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TAKE CARE, MR. PRESIDENT

EUGENE GRESSMAN†

On December 17, 1984, the Director of the Office of Management and Budget (OMB), David Stockman, acting on the advice of the Attorney General of the United States, issued a directive¹ to all heads of executive departments and agencies to disregard certain provisions of the Competition in Contracting Act of 1984.² The directive was premised on the Attorney General's conclusion that two bid protest provisions of that Act "are unconstitutional because they purport to authorize the Comptroller General to exercise Executive authority in violation of the principle of Separation of Powers."³

In my judgment, the directive constitutes a willful disobedience of the will of Congress as expressed in the two bid protest provisions. In our constitutional system of government, such a refusal by the Executive to "take care that the Laws be faithfully executed"⁴ cannot and must not be tolerated. The bases for

† William Rand Kenan Professor of Constitutional Law, School of Law, University of North Carolina at Chapel Hill; also, Special Counsel to the U.S. House of Representatives since 1976 in the "one-House veto" litigation, including *INS v. Chadha*, 462 U.S. 919 (1983). This Observation is based on remarks made by the author before the House Committee on Government Operations on February 28, 1985. See *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House of Representatives Comm. on Gov't Operations*, 99th Cong., 1st Sess. 74 (1985) (containing a more extensive discussion by Professor Gressman of the Executive's lack of constitutional authority to refuse to execute legislation believed to be unconstitutional).

1. Bulletin No. 85-8 from Director of Office of Management and Budget to Heads of Executive Departments and Agencies (Dec. 17, 1984), in *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House of Representatives Comm. on Gov't Operations*, 99th Cong., 1st Sess. 462 (1985) [hereinafter cited as *House Hearings*]. In pertinent part, the OMB bulletin directed that:

Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions.

With respect to the "stay" provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act. . . .

. . . .

With respect to the damage provision of the Act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General.

Id. at 463.

2. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (enacted as part of the Deficit Reduction Act of 1984) (to be codified at 41 U.S.C. §§ 251, 253). The constitutionality of the Executive's refusal to execute the Competition in Contracting Act was addressed in *Ameron, Inc. v. United States Army Corps of Eng'rs*, 610 F. Supp. 750, 755-56 (D.N.J. May 28, 1985).

3. See *House Hearings*, *supra* note 1, at 462. The Competition in Contracting Act was held not to violate the separation of powers doctrine in *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 607 F. Supp. 962, 970-73 (D.N.J. March 27, 1985) (plaintiff applied for order to show cause to preliminarily restrain defendant from performing on government contract). The United States District Court for the District of New Jersey repeated this holding in *Ameron, Inc. v. United States Army Corps of Eng'rs*, 610 F. Supp. 750, 756-57 (D.N.J. May 28, 1985) (plaintiff's motion for summary judgment granted). See also Comment, *GAO Bid Protest Procedures Under the Competition in Contracting Act: Constitutional Implications After Buckley and Chadha*, 34 CATH. U.L. REV. 485 (1985) (discussing constitutionality of the Competition in Contracting Act).

4. U.S. CONST. art. II, § 3, cl. 3.

my judgment in this respect can be summarized as follows:

(1) Whatever the merits or the sincerity of the Executive's constitutional doubts about the statutory provisions in question, the central fact is that the Constitution nowhere excuses the President from fulfilling his vested obligation to "take care that the Laws be faithfully executed." "It is a startling notion," Raoul Berger has written, that a President "may refuse to execute a law on the ground that it is unconstitutional. To wring from a duty faithfully to execute the laws a power to defy them would appear to be a feat of splendid illogic."⁵

Put differently, once a bill has passed through all the constitutional forms of enactment and has become a law, perhaps even over a presidential veto grounded on constitutional objections, the President has no option under article II but to enforce the measure faithfully. The Constitution simply does not give the President "the power to defeat the will of the people or of the legislature as embodied in law."⁶ As Professor Corwin has written, "[O]nce a statute has been duly enacted, whether over his protest or with his approval, [the President] must promote its enforcement."⁷

(2) The President's article II duty to execute the laws, as Justice Holmes once wrote, "is a duty that does not go beyond the laws or require [the President] to achieve more than Congress sees fit to leave within his power."⁸ To faithfully execute a law, the President must be faithful precisely to what Congress has written into the law, no more and no less. Once the Executive oversteps the bounds of faithfulness, either by adding to or subtracting from what Congress has provided, then the separation of powers equilibrium established by our constitutional system tilts dangerously toward the executive branch.

(3) The Supreme Court's ruling in *Youngstown Co. v. Sawyer*⁹ teaches that when the President tries to do more than he is permitted by statute, he becomes a lawmaker, a status foreign to the constitutional division of power. Certainly, as the *Youngstown* Court said, "[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."¹⁰ Rather, the Constitution places the lawmaking function exclusively in the hands of Congress.¹¹ Thus, the President's power of execution does not include the power of affirmatively adding to what the legislative body has provided.

(4) By the same token, the Executive's power of execution does not include a power to ignore or disobey what Congress has provided. A president who disobeys or refuses to execute a portion of a statute engages in the same sort of negative Executive lawmaking that precipitated the impoundment crisis of a

5. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 306 (1974).

6. 3 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1503 (2d ed. 1929).

7. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 79 (3d ed. 1948).

8. *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting).

9. 343 U.S. 579 (1952).

10. *Id.* at 587.

11. The *Youngstown* Court observed that the Constitution reserves to the legislature the power to "make laws which the President is to execute." *Id.*

decade ago.¹² Such refusal to execute, even though due to constitutional doubts about the statute, amounts to a partial repeal of the statute—a repeal that constitutionally can be effected only through the normal legislative processes. The principles enunciated in *Youngstown*¹³ bar negative lawmaking by the Executive.¹⁴ These principles are at the heart of a comment on the President's impoundment authority made by Justice Rehnquist in 1969 while serving as an Assistant Attorney General:

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.¹⁵

(5) The ultimate irony here is that the Executive's protest that Congress has authorized the Comptroller General to exercise executive authority is raised by means of an executive invasion of the legislative powers of Congress—a "non-execution" repeal of the challenged provisions of the Competition in Contracting Act. The Executive is attempting to read article II "as giving the President not only the power to execute the laws but to make [and unmake] some."¹⁶ Moreover, the Executive is seeking to use article II not only as a vehicle for executing legislative powers, but also as a mechanism for testing the constitutionality of the statutory provisions. There certainly are better methods of securing judicial review of those provisions than by an executive violation of the separation of powers doctrine and by an executive refusal to "take care that the [Competition in Contracting Act] be faithfully executed."¹⁷

12. In 1973 President Richard M. Nixon claimed inherent constitutional power in the Executive to refuse to spend money appropriated by Congress—the power to "impound." He argued that this power arose if spending the appropriated funds would lead to increased prices or increased taxes. G. GUNTHER, *CONSTITUTIONAL LAW* 361 (11th ed. 1985). The impoundment controversy engendered lengthy discussion in legal literature. See, e.g., Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 *GEO. L.J.* 1549 (1974); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 *GEO. L.J.* 149 (1974).

In 1974 Congress enacted the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, which restricts the Executive's ability to impound. The Act requires congressional approval before the Executive ends or reduces congressionally funded programs. G. GUNTHER, *supra*, at 361-62.

13. *Youngstown*, 343 U.S. at 579.

14. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution [for whatever reason], is a novel construction of the Constitution, and entirely inadmissible.").

15. J. BARRON & C. DIENES, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 284 (2d ed. 1983) (quoting Memorandum Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969)).

16. *Youngstown*, 343 U.S. at 633 (Douglas, J., concurring).

17. As I elaborated in a letter to the Chairman of the House Committee on Government Operations:

There are any number of legitimate ways in which the validity of most laws can be tested by some private citizen with standing to object, but Executive disobedience is not one of them. In fact, Executive disobedience serves to add an unduly complicating dimension to

(6) Finally, the foregoing sentiments do not imply that the President is without power to make his own assessment of the constitutionality of statutes, either before or after their final enactment. As we witnessed when "one-House veto" legislation was challenged in *INS v. Chadha*,¹⁸ the Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted. But this right is a far cry from saying that the Executive may express his constitutional displeasure with a duly enacted statute by ignoring or refusing to execute it in the first instance. Such inaction by the Executive strikes at the very fabric of the separation of powers doctrine. Congress should take prompt action to repair the jagged tear in that fabric created by the Office of Management and Budget's directive of December 17, 1984.

the judicial review process, for then judicial review can be had only by the citizen injured by the Executive disobedience rather than by the citizen injured by the law itself.

. . . .

If the Executive were to execute the provisions in question, any party injured by the execution would have standing to seek judicial review. The Executive would still have the privilege of refusing to defend the validity of the provisions he has executed, in which event the House and Senate would doubtless intervene or be invited to provide the necessary defense. That was precisely the procedure followed in the *Chadha* one-House veto litigation, where the Executive respected and executed the veto procedures [before] the injured party sought judicial review.

House Hearings, supra note 1, at 81.

18. 462 U.S. 919 (1983).