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**THE PRESIDENT’S FAITHFUL  
EXECUTION DUTY**

HAROLD H. BRUFF\*

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INTRODUCTION

Soon after our Constitution took effect, James Madison called the President’s duty to faithfully execute the laws the “essence” of the office.<sup>1</sup> A century later, even the rather undistinguished President Benjamin Harrison could see that it was the “central idea” of the office.<sup>2</sup> But what does the duty *mean*? At a rudimentary level of separation of powers theory,

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\* Professor Harold H. Bruff is the Rosenbaum Professor of Law at the University of Colorado Law School.

1. ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 61 (1845). For the Neutrality Crisis from which this letter sprang, see Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling Over Presidential Power Outside the Courts*, in PRESIDENTIAL POWER STORIES 21 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

2. BENJAMIN HARRISON, THIS COUNTRY OF OURS 98 (1897). See generally MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY, ch. 9 (2013).

every American middle schooler should know that Congress makes the laws, the courts interpret them, and the President executes them.<sup>3</sup> This simple construct ignores the richness and complexity of the duty as the forty-four Presidents of the United States have interpreted it. This Article seeks to flesh out the concept.

The text of the Constitution contains two separate but linked provisions to ensure that Presidents will accept and abide their faithful execution duty. First, at the moment of assuming office, each President takes the Constitution's prescribed oath to "faithfully execute the Office of President" and to "preserve, protect, and defend" the Constitution.<sup>4</sup> The oath-taking has an indelible effect on every President—they often refer to it—occurring as it does either in front of the nation at the Capitol or somewhere else immediately after the shocking news of a predecessor's death.<sup>5</sup> Second, as Article II finishes enumerating the various powers of the President, it abjures him or her to "take Care that the Laws be faithfully executed."<sup>6</sup> At first glance, this may seem mere repetition for emphasis, and that purpose may well be present. More importantly, the clause in Article II extends the President's responsibility beyond the conduct of his or her own office to a more general accountability for the actions of the subordinate

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3. Alas, in 2014 only 18% of eighth grade students performed at or above the *Proficient* level in U.S. history and 23% performed at or above the *Proficient* level in civics. *New Results Show Eighth-Graders' Knowledge of U.S. History, Geography, and Civics*, NATION'S REPORT CARD, [http://www.nationsreportcard.gov/hgc\\_2014/#](http://www.nationsreportcard.gov/hgc_2014/#) [<https://perma.cc/H3EW-VMUC>]. Only 7% of eighth grade students were able to identify the powers of the legislative, executive, and judicial branches and demonstrate complete knowledge of the checks and balances among the branches. *2014 Civics Assessment: Question 228*, NATION'S REPORT CARD, [http://www.nationsreportcard.gov/hgc\\_2014/#/civics/question/228](http://www.nationsreportcard.gov/hgc_2014/#/civics/question/228) [<https://perma.cc/9AK2-4DTX>]; see also Sam Dillon, *Failing Grades on Civics Exam Called a "Crisis,"* N.Y. TIMES (May 4, 2011), [http://www.nytimes.com/2011/05/05/education/05civics.html?\\_r=1](http://www.nytimes.com/2011/05/05/education/05civics.html?_r=1) [<https://perma.cc/ED6V-P4TG>].

4. U.S. CONST. art. II, § 1, cl. 7.

5. Oath-taking has a long history as a way to impose obligations. For example, in 1199 King John of England took a coronation oath "to observe peace [and to honor God] . . . ; to do good justice and equity to the people entrusted to his care; to keep good laws and destroy any bad laws and evil customs that had been introduced into the land." DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 141 (2003). Had King John better adhered to the oath, he might have avoided making the promises later extracted from him in the form of Magna Carta.

6. U.S. CONST. art II, § 3.

executive officers who will perform most administrative actions. It also stands as a warning, given the impeachment provision that occurs a few words later on.<sup>7</sup>

This Article offers a framework for understanding the faithful execution duty that is drawn from the way our Presidents have understood and implemented it.<sup>8</sup> They have indeed treated it as “central” and “essential” to their concept of the office.<sup>9</sup> They know it provides a main standard against which their performance will be measured by voters and posterity. Certainly their understanding of the content of the duty has varied widely over the last two and a quarter centuries since Washington first took the oath in 1789. Even so, enough common threads appear in the historical record to allow us to see what the duty has come to include.

It has been clear for a long time that the principal limit to presidential discretion under the duty is what “We the People” who govern under the Constitution and our representatives in Congress will accept politically at a particular time. Thus the duty is reciprocal: presidential behavior offers an ongoing interpretation of the office, and it behooves all of us to pay sufficient critical attention to ensure that the behavior is faithful in the full constitutional sense. Recall Benjamin Franklin’s admonition at the close of the Constitutional Convention to a woman who asked what the framers had wrought: “A republic, if you can keep it.”<sup>10</sup>

To appraise how We and our Presidents are doing at the task of keeping the Republic, I invite readers to ask five questions about performance of the faithful execution duty.

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7. Hence the resignation of Richard Nixon in the face of near-certain impeachment and removal for grievously failing his duties has probably braced his successors somewhat to their own obligations.

8. For a full exploration of these issues, see HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* (2015) [hereinafter *UNTRODDEN GROUND*]. See also Martin S. Flaherty, *Harold Bruff, Untrodden Ground: America’s Evolutionary Presidency*, 65 *CASE W. RES. L. REV.* 881 (2015) (book review).

9. Faithful execution is a central theme of *UNTRODDEN GROUND*, *supra* note 8. Particular passages that are relevant to discussion in this Article are cited below.

10. EARL WARREN, *A REPUBLIC, IF YOU CAN KEEP IT* 11 (1972).

## I. IN WHOSE HANDS?

Our current President, Barack Obama, once observed that conventional legal materials can supply most of the ingredients of constitutional interpretation, but that the critical last step to making a decision depends on what is in the interpreter's "heart."<sup>11</sup> By this he meant that all hard interpretive decisions are ultimately personal in nature. Past the point where legal guidance runs out, decisions reflect at least five major ingredients: the President's personality (which is a blend of character and experience), his or her political values, the incentives that the presidency creates, the nature of the controversy or crisis at hand, and the President's awareness of how a proposed action fits against the precedents created by prior Presidents. Summing up these various influences may allow predictions about presidential actions with some degree of confidence, but plainly a range of choice, and perhaps a wide one, is always present.

To see how much the personal element of interpretation matters, consider two pairs of Presidents. James Buchanan, a weak man, took a weak view of his faithful execution duty in the secession crisis of 1861.<sup>12</sup> Although he believed secession was unconstitutional, he claimed he had no power to take vigorous action against seceding states. His successor, the immeasurably stronger Abraham Lincoln, read his powers broadly enough to allow him to save the Union after conducting a great civil war. Half a century later, the temperamentally aggressive Theodore Roosevelt took an expansive view of his powers, interpreting them to allow him to do anything not forbidden by the Constitution and statutes.<sup>13</sup> His more cautious and lawyerly successor, William Howard Taft, thought he could take only actions for which affirmative authority could be found.

What constrains the range of interpretation? Presidents weighing the imponderables of faithful execution have paid close attention to what their predecessors have done, because

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11. UNTRODDEN GROUND, *supra* note 8, at 427.

12. *See id.* at ch. 5 (for Buchanan and Lincoln). Buchanan's weakest successor, Warren Harding, once abjured "personal government, individual, dictatorial, autocratic, or what not." *Id.* at 224. Plainly, Harding was not seeking to expand the powers of the office.

13. *See id.* at ch. 7 (for Roosevelt and Taft).

no one else has faced this unique responsibility. Presidents have instinctively understood that the duty involves the practical operation of an evolving government. Hence they have shown little interest in original intent theories of what the framers expected that the duty might entail for a government not yet in being.<sup>14</sup> Similarly, the episodic musings of the less informed judiciary, whose experience is in a separate branch, tend not to interest Presidents much unless they prove useful to quote in debate.<sup>15</sup> As presidential precedents accumulate, the result is a common law of the presidency, which encourages incumbents to find links to what has gone before and not to stray too far onto untrodden ground. Stability promotes acceptability.

Presidents ordinarily possess a gestalt view of the Constitution as a whole, as their oath implies they should do, instead of an approach tied closely to weaving together particular provisions. Compare Jefferson's view of a restrained federal government relying on power mostly left with the states with Lincoln's view of an indissoluble nation having constitutional powers adequate to pursue national ends. Thus a President's politics at the most general level will inform his decisions, which then translates presidential values into the legal operation of the executive branch. Presidents who have reconstructed American politics (and the presidency along with it) have usually reached back to invoke primal values they associate with the nation's founding. For example, Ronald Reagan claimed a "great rediscovery" of values of liberty that had been present in the Jeffersonian tradition from the earliest days.<sup>16</sup> Lincoln drew the values of liberty and equality that he crystallized in the Gettysburg Address from the Declaration of Independence rather than the more compromised text of the Constitution. Thus Presidents claim legitimacy by tying new departures to old values in the process of leaving their personal stamp on American history.

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14. For an explanation and endorsement of originalism for judges, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

15. Presidents do, however, ordinarily respect the holdings of the courts in particular cases, which is clearly part of their constitutional obligation.

16. UNTRODDEN GROUND, *supra* note 8, at 360.

## II. WHO/WHOM?

This famous question was Lenin's charming way of asking about the results of political change on the ground: *who* was going to do *what* to *whom*?<sup>17</sup> At the apex of a more forgiving polity than the one Lenin commanded, American Presidents have still favored some groups over others in executing the law. Here lies an irreducible tension between the President's role as head of state, which is implicit in the Constitution, and his or her role as head of a political party, which is ignored in the Constitution.

Of course, since about the time of Andrew Jackson, Presidents have routinely claimed to be tribunes of the whole people, but that is emphatically not how they have behaved. Jackson himself favored small property owners over the rich, whites over blacks, and almost everyone over the Indians.<sup>18</sup> Consider whether a given President has aided management or labor when a disruptive strike occurs. Gilded Age Presidents favored the railroads over their workers; for example, Grover Cleveland went to extremes in breaking the Pullman strike late in the nineteenth century.<sup>19</sup> But then Theodore Roosevelt brought the interests of workers into the mix as he mediated a coal strike, saying he wanted a "square deal" for all.<sup>20</sup> Harry Truman was so devoted to labor that he unsuccessfully seized the steel mills in an effort to get workers a raise.<sup>21</sup> At times presidential motivation is complex—Ronald Reagan broke an illegal air controller's strike by firing the workers, saying he was protecting the traveling public, but his action did also appeal to a conservative base that disliked unions.<sup>22</sup>

Presidents who have reconstructed American politics—such as Jefferson, Jackson, Lincoln, Franklin Roosevelt, and Reagan—have sharply shifted the who/whom relations they found upon taking office. Thus, like earthquakes, Presidents raise or lower the ground and frequently cause injuries. Even

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17. See generally Michael J. Beloff, *Who – Whom? Unresolved Issues in Judicial Review*, 20 DENNING L.J. 35 (2008).

18. UNTRODDED GROUND, *supra* note 8, at ch. 4.

19. *Id.* at 189–90.

20. *Id.* at 199.

21. See generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

22. UNTRODDED GROUND, *supra* note 8, at 530 n.15.

the least seismic presidencies alter the landscape somewhat, perhaps enduringly.<sup>23</sup>

As Presidents have alternated between conservative or liberal politics over the years, one might expect most groups in American society to have been favored at some times and disfavored at others, and for many of us that would be true. There have been, however, two kinds of groups that have consistently suffered neglect or outright hostility from Presidents. One of them, sadly, is the downtrodden—the poor, powerless racial minorities (blacks and Indians especially), and women (at least until they won the vote in 1920). Only Franklin Roosevelt and Lyndon Johnson have shown sustained attention to alleviating poverty. Yet FDR revealed great insensitivity to a vulnerable population when he interned Japanese Americans in World War II.<sup>24</sup> Several Presidents, including Grover Cleveland and Herbert Hoover, have denied that the federal government has any power to aid the poor.<sup>25</sup> Many Presidents have, however, tried to alleviate the tribulations of the rich.

Of course, the composition of the coalitions that elect and support Presidents explains much of this disappointing pattern. Presidents normally respond to elite groups that either support them or can cause trouble by opposing them in Congress, not to those at the fringes of society. We can only wish that widely held and well-justified theories that Presidents possess a “protective” power to come to the aid of citizens in distress were more often buttressed by examples of Presidents rushing to the aid of those who need it most.<sup>26</sup>

Political dissenters have also suffered under presidential execution of the law.<sup>27</sup> Presidents are naturally hostile to anyone objecting to what they are doing. Perhaps we should forgive suppression of dissent in the early days of the Sedition

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23. This is the theme of GERHARDT, *supra* note 2.

24. See generally GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001).

25. In 1854 Franklin Pierce vetoed a bill granting land to build mental hospitals, on grounds it would imply a federal power of “public beneficence.” JAMES MCPHERSON, *THE WAR THAT FORGED A NATION* 11 (2015).

26. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61–74 (1993).

27. This is a theme of GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

Act under John Adams, on grounds that the nation was still adjusting to the emerging role of political parties and the rise of an organized opposition to the administration.<sup>28</sup> In the cauldron of the Civil War, Lincoln took some actions such as shutting opposition newspapers that would not be considered acceptable today.<sup>29</sup> Nevertheless, his overall record regarding civil liberties was surprisingly gentle in the context of a civil war, involving as it did mostly temporary detentions and few prosecutions for speech.<sup>30</sup> The twentieth century was, however, a bad one for civil libertarians. Woodrow Wilson triggered widespread and unjustified prosecution and harassment of dissenters during and after World War I, a period that included the first Red Scare.<sup>31</sup> In the second Red Scare after World War II, Senator McCarthy conducted his rampage with only fitful presidential opposition by Harry Truman and Dwight Eisenhower.<sup>32</sup> There followed the illegal surveillance of dissident groups during the Vietnam War by Lyndon Johnson and Richard Nixon.<sup>33</sup>

As the War on Terror in the early twenty-first century has demonstrated, modern Presidents are determined to conduct vigorous surveillance to detect and deter terror threats against the nation, without showing fine sensibilities about the civil liberties involved.<sup>34</sup> This stance is clearly justifiable to an extent: every President's core conception of the faithful execution duty is that it demands preservation of the nation. All else is subordinate to this primal imperative. Throughout our history, however, it has been easy for Presidents to manipulate public fears of attack in ways that increase their unchecked discretion.

Moreover, it has become increasingly difficult to monitor presidential protection of national security. Presidents seem increasingly determined to look out upon the world without constraint while shielding their activity from anyone who would look in upon them, constantly asserting that secrecy

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28. *See id.* at 29–44.

29. *E.g., id.* at 126–34.

30. *See id.* at 124–26.

31. *See id.* at 180–84, 220–26.

32. *See id.* at 323–41.

33. *See id.* at 442, 487–500.

34. *See generally* HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR*, ch. 7 (2009).



must attend executive conduct of this “long war.” If the tradeoff between security and liberty is not to be overly skewed in executive hands, Congress and the people will need to find ways to monitor their Presidents and to set enduring limits to their discretion.<sup>35</sup>

### III. WITH WHOSE HELP?

No President can execute the law unaided. Hence Article II naturally adopts the passive mood in requiring that the President take care that the laws be faithfully executed—normally by the subordinate officers in whom Congress ordinarily vests the responsibility for administering statutes.<sup>36</sup> Again, the direct obligation in the oath is to faithfully execute the office of the presidency itself in order to preserve the Constitution. Reading these two provisions together, we see that the President’s obligation for ordinary administration is appropriately supervisory in nature rather than personal.<sup>37</sup>

At once a basic managerial challenge appears. All principal-agent relationships involve various amounts of “slack,” that is, divergence between the principal’s desires and the agent’s actions.<sup>38</sup> George Washington kept a close eye on what his small cabinet was doing, yet even he suffered from the difficulty of controlling headstrong personalities like Hamilton and Jefferson.<sup>39</sup> As the size of an organization grows, slack tends to increase, in part due to the principal’s difficulty in gathering information about what subordinates are doing. Any

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35. See generally HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015). Both this book and UNTRODDEN GROUND, *supra* note 8, are reviewed in Peter L. Strauss, *The President and the Constitution*, 65 CASE W. RES. L. REV. 1151 (2015). The accountability theme is also central to both UNTRODDEN GROUND, *supra* note 8, and PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009).

36. For a fine analysis of statutes that grant authority directly to the President, see Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005).

37. See Peter L. Strauss, *Overseer or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

38. Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 206–07 (2013).

39. UNTRODDEN GROUND, *supra* note 8, at ch. 2.

modern President can envy the comparative simplicity of Washington's task, considering the size of the modern executive with its fifteen cabinet departments, myriad other units, and teeming millions of agents. Harry Truman once lamented that he spent most of his time trying to get people to do what they should already be doing.<sup>40</sup>

The President's own tasks are threefold: he or she must select principal subordinates, supervise their activities, and dismiss them if deficient. Presidents have always had a daunting number of executive and judicial nominations to make, and they have always been constrained in making them. For offices involving senatorial confirmation, the appointments power is split by the Constitution itself, fundamentally compromising the prospects for a unitary and coherent executive establishment by adding an oversight body that may not accept the President's preferences. For all presidential appointments, whether conditioned on confirmation or not, party politics tugs against presidential preferences. The patronage wars of the nineteenth century left Presidents exhausted and frustrated, struggling to control their own branch of government.<sup>41</sup> Creation of the expanding civil service as an amelioration of patronage has produced a vast executive bureaucracy that Presidents often see as beyond their control and inert or even hostile to their policies.

Given these political realities, how do Presidents manage the executive branch? Knowing the importance of having their own people in the posts that matter most to them, Presidents focus their nomination energies in three areas. First is what I call the "constitutional cabinet," the four original functions of the executive that date from 1789: the Departments of State, Defense, and Treasury, and the Attorney General.<sup>42</sup> Even cabinet departments outside this core receive much less

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40. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501–02, 524 (2010).

41. Examples include James Polk, who remarked that every appointment produced one ingrate and twenty enemies, *UNTRODDEN GROUND*, *supra* note 8, at 113; James Garfield, who was assassinated by a disappointed office seeker, *id.* at 188; and our new friend Benjamin Harrison, *see GERHARDT*, *supra* note 2, at ch. 9.

42. Some other units such as EPA have attained nearly comparable importance to modern presidents. *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

presidential emphasis in the selection process. It should not surprise us, then, that departments such as Housing and Urban Development or Veterans Affairs have attenuated relationships to the President, and that scandal caused by lax supervision tends to hover near them.<sup>43</sup> Second, ever since Franklin Roosevelt created the institutional presidency, Presidents have tried to control their own White House staff, which in turn tries to control the larger bureaucracy in the agencies. Ironically, creation of this intermediary layer between Presidents and department heads creates its own problems of slack and control, requiring substantial amounts of presidential time and energy. And third, Presidents focus on the military leadership, such as the Chair of the Joint Chiefs of Staff. Civilian control of the military is a basic precept of our system, but it requires constant attention if it is to remain a fact and not an aspiration.

Before turning to prevailing modes of presidential supervision of the executive, I should mention the presence and limited utility of the power to remove unsatisfactory officers. The Supreme Court has created a large and somewhat confused body of caselaw about this power, and scholars have obsessed over it for eons.<sup>44</sup> From the President's own standpoint, though, whether the power to remove a particular officer is constrained or unconstrained as a matter of constitutional law rarely matters. What does matter, as with nominations, is the limits imposed by politics. For example, Presidents Lincoln and Truman had undoubted power to dismiss their insubordinate generals McClellan and MacArthur, but both Presidents hesitated and agonized over the decision due to the political turmoil that would surely ensue.<sup>45</sup> When Barack Obama chose his rival Hillary Clinton for Secretary of State, he surely knew that her political base made her all but unremovable.

In practice, the removal power is split between Presidents and the Senate, and has been at least from the time of Andrew Jackson. When Jackson decided to destroy the Bank of the

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43. For the VA, see Norm Ornstein, *Lessons of the VA Scandal*, ATLANTIC (June 5, 2014), <http://www.theatlantic.com/politics/archive/2014/06/the-big-takeaways-of-the-va-scandal/372212/> [https://perma.cc/JN3N-YHW2].

44. See generally PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS, ch. 4 (3d ed. 2011).

45. UNTRODDEN GROUND, *supra* note 8, at 139 (Lincoln), 273–75 (Truman).

United States by removing federal deposits from it, he discovered that his Treasury Secretary thought that to do so would be illegal.<sup>46</sup> Jackson disagreed, but because the statutory power to move the deposits was vested in the secretary, the President could only remove his balky subordinate, which he did, and seek senatorial confirmation of a more compliant replacement, which was refused for a time.<sup>47</sup> Thus the issue of what faithful execution means under a particular statute lies within the executive branch in the first instance, but has the potential to involve the Senate if a subordinate sufficiently disagrees to prompt removal and replacement.

This point reveals an important consequence of the Constitution's split allocation of the faithful execution duty—directly to the President for the conduct of his or her own office, but indirectly in the role of overseeing ordinary administration. It is a basic precept of Anglo-American law that governmental authority must remain where allocated unless properly transferred elsewhere.<sup>48</sup> As the episode of Jackson and the deposits reveals, the indirectness of the statutory part of the faithful execution duty both buttresses the rule of law and fosters the transparency of the executive branch.

#### IV. How?

As the episode involving Jackson and the Bank reveals, supervision of the executive branch is central to how any President actually discharges the faithful execution duty. Along with selecting subordinates and (sometimes) removing them for bad performance, Presidents issue myriad commands to the bureaucracy. These “executive orders” date from the Washington administration and have a rich history.<sup>49</sup>

The Supreme Court set the modern legal framework for assessing presidential executive orders in the landmark case that invalidated President Truman's order seizing the steel mills to stop a strike during the Korean War.<sup>50</sup> Justice Robert

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46. *See id.*, 99–101.

47. *Id.*

48. Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1994–97 (2015).

49. *See generally* GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS (2013).

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also*

Jackson's magisterial concurring opinion identified three categories of presidential action: those with express or implied statutory authority, which are most likely to survive judicial review; those inconsistent with express or implied statutory limits, which are least likely to survive; and a middle range of "twilight" situations where the distribution of power is uncertain.<sup>51</sup> In the *Steel Seizure* case, a majority of Justices concluded that a recent statute had denied the President the authority he sought to exercise. The Court correctly demonstrated great reluctance to hold that a President could exercise exclusive power that Congress could not control. Such a holding threatens fundamentally destabilizing our system of mostly shared powers.<sup>52</sup> As Justice Jackson emphasized, even emergency powers should be subject to outside control if they are not to lead to absolutism.

Supreme Court cases upholding exclusive executive power have been limited to a few matters concerning warmaking and foreign policy.<sup>53</sup> For the most part, Presidents have been loath to claim exclusive power. Even during the Civil War, Lincoln submitted fully to congressional control, emphasizing that all his emergency actions at the outset of the war were within congressional powers of statutory ratification and calling successfully for approval to be granted.<sup>54</sup> The contrary example is the disastrous presidency of Andrew Johnson, whose attempts to conduct Reconstruction without obeying statutes led to his impeachment and near removal.<sup>55</sup>

Just as the President's oath and the faithful execution clause in Article II of the Constitution refer separately to the President's conduct of his or her own office and the supervision of subordinates who are administering statutes, some presidential actions are subject to much more mediation within the bureaucracy than others.<sup>56</sup> Especially when an action is

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Patricia L. Bellia, *The Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES, *supra* note 1, at 233.

51. *Youngstown*, 343 U.S. at 635–39 (Jackson, J. concurring).

52. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

53. SHANE & BRUFF, *supra* note 44, at chs. 5–6. A recent example is *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

54. UNTRODDEN GROUND, *supra* note 8, at 132–33.

55. *Id.* at ch. 6.

56. Strauss, *supra* note 35, at 1161–64.

directly based on the President's constitutional powers (such as disposition of the military under the commander in chief power or recognition of a foreign government under the foreign policy powers), an order may pass through the implementing bureaucracy like a lightning bolt, little hindered by the medium through which it passes. For most domestic matters, however, thick layers of bureaucracy and administrative law mediate presidential actions and can readily impede or frustrate them.

Consider the nature of rulemaking by the executive agencies under modern American administrative law. Here a common complaint is that federal rulemaking has "ossified" under strict and burdensome requirements for extensive and rigorous analysis.<sup>57</sup> These legal strictures often stem from the Administrative Procedure Act, to which presidential action is not subject.<sup>58</sup> Executive orders, then, occupy a kind of middle ground: they are neither statutes nor ordinary delegated regulations but rather freestanding assertions of whatever combination of constitutional and statutory authority can be assembled, with the faithful execution duty as their ultimate justification. For unlike an ordinary administrative agency, Presidents can claim responsibility to oversee and harmonize the "mass of legislation" that empowers the executive branch.<sup>59</sup>

The twilight zones that are so often present in statutory interstices give Presidents opportunities to infuse administration with their political values. Three examples of long-running presidential programs will impart the flavor of this activity. First, not surprisingly, it was the aggressive Theodore Roosevelt who initiated a surge in the use of executive orders that has persisted to the present.<sup>60</sup> He made his strong conservationist values part of the policy of the federal government by issuing orders shielding large parcels of the federal lands from development. He had only thin statutory

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57. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992). *But cf.* Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009).

58. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

59. This argument, which was made by the dissent in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, J., dissenting), failed in that case but has more traction when statutory authority is unclear. .

60. DODDS, *supra* note 49, at 25 fig. 1.

authority for this practice, but the courts eventually upheld it on grounds that Congress was aware of it and had acquiesced in this presidential interpretation of the statutes.<sup>61</sup> Second, after World War II, Presidents, beginning with Harry Truman, have issued civil rights executive orders promoting equality in federal employment and contracting.<sup>62</sup> They have done so even in controversial realms such as affirmative action, where Congress had neither clearly endorsed nor forbidden these policies. Third, Presidents since Richard Nixon have required federal regulators to perform cost benefit analyses of proposed regulations.<sup>63</sup> Although these regulatory management programs have varied somewhat in emphasis and detail, all of them have tried to conform the bureaucracy to presidential values about the relation of social costs to new regulations.<sup>64</sup> Congress has acquiesced in and funded these programs without ever endorsing them explicitly.

Controversy about the regulatory management program reveals that the middle ground occupied by executive orders intrinsically presents issues about the legality of actions taken in the name of the President.<sup>65</sup> White House intervention in rulemaking has at times induced agencies to exceed their statutory powers or to ignore the permissible fact and policy bases for regulations that are contained in administrative records.<sup>66</sup>

Another way that executive orders communicate presidential values to the executive branch is by setting priorities for enforcing existing statutes. No President can hope to fully enforce every statutory requirement that exists on the books. There are too many laws and too few officers to make that a realistic prospect. Nor would the American people likely tolerate an attempt to enforce all laws as written. Consider what would happen if a city police chief decided to try to

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61. Harold H. Bruff, *Executive Power and the Public Lands*, 76 U. COLO. L. REV. 503, 509 (2005).

62. UNTRODDEN GROUND, *supra* note 8, at 265–66.

63. *Id.* at 334.

64. For the evolution of this program, see SHANE & BRUFF, *supra* note 44, at 486–511.

65. See generally Strauss, *supra* note 35.

66. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989). The problem is a continuing one. See *Tummino v. Hamburg*, 936 F. Supp. 2d 162 (E.D.N.Y. 2013).

enforce every traffic law against every violator—that is, to ticket every speeder, every jaywalker—the system would break down as processing of minor offenders foreclosed a more rational and acceptable policy of pursuing the most serious violators first, such as drunken or reckless drivers.<sup>67</sup>

This homely example reveals that faithfulness in execution is not a simple criterion that more law enforcement is better than less. Instead, the issues are: *how much* enforcement, of *what kinds*, and *against whom* (recall the who/whom question).<sup>68</sup> The ultimate goal of the best possible execution of the law is thus a judgment question that is deeply infused with political values. Resource limits force hard choices. Appropriations for federal agencies never allow them to do all that they might, and in modern times funds are often scarce enough to prompt laments about “hollow government”—an executive branch with far more responsibilities than resources.<sup>69</sup> Thus Presidents not only may but must prioritize enforcement if they are to execute their office faithfully. Inattention is never an adequate exercise of any oversight responsibility.

Presidential priority-setting for the agencies is often very difficult for Congress, the courts, and the people to oversee. A quiet command from the President or someone supposedly speaking for him can be a signal that is very hard to separate from the massive noise that the federal bureaucracy generates. Congressional oversight committees struggle to monitor presidential activities, but often meet the shield of executive privilege. Courts are generally very reluctant to review exercises of enforcement discretion closely, if at all.<sup>70</sup> And both the traditional press and the new journals of the cybersphere struggle to penetrate government secrecy.

President Barack Obama’s controversial executive order prioritizing immigration deportation efforts brings together

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67. For the disruption potential of extreme adherence to legal requirements, see Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015).

68. See generally Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

69. See generally MARK L. GOLDSTEIN, *AMERICA’S HOLLOW GOVERNMENT: HOW WASHINGTON HAS FAILED THE PEOPLE* (1992).

70. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985).



several of these issues.<sup>71</sup> Faced with the presence of many more undocumented immigrants than existing enforcement resources could pursue, the President stated his enforcement priorities clearly for all to see, providing a much greater level of visibility than attends most law enforcement.<sup>72</sup> For example, he ordered federal agents to seek out dangerous criminals while leaving law-abiding immigrants free to work or study for an indefinite period. Obama issued his order only after extensive legal review within the Justice Department to ensure that it had implied statutory authority or was at least in the twilight zone where no statute clearly forbade it. Litigation has challenged the order, but it rests on priority setting that is quite unsuited for judicial review.<sup>73</sup> As with other executive orders, the courts may limit themselves to determining whether the order violates the Constitution or a statute on its face, without delving much into its administration.<sup>74</sup> I think the order is a lawful exercise of the President's constitutional power to determine priorities for faithful execution of the immigration statutes.<sup>75</sup>

Presidents have traditionally interpreted the faithful execution duty to allow or even require that they refuse to enforce a statute that they regard as unconstitutional.<sup>76</sup> Hence in some cases the correct amount of faithful execution is zero. In a famous early example, Thomas Jefferson correctly refused to enforce the Sedition Act of 1798 on the ground that it was a flagrant violation of free speech as protected by the First

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71. Peter M. Shane, *Faithful Nonexecution* 1–2 (Ohio State Univ. Pub. Law Working Paper, Paper No. 300, 2015), <http://ssrn.com/abstract=2637827> [<https://perma.cc/D7VB-NNQK>].

72. For the order's particulars and a supporting legal analysis, see Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, U.S. DEP'T JUST. (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/EWF2-XWN3>].

73. The case is *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), *cert. granted*, No. 15-674, 2016 WL 207257 (Jan. 19, 2016).

74. Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 33–41 (1982).

75. See Ming Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87 (2016); see also Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

76. UNTRODDED GROUND, *supra* note 8, at 63–64, 174–76.

Amendment.<sup>77</sup> Similar examples have recurred throughout our history.<sup>78</sup> In these cases, Presidents claim that their duty requires them to confront and contest one or both of the other branches of government. Such a confrontation is often necessary if a litigation to resolve the underlying constitutional question is to be possible. If the oath means what it says, Presidents must decide what they believe the Constitution requires of the federal government as a whole. Then the other branches and We the People can grapple with the issues and come to some resolution.

## V. SO WHAT?

That is, having the various components of the faithful execution duty in mind, what effects have this aspect of the President's job had on the operation of our government? For good or ill, Presidents have wide opportunities to take initiatives that will alter government policies and that will be difficult for either Congress or the courts to overturn. In this way, they put their personal stamp on their constitutional office.

Presidential actions, such as executive orders, have encountered more political than legal jeopardy. Any order that receives competent legal review within the executive at the time of drafting is likely to survive judicial review, and most do. In the modern age of statutes that began with the twentieth century, the frequent presence of statutory gaps and ambiguities invites presidential touchups. Congress finds it difficult to overturn or modify presidential actions because of the power of the President's veto, which almost always allows him or her to preserve the statutory status quo on which an order rests. Perhaps ironically (but appropriately), presidential actions not codified in statute are often more vulnerable to the differing policies of a successor than to any other threat.<sup>79</sup> Thus Presidents hope that American politics will provide successors who will continue this contingent part of their legacy.

In our system of three branches exercising partly

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77. *Id.* at 63.

78. Shane, *supra* note 71.

79. For an example of repeated presidential reversal of predecessors, see UNTRIDDEN GROUND, *supra* note 8, at 405–06.

separated powers, presidential action to ensure faithful execution provides flexibility that is essential to success of the system as a whole.<sup>80</sup> It provides grease in our old machine of government, adapting its operation to the presidential politics of the day. In a parliamentary system like those in Great Britain and Australia, there is less need for such an adaptive mechanism because a prime minister with a working majority in the lower house can usually obtain legislation to do what American Presidents would do by executive order.<sup>81</sup> Even when our Congress is not in its present state of dysfunction, legislating is difficult enough in the American system to make it beneficial for Presidents to operate in the interstices to keep the federal government moving forward.

A given exercise of the faithful execution duty can be evaluated along a number of axes. Here are some of them. First, and of prime importance at the time action takes place, is whether it proves successful in fact and politics. In the longer term, the durability of particular policies across presidential administration matters. Retrospective assessments by scholars including lawyers and historians count (I hope). More important, though, is the attractiveness of an action to succeeding Presidents as part of their menu of available policy choices. At this juncture lies the enduring constitutional impact (or not) of presidential actions.

American history provides myriad examples of presidential interpretations of the faithful execution duty that can either delight or dismay the observer. Lincoln's Emancipation Proclamation stands at the apex, forging a new nation shorn of its gravest defect and enabled to take a new place in the world.<sup>82</sup> More mundane examples of positive exercises of the duty include many of the conservation and civil rights executive orders.<sup>83</sup> At the nadir sit actions such as Jackson's Indian removal, Andrew Johnson's conduct of Reconstruction, and Franklin Roosevelt's wartime internment of Japanese

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80. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 16–20, 22–23 (2014).

81. "Usually" reflects the possible presence of an upper house not controlled by the administration, as in Australia.

82. For an analysis of the Proclamation as an exercise of the faithful execution duty, see Henry L. Chambers, Jr., *Lincoln, the Emancipation Proclamation, and Executive Power*, 73 MD. L. REV. 100 (2013).

83. See, e.g., DODDS, *supra* note 49, at 198–201, 211–12.

Americans.<sup>84</sup> National remembrance of these worst moments is essential to prevention of their repetition.

From time to time, a mix of presidential and congressional activity alters the baseline of the federal government's role in American life. The largest shifts have occurred during the Civil War, in the New Deal, and after World War II. As the baseline shifts, so do the challenges presented for Presidents, Congress, and the people. In the twenty-first century, domestic political settlements dating from the New Deal and foreign policy settlements reached after the Vietnam War have encountered fundamental political challenges. In our turbulent political climate, no clear path to new and stable settlements appears.

The primary current challenge to any President's effective conduct of the faithful execution duty lies in managing the immense and secretive national security bureaucracy that is a legacy of World War II and the War on Terror. The public monitoring of executive activity that is so essential to its legitimacy is difficult at best and has been resisted by recent Presidents.<sup>85</sup> The judgment of the framers of the Constitution that executive power should be vested in one person is put to the test by the immensity, complexity, and remoteness of our current government. Enduring policy will depend on the nature of information flows both to and from our Presidents. It is especially important that a flow of accurately determined facts and well-considered advice reaches the President before action is taken.<sup>86</sup> The President then has an obligation to reveal and explain his or her actions sufficiently to the people to allow their meaningful assent to what their government is doing. And at the end of the day, Presidents must concede the capacity of statutes and public opinion to limit their actions.<sup>87</sup>

In closing, I invite the reader to consider what the answers to my five questions about the faithful execution duty, taken together, suggest about the current state of the presidency.

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84. UNTRODDEN GROUND, *supra* note 8, at 93–95 (Jackson), ch. 6 (Johnson), 252–54 (Roosevelt).

85. See Kathleen Clark, "A New Era of Openness?": *Disclosing Intelligence to Congress Under Obama*, 26 CONST. COMMENT. 313 (2010).

86. President Kennedy demonstrated both how *not* to manage the flow of advice to a President (the Bay of Pigs) and how to do so very successfully (the Cuban missile crisis). UNTRODDEN GROUND, *supra* note 8, at ch. 10.

87. Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231 (2016).

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First, we have seen that the duty's conception and implementation change with the personality of each President. Second, Presidents skew execution to favor supporters and routinely disfavor dissidents. Third, Presidents hold tenuous control of their subordinates, focusing their efforts on the most important officers. Fourth, the use of executive orders pushes the bureaucracy to implement a President's political values, within statutory limits. And fifth, the discretion that the President necessarily possesses dampens the rigidities in our system. The portrait of the office that emerges contains elements of raw power, conflict (both political and institutional), constraint (both legal and practical), and, ultimately, great potential to benefit or harm the nation that all Presidents serve. As I said at the outset, the stakes are high and Americans must monitor their Presidents to assure that they discharge the duty faithfully. That is a task for us all, and it will last as long as our Republic endures.