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# ESSAY

## The President and Faithful Execution of the Laws

Arthur S. Miller\*

“Can it be presumed, that Persons sworn to execute the laws, shall openly counteract and violate them?”<sup>1</sup>

### I.

The Constitution is explicit: The President “shall take care that the laws be faithfully executed.” Lurking, however, within that seemingly unambiguous language are several constitutional problems—some resolved, some partially resolved, some the subject matter of continuing controversy. As the power of the Presidency has aggrandized since 1789, particularly during the past half century, the question of the meaning to be given to that phrase—and by whom—in different contexts has moved to the forefront of issues involving the separation of governmental powers. This Essay will use the label “separation of governmental powers,” although it long has been known that the constitutional scheme calls for separate institutions sharing power—quite a different thing.<sup>2</sup>

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1. M. KAMMEN, *PEOPLE OF PARADOX; AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION* 42 (1973). The statement originally appeared in the *Independent Reflector*, a New York weekly newspaper, in 1753.

2. See R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP WITH REFLECTIONS ON JOHNSON AND NIXON* 101 (1976) (“The constitutional convention of 1787 is supposed to have created a government of ‘separated powers’. It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers.”) (emphasis added). Dean Don K. Price bids us “to quit talking about the Constitutional separation of powers.” D. PRICE, *AMERICA’S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION, AND POLITICAL RESPONSIBIL-*

This Essay addresses the faithful-execution provision in four discrete areas: (1) Presidential power when the Constitution is silent—here “reason of state” (*raison d'état*) is the focus of attention; (2) the Presidency and statutory mandates—a recent decision in the Third Circuit provides a point of departure; (3) the question of the President's constitutional duty to enforce Supreme Court decrees—*Cooper v. Aaron*<sup>3</sup> is the principal center of attention here; and (4) the President and international law—the Executive's recent actions with respect to the International Court of Justice offer a factual context for discussion of these principles. In speaking of the President and his duty to faithfully execute the laws, I shall make reference not only to the Chief Executive himself, but also the institutional Presidency and to that congeries of agencies, departments, and bureaus that make up what usually is called the executive branch. In legal theory, those who are the officers of that branch ultimately are responsible to the President, and he ultimately is responsible for their actions. Only the so-called independent regulatory commissions fall, in legal theory, outside the ambit of Presidential duty.

Neither history nor logic provides answers to the questions swirling around the faithful-execution provision: history in the sense of an accurate determination of the framers' intentions, logic in the sense that constitutional decisions can be syllogistic derivations from the constitutional text. What is known about what took place in the Constitutional Convention is of little help; neither are *The Federalist Papers*, those propaganda essays written by Madison, Hamilton, and Jay to manipulate opinion toward favoring the new constitution. Some insight can be gleaned from law created by the Supreme Court and other organs of government, but that gloss is far from definitive. As for logic, here as elsewhere it is only by a transparent fiction that constitutional decisions are deduced from the spare text of the document of 1787.

We have come to know, moreover, that since 1789—when the new government came into being—the development of the Constitution has been determined more by what Alexander Hamilton called “accident and force” than by some supposedly immutable truths set forth on parchment. The Constitution is now, and

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IRY 135 (1983). Surely he is correct. For discussion, see Miller, *Myth and Reality in American Constitutionalism*, 63 TEX. L. REV. 181, 191-94 (1984) (reviewing the Price book).

3. 358 U.S. 1 (1958). For discussion, see Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URB. L. 573 (1981).

always has been, relative to circumstances. Each generation of Americans, therefore, writes its own constitution. Some do not like that conclusion, but it is beyond reasonable doubt that the Constitution today is tied to the original formulation only in symbolic and metaphorical ways. Woodrow Wilson made the point in 1908: "[G]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life."<sup>4</sup> That people differ in their perceptions of those tasks and pressures does not belie Wilson's assertion.

The assertion holds true for the faithful-execution duty of the President. This Essay concludes that a) the meaning of the word "laws" in the Article II provision is not definitively settled; (b) the President has varying degrees of discretion, depending upon the particular law at issue, to execute the laws; (c) normatively, the Chief Executive's discretion should be reined in and circumscribed in some manner; (d) those in the executive branch at times assert the power to make independent judgments on the constitutional validity of certain governmental acts; and (e) the ultimate result is that here, as elsewhere in constitutional disputes, the play of politics, rather than the interdicts of those external standards called law, usually settles specific arguments. This, it should go without saying, is quite contrary to the precepts of a government of laws, not of men. In what follows, I shall pay attention to an aspect of what at times is called the "living constitution," rather than to what I elsewhere have called the operational code of American constitutionalism (or the "secret constitution," there being a system of constitutional dualism in the United States).<sup>5</sup> The term "living constitution" refers to the ways in which the meanings of the litigable ambiguities in the Constitution of 1787 have evolved over the decades. It does not refer to the institutions of the secret (or second) constitution, for example, the rise of political parties to constitutional status.

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4. W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56 (1908).

5. Miller, *Pretense and Our Two Constitutions*, 54 *GEO. WASH. L. REV.* 375, 375 (1986). See also A. MILLER, *THE SECRET CONSTITUTION AND THE NEED FOR CONSTITUTIONAL CHANGE* (forthcoming in Oct. 1987).

## II.

What the Constitution does not say is often as significant as what it does say. The ready example here is judicial review. For present purposes, this Essay will focus upon the President's exercise of the constitutional reason of state "doctrine"—what John Locke called the "prerogative."

What is reason of state and how is it relevant to the present discussion? Not mentioned in the document of 1787—although one could say that the Bill of Rights was an effort to place reasons of freedom and liberty on par with, or perhaps superior to, reasons of state—reason of state is "the State's first Law of Motion,"<sup>6</sup> "the doctrine that whatever is required to ensure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men."<sup>7</sup> Whoever rules, under whatever system of government, always follows principles of reason of state. Some, like the French, have the doctrine written into their constitutions. Its absence in the American Constitution has not prevented, and does not now prevent, Presidents from following its dictates. American constitutional history is replete with examples of use of the principle—not in so many words, to be sure, for politicians, courts, and commentators alike speak in terms of the document of 1787 and its amendments. Nonetheless, it is a fair and accurate inference from our constitutional history that *raison d'état* is as much a part of our fundamental law as is the written word itself.

This is not the time or place to discuss the idea of reason of state comprehensively. That has been done elsewhere. Suffice it for now to note that the doctrine received its constitutional imprimatur in *The Prize Cases*, which sustained President Lincoln's blockade of southern ports during the early days of the Civil War. Said the Supreme Court: "Whether the President in fulfilling his duties as Commander-in-Chief, in suppressing an insurrection, has met with armed resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be gov-

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6. F. MEINECKE, *MACHIAVELLISM: THE DOCTRINE OF RAISON D'ÉTAT AND ITS PLACE IN MODERN HISTORY* 1 (D. Scott trans. 1957).

7. C. FRIEDRICH, *CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER* 4-5 (1957). See Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980).

erned by the decisions and acts of the political department to which this was entrusted . . . . 'He [the President] must determine what degree of force the crisis demands.'"<sup>8</sup> A constitutional silence had been filled; reason of state became an operative principle of our fundamental law.

This is Machiavellianism pure and simple. The Florentine wrote: "[R]epublics which, when in imminent danger, have recourse neither to a dictatorship, nor to some form of authority analogous to it, will always be ruined when grave misfortune befalls them."<sup>9</sup> Machiavelli's insight is central to an understanding of American constitutionalism, although his precept should be modified to note that the dangers that have triggered extraordinary responses have not been limited to "grave misfortune." Major wars are one thing, but also notable are so-called limited or "brushfire" engagements (as in Grenada and the Dominican Republic), internal subversion (actual or supposed), economic depressions, labor strife, actions of dissident groups, and natural disasters.

The central idea is that the ruling elite must consider a given situation to be an emergency before extraordinary, even extraconstitutional, action is contemplated. In his writings Machiavelli plunged a sword "into the flank of the body politic of Western humanity, causing it to shriek and rear up."<sup>10</sup> The pain of that sword's thrust is still with us. If ever we stop feeling it, it will not be because the conditions that occasioned the pain have for some reason disappeared, but because our nerves have gone dead. This contradiction in American constitutionalism has never been confronted directly and certainly never reconciled.

What may we conclude about constitutional reason of state as exercised in the United States? First, government officers who employ extraordinary powers gloss over their acts with a counterpane of a more pleasing label, such as the "interests of society," the "national interest," the "public interest," and the like. Next, reason of state makes nonsense out of the running controversy between interpretivists and noninterpretivists that has cluttered up law journals in recent years. To my knowledge, none of the participants in the debate has ever called attention to the Constitution's silences, of which reason of state is a major one, that have been and are being filled in a completely noninterpretivist manner.

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8. 67 U.S. (2 Black) 635, 670 (1862).

9. I N. MACHIAVELLI, *THE DISCOURSES OF NICCOLO MACHIAVELLI* § 34, at 291 (L. Walker ed. & trans. 1975).

10. F. MEINECKE, *supra* note 6, at 49.

Third, all branches of the national government cooperate in the employment of reason of state. The President exercises well-nigh unfettered discretion in accordance with *his* interpretation of the public good. He follows Lockean principles. Congress usually goes along, largely having lost—if it ever really had—the will to govern. The Supreme Court, when push comes to shove, acts as an arm of the Executive. Beginning with *The Prize Cases* (and perhaps earlier) and running through *Haig v. Agee* and *Snepp v. United States*, there is an almost undeviating line of decisions that add up to the proposition that the state always wins in any case considered important by the ruling elite.<sup>11</sup> The *Steel Seizure Case*<sup>12</sup> is not to the contrary, for there the Presidential actions would have been sustained had President Truman seen fit to ask Congress to enact a statute validating the seizure of the steel mills.

Fourth, and of greatest present importance, the “law” that the President and other executive officers “execute” in filling this great constitutional silence simply does not exist, however “law” may be defined. The President, therefore, is executing no law, but following the great political principle of necessity. The problem this poses is obvious: the notion of a government under law is lost. Perhaps the concept never existed, except in the myth system. The exercise of reason of state’s further meaning is that the spirit of the Constitution, which calls in its separation of powers for accountability in the exercise of power, is flouted. That means that no criteria survive by which exercises of constitutional reason of state may be adjudged. It is politics, and politics alone, that prevails. Moreover, there is a further unsolved problem. As Milton recognized, necessity—the rationale for *raison d’état*—is the plea of every tyrant: “[A]nd with necessity, The tyrant’s plea, excused his devilish deeds.”<sup>13</sup>

We therefore are left with a constitutional anomaly. Unless one is willing to recognize an untapped reservoir of “inherent” powers resting in the Presidency, we must confront the fact that we often are ruled by executive fiat. President Lincoln knew this. He asked on July 4, 1861: “Is there in all republics this inherent and fatal weakness? Must a government be too *strong* for the liberties of the people, or too *weak* to maintain its own existence?”<sup>14</sup>

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11. 453 U.S. 280 (1981); 444 U.S. 507 (1980).

12. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

13. J. MILTON, *PARADISE LOST* bk. IV, l. 393, at 219 (A. Fowler ed. 1971).

14. C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES* 1 (1948) (quoting a message to Congress by President Lincoln).

Lincoln simply ignored law and the constitutional processes, saying (although he came into office "with little more than acute understanding of his obligation to see to the due execution of the laws"<sup>15</sup>),

It became necessary for us to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should let the Government fall at once into ruin, or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it, with all its blessings, for the present age and for posterity.<sup>16</sup>

That is eloquent, but obviously flawed. Those "broader powers" simply cannot be found in the Constitution. Lincoln governed by fiat.

The net conclusion must be this: Among the "laws" that the President must faithfully execute is constitutional reason of state, or in other words, the laws of politics. Presidents do those acts that the political process permits. A straight line runs from the Whiskey Rebellion of 1794 to the "covert" war in Central America, and it no doubt will continue to run. Unless Congress intervenes, which it is not at all likely to do, there is no way that anyone can stop the President by acting "within the system." The judiciary is not only the least dangerous branch; it is a sapless and toothless branch in such circumstances, even though the writ of the Supreme Court now can run against the President *qua* Chief Executive.<sup>17</sup>

### III.

We turn now to the much more obvious problem raised by the Presidential faithful-execution duty—the Executive's power to ignore or refuse to obey statutes. Two questions regarding this power may be identified: (1) Can the Executive contest the constitutionality of federal statutes in litigation? (2) Of more present importance, can he constitutionally refuse to execute laws, or portions thereof, that he does not like and about which he at times expresses constitutional reservations? The latter is the focus of attention at this time. A recent decision in the Third Circuit, *Ameron, Inc. v. United States Army Corps of Engineers*,<sup>18</sup> provides a basis for sharpening the discussion.

As for the first question, a colleague and I have discussed it in

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15. N. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY 31 (1932).

16. 4 MESSAGES AND PAPERS OF THE PRESIDENT 78 (J. Richardson ed. 1897).

17. See *United States v. Nixon*, 418 U.S. 683 (1974).

18. 787 F.2d 875 (3d Cir. 1986).



detail elsewhere,<sup>19</sup> so there is no need to repeat what was said there, save to emphasize that no court yet has expressed dissent or even reservations about the Department of Justice's challenging the constitutional validity of some statutes. The Supreme Court in *INS v. Chadha*<sup>20</sup> permitted the Justice Department to piggyback on Mr. Chadha's personal lawsuit. It appears, therefore, that the present Court perceives no constitutional problem with the executive branch's power to contest the validity of federal statutes, although I consider this to be a profoundly erroneous judicial position.

Judicially challenging the constitutionality of a statute may not be tantamount to refusing to obey the statute, but it comes close. *Ameron* presents the latter question of refusal to obey. The Director of the Office of Management and Budget (OMB), acting on the advice of the Attorney General, issued a directive to executive departments and agencies to disregard certain provisions of the Competition in Contracting Act (CICA). Thus, *Ameron* is important because it concerned a Presidential attempt to make an independent determination of the constitutionality of certain statutes and a refusal to execute those that he did not think met the constitutional test. *Ameron* involved the powers of the General Accounting Office—more specifically, the Comptroller General—but that is not of present interest. Nor is *Bowsher v. Synar*,<sup>21</sup> a somewhat analogous case involving the Comptroller General. The only issue of present relevance is an order from the OMB to executive agencies to proceed with the procurement process "as though no such [stay] provisions were contained in the act." The Third Circuit was not persuaded: "This claim of right for the President to declare statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional is dubious at best."

Surely, the court was correct. To say that the President's duty to faithfully execute the laws implies a power to forbid their execution is to flout the plain language of the Constitution. This was acknowledged by then Assistant Attorney General William H.

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19. Miller & Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L. J. 51 (1979).

20. 462 U.S. 919 (1983).

21. 106 S. Ct. 3181 (1986); *Seventh Report of the Committee on Government Operations*, H. R. REP. NO. 138, 99th Cong., 1st Sess. (1985) ("The President's suspension of the Competition in Contracting Act is unconstitutional.").

Rehnquist in 1969:

It is in our view extremely difficult to formulate constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law, is by definition, an executive function and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.<sup>22</sup>

To think otherwise would be to indulge in a feat of splendid illogic.

The argument for executive refusal to obey statutory mandates ultimately rests on the single rationale that the President takes an oath to uphold both the Constitution and the laws and that the Chief Executive is entitled to take an independent view of whether a given congressional enactment is constitutionally valid. In the language of Fred F. Fielding, counsel to President Reagan, "There are times when the Administration has been accused of ignoring the law. But remember that the President is sworn to uphold both the Constitution and the laws. We seek to resolve conflicts. Strong presidents especially are mindful of their responsibilities to those who come after them, and seek to assure that they do not erode any executive prerogative."<sup>23</sup> Some statutes, furthermore, are sufficiently ambiguous as to permit a great deal of discretion in their execution.

The Presidential position is disingenuous at best. It assumes the answer and calls it a reason. Fielding merely restated the basic issue in his defense. To permit his reasoning to prevail would mean, at the very least, that the President would be able to exercise an informal line-item veto over those portions of statutes he does not like. At worst, adoption of Fielding's reasoning would mean that Chief Executives are above and beyond the laws passed by Congress. That conclusion would render the constitutional scheme completely awry; the United States would then have a king for president, someone who would in fact be superior, rather than equal, in title and dignity to the Supreme Court and the Congress. It should not be forgotten that James St. Clair, when he argued *United States v. Nixon* for then President Nixon, let the Court know that under the Constitution the President might not be required to obey the writ of the Court should it be adverse.

The conclusion, therefore, is unavoidable. The President does

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22. Quoted in J. BARRON & C. DIENES, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 284 (1982).

23. Quoted in Tolchin, *As Laws are Flouted, Congress Seethes*, N.Y. Times, Nov. 13, 1985, at 19, col. 3.

not have an item veto, as he sought to exercise in *Ameron*, nor does he have the right under the Constitution to flout entire statutes. Once Congress enacts a statute, whether over a Presidential veto or with his approval, the President is duty bound to enforce it, as are other officers in the executive branch. The President's alternative is that set forth in the Constitution—to propose legislation in the hope that Congress will change its mind.

That, however, is the easy case. A statute is a law within the terms of the faithful-execution clause (of that there can be no doubt). To "execute" a statute, as Senator Sam J. Ervin often reminded executive officers, emphatically does not mean to kill it. Execution means implementation. A tougher problem arises when an executive officer does not brazenly flout the congressional will, as in *Ameron*, but rather simply does not follow what seems to be the clear legislative intention and does not take reasonably adequate steps to enforce some statutes. The officer simply permits the statute to fall into desuetude. For example, the Reagan administration delayed for eighteen months the issuance of regulations that would execute or enforce the Infant Formula Act of 1980. Said Senator Albert Gore, Jr.: "They absolutely refused to obey the law."<sup>24</sup>

The point need not be labored. With the rise of the "bureaucratic state," Congress has delegated large chunks of governing power to the public administration. About four hundred public laws are enacted each year. There is no way, at least no *known* way, that either Congress or the judiciary can oversee the implementation of the details of the statutes in the United States Code, save in the occasional case that does get to court when some person, natural or corporate, believes that his, her, or its rights have been trampled upon. The bureaucracy makes millions of decisions annually. It would be puerility compounded to think that those officers charged with the administration of statutes do not exercise discretion in choosing which road to take in implementation. In this connection, it is relevant to invite attention to what may be a "law" of bureaucratic behavior: The higher one is in the bureaucracy, the more discretion he or she may exercise. Stated conversely, those lowest in the administrative pecking order have the least discretion. In any event, it requires no documentation (for it is common knowledge) that different political administrations approach statutes in different ways. Some enforce them to the hilt;

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24. *Id.*

others casually ignore them.

The net conclusion, accordingly, is clear. Although executive officers, including the President, are duty bound to execute the laws that Congress enacts, that is true only under the mandate of the formal Constitution. The secret constitution (or operational code) differs considerably. Executive officers, particularly those in high-level positions, administer statutes as they think is best (rather than as Congress spoke) and are limited only by the pressures of politics, including judicial decisions, rather than by the interdicts of law. The President does what the political process allows him to do—or to get away with.

#### IV.

That courts, particularly the Supreme Court (although not exclusively), are lawmakers is one of the commonplaces of the day. Are those judge-made laws to be included in the “laws” that the President must faithfully execute? There is no ready answer to this question. For that matter, to my knowledge no one has ever raised the question before. Surely, however, any comprehensive analysis of the faithful-execution duty must confront the problem. This section concentrates more on posing the question than on providing a definitive answer, but does conclude that there is no logical reason why Supreme Court decrees should not be treated in the same way as congressional statutes.

Even members of the present Supreme Court have recognized the lawmaking powers of the judiciary. For example, Justice William Brennan wrote in 1980 that “[u]nder our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*.”<sup>25</sup> The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking. Justice Byron White commented similarly in his dissenting opinion in *Miranda v. Arizona*: “The Court has not discovered or found the law in making today’s decision, nor has it derived from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has done in the course of interpreting other great clauses of the Constitution.”<sup>26</sup> Supreme Court decisions, therefore, are *de facto* class actions—with the class being the entire nation—unless, as in *Pick-*

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25. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) (Brennan, J., concurring).

26. 384 U.S. 436, 531 (1966) (White, J., dissenting).

ering v. Board of Education,<sup>27</sup> the Justices expressly limit the thrust of their decisions.

*Cooper v. Aaron*, the Little Rock school desegregation case, amply illustrates that the Justices themselves view their decisions as stating "the supreme law of the land." *Cooper* is a major milestone in Supreme Court history, for it marked the first time that the Court overtly conceded that it was making constitutional law. In so doing, the Justices accomplished the neat feat of doing the logically impossible—inferring a *general* principle from *one* particular. The meaning in constitutional terms should be mentioned: great changes in the American system are being brought about under old forms. The *form* of adjudication remains, and the adversary system is still employed, but the Court's role has been altered substantially in recent decades. In other words, the formal Constitution adheres to a legal theory that says the Justices merely decide "the law of the case," but the secret constitution or operational code recognizes that they decide "the law of the land."<sup>28</sup>

As "laws," then, Supreme Court decisions surely fall within the ambit of the faithful-execution clause. The Presidential duty, therefore, becomes utterly clear—to faithfully execute those laws. Do not ignore them and do not seek to have them overturned in subsequent litigation: this seems to be the command of the Constitution.

Reality differs. Presidents and executive officers, unless directly affected by Supreme Court decrees, simply do not consider themselves to be bound by them or to have a duty to enforce them. There is no transference of, say, a Supreme Court administrative law decision concerning the Nuclear Regulatory Commission to an action taken in similar factual circumstances by some other executive agency. Administrative law is less a horizontal corpus of principles and rules affecting all public administration than a series of discrete corpora of principles and rules, each dealing with a separate agency or department. The President *qua* Chief Executive never has seen fit to execute judge-made laws of public administra-

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27. 391 U.S. 563 (1968).

28. This is the gravamen of Attorney General Edwin Meese's recent attack on the Supreme Court. Address by Att'y Gen. Edwin Meese, Tulane University (Oct. 21, 1986) excerpted in *LEGAL TIMES OF WASH. D.C.*, Oct. 27, 1986, at 12. Whether Supreme Court decisions are in fact "the law of the land" may be said to be an as yet unresolved constitutional question—although it is fair to say that the majority of informed observers disagree with Mr. Meese. *But cf.* Levinson, *Could Meese Be Right This Time?*, *THE NATION*, Dec. 20, 1986, at 689.

tion across the board, even with the existence of the Administrative Procedure Act, whose spirit would seem to call for precisely that Presidential action.

Modern-day Presidents go even further. They contest, when possible, the validity of some Supreme Court decisions. *INS v. Chadha*<sup>29</sup> is instructive in this regard. In that case the Justice Department piggybacked upon Mr. Chadha's lawsuit and helped to persuade the Supreme Court to invalidate the one-house legislative veto provision of the applicable statute. Mr. Chadha won, but the more important winner was the executive branch. The case, therefore, should be styled *Congress v. the President*, for that was precisely what was involved, although neither branch was a primary party in the litigation.

This is too much. Although the question of the propriety of the Executive's challenging the constitutionality of duly enacted federal statutes has never been confronted directly by the Supreme Court, surely there is no warrant, either in the Constitution or the relevant statutes, for the Department of Justice so to act. Only by equating the executive branch with "the" government or "the" United States can it be said that the Department is adhering to its statutory responsibility set forth in 28 United States Code section 2403. That section provides for the Department's appearance on behalf of the United States when a congressional act's constitutionality is involved. The section's purpose was to accord the "government the right to defend the constitutionality of the law of the land. No longer must the Government stand idly by, a helpless spectator, while Acts of Congress are stricken down by the Courts."<sup>30</sup> That statement by President Franklin D. Roosevelt came in 1937. Fifty years later, the original purpose of the law has been reversed; the United States has, in the eyes of the Department of Justice, become the executive branch. Cavalierly disregarding their duty to enforce the Constitution and the laws of Congress, lawyers in the Justice Department attack the constitutionality of statutes and Supreme Court decisions of which the President does not approve. This will not do. The Constitution did not establish a regal president who may pick and choose from among the laws—legislative or judicial—that are to be executed.

Finally, the Supreme Court in the famous *Neagle*<sup>31</sup> case held

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29. 462 U.S. 919 (1983).

30. White House Press Release, Aug. 25, 1937, at 2, reprinted in 122 CONG. REC. S17,084 (Sept. 29, 1976). See Miller & Bowman, *supra* note 19.

31. *In re Neagle*, 135 U.S. 1 (1890).

an Attorney General's regulation was to be "a law of the United States," a holding that could provide the basis for the regulation's faithful execution. In *Cooper v. Aaron* the Court unanimously rejected an argument that the President's take-care duty did not permit the use of troops to enforce *Brown v. Board of Education* because, so the argument went, only statutes are to be included in the term "laws" in the faithful-execution clause. No one yet has tried to extend *Cooper* to other situations and thus to compel the President to execute other judicial decrees. Perhaps the time has come, however, for serious attention to be paid to this issue.

All of this is not to suggest, as did President Lincoln in his first inaugural address in 1861, that the people will have "resigned" the conduct of the government to the Supreme Court. Far from it. Executive enforcement of judicial decrees would be limited by the very fact that the invisible, but nonetheless existent, cords that bind judicial activity would not be thrown out. Congress too has an undetermined amount of authority to regulate the Court's appellate jurisdiction. The Court is not a rogue elephant, given to going off on frolics of its own. Rather, it is a constituent part of government. We should bear in mind Professor Martin Shapiro's observation: "No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints."<sup>32</sup> Judges are part and parcel of the political regime.

## V.

Is international law a part of the corpus of laws that the President must faithfully execute? This section explores that question. We begin with the assumption that international law really is law, as Professor Anthony d'Amato recently concluded.<sup>33</sup> As Ambassador Philip Jessup observed thirty years ago, international law is adhered to as much as municipal law.<sup>34</sup>

International law, furthermore, is part of the law of the United States. To the extent, for example, that international law may be found in treaties, it is part of "the supreme law of the land" pursuant to Article VI. (Of course, there is more to international law than that embodied in treaties, but attention here will focus on the United States' treaty obligation with respect to the International

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32. M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 34 (1981).

33. D'Amato, *Is International Law Really "Law"?*, 79 NW. U.L. REV. 1293 (1984).

34. P. JESSUP, *TRANSNATIONAL LAW* 5-6 (1957).

Court of Justice (ICJ).) This has been so since the beginning. The participants in the Constitutional Convention "had a knowledge of contemporary legal thought . . . . It was axiomatic among them that the Law of Nations, applicable to individuals and to states, was an integral part of the law which they administered or practiced."<sup>35</sup> Chief Justice John Marshall agreed. He "accepted the binding force of international law upon courts of the United States with no apparent difficulty."<sup>36</sup>

Can then the President refuse to obey or, to put it more strongly, violate international law? The answer must come on two levels. First, under the "norms" of the operational code, the President simply can take actions contrary to international law or even the solemn promises in treaties. This may be seen, to take only one example, in the manner in which the United States has refused to adhere to the compulsory jurisdiction of the International Court of Justice with respect to disputes arising in Central America. Relying upon Professor Louis Henkin's *Foreign Affairs and the Constitution*, Justice Department lawyers contend that "[t]he Constitution does not forbid the President . . . to violate international law, and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law."<sup>37</sup> This, to put it bluntly, simply is too much. Even Henkin, a former State Department functionary, concedes that "there are no clear Supreme Court holdings, or even explicit dicta, upholding the power of the President to act contrary to international law."<sup>38</sup> There can be no question that the President acted unconstitutionally in unilaterally amending the ICJ treaty and in refusing to follow the decision of the ICJ in Nicaragua's lawsuit against the United States.

Second, it is clear beyond doubt that power is one thing, law another. The President was able to succeed in his amendment of a treaty and his cavalier refusal to adhere to the ICJ's decision, but only because of a lack of an appropriate enforcement mechanism. The norms of the formal Constitution cannot sustain these actions. "Whether President Reagan's 1984 modification of the 1946 Decla-

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35. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 35-36 (1952).

36. B. ZEIGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* 5 (1939); see, e.g., *The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825) (the law of nations "which has received the assent of all must be the law of all") (Marshall, C.J.).

37. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 221 (1972).

38. *Id.*



ration [concerning the ICJ] is called a temporary termination, an amendment or something else, in the absence of Senate or congressional concurrence," Professor Michael Glennon concludes, "his act is unconstitutional."<sup>39</sup> The remedy for such improper executive actions, therefore, lies initially in Congress, not the courts. Failure of Congress to act bespeaks a breakdown in the separation of powers and the checks and balances that the men of 1787 wrote into the formal Constitution. It will not do to argue that an appropriation to fund the Contras in Nicaragua is a de facto ratification of the Executive's constitutionally improper acts. All knowledgeable people know that in voting to appropriate money, a Congressman is not necessarily approving of the continuation of a conflict, regardless of whether the appropriation act refers to that particular war. The Supreme Court has never specifically approved such extraconstitutional Presidential actions as the Korean and Vietnam "wars," and as Professor Henkin notes, the Court never has said that a President may violate international law.

In some respects, executive actions with respect to Central America are an example of what above was called *raison d'état*. Such actions are Machiavellian, pure and simple. Machiavelli wrote: "It is a sound maxim that reprehensible actions may be justified by their effects, and . . . when the effect is good . . . it always justifies the action."<sup>40</sup> This, of course, is a variation on the old means-ends theme: do the ends justify the means? By no means may it be said that the stated aims of the United States' Central American policy are proper, although some international lawyers—for example, Professor John Norton Moore—strive valiantly (but futilely, in my judgment) to justify the aims.<sup>41</sup> By any criterion, the means chosen are reprehensible. We do not yet know what the "effects"—Machiavelli's word—of our latest Central American adventure will be. How do we know that they will be "good," either in the short or long term? What we do know is that the United States employs the ICJ as an instrument of policy—going to it when deemed desirable (as in the Iranian hostages situation) and thumbing our nose at it when the knife cuts the other way. That is an odd posture for a nation that trumpets that it follows the rule of law.

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39. Glennon, *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 AM. J. INT'L L. 682, 689 (1985).

40. I N. MACHIAVELLI, *supra* note 9, § 9, at 234.

41. Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986).

The net conclusion is utterly clear. The President is failing to adhere to his constitutional duty to faithfully execute the laws—in this instance, international law.

## VI.

There is little to be said by way of conclusion. This Essay has been a *tour d'horizon* of the President's take-care duty under Article II of the formal Constitution. My conclusions already have been stated. It remains only to make two points. First, to hold the Chief Executive to his constitutional obligation under the faithful-execution clause would not make him a mere "messenger boy," as Chief Justice Carl Vinson asserted in his dissent in the *Steel Seizure Case*. The President would still have a large amount of power, whether formally granted or informally taken. The constitutional scheme, however, calls for what Woodrow Wilson labeled as cooperation and Dean Gerhard Casper has said is coordination between the two avowedly political branches of government. Congress' failure in its bounden constitutional duties to check the Executive when necessary, as well as to cooperate, does not dilute the point. The constitutional command is for collective decisionmaking. Government by executive fiat runs contrary to the spirit and the letter of what the framers wrought in 1787.

Second, there is in the final analysis little that individuals can do when the take-care duty allegedly is flouted. True enough, on occasion—as in *Ameron*—the judicial process can be invoked in an effort to halt the trend toward a regal Presidency. The very costs of litigation, as well as the millions of decisions affecting individuals (natural and corporate) made annually by the Executive, however, do not augur well for faithful adherence to the faithful-execution duty. Government lawyers always can be found, as former Secretary of State Dean Rusk has remarked, to create a counterpane of putative legality over any action the President desires. Said Rusk: "There are times when I think that the [State Department] legal adviser has been put in the position of a client who says to [his] lawyer—this is what I'm going to do and you do your best with the law of the matter."<sup>42</sup> That is precisely what occurred with respect to the ICJ, although it must be added that the legal adviser's justification was weak and unpersuasive.

The ultimate meaning is obvious. The United States is governed by an institution with three supposedly equal branches, but

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42. Saikowski, *International Law*, *Christ. Science Mon.*, Apr. 4, 1986.

one is *primus inter pares*—it is “more equal” than the others. In theory the Congress and the Supreme Court may be preeminent, but in constitutional fact the President is dominant. The uncertainties and ambiguities in constitutional practice under the take-care clause illustrate one of the ways in which this nation is ruled by a system of executive hegemony.