

CHAPTER THREE

President Washington's Proclamation of Neutrality

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CONSTITUTIONAL INTERPRETATION, as a rule, tends to divide scholars, judges, and commentators between two camps: those looking to find some “original intent” on which to hang their hats and those wanting to “see into” the Constitution some principle that time, knowledge, and circumstances should now bring to the fore regardless of whether the founding generation would recognize it as belonging to the constitutional order they intended. But a striking exception to this split occurs when it comes to interpreting the powers of the presidency in the area of national security. Here, more than in any other area of constitutional disputation, one finds both defenders and critics of presidential decisions racing to find quotes, arguments, and precedents from the founding period to bolster their views on what the president should or should not do when it comes to foreign affairs and national security. This is even more salient when one thinks about the fundamentally altered position of the country in world affairs from 1787 to today. If there were ever a situation ripe for reading the Constitution as a “living” document, one would think this would be it. Yet, there is something about such a fundamental civic issue as war and peace that we are continually drawn back to the founding period for guidance. Indeed, few today would argue that we should jettison the framers’ allocation of the war and foreign affairs powers between the Congress and presidency.

Complicating these efforts, however, is the fact that the actual powers of the presidency were not widely discussed in the Constitutional Convention and the follow-on state ratification conventions. In Philadelphia, the overwhelming portion of the debate about the executive focused on working out the office’s structure—a plural or singular executive, the president’s tenure, and his mode of selection. Far less time was spent discussing

the meaning of the particular powers that came to be vested with the president. Even *The Federalist* is, from a constitutional lawyer's point of view, short on explication of the president's authorities and, arguably, not always clear in the few instances where those powers are discussed.

Naturally enough, this less-than-definitive record in the convention and ratification period leads one to look at the early precedents on the use of executive power. What decisions the first presidents made, what authorities they wielded, and how the other branches of government and the political opposition reacted to the use of executive power are seen as telling examples of what the Constitution's framers had in mind when they created the executive office. Hence, it is no surprise that those interested in divining the framers' intentions would look at Washington's handling of the first major foreign policy crisis under the new constitution — war in Europe and the issuance of the Neutrality Proclamation in 1793.

Yet, the examination of the debate surrounding Washington's proclamation has often generated more confusion than clarity, as scholars and commentators see not one, but two key framers — Hamilton and Madison — squaring off over the proper understanding of the president's constitutional powers. As this chapter attempts to show, however, there is more to the precedent than just the debate between Pacificus and Helvidius. Indeed, there is even more to that particular debate when examined more closely. This episode, taken as a whole, provides us a unique look into this earliest of important exercises of presidential power. Equally important, a thorough examination of this precedent also gives us a unique perspective on the possibilities and paradoxes of the exercise of executive power itself, touching directly on that core issue raised by Publius in *Federalist* No. 70, that “there is an idea which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government.”

The Crisis Unfolds

Whatever the United States' long-term advantage in being separated from Europe by the Atlantic Ocean, the immediate problem the nation faced in the wake of independence was encirclement by the colonial possessions of two imperial powers: Spain and Great Britain. Through its North American possessions in the west and in the south, Spain controlled

navigation rights on the Mississippi and, as such, had a significant say over the commercial life of Americans living west of the Appalachians. Spain also held Florida and was asserting claims over large areas of what eventually would become parts of Alabama, Mississippi, Tennessee, and Kentucky. Concerned about possible U.S. plans to expand to the west and south, Madrid was not above stoking secessionist fires among disgruntled American frontiersmen. To the north, Great Britain retained control over Canada. From there, the British provided assistance to Vermonters conspiring to rejoin the empire and, with trade and aid, supported the Indians of the Northwest Territory in their effort to impede American settlers from moving into the region. In the east, London had closed its West Indian ports to U.S. trade. And, in retaliation for the Americans' failure to carry out fully the terms of the peace treaty ending the Revolutionary War, Britain still manned strategically placed forts on U.S. soil in the Northwest Territory.

Accordingly, before the United States could enjoy its splendid isolation from Europe and the world's great powers, it first had to address its encirclement in North America. But it had to do so, if possible, without getting involved in a war that it could not afford at this stage in its development. For American statesmen of the time, the central difficulty was that Great Britain, the country that posed the greatest threat to the United States, was also the nation's largest trading partner. And it was on the back of that trade—and the federal revenues it generated—that the new government's plans for the country's fiscal stability and commercial prosperity rested.

Further complicating America's security were the turmoil and wars brought about by the French Revolution. Initially, most Americans were favorably disposed toward events in France, believing that the establishment of a second liberal republic in the world might lesson the United States' own international isolation. In the years following 1789, however, American public opinion began to divide as the revolution took on a more radical cast and the French regime grew increasingly unstable. The division was essentially between those who retained some hope for what the revolution might eventuate in and those who dismissed it for what it had become.

The split in American opinion largely mirrored, and became a partisan touchstone for, the division between the Federalists, who supported

Secretary of Treasury Alexander Hamilton's London-centric fiscal and commercial policies, and the emerging party of Democratic-Republicans, led by Secretary of State Thomas Jefferson and Congressman James Madison, who saw closer ties to France as a means to break the Anglophilia they thought animated the Washington administration's policies. For Republicans, it was particularly significant that America's only treaty-based alliance was with France. Two treaties had been signed in 1778 with the *ancien régime*: a Treaty of Amity and Commerce and a Treaty of Alliance.¹ Under the terms of the latter, the United States had committed itself to defending France's West Indian possessions in a time of war.

"Strict Neutrality"

Through this maze of strategic interests, treaty obligations, and domestic politics, it was not evident that the United States could stay clear of war. Matters were coming to a head in 1792. While France had suffered a spring and summer of disastrous military campaigns in its war with Austria and Prussia, the autumn brought a sudden reversal of fortune with success on the battlefield and the conquest of the Hapsburg-ruled Netherlands. Flush with this success, the French government announced in November its willingness to support revolutionary efforts outside of France and promised assistance to any people trying to "recover their liberty" by toppling their monarch. Two months later, France beheaded its own king, Louis XVI. Then, on February 1, 1793, Paris formally declared war against its remaining monarchic neighbors: Spain, Great Britain, and Britain's ally, the Netherlands.

Word of these events made their way slowly across the Atlantic. By early April, Secretary of State Jefferson was convinced that the reports of a general war in Europe were true and so wrote the president at Mount Vernon. Washington responded with notes to Jefferson and Hamilton, saying he was canceling his plan to stay in Virginia for the month and would make his way back to Philadelphia immediately. In his response, the president made it clear that he was especially worried that American ship owners and seamen would find the opportunity provided by the war to make large sums of money by privateering for either France or Great Britain too attractive to resist. He insisted that the cabinet give prompt

attention to determining what measures were needed “to prevent” U.S. citizens “from embroiling us with either of those powers.” His goal, he wrote, was to establish a policy of “strict neutrality” between London and Paris.²

As promised, Washington hurried back to Philadelphia, arriving on Wednesday, April 17. The Second Congress had adjourned a month before and the Third Congress was not scheduled to meet until December. The day after his return, Washington circulated to his cabinet a list of thirteen questions answers to which, he indicated, would form “a general plan of conduct for the executive” in addressing the crisis at hand. On Friday, Washington and his cabinet met. It was “agreed by all” that a proclamation should be issued by the president “forbidding” U.S. citizens from undertaking any activities that might undermine U.S. neutrality between the two powers. Prepared by Attorney General Edmund Randolph, the proclamation declared that it was the United States’ intention to “pursue a conduct friendly and impartial towards the belligerent powers.” Washington signed and issued the proclamation the following Monday, April 22.³

Interpreting the Proclamation

Despite the unanimity within Washington’s cabinet over the desirability of issuing the proclamation, questions immediately arose about the proclamation’s precise character and, in turn, the president’s authority to issue it.

Many Republicans initially interpreted the proclamation as a binding declaration of U.S. policy that, they also believed, exceeded the president’s constitutional powers. Madison complained to Jefferson that the proclamation’s “unqualified terms” established America’s position as one of “unconditional neutrality,” a position that seemed to ignore the country’s existing treaty obligations with France. By “express articles,” the United States had guaranteed, Madison argued, French possessions in the West Indies. Yet, with his proclamation the president had unilaterally determined that the United States was not bound to guarantee French possessions and would not go to war to protect them. Madison did not think this was a matter the president could legitimately determine on his own. The “right” to choose between “war and peace,” he wrote Jefferson, was “vested in the Legislature” by the Constitution.⁴

Essays appearing in the Republican-leaning *National Gazette* in May and the early part of June 1793 made similar points. The president had assumed kingly powers, it was argued. Not only had Washington annulled existing treaty obligations on his own, he was also threatening, without the benefit of a duly-enacted law, criminal proceedings against U.S. citizens exercising their “sacred rights” as free individuals to assist the French.⁵

It was in response to these public attacks that Secretary of Treasury Alexander Hamilton set out to defend both the president’s authority to issue the proclamation and the wisdom of doing so. Writing under the pseudonym “Pacificus,” Hamilton penned seven essays that appeared in Philadelphia in the *Gazette of the United States* from the end of June through late July. Pacificus argued that the president had in fact issued a formal and binding “Proclamation of Neutrality,” that he was within his constitutional powers to do so, and that, for solid reasons of state, the United States was not bound by its treaty with France to defend its island possessions from attacks by Great Britain.⁶ The heart of the constitutional defense is found in the first and longest essay: Article II of the Constitution vests “the executive power” in the president, and this authority includes not only the power to execute the laws but also (following the analysis of the executive power found in the writings of Locke, Montesquieu, and Blackstone) the “federative power” to manage a country’s foreign affairs.⁷ And, although the Constitution admitted exceptions to the executive power by giving Congress the right to declare war and the Senate a say in making treaties, these were merely exceptions to the wider compass of executive power and were not to be viewed as anything but. Accordingly, Pacificus argued, it was Washington’s constitutional prerogative, as the executive, to interpret and determine the country’s obligations under its existing treaties.⁸ In the six essays that followed, Pacificus set about cataloguing the arguments that justified Washington’s determination that, despite the terms of the treaty with France, the United States was not bound to become “an *associate* or *auxiliary* in the War.”⁹

Initially, then, both the defenders and critics of the proclamation interpreted it in a similar fashion: the proclamation was a formal declaration of U.S. policy that not only proscribed Americans from provocative activities but also announced to the world that the U.S. government believed

that it was under no obligation to defend France's West Indian possessions.

The proclamation's critics, however, faced a particular political problem. Despite the existence of considerable sympathy for France within the American citizenry, most Americans seemed to favor keeping the country out of war.¹⁰ As a result, Republican essayists often decried the fact that the administration was turning its back on France at a critical time but, then, typically, went on to suggest that American assistance need not include U.S. military involvement in the war.¹¹ In short, although the proclamation's critics disliked its reach and the assertion of executive authority it seemed to rest on, like the population as a whole they were largely in agreement with the proclamation's overarching goal.

Led by Jefferson, Republicans eventually attempted to square this circle by arguing that the proclamation was not in fact a formal "Proclamation of Neutrality." To his friends, Jefferson pointed out that the proclamation did not actually use the term "neutrality" and did not explicitly repudiate the treaty or the U.S. guarantee. Moreover, the United States had no military force capable of fulfilling the guarantee in any case. There was little chance, then, that France would force the issue by asking for American military help in protecting its possessions in the West Indies.¹² Jefferson's position was that there was no reason for the Republicans to concede that the proclamation had formally determined an answer to a question that had not, and likely would not, be raised.¹³

Having found a way to save, at least nominally, the alliance with France, Republicans could turn their efforts to contesting the nature of the precedent that Washington seemed to be setting with the proclamation's issuance. It was obvious that the president's decision to issue the proclamation—and do so without Congress's involvement—was an important precedent. The task at hand for Jefferson and the Republicans was to limit it by narrowing the grounds on which the president's action could be constitutionally justified. By mid-summer 1793, the issue was no longer the president's policy, but rather Hamilton's claims about what the president's actions meant constitutionally. It was with some urgency, then, that Jefferson wrote to Madison complaining, after the first three essays of *Pacificus* had been published, that "nobody answers him." If left unchallenged, "his doctrine will . . . be taken for confessed."¹⁴

With some reluctance it appears, Madison took up his pen in response.

Writing under the pseudonym “Helvidius,” Madison authored five essays.¹⁵ The first was published in late August and the last in mid-September. Ignoring everything but Pacificus’ claims regarding the nature of the president’s “executive power,” Helvidius argued that the president’s essential function—his “natural province” as the official vested with “the executive power”—is “to execute laws.”¹⁶ From this it follows that Congress’s power to declare war cannot be read as an exception to a general grant of executive authority when, according to Madison, that power is properly understood as limited in scope. In fact, the power to authorize war, along with the power to make treaties, is more akin to the legislative function of enacting laws than executing them. Hence, if Washington’s decision to issue the proclamation is to be justified constitutionally, it cannot rest on the exaggerated claims about the meaning of “the executive power.” Helvidius argues instead that it must rest on the implicit obligation of the president, as the nation’s chief executive, to maintain the country’s existing legal condition—in this case, a state of peace—until Congress has met and voted to declare war or not.¹⁷

Under the Constitution, as Helvidius reads it, power over war and peace lies with Congress and it is the president’s duty, given the limited reach of “the executive power,” not to infringe on the exercise of Congress’s prerogative.¹⁸ Properly understood, Washington’s decision to issue the proclamation was an example of executive deference, not presidential prerogative. The proclamation was not establishing new policy; rather, it was keeping the nation at peace until Congress determined otherwise.¹⁹ Hence, the precedent being set by the proclamation’s issuance was, under Helvidius’s reading, considerably different from what Pacificus had claimed.

As for the president himself, Washington never explicitly clarified what his own views were about the proclamation’s reach or the constitutional grounds for issuing it.²⁰ On the one hand, in his correspondence Washington was more likely than not to refer to the proclamation as the “Proclamation of Neutrality,” terms suggesting a broad reading of what he had done.²¹ On the other hand, when it came time to inform Congress in his “state of the Union” address in December 1793 of what he had done, he described the proclamation as “a declaration of the existing legal state of things” and noted that it was within Congress’s power “to correct, improve, or enforce” the rules subsequently issued by him in carrying out the proclamation.²²

From the latter, Madison biographer Irving Brant has concluded that Washington's address to Congress . . . left no doubt of the effect of Madison's reply to "Pacificus." Jefferson, who wrote the passage on foreign affairs, was able to describe the neutrality proclamation merely as a declaration of the legal state of things, designed to prevent Americans from engaging in hostile acts. This was the same as saying that Hamilton ("Pacificus") had no warrant for calling it a denial of future obligations under the treaty of France.²³

The House of Representatives' reply, which Madison helped craft, attempted to seal this interpretation by declaring that "the maintenance of peace was justly regarded as one of the most important duties of the Magistrate charged with the faithful execution of the laws" and, thus, the proclamation's defense of "the existing legal state of things" was an appropriate measure taken by the president.²⁴

Brant's reading of this exchange, however, is not definitive. For one thing, the Senate's response to the president's message was different from that of the House. The Senate described the proclamation as having declared "the disposition of the nation for peace . . . to the world," suggesting a somewhat broader understanding of what the president had done.²⁵ Moreover, Washington's use of the phrase "existing legal state of affairs" and his stated deference to Congress's right to pass new legislation changing what he had done were not at odds with the views of any of his Federalist defenders, including Pacificus. No Federalist defender of the president denied Congress' potential role in regulating these matters.

Even though Pacificus believed it "advisable" to provide a "broad and comprehensive" constitutional justification for the proclamation's issuance, even he argued at the end of the first essay that it was not "absolutely necessary to do so." It is "entirely erroneous" that the proclamation's critics have "represented [it] as enacting some new law." Seen within the context of existing U.S. treaties (including a peace treaty with Great Britain) and the law of nations, Pacificus argues that the proclamation "only proclaims a fact with regard to the existing state of the nation, informs the citizens of what the laws previously established require of them in that state, & warns them that these laws will be put in execution against the infractors of them." Accordingly, Washington's duty

under the Constitution to execute the laws was, *Pacificus* claims, sufficient to justify what he had done. In short, Washington's description of the proclamation as "a declaration of the existing legal state of things" was one both Republicans and Federalists could agree on.²⁶

This last point is significant. The initial reaction to Washington's proclamation was partisan and heated, with much of the heat directed at Washington personally. By late fall 1793, however, the partisanship had given way to general support for the policy of neutrality, if not the precise grounds to justify it. The president had been inundated by resolutions from around the country—from areas controlled by Federalists and Republicans alike—that praised both him and his policies. With this new unanimity in hand, and still concerned about the level of partisanship within and outside his administration, Washington might have concluded that the most politically prudent course was to justify the proclamation and the rules to carry it out in terms likely to generate the least debate. This was not the time to renew a fight. The Federalists were expected to lose control of the House in the next session of Congress, and Washington might well have thought it best not to put the new Congress in a mind to challenge him and his policies.²⁷ If this was Washington's stratagem, it was successful: both houses of Congress formally praised the president for the actions he had taken and, with minor exception, enacted into law the policies he had already put in place.

The Proclamation's Administration

Washington was never forced to make a final choice between the arguments of *Pacificus* and *Helvidius*, and he didn't. As divergent as the two sets of essays were on the fundamental question of the nature of "the executive power" vested by Article II, both provided the president with sufficient constitutional authority to issue the proclamation. And because Paris was unlikely to call on the United States to fulfill its pledge to protect France's American possessions, there seemed to be no issue on the horizon that might force Washington to abandon his silence and assert the proclamation's ultimate meaning. But the proclamation's significance as a precedent for the exercise of presidential power did not begin and end with its issuance. Between April 1793, when Washington signed the proclamation, and the following December, when the Third Congress

convened for the first time, the administration took a number of steps to ensure that the policy outlined in the proclamation was implemented. In carrying out the proclamation, the Washington administration exercised authorities that, in certain respects, revealed as much about the nature of the new executive office and its institutional capacity as the decision to issue the proclamation in the first place.

To start, shortly after Edmond Charles Genet, the new French ambassador, had arrived in America, news reached the capital that French warships and newly commissioned privateers had seized a number of British merchant ships as prizes. When the vessels were brought into American ports, it was learned that most of the captures had taken place close to U.S. shores. George Hammond, Great Britain's representative in the United States, immediately asked the administration to take the ships from French control and return them to their owners. Since the British ships had not been captured on the high seas as allowed by the laws of war, he argued that the seizures were illegal. The problem the administration faced, however, in responding to Hammond's demarche was that the United States had never set its maritime boundaries. What constituted "U.S. waters" had not been formally established. Pushed by the necessity of giving the British ambassador an answer, the administration, after a bit of deliberation, fixed the country's home waters at one sea league (three maritime miles) from shore. That determination then became the binding rule used to determine future disputes over captures and claims of illegal seizures.²⁸

In an effort to maintain the country's neutrality, the Washington administration was also determined to prohibit U.S. citizens from enlisting in the service of any of the belligerents.²⁹ Without the benefit of any guiding federal statute, and in the face of complaints that he was exercising "despotic" powers in doing so, the president outlawed Americans from joining in the fray: there would be no U.S. citizens serving on board French privateers, no U.S. citizens joining British-sponsored expeditions against French West Indian possessions, and no U.S. citizens involving themselves in French schemes to launch a military campaign from Kentucky aimed at the Spanish-held city of New Orleans.³⁰

But of all the decisions taken by the administration to implement the proclamation, perhaps the most significant was its determination to prohibit France and its ambassador from outfitting privateers in American

ports. Under the 1778 Treaty of Amity and Commerce with France, the United States had agreed to deny France's enemies that privilege. The treaty was silent, however, on the question of whether Paris could use American ports as a base from which to commission its privateers. Read one way, the silence could be interpreted as implying a French right to use U.S. ports for that purpose. Moreover, there was a matter of America's debt to France for allowing American naval captain John Paul Jones to use its ports to raid British shipping during the early years of the Revolutionary War and before France had formally sided with the United States. Nevertheless, the president and his cabinet were unanimous in the view that the treaty's prohibition against France's enemies did not, in turn, imply a positive right for France. Although the French government had some expectation that the American government might allow—or at least turn a blind eye to—the outfitting of French privateers from its ports, the administration consistently operated under the assumption that the policy of neutrality required denying Paris that privilege.³¹

Like the decision to fix the country's maritime boundaries, the administration's ruling on French use of American ports arose in response to cases that followed pretty quickly in the wake of the proclamation's issuance. By mid-summer 1793, Washington and his cabinet were convinced a more systematic and prescriptive approach to this and related questions was necessary. During the second half of July, the cabinet crafted a relatively comprehensive code ("Rules Governing Belligerents") that was intended to regulate the arming, repair, and equipping of vessels of the belligerent states in U.S. ports. Described as being "deductions from the laws of neutrality," the rules established, in effect, a kind of "administrative law of neutrality."³²

Implementing the proclamation was a complex and, at times, difficult task. But the most potentially explosive problem facing the administration came in the person of Genet, France's ambassador to the United States. Buoyed by the enthusiastic public reception he received upon his arrival in the United States, and misconstruing Jefferson's initial willingness to confide in him the comings and goings of cabinet politics, Genet was unwilling to accept the administration's decisions when he thought they conflicted with either French interests or what he believed French rights were under existing treaties. By summer, Genet was not only taking steps to challenge the substance of many of Washington's

decisions, but he was also questioning the authority of the president to make them. Again, acting unilaterally, the administration responded to Genet's actions, in one case, by revoking the privileges of the French consul in Boston and, finally, by requesting that the French government recall Genet himself.³³

These efforts to implement the proclamation and to request Genet's recall could have been constitutionally justified by the arguments of either Pacificus or Helvidius. For Pacificus, this authority naturally followed from "the executive power," understood broadly. For Helvidius, however, the president's power fell into his hands by a kind of constitutional "back door." In carrying out what Helvidius describes as an essentially ministerial role in maintaining the legal status quo, Washington was apparently authorized to wield authorities that were themselves not simply ministerial, nor minimal.³⁴ Between the goal of maintaining "the existing legal state of things" and the actual establishment of a regime of neutrality, there existed considerable room for the exercise of executive discretion. And while this discretion was not without limits, it was considerable: so much so that the president appeared at times to be less engaged in executing the laws than in creating them. As the cabinet's administration of the proclamation revealed, even Madison's narrow account of executive power had the potential, under certain circumstances, to expand into an authority that was anything but narrow.³⁵

Moreover, the possible consequences resulting from the proclamation's administration were not of an order normally associated with the exercise of ministerial-like functions. Although a system of "strict neutrality" was adopted by the Washington administration, international practice at the time appears to have not required this degree of impartiality. A state might have retained its neutral status, and the privileges associated with that status, even while it provided material assistance of various kinds to the powers at war. This was especially true in those instances in which the neutral power had, by virtue of a treaty, obligations of some sort to the belligerents. Accordingly, because the United States observed "strict neutrality" between France and Great Britain in every particular, Paris might have accused the Americans of adopting a policy more favorable to the British than was absolutely necessary.³⁶ Thus, if it had been in Paris's interest to do so, France could have used the request for Genet's recall to end friendly relations between the France and the United States.

Although unlikely, it was even possible that Genet's recall would have led to hostilities.³⁷ As British Ambassador Hammond speculated in a note back to his own government, should the French government "determine to support its minister—this order of things must issue in war between France and this country."³⁸

For a number of reasons, events did not unfold as Hammond conjectured they might. Nevertheless, we should not lose sight of the fact that Washington's efforts to keep the United States from becoming involved in Europe's war required him to make decisions that might have entangled the country in a major foreign policy crisis and, perhaps, even armed conflict. In such circumstances, a president who understood his role as chief executive to be fairly circumscribed and believed his principal duty was to keep the country at peace until the Congress had met would presumably have thought it his constitutional duty to call Congress into session early to get from it a firm set of directives on what U.S. policy should be. But, as noted above, the Second Congress had closed its doors in March 1793—before word of the war in Europe had reached the United States—and the Third Congress was not due to meet until December. Washington and his cabinet twice considered calling the new Congress into session early, but they decided not to.³⁹ For seven event-filled months, the Washington administration established and managed a system of neutrality on its own. The fact that Washington did not call Congress into session and no public outcry arose as a result strongly suggests that the Madisonian model of active presidential deference to Congress was not the prevailing understanding of the time.

Actually, the sharpest criticism of the administration's decision not to involve Congress more directly in these matters came from the French ambassador and not members of the House or the Senate. Frustrated by Washington's minimalist reading of the United States' obligations to France, Genet told Secretary of State Jefferson that these were decisions that "ought not to have been made by the Executive without consulting Congress, and that on the return of the President [to Philadelphia from a visit to Mount Vernon] he would certainly press him to convene the Congress."⁴⁰ According to Jefferson, his own reply was blunt: on questions related to the interpretation of treaties, "the constitution had made the president the last appeal." The U.S. government, he told Genet, had "divided the functions of government among three different authorities . . .

each of which were supreme in all questions belonging to their department and independent of the others.” On those “questions” that had arisen between France and the United States, it was up to “the Executive department” to decide. Even “if Congress were sitting,” such issues “could not be carried to them, nor would they take notice of them.” When it came to these matters, Jefferson informed Genet, the president was “the highest authority.”⁴¹

Seeking Support

Despite having both a constitutional justification for taking the initiative and the institutional capacity to do so, the administration was uneasy as it began to implement the proclamation. Political tensions were high. Pro-French sentiment among the public was considerable and “the republican interest” would, it was thought, be in control of the incoming Congress. Although the basic goal of staying free of the conflict was shared by most everyone, there was still plenty of room for debate about how to do so.

Moreover, Washington and his cabinet did not have the luxury of easing into the proclamation’s enforcement. Disputes immediately arose over the proclamation’s meaning and how to apply it in particular cases and circumstances. Handling each case as it arose was a considerable administrative and political burden. The cabinet quickly came to the conclusion that a comprehensive set of rules needed to be promulgated to put an end to some of the uncertainties that were producing this steady stream of mini-crises.

Crafting the “Rules Governing Belligerents” involved the administration in interpreting and applying existing treaties, international law, and the common law. Given the nature of the task, Washington and his cabinet decided in mid-July to submit a list of twenty-nine questions to the Supreme Court (to those “learned in the laws”) for their opinion on various legal issues related to neutrality’s enforcement. In the letter accompanying the submission, Secretary of State Jefferson explicitly took note of the fact that the administration was asking the Court to involve itself in a matter outside its normal “cognisance.” There was no case to be decided in this instance. But, he suggested, the administration was also a bit at sea since the issues facing the president were “little analogous to

the ordinary functions of the Executive.” By providing their expert legal opinions on these matters, the Court would help protect the administration “against errors dangerous to the peace” of the United States. In addition, as Jefferson seemed to admit, the Court’s role as a nonpartisan body could be useful politically, should it decide to provide its advice. By connecting the reputation of the justices to the administration’s decisions, the administration was hoping to “ensure the respect of all parties” to the rules and, implicitly, the policy they rested on.⁴²

In July, when the cabinet submitted its questions to the Court, there appears to have been little, if any, discussion about the possible precedent being set by the executive seeking an opinion about foreign affairs from the judicial branch. The matter had come up previously, however. In May, Hamilton had argued in a memorandum submitted to the president that involving the Court in a dispute over the restitution of illegally seized British ships was to involve the justices in an issue they were not “competent” to decide. As the treasury secretary reasoned at the time, this was fundamentally an issue “between the Governments” and, as such, should be “settled by reasons of state, not rules of law.” Asking the Court for advice would inevitably invite questions about the president’s own constitutional authority to decide these matters. Once the precedent had been set of involving the Court, the president might be hard-pressed not to defer to its judgment in future controversies.

Perhaps Hamilton didn’t raise any objections in July over the cabinet’s submission since he had already made the case against seeking such advice and because he was confident that the Court would not respond positively to the administration’s request in any case.⁴³ Moreover, none of the twenty-nine questions concerned the president’s own authority to issue or enforce the rules under discussion.⁴⁴ And, in fact, the administration did not wait for the Court’s guidance. The cabinet completed the “Rules for Belligerents” even before it received word that the Court rebuffed its request.⁴⁵

Hamilton may (or may not) have had serious reservations about seeking assistance from the Court—and thus support from *within* the constitutional order—for the administration’s policies. Surprisingly, he was apparently not shy about seeking support from *outside* it by rallying public opinion to the president’s side. To understand Hamilton’s actions, one should begin by remembering that the war in Europe presented the new

American government with its first major challenge. Many thought that the stability, prosperity, and even the existence of the country were at stake. The country could not afford mistaken or erratic policies. But most observers, including Washington and his cabinet, were unsure how the public would react in that spring and early summer to the administration's decisions. Hamilton and other Federalists were keenly aware of the favorable reception Genet had received from the public on his arrival in the United States and were quite worried about the harsh, and, from their perspective, Jacobin-like attacks on Washington and his policies.⁴⁶ They had never faced this kind of crisis before. The bitter partisanship was new, and they were uncertain whether the public's tacit support for the administration's policy of strict neutrality would last.⁴⁷

To the Federalists' good fortune, the increasingly impolitic behavior of France's ambassador provided them with the opportunity to rally support for the president and his policies. Genet had not only publicly questioned the administration's policies, but, as his frustration with the president's decisions boiled over, made the mistake of threatening to go over Washington's head with an appeal to Congress and, if necessary, directly to the American people.⁴⁸ As soon as Hamilton and other Federalists found out about Genet's threat, they believed they had a way of moving opinion in the administration's favor. They assumed that once the French ambassador's slights of Washington and the constitutional order were made public, Americans' pride in their president and new constitution would turn them against Genet and increase their sympathy for Washington's efforts to maintain the country's neutrality.⁴⁹

This was not an opportunity Hamilton could let pass by and, in Jefferson's words, the treasury secretary "pressed" Washington to use this information and make "an appeal to the people . . . with an eagerness I never saw before." Although the president was apparently attracted to the idea initially, he eventually agreed with Jefferson that Genet's behavior should first be taken up with the French through the normal diplomatic process. This did not stop the treasury secretary, however. Writing under the pseudonym "No Jacobin," Hamilton catalogued Genet's misconduct in a series of essays. He was joined in this effort by other Federalists, notably John Jay and Rufus King of New York. The cumulative impact was as they hoped: popular indignation toward the French ambassador and increased support for the president.⁵⁰

But promoting general support for the president was not enough. If it was to have an impact politically, especially on the members of the incoming Congress, a means had to be found to give that support an effective voice. To this end, the Federalists resurrected from the country's revolutionary period the practice of calling mass meetings at which resolutions on public disputes would be debated and then voted up or down by the gathered crowd of citizens. Although the first of these town meetings was held in Boston before the No Jacobin essays appeared, the revelation of Genet's threats generated dozens of similar meetings and the passage of resolutions of support for the president in cities throughout the Northeast and mid-Atlantic areas. The meetings and resolutions were reported on locally and those stories, in turn, were reprinted by newspapers in neighboring cities and states. It soon appeared as though the whole nation was rallying around the president and his policies.⁵¹

And it was not just an impression. Jefferson himself admitted that there had been a real and substantial change in public opinion:

In N[ew] York, while Genet was there, the vote of a full meeting of all classes was 9 out of 10 against him, i.e., for the Proclamation . . . All the towns Northwardly are about to express their adherence to the proclamation and chiefly with a view to manifest their disapprobation of G[enet]'s conduct. Philadelphia, so enthusiastic for him, before his proceedings were known, is going over from him entirely.

The Federalists were even able to organize a public meeting in support of the president in Richmond, Virginia, normally a stronghold of Republican views.⁵²

Stung by this avalanche of resolutions, Madison and James Monroe drafted their own model resolution, designed to reflect what they thought to be "the true and general sense of the people." Hoping to generate meetings at which resolutions would be passed along the lines proposed by them, the two distributed copies of their draft to allies in various Republican strongholds.⁵³ A more resigned Jefferson, however, had warned them that Genet's behavior made it imperative that Republicans "abandon" him "entirely." And since the American public's "desire for neutrality" was now "universal," there was little room left for the Republican-styled resolutions to differentiate themselves from those that had already been passed. As Stanley Elkins and Eric McKittrick conclude: "Except for matters of shad-

ing and emphasis—on the Proclamation and on friendship for the French people—there was now little in substance to choose between Republican resolutions and Federalist resolutions, and Washington benignly welcomed them all.”⁵⁴

With Hamilton’s encouragement and possible direction, the Federalists won the “war of the resolutions.” By exploiting Genet’s behavior in this revolutionary-era fashion, they were able to help shape and solidify public opinion in favor of the president and his policies. Although it is obviously impossible to measure with any precision the effects of this campaign, the short-term political result seems to have been a quiescent legislature. In spite of the fact that although the new Congress that convened in December 1793 was decidedly more Republican than its predecessor, it fully supported Washington’s decisions.⁵⁵

The long-term consequence, however, was to make way for a presidency tied to populist politics. With the exception principally of James Wilson, the Federalists had argued that insulating the chief executive to some degree from the tides of popular sentiment by creating a stable and independent office of some independence was one of the new constitution’s principal advantages. Putting distance between the chief executive and the demands of popular politics allowed presidents to act, if necessary, against existing opinion for the greater and more permanent good of the country. But, by playing the public card as they had, Federalists were, in James Monroe’s words, “seiz[ing] a new ground whereon to advance their fortunes.”⁵⁶

Not all Federalists were sure they had done the right thing. As Rufus King, Federalist senator from New York and organizer of New York City’s own rally, reminded Hamilton, “We have with great trouble established a Constitution, which vests competent powers in the hands of the Executive.” By relying on such “irregular measures” as mass rallies to generate support for the president, the administration’s friends were legitimating a political stratagem that over time could “destroy the salutary influence of regular government.” In particular, King worried that a reliance on these kinds of efforts had the effect of “render[ing] the magistracy a mere pageant,” implying as they did that the public should have some immediate say in judging the executive’s decisions. Despite his own role in orchestrating the public campaign on behalf of the president, King wondered whether what he had done was “altogether wrong.”⁵⁷

Setting a Precedent

The war between France and Great Britain was the first major crisis faced by the country under the new constitution. It was a test that the Washington administration helped the nation pass with flying colors. Lacking any congressional guidance, uncertain about public support, and facing unprecedented partisan opposition, the administration was still able to provide the kind of leadership that the Constitution's architects hoped would result from the creation of an independent and unitary executive office.

However, most presidential scholars, when they turn to Washington's issuance of the proclamation, focus chiefly on the debate over the president's powers between Pacificus and Helvidius. Given who was involved in the debate and the importance of the arguments themselves, this is certainly understandable. But the debate itself—as one might have predicted—did little to settle questions about the president's specific authorities. In part, this was because Washington never thought it necessary to provide an extended constitutional justification for his actions and, in part, because both Madison and Hamilton believed that Washington's actions could be justified under their respective but divergent accounts of “the executive power.” At most, the controversy surrounding Washington's decision to issue the proclamation generated not one but two “authoritative” interpretations of presidential power, setting a “precedent” of sorts for subsequent debates down to this day.⁵⁸

Yet, as important as the debate between Pacificus and Helvidius was in outlining two distinct constitutional paradigms for the exercise of presidential power, focusing simply on that debate can lead us to miss the actual decisions taken by Washington and the reactions to them by the body politic. As Charles Thach Jr., among others, has reminded us, a total absence of a distinct executive branch under the Articles of Confederation had left the United States with a federal government severely handicapped in the administration of the country's day-to-day affairs as well as in the management of crisis situations. A unitary and independent executive was needed not only to check legislative excesses in policymaking (a lesson learned particularly in the new states with their weak governors) but also to imbue the government with a facility for effective and decisive action. Creating such a capacity through the new presidential office was a critical priority of the framers.⁵⁹ From this perspective, Washing-

ton's behavior was not only well within the intent of the creators of his office but perhaps even predictable given the office's independence and unitary structure. Moreover, the fact that Washington did not call Congress back into session early to deal with this crisis suggests that although he voiced his willingness to abide by Congress's subsequent decisions on neutrality, he did not accept Helvidius's most fundamental assertion that the chief executive should do nothing that would impinge on the legislative branch's say over matters of war and peace. Here, at least, Washington's actions speak louder than his few words.

Finally, the arguments put forward by Madison as Helvidius and Hamilton as Pacificus, when examined in the context of the politics and policies of the time, highlight the latent paradoxical character of executive power in a republican government. Madison depicts an executive whose formal authority appears quite limited but who, in certain narrow circumstances and in supposed deference to Congress, can nevertheless wield extensive prerogatives in service of the limited goal of maintaining the status quo. In contrast, Hamilton, when his words and actions are taken together, offers up a president who is formally powerful but seems weak politically.

Under Hamilton's understanding of "the executive power," the president retains broad formal authorities to initiate new policies and to do so without Congress's sanction. Yet it was precisely Hamilton, the author of this position, who appears most concerned with bolstering the exercise of these discretionary authorities with extraconstitutional, popular support. The treasury secretary might have told himself that this was a one-time effort, which did not involve the president directly and was justified by the extraordinary dangers and politics of the day. But, the fact remains, Hamilton and his Federalist allies helped open the door to a form of presidential politics that has never been quite shut again. Although the attempt to use public opinion in this fashion was bound to happen sooner or later given the underlying republican character of the regime, the surprise is that this precedent was set so quickly and, interestingly, set first by the Federalists and not Jefferson and Madison's Republicans.

The controversy over Washington's Proclamation of Neutrality in just the fourth year under the new Constitution reminds us of the tendency, capacity, and perhaps necessity for the president to act first and decisively

to protect vital national interests. As we have seen, this does not always require an expansive view of executive power under the Constitution. In 1793, even Madison's more modest interpretation of Article II powers was firm enough ground to support a range of presidential initiatives and a large degree of executive discretion. That such initiatives during crises constrain Congress is unavoidable. The legislative branch finds itself confronting two basic options: supporting the president's acts in the interests of continuity of policy and national unity or challenging the president at a time when it seems most necessary for the nation to speak and act with one voice. Congress, of course, retains its constitutional ability to resist, and perhaps even thwart, the president, and the Constitution gives it the tools to do so. But it is naive to think, as the Federalists learned in 1793, that a separation of powers clash will be resolved simply independent of the character and direction of public opinion, an opinion likely to be energized by the stakes at hand.