of state rights, Able P. Upshur, President Tyler's Secretary of State, made a similar observation as to presidential

[5] Art. 1, sec. 1, clause 1.

[6] Art. 3, sec. 1, clause 1.

[7] Alexander Hamilton, *Works* (Lodge, ed., 1885), IV, 142–44.

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power with the difference that he deplored what Hamilton approved in the vagueness of the Constitution:

> The most defective part of the Constitution beyond all question [wrote Upshur] is that which relates to the executive department. It is impossible to read that instrument without being forcibly struck with the loose and unguarded terms in which the powers and duties of the President are pointed out. So far as the Legislature is concerned, the limitations of the Constitution are perhaps as precise and strict as they could be safely made; but in regard to the Executive, the Convention seems to have studiously selected such loose and general expressions as would enable the President, by implications and construction either to neglect his duties or to enlarge his powers.[8]

More than a century after Hamilton's broad interpretation of executive power, President Theodore Roosevelt, apparently unaware of Hamilton's views on the matter, expounded his "stewardship theory of the executive power" of the president by his "insistence upon the theory that the executive power was limited only by specific restrictions appearing in the Constitution or imposed by Congress under its constitutional powers . . . . I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it."[9]

The loose interpretations of presidential power by Alexander Hamilton and Theodore Roosevelt may be dismissed as merely expressions of personal opinion rather than authoritative expositions of the law of the land. The courts have never accepted quite so much. In 1916 former President William Howard Taft, then a professor of law at Yale University, attempted to express the then prevailing judicial consensus on the scope of the executive power of the president. "The true view of the Executive functions," he wrote, "is that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power

[8] *A Brief Enquiry into the True Nature and Character of Our Federal Government*, (1840), pp. 116.

[9] *Autobiography* (1913), p. 389.

or justly implied and included within such grant as proper and necessary."[10] However this did not express Taft's final interpretation, because ten years later in the Myers case he found implied power of the executive in the opening clause of the third article of the Constitution, "The executive power shall be vested in a President of the United States," the very clause from which Hamilton had derived presidential prerogative as early as 1793.

A full decade before Theodore Roosevelt publicized his stewardship theory of the presidency, he had already given a demonstration of it. In May, 1902, the accumulated grievances of the anthracite miners of Pennsylvania culminated in what turned out to be a historic strike. Roosevelt could have dismissed the matter as none of his responsibility until the Governor of Pennsylvania would ask for federal troops to restore order. But before the strike was a month old, he had sent his Commissioner of Labor to investigate and make recommendations, which neither side would accept. The East depended on anthracite coal for heating purposes, and if the strike continued into the autumn and winter, intense suffering would result.

Roosevelt got the operators and labor leaders together in a White House conference, where the conduct of the leading operator was so offensive that the President said later, "If it wasn't for the high office I hold I would have taken him by the seat of his breeches and the nape of the neck and chucked him out the window." Roosevelt was seriously considering sending the army to seize the mines and under it have the miners get out the coal, when he broke the impasse by sending Secretary of War Elihu Root to confer with the New York financial giant, J. P. Morgan, under whose influence the operators agreed to arbitrate. But in order to protect the miners' rights, Roosevelt saw to it that the arbitration board included a Catholic bishop and a union official, whom he palmed off as an "eminent sociologist," which the agreement to arbitrate had required.

[10] *Our Chief Magistrate and his Powers,* (1916), pp. 139–40.

The "stewardship theory" of the presidency proved "prophetic of developments in a field Theodore Roosevelt had staked out for its application—that of industrial relations."[11] Nothing so drastic as Roosevelt's methods in 1902 have been used since, but in the next forty-five years there were 26 instances in which a president intervened in a similar way in industrial crises by other than a purely police capacity, that is instead in an extralegal and extraconstitutional manner, which is the essential nature of the stewardship theory of the presidency.[12] The stewardship of the presidency must now be considered an established usage of the office.

In 1936 the Supreme Court of the United States decided a case in which it sanctioned an area of executive power inhering in the office of the president. Congress had, by joint resolution, authorized the President to lay an embargo on the sale of arms and munitions to two South American republics, Bolivia and Paraguay, then at war with each other, if he found that such an embargo might contribute to the restoration of peace between them. The act prescribed fine and imprisonment for violators of the President's proclamation. President Franklin Roosevelt, in accordance with the resolution, issued a proclamation laying such an embargo, which a corporation violated by selling machine guns to Bolivia. When prosecuted, the corporation contended that the delegation of authority by Congress to the president had given him "unfettered discretion" and that the delegation was controlled by no standard, which the courts had only recently insisted upon in congressional delegation of its power. This defense was rejected by the Supreme Court. Speaking through Justice Sutherland the majority declared that "the investment of the federal government with powers of external sovereignty did not depend upon affirmative grants of the Constitution." As a sovereign nation the United States possesses, with respect to foreign relations, all the powers other sovereign nations enjoy, and this power is not dependent on delegations by the clauses of the

[11] E. S. Corwin, *The President: Office and Powers* (1957), p. 153.
[12] *Ibid.*, pp. 408–409.

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Constitution. In brief here is an area of inherent national power. Justice Sutherland quoted the dictum of Representative John Marshall uttered in a debate in Congress, March 7, 1800. "The President is the sole organ of the nation in its external relations and its sole representative with foreign nations."[13] This meant that, in delegating the power of the joint resolution of Congress concerned in the case being considered by the Court, Congress needed to prescribe no standard as it must in the domestic field of specified powers of Congress. In the field of foreign relations not only Congress but even the president has inherent powers.[14] In one area then the prerogative dogma of Hamilton had been judicially vindicated.

As a general rule only Congress can authorize or create the offices and agencies available to the president in seeing to the faithful execution of the law. Until late in the nineteenth century it had been generally assumed that there could be no exception to this rule. But in 1889 there occurred a dramatic episode that determined the matter otherwise. Stephen J. Field, whom Lincoln had appointed an Associate Justice of the Supreme Court, had developed a capacity for survival in the turbulent days of the California gold rush, having acquired, among other accomplishments, the subtle art of shooting from the pocket. He had promptly accepted challenges to duels only to have challengers withdraw on second thought. In 1888, Justice Field in the face of a threat of assassination decided a case against Althea Hill, who had filed a will found to be a forgery. For outrageous misconduct in court, she and her attorney, David S. Terry, who soon afterward married her, were held for contempt by Justice Field. Terry declared he would shoot Field if he returned to California for his next session of circuit court. Thereupon President Benjamin Harrison acting through his Attorney General, detailed a United States deputy marshall, Neagle, to accompany and protect Justice Field, to the

[13] *Annals*, 6th Cong., col. 613.

[14] U. S. *v.* Curtis-Wright Export Corp., 299 U. S. 304 (1936).

utter disgust of the latter, who was accustomed to taking care of himself.

Upon Field's return to California on circuit court duty, Terry made a murderous attack upon him, but Marshall Neagle was quicker on the trigger and killed Terry. Neagle was arrested at once by a California sheriff and charged with murder. The California prosecutor argued before the court that, since no act of Congress had authorized the President to appoint Neagle, he was not an officer but merely a private citizen and therefore guilty of murder. When the case, on appeal, reached the Supreme Court of the United States, it was decided that the president, in the exercise of his obligation "to take care that the laws be faithfully executed" may, without statutory authorization, appoint an officer to protect the life of a Federal judge.[15] Thus the president's duty is not restricted to "the enforcement of Acts of Congress or of treaties of the United States according to their express terms," but includes "the rights and obligations growing out of the Constitution itself, our international relations and all the protection implied by the nature of the government under the Constitution." That much authority of the president then inheres in the very nature of the office of chief executive. Hamilton would have applauded the decision of the case *in re* Neagle.

Let no one assume from the outcome of the Neagle case that the president is not limited by statute law. During the undeclared war with France in 1798–1799 Congress enacted a Nonintercourse Act authorizing the seizure of American vessels sailing *to* France or its dependencies. President Adams directed the captains of armed vessels "to be vigilant that vessels really American but covered by Danish or other paper bound to or from French ports be intercepted. Under these orders the *Flying Fish*, a Danish vessel, was captured bound *from* France while the law had authorized interception only of vessels sailing *to* France. The naval captain was sued by the owners of the captured vessel for damages

[15] *In re* Neagle, 135 U. S. 1 (1890).

and plead in defense that he was acting under orders of the President. In due course the Supreme Court of the United States had to answer the question: "Will the orders of the President misconstruing the Act of Congress release from damages the officer obeying them." The Court decided unanimously that "the instructions cannot . . . legalize an act which without the instructions would have been a plain trespass."[16] This principle that the president cannot legalize what is otherwise a violation of law is just as valid today as it was a century and a half ago when Marshall gave the decision of the Court. In fact, Justice Thomas C. Clark based his opinion against the legality of President Truman's "seizure" of the steel mills in 1951 on the very decision of Little *v.* Barreme[17] just quoted.

Even a more striking decision emphasizing the fact that the president, in his capacity of commander-in-chief, cannot legalize what is not already legal is that of U. S. *v.* Lee. In the midst of the Civil War, Congress had ordered confiscated the estate of General Robert E. Lee, the present site of Arlington Cemetery, for failure to pay taxes due on it. After General Lee's death his heirs took legal steps to recover the property. Their action took the form of ejection of the military stationed with troops on the estate under orders of the President. The Attorney General of the United States found himself unable to prevent the ejection of the officers despite the fact that they were there under orders of the Commander-in-Chief. The Attorney General endeavored to prevent suit on the ground that the sovereign cannot be sued without its consent. The Supreme Court however chose to consider the action as one against persons. "No man in this country is so high that he is set above the law," said the Court. "No officer may set that Law at defiance with impunity. All officers of the government from the highest to the lowest, are creatures of the law and are bound to obey it."[18] The Attorney General failed also because of

[16] Little *v.* Barreme, 2 Cranch 170 (1804).
[17] 343 U. S. 579, 660, 661.
[18] U. S. *v.* Lee (1882).

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the constitutional provision, which the act of Congress authorizing the confiscation explicitly recognized, namely that "no attainder of treason shall work corruption of blood except during the life of the person attained."[19] The decision of the Court signified once more that not even the President himself acting in his capacity of commander-in-chief can authorize anyone, in this case an army captain, illegally to occupy private property without the person so directed being subject to penalty for trespass.

In 1952 President Truman, in order to avert a threatened strike of steelworkers, which he believed would interfere with national defense in the midst of the Korean War, issued an executive order to the Secretary of Commerce to seize and operate most of the steel mills of the country. He did this upon the advice of the Attorney General under the assumption that the Constitution and the laws had vested such powers in the president. The President reported his action to Congress conceding at the same time that it had the power to supersede his executive order. In the legal maneuvering that followed, the issue reached the Supreme Court of the United States, which decided by a vote of 6 to 3 against the legality of the President's order. Justice Black, who delivered the opinion of the Court, reasoned that no statute authorized the President to take possession of the property. In framing the Taft-Hartley Act Congress had refused to authorize such action. Such authority, the Court held, could not be derived from the aggregate of the president's executive powers nor his powers as commander-in-chief. The powers the President here sought to exercise in law-making the Constitution vests in Congress alone.[20]

So far as emergency powers of the president are concerned the Supreme Court decision in the steel-seizure case induced about as much controversy as conviction. The so-called "emergency power" of the President apparently constitutes a field of authority he may exercise unless Congress limits it by legislation. Now

[19] Art. 3, sec. 3, clause 2.
[20] 343 U. S. 579.

Congress had, by the Taft-Hartley Act of 1946, prescribed a procedure that President Truman by-passed. In the opinion of Professor Robert Dishman, "Considering the bullheadedness of both sides and the cumbersome administrative machinery which had been set up to handle the stabilization and mobilization problems, I believe that a strike was inevitable and that therefore nothing would have been gained by invoking the Taft-Hartley Act."[21]

Professor Glendon Schubert was convinced that the majority opinion of the Court did not at all challenge Truman's declaration of emergency when he seized the steel mills in 1952 but simply ignored this fact of emergency, which led Schubert to conclude, "In any event that opinion of the Court is *sui generis*."[22] Whether the steel-seizure decision represents finality or not, Professor Corwin observed that it was "unquestionably contradicted by a long succession of presidential pioneering in territory eventually occupied by Congress."[23] The area remains vast in which the president may act in order "to take care that the laws be faithfully executed" and to perform his duties as commander-in-chief.

The "convenient vagueness" of the Constitution has required judicial clarification in scores of court decisions on the executive powers of the president. Some of the prescriptions of the Constitution, however, are so clear as to be self-explanatory. Certainly no one but the president can "grant reprieves and pardons for offenses against the United States."[24] He cannot delegate to anyone else his function as commander-in-chief. It is only he who "shall receive ambassadors and other public ministers and commission all officers of the United States."[25] He alone can veto acts of Congress. It is when the Constitution vests in the president the duty to take care that the laws be faithfully executed and when acts of Congress create and vest in him specific duties that he may

[21] E. S. Corwin, *The President: Office and Powers* (1957), p. 410.
[22] *The Presidency and the Courts* (1957), p. 357 n.
[23] *The President: Office and Powers* (1957), p. 155.
[24] Art. 2, sec. 2, clause 1.
[25] Art. 2, sec. 3.

exercise his authority as chief executive through an appropriate department whose act, if performed within the law, then becomes the president's act.[26] Moreover the president may not, without statutory authority, delegate a discretionary duty so that it will not be his act but that of another.[27]

But if the acts of public officials who directly enforce the law are legally the president's acts, how can he be assured that they are such dependable subordinates that he is willing to be held responsible for their acts? The First Congress wrestled with this very problem in a long debate. It came down to the question as to whether the Constitution intended that the Senate, which by precise prescription shared in appointing, would by implication share likewise in the removal power of officials? No action was taken by Congress on the question then, and that very inaction "produced the *net result* that the President alone has the power to remove at pleasure all superior officers, at least until Congress positively undertook to regulate their tenure."[28] The assumption underlying this conclusion is, as noted above, that the president cannot logically be held responsible for the acts of his appointees unless he has the sole power to remove them.

The first great test of the power of the president to remove his appointees occurred in 1832 when President Andrew Jackson removed Secretary of the Treasury William J. Duane because he would not comply with the President's policy of removing Federal deposits from the Bank of the United States. By removing Duane, Jackson raised the question as to whether this could be legally done in the face of the statute[29] that vested discretion solely in the secretary of the treasury. Jackson stood his ground on the removal in the face of an unprecedented uproar in the Senate and argued "that the entire executive power is vested in the President," that the power to remove those officers who are to aid him in the

[26] Wilcox *v.* Jackson ex. dem. McConnel, 13 Peters, 498 (1839).
[27] Williams *v.* U. S., *1 Howard*, 290, 297 (1843).
[28] James Hart, *The American Presidency in Action, 1789* (1948), p. 247.
[29] *U. S. Statutes at Large*, III, p. 274.

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execution of the laws is an incident to that power, and that the secretary of the treasury was no exception. Not until nearly a century later was the question judicially settled. President Wilson had removed a postmaster before the end of the four-year term for which he had been appointed under a statute of 1876 that had made removal specifically subject to the consent of the Senate, which President Wilson did not even pretend to seek. Ultimately the question of the legality of the removal reached the Supreme Court, which sustained the President's action, and since then the absolute power of the president to remove executive appointees has not been judicially challenged.[30] Nor need the president give any reason whatever for the removal of such an official.[31]

Under his power to see to the enforcement of the law the president must inevitably interpret law preliminary to its enforcement. It cannot be maintained that the courts only have this power, for they cannot accept jurisdiction until a live case involving a question of law is brought before them by someone who insists he has been hurt by enforcement of the law. Nor is this presidential interpretation of law confined to executive orders and ordinances, that is, executive regulations or rules authorized or required by statute and having the force of law. In addition there are such matters as the order of the Attorney General in the Neagle case directing a United States marshal to accompany and protect the life of a threatened Justice of the Supreme Court. The

[30] Myers *v.* U. S., 272 U. S. 52 (1926).

[31] It should be noted that when Congress creates an agency to which it, under proper regulation, delegates quasi-legislative or quasi-judicial authority in order to carry out a congressional rather than an executive function, Congress may constitutionally restrict the removal power of the president to certain offenses. Thus when President Franklin Roosevelt removed William E. Humphrey from the Federal Trade Commission, the removal was held to be illegal by a unanimous Supreme Court. In the act creating the commission Congress had confined the President's power of removal to "inefficiency, neglect of duty, or malfeasance in office," none of which was assigned by the President as the reason for Humphrey's removal. Humphrey's Executors *v.* U. S., 295 U. S. at 602 (1935).

marshal in that mission "got his man." Though no law had authorized the appointment of the marshal, the "order" was nevertheless held by the Supreme Court to be "a law of the land." But long before that the Attorney General had to decide that the appointment was constitutional.

In seeing to the enforcement of the laws the president is not at all limited to employing ordinary personnel of the judicial and executive branches, but may also employ armed forces. The first large-scale challenge of Federal authority was made in 1794 by the whisky rebels of western Pennsylvania, who rioted against collection of the whisky excise. Resistance collapsed when President Washington mobilized and ordered against them 15,000 state militia, which Congress had authorized him to call into Federal service for such a purpose by legislation under the power granted it by the Constitution.[32]

If one of the whisky rebels of 1794 could have reappeared in the midst of the Little Rock desegregation crises of 1957, he would inevitably have wondered what had happened in the intervening 163 years to unsettle the matter apparently so decisively determined then in western Pennsylvania. Washington had taken decisive action in sending the "federalized" militia against the defiers of court orders—that is, the whisky rebels. There had been tarring and feathering then of Federal marshals who attempted to serve court writs on persons refusing to pay the whisky excise. In 1957 the Federal District Court in Arkansas had approved the Little Rock school board's program of gradual integration "with all deliberate speed" as the United States Supreme Court had directed May 31, 1955, and the District Court enjoined all persons from interfering. Nevertheless Governor Orval Faubus called out the Arkansas state militia or National Guard ostensibly to preserve order, but two days later under the Governor's order the militia was deliberately preventing integration. When the Federal judge,

[32] Art. 1, sec. 8, clause 15.

sitting in the district, granted an injunction against interference with integration, Governor Faubus withdrew the National Guard, and rioting against integration broke out in Little Rock. President Eisenhower, following the statutory provision in force since the Whisky Rebellion, issued the required proclamation commanding all persons obstructing justice to cease and desist and disperse. When the mob defied the President's proclamation, he ordered Federal troops into Little Rock and federalized the Arkansas National Guard, which deprived Governor Faubus of command of it. In calling the militia into Federal service no less than in ordering Federal armed forces to Little Rock the President was but following in the footsteps of Washington in 1794 and Lincoln in 1861 when Federal authority had been obstructed.

In 1808 Jefferson issued a proclamation ordering all officers having authority civil or military who shall be found in the vicinity of an unruly combination resisting enforcement of the Embargo Act to assist in suppressing the combination "by all means in their power, by force of arms and otherwise."[33] What Jefferson ordered would have constituted a *posse comitatus*, based upon common law by which a sheriff might summon the inhabitants of a county to suppress disorder and enforce law. It was a striking commentary of the late Henry Jones Ford on Jefferson's about-face on utilizing Federal power when his administration instead of Washington's or Adams' was employing it that "the enforcement act passed to sustain the embargo was a greater interference with the ordinary privileges of citizens than would have been necessary in the exercise of war powers."[34]

Specific statutory authorization of utilizing private citizens in the chief executive's "taking care that the laws be faithfully executed" was incorporated in the Fugitive Slave Act of 1850.[35]

[33] "Federal Aid in Domestic Disturbances," S. Doc. 209, 59th Cong., 2nd Sess., p. 51 (1907).

[34] *The Rise and Growth of American Politics* (1898), p. 132.

[35] *U. S. Statutes at Large*, IX, 453 ff.

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The Federal commissioners appointed to apprehend fugitive slaves were authorized "to summon and call to their aid the bystanders, or a *posse comitatus* of the proper county when necessary to ensure faithful observance of the clause of the Constitution referred to, in conformity with the provisions of this act."

It was under his duty to take care that the laws be faithfully executed that Lincoln, in 1861, employed Jefferson's conception of the *posse comitatus* by issuing his call for 75,000 state militia under the authority of the Act of 1795 for calling the militia into the Federal service. As Lincoln conceived it, the entire Union army constituted a gigantic *posse comitatus* summoned to suppress combinations obstructing the enforcement of Federal law. It was an augmented police force, and those who are puzzled because no declaration of war was ever made in 1861 need to be reminded that police are not expected to "declare war" in exercising their duties.

The Constitution provides that the United States shall protect each state "on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."[36] The long and harrowing economic depression of the 1870's led, in time, to railroad strikes so widespread and violent that nine governors called upon President Hayes for assistance. The use of Federal troops for suppressing internal disorder, other than resistance to Federal authority, was then unprecedented. President Hayes proceeded with his characteristic circumspection and, in consultation with his exceptionally competent Cabinet, arrived at judgments that established permanent precedents for similar later episodes. Among these precedents were the conclusions that the president can, when necessary, declare martial law, can insist upon formal constitutional requests from the state for Federal military aid, can issue proclamations in accordance with Federal statutes, and can make judicious use of troops under

[36] Art. 4, sec. 4.

Federal authority to preserve order and protect property but *not to break* the strike.[37]

In 1894 President Cleveland introduced a new pattern of the use of the military in civil disorder, in this instance, using Federal troops ostensibly to maintain the mail service and ensure free flow of interstate commerce but actually to restrain strikers seeking to force arbitration in a dispute with employers. The American Railway Union, acting in sympathy with striking Pullman-car workers, refused to handle trains that included Pullman cars, which action practically tied up passenger traffic in the United States. Without waiting for any application from the state legislature or the state executive of Illinois, as the Constitution requires in cases of domestic violence, and in the face of the vigorous protests of Governor John P. Altgeld of Illinois, President Cleveland dispatched Federal troops to Chicago.

> The actions of the President which were really the actions of his Attorney General Richard Olney [as Professor Rossiter correctly observed] were ill conceived, disconnected and thoroughly effective in breaking the strike.... At every point in the course of the strike and its suppression the wishes of the railroad officials who acted through the General Managers Association, found support in the federal government's action. Like Hayes, Cleveland intervened to restore public order. Unlike Hayes he accomplished this by judicially and physically breaking the strike.[38]

Whatever the merit or demerit of Cleveland's action in the Pullman strike, the issue was eventually resolved by a United States Supreme Court decision that "the entire strength of the nation may be used to enforce, in any part of the land, the full and free exercise of all national powers. The strong arm of national government may be put forth to brush aside all

[37] See Clinton L. Rossiter, "The President and Labor Disputes," *The Presidency in Transition* (The Journal of Politics), February, 1949, p. 97.

[38] *Ibid.*, p. 98.

obstructions."[39] No president since Cleveland has used the military in effect to break a strike, but they all have instead returned to the practice initiated by Hayes. In the anthracite coal strike of 1902 President Theodore Roosevelt resolutely refused the demand of the operators that he follow Cleveland in using troops to break the strike. On the contrary, after months of deadlock, Roosevelt was ready, if the operators had remained obdurate against arbitration, to use troops to seize and operate the mines in order to supply the fuel needed in the approaching winter. In 1907 President Theodore Roosevelt forced an unwilling Governor, who had deceived him into dispatching troops to Goldfield, Nevada, into policing his own state.

By mid-twentieth century the President's role in labor controversies that constituted national emergencies had evolved into an amalgam of legal authority plus sheer usage based upon the accumulating prestige of the presidency. In the Neagle case[40] Justice Miller had declared that there is a "peace of the United States" which is the basis of some of the president's unenumerated powers. This might justify a presidential title of "Protector of the Peace."[41] In his hectic first year as President just after World War II, Harry Truman spent unnumbered hours "writing labor messages to Congress, sponsoring labor management conferences, appointing emergency fact finding boards, sending personal pleas to strike bound union leaders, seeking injunctions from Judge Goldsborough, and seizing plants and whole industries threatened or paralyzed by work stoppages."[42] No wonder President Truman was led to say that "the principal power that the President has is to bring people in and try to persuade them to do what they ought to do without persuasion. That's what *I* spend most of my time doing. That's what the powers of the President amount to."[43]

[39] *In re* Debs, 158 U. S. 564 (1895).

[40] *In re* Neagle, 135 U. S., 1, 69 (1890).

[41] Rossiter, "The President and Labor Disputes," *The Presidency in Transition*, February, 1949, p. 94.

[42] *Ibid.*

[43] *New York Herald Tribune*, May 7, 1948, p. 16.

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Let it be noted that the president not only has the authority to enforce a law but also the discretion not to enforce it. When he chooses not to enforce a law, that settles the matter. No power under heaven could compel President Truman to apply sanctions of the Taft-Hartley Act to strikers when he decided not to do so, and the rage of his political foes against him for failing to do so was just so much wasted energy. Impeachment of the president has been out of the question since the folly of the Radical Republicans in 1868 in turning it against President Johnson. In any case, it is difficult to frame articles of impeachment sufficient to convict any president of "treason, bribery, or other high crimes and misdemeanors"[44] on the basis of his failure to execute his power as chief executive.

Even when the president is ready and eager to enforce the law, he may be frustrated by the inadequate means of enforcement provided by an indifferent Congress. For example, why had the consumers' interest in adequate enforcement of antimonopoly legislation never been quite satisfied? The answer is contained in the Report of the Attorney General of the United States for 1938, in which he reveals:

> It is a well known fact that the anti-trust laws have been ineffective in preventing combinations in restraint of trade... From 1914 to 1923, during which our system of mass production and vast corporative enterprise may almost be said to have come of age, the average of attorneys in the Anti Trust Division was only 18. With such a personnel regardless of what the formula of the law might have been, no practical results were possible.

This condition was typical of the understaffing of other agencies. So handicapped was the Food and Drug Administration by its meager field force that its objective became "A maximum

[44] U. S. Constitution, Art. 2, sec. 4.

of enforcement with a minimum of resistance."[45] Congressional jealousy of the presidency is fortified by strong constituent interests in the districts, which exert their influence to prevent maintenance of effective administrative apparatus for uniform enforcement of laws regulating business. Thus it can be said that, with respect to some matters, the power of the chief executive may be but the shadow of his authority. In no case can the hand of the chief executive be stronger than the forces in society that give him whatever support he may possess.

[45] E. P. Herring, *Public Administration and the Public Interest* (1936), Chap. IV.