The Uncertain Power of the President to Execute the Laws

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The Uncertain Power of the President to Execute the Laws

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Among the many grants of power to the President, none is more significant nor more controversial than the power of the President over execution of the laws.\(^*\) Constitutional battles have

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1. For purposes of this article, a rough definition of the concept “execution of a law” is sufficient. Justice Fortas has described the President as “the sole and ultimate repository of power to carry out the laws of the United States.” Fortas, The Constitution and the Presidency, 49 WASH. L. REV. 987, 991 (1974). Executing a law will be defined herein as implementing a statutory scheme or carrying it into effect. The definition is derived from cases that arose in a variety of administrative contexts. “The Executive Department, with all its branches, is charged with the true and faithful administration of the acts of Congress . . . . The Executive Department carries the acts of the Congress into effect, administers them, secures their due performance and enforces them.” In re
taken place over the extent to which the power to execute the laws implies power to go beyond statutes enacted by Congress.\textsuperscript{3} While

Texas Co., 27 F. Supp. 847, 849-50 (E.D. Ill. 1939). "It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To it has been entrusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property." Morgan v. T.V.A., 115 F.2d 990, 993-94 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941). See also Buttfield v. Stranahan, 192 U.S. 470 (1904).

A more precise definition of execution would be useful but would involve major analytical work far beyond the scope of this article. Several controversies have led to confusion over the concept of execution of the laws. The dispute with the most practical significance involves the relationship between quasi-legislative and quasi-judicial acts, on one hand, and acts of execution of law on the other. Since Humphrey's Executor v. United States, 295 U.S. 602 (1935), the extent of the President's removal power has turned in large part upon the characterization of the administrative body at issue as either executing the laws or interpreting them. Although highly significant, the distinction between the two is not clear since all acts of discretion require decisionmaking and clearly also carry out a statutory program. See note 55 infra. An earlier controversy, never really resolved, ranged over the extent to which scientific administration could or should be divorced from political execution. See generally Grubstein, \textit{Presidential Power, Administration and Administrative Law}, 18 \textit{Georgetown L. Rev.} 265 (1960).

2. Other constitutional powers of the President are to some extent independent of Congress. The determination of foreign policy is one such independent power. See United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

When the President is acting to execute a statute, however, he is limited by the terms of the statute. See Myers v. United States, 272 U.S. 52 (1926). "The duty of the President to see that the laws are executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." \textit{Id.} at 177 (Holmes, J., dissenting). A question about execution can arise, however, in circumstances of congressional silence or ambiguity. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

The last serious challenge to congressional authority to control the means of execution was President Nixon's position that impoundment of allocated funds is an aspect of the executive power. See 9 \textit{Weekly Comp. of Fed. Regs.} Doc. 333-34 (Apr. 9, 1973) (message vetoing H.R. 3298, a bill to revive federal grants for certain water projects). This Presidential challenge ultimately led to the enactment of the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1301-1407 (1976). The failure of the Supreme Court even to consider constitutional ramifications in rejecting Presidentially ordered impoundment in \textit{Train v. City of New York}, 420 U.S. 35 (1974), suggests that the Court did not think that any serious constitutional issue was presented by Presidential impoundment. The lower courts had also rejected the constitutional argument

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arguments over the definition and scope of the power to execute the laws will continue, a potentially more significant question is being ignored. Under the Constitution, who executes the laws?

The purpose of this article is to examine an unacknowledged dispute concerning the power of the President over execution of the laws. On one hand, a firm tradition suggests that the President, under the executive power granted in article II, executes the laws. In contrast to this view, most of our administrative practices suggest that the President possesses no special constitutional authority to execute the laws, but is instead limited to supervising execution of the laws by officers selected by Congress.

Part I of this article sets out in some detail the view of maximum Presidential power over execution of the laws. Chief Justice Taft maintained, and it has never been expressly disputed, that as part of the executive power the President executes the laws. Since the executive power belongs exclusively to the President, it should follow, as it did for Justice Taft, that only the President, or someone acting as his agent, could execute a law. These two


While there is no general domestic executive authority to impound funds, a stronger constitutional argument justifying impoundment exists when the impoundment is for the stated purpose of avoiding violation of an existing debt limit, see Stanton, History and Practice of Executive Impoundment of Appropriated Funds, 53 Neb. L. Rev. 1, 13 n.79 (1974), or is based upon implied statutory discretion, see Pennsylvania v. Lynn, 501 F.2d 948 (Cir. 1974).

In both instances, impoundment may be seen as an attempt to execute the will of Congress. In military matters, the President may rely upon the Commander-in-Chief power to justify impoundment. See 1975 Wis. L. Rev. 203, 206-08.


ideas are referred to in this article as the active theory of the executive power. Under the active theory, no act of execution could be accomplished except under the direction and control of the President.

Part II explores the inconsistencies between the active theory and actual administrative practices. These practices indicate that any executive officer may be directed by Congress to execute a law and that any discretion which may ensue in the course of execution can be exercised independently of Presidential control.

Part III outlines an alternative theory of the executive power. This theory, called the passive theory, is premised upon the view that the President has authority under the Constitution to supervise execution of the laws but that actual execution may be carried out by other executive officers. The passive theory, while preserving for the President a limited role in oversight of the executive branch, permits Congress to effect independent execution of the laws through independent agencies or by formally independent executive officers.

The choice between the active and passive theories poses the question whether the Constitution mandates Presidential control over the policymaking that inevitably flows from execution of the laws. If Congress could pass legislation that required no discretion on the part of administrators, the issue of control of administrative decisionmaking would not be significant. Because Congress does legislate by delegating discretion to administrators, however, the bureaucracy is necessarily involved in controlling the distribution of national resources. Because of its require-

5. The decline of the delegation doctrine can be traced to the recognition by the courts that in certain areas Congress needed to utilize the flexibility of grants of discretion to the executive branch. See Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); Field v. Clark, 143 U.S. 649, 691 (1891). The present practice of delegating broad authority to administrators has been said to arise out of the incapacity of Congress to foresee all possible contingencies and to make provisions therefor. MacIntyre, The Status of Regulatory Independence, 29 Fed. Bar. J. (1969), and out of the unwillingness of Congress to make policy decisions. T. Lowi, The End of Liberalism 126 (1969). Whatever the reason, delegation of discretion to administrators transforms them into the actors who make key policy decisions. Even if delegation were reduced, a degree of policy-making would inevitably remain in almost any administration of a statutory program. See Leiserson, Political Limitations on Executive Reorganization, 41 Am. Pol. Sci. Rev. 68 (1947).
ment that only agents of the President may perform acts of execution, the active theory places all administrative discretion in the hands of the President by constitutional mandate. The active theory thus threatens congressional control over national resources and their distribution.¹

The passive theory, on the other hand, permits Congress to create a bureaucracy that is relatively independent of the President and that is subject to the direct influence of Congress.² Congress would be free under the passive theory to utilize the President as administrative chief to coordinate policymaking,³ but Presidential control over bureaucratic decisionmaking, and thus over domestic policy, would be subject to congressional control and could be greatly restricted or revoked entirely.⁴ The choice,

6. Debate over administrative control by the President is often put in terms of management goals such as efficiency. See, e.g., The President’s Committee on Administrative Management, Administrative Management in the Government of the United States (1937) [hereinafter cited as Bromley Committee Report]. Such terms appear to be neutral, but increased Presidential control over administrative activity means that the President will have increased influence over administrative policy determinations, which in turn could lead to a decline in the responsiveness of the bureaucracy to Congress. See Karl, Executive Reorganization and Presidential Power, 1977 S. Ct. Rev. 1.

7. Congress’ ability to control the federal bureaucracy is open to serious doubt. The hierarchy, which a system of congressional control undermines, is a necessary element in the formulation of any policy, regardless of whose policy preferences are expressed. See Zamir, Administrative Control of Administrative Action, 57 Calif. L. Rev. 866, 868 (1969). See also Brown, The President and the Bureaucracy: Time for a Renewal of Relationships?, 26 Pub. Adm. Rev. 174 (1968). There is certainly a feeling at the present time that the bureaucracy is not sufficiently responsive and that policy is not coherent. See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L. J. 451 (1979); 35 Geo. Wash. L. Rev. 1056, 1056 & n.7 (1967).

8. In evaluating the practical effects of Presidential control over execution of the laws, it is important to note that the President as well as Congress has been criticized for ineffectiveness in controlling administration. See Brown, supra note 7, at 178; Bruff, supra note 7, at 469; Frug, Does the Constitution Prevent the Discharge of Civil Service Employees?, 124 U. Pa. L. Rev. 942, 949-50 (1975).

9. For the effect of such dependence on Congress see Black, The Working Balance of the American Political Departments, 1 Hastings Const. L.Q. 13 (1974). "But all know, in full consciousness or in the back of their minds, who originally had this power and who can take it back if the pressure to do so increases sufficiently." Id. at 18. "The one fundamental error is that of supposing that the modern expansion of presidential power is based on the Constitu-

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then, between the active and passive theories, leads to significant consequences for the balance of power between Congress and the President over domestic policy.

This article does not recommend either the active or the passive theory, but rather addresses a present lack of understanding of the power of the President with respect to execution of the laws. Each of the theories advanced has some support either in precedent, constitutional language, or administrative practice, but each is subject to serious practical objections. That a conscious decision be made between these theories or that new approaches to the executive power be formulated is necessary. If we do not do so expressly, we will ultimately define Presidential power, as we do at present, implicitly, through a series of ad hoc decisions about specific practices. The power of the President is too important to be left to this kind of drift. What is lacking is formal analysis of Presidential power. At this late point in constitutional history, we should not have to guess whether the Constitution grants to the President the power to execute the laws.

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II. THE ACTIVE THEORY OF THE EXECUTIVE POWER

A. The President Exercises the Laws

In the context of a challenge to the President’s power to remove inferior executive officers, *Myers v. United States* established that article II grants to the President “the power to execute the laws.” Congress had provided by statute a term of office for a postmaster. The question presented was whether the President could remove the postmaster, without cause, before his term of office had expired. The Court held that removal was within the President’s constitutional authority and that the statute was unconstitutional. In support of the President’s right of removal, Chief Justice Taft reasoned in part from precedent. The heart of the opinion, however, lay not in the law of removal but in Chief Justice Taft’s theory of bureaucratic control under the Constitution, that the President executes the laws; because the President executes the laws, executive officers act for the President as aids to him in execution; therefore, an absolute removal

11. 272 U.S. 52 (1926).
12. Id. at 117.
13. Chief Justice Taft looked first to the Act of July 27, 1789, ch. 4, 1 Stat. 28 (1789), in which the First Congress decided that the President should have an unrestricted power of removal over the Secretary of War. Id. at 111-15. See generally E. CORWIN, supra note 4, at chs. I, III. Chief Justice Taft was greatly influenced by the congressional determination because it “was the decision of the First Congress, on a question of primary importance in the organization of the Government ... [and], because that Congress numbered among its leaders those who had been members of the [constitutional] convention.” 272 U.S. at 136. Taft regarded the general acceptance the decision received during the ensuing seventy-four years as strong support for his contention that the President possessed an absolute removal power, id. at 136-63, and considered the enactment of the Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (1867), and similar measures, a constitutional aberration arising out of the political crisis of reconstruction, 272 U.S. at 164-74. Those later actions did not compare to the decision of the First Congress, “a Congress whose constitutional decisions have always been regarded ... as of the greatest weight in the interpretation of [the Constitution].” Id. at 174-75.
14. The bulk of the opinion is devoted to Mr. Chief Justice Taft’s views of the reasoning behind the decision of 1789, 272 U.S. at 115-36. Most of the reasons given involved the role of the removal power in enforcing presidential control over subordinates in the executive branch.
15. “The vesting of the executive power in the President was essentially a grant of the power to execute the laws.” Id. at 117.
16. [T]he President alone and unaided could not execute the
power is necessary to ensure the constitutionally mandated Presidential policy control over the decisions of lower officers. Thus, Presidential control over executive officers stems from their role as Presidential agents. The role of agents in turn stems from the President's constitutional authority to execute the laws. The

laws. He must execute them by the assistance of subordinates. . . .
As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible.

Id. at 117.

Chief Justice Taft also argued that the functions of the three branches should be kept separate and certainly felt that Congress could not perform executive tasks, id. at 116, including, presumably, execution of the laws. Of course, Congress does execute the laws in some sense by providing by statute for their execution. See McCulloch v. Maryland, 17 U.S. 415, 422-23, 4 Wheat. 316, 407-09 (1819).

17. Chief Justice Taft linked two control devices, removal and appointment, to his conclusion that the President must have control over executive officers commensurate with his total responsibility for them. 272 U.S. at 117. The lack of absolute removal power would frustrate valid Presidential authority "by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." Id. at 131.

18. Chief Justice Taft did waiver from straightforward exposition of the executive power and the relationship of executive officers to the President. He tried to deal with the argument that "executive officers appointed by the President . . . are bound by the statutory law and are not his servants to do his will." Id. at 132. In response, Taft appeared to concede that it is only in the political field that executive officers act for the President, exercising presidential discretion rather than their own. Id. The political field, although broad, does not seem to include all execution of the laws, but deals with activities such as foreign affairs, protection of federal interests, and military activities Id. at 133-34. Having made this concession, Chief Justice Taft then rescinded it.

But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of

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necessary implication of the Executive power, as characterized in *Myers*, is that if an action constitutes execution of law, the President may be said to have, under article II, the sole responsibility to perform it.

The assertion that the President executes the laws has never been formally challenged in the courts, nor has it received much attention since *Myers*. An important, though unlikely, source of support for Chief Justice Taft’s view of the Presidential power of execution is *Youngstown Sheet & Tube Co. v. Sawyer*. The case arose out of a threatened steel strike in the midst of the Korean war. President Truman ordered the Secretary of Commerce to seize and operate the steel mills. The Supreme Court affirmed the district court’s issuance of a preliminary injunction against the seizure. Justice Black first found no statutory authority for the

the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

*Id.* at 135. Except with respect to quasi-judicial duties, Taft never clearly acknowledged that discretion can be vested in executive officers. “[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance.” *Id.* Even if he cannot act directly, the President can, according to Taft, at least maintain control by removing the officer after the fact.

The idea that the President cannot interfere with the activities of executive officers outside the political area is not consistent with Taft’s view that general “executive power” is vested in the President alone, *id.* at 117, and that this grant represents the power to execute the laws. While Taft did not directly challenge the tradition of *ex nomen* discretion by executive officers, which was at issue in *Myers*, his overall reasoning certainly undermines any legitimate basis for such a tradition.

19. The President’s removal power has, however, been restricted, first in Humphrey’s Executor v. United States, 295 U.S. 602 (1935), see note 87 infra and accompanying text, and later in Wiener v. United States, 357 U.S. 349 (1958). In those cases members of independent agencies performing quasi-legislative and quasi-judicial acts were held to be outside the President’s removal powers. In both cases the Court distinguished agency interpretive powers from execution of the laws, over which the President’s removal power remained as a control device. 357 U.S. at 353-56; 295 U.S. at 628.


seizure, either express or implied. Rejecting the argument that the President had inherent power to prevent the strike, Justice Black also found that neither the President's role as Commander-in-Chief nor his authority under the executive power justified the seizure.

Justice Black did not deny that the President has responsibility to execute the laws. He thought, however, that Congress' authority to make the laws that the President is to execute included power to prescribe the means of execution. Both concurrences and dissent appeared to agree that the key issue in the case concerned the extent to which Congress had granted flexibility to the President in the execution of congressional policies. This

22. 343 U.S. at 585-86. In fact, Justice Black noted that Congress had recently rejected just such emergency authority for the President. Id. at 586.
23. Id. at 587-89.
24. Thus, the seizure was invalid because it represented Presidential policy carried out in accordance with Presidential means, rather than congressional goals carried out by congressionally approved means. Id. at 586. Justice Black did not deal with the situation in which the President executes congressional policies through means about which Congress has not expressed any view.
25. Justice Jackson found that Congress had implicitly rejected emergency seizure authority, id. at 639 (Jackson, J., concurring), and refused to allow general emergency authority in light of such disapproval, id. at 653-55 (Jackson, J., concurring). Justice Burton also noted the decision of Congress to retain control over property seizures, id. at 660 (Burton, J., concurring), but implied that seizure authority might be valid in the absence of such congressional action, id. at 659 (Burton, J., concurring). Justice Clark expressly accepted the theory that the President could act in a crisis, but only if Congress had not set out procedures to be followed as he found it had in Youngstown. Id. at 662 (Clark, J., concurring). Justice Douglas, though noting the power of the President to execute the laws, id. at 633 (Douglas, J., concurring) (quoting U.S. Const. art. II, § 3) apparently agreed with Justice Black that some congressional authorization would be required to justify a Presidential order to seize private property, id. at 630-32 (Douglas, J., concurring). Justice Frankfurter agreed with all concurrences that Congress had implicitly decided to withhold authority for the seizure at hand, id. at 602-03 (Frankfurter, J., concurring), and for him this was the decisive determination.

Chief Justice Vinson's premises in dissent did not differ much from those of the majority. He was careful to point out that Congress had not prohibited seizures. "There is no statute prohibiting seizures as a method of enforcing legislative programs." Id. at 702 (Vinson, C.J., dissenting). He apparently believed that in an emergency Congress would prefer to allow the President to hold a situation in status quo until it had time to act if a particular program or a series of programs were threatened by unexpected developments. Id. at 702-04
question presupposed that the President had responsibility to execute the laws. The opinions in Youngstown discussed the question whether the steel mills could be seized. All sides assumed without discussion that the President would be the one who could seize the mills were such an act warranted. 24

Further support for Tait's assumption that the President executes the laws, though not necessarily for his theory of Presidential administrative control, comes from political theory, 27 case law, 28 and commentators. 29 In addition, there was general agreement at the federal convention "that a national executive ought to be instituted with power to carry into effect the national laws." 30 Roger Sherman, generally an opponent of a strong and independent President, 31 "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect . . . ." 31

(Vinson, C.J., dissenting). The authority of Congress to control execution is not theoretically threatened by this position.

26. Thus no Justice remarked upon the act of the President in ordering the Secretary of Commerce to seize the mills. There was no suggestion in Youngstown that the power of some other officer might be relevant to the outcome of the case.

27. C. Montesquieu, Spirit of Law XI, ch. 3 (executive power includes power to execute the laws).

28. E.g., In re Neagle, 135 U.S. 1, 63-64 (1890) (President has duty to enforce acts of Congress); Consumers Union v. Rogers, 352 F. Supp. 1319, 1323 (D.D.C. 1973) (President must faithfully execute the laws).


Raoul Berger, for one, would not be likely to agree that the President must control all executive officer decisionmaking. See Berger, The President and the Constitution, 28 Okla. L. Rev. 97 (1975).

30. 1 The Records of the Federal Convention 67 (M. Ferrand ed. 1911) [hereinafter cited as Federal Convention]. This part of Madison's resolution passed the convention with Connecticut's divided vote the only negative vote cast. Id.

31. Roger Sherman supported appointment of the Executive by the Legislature and felt that the number should not be fixed. Id. at 85.

32. Id. at 85. "Mr. Wilson preferred a single magistrate . . . . The only powers he conceived [as] strictly executive were those of executing the
B. Constitutional Language

No language in the Constitution establishes, unambiguously, a Presidential power to execute the laws. While three textual sources suggest that power, none is conclusive. Chief Justice Taft in Myers looked to article II, section 1, which provides in part that "[t]he executive power shall be vested in a President." The problem with considering section 1 a grant of the power to execute the laws is that its language does not describe the content of the executive power, but rather places the power, whatever its content, in the hands of a single officer, the President. Justice Jackson noted that if article II, section 1, had been intended as a general, substantive grant of power to the President, "it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones." 24

Chief Justice Taft also looked to article II, section 3, which provides in part that the President "shall take care that the laws be faithfully executed." 25 This section is regarded as the basis for the President's direct, and almost complete, control over federal law enforcement. 26 Because enforcement and execution have been

laws . . . ." Id. at 65-66. These comments were part of a series of mini-debates on the powers, form, and term of the Office of the Chief Executive that took place during the early part of the Convention. Id. at 20-114. See generally Berger, supra note 29, at 1069-71.

The convention did not address the question whether such execution is exclusive to the Presidency. The convention was primarily concerned with the issue of executive power. See, e.g., Federal Convention, supra note 30, at 65, 108-14. Sherman, for example, was defining a maximum of Presidential power rather than an irreducible minimum. Id. at 65. The convention did not seriously consider the relationship between executive officers and the President.


34. Berger, supra note 29, at 1073.


36. Chief Justice Taft utilized section 1, clause 1 and section 3 almost interchangeably, 272 U.S. at 117, although he never specifically stated that section 3 of article II represented a grant of power to execute the laws.

37. Enforcement of the law is generally recognized as an executive func-
used interchangeably, section 3 could be considered the foundation for Presidential control over execution as well. The difficulty with relying on section 3 is that this provision does not say that the President shall execute the laws. The actual wording suggests supervision over execution by other parties rather than direct execution by the President.

A third possible source of a Presidential power to execute the laws is not found in any express language of the Constitution but rather is either implicit in the President's constitutional role as head of the executive branch or inherent in the very nature of the executive power. The institutional argument for a President's enforcement power is exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take care that the Laws be faithfully executed." Buckley v. Valeo, 424 U.S. 1, 138 (1976) (quoting U.S. Const. art. II, § 3) Thus the Court concluded that the President personally controls enforcement.

38. See note 70 infra.
39. Chief Justice Taney wrote that the President "is not authorized to execute [the laws] himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution . . . ." Ex parte Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487).

The apparent weakness of a constitutional foundation for the President's power to execute the laws leads to doubt that there is a clear constitutional basis for Presidential control over law enforcement. The Court in Buckley did not explain precisely how the power to take care that the laws be faithfully executed leads to personal control by the President over law enforcement. If the President executes the law, the answer is plain. If, however, other executive officers may execute the laws, it is difficult to see why they could not enforce the laws as well, since execution and enforcement are equivalent.

40. See note 194 infra.
41. This argument is a variant of the argument pressed by the Government in Youngstown that certain powers inhere in the Presidency without express constitutional delineation. 343 U.S. at 848 (Jackson, J., concurring).
tial power of execution is unpersuasive because, even if the President is the head of the executive branch, that role need not imply a power of execution. The theory of inherent power is also not an acceptable basis for a power of execution. Inherent executive power is incompatible with the very purpose of a limiting, written Constitution.

The lack of any obvious foundation in constitutional language for Presidential execution apparently has not weakened the view that the President executes the laws. The question thus becomes, what are the implications of this view?

C. The Logical Implications of Presidential Execution of the Laws: The Active Theory

The logical implications of Presidential execution of the laws arise from the assumption that, since the grant of power to the President to execute the laws is said to arise out of Article II, only the President should be able to execute the laws. Neither Congress nor the judiciary could execute the laws. Such exclusivity over execution does not necessarily lead to Presidential dominance because execution, as illustrated in Youngstown, is a derivative power only. Congress would retain ultimate authority to define the means and manner of execution even under the active theory.

With respect to Congress and the judiciary, the assertion that the President alone executes laws does not seem extraordinary, but the prohibition on execution of the laws by Congress would logically extend to all executive officers also, except insofar as they are acting for the President. Such officers are not granted

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any part of the executive power in article II.\textsuperscript{44} Therefore, under the active theory executive officers could not independently execute the laws. Lower officers could, of course, aid the President in his duties of execution, but only as his agents. Chief Justice Taft, in Myers, illustrated the limited role that executive officers occupy in a system in which the President is acknowledged to execute the laws: "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."\textsuperscript{45} Taft here assumed that only the President executes the laws and that therefore, whenever an executive officer can be said to be executing the laws, the officer must be conceptualized as an agent of the President. Regardless of how actual practice differs from this theoretical construction, Chief Justice Taft’s description is logically compelling. Whether acknowledged or not, demands for greater Presidential control over administrative decisionmaking are based on the premise that the President does execute the laws.\textsuperscript{46}

\textsuperscript{46} At the Constitutional Convention the role of a bureaucratic apparatus was not much discussed, though the President's responsibility for execution of the laws was acknowledged. See notes 30-32 supra and accompanying text. The administrative powers specifically granted to the President in article II, such as appointment and the right of solicitation, are a clear recognition that a bureaucracy will exist, but the anticipated relationship between the President and administrative officers is not defined. See Zamir, supra note 7, at 869-70.

The First Congress apparently recognized that subordinates would execute the laws. Justice Taft's interpretation of the congressional debate over removal was that such subordinates would execute the laws as Presidential aides subject to removal without cause. 272 U.S. at 131-34 (comments of Mr. Madison). While the dissents read the debate as ambiguous concerning constitutional authority in the President to control execution, id. at 193-99 (McReynolds, J., dissenting); id. at 283-85 (Brandeis, J., dissenting), no Justice suggested that executive officers share in the executive power.

\textsuperscript{47} 272 U.S. at 117.

\textsuperscript{48} See Brownlow Committee Report, supra note 6; Commission on Organization of the Executive Branch of the Government Report, 3-4 (1949) [hereinafter cited as Hoover Commission Report]. Insofar as these reports bear on the independence of agencies engaged in interpretive rather than executive functions, they raise considerably different constitutional and statutory issues. See E. MacIntyre, supra note 5, at 13-15. The Hoover Commission in particular attempted to distinguish between executive functions exercised by the independent agencies and their role in resolving controversies. Hoover Commission Report, supra note 427-40.
Full recognition that the President alone executes the laws would lead to a variety of new administrative practices. Congress would legislate but would not execute. Directions would be given by Congress to the President, who in turn would instruct his subordinates to carry out these directions on his behalf. Such a system would require Presidential control over appointment, removal, and organization, as well as formal direction and review. Furthermore, except as a matter of convenience, Congress would not deal directly with executive officers, but instead would rely upon the President to carry out execution of statutory commands and programs. The President would not actually acquire power over expenditures; he would, however, decide how to utilize administrative resources allocated by Congress. Furthermore, the President also would be responsible for the coordination of execution of all statutes, as well as for support of the machinery

49. Direction and control are accepted elements of agency relationships. See Restatement (Second) of Agency §§ 1, 14 (1958). These formal powers of review are the key elements to clear Presidential execution of the laws. See notes 152-89 infra and accompanying text. Removal, even at will, is not the same as a recognition that it is always the President who is in fact acting. See Zamir, supra note 7, at 877-79.

50. The power to select agents is generally reserved to the principal. See Restatement (Second) of Agency § 79 (1958). The President would be expected to decide who would serve as his agent and which agent would carry out what function. Attorney General Cushing, who supported the President's power to direct execution, see notes 127-30 infra and accompanying text, admitted that Congress possessed authority to delegate tasks to named executive officers. 7 Op. Att'y Gen. 453, 468 (1855). Cushing rationalized this congressional power by asserting that the President's approval of a statute represented the exercise of the President's constitutional discretion. Id. This view implies that a bill passed over the President's veto could not name the executive officer who is to act, an outcome that has not and is not likely to receive judicial approval.

51. Nothing in the active theory implies that Congress would be bound to provide sufficient tools and resources to the President to allow him to execute the law effectively. The theory does suggest, however, that once administrative resources are provided, the President, as the responsible actor, would retain discretion over how best to utilize these resources. If dissatisfied with the manner of execution, Congress would remain free to limit the President's discretion and translate execution into ministerial actions. Congress would also be free to prescribe the means of execution. See note 25 supra and accompanying text. Congress could not, however, decide who would perform the executive act. See notes 57-61 infra and accompanying text.

52. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, J., dissenting) (President charged with executing the ‘mass of legisla-
of Government itself. Because all administrative actions would be actions of the President, this system is potentially one of great Presidential power.

D. Theoretical Limitations on the Power of the President Under the Active Theory

The potential of Presidential power under the active theory need not be realized fully. Three significant limitations upon Presidential power inheres in the active theory.

First, although the President would execute the laws, he would not control interpretive activities that arguably do not constitute execution. Independent agencies that exercise quasi-legislative and quasi-judicial power are not now considered to be exercising any part of the executive power and are said to be outside the President's reach. While the difference between execution and these interpretive functions is by no means clear, the


55. The distinction between execution and interpretation has proven difficult to apply. Compare Morgan v. TVA, 115 F.2d 990, 993-94 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941) with Drumheller v. Berks County Local Board No. 1, 130 F.2d 610 (3rd Cir. 1942) and ICC v. Chatsworth Coop. Mktg. Ass'n, 347 F.2d 821 (7th Cir.), cert. denied, 382 U.S. 938 (1965).

There does not appear to be any persuasive reason why interpretive activities must be independent while execution need not be. The Court in Humphrey's Executor emphasized that Congress intended to render the FTC independent. 295 U.S. at 628. While important for purposes of statutory construction, Congress will does not enlarge its constitutional powers. General
practical effect of recognizing such a distinction would be to eliminate Presidential control in interpretive activity in which administrative discretion is likely to be greatest. Congressional authority to retain independent agencies as an independent policy resource would be particularly significant under the active theory because all administration that arguably constitutes execution would be controlled by the President.

The second limitation on Presidential power under the active theory is that Congress, by virtue of its legislative power, would decide how much discretion the President would have in executing a particular statute. That is to say, the power to execute a law begins and ends with the law itself. Thus, Congress would possess a reliable means of checking policy outcomes that it did not approve.

The presumption that the President has the sole power to execute the laws would not conflict with Congress’ power to control the means of that execution. Although the Youngstown Court allowed Congress to decide how a statute is to be executed, it did not go so far as to suggest that Congress has the power to decide who is to execute a statute. Congress can reduce administrative discretion or even eliminate it, but Congress could not, under the active theory, transfer the administrative discretion that it creates away from the President.

The President performs his full constitutional duty, if with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.” Myers v. United States, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting). “The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.” Id. at 177 (Holmes, J., dissenting). This rule reached majority status in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (Frankfurter, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)); id. at 833 (Douglas, J., concurring). See note 25 supra. After Youngstown, the means of execution were clearly within the exclusive control of Congress if Congress desired to specify particular procedures and outcomes.

56. 343 U.S. 579 (1952).
57. See notes 20-28 supra and accompanying text.
Thus, the one exception to Congress' authority to control the means of execution would be that Congress could not grant independent authority to an executive officer to execute a statute. Congress could not, for example, authorize the Secretary of the Interior to construct a series of dams at a site of his own choosing and deny to the President the formal power to reverse the Secretary's decision. 69

While Justice Fortas has argued that Congress may legitimately pass such a statute and that the President's only recourse would be to remove the Secretary if he were dissatisfied, 69 independent execution is logically inconsistent with the assumption of the active theory that the Constitution gives to the President the power to execute each law. In effect, passing such a statute would amount to a congressional order to the President not to execute. If Congress were free to act in this manner, it could pass legislation placing all acts of execution in the hands of one subordinate executive officer and could thereby eliminate the article II grant of power to the President to execute the laws.

The third limitation upon Presidential power under the active theory consists of a subcategory of Congress' legislative power. General enforcement policy, including the priorities of enforcement, the resources to be committed to enforcement, and the limitations upon enforcement, determines the substantive scope of a statute. 70 The scope and meaning of a statute are

59. The Hoover Commission Report, supra note 48, noted critically the independent power of execution granted to the Corps of Engineers and the Secretary of the Interior. Though removal would be available in such a case, the President would lack the power, for example, to forbid execution of a contract entered into against his wishes.

60. "In short, the President has the responsibility for the faithful execution of the laws, but he can bear this responsibility only within the terms and through the officials and agencies prescribed by the Congress. He cannot take over the powers of an agency without congressional authorization." Fortas, supra note 1, at 1002.

61. Justice Fortas admitted that the President is, under the Constitution, "the sole and ultimate repository of the power to carry out the laws of the United States." Fortas, supra note 1, at 991.

clearly legitimate legislative concerns, and under the active theory Congress would retain a degree of authority over enforcement policy.

III. PRACTICE: INDEPENDENT EXECUTION OF THE LAWS

Many present administrative policies appear to be fully consistent with the active theory. For example, the President has exercised authority in the areas of federal procurement contracts, personnel loyalty, and even substantive regulations concerning policy. Undoubtedly, many view Presidential direction over the executive branch as a valid exercise of Presidential authority. Yet, in all these areas, it is often not clear whether the President is acting pursuant to an independent constitutional

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66. President Truman acted unilaterally to ensure the loyalty of public employees by issuing Executive Order No. 9835, 3 C.F.R. 129 (Supp. 1947). President Eisenhower's loyalty program was instituted pursuant to statutory authority. See Cole v. Young, 351 U.S. 536, 557 (1956); 17 Vill. L. Rev. 688, 689-93 (1972).


68. The Government claimed, for instance, in United States v. Nixon, 418 U.S. 683 (1974), that, under the Constitution, "a President's decision is final in determining what evidence is to be used in a given criminal case," thereby implying a Presidential power of direction over federal prosecution. Id. at 693. See Brownlow & Humphreys, supra note 6.
power or under an implied or express congressional grant of authority. Furthermore, no form of Presidential authority appears to reach the vast majority of practices constituting execution of the laws. An examination of key administrative practices demonstrates that executive officers can and do execute the laws themselves. These officers, as a formal matter, are independent of the President, and, in practice, executive officers are not mere agents confined to policy choices of the President.

A. Law Enforcement

The most surprising area of Presidential incapacity is the area of law enforcement. On the one hand, this accepted aspect of execution is probably the area of greatest Presidential domes-


70. The phrases “execution of law” and “enforcement of law” have been utilized almost interchangeably. For example, in Springer v. Government of Phil. Is., 277 U.S. 189 (1928), the Court stated, “Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement.” Id. at 202 (emphasis added). In Buckley v. Valeo, 424 U.S. 1 (1976), the Court substituted the word “execute” for the word “enforce” in paraphrasing this quote from Springer. The Court referred to the “principle enunciated in Springer v. Philippine Islands . . . that the Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws.” Id. at 119 (citation omitted) (emphasis added). Thus executing law and enforcing law appear to have been viewed by the Court as equivalent activities.

Of course the individuals appointed in Springer were not to enforce law in the sense of bringing civil enforcement suits. The Court in Buckley, however, appeared specifically to have included civil enforcement suits as a part of execution of the laws. In discussing the Appointments Clause in order to determine what, if any, powers the Election Commission could exercise, the Court stated, “[Appellants’] argument is that [the Appointments Clause] is the exclusive method by which those charged with executing the laws of the United States may be chosen.” 424 U.S. at 118. The Court accepted this formulation and ultimately decided that civil enforcement suits could not be brought by the Commission because its members were not chosen in accordance with the Appointments Clause. Id. at 138-40. Presumably this meant that civil enforcement suits amount to execution of law. At another point in its opinion, the Court did substitute for the phrase “execution of law” the phrase “administration and enforcement of the public law” in describing the sort of task only one appointed by means of the Appointments Clause could perform. Id. at 139. Nothing in the opinion, however, indicates that this change in terminology was intended to

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tic authority." On the other hand, independent law enforcement is a common practice.

Buckley v. Valeo illustrates the magnitude of supposed Presidential power over enforcement. While the case is noted primarily for its treatment of congressional power over campaign financing, Buckley also involved a challenge to the authority of the Federal Election Commission on the ground that its members imply that enforcement is not a part of executing the law. In fact, the tendency of the Court to interchange the phrase administer and enforce for the word execute, and to do so without comment, reinforces the conclusion that civil enforcement suits, and presumably criminal suits as well, are a part of the execution of the law.

The essential congruence between execution of law and enforcement of law was also emphasized in Foley v. Connelie, 435 U.S. 291 (1978). The Supreme Court held that the State of New York could exclude aliens from employment as state troopers. Writing for the majority, Chief Justice Burger equated enforcement of the law (the role he ascribed to state troopers) and "execution . . . of broad public policy." Id. at 300 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)) (emphasis added by the Court).

71. The prosecutorial function is considered an executive responsibility. See United States v. Nixon, 418 U.S. 683 (1974); United States v. Alessio, 328 F.2d 1079, 1081 (9th Cir. 1966); Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967). Authority over this executive duty is usually ascribed to the President. See United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); E. Corwin, supra note 4, at ch. IV. While Presidential control over prosecution seems secure, criticism has been directed at the related proposition that all law enforcement decisions necessarily entail unrestrained executive discretion. See Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Note, The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification, 87 Yale L.J. 1692 (1978); Note, Judicial Control of Systematic Inadequacies in Federal Administration Enforcement, 68 Yale L.J. 407, 430-31 (1978).


were not officers of the United States, appointed in accordance with the Appointments Clause. 74 The Court held that because the members of the Commission were not so appointed, they could not administer statutory provisions that "[v]est in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights."75 The Court also prohibited the members of the Commission from exercising interpretive functions, such as rulemaking and the issuing of advisory opinions,76 and limited their responsibilities to investigatory and informational tasks.77

The Court distinguished sharply between investigation and enforcement. Members of the Commission were permitted to conduct investigations because this function falls "in the same general category as those powers which Congress might delegate to one of its own committees."78 A civil enforcement action, on the other hand, could not

possibly be regarded as merely in aid of the legislative function of Congress [because a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."79

Enforcement of the laws, as an executive act, was not to be performed by legislative officers.80

The Court's treatment of the role of the President in law

74. 424 U.S. at 118-43. U.S. Const. art. II, § 2, cl. 2 provides: [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
75. 424 U.S. at 140.
76. Id. at 140-41.
77. Id. at 137-38.
78. Id. at 137.
79. Id. at 138 (quoting U.S. Const. art. II, § 3).
enforcement demonstrates that civil enforcement actions were seen, as a constitutional matter, to be the exclusive responsibility of the President. This view was by no means necessary to the decision in the case, but it is a considered and plainly stated dictum. Insofar as Buckley may be regarded as suggesting that the President alone must control all enforcement of the laws, the case parallels the mandates of the active theory.

In contrast to the exclusive Presidential enforcement power suggested in Buckley and mandated under the principles of the active theory, is the 1935 Supreme Court opinion in Humphrey's Executor v. United States. The Court in Humphrey's Executor appeared to recognize a power in independent regulatory agencies to bring civil enforcement actions independently of Presidential direction. The estate of a member of the Federal Trade Commission (FTC) brought suit to recover the decedent's salary for the period between his removal by the President and his death. The Court held that Congress had authority to restrict the President's removal power over a member of the FTC. The President's claim

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81. The Court could have decided that enforcement functions had to be performed by persons appointed in accordance with the Appointments Clause because enforcement is "a significant governmental duty exercised pursuant to a public law." 424 U.S. 141. This is the standard the Court used in deciding that the interpretive functions could not be performed by the Commission as appointed. Just as this holding did not entail a finding that the President controls quasi-legislative activity, the Court could have decided the enforcement question without a reference to Presidential control.

82. The Second Circuit has recognized a distinction between "obiter dictum" and "considered or 'judicial dictum' " by which the Supreme Court intends to give guidelines for future decisions. United States v. Bell, 524 F.2d 202, 206 (2nd Cir. 1975).

83. The Court apparently did recognize by a reference to the Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868), that the Attorney General could control enforcement litigation, 424 U.S. at 139. In the Confiscation Cases the Supreme Court decided that the Attorney General had authority to dismiss a confiscation prosecution. This decision did not imply, however, that the President lacked exclusive responsibility for enforcement of the laws. The Attorney General is normally regarded as the agent of the President in law enforcement, see Ponzi v. Fessenden, 258 U.S. 254, 262 (1921), and there was no hint in the Confiscation Cases that the Attorney General was acting against the wishes of the President.

84. 295 U.S. 602 (1935).

85. Id. at 629-32. The Commissioner was removed by President Roosevelt on the sole ground that the President desired personnel who shared his views on policy. Id. at 618-19. By statute, removal was permitted for "inefficiency.

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of an unlimited constitutional power of removal was thereby rejected.

The Court strove to distinguish rather than to overrule Myers v. United States, in which it had upheld the President's unlimited removal powers, and declared that the FTC could not "in any proper sense be characterized as an arm or an eye of the executive." The FTC was said to exercise no part of the executive power but to act either as an agency of Congress and the judiciary or under quasi-legislative and quasi-judicial powers. The Court stated that Congress may legitimately provide that a quasi-legislative or quasi-judicial body perform its functions independently of Presidential control and that such independence could be safeguarded only by protection against removal at will.

The importance of Humphrey's Executor for the field of enforcement lies in the Court's recognition that the FTC possessed statutory authority to prevent unfair methods of competition through the utilization of cease and desist orders. If such an order were disobeyed, the Court admitted, "the commission may apply to the appropriate circuit court of appeals for its enforcement." While this route to enforcement of the Federal Trade Commission Act was more circuitous than a direct civil enforcement action, neglect of duty, or malfeasance in office." Id. at 619. The Court held that this provision was intended to limit removal to specified causes only, id. at 621-26, and that the statute was constitutional, id. at 626-32.

86. 272 U.S. 52 (1926). See notes 11-18 supra and accompanying text for discussion of Myers.
87. 295 U.S. at 628.
88. Id.
89. Id. at 629. One of the major purposes suggested by the Supreme Court in Humphrey's Executor for holding that the President lacked an absolute removal power was that otherwise the Commissioners could not be depended upon "to maintain an attitude of independence against [the President's] will." Id. The rule in Humphrey's Executor has led to the independence, at least as a formal matter, of the regulatory commissions. See C. Hyman, Bureaucracy in a Democracy 311 (1950). This independence has led to calls for greater presidential involvement in the formulation of regulatory policy. See Bruff, supra note 7.
90. 295 U.S. at 620-21.
91. Id. At the time the FTC could not, in the first instance, sue in federal court to enjoin an alleged unfair method of competition, Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, § 5 (1914) (current version at 15 U.S.C., § 45 (1975)).
it still embodied the "discretionary power to seek judicial relief" that in *Buckley* appeared to define the enforcement power reserved to the President. This FTC enforcement power was lodged in a body purposely insulated from any formal Presidential direction. Enforcement thus may be pursued independently of the President.

The Court in *Humphrey's Executor* was not forced to confront the existence of independent enforcement power because it evidently felt that characterization of the FTC as a nonexecutive agency sufficed to decide the removal issue. The enforcement power of the FTC may have been viewed by the Court as a collateral power or as a minor aid to the quasi-judicial powers of the FTC, insufficient by itself to alter the fundamental nature of the Commission.

A direct separation-of-powers challenge to an enforcement action by an independent regulatory agency has never reached the Supreme Court. In fact, the issue appears to have been decided only once. In *ICC v. Chatsworth Cooperative Marketing Ass'n*, the ICC had obtained an injunction against certain practices that, as stipulated by the defendants, violated the Interstate Commerce Act. On appeal, appellants' only challenge to the

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92. 424 U.S. at 138.
93. Both the enforcement scheme at issue in *Buckley* as well as that in *Humphrey's Executor* involved civil actions. By placing the locus of Presidential enforcement authority in article II, however, the Court in *Buckley* placed civil enforcement upon the same constitutional footing as criminal enforcement. Thus, the availability of independent civil enforcement appears to be the same as the availability of independent criminal enforcement.
94. The Court concluded that "[t]o the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." 296 U.S. at 628.
95. Disputes about whether Congress intended that a particular regulatory agency possess independent enforcement authority, in contrast to whether Congress has the power to create independent enforcement, do arise occasionally. See, e.g., *I.C.C. v. Southern Ry.*, 543 F.2d 534 (5th Cir. 1976), *rehearing denied en banc*, 544 F.2d 956 (1977), *I.C.C. v. Koral Sales, Inc.*, 435 F. Supp. 1162 (E.D. Wis. 1977).
96. 347 F.2d 821 (7th Cir.), *cert. denied*, 382 U.S. 938 (1965).
97. 347 F.2d at 822.
order was that the section10 that authorized the ICC to apply to a district court to enjoin a violation was an unconstitutional infringement upon the President's constitutional authority. The Seventh Circuit ruled that the Commission's independent enforcement power was valid.101

The reasoning in Chatsworth is flawed,100 but the decision no doubt correctly states the prevailing view. The absence of constitutional challenges to independent agency enforcement power is itself an indication that the power of Congress to create independent law enforcement is accepted.101

The existence of independent enforcement power cannot be reconciled with the active theory. Civil enforcement is not a quasi-judicial or quasi-legislative function that can be legitimated by labeling it nonexecutive,102 nor is civil enforcement by

99. 347 F.2d at 822.
100. The court stated that initiation of enforcement actions is not part of the executive power. Id. at 822. This conclusion is incorrect insofar as it relates to a usual policy decision to initiate an enforcement action. See United States v. Nixon, 418 U.S. 683, 693 (1974). Of course where enforcement procedure is defined by law, the courts can ensure that the law is obeyed. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). But recognition that prosecutorial discretion is subject to judicial review does not render a decision to bring an enforcement action anything other than an essentially executive function. Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974).

The Seventh Circuit also relied on Humphrey's Executor, 347 F.2d at 822. Although the Supreme Court did not question independent agency enforcement authority, the propriety of such authority was not an issue in Humphrey's Executor. See note 94 supra and accompanying text.
101. The National Labor Relations Board, for example, has been granted similar independent authority to initiate actions to enforce its orders under section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (1973). Such orders are routinely enforced by the courts, either on direct petition by the NLRB, e.g., NLRB v. C. T. Krebels Co., 593 F.2d 252 (6th Cir. 1979); NLRB v. King's Royal, Inc., 592 F.2d 341 (6th Cir. 1979), or on cross-application, e.g., Cox Corp. v. NLRB, 593 F.2d 261 (6th Cir. 1979); Prestolite Wire Div. v. NLRB, 592 F.2d 302 (6th Cir. 1979); Masden Elec. Co., Inc. v. NLRB, 586 F.2d 8 (6th Cir. 1978).
102. See Harvey Aluminum, Inc. v. NLRB, 336 F.2d 749, 754 (9th Cir. 1964) (internal agency proceeding characterized as enforcement of a public act). A court action would appear even more plainly to be enforcement. An enforcement action cannot be said to be quasi-judicial or quasi-legislative in the sense that the federal courts or Congress could actually prosecute such a suit.
an independent agency a necessary collateral function that is inseparable from quasi-legislative and quasi-judicial powers. The power to select enforcement targets and to make enforcement policy without formal input from the President represents clear independent execution of the laws by executive officers. So long as this independent authority exists, there appears to be no logical reason why criminal law enforcement could not be treated in precisely the same manner by Congress.

B. Independent Interpretation

While civil enforcement by independent agencies is the most dramatic example of independent execution, the independent interpretive authority of traditional executive officers is an even more significant negation of the idea that executive officers serve as agents of the President. The formal independence of exec-

103. In Buckley the Court demonstrated that enforcement powers are not an inseparable part of quasi-legislative and quasi-judicial powers, 424 U.S. at 138-41, and recognized the separate executive power implications of such enforcement authority.

A separation of prosecutorial function from adjudication is not only theoretical; the Administrative Procedure Act already imposes just such separation to a great extent. 5 U.S.C. § 554(d) (1977). See, e.g., Adolph Coors Co. v. F.T.C., 497 F.2d 1178 (10th Cir. 1974), cert. denied, 421 U.S. 1105 (1975). As for the argument that enforcement is collateral to quasi-legislative powers, there would appear to be no reason why regulatory agencies could not enter into rulemaking without any prosecutorial function, much as does Congress at present. Adjudication, however, could well cease to be an independent policy-making tool of the regulatory agencies under such separation.

104. See note 93 supra. This result would be, of course, a vast departure from present practice. See note 71 supra.

In the wake of Watergate, questions concerning the ability of the Justice Department to investigate and prosecute violations of criminal statutes perpetrated by high government officials led to proposals for prosecutorial independence from the President. See Note, Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform, 50 N.Y.U. L. Rev. 366 (1975); Note, The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification, 87 Yale L.J. 1892 (1978). The enactment of the special prosecutor provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-98 (1978), represents a congressional response to these concerns. The unreviewable discretion of the Attorney General to ask for the appointment of a special prosecutor, 28 U.S.C. § 592(f) (1978), suggests that Congress is not yet ready to challenge the President's traditional control over law enforcement.

105. The independent agencies are formally defined as part of the exec-
tive officers in interpreting the laws is well established. There is little doubt that Congress may, for example, place a quasi-judicial decision solely in the hands of a lower executive officer and may protect his decision against attempts by superiors to reverse it. While the President has not tested this tradition of independence, language in Butterworth v. Hoe suggests that Presidential interference would not be successful.

In Butterworth the Commissioner of Patents decided to issue a contested patent to the assignees of one of the claimants. An appeal was taken from that decision to the Secretary of the Interior under regulations promulgated by the Secretary, and the Secretary reversed the decision of the Commissioner. The assignees then obtained a writ of mandamus from the appellate court of the District of Columbia to require the Commissioner to prepare the patent in accordance with his earlier decision. The United States Supreme Court affirmed the issuance of the writ of mandamus and held that no right of appeal to the Secretary of the Interior existed.

The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the department may extend, in respect to matters purely administrative and executive, they do not extend to a review of the action of the executive branch. See 5 U.S.C. § 105 (1977): “For the purpose of this title ‘Executive agency’ means an Executive department, a government corporation, and an independent establishment.” On the other hand, the regulatory agencies are recognized generally as different from other components of the executive branch. See Hynes, note 89 supra, at 311 (describing the popular assumption that regulatory commissions are independent of the President); Brownlow Committee Report, supra note 8, at 37 (criticizing the independence of the regulatory agencies and urging coordinated control by the executive branch); R. Cushman, The Independent Regulatory Commissions 442 (1941) (independent regulatory commissions are and must be parts of more than one department of government).


108. 112 U.S. 50 (1884).

109. Id. at 51-54.
Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of a judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subsection takes from it the quality of a judicial act.\textsuperscript{110}

The breadth of this language suggests its applicability had the President attempted to review the Commissioner's decision. The Secretary claimed authority to review by virtue of his role as head of an executive department.\textsuperscript{111} The Court rejected this argument by referring to the limited, specific statutory authority granted to superior executive officers in the patent context.\textsuperscript{112} The failure of the Court even to mention the possibility of Presidential authority suggests that quasi-judicial decisions are always controlled by statute. In fact, the Court's comment that the action of an executive officer can by statute be rendered "entirely independent, and, so far as executive control is concerned, conclusive and irreversible,"\textsuperscript{113} could well be viewed as a rejection of Presidential control over quasi-judicial acts and as perhaps a recognition of independence even in execution of the laws.\textsuperscript{114}

In contrast to quasi-judicial activity there are no similarly clear statements of independence in the area of quasi-legislative decisionmaking.\textsuperscript{114} The Supreme Court has, however, referred to the recipient of quasi-legislative authority as an "agent" of Congress in the drafting of regulations.\textsuperscript{115} This language implies that the line of authority for this task runs from the officer to Congress rather than to the President.\textsuperscript{117}

\textsuperscript{110} Id. at 67.
\textsuperscript{111} Id. at 56.
\textsuperscript{112} Id. at 64-67.
\textsuperscript{113} Id. at 56.
\textsuperscript{114} See id. at 67. For an even clearer suggestion that statutory discretion in at least a quasi-judicial area can be finally vested in a lower officer, beyond the power of the President to interfere, see United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), cert. denied, 279 U.S. 866 (1929) (no review of consular officers' decisions on issuance of visa).

\textsuperscript{115} The practice of delegation of quasi-legislative authority by Congress is, however, well established. See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

\textsuperscript{116} United States v. Grimaud, 220 U.S. 506, 516 (1911).
\textsuperscript{117} Buckley v. Valeo, 424 U.S. 1 (1976), does not demonstrate hostility

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Interpretive functions can be distinguished, though with difficulty, from acts of execution of the laws. A failure of Presidential direction in the interpretive area, therefore, does not necessarily undermine the active theory. On the other hand, independent action by executive officers in any area of responsibility is inconsistent with the view that there is a "constitutional ideal of a fully coordinated Executive Branch responsible to the President."

C. Ministerial Functions

Even in the field of functions plainly constituting execution of laws, executive branch officials may act personally rather than as agents of the President. The clearest example of such independence is in the area of ministerial functions.

One question among many discussed in Marbury v. Madison was the authority of the courts to exercise judicial review over acts of executive officers. Speaking for the Court, Chief Justice Marshall concluded that in cases in which the Constitution vests the President with "political powers" the acts of subordinate officers are in law the acts of the President. In this

to the desire of Congress to insulate quasi-legislative authority from Presidential control, though the Court held that officers who perform such functions must be appointed in accordance with the Appointments Clause. Id. at 140-41. The Court pointed out that interpretive powers are normally "performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress." Id. at 141. The reference to the direction of Congress may have been intended to emphasize the independence that can potentially be granted to executive officers engaged in rulemaking. Certainly the Court's language echoes Humphrey's Executor, in which independence was held to flow from a similar statutory purpose. Id. (citing Humphrey's Executor v. United States. 295 U.S. 602, 628 (1935)).

118. See note 55 supra.
119. BROWNLOW COMMITTEE REPORT, supra note 6, at 37.
120. Lack of Presidential control over ministerial acts tends to undermine Presidential authority over discretionary acts since the distinction between the two functions is unclear, see 31 VAND. L. REV. 91, 93-94 (1978). It also reduces the President's practical influence with Congress, since it withdraws his potential ability to delay the carrying out of a legislative directive.
121. 5 U.S. (1 Cranch) 137 (1803).
122. The question Chief Justice Marshall considered was whether the act of withholding a commission was reviewable. The Court concluded that if delivery was a political act, there could be no judicial review. Id. at 164. In the
context at least, an agency relationship prevails. Though the political realm was not defined, the President's military and foreign affairs powers were probably intended. A different relationship between the President and an executive officer was said to exist when the executive officer is commanded by Congress to perform a particular act. According to Chief Justice Marshall, Congress could choose not to put the officer, in his performance of a ministerial act, under the direction of the President, and in such an instance the President apparently could not forbid the performance of the duty.\textsuperscript{123}

Although Marshall was concerned primarily with the reach of judicial mandamus and not with the relationship of executive officers to the President, his discussion of ministerial duties is a theoretical challenge to the active theory. Marshall evidently felt that performance of a ministerial act is the responsibility of the executive officer on whom the duty is placed.\textsuperscript{124} Carrying out a ministerial command is an act of executing the laws. The active theory would vest the President with the responsibility to carry out the ministerial duty. The duty may have been entrusted to an inferior officer as a formal matter, but it is the President who would be acting.\textsuperscript{125}

\textbf{D. Discretionary Functions}

The theoretical existence of executive officer independence in the ministerial area, though a doctrinal affront to the active exercise of political powers, executive officers are merely extensions of the will of the President. \textit{Id.} at 166-66.

The political realm was probably intended to refer to the President's military and foreign affairs powers. See Zamir, supra note 7, at 71. But see United States v. Black, 128 U.S. 40, 44 (1888).

\textsuperscript{123} 5 U.S. at 166.

\textsuperscript{124} 5 U.S. at 166.

\textsuperscript{125} Even under the active theory a proper ministerial command ultimately would have to be carried out. But the actor who could be compelled to act would be the President, not the lower executive officer. Under the active theory the President could legitimately forbid a lower officer to perform a ministerial duty because the officer is merely the alter ego of the President. Judicial power would then run against the President to see that the ministerial act was performed. Such an agency relationship would not place the President above the law; it merely would recognize the President rather than the named officer as the responsible actor. \textit{Marbury} indicates instead that the lower officer is the responsible actor.
theory, has little or no practical significance. No matter which officer executes the law, Congress is ultimately entitled to enforcement of a ministerial command. The area of discretionary commands, on the other hand, is one of tremendous theoretical and actual consequence. Presidential control over acts of discretion guarantees Presidential policy control over the executive branch. Furthermore, Presidential control over discretionary action is a necessary corollary of the view that the President executes the laws.

The centrality of Presidential direction of lower officer discretion was formally stated in 1856 by Attorney General Cushing, who described the rule of the active theory for the circumstances "in which an executive act is, by law, required to be performed by a given Head of Department." He concluded that Presidential direction over administrative action does exist outside the ministerial area.

Take now . . . that common or most ordinary style (for legislation), in which an executive act is, by law, required to be performed by a given Head of Department. I think here the general rule to be . . . that the Head of Department is subject to the direction of the President. I hold that no Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts.

126. This is true because Congress is not capable of making all policy choices and then translating its decisions into ministerial commands. In the discretion of administrators lies the importance of the executive branch and the heart of the competition for control between the President and Congress. See Karl, supra note 6, at 19-20; notes 5-9 supra and accompanying text.

127. 7 Op. Att'y Gen. 453, 469 (1865). Attorney General Cushing had been asked whether instructions by Heads of Departments were lawful without express reference to the direction of the President. Id. at 453 (quoting a communication from the President of the United States). He analyzed the fundamental nature of the President's administrative authority and concluded that express direction was not required because, "as a general rule, the direction of the President is to be presumed in all instructions and orders issuing from the competent Department . . . ." Id. at 482.

128. Id. at 469-70. Cushing may also have excluded quasi-judicial acts from Presidential control. Id. at 470-71.

129. Id. at 469-70 (emphasis in original). In Cushing's view, a denial of the power of Presidential direction would allow Congress "so [to] divide and transfer the executive power as utterly to subvert Government . . . ." Id. at 470.
Cushing grounded this description of agency in the observation that under article II only the President could perform executive acts.\(^{130}\)

Although not noted by Cushing, his view of independent discretion had been convincingly rejected in dictum by the Supreme Court in 1837 in *Kendall v. United States*.\(^{131}\) *Kendall* grew out of a statutory order to the Postmaster General to pay a money award. The Postmaster General paid only a part of the award, whereupon the disappointed mail contractor sued for the rest. The lower court issued a writ of mandamus ordering the Postmaster General to make the remainder of the payment due.\(^{132}\) The Postmaster General interpreted the responsibility for payment to be a matter of discretion\(^{133}\) and argued that only the President, and not a court, could direct the exercise of such discretion.\(^{134}\)

Since the Court decided that the act in question was ministerial,\(^{135}\) it did not hold that executive discretion could be independent of the President. A key passage shows, however, that the Court did view executive officers as free from Presidential direction in carrying out even discretionary duties.

The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no

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130. Id. at 463.
132. Id. at 526-35.
133. Id. at 592-93. The primary position of the Government was that a ministerial command that did not affect the public could be enforced by means of mandamus. Ministerial acts that did affect the public were to be controlled by the President. Id. at 542-44. At a later point, however, the Government was at pains to point out that the act in question was not ministerial at all, and acknowledged the authority of the judiciary to compel the performance of ministerial duties. Id. at 592-96.
134. Id. at 599-600, 612. Counsel for the Postmaster General argued, in relation to executive officers, in the same manner as Attorney General Cushing, see text accompanying notes 127-30 supra, that under the Constitution there could not be "acts of independent subordinates." 37 U.S. at 543-44. At another point, however, the Government appeared to admit that a lower executive officer could at least refuse to obey an order of the President and could not be compelled to act, though he could be removed. Id. at 600.
135. Id. at 610. The Court also noted that the President had not forbidden payment of the awards. Id. at 612-13.
means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.136

Although it is emphatically the case with ministerial commands that the President does not have a power of direction, that appears to have been thought by the Court also to be the rule pertaining to all other commands, including, presumably, discretionary ones.137

A famous illustration of the legal incapacity of the President to act in the face of discretion granted to a lower executive officer occurred in 1938 when Secretary of the Interior Ickes rejected President Roosevelt's requests to authorize the sale of helium to Germany.138 The President could not himself authorize the sale because that power had been granted to the Secretary.139 If the President were in fact executing the law, he would be permitted to act directly in place of his agent. The Secretary's legal authority to refuse to act and risk removal, demonstrates the formal weakness of the office of the President.140 An unsuccessful st-
tempt in 1949 to give to the President a general power of direction over the executive branch further underscores the existing gap in the President’s legal powers.142

From the beginning of the Republic, Congress has acted as if formal Presidential control over execution were purely a matter of legislative authorization. Early Congresses gave to the President an express statutory power of direction over the departments associated with the President’s delineated “political” authority over foreign affairs and defense. This power of direction was omitted from the domestic departments such as the Treasury and the Post Office. During this period Congress demonstrated the helium policy in public debate. A less risky course would have been to apply serious Presidential pressure, such as the threat of removal, or political pressure. Ickes’ account suggests that serious pressure was not forthcoming. Perhaps in reality the President used Ickes’ opposition as a smoke screen for his own disapproval of the sales.


142. See McGrain v. Daugherty, 273 U.S. 135, 177-78 (1927) (Congress has powers of organization in military and criminal law enforcement); United States v. Mout, 124 U.S. 303, 308 (1888) (an inferior officer may be vested by statute with an independent power of appointment); 10 Op. Att’y Gen. 111 (1861) (Congress has organizational power in military departments); E. Corwin, supra note 4, at 69-70 (Congress creates all offices). Although Congress has plenary power in organizational matters, see 272 U.S. 52, 248 (1926) (Brandeis, J., dissenting), Congress may decide to yield some reorganization authority to the President. See United States v. Fresno Unified School Dist., 592 F.2d 1889 (9th Cir. 1979).

There is a surprising tendency to think of the office of the President as more powerful than it is in fact. For example, it is said that when President Ford found out that HEW had prohibited certain father-son and mother-daughter school activities, “he ordered immediate suspension and reexamination of the rule.” Bruff, supra note 7, at 465 n.67. The question of the President’s authority to intervene in this way could present a serious constitutional issue depending upon the precise statutory framework. Apparently, though, the public perceives the President as the one in charge of the executive branch, and the question was never raised.

143. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28.

144. Department of War, Act of August 7, 1789, ch. 7, § 1, 1 Stat. 49; Department of the Navy, Act of April 30, 1789, ch. 35, § 1, 1 Stat. 553.

145. Act of September 2, 1789, ch. 12, § 2, 1 Stat. 65, 66.

a commitment to independent execution of the laws by placing discretion in the Postmaster General to enter into contracts for post roads, despite the argument that this function should be controlled by the President.\textsuperscript{147} In the Treasury Department the practice of independence was at least as great. For a significant period in our early history, the President did not even see department budget estimates before the Treasury Department transmitted them to Congress.\textsuperscript{148} In fact, the Treasury Department recommended tax policy to the Congress.\textsuperscript{149} Though not without dissent,\textsuperscript{150} one commentator has concluded, "Guided by the model of the colonial governments the framers of the Constitution probably did not intend the President to be administrative chief of the executive branch, clothed with a general power to control the acts of all executive officers."\textsuperscript{151}

\textit{E. Appointment and Removal}

The argument could be made that the President's power of appointment and removal are the equivalent of a formal power of direction\textsuperscript{152} and thus vindicates the active theory. Removal and appointment, however, cannot substitute for an agency relationship. A principal is not limited to removing one agent and selecting another; a principal may direct his agent's actions or remove all authority from the agent and act directly in his place.\textsuperscript{153} If the

\begin{itemize}
\item[147.] L. White, \textit{The Federalists} 79 (1965).
\item[148.] L. White, \textit{The Jacksonians} 78 (1954).
\item[149.] L. White, \textit{supra} note 147, at 326.
\item[150.] "The law and the Constitution alike prescribed that in theory the whole business of the executive branch, domestic and foreign, be performed by the President or at his direction." L. White, \textit{The Jeffersonians} 70-71 (1965).
\item[151.] Zamir, \textit{supra} note 7, at 869. Such a system of decentralization was not necessarily an anomaly at the time. \textit{Id.} at 873. Indeed, the role of fragmentation in curbing arbitrary powers had modern adherents. See Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
\item[152.] A formal power of direction has been said to emanate from the removal power, E. Corwin, \textit{supra} note 4, at 85; P. Goodnow, \textit{The Principles of the Administrative Law of the United States} 81 (1905), as well as from statutes and other indirect control devices that support the principles of hierarchy. See Zamir, \textit{supra} note 7, at 873.
\item[153.] One of the distinguishing characteristics of the agency relationship is that the agent may act "with the same effect as if [the principal] were to act in person." \textit{Restatement (Second) of Agency} § 20 (1958). Control of the agent by the principal is a basic attribute of agency. \textit{Id.} at § 14. The significance
\end{itemize}
President possessed the sole power of execution of the laws, he would be able to maintain this degree of authority over the actions of executive officers. In addition to these theoretical problems, however, appointment and removal are not the practical equivalent of an agency relationship.

The President's appointment power is a particularly dependable means of control over executive officer discretion. Even in a situation in which the President has the power to appoint and manages to find an individual with whom he agrees on major issues, Congress may limit that power. The Senate must approve major Presidential nominations, and Congress'
power over organization is such that Congress decides which officer executes which law. Thus, if Congress is sufficiently determined it may give a statutory program to one particularly sympathetic executive officer for execution, despite any possible Presidential disfavor of the program.

The President's removal power is a far more potent source of policy control than is the power of appointment. Chief Justice Taft suggested in *Myers* that removal could represent the means to ensure the Presidential administrative control that he viewed as constitutionally required. The removal power has in fact been used from the beginning of the nation's history as a means of maintaining Presidential policy control. Since most officers will not risk being fired over a disagreement with the President, removal has been considered the practical equivalent of an express Presidential power of direction.

There exist, however, several reasons why removal is not a suitable, practical replacement for the power of direction. In the first place, policy control through removal operates only prospectively. Once it is recognized that an executive officer may be given the authority to execute a law, his decision is not automatically reversed even if he is replaced. Furthermore, removal is not

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160. See note 142 supra. There are other limitations on the efficacy of the appointment power. The President does not necessarily control appointment of inferior officers. See United States v. Mouat, 124 U.S. 303, 308 (1888). Furthermore, Congress may restrict the qualifications for an office. See generally Myers v. United States, 272 U.S. 52, 265-74 (1926) (Brandeis, J., dissenting).

161. Removal has even been thought to create a formal power of direction. See note 152 supra.

162. 272 U.S. at 135. Chief Justice Taft approached the removal power from the same perspective as did President Jackson. They both thought that Presidential direction of administrative officers was and ought to be the constitutional norm. See note 17 supra. *Humphrey's Executor* illustrates the opposite perspective in which a Presidential removal power is rejected precisely because direction is not valid. 295 U.S. at 629.

163. For example, President Adams dismissed Coxe as Commissioner of Revenue in 1797, L. Wurtz, supra note 147, at 269, and Pickering as Postmaster General in 1800, id. at 251-52, essentially for political differences.

164. See Grushkin, supra note 1, at 309.

165. See Myers v. United States, 272 U.S. 52, 135 (1926) (President may consider the decision after its rendition as a reason for removing the officer). The President might not be able to utilize removal prospectively, as a threat. If the lower officer has been granted personal discretion, any threat to fire him might
always available. In the case of the independent agencies, the power of removal does not exist,\textsuperscript{165} and it is not necessarily available in the case of lower officer appointees.\textsuperscript{166} Even in cases in which removal is available, the political cost of removal may be great.\textsuperscript{166} The President might also hesitate to remove an officer because the officer is valuable in other contexts. Finally, even if the power of removal is ultimately exercised, the President has been forced to expend time and energy to accomplish indirectly what the active theory states he ought to be able to do directly: control all execution of the laws. If the President does not control all execution of law, or if he does so only indirectly, the executive power cannot be said to include the power to execute the laws. This is true in the face of the admittedly great Presidential influence that flows not only from the removal power, but from other control devices available to the President.\textsuperscript{166} The conclusion that the President is not treated as if he executed the laws leads to a search for an alternative theory of the executive power.

IV. THE PASSIVE THEORY OF THE EXECUTIVE POWER

A. The President Supervises Execution of the Laws

The short survey in part II of this article suggests a tentative negative hypothesis: the President does not execute the laws.


\textsuperscript{165} There are in fact a host of disciplinary measures and incentives that an administrative superior can utilize to enforce policy judgments upon erstwhile independent subordinates. See C. Friedrich, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 397-408 (1968). But all indirect control devices suffer from the same defects from the point of view of the active theory. The President would have the right to act directly under the active theory. No indirect device is as dependable or as efficient as that simple expedient.
This view, though perhaps surprising, is not a complete departure from prior constitutional analysis. "[The President] is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself . . . ."170 "[The President] has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates."171 Of course, any theory of the executive power requires more than a description of what the President does not do. Article II itself provides the basis for a positive, alternative viewpoint.

Article II does not clearly grant to the President the power to execute the laws.172 Aside from the probably empty grant of the executive power itself, the President's power over execution is defined by article II, section 3, which provides in part that the President "shall take care that the Laws be faithfully executed." This wording implies that other parties are to execute the laws and that the President is to see that they execute the laws faithfully, thus limiting the President's role to supervision of execution by executive officers.173 The recognition that the President does not execute the laws, but rather merely supervises execution, is the heart of the passive theory of the executive power.

B. The Scope of Supervision

The President has often been said to supervise execution of

170. Ex parte Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487).

171. 4 Op. Att'y Gen. 515, 516 (1846); cf. Parker, supra note 29, at 449 ("President's substantive legal position . . . is not unlike that of any other agency of the administrative branch of the government," id.). See also 19 Op. Att'y Gen. 685, 686 (1890).

172. See notes 33-39 supra and accompanying text.

173. The constitution of the United States requires the President, in general terms, to take care that the laws be faithfully executed; that is, it places the officers engaged in the execution of the laws under his general superintendence: he is to see that they do their duty faithfully; and on their failure, to cause them to be displaced, prosecuted, or impeached, according to the nature of the case . . . . But it could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself.

the laws, but this description has not been considered a limitation upon Presidential policy control.\textsuperscript{174} In contrast, the premise of the passive theory, that executive officers execute the laws, logically requires that Presidential supervision over execution of the laws be limited in scope.

If the President does not execute the laws, Congress could legitimately command that other officers do so, and clearly Congress could command that in execution of a statute an officer use his best judgment. The President's role would be limited to ensuring that the statute be executed faithfully. If the officer, in good faith, used his best judgment, the statute would be executed in a manner faithful to congressional intentions. Accordingly, the President could not interfere solely because of a disagreement with the officer over the proper exercise of discretion.

Under the passive theory, Presidential control over officer decisionmaking would be a function of the degree of independence Congress wished to grant to lower executive officers. Congress could grant a lower officer broad or limited discretion, and any restrictions on officer discretion could be enforced by the President in his supervisory role. The President's supervisory role could be analogized to that of the courts in reviewing administrative actions.\textsuperscript{175} There would be no presumption that the President has authority to substitute his views for those of the officer.

Aside from the logical requirements of the passive theory, narrowly defined Presidential supervision over executive officers

\textsuperscript{174} See, e.g., Myers v. United States, 272 U.S. 52, 135 (1926); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843).

\textsuperscript{175} There is no indication in either Williams or Myers, for example, that references to supervision were intended in any way to limit Presidential power. Williams held that the statutory duty of the President to direct the payment of public money did not require a direct Presidential order in every instance. Myers held that the President had an absolute right of removal over executive officers. It is clear in Myers that Presidential policy control was considered a valid exercise of Presidential authority. See note 17 supra and accompanying text.

\textsuperscript{176} Traditionally there is a narrow standard of review of administrative action. See, e.g., NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-32 (1944). The standard of review is often framed in terms of actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1967); Citizens to Preserve Overton Park, Inc v. Volpe, 401 U.S. 402, 411-16 (1971). Disputes continue to arise in judicial review, as they surely would in Presidential supervision under the passive theory, over whether Congress intended to grant broad discretion to an administrator. Id.
is supported by a real, though neglected, tradition. This tradition, ironically, does not arise from attempts by the judiciary or Congress to limit Presidential power but from the executive branch itself. President Madison stated that the responsibility of the President was to "superintend" executive officers and to ensure "good behavior" on their part. In 1823 Attorney General Wirt set out similar limits. When requested to give his opinion of the President's authority to review settlements made by government accounting officers, Wirt responded that article II, section 3 gave to the President no authority to act.

The Constitution assigns to Congress the power of designating the duties of particular officers; the President is only required to take care that they execute them faithfully. [the President is] to see that the officer assigned by law performs the duty faithfully—that is honestly, not with perfect correctness of judgment, but honestly.

Attorney General Crittenton suggested a somewhat greater administrative role for the President; he asserted that the proper way for the President to ensure faithful execution of the law was to remove executive officers "for every neglect or abuse of their official trust." This standard of review permits Congress to place discretion in the hands of executive officers and at the same time allows the President to ensure administrative efficiency as well as integrity.

Judicial support for a narrow definition of Presidential supervision is expressed in the reported view of the circuit court in Kendall v. United States. Counsel for the Postmaster General said that the lower court recognized that the act at issue was executive in nature but held that the President has "no other

177. 1 Annals of Congress 387 (1789).
178. Id. at 379.
180. Id. at 625-26.
182. See also Myers v. United States, 272 U.S. 52, 247 (1926) (Brandeis, J., dissenting) (President has inherent authority to suspend lower officers for disloyalty, insubordination, and neglect of duty); L. White, supra note 147, at 287-88 (President Adams removed lower officers for administrative neglect and delinquency).
control over the officer than to see that he acts honestly, with proper motives without any power to construe the law, and see that the executive action conforms with it." 184 In counsel's view, the circuit court limited the President to supervising integrity rather than discretion. "If [the President] sees the inferior executive officer acting honestly, he can look no further. How, or when they execute a law, are things he has no concern with." 185

In *Myers v. United States* 186 Chief Justice Taft attempted to reconcile the premise of the passive theory with a more expansive view of supervision. In general, Taft reasoned directly from the premises of the active theory. 187 At one point in his opinion, however, the Chief Justice recognized that in certain instances the President might not have authority to direct an executive officer to a particular outcome. Even in such situations, Taft upheld absolute Presidential control. If a disagreement arose between the officer and the President, the President could remove the officer "on the ground that the discretion entrusted to that officer by statute [had] not been on the whole intelligently or wisely exercised." 188 By allowing the President to supervise the wisdom of an exercise of discretion, Taft's system permitted a great deal of Presidential policy control. In fact, Taft did not appear to recognize any practical difference between execution by the President and supervision.

For Chief Justice Taft, the scope of proper supervision had to include authority to substitute the President's judgment for that of the executive officer. The President's interpretation of a statute controls to ensure "that unitary and uniform execution of the laws which article II of the Constitution evidently contemplated in vesting general executive power in the President alone." 189

Chief Justice Taft's approach to supervision is inconsistent with his recognition that a statute might legitimately vest discretion in a lower executive officer. Presidential interference in such

184. Id. at 539.
185. Id. at 542.
186. 272 U.S. 52 (1926).
187. See notes 11-18 supra and accompanying text.
188. 272 U.S. at 132-35. See note 18 supra.
189. 272 U.S. at 135.
190. Id.
a circumstance, on the ground that the officer was unwise, does not ensure faithful execution; interference frustrates the congressional objective of independent execution. Even post hoc removal could threaten the independent discretion validly sought by Congress. The reason for Taft's inconsistency is perhaps his underlying support of the premises of the active theory. Taft's basic view was that the President is the only officer who may execute the laws, and thus he probably did not view congressional creation of independent execution as legitimate.

The proper scope of supervision under the passive theory is illustrated by examining the differing roles of removal under the active and passive theories. Under the active theory removal serves as a sanction for the failure to obey legitimate Presidential orders; the President's interpretation of a statutory scheme would prevail. Insistence by lower officers upon a contrary policy would not be lawful and would be properly handled by dismissal. In contrast, under the passive theory removal could not be exercised to ensure Presidential control of administrative policymaking, but only to protect a statutory scheme from administrative abuse or neglect.

C. Implications of the Passive Theory

Two significant implications flow from the passive theory. The first is unsettling, in light of our tendency to consider the President as head of the government. Because Congress would be free to give to any executive officer authority to execute a statute, one could say that no constitutional requirement of centralized and consistent policy formulation and execution exists.

191. Cf. 1 Op. Att'y Gen. 678, 679 (1824) (without statutory authority President's interference with decisions of accounting officers was a usurpation).
192. See note 165 supra.
193. See note 18 supra.
194. See Fortas, supra note 1, at 1001; Parker, supra note 29. The importance of the Presidency is acknowledged even by those who might be considered its critics. See Black, supra note 9, at 13; Fortas, supra note 1, at 987. Whether Presidential power is ascribed to constitutional authority, see Brownlow Committee Report, supra note 6; Hoover Commission Report, supra note 48, to legislative sufferance, see Black, supra note 9, or to a combination of both, see Grubstein, supra note 1; Zamir, supra note 7, reliance upon the Presidency to solve problems has come to be an established fact of American political life. See Karl, supra note 6, at 2, 23.
There would not appear to be any reason why law enforcement, for example, or any other key responsibility of enforcement and execution, could not be directed by an officer independent of the President, though subject to removal for cause.196

Under the passive theory Congress may choose not to divest the President of policy control; but, Congress could decide to give to the President authority to execute a particular law or even pervasive oversight of bureaucratic decisionmaking.197 Even though the President might thus exercise great authority under the passive theory, the office would have to be viewed as essentially a creature of Congress in domestic affairs.197

195. See note 70 supra.

196. This is a distinction that proponents of increased Presidential power are apt to miss. For example, the bureaucracy has been called "a major constitutional anomaly [because of the absence of a check or balance] capable of subjecting bureaucracy to political management." Karl, supra note 6, at 20-21. But this is entirely incorrect as a matter of constitutional law. Congress has complete control over the bureaucracy and may easily grant all necessary administrative oversight powers to the President.

It may be true, as has often been suggested, that Congress cannot efficiently manage the bureaucracy. See note 7 supra. Furthermore, there may well be political and constitutional reasons why Congress refuses to delegate entire administrative power to the President. See Karl, supra note 6, at 32-33. Nevertheless, before concluding that the existing state of affairs represents an institutional impasse necessitating extreme measures, it should be noted that Congress has delegated vast administrative power to the President already, see Zamir, supra note 7, and that administrative efficiency is by no means an unmixed blessing in a pluralistic democracy.

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.


197. In a different context, Mr. Chief Justice Vinson derided a "messenger-boy concept" of the Presidency that lacked powers necessary to meet the challenges of the day. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 708-09 (1952) (Vinson, C.J., dissenting). The passive theory suggests a President who is in fact nothing more than the messenger boy of the Legislature in domestic policy matters. If the passive theory is our present conception of the office, we would perhaps do well to consider the startling words of Professor Black:

My classes think I am trying to be funny when I say that, by simple
The second implication of the passive theory is that the President would retain the power to remove any officer who, in executing the law, abuses his position in some way. Under the passive theory, the proper scope of supervision would be narrow, but within the confines of that scope, the President's removal power could not be limited because it would be constitutionally mandated. Generally speaking, the President presently possesses statutory authority to remove for abuse, even over independent agencies. Insofar as the agencies execute the laws, this removal authority would be required under the passive theory.

Despite the centrality of removal, the passive theory's prohibition of Presidential policy control except by congressional authority could conflict with the constitutional obligation of the President to exercise supervision through the removal power. If the President removed a congressionally protected officer after an exercise of independent discretion, the officer might claim that the removal was motivated by an improper desire for policy control rather than for supervisory goals such as elimination of administrative abuse. Under the passive theory, could the courts intervene in Presidential removal by requiring stated reasons for removal and evaluating the President's good faith?

Judicial intervention would represent a great danger to the President's obligation to protect against the administrative abuse and neglect. In the first place, insofar as such an officer stood in a political relationship to the President, any failure of confidence by the President would justify removal, whatever its source, even under the passive theory. Even if the officer were merely execut-
ing the laws and stood in no special relationship to the President, judicial examination of a specific removal decision would have the effect of eliminating Presidential judgment in precisely the area in which it was intended to operate.\textsuperscript{202} Admittedly, unbridled removal authority would inevitably lead to some Presidential policy control that would be unwarranted under the passive theory. The formal acceptance of the view that policy removals are an abuse of Presidential power, however, would serve to discourage flagrant Presidential abuse of the removal power.

V. Conclusion

Congress legislates, and the courts decide disputes. What the President does should be obvious to all. Careful consideration reveals, instead, that two different theories of the executive power exist, neither of which has received any serious doctrinal development. These two theories differ over a simple distinction. One theory holds that the President acts; the other that he merely supervises others who act.

The evidence shows that the President need not be the primary actor in execution of the laws. On the other hand, important elements of the active theory continue to influence the Presidency in many ways, not the least of which is our manner of speaking of the office. To be told that the President does not execute the laws might seem absurd to most people, but the office of the Presidency may appear more powerful than it really is.

\footnote{The difficulty of distinguishing among the functions of executive officers for purposes of the removal power was one of the reasons cited by Chief Justice Taft for upholding a general removal power. \textit{Myers v. United States}, 272 U.S. 52, 134 (1926).}

\footnote{202. The officer would be asking the courts to look behind the President’s claim, required under the passive theory, that the removal was for proper cause, either for the alleged real reason or simply to weigh independently the evidence of administrative failure. There are two objections to such a course. Such an endeavor might well be fruitless insofar as it looks for unstated reasons. Moreover, if a court simply attempts to examine the evidence to determine whether the officer was really inefficient, it will be exercising a power specifically granted to the President. Under the passive theory, the President would retain sufficient authority to decide the proper level of competence in the execution of the laws. Occasional arbitrary action is a small price to pay for vindication of a constitutional system of bureaucratic control that permits a rapid response to administrative abuse.}

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Rigorous adoption of the active theory would have unfortunate consequences. All administrative decisionmaking by the executive branch would come under the President's direct control, and Government policy would become synonymous with Presidential policy. The President would have valid claims to new powers of organization, removal, and direction. Nonpolitical independent expertise in decisionmaking would no longer be an attainable goal. Theoretically, quasi-judicial and quasi-legislative acts would not be subject to Presidential policy direction. But given the logical weakness of the distinction between interpretation and execution, even those functions might come under Presidential control. Congress' theoretical capacity to protect legislative policy by placing less discretion in execution is not likely to be utilized in practice given present-day complexities.

On the other hand, adoption of the passive theory would be worse. The Presidency would be left a shell. Certain powers unrelated to execution of the laws would remain. Perhaps even limited powers relating to execution would also remain, although those powers would be subject to congressional withdrawal. But the execution of all government programs could be given to a series of cabinet secretaries, and our system of government could thus be converted into a kind of cabinet system. Even law enforcement could be removed entirely from Presidential control. The removal power itself, its limited role unmasked, might be subject to potential judicial limitation if utilized improperly to ensure policy control. Although Congress could avoid all these consequences by appointing the President administrative chief, the realization of Presidential weakness made evident by recognition of the passive theory might tempt Congress not to grant such power to the President.

The stark contrast between the consequences of the active and passive theories suggests that a balance between them should be found. Such a balance might well reflect our present inconsistent practices. But there is nothing inherently stable about our

203. The Constitution grants authority to the President in military affairs, U.S. Const. art. II, § 2, cl. 1; Ex parte Quirin, 317 U.S. 1, 28 (1942), and foreign affairs, United States v. Pink, 215 U.S. 203 (1919); United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936). These powers do not appear to be tied to Presidential authority over execution of the laws.

204. See notes 65-69 supra and accompanying text.
present practices because they are not based upon a comprehensible view of Presidential power. Instead of continuing to muddle through as at present, the more likely result, in view of the overwhelming support our administrative practice gives to the passive theory, is that the Presidency will be deprived of the remaining vestiges of the active theory.

If adoption of the passive theory is not a desired course, and if the consequences of the active theory are similarly unacceptable, an effort must be made to develop an alternative, coherent account of the nature of Presidential power over execution of the laws. Such an account, if it is to be persuasive, will have to recognize the two approaches present practices demonstrate. Even if no alternative to the active and passive theories is ultimately formulated, an informed choice between them would at least not leave an important aspect of Presidential power resting upon a foundation of confusion and ambiguity.