Constitutional Boundaries of Executive Powers and the Impasse over the Appointment of an EFCC Chairman in Nigeria: Critical Comparative Perspectives from the United States Constitution

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Abstract

Nigeria's 4th Republic boast of a laundry list of different episodes of unconstitutional behaviours, top on the list being the gross abuse of Executive powers as domiciled in the Office of the President. This Paper seeks to examine one of such acts, which is the most recent, and one that is still a subject of ongoing legal and academic inquisition. This Paper refers to the constitutional crisis surrounding the confirmation of the Acting Chairman of the Economic and Financial Crimes Commission (EFCC), Mr. Ibrahim Magu, as a substantive EFCC Chairman. This Paper's Analysis does not purport to change the law, but seeks to provide a proper understanding of the scope of the President's executive powers in making appointments of this nature. It endeavours to propose a balanced and practical solution to a crisis that has attained an unprecedented level of complexity giving rise to confusion and uncertainty, by considering the wide variety of arguments, while at the same time extrapolating gainful insight from a leading Constitutional Democracy i.e. the United States of America, toward providing for Nigeria, a clearer, surer, and more decent interpretation of the law, consistent with the purposes and principles of contemporary Constitutional Jurisprudence.

Keywords: Executive Powers, Appointment, EFCC, Senate, and Constitution.

1. Introduction

At the centre of 21st century notion of Constitutional Democracy is the exercise of Executive powers. This flows essentially from the authority vested in the Executive as one of the three branches of government. Notwithstanding that these powers are not only clearly spelt out by the Constitution as they

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apply to each of these branches,[2] and irrespective of the fact that each of these branches are deemed to co-exist in a tightly fitted framework of equality and mutual respect, the wide spectrum of powers donated to the Executive has over time given it an appearance of superiority over the other two, such that it is not strange to see the Executive often times exercise its powers in such a manner that is clearly unconstitutional.

Nigeria's constitutional democracy has not been short of such episodes in the last 19 years of the 4th Republic. From May 29, 1999 successive Chief Executives have practically made it a habit to insufferably test the patience of the law, by nonchalantly exceeding the scope of their powers with the result being a deluge of unnecessary controversies, heating up of the polity, and damage to the country's constitutional framework. The latest in line is the crisis over the confirmation of the Acting Chairman of the Economic and Financial Crimes Commission (EFCC), Mr. Ibrahim Magu. On this matter the country has remained sharply divided for over two years and so protracted is the crisis that there appears to be no light at the end of the tunnel. Certainly, there is no gainsaying the fact that all is not well with the Magu appointment. As things stands, the Office is currently hopping on one leg, with the other dangling ominously and any accurate kick either from a successive government or judgement of court, is bound to cause the entire house tumbling down. The Paper therefore seeks to examine the appointment of Mr. Ibrahim Magu as Acting EFCC Chairman within the province of the President's Executive powers, drawing perspectives from the exercise of similar powers under the American constitution, to see how valuable insights can be gained. The sole aim of the Paper is to see how drawing such parallel can help put the issues in context and deepen Nigeria's constitutionalism.

2. What is 'Executive powers'?

When Executive power is understood in terms of the ambivalence between the weak formal executive in theory, and the strong informal executive in practice, a quick overview of its history becomes necessary particularly to establish how this ambivalence is to be construed.[3] From Aristotle who deliberately ignored the Chief Executive, to Machiavelli who conceived it, to Locke who constitutionalized it, to Montesquieu who made it less terrible and enabled a free government to govern without frightening its citizens, the

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2 These branches are fundamentally the Legislature which is empowered to make laws, the Executive clothed with powers to execute the law, and the Judiciary which reserves the exclusive powers to interpret the law.

3 For a valuable perspective *see generally*, Harvey C. Mansfield, 'The Modern Doctrine of Executive Power' (1987) 17(2) Presidential Studies Quarterly - The Origins and Invention of the American Presidency 237-252. Richard Neustadt also talks about the ambiguity of the American President being both a 'Clerk' as well as 'Leader' in the context of American understanding of Executive powers. In this respect, see John. A. Rohr, 'Public Administration, Executive Power, and Constitutional Confusion' (1997) 20(4) International Journal of Public Administration 887-905.

notion of Executive powers has grown and evolved over centuries.[4] Sir William Blackstone was one of the early thinkers advocating the theory that in external affairs the King was the sole authority of the State, and that the English Constitution donated so much powers to the executive 'for the sake of unanimity, strength, and dispatch, such that in the exercise of this prerogative, the king is deemed absolute, so absolute, that there is no legal authority that can challenge his powers.[5] What then is 'Executive powers'?

Generally, the term connotes the sum total or bundle of powers constitutionally donated to the executive branch, to be exercised by the Head of the branch usually the President and Commander-in-Chief.[6] Under a Presidential system of government, Executive power connotes that the Constitution vest in the President the power to execute all laws and policies of the State within the context of his Office as 'Chief Executive'.[7] The Chief Executive vested with such powers constitutionally has control over the execution of laws, principally federal laws.[8] The power also has to do with overseeing the political and administrative functions of the State. This power is 'executive' in nature, in the sense that the holder of the power i.e. the President is charged with the responsibility of day to day running of the affairs of the country, and he is deemed to have been elected by the popular will of the governed through a democratically structured electoral process. 'Executive powers' has also been defined as a general grant of powers.[9] The powers in question also span a wide spectrum and include domestic powers such as the power of appointment and execution of policies, as well as such dangerous external powers such as powers to declare war, or the unilateral use of force.

Scholars have expressed divergent views on the general notion of Executive powers, and principally two schools of thought have emerged in this area. The first is that which argues that the President possesses the power to control the entire executive arm of government, an idea rooted in the Unitary Executive Theory.[10] This theory posits that all executive powers are vested in one single

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4 ibid

5 William Blackstone, *Commentaries on the Laws of England* (1st edn, Clarendon Press 1765) 1, 232.

6 Saikrishna B. Prakash, 'The Essential Meaning of Executive Powers' (2003) 3 University of Illinois Law Review 701.

7 Gary Lawson, 'The Rise and Rise of the Administrative State' (1994) 107(6) Harvard Law Review 1231; L.S. Liberman, 'Morrison *v* Olson: A Formalist Perspective on Why the Court Was Wrong' (1989) 38 American University Law Review 313.

8 ibid 819.

9 This position seems to suggest a wide latitude in the exercise of such powers without limitations. For an overview of this *see generally* Julian G. Ku, 'Unitary Executive Theory and Exclusive Presidential Powers' (2010) 12(2) University of Pennsylvania Journal of Constitutional Law 616.

10 Steven G. Calabresi and Saikrishna B. Prakash, 'The President's Power to Execute the Laws' (1994) 104(3) Yale Law Journal 541; Martin S. Flaherty, 'The Most Dangerous Branch' (1996) 105(7) Yale Law Journal 1725; Connected to this is the doctrine of Presidential administration, in which the President is clothed with full control over agencies of the State. *See* Elena Kagan, Presidential Administration (2001) 114 Harvard Law Review 2245.

powerful Chief Executive known as the 'Executive President'.[11] This is a landmark feature of the US Constitution,[12] and is further reflected in its notion of 'Executive Agreements' in which the President does not require congressional approval for certain acts.[13] It has also been a frequent justification for the unilateral use of force by American Presidents in the protection of National Security.[14] The argument is that this is an offshoot of Executive powers.[15] Others have said the unitary executive theory is a ruse,[16] as it has been rejected by the courts,[17] while in contemporary times controversies have continued to rage between the early and later theorists.[18] The Second school of thought are those who talk of a plural executive, where executive powers is dispersed amongst different elected officials in the executive branch. It must however be stated that the idea of a unitary executive is the generally accepted norm in most constitutional democracies,[19] though Scholars have posited its operation should at all times be limited by the Constitution.[20]

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11 At the time of drafting the American Constitution, the founders toyed with the idea of vesting executive powers in a Committee in the executive branch, that notion was later abandoned in favour of an all-powerful President.

12 Steven G. Calabresi and Kevin H. Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105(6) Harvard Law Review 1153-1179; Steven G. Calabresi, 'Some Normative Arguments for the Unitary Executive' (1995) 48 Akron Law Review 23.

13 Gary J. Schmitt, 'Separation of Powers: Introduction to the Study of Executive Agreements' (1982) 27(1) The American Journal of Jurisprudence 114-138.

14 Robert J. Delahunty and John C. Yoo, 'The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbour or Support Them' (2001) 25 Harvard Journal of Law and Public Policy 487-493.

15 Schmitt (n 13).

16 Lawrence Lessig and Cass R. Sunstein, 'The President and the Administration' (1994) 94(1) Columbia Law Review 1-2.

17 *Morrison v Olson*, (1988), 87 U.S. 654.

18 For a rich discussion on the controversy between the early liberal unitary executive theorists, and the later day hardliners, *see generally*, Richard J. Pierce, Jr, 'Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of *The Unitary Executive* by Steven G. Calabresi and Christopher S. Yoo' (2010) 12(2) University of Pennsylvania Journal of Constitutional Law 593-594.

19 For a more insightful understanding of this general position, *see generally* Steven G. Calabresi and Christopher S. Yoo, 'The Unitary Executive During the Second Half-Century' (2003) 23 Harvard Journal of Law and Policy; Christopher S. Yoo, Steven G. Calabresi and Laurence D. Nee, 'The Unitary Executive During the Third-Half of the Century, 1889-1945' (2004) 80 Notre Dame Law Review; Robert V. Percival, 'Presidential Management of the Administrative State: The Not-So-Unitary Executive' (2001) 51(3) Duke Law Journal 963; Steven G. Calabresi and Gary Lawson, 'The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia' (2007) 107(4) Columbia Law Review 1002-1047.

20 For deep expositions on this position see Christopher R. Berry and Jacob E. Gersen, 'The Unbundled Executive' (2008) 75(4) University of Chicago Law Review 1385-1434.

3. Executive Powers under Nigeria's 1999 Constitution

Nigeria operates a Presidential system of government, modelled heavily after that of the United States of America, in which full Executive powers is vested in one sole individual, who combine several statuses, top of which is that he is referred to as 'Executive President'.[21] Under this system, the President as 'de jure' ruler symbolizes the power, prestige, and might of the State through his designation as Commander-in-Chief, a position that literally puts the survival or extermination of the State in his hands, as regards defending its territorial integrity from both internal and external aggression.[22] He commands enormous powers, enjoys an abundance of privileges, and is consistently regaled in pomp and pageantry, so much so that he is accorded the same manner of royalty and majesty that was the sole prerogative of ancient dynasties and constitutional monarchies.[23] Everyone beholds to him as he holds a wide discretion over the distribution of the resources of the State, thus embodying its prosperity. He is the domain of the State's sovereign powers, which is exemplified when he represents the country on the international scene, where he is accorded full diplomatic rights and privilege, such as for instance international legal protection under the doctrine of sovereign immunity.

A unique product of separation of powers is that it is known to generate consistent tensions amongst the different branches of government particularly the Executive and Legislature, in some sort of supremacy battle which is a

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21 Under modern Presidentialism, the designation 'Executive President' is not an exercise in semantics, but a politically instructive classification. The insertion of the word 'Executive' helps to separate the Chief Executive under a Presidential system, from the Head of State in a Parliamentary system of government, who even though is referred to as President, does not wield Executive powers, but is simply a ceremonial figure. Under such a system, executive power is usually vested in the Prime Minister who doubles as the Head of Government, while the President or by whatever name he is called, simply carries out ceremonial functions in a subordinate role. An example was the structure in Nigeria's first Republic where even though Dr. Nnamdi Azikiwe was consistently referred to as 'President' he was no more than the ceremonial head, with Alhaji Tafawa Balewa as Prime Minister exercising executive powers.

22 This is the kind of Status the Nigerian President enjoys. For instance, Section 217 of the Constitution of the Federal Republic of Nigeria, 1999 provides that, "*There shall be an Armed Force for the Federation which shall consist of an army, a navy, an Air Force and such other branches of the armed forces of the Federation as may be established by an Act of the National Assembly*". The Armed Forces has the constitutional mandate to defend Nigeria from external aggression and maintain her territorial integrity as well as secure her borders from violation by land, sea, or air. It is pursuant to this that the same Constitution provides that, "*The powers of the President as the Commissioner-in-Chief of the Armed Forces of the Federation shall include power to determine the operational use of the armed forces of the Federation*". See Section 218 (1), Constitution of the Federal Republic of Nigeria, 1999.

23 On the characteristics and the uniqueness of the English royal prerogatives and immunities, *see generally*, Blackstone (n 5); Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd edn, Thomson Brookers 2007) 628-630; Margit Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2005) 25(1) Oxford Journal of Legal Studies 105-106; H. W. R. Wade, 'Procedure and Prerogative in Public Law' (1985) 101 Law Quarterly Review 180-191.

resident characteristic of many stable democracies.[24] In this regard, Nigeria is not an exception and it is based on this that Scholars have argued that it is fundamental that every State defines the scope of executive powers through the fundamental law i.e. the constitution. According to Twomey, given the inherent dangers involved in vague undefined executive powers, the likely use of this power to undermine the federal distribution of powers in the Constitution is a reality.[25] Flowing from the above, Executive Powers is a main feature of Nigeria's 1999 Constitution. Specifically, the Constitution provides that:

> Subject to the provisions of this Constitution, the executive powers of the Federation - Shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and; shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.[26]

The Constitution provides that the President can exercise this power either by himself or through his Ministers appointed for that purpose.[27] In addition, the Constitution provides for a number of enumerated powers.[28] Thus, without doubt the Nigerian President, like his counterparts in other constitutional democracies enjoys constitutionally guaranteed executive powers, however the question to ask is if this power extends to presidential appointment powers, particularly powers to appoint an EFCC Chairman unilaterally such as in the case of Mr. Magu.

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[24] Pius N Langa, 'The Separation of Powers in the South African Constitution' (2006) 22(1) South African Journal on Human Rights 2-9.

[25] Anne Twomey, 'Pushing the Boundaries of Executive Power: Pape, The Prerogative, and Nationhood Powers' (2010) 34 Melbourne University Law Review 313-343.

[26] Section 5 (1) (a) & (b), Constitution of the Federal Republic of Nigeria, 1999.

[27] It is important to state that though the power to execute laws and policies devolves from the executive power of the President, the delegation of such authority to a subordinate like a Minister or Head of Agency does not on an equal footing translate into a delegation of executive powers as such. It is also within the same understanding that the Minister or Head of Agency, carrying out a delegated function on behalf of the President should not be seen as exercising the executive power. Such a Minister or Head of Agency must be seen as acting as an agent of the President and subject to his direct control and interest. Executive power is vested sole in the President as Chief Executive.

[28] These enumerated powers include the power to assent to bills from the National Assembly, power of appointment and removal from office, power to grant prerogative of mercy i.e. presidential pardoning power, power to appoint the Inspector-General of Police, power of command and operational use of the Armed forces of the Nation, power to appoint the Chief Justice of Nigeria, and the power to declare a State of Emergency where there is breakdown of law and order. See Section 147(3); Section 171(1); Section 175(1); Section 215(1) (a); Section 218(1) (2) (3); Section 231(1) (2); and Section 305(1) (2) (3).

4. Abuse of Executive Powers under the Nigerian Constitution – The Conundrum over the Appointment of an EFCC Chairman

The Nigerian President, Muhammadu Buhari on assumption of office on May 29, 2015 nominated Mr. Ibrahim Magu, a former Director of Operations, and an Assistant Commissioner of Police (ACP) to take over as the Acting Chairman of the Economic and Financial Crimes Commission (EFCC), upon the sack of the erstwhile Chairman, Mr. Ibrahim Lamorde. As it has been customary with the Commission, Mr. Magu was meant to hold office in acting capacity for brief period pending his confirmation by the Nigerian Senate, except that this has not seen the light of day given the back to back refusal of the Senate to confirm his appointment.

Since the crisis began, it has generated great furore as one of the many contemporary imponderables of Nigeria's constitutional journey, most especially as an uncanny replication of an unsavoury past that most Nigerians would want to forget in a hurry. The crisis has blown and is still blowing a fissiparous wind across the constitutional landscape of the country. Mr. Magu was presented before the Nigerian Senate for confirmation by the President, where things went awry as he was ambushed by a damning report submitted to the Senate by another Agency of the same Federal government, the Department of State Services (DSS).[29] Mr. Magu's cross was aggravated by the attendant shoddy performance he put up at the Senate Chambers. Following this below par outing, Mr. Magu was subsequently rejected by the Senate and in defiance of the Senate, he returned to Office to continue as the Acting Chairman of the EFCC.[30] Following this initial rejection, Mr. Magu was again presented by the President to the Senate, only to be further

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[29] On December 15, 2016 the Senate for the first time rejected Mr. Magu and refused to confirm his appointment. For a more detailed overview *see generally*, Ifreke Inyang, 'Details of DSS Report that stopped Magu's Confirmation as EFCC Boss' *The Daily Post Newspaper* (Lagos, 16 December 2016) <http://dailypost.ng/2016/12/16/details-dss-report-stopped-ibrahim-magus-confirmation-efcc-boss> accessed 7 March 2018.

[30] Abu Najakku, 'Why has the Senate refused to Confirm Magu?' *The Daily Trust Newspaper* (Abuja, 15 November 2016) <www.dailytrust.com.ng/news/opinion/why-has-the-senate-refused-to-confirm-magu/171719.html> accessed 7 March 2018; Levinus Nwabughiogu, 'Buhari Receives Senate Report on Magu's Rejection' *The Vanguard Newspaper* (Lagos, 19 March 2017) <www.vanguardngr.com/2017/03/buhari-receives-senate-reports-on-magus-rejection-by-senate> accessed 7 March 2018; Henry Umoru, Dapo Akinrefon, Charles Kumolu, Wahab AbdullaGbenga Oke & Ikechukwu Nnochiri, 'EFCC Confirmation Screening: DSS not credible – Magu' *The Vanguard Newspaper* (Lagos, 16 March 2017) <www.vanguardngr.com/2017/03/efcc-confirmation-screening-dss-helped-senate-stop-magu> accessed 7 March 2018.

rejected.[31] Since then, there has been the back and forth argument as to whether Mr. Magu can continue in Office without the Senate confirming his appointment, while Mr. Magu has remained in limbo.[32] While all this lasted, many kept calling on the Presidency to do the right thing,[33] while the response of the Presidency was that it was acting in line with the law,[34] just as the Senate vowed to turn back further appointees from the President.[35]

In the course of the controversy, the Presidency suddenly adopted a new posture claiming that the Constitution does not require Mr. Magu to go through a Senate confirmation process to be appointed. The Presidency rested its argument on the parsimonious text of Section 171 of the Constitution which catered for extra-ministerial departments,[36] claiming that the EFCC is nothing but an extra-ministerial department having its umbilical cord tied to the Office of the President. Since then, different shades of opinions have been proffered by the contending parties. With each argument, the water is further muddled and for three years and still counting, Nigeria's constitutional

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31 Davidson Iriekpen and Omololu Ogunmade, 'Again, Buhari Tell Senate to Confirm Magu as EFCC Chair' *Thisday Newpaper* (Abuja, 24 January 2017) <www.thisdaylive.com/index.php/2017/01/24/again-buhari-tells-senate-to-confirm-magu-as-efcc-chair> accessed 7 March 2018; Olalekan Adetayo and Leke Baiyewu, 'Senate to Presidency: No Going back on Magu' *The Punch Newspaper* (Lagos, 8 July 2017) <https://punchng.com/senate-to-presidency-no-going-back-on-magu/> accessed 7 March 2018; D. Iriekpen and D. Oyedele, 'Ibrahim Magu: The Last Straw? *Thisday Newspaper* (19 March 2017) <www.thisdaylive.com/index.php/2017/03/19/ ibrahim-magu-the-last-straw> accessed 7 March 2017.

32 Ismail Mudashir, 'Can Buhari appoint Substantive EFCC Chair without Senate Approval?' *Daily Trust Newspaper* (Abuja, 31 January 2017) <www.dailytrust.com.ng/can-buhari-appoint-substantive-efcc-chair-without-senates-approval.html> accessed 7 March 2018; Agatha Ezendiaru, 'Buhari, Magu, and Anti-Corruption War' *New Telegraph* (Lagos, 31 August 2017) <https:// newtelegraphonline.com/2017/08/buhari-magu-anti-corruption-war> accessed 7 March 2018.

33 Ebuka Onyeji, 'Senate's Rejection of Magu: Lawyers React, Blames Presidency' *The Premium Times Newspaper* (15 March 2017) <www.premiumtimesng.com/news/headlines/226210-senates-rejection-magu-lawyers-react-blame-presidency.html> accessed 7 March 2018.

34 Augustine Ehikioya, 'Buhari Believes Magu is Right Man for EFCC Job, Osinbajo Insists' *The Nation Newspaper* (Abuja, 7 March 2018) <http://thenationonlineng.net/buhari-believes-magu-right-man-efcc-job-osinbajo-insists-2> accessed 7 March 2018; Henry Umoru, 'Buhari says Magu, SGF Lawal Cleared of Corruption Allegation' *The Vanguard Newspaper* (Lagos, 24 January 2017) <www.vanguardngr.com/2017/01/breaking-buhari-says-magu-sgf-lawal-cleared-corruption-allegation> accessed 7 March 2018.

35 Taiwo-Hassan Adebayo, 'Senate Suspends Confirmation of RECs to protest Buhari's Refusal to Sack Magu' *The Premium Times Newspaper* (Lagos, 28 March 2017) <https://www.premiumtimesng.com/ news/headlines/227338-updated-senate-suspends-confirmation-of-recs-to-protest-buharis-refusal-to-sack-magu.html> accessed 7 March 2018.

36 *Section 171(1) which provides thus: "Power to appoint persons to hold or act in the offices to which this section applies and to remove persons so appointed from any such office shall vest in the President." Subsection (2) states that "the offices to which this section applies are, namely-*
Secretary to the Government of the Federation;
Head of the Civil service of the Federation;
Ambassador, High Commissioner or other Principal Representative of Nigeria abroad;
Permanent Secretary in any Ministry or Head of any Extra-Ministerial Department of the Government of the Federation howsoever designated; and Any office on the personal staff of the President.

framework has been the casualty. But what are these arguments and how constitutionally sound are they? The succeeding analysis answers this question.

4.1. Section 2(3) of the EFCC Act and the 'Inconsistency with the Constitution' Argument

The EFCC (Establishment) Act 2004,[37] (*hereinafter* referred to as the 'EFCC Act') which is the main document that superintends Mr. Ibrahim Magu's appointment as EFCC Chairman provides for a process of confirmation, without which the appointment would be deemed inchoate. The Act though a legislation subsidiary to the Constitution was made by the National Assembly pursuant to its powers under the Constitution to strengthen the process of such an important office.[38] Specifically, Section 2(3) of the EFCC Act provides as follows, "*The Chairman and members of the Commission other than ex-officio members shall be appointed by the President subject to the confirmation of the Senate*". This is the legal provision that has become a major clog in the wheel of Mr. Magu's appointment, given that it has been subjected to a myriad of extra-constitutional interpretations. There is therefore a need for a thorough and forensic analysis of this provision, particularly its interaction with the provisions of the Constitution in terms of application. The major sticky point here is the argument that notwithstanding the provisions of Section 2(3) of the EFCC Act, the founders of the Constitution never envisaged that the President in the exercise of executive powers in this regard should have it subject to a Senate confirmatory process, hence the position that Section 2(3) is inconsistent with the 1999 Constitution. There is therefore a great deal to dissect here.

To glean the mind of the Constitution on whether the makers would have imagined that the EFCC Chairman be not subjected to a Senate confirmation, the way to go is to ask, "*Does a Senate confirmation of the EFCC Chairman harm the appointment process as to be inconsistent with certain provisions of the constitution, or does it help the process?*" In answering this question, this Paper argues as follows - The additional layer in the confirmation process is not just to ensure that the man saddled with such wide appointment powers does not become a prisoner of his own personal fallibility by appointing his lackey into office, but more importantly to ensure that the appointment process is a very rigorous and thorough one, in which the Legislature as the representatives of the people serve as a necessary check on the executive powers of the President. Where such a sensitive appointment was to be left in the hand of just a man, the chances are that it would be open to abuse and an exercise without judicious introspection.

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37 CAP E17, Laws of the Federation of Nigeria (LFN), 2004.

38 See Section 4, Constitution of the Federal Republic of Nigeria, 1999.

One may need to ask again, is Section 2(3) of the EFCC Act, indeed in conflict with extant provisions of the Constitution? This Paper takes the position that such notion is totally unfounded, however to understand its unremarkable nature there is a need to be clear about the correct understanding. Like every other Constitution before it, the 1999 Constitution provides in its Supremacy Clause that, "*If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law, shall to the extent of its inconsistency, be void*".[39] The operative phrase here is "if any other law is inconsistent", as such the issue for determination is whether Section 2(3) of the EFCC Act indeed (*emphasis mine*) runs contrary to the Constitution.

In ascertaining the sense in which the idea of 'inconsistency' is construed here, a proper argument is to say that enabling statutes such as the EFCC Act are not viewed as antithetical or in conflict with the Constitution, but rather as complementary toward achieving the overall mandate of the rule of law. The EFCC as an Agency was created as a response to decades of brazen acts of corruption and mindless looting which had become the insignia of public office in Nigeria.[40] The Commission also became necessary to counter the monster of advance fee fraud and other financial crimes that sought to destroy the image of the country both home and abroad. From inception, the Agency was never attached to any ministry of government except for the general oversight granted to the Federal Ministry of Justice, only in respect of prosecutorial powers. Corruption and stark embezzlement of public funds is not an indication of prosperity in any society and so where a Law in recognition of the perils in allowing corruption a free reign, prescribes the procedure for the appointment of an anti-corruption Czar to be water-tight through a second-stage of senate confirmation, it becomes difficult to see how such can be argued as inconsistent with the Constitution. Even as one does not subscribe to the omnipotence of the EFCC Act, the province of the law is that no Constitution can cater for every foreseeable situation, and so Statutes as a source of law come in to complement the work of the Constitution.

It is within this reasoning that Section 2(3) of the EFCC Act, must be seen as a building block, carefully created 5 years after the Constitution had come to life, to further strengthen the appointment process of an EFCC Chairman, working hand in hand with the executive powers of the President under Section 5 of the Constitution. Given the delicateness of the job of the EFCC Chairman, and the temptation by any President to have his loyalist hold such office, the strategic importance of having such person subject to a senate confirmation cannot be over-emphasized. Such a person's appointment is a

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39 Section 1(3), Constitution of the Federal Republic of Nigeria, 1999.

40 Generally, in Nigeria public office is become prebendal channels that unscrupulous politicians use to ferry out public funds and empty the national treasury. See Richard Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* (Cambridge University Press 1987).

matter of national security, such that it must receive the imprimatur of the general assembly of the peoples' elected representatives, which is what the senate represents.

The above argument finds some comfort in the doctrine of textualism, a potent tool under American constitutional jurisprudence, which proposes that the intent of any statute must start with the written word.[41] Applying this principle, when one juxtaposes the letters of Section 1(3) of the Constitution and Section 2(3) of the EFCC Act, it becomes difficult to see where one contradicts the other except that the former only clearly reinforces the latter. It needs no reinstating that a law establishing a Statutory Agency like the EFCC, can only be viewed as in conflict with the Constitution where its provision is not only at variance, but is clearly designed to destroy the objectives of the Constitution. For instance, a core aspiration of the Nigerian Constitution is to ensure good governance and the attainment of prosperity for the State.[42]

The baneful influence of a narrow construction of the notion of 'inconsistency' in this context is to argue for just a single individual (*emphasis mine*) being the President, to be clothed with unquestionable powers to appoint the Head of a highly sensitive agency like the EFCC. Certainly, that could never have been a part of the underlying objectives of the rule of law, except to call it what it exactly is - the mischief of the rule of men. It is incomprehensible that the Presidency would disagree with a procedure meant to strengthen an appointment process, due to its inability to quieten the opposition voices within its own political family, and its shortcomings in managing the political valves leading to the confirmation process.[43]

5. The EFCC, Statutory Agencies, and Extra-Ministerial Departments within the Context of Section 171 of the Constitution – Critical Analysis and Comparative Perspectives under United States Law

A key principle of constitutional interpretation is the American doctrine of 'Originalism', which aims at discovering what the founders or drafters of any

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41 Antonin Scalia, 'Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) 22.

42 In this regard, the Constitution provides that "*the security and welfare of the people shall be the primary purpose of government*". See Section 14 (2) (b), Constitution of the Federal Republic of Nigeria, 1999.

43 Capturing these same thoughts, a former Director-General of the Nigerian Institute for Advanced Legal Studies (NIALS), Prof. Epiphany Azinge SAN in a brilliant analysis is made in the Guardian Newspaper. For a detailed report, *see generally* Joseph Onyekwere, 'Is Confirmation of Executive Appointment by Senate inconsistent with Section 171 of the 1999 Constitution? Lawyers say No' *The Guardian Newspaper* (Lagos, 25 July 2017) <https://guardian.ng/features/is-confirmation-of-executive-appointment-by-senate-inconsistent-with-section-171-of-1999-constitution-lawyers-say-no> accessed 14 March 2018.

Constitution intended for its provisions to mean at the time of execution.[44] This instrument of interpretation is relevant to the analysis in this Paper. To start with, the EFCC as an Agency of the Federal Government was established in 2004 pursuant to an enabling statute.[45] It is pertinent to state that this Act, a Federal law was passed five (5) years after Section 171(2) (a-e) of the 1999 Constitution had become full law. It is therefore safe to say that the drafters of the 1999 Constitution could never have made a provision prospectively to bind a future Agency that was yet to be established. After all, the Office of the EFCC Chairman had not even been created at the time the Constitution was adopted on May 29, 1999, and so how can it be argued that a Constitution that came before an Office was created, had designated the same office as an "extra-ministerial department"?

Rather, the logical reasoning that can be drawn is that the intent of the makers of the 1999 Constitution would be that men of good conscience, who in the future would be charged with the responsibility of executing provisions of the constitution, would hold Section 171 (2) (a-e) as simply relating to offices within the usual definition of "extra-ministerial" in the common and ordinary usage, particularly as it operates in sisters jurisdictions like the United States of America where valuable insights can be drawn. It is the position of this Paper that as at May 29 1999 Section 171(2) (a-e) had clearly envisioned the offices to be designated as 'Extra ministerial bodies', which of course would mean offices either already in existence at that time, or offices that even though not in existence, are offices that would be of an 'Ad hoc' nature to be attached to the Office of the President to help him in carrying out the demands of his *office.* This point was brilliantly re-echoed by Ozekhome who said:

> The pith and substance of my argument is that there is no conflict whatsoever and howsoever between the clear provisions of Section 2(3) of the EFCC Act which insists that the President shall have powers to appoint its Executive Chairman subject to confirmation by the Senate, and Section 171 of the 1999 Constitution, which never envisaged an EFCC created 5 years later, never provided for it, but which merely provides for certain bureaucratic positions of government that are not created by Statute, such as Extra – Ministerial Departments (EMDs). Such EMDs are not like statutorily created bodies, such as the EFCC, NNPC, CBN, NAFDAC, FRSC, Prisons, Customs, etc. Such EMDs once enacted into an Act of the National Assembly, they cease to be EMDs. They are governed solely by the provisions of the parent creating Act and no more.[46]

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44 W.F. Murphy et al., *American Constitutional Interpretation* (2nd Edn, The Foundation Press 1995) 385; Philip Bobbitt, *Constitutional Fate* (Oxford University Press 1982) 26.

45 Economic and Financial Crimes Commissions (EFCC) (Establishment) Act, No. 1, CAP E17, Laws of the Federation of Nigeria (LFN), 2004.

46 Mike Ozekhome, 'Constitution Superior to any Act of National Assembly' *The Vanguard Newspaper* (Lagos, 4 May 2017) <www.vanguardngr.com/2017/05/constitution-superior-act-nassembly-ozekhome> accessed 14 March 2018.

Taking the argument further, the question becomes apposite, what exactly are extra-ministerial departments? In answering this question, it is important to return to the Constitution. The 1999 Constitution provides that the President may exercise the function of his office either by himself or through Ministers. Ministers in a Presidential system of government are not seen as exercising executive powers,[47] rather the powers they exercise is a delegated form of the executive powers vested in a single President.[48] However, because Ministers alone are not sufficient to carry the heavy burden in most governments, the President is given authority to appoint other officers. For instance, under the 1999 Constitution every State is required to have at least one Minister in the Federal Executive Council (FEC),[49] making a total of 36 Officers, which is a far cry from what the President requires to fulfil his mandate. It is within this understanding that Constitution made room for extra-ministerial departments.

Conceptually, extra-ministerial departments are simply units in government, separate, and independent of the regular ministries, established not by an enabling law or federal law, but whose appointments are left to the discretion of the President, and who come in as assistants to help handle certain aspects of the demands of his office. The most common examples are offices like that of the Chief of Staff and the Secretary to the Government of the Federation. It is settled law that when an Office is established by a Statute, it derives its legitimacy, powers, and totality of its existence from the operation of that Statute alone. Proper constitutional understanding demands that a clear parallel is drawn between Statutory Agencies like the EFCC that are created pursuant to an Act of the National Assembly, and ordinary Extra-Ministerial bodies that are designed as '*all other necessary bodies needed to fulfil the mandate of the President's Office*'. The use of the word 'extra', clearly betrays this truth.[50]

The position of this Paper is that the Nigerian President must take inspiration from the United States Constitution, which in comparative terms has relevant provisions that would help the President understand the length, breadth, and

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47 It is trite law that you cannot give what you do not have, expressed in the Latin maxim, '*Nemo Dat Quod Non Habet*'.

48 For argument that such Agencies can only be seen as exercising Executive powers as donated to them by the President, see M. Elizabeth Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 University of Pennsylvania Law Review 603.

49 See Section 147 (3), Constitution of the Federal Republic of Nigeria, 1999.

50 If the EFCC is an extra-ministerial body, certainly the CBN must also be an extra-ministerial body since there is nowhere in the 1999 Constitution where the appointment of the CBN Governor is required to undergo a confirmation procedure in the Nigerian Senate, except for the provision in the CBN Act, an Act *in pari materia* with the EFCC Act. Strangely all of the CBN Governors so far appointed, including the current office holder all had to go through a Senate confirmation process, with no one raising the roof. This point was also made by Mike Ozekhome, SAN in his brilliantly rendered article. See Bartholomew Madukwe, 'S. 171 of the Constitution not Superior to S.2(3) of the EFCC Act – Ozekhome, SAN' *The Vanguard Newspaper* (Lagos, 27 April 2017) <www.vanguardngr.com/2017/04/s171-constitution-not-superior-s-23-efcc-act-ozekhome-san> accessed 14 March 2018.

width of his powers. To start with, the Appointment Clause of the US Constitution states as follows:

> The President shall be 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; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.
>
> He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are herein not provided for, and which shall be established by law; But the Congress may by law vest the appointment of such inferior offices, as they think proper, in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.[51]

The above provision calls for proper examination as to how it can help provide the needed interpretative guide to laying the Magu conundrum to rest. The first part of the above provision, relevant to this analysis is the phrase, whose appointments are herein not provided for, and which shall be established by law. This phrase when examined in its literal sense connotes that in the wisdom of the drafters of the Constitution, the constitution has brilliantly taken care of future conflict that may arise, where a President decides to appoint a public officer pursuant to a law that would be made after the American Constitution had been adopted. The reasoning is that such appointments would be in tandem with the enabling law, particularly as it relates to the appointment process, and no conflict would be deemed to be in view since such laws would have been made pursuant to constitutional powers donated to the US Congress to make laws.

An aspect of Article II, Section II of the US Constitution reproduced above applies *mutatis mutandis* to the stormy debates on the meaning of 'Extra-Ministerial Departments'. The relevant clause is that which say, but the Congress may by law vest the appointment of such *inferior offices*, as they think proper in the President alone, in the courts of law, or in the heads of departments. Concerning this clause, the drafters of the US Constitution clearly demonstrates their depth of knowledge in constitutional making. Understanding clearly that the demands of the Office of the President is such that he will always require 'extra-ministerial' officers to handle other matters

[51] Section 2, Article II, United States Constitution.

that ministries/departments may not be able to cover, the drafters with insight granted powers to the President to appoint these officers all by himself, hence the expression 'in the President alone'. However, to ensure a clear-cut difference between these officers and the regular Officers of the United States Government already captured in the expression 'Ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States', the drafters referred to the extra-ministerial appointments as 'Inferior Officers' to show that by reason of how less weighty their job function is in relation to the life of the State, their appointment can be made by the President alone. Within this reasoning, one can argue that it would be considered an affront on the Constitution for the US President to refer to the Heads of Statutory Agencies such as the US Internal Revenue Service (IRS), Federal Reserve Bank (FRB), Drug Enforcement Administration (DEA), or Federal Trade Commission (FTC) as 'Inferior Officers'. In the same vein, it would be viewed as abuse of Executive powers for the US President to arrogate to himself powers to unilaterally appoint the Heads of the IRS or DEA, without such appointment going through a confirmatory process at the US Senate. The reason is simple, these bodies are all established by relevant US Federal Statutes clearly stipulating the procedure for appointment.

Even though the American Constitution, pursuant to the above provision is not an authority binding on Nigeria, it needs reinstating that given the high affirmation it has received in today's constitutional jurisprudence, it remains a rich source of persuasive reasoning, offering illuminatingly useful insights into how the executive powers in the context of appointments of this nature must be understood. This point becomes more relevant when one considers the fact that the current 1999 Constitution, where the Nigerian President derives his powers, provides for a Presidential system of government, heavily modelled after American Presidentialism.

On the basis of the above, it is an assault on the rule of law for the Presidency to stubbornly refuse to re-present Mr. Ibrahim Magu for confirmation as EFCC Chairman. If Mr. Magu is the best man for the job, he must proceed to justify this confidence by acquitting himself creditably before the only body constitutionally charged with the confirmation of his appointment. The point must be made that the Presidency has the right to present Mr. Magu to the Senate as many times as it may deem fit, just as the Senate equally possess the powers to reject his nomination as many times as they may find him unqualified and unfit for the job. However, the Presidency does not have the powers to take refuge in aloofness and create its own constitutional reality by refusing to re-present Mr. Magu. Such stiff-necked refusal to re-present Mr. Magu is a refusal to act, and a refusal to act in this instance is nothing but an abdication of the functions of office, and a confrontation with the authority of the constitution.

In most discussions on the exercise of Executive powers, one difficult question that has always emerged, is the question of if the President in any

given situation has 'faithfully executed' the provisions of the Constitution he swore to protect.[52] This question is fundamental as it helps present the framework within which the President exercises his powers.[53] Certainly, the express provision of the Constitution mandates the President to acts faithfully at all times in the discharge of his duties. To this end the President's executive powers to appoint an EFCC Chairman, must be exercised in good faith in light of the overall object and purpose of the Constitution. This is supported by the view of Scholars who have posited that the Constitution as a document must be construed with its original historical meaning.[54]

6. The Magu Confirmation Crisis and the Need to Approach the Court

One of the pillars of modern constitutional governance is the constitutionally designed role of the courts in acting as arbiters between individual members of the society, agencies of the State, and most importantly the key branches of government. In this wise, the war of attrition between the Executive and the Senate should not have degenerated into a public spat. This Paper posits that following the Senate's non-confirmation of Mr. Magu for a second time, and given the President reluctance to go down that route having reached his wit end, two important alternatives were available – He either finds another candidate that will fit the eye of the political needle or where that fails, do that which the rule of law prescribes, which is to approach the court and in this regards, the Supreme Court of Nigeria for a determination of the boundaries of his powers in relation to appointments of this nature.

In this matter, the apex court is assigned original jurisdiction to dissect the richly textured lines of the Constitution and its meeting points as well as divergence with the EFCC Act, and the powers of the Court is one without negative or restrictive words.[55] It is worth mentioning that in the leading case

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52 See *Youngstown Sheet & Tube Co. v Sawyer*, (1952) 343 U.S. 539, 587, where it was established that the President of the United States must exercise his law execution power to, "*take care that the laws be faithfully executed*".

53 Founders of the American Constitution had, "*assumed that the president would be a political eunuch, with the duty of only assuring that the laws passed by Congress, which is where the political action would occur, be faithfully executed*". However, between independence on July 4, 1776 and now, the reality does not appear to support this notion. In fact, the total reverse is the case. Scott P. Johnson and Christopher E. Smith, 'White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects for Reform' (1999) 33 New England Law Review 907-912.

54 For an outstanding discussion on the Doctrine of Originalism, *see generally*, Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849-862; C. Thomas, 'Judging' (1996) 45 University of Kansas Law Review 6-7.

55 See Section 232(2), Constitution of the Federal Republic of Nigeria, 1999. See also Section 1 of the Supreme Court (Additional Original Jurisdiction) Act 2002. In this wise, the Supreme Court can exercise its Original Jurisdiction in two lights. First is to consider this matter as one bordering on an interpretation of the Constitution. Second, is to become seized of the matter as a matter between the President and the National Assembly. In any of the two instances, the question of jurisdiction would have been duly answered.

of *Cooper v Aaron*,[56] the US Supreme Court has made it profoundly clear that in all questions of constitutional interpretation, the Supreme Court is entrusted with a special and distinctive role as the ultimate guardian of the meaning of the Constitution and government officials are forbidden from interpreting the constitution for themselves, but to look to the court's interpretation and take it as authoritative.[57] This responsibility is especially insistent in light of the fact that where it comes to the exercise of executive powers, moral issues frequently become constitutional issues, with the result that political actors end up abandoning existential moral codes in favour of the carrots of survival.[58] It has been argued that government officials cannot decide that they have a mind of their own (emphasis mine), as regards what they perceive to be peril to constitutional norms.[59]

The judicial powers of the court in this respect is therefore apt and it is the Executive headed by the President whose appointee has serially been turned down, that shoulders the responsibility of approaching the apex court for a judicial determination of its powers and not the other way. For the Executive to consistently taunt the Senate, who has in no way refused to confirm, and who has no further burden to discharge in this matter, to go to Court is a disrespect to constitutional processes. By the principles and usages of law, it is he who asserts that must prove,[60] and no man is allowed to be a Judge in his own cause, because his interest would certainly bias his judgement and most probably corrupt his integrity.[61] Since the Presidency has asserted that the Senate is not required to confirm the appointment of the EFCC Chairman, the primary duty of discharging this burden falls on its shoulders.

In an earlier landmark decision, the same US Supreme Court had close to two centuries before the *Cooper rule*, illuminatingly considered the notion of Executive powers in *Marbury v Madison*,[62] a move that indeed provoked a new jurisprudence and that has become a pedestal for several judicial milestones later.[63] According to the court, in the performance of certain

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56 (1958) 353 U.S. 1.

57 ibid

58 On this matter, the opinion of Scholars has been divergent. While some argue that granting the Court such exclusive power is to grant them the authority to irrevocably fix the policy of government, others say that being the custodian of the intent of the Constitution, the Court is well within the sphere of its power in this regard. On the controversy as to whether it is desirable for the Supreme Court in exercise of Judicial supremacy, to have the power to settle constitutional questions, *see generally*, Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110(7) Harvard Law Review 1377.

59 Lawrence Gene Sager, 'Fair Measure: The Status of Under-enforced Constitutional Norms' (1978) 91 Harvard Law Review 1212-1227.

60 This is expressed as, "*Affirmanti non neganti incumbat trio*".

61 This powerful rule is espoused in the Latin maxim, "*Nemo Judex in causa sua*".

62 (1803) 5 U.S. (1 Cranch) 137.

63 Following the Marbury Rule, the US Supreme Court has deepened the understanding of Executive Powers in a number of leading cases. See generally, *McCulloch v Maryland*, (1819) 17 U.S. (4 Wheat.) 316; *United States v Curtiss- Wright Export Corp*., (1936) 299 U.S. 304; *Brown*

executive acts, the President is vested with political powers, the exercise of which he is expected to use his discretion and in which regard he is only accountable to his conscience, and to the people who may utilize their electoral power to either re-elect him or refuse him at the polls.[64] In the opinion of the Court, to aid the President in the performance of his duties, he is authorized to appoint certain officers, who not only act by his authority, but certainly based on his orders.[65] In this wise, the appointees acts are his acts, the appointee's duties are expected to conform precisely to the will of the President, and they are merely his organ.[66] The conclusion therefore is that for such politically appointed agents, their appointment and acts are only examinable politically and have no business with the Courts.[67]

However, further submitting, the *Marbury Court* opined that where a specific duty is assigned the President by law (emphasis again mine), and individual rights depend on the performance of that duty, it is abundantly clear that such appointment must follow the due process of the law, and where that is not done, it becomes examinable by the judicial authority of the court.[68] Connecting these two judicial proclamations with the Magu controversy, it is clear that the appointment of the EFCC Chairman is one in which the President is assigned a specific duty by law, and is an appointment so fundamental given that the office would be involved in the investigation, arrest, detention, and prosecution of persons in which matters of individual rights would be in issue. Property worth billions of naira would be seized and the Commission is so powerful that it is empowered by law to seek the extradition of individuals that may have fled to other countries for the purpose of holding them accountable.

And so, for such appointments that are beyond the political firmament, where there is a contest as to where the finality of appointment powers lies, it becomes the business of the court to given direction. Sadly, since the debacle began instead of the Presidency to approach the Supreme Court for an interpretation of Section 171(2) (a-e) it has chosen to adopt self-help by not representing Mr. Magu, but retaining him as an Acting Chairman and preferring an environment in which his actions in Office continue to bear the yoke of unconstitutionality. Just recently however, following a suit filed by a Legal Practitioner, a Federal High Court in Abuja has ruled that the Senate is

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v Board of Education, (1954) 347 U.S. 483; *New York Times Co. v United States*, (1971) 403 U.S. 713; *United States v Nixon*, (1974) 418 U.S. 683; *Clinton v Jones*, (1997) 520 U.S. 681,703.

64 ibid

65 ibid

66 ibid

67 ibid

68 ibid

indeed empowered to confirm all appointees of the President, including appointees to the Office of the EFCC Chairman.[69]

7. Conclusion

That the people have a right to establish for themselves such principles, as in their opinion shall most conduce to their happiness is the basis on which the modern Constitution is designed. This principle so established is deemed fundamental. This original and supreme will organizes the State and government and assigns to the different unit their respective powers, as well as boundaries not to be transcended. The government of Nigeria is of this description. The distinction between a government with limited and unlimited powers is abolished, when those boundaries do not restrain those on whom they are imposed. Executive powers under the constitution are clearly defined and the boundaries not permitted to be mistaken or forgotten.

It is manifest that since the start of the 4th Republic, Nigeria has unremittingly been characterized by naked evidence of gross abuse of the constitution by an avaricious political class. Interestingly, since 1999 Nigerians have demonstrated extensive fortitude tolerating the shenanigans of the political class. However, it would be dangerous to normalize this reckless use of powers. Our history of reliance by the political class on contours and gaps in the law so as to circumvent well established constitutional norms, is one that should be stoutly resisted. 'Executive powers' does not connote political idolatry, and it is injurious to any society with democratic aspirations when a cult personality is built around the Executive, supported by rhapsodic adulations in support of unconstitutional behaviour.

The intended and unintended but necessary consequences of such glorification is to create a sort of "Father-figure President", whose favour everyone seeks and to whose benevolence the society must remain grateful. Such characterization is typical in most developing societies in Africa where democracy still remains largely a pipe dream. In these societies trapped in the personhood of political patriarchy, executive power is exercised with an entitlement mentality, rather than in obedience to constitutional norms. As long as wrong political acts continue to outstrip the right democratic attitude, Nigeria will continue to claw at the short end of the stick. There is a deontological perception that public officials have a character of soiling their

[69] For a comprehensive overview of the judgment, *see generally* Ikechukwu Nnochiri, 'EFCC Chairmanship: Senate has powers to reject Magu - Court' *The Vanguard Newspaper* (Lagos, 1 February 2018) <www.vanguardngr.com/2018/02/efcc-chairmanship-senate-powers-reject-magu-court> accessed 7 March 2018; Onyedi Ojiabor, 'Senate to Buhari: Nominate Magu's Replacement' *The Nation Newspaper* (Abuja, 1 February 2018) <http://thenationonlineng.net/senate-buhari-nominate-magus-replacement> accessed 7 March 2018.

hands with power,[70] as such there is a duty on the Executive that this perception does not take further roots downwards. There is also no short cut to the rule of law, and for a nation to gain any modicum of respect there must be a minimum adherence to the moral content of its laws.[71]

It is therefore this Paper's submission that in exercising executive powers, it is imperative that the Presidency observes circumspection, in order to convey that which is reasonable to the average mind. The body of thought in the modern world, both legal and judicial is one in which the fundamental law of most nations imposes an unqualified limit on the executive powers of the President, by subjecting his actions to the just consent of the legislature, while condemning all unilateral acts as forbidden fruits.[72] This truth was echoed by a leading light of the US Supreme Court, Justice Robert Jackson when he said:

> With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[73]

The Jurisprudence in Nigeria is not different from the above, and the Nigerian President must save the honour of the office he holds and return to the path of law. As pointed out by Mr. Justice Sutherland, the distinction between power and discretion is not only very plain but important.[74] As it has been rightly posited, while obedience to the Constitution is not expected to be a suicide mission, it has been firmly stated that any President wielding executive powers is at all times subject to constitutional and legally imposed constraints, from which he cannot extricate himself.[75] This Paper cannot agree more. This Paper therefore affirms that the appointment of Mr. Ibrahim Magu as substantive EFCC Chairman is not discretionary, rather it is a matter of law. And so, the President must return to the Senate for its imprimatur in this respect, or go before the court to test the law. To continue in the arena of self-help, can only continue to blow an ill wind which will do no one any good.

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70 On this philosophical position, *see generally* Michael Walzer, 'Political Action: The Problem of Dirty Hands' (1973) 2(2) Philosophy and Public Affairs 160.

71 D. O. Aihe and P.A. Oluyede, *Cases and Materials on Constitutional Law in Nigeria* (University Press Plc 2006) 60.

72 There is a vast literature in this respect. Ranking top includes Alan F. Westin, *The Anatomy of a Constitutional Law Case: Youngstown Sheet and Tube Co. V. Sawyer*, (The MacMillan Co. 1958; William H. Rehnquist, 'Constitutional Law and Public Opinion' (1986) 20(4) Suffolk University Law Review 751-752; William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (William Morrow and Co. 1987); Louls Fisher, *Constitutional Conflicts between Congress and the President* (4th edn, University Press of Kansas 1997); Robert J. Spitzer, *President and Congress: Executive Hegemony at the Crossroads of American Government* (Temple University Press 1993); M. A. Genovese, *Presidential Powers* (Oxford University Press 2000).

73 *Youngstown Sheet & Tube Co. v Sawyer*, (1952) 343 U.S. 579, 655.

74 See *Carter v Carter Coal Co*., (1936) 298 U.S. 238.

75 Richard H. Fallon, 'Interpreting Presidential Powers' (2013) 63 Duke Law Journal 391.

REFERENCES

- Joseph R., *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* (Cambridge University Press 1987).
- Scalia A., 'Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) 22.
- Aihe D. O. and Oluyede P.A., *Cases and Materials on Constitutional Law in Nigeria* (University Press Plc 2006) 60.
- Genovese M. A., *Presidential Powers* (Oxford University Press 2000).
- Murphy W.F. et al., *American Constitutional Interpretation* (2nd Edn, The Foundation Press 1995) 385.
- Blackstone W, *Commentaries on the Laws of England* (1st edn, Clarendon Press 1765) 1, 232.
- Joseph P, *Constitutional and Administrative Law in New Zealand* (3rd edn, Thomson Brookers 2007) 628-630.
- Bobbitt P, *Constitutional Fate* (Oxford University Press 1982) 26.
- Fisher L, *Constitutional Conflicts between Congress and the President* (4th edn, University Press of Kansas 1997).
- Spitzer R, *President and Congress: Executive Hegemony at the Crossroads of American Government* (Temple University Press 1993).