

## Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

strict accuracy, termed his subordinates. What powers are implied from this duty? In this connection, five categories of executive power should be distinguished: first, there is that executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary powers which acts of Congress at any particular time confer upon heads of departments and other executive (“administrative”) agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally, there are so-called “ministerial duties” which admit of no discretion as to the occasion or the manner of their discharge. Three principal questions arise: first, how does the President exercise the powers which the Constitution or the statutes confer upon him; second, in what relation does he stand by virtue of the Take Care Clause to the powers of other executive or administrative agencies; third, in what relation does he stand to the enforcement of the criminal laws of the United States?<sup>690</sup>

Whereas the British monarch is constitutionally under the necessity of acting always through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In the words of an opinion by Attorney General Cushing in 1855: “It may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States. . . . So he, and he alone, is the supreme commander in chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President.”<sup>691</sup> Moreover, the obligation to act personally may be sometimes enlarged by statute, as, for example, by the act organizing the President with other designated officials into “an Establishment by name of the Smithsonian Institute.” Here, says the Attorney General, “the President’s name of office is *designatio*

<sup>690</sup> In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–78 (1992), the Court purported to draw from the Take Care Clause the principle that Congress could not authorize citizens with only generalized grievances to sue to compel governmental compliance with the law, inasmuch as permitting that would be “to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’” *Id.* at 577.

<sup>691</sup> 7 Ops. Atty. Gen. 453, 464–65 (1855).