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## The Federal Interest in Employment Discrimination: Herein the Constitutional Scope of Executive Power to withhold Appropriated Funds

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## PART I: BASIC QUESTIONS

### THE FEDERAL INTEREST IN EMPLOYMENT DISCRIMINATION: HEREIN THE CONSTITUTIONAL SCOPE OF EXECUTIVE POWER TO WITHHOLD APPROPRIATED FUNDS

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The proper allocation of governmental power between the states and the central government has, since the birth of the Republic, been the subject of continuing commentary. The topic to which these remarks are addressed continues in the tradition of that commentary. That this symposium is within the mainstream of that tradition is made clear by the very subject matter of this conference. One of the more striking characteristics of non-academic discussions of American federalism problems is the frequency with which race provides both the context and the subject matter of analysis. One need only recall the historical dialogue regarding slavery and the nature of the federal union transpiring from the Constitutional Convention to the Civil War—and its final doctrinal benediction delivered in *Texas v. White*.<sup>1</sup> Even now, public discussion of federalism tends to be provoked by and centered upon considerations which relate predominately to issues of civil rights. Thus, in the grand tradition of American federalism analysis, we are gathered together again to explore the appropriate extent and roles of federal state and local regulation regarding discrimination, based on race, in employment.

Perhaps it might be well to expose at the beginning—expressly—the central theme of these remarks: that is, there is an overriding federal responsibility for both policy declaration and policy implementation in employment discrimination which has been overlooked on the one hand, and, on the other hand, where power has been perceived it has remained for the most part unexercised.

It might be well also to point out that in this context of our present social revolution, there are two major dynamic forces at work. Firstly, there is the continuing drive to eradicate racial discrimination in employment through utilization of the processes of the legal system. Surprisingly, this now dynamic force in the United States has only lately come to be a major factor in the civil rights movement.<sup>2</sup> There is another dimension to the struggle against discrimination in employment which is only slowly coming to be recognized. It now seems clear to most perceptive observers that what is truly involved in the civil rights revolution is a fundamental remaking of the entire American society.<sup>3</sup> The removal of race as a relevant factor in the employment relation

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1. 74 U.S. (7 Wall.) 700 (1868).

2. See 1961 Report of the U.S. Commission on Civil Rights, *Employment*; Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 Va. L. Rev. 837 (1957).

3. See, e.g., Ferguson, *Civil Rights Legislation 1964: A Study of Constitutional Resources*, 24 Fed. B. J. 102 (1964).

must inevitably drastically alter the structure and dynamics of our economic order. And, just as inevitably, fundamental reordering of traditional concepts of federalism will follow. Thus, as has been true in so much of our social history, the necessity for resolving a crisis in racial adjustment in our society generates not only the occasion, but the very mechanisms through which our federal system is reordered.

I. THE DIMENSION OF THE EMPLOYMENT PROBLEM

The total effect of discrimination in the employment relation is almost impossible to calculate. The statistical profile of the problem tells a dire tale indeed. For the last four years the unemployment rate among adult Negro males has consistently averaged almost twice that of the white adult male.<sup>4</sup> Median money income for nonwhite families and individuals is slightly over half that for whites.<sup>5</sup> In some of the major industrial cities more than one-third of the Negro work force is unemployed.<sup>6</sup> Similar disparities can be projected for almost any statistical criteria.<sup>7</sup>

It is clear, of course, that the mere statement of disparity between white and nonwhite averages, and medians is not necessarily the description of the results of discrimination in the employment relation. Certainly, lack of educational opportunity is a contributing cause. Over half the Negro, adult males have less than a grade school education;<sup>8</sup> school dropout rates continue to increase at a time when more and more educational background is demanded.<sup>9</sup> And, increasingly we are reminded that frustration breeds in a social environment based on discriminatory patterns of life and attitudes. Frustration in turn destroys motivation and lowers horizons of aspiration. Yet, few will assert that provision of economic opportunities without regard to racial considerations has perhaps the highest potential for dramatically alleviating the most pressing problems of the current crisis.<sup>10</sup>

What is being lost to our economic system now is indeed impossible to assay. Most reliable estimates are that the dollar cost is of the order of \$17 to \$20 billion in gross national product every year.<sup>11</sup> We know, however, that the cost of discrimination is much higher. While the impact upon the individual of cyclical and structural unemployment may be no different for members of one minority group than for others—the environment of the nonwhite in the

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4. U.S. Dep't of Labor, *Manpower Report of the President and A Report on Manpower Requirements, Resources, Utilization, and Training* 43, 145 (1963).

5. U.S. Bureau of the Census, *Statistical Abstract of the United States* 331 (83rd ed. 1962).

6. 1963 Report of the U.S. Commission on Civil Rights, *Employment* 83-87.

7. See, e.g., Ferguson, *A Brief Commentary on Urban Redevelopment and Civil Rights*, 9 *How. L.J.* 101 (1963).

8. Notes 4, 5 *supra*; National Urban League, *Survey of Unemployment in Selected Urban League Cities* (1963).

9. *Ibid.*

10. See Hays, *A Southern Moderate Speaks* (1959).

11. Council of Economic Advisers Report quoted in *Critical Issues Paper* (No. 4) 4 (*Critical Issues Council* 1964).

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United States is such that unemployment and underemployment have a special dimension. Thus, the role of the nonwhite in the economic system in large part may be attributed to discriminatory factors in areas other than in the employment relation. We need not document the proposition, however, that at least one of the major causes of the statistical disparity between the white and non-white economic profiles is that of racial discrimination in the employment relation itself.

### II. THE FEDERAL ROLE IN THE EMPLOYMENT RELATION

The federal government is a major force in the totality of employment relations in the United States. It is itself by far the largest employer in the country.<sup>12</sup> It creates and supports millions of employment opportunities through its direct contracting activities and direct grants-in-aid programs.<sup>13</sup> The federal government subsidizes a system of public employment offices and is engaged extensively in financing an array of job training programs.<sup>14</sup> It supervises and regulates certain activities of labor unions.<sup>15</sup> Finally, it has a constitutional concern with the flow of interstate commerce—which means substantially any commerce which is more than of a *de minimus* level.<sup>16</sup>

Attention has been focused on the role of the Court, both in its role as constitutional adjudicator and on its function of policy making in the general area of racial discrimination. Now, attention is focused on Congress and the legislative role in elimination of discrimination in job opportunities.<sup>17</sup> On this occasion I should like to address the problem of the federal executive—the Office of the President—in eradicating discrimination in federally connected employment. It is recognized that there are two dimensions to the problem of discrimination in such employment. The first is that of removing discriminatory practices and patterns. The second dimension is that of affirmatively taking steps to remove the disabilities created by past deprivation of opportunity. In treating of the proper role of the federal executive our concern is with the first of these dimensions: removing discrimination from federally connected job opportunities.

The nature of the federal employment problem can be best grasped by considering the findings of a survey conducted by the Civil Rights Commission for its *1961 Report*. Federal agencies in the five metropolitan areas were asked to count the number of Negro employees in each of three categories of federal employment; to break down their figures to reflect grade levels and job descriptions of Classification Act employees; and to indicate the number of Negroes who held supervisory jobs. The major findings reported by the Commission were as follows:

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12. 1961 Report of the U.S. Commission on Civil Rights. *Employment*. 19.
  13. *Id.* at 55.
  14. *Id.* at 95.
  15. *Id.* at 127.
  16. Ferguson, *supra* note 3, at 115.
  17. Civil Rights Act of 1964, Title VII.

- (1) In the five cities as a whole, 23.4 percent of federal employees were Negroes; 24.4 percent in Washington, D.C.; 28.5 percent in Chicago; 17.9 percent in Los Angeles; 18.2 percent in St. Louis; and 15.5 percent in Mobile.
- (2) 42.7 percent of all Negro employees in the five cities were in Classification Act positions; 31.1 percent were in Wage Board positions; and 26.2 percent were in "Other" positions, primarily in the Post Office Department.
- (3) Of Negro employees in Classification Act positions, 85.4 percent were in grades 1 through 4; 14.3 percent in grades 5 through 11; and 0.3 percent in grades 12 through 15.
- (4) 5.2 percent of the total Negro employees were in supervisory positions.<sup>18</sup>

This finding speaks for itself. It tends to confirm the allegations that in the most accessible employment opportunity (*i.e.* most free from discrimination), there is a general confinement of Negroes to the lower paying positions and a general non-presence in supervisory positions.

It should be pointed out that there has been an improvement in this matter since that Commission report.

What then can be the response of the executive based on administrative power?

On March 6, 1961, Executive Order 10925,<sup>19</sup> continuing the policy of the Truman and Eisenhower administrations, established the President's Committee on Equal Employment Opportunity with jurisdiction ". . . to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts. . . ." Part II of the Order, relating to government employment, provides, in part:

SECTION 201. The President's Committee on Equal Employment Opportunity established by this order is directed immediately to scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government.

SECTION 202. All executive departments and agencies are directed to initiate forthwith studies of current government employment practices within their responsibility. The studies shall be in such form as the Committee may prescribe and shall include statistics on current employment patterns, a review of current procedures, and the recommendation of positive measures for the elimination of any discrimination, direct or indirect, which now exists. Reports and recommendations shall be submitted to the Executive Vice Chairman of the Committee no later than sixty days from the effective date of this order, and the Committee, after considering such reports and recom-

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18. 1961 Report of the U.S. Commission on Civil Rights, *Employment* 27.  
19. 26 Fed. Reg. 1977 (1961).

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mendations, shall report to the President on the current situation and recommend positive measures to accomplish the objectives of this order.

### *The Office of President as Chief Administrator.*

Among the functional roles of the President is that of chief administrator of the federal establishment.<sup>20</sup> This function of chief administrator derives directly from article II, section 1 of the Constitution providing that "The executive Power shall be vested in a President of the United States. . . ." There is some question, however, of the extent of the executive power in regard to employees of the so-called independent agencies. In our context the question is whether the Office of the President may take steps to secure compliance with the unquestioned federal policy of nondiscrimination as regards employees of the independent agencies and offices.

Independent agencies have been defined as those "entirely outside any regular executive department" of the federal government.<sup>21</sup> In this, the more usual sense of "independence," the characterization is in contradistinction to the agency within the executive branch of the government.<sup>22</sup> Upon the authorities it is clear that characterization of an agency as independent, as distinct from executive, has proved viable in resolving certain issues in regard to control by the President.<sup>23</sup> It does appear, however, that analysis of the status of an agency as "independent" or otherwise in regard to its function, would be very useful in regard to the power of the President to administer a constitutionally based policy. (The basis of this conclusion is set forth in the following section: *The Office of the President as Chief Executive.*)

Moreover, although the growth of the independent regulatory agency has created what Mr. Justice Jackson called the "fourth branch of government," Congress in establishing such agencies still recognizes three branches only. It consistently creates agencies and commissions within "the executive branch."<sup>24</sup> To give to the words "in the executive branch" their plain meaning would lead to the conclusion that the agencies are subject to executive direction in at least their housekeeping functions (administration) even though they are independent of direct presidential supervision in formulation and implementation of regulatory policy. Recent history of the administration of President Kennedy indicates quite clearly that a willingness to remove discriminatory patterns can be vigorously exercised within the context of employment throughout the executive branch.

Few legal problems have arisen in regard to appointments to so-called

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20. See Corwin, *The President: Office and Powers* 114-21 (4th rev. ed. 1957).

21. Cushman, *The Independent Regulatory Commissions* 3 (1941).

22. Landis, *The Administrative Process* 111 (1938).

23. See, e.g., *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935) (removal of a Commissioner of the Federal Trade Commission by the President without cause before expiration of statutory term); cf. *Myers v. U.S.*, 272 U.S. 52 (1926).

24. E.g., Public Law 85-315, 71 Stat. 634 (1957).

exempt positions directly within the administrative establishment. Actually, considerable political advantage has been taken of nonwhite appointments to high positions available to the President.

More difficulty has arisen in regard to federal positions covered either by Civil Service<sup>25</sup> or Postal Service regulations.<sup>26</sup> Two incidents of recent time summarize the kinds of problems involved.

It has been reported that the Corps of Engineers office in Louisiana, had required that if on any appointment under Civil Service a Negro was one of three eligible candidates for the position and, if for any reason the Negro was not appointed, administrative explanation would be required on the appointment of the non-Negro. The second involves the promotion of a Negro supervisor in the Dallas post office, allegedly over the heads of several white eligibles who ranked higher on the list of eligibles.

The problem is, of course, whether in both or either of these instances the result of administrative action was to discriminate in reverse.

In my judgment neither of such cases raises the problem of discrimination in reverse. First, it should be made clear that neither case lies within the main theme of the present analysis: they do not involve removing discriminatory bars. They are in fact examples of administrative techniques designed to assure equal opportunity in situations where prior discriminatory practices would result in continued deprivation. In the first case the issue is the creation of an administrative technique to "police" the administrators. It might be suggested that the reporting device has at least the utility of building into the direct administrative process an awareness and consciousness of the problem of discrimination. As such, it is responsive to one of the basic and fundamental problems of administering norms based on nondiscrimination—how to build into normal work-a-day administration a concern for implementing policy. In this sense, this technique is the same as the reporting requirement in many state administrations imposed after a finding of past discriminatory practices. In our case, it is arguable that past discriminatory practices in the federal establishment are so notorious that official notice might well be taken of them—and reporting obligations established immediately. In the second case, a much different problem is raised. Whites seem to be deprived of a legitimate expectation. But, that expectation is in fact based upon prior discrimination. And, to employ equitable doctrine, it is not inequitable to destroy an expectation based upon wrongful treatment of Negro competitors in the past.

In sum, it might be safe to predict that the employment of vigorous, and in some cases imaginative administrative techniques, ultimately resting upon presidential power, will show dramatic changes in direct federal employment. On the other hand, it is clear that many problems surround the "agency" of

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25. The Pendleton Act (Civil Service Act), 22 Stat. 403 (1883) 5 U.S.C. §§ 631-58 (1958).

26. 39 U.S.C. §§ 31-219 (1958).

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the President's Committee as an effective specialized organ within the executive branch.

### *Executive Power as Chief Executive*

Second only in importance to federal contracts as a mechanism for creating job opportunities is the federal grant-in-aid.<sup>27</sup> These grants are made to state and local governmental units and public agencies, to public institutions and to private nonprofit organizations.<sup>28</sup> It is in regard to these programs of some 155 kinds<sup>29</sup> that the greatest inroads have been made in traditional concepts of federalism. And, it is as to these programs and their secondarily generated job opportunities that executive power is at its maximum. Ultimately, the power to assure equal opportunity in these programs rests upon the executive power to see to the faithful execution of the Constitution. And, experience here indicates that the most effective administrative technique is the threat to withhold previously appropriated funds. It is to the constitutional basis of this power that the following analysis is directed.

The power to appropriate federal funds is vested in Congress.<sup>30</sup> Congress not only has such constitutional power of appropriation but can attach limiting conditions to the expenditure. But it is clear that Congress cannot attach an unconstitutional condition to an appropriation.<sup>31</sup> In *U.S. v. Lovett*,<sup>32</sup> the Supreme Court held that a condition attached to an appropriation prohibiting expenditure of funds to pay salaries of certain individuals was an unconstitutional bill of attainder. The principle is well settled that exercises of congressional power are limited by the Constitution.<sup>33</sup>

Section 8 of article I of the United States Constitution grants to Congress the ". . . Power To lay and collect Taxes . . . and provide for the . . . general Welfare . . ." The federal government, like state governments, must exercise its powers to distribute funds, as well as its other powers, ". . . so as not to discriminate between [its citizens] except upon some reasonable differentiation fairly related to the object of regulation."<sup>34</sup>

It has been squarely held that governmentally required or permitted racial segregation ". . . is not reasonably related to any proper governmental objective. . . ."<sup>35</sup> To the same extent that the equal protection clause of the fourteenth amendment has been held to prohibit discrimination based upon race where a state is involved, the due process clause of the fifth amendment

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27. U.S. Bureau of the Budget, Special Analysis of Federal Aid to State and Local Governments in 1962 Budget 3-4 (1962).

28. 1961 Report of the U.S. Commission on Civil Rights, *Employment* 81-93.

29. *Ibid.*

30. U.S. Const. art. I, § 8.

31. *U.S. v. Lovett*, 328 U.S. 303 (1946).

32. *Id.* at 315.

33. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

34. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring opinion.)

35. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

prohibits discrimination where the federal government is so involved.<sup>30</sup> Thus, the federal government is prohibited from expending its funds in the support of racial segregation in its own projects, activities and programs under the due process clause of the fifth amendment.

The adherence by the federal government to the policy of nondiscrimination in its own activities, while at the same time financing racial discrimination by supporting state conducted projects and activities where such practices are maintained is an obvious inconsistency. The issue raised by this inconsistency is whether the congressional appropriation and subsequent executive expenditure of federal funds are federal activities exempt from the limitations implicit within the due process clause of the fifth amendment merely because the government is one step removed from the forbidden activity. The applicable principle of law has been succinctly stated by Justice Frankfurter:

Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way . . .<sup>37</sup>

Examination of cases in which this principle has been applied as a limitation on expenditure of state funds under the equal protection clause of the fourteenth amendment demonstrates that the due process clause of the fifth amendment necessarily prohibits *support* by the federal government to racially segregated state conducted projects, activities and programs.

In a series of cases it has been held that where state funds have been used to purchase, build, operate, or lease for operation public facilities, the equal protection clause of the fourteenth amendment requires that those facilities be available on a nondiscriminatory basis.<sup>38</sup> Clearly for the federal government to furnish funds to the states to underwrite the cost of similar activities in a racially segregated manner would result in that Government's sanctioning discriminatory practices which, under the *Bolling* formulation, the federal government could not itself conduct without contravening the prohibitions of the fifth amendment's due process clause. That the federal government cannot escape its constitutional limitations by furnishing the ways and means for a private individual, corporation or state to discriminate against its own citizens is clearly indicated by the Supreme Court's denouncement of such practice by a state under the fourteenth amendment. In *Burton*, the state leased a public restaurant facility to a corporation which excluded Negroes solely because of their race. In holding that the restaurant was subject to the

36. *Id.* at 499.

37. *American Communications Ass'n v. Douds*, 339 U.S. 382, 417 (1950) (separate opinion.)

38. For cases relating to state owned facilities, see, e.g., *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (per curiam) (city park facilities); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses operated on city streets.) For cases relating to facilities leased from the state, see, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (restaurant); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (restaurant in airport.)

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strictures of the fourteenth amendment, the Court noted that in its lease the state could have expressly forbidden racial discrimination, and then went on to say:

But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.<sup>39</sup>

Surely the due process clause of the fifth amendment does not require less where the federal government plays a vital role in the support of racial segregation. Thus, the proscriptions of the fifth amendment are as binding on the federal government itself as on the grantees of federal funds.

The scope of due process limitation upon the power of the federal government is clearly laid down in *Cooper v. Aaron*.

State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling v. Sharpe*, 347 U.S. 497.<sup>40</sup>

The President's duty to faithfully execute the laws is not limited solely to acts of Congress or treaties made pursuant to the Constitution, but includes "the rights, duties and obligations growing out of the Constitution itself, . . . and all the protection implied by the nature of the Government under the Constitution."<sup>41</sup> In the words of Professor Corwin, "that the President is entitled to claim broad powers under his duty to take care that the laws be faithfully executed' has been demonstrated many times in our history."<sup>42</sup>

The expenditure of federal funds (as distinct from the appropriation) is an executive function. In the words of Corwin, The Constitution

. . . assumes that expenditure is primarily an executive function, and conversely that the participation of the legislative branch is essentially for the purpose simply of setting bounds to executive discretion—a theory confirmed by early practice under the Constitution.<sup>43</sup>

The exercise of executive powers is no less subject to the limitations of the Constitution than the exercise of legislative or judicial powers.<sup>44</sup>

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39. *Burton v. Wilmington Parking Authority*, *id.* at 725.

40. 358 U.S. 1, 19 (1958).

41. *Cunningham v. Neagle*, 135 U.S. 1, 64 (1890).

42. Corwin, *The President: Office and Powers*—(4th rev. ed. 1957).

43. *Id.* at 127-28.

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

*Executive Power Where Congress is Silent.*

The power of the President, pursuant to his constitutional duty, to direct appropriate rule making exercises by executive and independent agencies has been exercised on many occasions. On the most recent occasions, the power was exercised expressly to require the eradication of discriminatory practices in areas of responsibility posited with particular agencies under statutes devoid of antidiscrimination provisions. It has been concluded on this basis that:

The lack of serious challenge to the exercise of this authority by four Presidents in nine executive orders over twenty years lends support to presidential power to prescribe nondiscrimination, at least until Congress acts.<sup>45</sup>

It should be noted that there is no express statutory authorization for this exercise of Presidential power. The absence of such authorization amply serves again to illustrate that the duty of the President under the Constitution is broader than simply the fulfilling of the will of Congress as reflected in congressional enactments. As the Supreme Court held in *Cunningham v. Neagle*,<sup>46</sup> the duty of the President is not limited solely to acts of Congress or treaties made pursuant to the Constitution, but includes "the rights, duties and obligations growing out of the Constitution itself . . . and all the protection implied by the nature of the Government under the Constitution."

*Executive Power Where Congress Requires Federal Support of Discrimination.*

A definite issue of course would be raised where there is an express congressional direction to the President to administer a statute in an unconstitutional manner. In that event, absent a binding determination by the Supreme Court, the President is obligated to refuse execution of laws of Congress which in his judgment are in violation of the Constitution if such congressional acts are administered in accordance with congressional direction.

The question at this point is whether the President, relying expressly upon his duty to "take care that the Laws be faithfully executed" (United States Constitution article II, section 3) can refuse to administer an act of Congress on the ground that he believes the administration of the Act would result in racial discrimination supported by federal funds, and, consequently, that it violates the fifth amendment of the Constitution, and thus the act as so applied and administered was not "made in Pursuance thereof."<sup>47</sup> It appears to be wholly erroneous to assert that:

[I]t is not the responsibility of the Executive to pass upon the constitutionality of statutes enacted by Congress, once they have been finally approved by the President.

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45. Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 Colum. L. Rev. 243, 245-46 (1963).

46. 135 U.S. 1 (1890).

47. U.S. Const. art. VI.

Mr. Justice Story, in his *Commentaries on the Constitution*<sup>48</sup> has provided us with what is perhaps the best articulated assertion of a broad power in the President to refuse to carry out a legislative mandate which he believes to violate the Constitution. In laying the groundwork for a discussion of why the Supreme Court is the final arbiter with respect to constitutional questions, Dean Story made the following observations:

The Constitution, contemplating the grant of limited powers, and distributing them among various functionaries, . . . whenever any question arises as to the exercise of any power by any of these functionaries under the State or Federal Government, it is of necessity that such functionaries must, in the first instance, decide upon the constitutionality of the exercise of such powers. . . . The officers of each of these departments [executive, legislative and judicial] are equally bound by their oaths of office to support the Constitution of the United States, and are therefore conscientiously bound to abstain from all acts which are inconsistent with it. . . . If, for instance, the President is required to do any act, he is not only authorized but required to decide for himself, whether, consistently with his constitutional duties, he can do the act.<sup>49</sup>

In contrast to some arguments in support of the same conclusion,<sup>50</sup> Story makes it clear that in his eye the President's duty to decide constitutional questions is limited to cases "not hitherto settled by any proper authority," and that a decision by the Supreme Court with respect to the matter in issue would be binding on the President.<sup>51</sup> Counsel for President Johnson in his impeachment proceedings made an argument similar to that of Story in defending President Johnson's refusal to comply with the Tenure of Office Act of 1867 on the ground that it was unconstitutional, but added the additional limitation that the situation be such that only by a refusal to act could the President raise a justiciable issue.<sup>52</sup>

Stated in this form, the argument is not that the position of the President is superior to that of Congress, but only that each of the two branches of the Government owes a duty to obey the Constitution and that the opportunities to act in the light of his duty will occur at different times because of the separate role each has in dealing with matters of national concern. Thus Congress may refuse to enact a law recommended by the President, because of a belief that the law would be unconstitutional, and thus to a certain extent appear responsible for frustrating the aims of the President. The President, on the other hand, when it comes time to execute a law of Congress may refuse to do so

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48. 1 *Commentaries on the Constitution of the United States* (4th ed. 1873).

49. *Id.* at 264-65.

50. *E.g.*, Meigs, *The Independence of the Departments of Government*, 23 *Am. L. Rev.* 594 (1889).

51. See 1 *Commentaries* 265.

52. Curtis, *Argument on Behalf of President Johnson in Impeachment Proceedings*, *Cong. Globe (Supp.)*, 40th Cong., 2d Sess. 126-127 (1868), quoted in 1 Freund, Sutherland, Howe & Brown, *Constitutional Law* 18-19 (2d ed. 1961). See also Story, 1 *Commentaries op. cit. supra* note 48, at 266-67.

because of his belief that the law is unconstitutional. It should be noted that the duty to ascertain constitutionality is an executive duty required by the Constitution itself. Subordinate executive and administrative officials are not directed to "take Care that the Laws be faithfully executed" as is the President. On occasion, however, the courts have recognized that such subordinated administrators may determine the constitutionality of an enactment they are required to administer.<sup>53</sup> In *Little Rock & Fort Smith Ry. v. Worthen*,<sup>54</sup> the Court set forth the reasons why subordinate executive and administrative officials ordinarily are not permitted to determine the constitutionality of statutes they are administering. In a decision which vindicated the action of a state board of railroad commissioners in disregarding, on constitutional grounds, a legislative exemption of certain railroad property from taxation, the Court commented:

It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and productive of great inconvenience to the public but still the determination of the judicial tribunals can alone settle the legality of their action.<sup>55</sup>

Both the President and Congress of course must obey the decisions of the Supreme Court. But, absent such a decision, the President must firstly address himself to the constitutionality of his administration of congressionally approved programs.<sup>56</sup>

*Executive Power Where Congress Prohibits Federal Support of Discrimination.*

On the other hand, if Congress enacts a nondiscriminatory provision, no problems whatsoever as to the extent of executive power would be raised. Here, in the words of Mr. Justice Jackson in *Youngstown Sheet & Tube*,<sup>57</sup> the executive power is at its maximum.

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.<sup>58</sup>

The President's Executive Order regarding equal opportunity in housing stands as ample precedent for the exercise of executive power to assure admin-

53. *E.g.*, *Little Rock & Fort Smith Ry. v. Worthen*, 120 U.S. 97 (1887).

54. *Ibid.*

55. *Id.* at 101.

56. *Cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

57. 343 U.S. 579 (1952).

58. *Id.* at 635.

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istration of federal programs in a constitutional manner.<sup>59</sup> The order itself clearly reveals its constitutional basis:

[T]he executive branch of the Government, *in faithfully executing the laws of the United States which authorize Federal financial assistance*, directly or indirectly, for the provision, rehabilitation, and operation of housing and related facilities, is charged with an obligation and duty to assure that those laws are fairly administered and that benefits thereunder are made available to all Americans without regard to their race, color, creed, or national origin. (Emphasis added.)

Among the sanctions which may be imposed for violation of the policy of nondiscrimination is withholding of federal assistance. Section 302 of the Order expressly provides that appropriate departments and agencies may:

- (a) cancel or terminate in whole or in part any agreement or contract with such person, firm, or State or local public agency providing for a loan, grant, contribution, or other Federal aid, or for the payment of a commission or fee;
- (b) refrain from extending any further aid under any program administered by it and affected by this order until it is satisfied that the affected person, firm or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order, and any nondiscrimination provisions included in any agreement or contract;
- (c) refuse to approve a lending institution or any other lender as a beneficiary under any program administered by it which is affected by this order or revoke such approval if previously given.

There is little doubt as to the constitutional authority of the President to issue an order with such provisions.

There would appear to be little doubt that the issuance of the Executive Order in housing is constitutional. It can be concluded that the President has authority to act, based: (1) in part upon the provisions of 42 U. S. C., section 1982 ("all citizens of the United States shall have the same right in every state . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real . . . property"); (2) in part on the constitutional requirements for equal protection of the laws and due process (particularly as interpreted by the Supreme Court in *Hurd v. Hodge*,<sup>60</sup> ruling that a federal court may not lend its aid to enforcement of a private racially restrictive covenant); (3) in part on the precedent of the Executive Orders requiring a nondiscrimination clause in government contracts; and (4) in part on the rulemaking powers conferred on the housing agencies by their basic statutes.

Moreover, the issuance of Executive Orders imposing and renewing prohibitions against discrimination on the basis of race in employment and contract work for the federal government reaffirms the underlying constitutional power of the President to direct the manner of expenditure of federal funds or

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59. Executive Order 11063, 27 Fed. Reg. 11527 (1962).

60. 334 U.S. 24 (1948).

ultimately to require the withholding of federal expenditures in specified circumstances. The last reaffirmation of this executive power was in President Kennedy's Executive Order 10925.<sup>61</sup> The constitutional foundation for the issuance of the Order has been commented upon extensively in legal literature.<sup>62</sup>

The President in addition to his overriding executive authority pursuant to his constitutional duty to take care that the laws be faithfully executed has by statute the power to direct the manner in which Government business is conducted.<sup>63</sup> Section 22 of title 5 of the United States Code provides that each executive department head

. . . is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers and property appertaining to it.

In addition, the present federal budget system makes provision for the withholding of expenditure of appropriated funds. The position of the Bureau of the Budget is:

In requiring that money be placed in reserve, the Bureau proceeds also on the principle that ordinarily an appropriation is merely an authorization and not a mandate to spend money for the specified purpose.<sup>64</sup>

On matters of defense expenditures, there is a considerable body of executive precedent in withholding appropriated funds.<sup>65</sup>

In considering the power of the executive to assure nondiscrimination in federal assistance, it is important to recognize that a number of significant steps already have been taken toward that objective by heads of executive departments.

For example, former Secretary Ribicoff ruled that beginning in September 1963, racially segregated public education would not be considered "suitable" under the terms of the Impacted Area school program for children residing on federal properties. Several important steps were taken to implement this ruling. First, the Departments of Health, Education and Welfare, and Justice undertook a series of negotiations with school districts in an effort to secure compliance. As a result, fifteen districts said that they would admit on-base children on a nonracial basis, and most have gone beyond this by indicating that they would adopt policies of desegregation which would benefit all students within the district. In five areas where compliance was not forthcoming, the

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61. 26 Fed. Reg. 1977 (1961).

62. See Speck, note 45 *supra*; Birnbaum, *Equal Employment Opportunity in Executive Order 10925*, 11 Kan. L. Rev. 17 (1962); Bennett, *Non-Discrimination Provisions of Federal Contracts*, Mich. S.B.J. 21 (March 1952); and Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 Va. L. Rev. 837 (1957).

63. Rev. Stat. § 161 (1875), 5 U.S.C. 22 (1958).

64. See Wallace, *Congressional Control of Federal Spending* 145 (1960).

65. *Id.* at 146.

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Department of Justice determined that it had authority and standing to initiate lawsuits (without express statutory authorization) on behalf of Negro military dependents seeking desegregation of federally-aided local schools. In eight other localities where commitments could not be obtained, the Department of Health, Education and Welfare decided to build schools on base in order to provide suitable education for children living on federal property.

These actions, of course, have not come close to solving completely the problem of providing equal educational opportunity for the children of military personnel. They are directed primarily toward families who live on federal property, with only peripheral benefit thus far to the great bulk of military dependents who reside off base. Nonetheless, the actions add up to an affirmative assertion of executive authority to assure nondiscrimination.

Even absent an express statutory nondiscriminatory provision of mandatory nature, the executive obligation compels executive action to assure nondiscrimination in administration of federal programs. Moreover, either the rejection or the enactment of a "nondiscrimination" provision by Congress cannot, under the Constitution, derogate from the constitutional scope of executive power. Therefore, while one would support the objective of legislative nondiscriminatory provisions, it is clear that such provisions are not necessary to establish executive power to reach the same end. But, at the most, such provisions would represent expressions of congressional intent that federal programs be administered in a nondiscriminatory fashion.