
Introduction: The Ambivalence of Executive Power

To understand the modern doctrine of executive power, we need to know, at least approximately, what executive power is. It might at first seem best to go directly to the thing and to ignore opinions about it. For executive power is universally agreed to be a modern necessity: why, then, should it be presented as a modern doctrine? No modern state is considered a going concern unless it is equipped with a strong executive, and every state without one is held to be courting disaster, and regarded with pity and contempt by those more fortunate.

Nor can the necessity of executive power be dismissed as an unconscious assumption which, being universal, goes unchallenged. It is challenged, but never successfully. Even though the assumption regarding the necessity of executive power is universal, there are always some and sometimes many living under free governments who grumble about strong executive actions they find distasteful. They deplore and oppose them as the practices of tyranny, calling them by one of the many contemporary equivalents for that term which our prudery requires and our experience makes very familiar. Yet the protestations subside soon enough as if in recognition of necessity, unless indeed the tune is changed and a clamor begins for strong executive actions which the formerly disapproving now find beneficial. The necessity of a strong executive has, therefore, been tested by those to whom it has not been obvious. Those who speak against it either fall silent or contradict themselves. So to present executive power as

a modern doctrine, implying discovery of something previously hidden, and thus to reveal a choice among the new and the old possibilities, is to speak in the face of a need that seems obvious and compelling.

If we were at the end of our inquiry, it would be possible to argue that the early teachers of executive power intended to secure the difference between free government and tyranny by giving the former some of the power and techniques of the latter. One such technique is to make people think they are bowing to necessity when they are in fact obeying you. But here, at the beginning of our investigation, we can see an ambivalence in executive power which does not arise from ineluctable necessity, and calls for some kind of clarification—perhaps a doctrine. For although everyone agrees on the necessity of a strong executive, everyone also agrees on the use of a term, "executive," which implies in its literal meaning that somebody is not strong in his own right but is merely an agent. In other words, everyone agrees on the necessity of a strong executive, but also agrees, it appears, on the importance of concealing that necessity. Untaught necessity such as hunger speaks for itself without ambivalence or equivocation. But a necessity that needs to be concealed is more complicated, and needs to be explained. Why, in short, is it necessary to call executive power by a name that deprecates it?

The Dictionary Executive

In politics today, the word "executive" has two meanings. One is the dictionary definition, he who "carries out," as in the American Constitution the president is given the duty to "take care that the laws be faithfully executed."¹ Derived from the Latin *exsequor*, meaning "follow out," "execute" is used by both classical authors and the Roman law in the extended and particular sense of following out a law to the end: to vindicate or to punish. The Greek equivalents *lambanein telos* and *ekbibazein* are also similarly used. In this primary meaning, the American president serves merely to carry out the intention of the law, that is, the will of others—of the legislature, and ultimately of the people. But if any real president confined himself to this definition, he would be contemptuously called an "errand boy," considered nothing in

himself, a mere agent whose duty is to command actions according to the law.

Going to his usual extreme, Kant has represented this meaning of the executive in the form of a syllogism, where the major premise is the legislative will, the minor premise or "the principle of subsumption" is the executive, and the conclusion is the judicial application to particulars.² By this syllogistic form the executive function is separated rather artificially from the judicial, but it is definitely made subordinate to the legislative.

Yet it would be unwise for any legislature that is willing to accept Kant's major premise to speak openly of its executive as an errand boy, for to hurt the executive's pride would diminish his utility. So executive pride transcends the primary dictionary definition of "executive," but is captured perhaps in the phrase "law enforcement," which suggests that carrying out the law does not come about as a matter of course. "Law enforcement" implies a recalcitrance to law in the human beings who are subject to it, making necessary a claim by the executive to some of the authority and majesty of the law itself. To execute the law it is sometimes not enough for a policeman to ask politely; eschewing the role of an errand boy, he does something impressive to make himself respected. And if a policeman must be more than an errand boy, so too must a president.

Perhaps the authority of law is better connoted in the term "law enforcement" than is its majesty. The end of law as stated or implied in the law (the final cause) is a noble thought which we respect, to which we are dedicated, and for which government would execute the law in the primary, instrumental sense. But the idea of execution as law enforcement puts us in fear and reminds us of the reason why laws are made (the efficient cause): to dispel fear and provide security. The latter makes use of legalized lawlessness, that is, of retaliatory or anticipatory actions which would be illegal if they were not performed by the police. These are punitive actions, sometimes done so impressively as to suggest that the purpose of law is mainly to punish. Such action also permits or even requires the executive to gather in his person the power that enabled the first lawgiver to awe his unsettled subjects, and to exude the fearsomeness of a being who makes and executes his own law, as if he were an angry god. One would not suggest too much in saying that executive pride smacks of tyr-

anny, so radically does it enlarge upon the instrumental executive.

It is all very well to speak sententiously of a government of laws, not of men, but to an executive that may be so much unsupported assertion of legislative pride. Legislators may fervently believe that to change behavior it is enough to pass a law. But laws that are mere demonstrations to the intellect are like prayers to the deaf. Because the government of laws rules over recalcitrant men, the laws are nothing in fact unless they are executed, and to get them executed, the executive must be given some or most or all of the legislative pride. By this view, a government of laws addressed to men is reducible to a government of men.

Thus, recognizing executive pride, we find in the American Constitution that taking care to execute the laws faithfully is only one of the duties imposed on the president, for the performance of which he is given several powers. Among them are powers that are neither executive in nature (the veto of legislation) nor subordinate (commander-in-chief of the army and navy). Moreover, he is vested with "the executive power," which according to Hamilton's famous argument,³ has a nature of its own, bounded only by necessity, that is not exhausted by the enumerated powers; and he takes an oath to faithfully execute not the laws but his *office*.⁴ But, for Kant, not only is the executive represented as a minor premise, but he is also described—with the covert, corrective realism that is as usual with Kant as his theoretical extremism—as a moral person of coordinate power with the other two powers.⁵ We see that the real, practical, informal executive is, if not a tyrant, far more powerful than the supposed, theoretical, formal executive.

He is also quicker and more masterful. In today's political science the term "decision-making" is sometimes applied indiscriminately to all governmental actions or to all actions whatever, conveying a sense that all decisions are similar and none of them particularly "executive." It is admitted, however, that decisions sometimes follow one another in a series, and so one hears of "the legislative process," "the judicial process," and "the administrative process." But one does not hear of "the executive process."⁶ In actual usage, as distinguished from intent, executive decision-making retains a decisive aura and seems distinct from the general, workaday, reassuring process of ordinary "decision-making."

Two Schools of Interpreting the Executive

In the academic literature on the American presidency, the ambivalence of the executive is clearly apparent. Of the two works that have helped to define the field, Richard E. Neustadt's *Presidential Power* represents the real, informal presidency, and Edward S. Corwin's *The President: Offices and Powers* the limited, formal presidency. Neustadt defines two conceptions of the office as clerkship and leadership, and clearly prefers the latter—a president who creates strength of position from his own initiatives, using the formal powers of his office to transform himself from clerk to leader. Corwin, for his part, does not deny the reality of a president's personal power, but he deplors it. So rather than analyzing examples of executive power, as Neustadt does, he divides it into powers or functions or roles, thereby defining and delimiting it.⁷ Corwin is not ashamed to present the "literary theory"⁸ of the presidency as found in part, he says, in the intention of the Framers of the Constitution, and at length in cases of constitutional law. His understanding is legal and prescriptive rather than realistic, and if Corwin does not reduce the president to a clerk, he asks us to recall John Dunning's resolution in the British Parliament on the influence of the Crown in the eighteenth century and revise it thus: "the power of the President has increased, is increasing, and ought to be diminished."⁹

Corwin's view, of course, was very much in the minority during the administrations of Franklin Roosevelt and Harry Truman, was almost forgotten in the lauding of the presidency that accompanied John F. Kennedy's accession, and then gained favor while Richard Nixon and Ronald Reagan served.¹⁰ Putting partisan feeling aside, we should observe that the realistic school of interpretation, even with the advantage of long periods of dominance, has never succeeded in destroying the formal school, just as the formal school has never quite succeeded in defining the reality of executive power. One school serves justice, the other serves necessity; and both serve political partisans as they claim justice when in opposition and necessity when in power.

When examined, moreover, each of the schools reveals something of the other in itself. Corwin admits that the Constitution, though a formal document, reflects an informal struggle between two conceptions of executive power that may be identified with the two points of view: a weak executive resulting from the no-

tion that the people are *represented* in the legislature, a strong executive from the notion that they are *embodied* in the executive.¹¹ Though Corwin would seem to prefer the former conception, he never questions the need for both. And it is hard to see why the people should be embodied in one man if not to secure the unity of executive powers, despite their separate definitions, through the unity of one human body. Corwin proposes to control presidential power, to make it more regular and less personal, and to establish a cabinet council including legislative leaders, but not to remove executive power from one man. As the reality of that one man is quite personal, so must be the reality of the power formally conferred on him.

Or does the reality of the president's power depend on the form? Neustadt's main argument is that the president must acquire and use personal power in order to secure the formal power promised, but not guaranteed, by the "literary theory," the constitutional forms, and the developed expectations of the office. Neustadt holds that the president is formally a strong executive, and in reality either weak or strong according to his personal strength. But with this view one takes for granted the opportunity for strength afforded by the Constitution, since it is the Constitution (as we shall see in Chapter 10) that gives the president "his unique place in our political system" and enables or requires him to "sit where he sits"¹²—a favorite phrase of Neustadt's borrowed from Harry Truman to denote a base of operations rather than formal occupancy of an office. Neustadt makes a distinction between formal power and "effective influence," thus making it clear that for him formal power is ineffectual. Formal power is the power to compel, and Neustadt's book is devoted to the proposition that the power to compel is worthless by itself. And that power becomes positively harmful if a president believes that he can rely on it; formal power, for Neustadt, is useful only if it is understood as a subordinate factor in the work of persuasion, or as "incidents in a persuasive process."¹³

But is it not more reasonable and realistic to suppose, on the contrary, that persuasion is incidental or instrumental to compulsion? Although the power to compel must often or even always be supplemented by persuasion, a president's power to persuade would be greatly weakened without his coercive power. The rational appeal to interest is much diluted without a capacity to engender fear. Moreover, to the extent that he must persuade

(which is admittedly considerable), is this not by command of the Constitution? Persuasion (or bargaining) is made a regular necessity for the president, and generally in American politics, by the peculiar separation and sharing of powers ordained by the Constitution. As Neustadt says, "the limits on command suggest the structure of our government"; and he traces that structure to the Constitution. Who are the persons necessary in the end to be persuaded? Are they not those with the constitutional power to compel? It would seem that "effective influence" is thereby grounded in formal power. But Neustadt does not acknowledge the magnitude of his concession, for he concludes shortly thereafter that "the probabilities of power do not derive from the literary theory" of the Constitution.¹⁴ Neustadt, accordingly, takes for granted the potential strength of the presidential office, which might become active in the most self-effacing personality with or even without the tutelage of Neustadt's own "literary theory."¹⁵ A latent teaching exists in the constitutional powers themselves that is discernible or at least presentable to politicians.

Besides taking for granted the formal strength of the executive, Neustadt overlooks its formal weakness and thus its ambivalence. "The limits on command" that pertain to the structure of our government also suggest that formal restraints impose real restraints, compelling presidents to bargain rather than command. Moreover, although convinced of the need for a strong executive, Neustadt pays no heed to the dictionary definition of executive and takes no account of the modest pretense to be executing the will of someone else—a pretense required especially of the strongest presidents. He identifies the formal executive with the constitutional presidency, but as we have seen, the latter includes powers that go beyond the merely formal executive power. It is perhaps by constitutional design that the president must achieve his leadership, and that the alternative of clerkship is open to him either as a refuge from responsibility or as a cloak for his aggrandizement.

Neustadt rightly emphasizes the truth that persuading others means persuading them that something is in their interest. But to succeed in such persuasion, it is useful to have the instrumental conception of the office whereby it can appear that the president himself is nothing, a mere representative of stronger forces that are more important, more sovereign than he. Thus he need not demand obedience to his will but need only implore his petitioner

to take pity on him for what he must do. The very notion of "interest" in political science disguises assertiveness, as it proposes something abstract and objective to be followed, distinct from will or caprice. What I must do in my own interest is, as it were, imposed on me. Too bad for you, but surely you understand?

As for the president's personal power, one can sometimes get more out of a broker's commission than from a direct payment. Neustadt knows this and says that "persuasion becomes bargaining,"¹⁶ but he does not say that the president's formal weakness is suited to the character of his personal power. One is left wondering what the president's personal power is. Neustadt is ambiguous as to whether it is the power of the office, with which the president identifies himself, or the pursuit of his private interest, to which his official power is merely an instrument. Given the ambiguity between constitutional role and Machiavellian self-aggrandizement, the president's "unique place in our political system" cannot guarantee that his only concern is for the whole of our polity. He may serve the whole only so far as the whole affects him. So then is the rule of law necessarily reduced to executive pride served by executive connivance? If so, the executive would be more than the leader-as-clerk; he is more like a tyrant with the conception of clerk serving as a mask.

If one were to carry Neustadt's theory to an extreme, the president's personal power could be described only in the style of each president, as biography.¹⁷ Thus Neustadt's book, while formally a study of presidential power, could be understood in fact as a critical biography of President Eisenhower: Neustadt accepts the critique of President Eisenhower by his predecessor, Truman, who thought the general a bumbling innocent in politics.¹⁸ A more recent book, Fred I. Greenstein's *The Hidden-Hand Presidency* (1982), does not examine the sinister potential of personal leadership directly, perhaps because Greenstein, despite his partisan inclination, was persuaded by the evidence to admire President Eisenhower's personal skill.¹⁹

Unlike Neustadt, Greenstein argues that leadership can sometimes be more effective if it does not appear to be leadership: having a reputation for cleverness is not the same as being clever. Eisenhower, according to Greenstein, was eminently skilled at getting what he wanted without seeming to have had a hand in the result. Where he was in fact evasive, he seemed guileless; and while always calculating, he appeared merely lucky. To

achieve the effect, Eisenhower used the formalities of his office to make himself look non-partisan. Or should one say that since the general content of Eisenhower's partisanship could not remain hidden, he used the informalities of his office to achieve what formally it is supposed to be? The public smile covered the hidden hand, but the hidden hand created the conditions for the public smile.

Greenstein, in short, introduces us to the complexity of the relationship between formal and real power, something not as simple as formal theory *versus* real deeds. The president's formal, non-partisan office as chief of state can serve partisan ends by concealing the use of partisan means, so that formal power can become real power; but the hidden partisan means must be used to serve ends that do not have to be concealed, ends that can be announced or proclaimed to produce Eisenhower's electoral successes. So understood, real power is identical with formal power.

Another recent book, Richard M. Pious's *The American Presidency*, has the merit of being hard to place on either side of the formal-realistic dichotomy. On the formal side, Pious wants stricter standards for the exercise of prerogative powers in emergencies, but more as a grant of power than as a diminution of it. He believes that emergencies arise oftener than they should because the president is too weak in both formal and informal power.²⁰ More formal power for the president will reduce the need for his informal power. Yet, as a realist, Pious strongly feels that the Constitution is the source of the president's informal power. The Constitution, Pious asserts, speaks plainly on some matters and remains silent on others. What it says to establish the three branches of government enables them to fill the silences that were left by the Framers of the Constitution. The president, with his expansive office, is particularly adept at filling the void: "The president claims the silences of the Constitution."²¹ Thus, the reality of his power is not described in the Constitution, but it depends on what is described there. One cannot make the distinction, as Neustadt does, between formal power and effective influence. To describe the "effective influence" of the president precisely, one must take account of the "literary theory" of the Constitution.²² Pious takes note, moreover, that the formal offices of the Constitution have not only been used to serve partisans, but they also have created partisans—"presidentialists" and

"congressionalists"—who, by Montesquieu's prediction, defend their favorite offices to some extent apart from other partisan considerations.²³

How deliberately the Framers may have left silences in the Constitution to complement its express statements is not made clear in Pious's book. He writes: "While the Framers were brilliant politicians, they were cautious draftsmen."²⁴ Pious does not venture to say: *Because* the Framers were brilliant politicians, they were cautious draftsmen. So we are kept wondering whether the ambivalence of executive power was the product of constitutional design; nonetheless by Pious's own "theory of presidential power"²⁵ we are shown some part of how that ambivalence could have been consciously planned.

Another more psychological theory of the informal executive has lately emerged, purporting to lay bare the personality of the president. Here the individual personality is assumed to be critical, rather than the president's political situation or the demands of his constitutional office. One might expect, therefore, that the fearsome aspect of the executive, which is the more personal, would be emphasized, and its lawful character played down. This expectation is neither entirely frustrated nor happily fulfilled. In the theory, personality is divided into personalities, which are defined as types or roles with much of the formalism used by constitution-makers to define offices. James D. Barber, in his influential book, *The Presidential Character*,²⁶ identifies the "active-positive" personality which makes for the preferred type of president—someone who goes about his work free of the compulsive drive for power for its own sake. Such a personality is very fortunately composed: he is, by definition, active, and so escapes the mean compliance of what Barber calls the "passive-positive" executive as well as the dutiful propriety of the "passive-negative" type; but since he is also positive, he escapes those temptations to violence to which the active-negative executive yields, given his silly heroism and braggart masculinity. Finally, the active-positive executive is permitted and even encouraged by Barber to indulge his love of fun and his belief that politics is play.²⁷

The sunny democratic optimism of this character and his scholarly creator is quite remarkable. Barber apparently assumes, contrary to his premise that personality is more important than institutions, that the modern executive cannot be either passive or weak. Accordingly, he implies that the weak executive is in thrall

to compulsive legislators, meekly executing the laws they pass, and thus becomes strong by servility to strength. For Barber, the modern executive must be strong somehow. In any case, Franklin D. Roosevelt cannot be described as weak, and he clearly loved politics. But did he love making the stern, hard decisions that strength makes possible, among them ordering his country to war? And did he love to deceive, as he sometimes did, using his political skill?²⁸ Was not Lincoln's melancholy irony, though negative, something Barber could applaud?

If a strong executive is necessary, his strength is not needed to lead the nation at play, unless the game played is understood as a competition. In which case, it is too much to believe that a politician's desire to win will rouse him from passivity without carrying him into a dangerous desire for mastery. So the active-positive character is simply a wish, a political hope displaced upon psychological theory. Such a character could not check his own desire for mastery without possessing the diffident "civic virtue" of the passive-negative character. Moreover, if he were checked by others with institutional restraints in the spirit of *Federalist* 51's maxim, "Ambition must be made to counteract ambition," such a president would become one active-negative character among others.

Barber's work has prospered because psycho-history is currently fashionable, and also because Barber can claim to have called the turn on active-negative Richard Nixon. But Barber's proximate intellectual antecedent is Harold Lasswell, whose *Power and Personality* (1948) also reflects—and more sharply—the problem of a not-so-playful desire for mastery.²⁹ Lasswell was never loath to grasp the far-off and far-out consequences of his fashionable ideas, and his chief merit is the unfashionable zeal with which he promotes them. He shows them for what they are and may yet, perhaps, unwittingly sound an alarm with the piercing shriek of his trumpet of progress. When he describes the traits of the power-seeker, he does not avoid the ineluctable conclusion that the power-seeker is completely satisfied only by ruling the world.³⁰ And Lasswell is not embarrassed to say that the aim of his policy science, long-term, is to "get rid of power,"³¹ to get rid of politics, because politics includes—or rather centers on—what he clinically calls "severe deprivations."³²

In the short run, however, Lasswell wants to curb and chasten power by promoting the democratic personality, which is free of

social anxiety and accompanying unhealthy negativism. In government, Lasswell would generally favor the "agitator" type—responsive to change, flexible in crisis, and tolerant of diversity—over the "bureaucrat," whose compulsive desire for uniformity masks a desire to avoid responsibility.³³ Agitators, like Barber's active-passive presidents, are intended to be strong executives, though not too strong. But again, the notion of executing another's will, which is essential to the institution of executive, awkwardly and noticeably limits the psychological construct that has been arbitrarily designed to replace that notion—as if nature had undertaken to provide souls suitable for democratic leaders.³⁴

Leaving aside consideration of the American presidency for a moment, we find two notable works by M. J. C. Vile and W. B. Gwyn on the history of the doctrine of the separation of powers. Here again we encounter the ambivalence of executive power. Both authors insist that the doctrine of separation of powers must be understood as connected with—or, as they say, confused with—the notion of the mixed or balanced constitution.³⁵ The cause of this confusion, it would seem, is the problem of executive power. Because the separation of powers, according to them, is based on an analysis of functions, and because the executive function is considered subordinate to the legislative, the result is a weak executive. Yet the powers do not remain separate operationally unless they are strong enough to defend themselves against each other, and thus are independent. In such circumstances a strong executive is required. Obviously because no formal dictionary or functional definition of "executive" power can produce equality with legislative power, a supplementary and informal reality must be found and justified by the doctrine of the mixed or balanced constitution. This in itself requires only an informal mix or balance of functions and not a formal demarcation of them. To secure an actual separation of powers, therefore, the doctrine of separation of powers must reach outside its formal justification for that separation and necessarily grasp some notion of expansive, informal, executive power. A recognition, more or less understood, of this necessity has produced the supposed confusion of the separation of powers and the mixed constitution. Accordingly, the history of the doctrine of separation of powers needs to be considered with special emphasis on executive power.

Form and Reality in the Executive

If the weak and strong executives are admitted to be both persistent and pervasive, and if today one is never found without the other, we can say that they depend on one another.³⁶ For executive power is typical of modern government, where form and reality are to be found at a certain distance from each other. How so? Modern government claims to represent the people as a whole, but in reality some people are better represented than others; it claims to be democratic, but is actually oligarchic or elitist; it claims to be constitutional, but extra-constitutional institutions, such as parties, actually run it; it claims to be merely instrumental to the "pursuit of happiness," but in reality fosters a certain notion of happiness; it claims to be universal, but actually works only under certain conditions; its peoples claim to be citizens, but are in fact no more than voters, if that; and its leaders claim to be executives, but are actually rulers.

The pattern is sufficiently distinct so that today we tend to think that the form is necessarily separate from the reality. But I shall argue that this feature of modern government, both liberal and illiberal, was *deliberately contrived*. Its origin is to be found in liberal constitutionalism, where the forms of the constitution are held out in public view and the Machiavellian practices needed to make them work are concealed.

I have suggested that the weak, formal executive is an aid to the strong, informal executive. When explaining the policy laid down by the emperor Augustus, Gibbon says on the first page of his history that "the Roman Senate appeared to possess the sovereign authority, and devolved on the emperors all the executive powers of government."³⁷ He meant that the real government (the emperor) was apparently acting on behalf of the supposed government (the Senate). So from early on, the notion of the executive seems to have connoted not weakness but the semblance of weakness, a presumed drawing of its own strength from the strength of another: the retiring disguise, combined with the efficient activity, of the *éminence grise*. For it adds to one's power to conceal it or deprecate it, and the regular pretense of "executing" another's wishes, however easily penetrated, is not at all distasteful to anyone who thinks he himself cannot be fooled. In time, he comes to value the courtesies of his "execu-

tives" just as he would enjoy the exercise of his own power. Indeed, modern citizens in liberal democracies take a perverse pleasure in figuring out the tricks by which they are not deceived, to be sure, but merely governed. And our modern political science, conveying neither surprise nor anything more than routine indignation, offers its findings to support the curiosity of citizens. Even our most forceful contemporary politicians claim only to be stewards of the people, and find it useful as well as necessary not to claim more.³⁸

Yet it is also necessary to consider the strong executive as an aid to the weak, and to make another obvious observation. For if the weak executive is bashful and retiring, the strong executive is bold and impressive. Instead of a cloak to wear, the strong executive has an image to create and to cultivate, an image of masculine energy impressively controlled because it is just barely so. The regularity of his performance is interrupted by unpredictable shifts of policy which can later be interpreted by the sophisticated courtiers of modern democracies: journalists, commentators, and political scientists. A strong executive may well be regarded as having a disconcerting taste for the sensational, so eagerly does he seize upon an accident of politics to magnify it for his own use. He may even create accidents; he is a master of what Neustadt calls "initiatives," which are motions toward something new—designs for him, surprises to others.³⁹ He surely does not shrink from raising alarms, or from forcefully reminding others of what is what and who is who. His indulgences are sweetened by his punishments, and the effect of his active-positive smile is enhanced by the occasional appearance of his active-negative frown. The purpose of all this, however, is not merely to boost the ego of the weak executive (a comic character), but also to make lawful executions easier and less oppressive. A snarl or a bite every once in a while, if it is carefully chosen, will quiet the brave and satisfy the multitude by venting pent-up humors and releasing a wholesome, wondering fear.

The result is more useful to free governments than to tyrannies, because the necessary exactions of any government bring more danger and dishonor to free governments than to tyrannies. Every dissipation of the hatreds that a free people inevitably begins to feel toward government reduces its resistance to the necessary exactions that must be made upon it. And then too, a single, quick stroke is always impressive and nearly painless. When

such thoughts have been elaborated to explain "the economy of violence"⁴⁰—which one might counter by asserting the humanity of violence—the strong executive can be seen to make possible the weak. The strong executive's very energy makes it possible to move government away from "ruling" in the classical sense to something more limited in scope and ambition—"representation" in the modern sense, that leaves government the servant of the people.⁴¹ Or one could say "the steward of the people," for a strong executive of the people's will is, in principle and intent, a weak ruler over the people.

The ambivalence of the executive, therefore, must be understood less as embodying two rival, contrary conceptions than as the same thing in two phases or aspects.⁴² One must look beyond the differences between strong and weak presidents—such as Theodore Roosevelt and William Howard Taft—to a conception of the executive that unites them, reflected in the simple and obvious fact that both have held the same office. What is the nature of an office that can survive, and satisfy, both men? So Barber's psychological theory fails to recognize the fact that the matrix of personalities proudly set forth is not a discovery but a creation of the office itself. For the psychological realists have construed their reality out of another's creation. If an executive can be described as active or passive, positive or negative, this is because the office itself encompasses the behavior. So it is only by the design of the creators of the office that such descriptions seem to correspond to what we observe in the character of the president.

The unity of the office implies the possibility, though a remote one, of an ideal executive. Such a person would combine in himself the ambivalence inherent in the office, ducking out of sight and leaping into view when necessary and appropriate. And his knowledge, part of which is understanding how to tolerate the ignorance of others—for executives usually excel in being either weak or strong, not both—would encompass the doctrine of executive power, uniting its two aspects while justifying their separation. When separated, the two aspects demonstrate the gulf between weak formal power and strong informal power. But when together in hypothetical perfection, the formal ambivalence in the office would cause a real ambivalence in the executive's behavior. This presumed result suggests a puzzle about the relationship between formal and real power that has not been solved, or even understood, in the literature we have surveyed. We have seen a

formal executive and an informal executive, and we have had a glimpse of the complexity of their relationship. But no scholar has made this relationship his theme or answered the following simple question: Is the formal executive power merely a cloak for the real executive, or is it also the cause of real power?

Recalcitrance and the Executive

A doctrine is needed to combine the two aspects of executive power not only for the constitutional executive but for the party executive as well. Confining ourselves to the free and civilized world, we can discern two basic kinds of chief executive: a constitutional executive like the American president, who draws his powers from a formal document, and a party executive like the British prime minister, who derives power from an informal source, a political party. The American executive, having powers formally stated in the Constitution, does not rely on strict party discipline in the legislature when he exercises his authority. But he does need, it would seem, the help of some general understanding favoring strong executive power to resist legislative usurpation and its partner, overbearing bureaucracy. He needs a doctrine, a "literary theory," to protect himself against the partisan application by the legislature of the dictionary definition of executive, which would reduce him to its instrument.

In such a case, necessity might recommend an executive capable of strong action, but necessity teaches only those compelled to recognize it, and recognition often comes too late. Moreover, necessity cannot teach successfully if the required actions leave a bad conscience in the strong executive and rebellion in those who acquiesced. Even the constitution would not be enough to defend the executive if no public argument existed to inform the citizenry why the executive should have access to extraordinary powers that are not strictly executive in the instrumental sense. The American president, for one, is not sufficiently fortified by his constitutional powers, because in practice they might be denied to him. The ambivalence of executive power compels every president to defend himself by claiming the powers that are formally his. For this the president must have something convincing to say. He needs a doctrine, a justification, such as Hamilton's argument in *The Federalist* 70-77, to show why a strong executive is

compatible with republican government. The institutions of the constitution must be filled out and backed up by constitutional speech. And the party executive, the beneficiary more of party discipline than of formal constitutional powers, needs the same protection from party dictation that the constitutional executive needs from legislative usurpation. Here even the legislature is sustained against party dictation by the reasoning that justifies the strong executive. For while legislative independence is greatly restricted by party discipline, it can be sustained by the responsibility to call the strong executive to account, a responsibility that cuts across party lines; parties functioning as such cannot by themselves curb the executive as effectively.

If a doctrine is needed to explain and support the ambivalence of executive power, what might it be? What advantages are expected from an office that expands and contracts, that alternately reveals and hides itself? A general hypothesis may now be suggested. From the superficial observation with which we began, that everyone agrees on the necessity of a strong executive, it seems evident that the executive cannot merely "execute" in the dictionary sense. Yet if he must therefore acquire and exercise a "personal power,"⁴³ the danger of tyranny becomes equally obvious. Why the executive cannot merely "execute" in the formal sense should now be clearly stated, so that the necessary risk of tyranny may be fairly estimated.

An executive could execute the law dutifully and faithfully, without an insubordinate exercise of his own power, if the law were reasonable; that is, if it could make all necessary distinctions among individual cases, and if its provisions did not omit anything that might make its intention impossible. For a reasonable law must first be exact, and then self-sufficient or perfect. But in fact a law can be neither. It cannot be exact because it is addressed to human beings, who are recalcitrant to reason. And their recalcitrance, though by no means simply deplorable, takes the form of a stubborn insistence that no matter how reasonable the law or how wise the lawgiver, *I* want to be able to say "no." The right to say "no" is exercised often enough to prevent anyone from believing that the very human insistence on it is abstract or whimsical, no matter how abstract or whimsical any particular "no" may be. This insistence is responsible for the need to punish those who offend against the law. Both the need to say "no" and the need to punish compel the legislator to forfeit exactness in

making the law. In seeking consent for the law he must make it conform to what most men like, which is to some extent different from what is good for them; and in punishing offenders, he must make the punishments seem reasonable to most men, which is to some extent different from what is reasonable. For consent, he must define privileges according to what men like; and for punishment, he must define offenses according to what men will accept. Both needs, therefore, compel the legislator to move from exactness toward generality, with either a welcome to the undeserving claimant or a denial to the deserving exception. Even the best law is always too general to be reasonable because it must in some way or another defer to the human naysayer.

Naysaying stems from the brute fact that every human being has a separate body that constitutes his unshareable self-interest. Someone else may be wiser than you, but since he cannot care for your body to the extent you can, and also must look out for his own, the suspicion always arises that his wisdom is not applicable to your good, and hence your insistence on a right to veto him. The naysayer regards the generality of law as usually offering more useful protection than does the exactness of wisdom, and the legislator accepts the naysayer's suspicion as prudence, or rather he transforms it into prudence.

The separateness of human bodies, which makes the law inexact, also shows us the law's imperfection. For it would not matter that human bodies are separate if they were not mortal. Only the imminent return to ashes and dust makes us aware that we are not only surrounded by alien matter but actually encased in it. This material fact causes us to fear, and to regard the law's provisions for us—which to our vision extend only from cradle to grave—as quite inadequate. For the law to lay claim on our obedience because it takes care of us may seem nothing but human boasting,⁴⁴ and so we are disposed to disobey when it seems necessary.

That the law cannot control nature is the fundamental cause of its injustice and of its inability to remove fear. Because of its generality, law becomes injustice when measured against exactness, and is received as justice only if measured against outright favoritism. Since injustice and fear necessarily accompany law, law can be executed only by means of injustice and fear—the injustice that institutes executive pride and majesty, and the fear that overcomes our recalcitrance. It must be said, then, that since some taint of tyranny necessarily accompanies law, law can only

be executed tyrannically: for injustice and fear are the bases of tyranny.

We can either recoil in shock from this extreme conclusion, or respond with amusement, contemplating, for instance, the necessary tyranny of William Howard Taft. For the American executive and some others, the power to punish (originally regarded as an executive power even in the weak sense) has been removed and given over in good part to an independent judiciary. There the tyranny of punishment is effectually concealed as "judgment not will" by judges who are checked by a jury, so that punishment seems to come from one's peers.⁴⁵ And though it might be urged that naysaying to reasonable law is not reasonable, it is not unreasonable to respond that men cannot help being unreasonable. The same is true for the generality of the law and the fearsomeness of the executive. But this argument does not impugn the conclusion. It only gives us reason's reason for coming to terms with unreason, whose human name is tyranny.

It is important to recognize that reason must come to terms with tyranny because there is more than one way to do it. Two ways have been found by which political science, being unable to escape tyranny, attempts to tame and use it. The first is the Aristotelian way, in which the political scientist takes the place of the tyrant and, to the extent that he can, transforms the tyrant from the destroyer of law into a king, the guardian of law. The Aristotelian performs the task as unobtrusively as he can, without making a public office of his responsibility and without openly proclaiming the inadequacy of the law. The second remedy was first proposed by Machiavelli, though it was substantially modified by the time the American founders made use of the discovery. This is to recognize openly the necessity of tyranny in the character of the prince, who initiates and innovates, even while he seeks democratic sanction for his actions so that he may seem merely to execute the people's will. Later, chiefly by the thinking of John Locke, the Machiavellian prince was regularized as an office, called the executive, and juxtaposed to the legislative power in a constitutional framework, in the ambivalent form we recognize: now subordinate, now independent. In the deliberate design of this ambivalence may be found the modern doctrine of executive power.

The scholars we have examined look either to the weak or to the strong executive as the essential executive. They do not perceive the ambivalence of executive power because they do not see

it as a piece, and they fail to do so because executive power appears to them as a given necessity, not as a choice. Living with executive power and seeing it everywhere, they take it for granted and vainly attempt either to formalize it or to personalize it when both are required. They do not see executive power as a remedy for human recalcitrance, chosen to replace another remedy, because its success has completely obscured the problem, and with it the possibility of choice.

Some who witnessed the Watergate scandal in America think "cover-up" when they hear "executive power." And they are not wrong to think so because cover-up is indeed in the nature of executive power. In operation, executive power covers up because the successful executive does his best to represent his choices as necessities unwillingly imposed on him. He did not *choose* to get in your way, and therefore he is not responsible for harming or offending you. But if we are fully to understand executive power, we must see it as a whole; and to do that we must try to imagine how government would be if there were no executive power. Thus we can begin to see executive power as a choice, embodied in a doctrine. Fortunately, our task does not require any hypothesis contrary to fact. And imagining government without executive power is made easier by the existence of Aristotle's *Politics*, from which the executive is almost absent.

I

The Prehistory of Executive Power