DELEGATING AWAY THE UNITARY EXECUTIVE: REVIEWING INA § 287(g) AGREEMENTS THROUGH THE LENS OF THE UNITARY EXECUTIVE THEORY

MATTHEW A. SMITH*

INTRODUCTION

In December 2012, the Obama administration announced that it would not renew its agreements with state and local law enforcement agencies under section 287(g) of the Immigration and Nationality Act.1 If the administration follows through on this announcement, it will bring to a close a program that has provoked its share of controversy. Debate over the constitutionality of the federal-local agreements authorized under section 287(g) has raised a range of structural questions about the nature of American federalism.2

* Attorney, Cohen Milstein Sellers & Toll. BA Columbia University, 2006. JD/LLM Duke University School of Law, 2011. The author would like to thank Joseph Blocher, Margaret Hu, David Martin, Hiroshi Motomura, and Juliet Stumpf for their comments on this Article.

1. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006); see Press Release, U.S. Immigration and Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidelines to Further Focus Resources (December 21, 2012), available at http://www.ice.gov/news/releases/1212/121221washingtondc2.htm (“ICE has also decided not to renew any of its agreements with state and local law enforcement agencies that operate task forces under the 287(g) program.”).

2. See generally Kris W. Kobach, Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration, 22 GEO. IMMIGR. L.J. 459 (2008) (arguing in favor of local immigration enforcement); Peter H. Schuck, Taking Immigration Federalism Seriously, 2007 UNIV. CHI. LEGAL F. 57 (same); see also Clare Huntington, The Constitutional Dimension of Immigration Federalism, 61 VAND. L. REV. 787 (2008) (arguing that the federal government may delegate immigration enforcement authority but that the 287(g) program allows too much discretion to be constitutionally permissible); Cristina Rodriguez, The Significance of the Local in Immigration Regulation, 106 MICH. L. REV. 567 (2008) (arguing that local jurisdictions possess inherent authority to regulate immigration but their authority to do so has been preempted by federal statutes). But see Huyen Pham, The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution, 31 FLA. ST. U. L. REV. 965 (2004) (arguing that states lack inherent authority to
Commentators on one side of this debate have asserted that states possess the authority to enforce immigration law as an inherent aspect of their residual sovereignty. Those at the opposite end have argued that the power to regulate immigration belongs exclusively to the federal government and is incapable of being delegated to the states.

Disagreement about state and local governments’ authority over immigration raises a vexing set of issues regarding the scope of these governments’ power to enforce federal immigration law. Although the implications for federalism of the 287(g) program have been canvassed, the program’s implications for the constitutional role of the Executive Branch have not received the same attention—even though the Executive Branch may have more at stake in this discussion than any other institutional actor. In particular, because the 287(g) program confers immigration enforcement power on officials who are not formally part of the Executive Branch, the program provides an opportunity to consider the implications of delegating federal immigration enforcement authority for the constitutional theory of the unitary executive.

The analysis of the 287(g) program presented in this Article runs, in effect, in two directions. The development of the unitary executive theory, as expounded by the Supreme Court and by scholars of executive power, opens an avenue to curtail the operation of programs that, like the 287(g) program, permit state and local officials to enforce federal immigration law. At the same time, doctrinal


3. E.g., Kobach, supra note 2.

4. E.g., Wishnie, Laboratories of Bigotry, supra note 2.


6. See discussion supra note 2.

analysis of the 287(g) program affords an opportunity to examine the limits of the unitary executive theory and to explore the practical implications of a strict application of its tenets. This essay explores both themes.

Part I of this essay begins by highlighting those aspects of the 287(g) program that give rise to doubts about the program’s consistency with the unitary executive theory. In particular, this Part reviews the findings of empirical research demonstrating that, despite the Obama administration’s efforts to revise its 287(g) agreements to focus on federally defined priorities, the divergence in state and local implementation of these agreements has persisted. The increased supervisory functions adopted by the administration’s revised agreements have not enabled Immigration and Customs Enforcement (ICE) to achieve consistency with federal policy objectives. What was hailed by its proponents as the force-multiplying solution\(^8\) to the perceived inadequacy of federal enforcement has splintered the national Executive’s ability to pursue a coherent national policy.

With this empirical framework in place, Part II explores potential challenges to the 287(g) program based on the Supreme Court’s precedents that have developed the unitary executive theory. At the outset, this section notes that the underlying statute itself is written broadly and is therefore probably impervious to a facial Take Care Clause\(^9\) challenge. But if framed as an “as applied” challenge to the 287(g) program carried out under the Obama administration’s revised 287(g) agreements, a challenge grounded in both the Appointments Clause\(^10\) and the Take Care Clause would raise important questions about whether the program exerts adequate executive control over state and local law enforcement’s exercise of their delegated

---


9. U.S. CONST. art. II, § 3, cl. 4 (“[H]e shall take Care that the Laws be faithfully executed . . . .”).

10. Id. § 2, cl. 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”).
immigration functions. One argumentative approach concentrates on formal problems with the manner in which 287(g) officers are appointed and removed from their positions. Because 287(g) officers are not appointed to their positions as state and local officials by the President or by one of his subordinates and are charged with simultaneously carrying out executive and non-executive functions, these officers are not sufficiently subject to the President’s power of appointment to preserve the unitary executive. Further, because 287(g) officers may be removed from their positions at any time by their superiors in state or local government without the consent of the President or his subordinates, they are not fully within the removal power of the President, as the unitary executive theory requires.

A second line of attack maintains that the President’s ability to supervise 287(g) officers is not sufficient to satisfy the unitary executive. This argument focuses on functional difficulties in ensuring that 287(g) officers are sufficiently controlled by and accountable to the Executive Branch in the course of performing their delegated functions.

I. LAYING THE GROUNDWORK: THE EMPIRICAL BASIS FOR TAKE CARE CLAUSE CONCERNS

Enacted in 1996 as an amendment to the Immigration and Nationality Act, section 287(g) authorizes the Secretary of the Department of Homeland Security to enter into written agreements with state and local law enforcement agencies permitting officers of these agencies to perform the functions of federal immigration officers. The designated law enforcement agency acts pursuant to an agreement with ICE under the supervision of the Department of Homeland Security. The agreement establishes rules governing the local agency’s exercise of federal immigration authority and designates the officers authorized to perform immigration functions, the immigration powers that the officers are authorized to perform, and the federal entity that will supervise the local agency’s use of its

12. See Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g)(1) (2006). The authority granted by section 287(g) was transferred from the Attorney General to the Secretary of the Department of Homeland Security in 2003 when immigration enforcement was consolidated in the Department of Homeland Security.
13. See id. § 287(g)(3).
delegated authority.\textsuperscript{14}

In July 2009, Department of Homeland Security Secretary Janet Napolitano announced that ICE would structure its agreements with local law enforcement authorities under section 287(g) according to a new standardized Memorandum of Agreement, which would serve as a template for future 287(g) agreements.\textsuperscript{15} The template was adopted in part to allay criticisms that the program had allowed local authorities too much discretion, which had led to pronounced divergences between state and local enforcement practices and federal enforcement priorities.\textsuperscript{16} In particular, the template agreement provided that state and local agencies participating in the 287(g) program should prioritize enforcement against aliens who had been arrested for, or convicted of, major drug offenses or violent crimes.\textsuperscript{17} Public statements by senior Obama administration officials confirmed that the administration viewed the 287(g) program as focused on detecting immigration status violations by “dangerous criminal aliens.”\textsuperscript{18} Through the use of the new template, ICE sought to minimize divergence from this federal program goal by “align[ing] 287(g) local operations with major ICE enforcement priorities—specifically, the identification and removal of criminal aliens.”\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{14} See id. \textsection 287(g)(5).
  \item \textsuperscript{17} See Memorandum of Agreement Template, app. D [hereinafter Memorandum of Agreement], available at http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf.
  \item \textsuperscript{18} Press Release, supra note 15; see also Testimony of Assistant Secretary John Morton Before the Senate Appropriations Committee on the U.S. Immigration and Customs Enforcement Fiscal Year 2011 Budget Request (Apr. 16, 2010), http://www.dhs.gov/news/2010/04/16/assistant-secretary-john-mortons-testimony-us-immigration-and-customs-enforcement (“The new MOA requires that our partners align local operations with key enforcement priorities—the arrest and detention of criminal aliens who pose the greatest threat to the public safety or danger to the community.”).
  \item \textsuperscript{19} Press Release, supra note 15.
\end{itemize}
By October 2009, ICE had renegotiated all of its existing 287(g) agreements to conform to the new template; however, enforcement practices continued to vary among jurisdictions and to diverge from the priorities outlined in the revised agreements. For example, in the first ten months after all existing 287(g) agreements had been updated, one half of all immigration detainers issued in eight jurisdictions were placed upon non-citizens arrested for traffic offenses, non-criminal violations, and violations that fell within the lowest-priority enforcement category under the revised agreements. Over the same period, more than sixty percent of immigration detainers issued pursuant to 287(g) agreements in place in Cobb County, Georgia, and Frederick County, Maryland, were imposed on traffic offenders, whereas less than a quarter of detainers were issued to non-citizens whose offenses fell within high-priority categories as defined in the template agreement. Similarly, a review of four 287(g) agreements conducted by the Department of Homeland Security’s Inspector General in 2010 revealed that only half of the detainers issued by these programs were placed on non-citizens whose offenses corresponded to the enforcement priorities articulated in the agreement template.

In contrast, enforcement practices were more aligned with federal priorities in some jurisdictions, such as in Las Vegas, Nevada. Overall, enforcement patterns differed widely among jurisdictions participating in the 287(g) program, both in comparison to the program goals articulated in the revised 287(g) agreements and between participating jurisdictions themselves.

---

21. See Capps, supra note 16, at 4 (“In sum, the statutory language of section 287(g), the Obama administration’s statements and guidelines, and ICE’s implementation practices allow jurisdictions to operate the 287(g) program in fundamentally different ways across the country.”).
22. See id. at 18–19.
23. See id.
24. See id. at 19 fig. 2.
Even more troubling for federal policymakers seeking consistency in the enforcement of immigration law, some ICE regional supervisors established enforcement priorities according to state and local political pressures.\footnote{Id. at 28 (reporting that “all of the 287(g) programs represent a response to state and local political pressures[] rather than . . . national enforcement priorities").} Thus, although regional ICE personnel were intended to ensure consistency in enforcement,\footnote{Id. at 34.} their supervision did not necessarily translate into local accountability to national program goals.\footnote{Id. at 34.}

In sum, the reforms announced in 2009 do not appear to have eliminated the major problem identified by critics of the 287(g) program—that the 287(g) agreements inverted the relationship between federal and local immigration enforcement, so that federal law became an instrument of local preferences rather than of national policy. With the primary responsibility to carry out immigration screening in the hands of local authorities, local biases and preferences defined the prioritization of enforcement efforts.\footnote{See id. at 26–28 (discussing findings that state and local program goals often derive from political pressures).} Indeed, in several well-documented instances, 287(g) program participants abused the authority delegated under section 287(g) to carry out racial profiling.\footnote{See, e.g., Letter from Thomas E. Perez, Assistant Att’y Gen., to Bill Montgomery, Cnty. Att’y, Maricopa Cnty. (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcsocfindletter_12-15-11.pdf [hereinafter Letter to Bill Montgomery] (documenting the pattern of racial profiling carried out by the Maricopa County Sheriff’s Office, a 287(g) program participant); Letter from Thomas E. Perez, Assistant Att’y Gen., to Clyde B. Albright, Cnty. Att’y, Alamance Cnty. (Sept. 18, 2012) (documenting the pattern of racial profiling carried out by Alamance County Sheriff’s Office, a 287(g) program participant); AM. CIVIL LIBERTIES UNION FOUND. OF GA., THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(g) (2010), available at www.acluga.org/download_file/view_inline/1504/392/ (documenting racial profiling carried out by the Gwinnett County Sheriff’s Office, a 287(g) program participant).} According to these findings, rather than helping implement national policy as “force multipliers,”\footnote{See generally Kobach, supra note 8 (arguing that state and local authorities “multiply” the resources available for enforcement of national immigration priorities).} local authorities exploited the mantle of immigration enforcement to carry out local priorities.\footnote{See CAPPS, supra note 16, at 26–28 (describing 287(g)’s impact in local sheriff’s elections).} This is not a portrait of state and local entities expanding the resources available to the Chief Executive to carry out a concerted national policy. It is instead a process of fragmentation...
that undermines the President’s ability to formulate a coherent approach to immigration enforcement.

II. The 287(g) Program in Tension with the Unitary Executive Theory

Based on the persistent difficulties encountered in conforming the 287(g) program to the policy expectations embodied in the Obama administration’s template Memorandum of Agreement, this Part analyzes flaws in the implementation of the 287(g) program through the lens of the unitary executive theory. At the outset it should be stressed that the constitutional flaws discussed here arise from the Obama administration’s implementation of the program rather than from the face of the statute itself. Generally, the Take Care Clause of Article II raises constitutional concerns for statutes that facially interfere with the President’s ability to implement federal law. For example, a recent Supreme Court decision struck down “double for cause” limitations on the President’s power to remove directors of the Public Company Accounting Oversight Board on the ground that this second “for cause” requirement impermissibly limited the President’s control over these directors.34 In contrast, the broad provisions of section 287(g) do not, on their face, limit the President’s executive authority.35

Notwithstanding the statute’s probable immunity from facial challenge, several features of the Obama administration’s implementation of the statute stand in tension with the Take Care Clause and Appointments Clause as understood by proponents of the unitary executive theory. First, the Obama administration’s implementation of section 287(g) may be vulnerable because state officials exercising federal immigration enforcement authority under the 287(g) program are not appointed to their offices as state officials by the President.36 This feature of the program disrupts the formal unity of the Executive Branch that is privileged by the unitary executive theory.

---

35. Instead, section 287(g) authorizes the President to enter into agreements with local law enforcement agencies, subject to certain eligibility requirements. See generally 8 U.S.C.A. § 1357(g)(1)–(10) (West 2013).
36. See infra Part II.B.
The 287(g) agreements are also vulnerable to arguments emphasizing the functional limits that the 287(g) program places upon executive control. Officers designated to perform immigration enforcement functions under the program may be removed from their offices at any time by their superiors in state or local government, without the consent of the Chief Executive. This feature deprives the President of necessary control over the enforcement of federal immigration law by making officers who are entrusted with executive power removable without the consent of the President or his subordinates. Further, insofar as the agreements contemplate local authorities carrying out immigration functions simultaneously with enforcing local laws, often alternating from one posture to the other in a single operation, the 287(g) program confuses instances in which officers act in their federal immigration enforcement capacity with situations where they act under their local police powers. The amount of federal supervision ostensibly devoted to program participants is inconsequential if supervisors are unable to make \textit{ex ante} distinctions between situations in which their guidance is required and situations in which their supervisees will engage in purely local law enforcement activity and the ICE Standard Operating Procedure gives federal agents no role.

After reviewing the elemental concepts of the unitary executive theory that are common to all three arguments, these arguments will be explored in light of the relevant Supreme Court precedents.

\begin{footnotes}
\footnote{The standard agreement template anticipates that local agency officials to whom immigration authority is delegated will carry out immigration-related activities simultaneously with their normal law enforcement responsibilities. See Memorandum of Agreement, supra note 17, at 18–21 (illustrating the task force model template); \textit{id.} at 21–23 (explaining the jail model template). The difficulty of distinguishing the limits of delegated immigration-related authority is heightened in the case of task force model enforcement, which contemplates that 287(g) officers will carry out immigration functions “during the course of criminal investigations[].” See \textit{id.} at 19.}
\footnote{See \textit{infra} Part II.B. This problem is particularly likely to arise in jurisdictions operating under the “task force” model. See discussion supra note 37. Inevitably, task force 287(g) officers and their ICE supervisors are unable to anticipate every situation in which an operation designed to enforce local law will lead to the discovery of an immigration violation that implicates the authority granted by the governing MOA. Similarly, ICE supervision can do little to prevent 287(g) officers from engaging in pretextual use of their police powers in an encounter with a suspected alien, as these encounters begin as—and arguably remain—exclusively an exercise of police power. \textit{Cf.} Letter to Bill Montgomery, supra note 31 (discussing findings related to Maricopa County Sheriff’s Office’s pretextual immigration enforcement practices).}
\end{footnotes}
A. Thematic Elements of the Unitary Executive

Although, as this section will argue, the unitary executive theory has also guided majority decisions of the Supreme Court, the theory’s most comprehensive doctrinal articulation from the Court appears in Justice Scalia’s dissent in *Morrison v. Olson*.\(^{39}\) As described by Justice Scalia in *Morrison*, the unitary executive theory dictates that “[i]t is not for [the courts] to determine . . . how much of the purely executive powers of the government must be within the full control of the President. The Constitution prescribes that they all are.”\(^{40}\) The unitary executive theory is highly formalistic in its approach. In an influential article defending the theory,\(^{41}\) Professors Calabresi and Prakash referred to the structural framing of government in the Constitution’s first three articles as “An Exclusive Trinity of Powers” that establishes three branches of government, each possessing mutually exclusive powers, and precludes the possibility of there being any other branch.\(^{42}\) Calabresi and Prakash also set forth a textualist interpretation of both the Take Care Clause and the surrounding provisions of Article II,\(^{43}\) and found confirmation for their interpretation in the pre- and post-ratification history of the Constitution.\(^{44}\)

As explained by Justice Scalia in his *Morrison* dissent, the first inquiry in determining whether the unitary executive theory is implicated by a particular exercise of authority is to consider whether the activity in question is an “exercise of purely executive power.”\(^{45}\) This inquiry is resolved by looking to whether the Executive Branch is normally charged with carrying out the activity in question without the involvement of the Legislative or Judicial Branches.\(^{46}\) If the authority being exercised is found to be a “purely executive” one, the next question is whether the President has been deprived of

---


\(^{40}\) Id. at 709 (Scalia, J., dissenting).

\(^{41}\) See generally Calabresi & Prakash, supra note 7.

\(^{42}\) Id. at 564.

\(^{43}\) Id. at 570–99.

\(^{44}\) Id. at 601–62.

\(^{45}\) Morrison, 487 U.S. at 705 (Scalia, J., dissenting).

\(^{46}\) See id. (discussing the historical practice of the Executive Branch as being solely responsible for carrying out criminal prosecutions); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 689 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (“Under the text of our Constitution, a single President possesses the entirety of the ‘executive power’ . . . and the entire authority to take care that the laws be faithfully executed.” (citing U.S. Const. art. II, § 1, cl. 1)).
“exclusive control over the exercise of that power.” In the event that the officer discharging the executive function is found not to be “fully within the supervision and control of the President,” for example, because of impermissible constraints on the President’s power to remove the officer, as in Free Enterprise Fund v. Public Company Accounting Oversight Board, the exercise of executive authority by the officer unconstitutionally “denigrat[e] the President’s power by circumventing the Executive Branch.”

The unitary executive theory has emerged as an influential interpretation of Article II that is capable of marshaling the support of a majority of the Justices. In Printz v. United States, the Court struck down provisions of the Brady Handgun Violence Prevention Act that required state law enforcement authorities to carry out interim provisions of the Act. In a holding that stood independently of the Court’s “commandeering” rationale, the Court invalidated the challenged provisions on Article II grounds. In so doing, the Court endorsed the unitary executive theory as an alternative basis for its holding, concluding that the unity of the Executive Branch “would be shattered” if the statute’s delegation of executive power in the hands of state officers were upheld. More recently, in Free Enterprise Fund, the Court again implemented the precepts of the unitary executive theory, this time by invalidating a double-for-cause removal limitation on the President’s authority to remove inferior officers. The unitary executive theory animated the logic of the Court’s decision, as Chief Justice Roberts’s majority opinion stressed that the double-for-cause limitation contravened principles that are privileged by the unitary executive, including Article II’s formal “vesting of executive power in the President,” and the necessity of ensuring the accountability of inferior officers through the electoral process. Notwithstanding that the unitary executive theory’s most comprehensive articulation appears in Justice Scalia’s Morrison dissent, the theory has

47. Morrison, 487 U.S. at 705 (Scalia, J., dissenting).
48. 130 S. Ct. 3138, (2010); see id. at 3163 (invalidating double-for-cause removal provision).
49. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States, 367 F.3d 650, 658 (7th Cir. 2004) (paraphrasing Printz v. United States, 521 U.S. 898, 922 (1997)).
51. Id. at 923.
52. Free Enter. Fund, 130 S. Ct. at 3154.
53. See id. at 3154–56.
demonstrated very real vitality in animating the modern Court’s approach to Article II.

B. Appointment and Removal Power Objections to the Obama Administration’s 287(g) Template Agreements

Unitary executive theorists regard the Take Care Clause and the Appointments Clauses as two sides of the same presidential monism. 

Thus, proponents of the theory have written that sufficient presidential control over those exercising executive authority requires that “at a minimum, the President must have some measure of the ‘power to appoint and remove’ those exercising that power.”

This minimum requirement of the unitary executive presents formal difficulties for the Obama administration’s revised 287(g) agreements. There can be no doubt that the state and local law enforcement officials deputized by the 287(g) program are officers exercising the powers of the Federal Executive. The statute itself permits the Secretary of Homeland Security to delegate to state and local officials the power “to perform the function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . .”

In turn, the model Standard Operating Procedure adopted in 2009 by ICE expressly references the sources in statute and regulation of the federal authority that is conferred upon local agencies that enter into 287(g) agreements. Thus, the first requirement for showing an abrogation of the unitary executive—that the activity in question be an exercise of purely executive power—is easily met by the 287(g) program.

That state and local authorities who participate in the 287(g) program are appointed to their positions as state and local officers by powers outside the control of the President stands in tension with the requirements of the unitary executive. As the Court has observed, “[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, ‘shall take Care that the Laws be faithfully executed,’ personally and through officers

54. See generally Calabresi & Prakash, supra note 7, at pt. II (considering the textual basis for the unitary executive).


56. 8 U.S.C.A. § 1357(g) (West 2013).

57. See Memorandum of Agreement, supra note 17, at appx. D. (delineating authority delegated to participants in the task force officer model and jail model agreements).

whom he appoints” or through appointees of subordinate officers of the Executive Branch.\textsuperscript{59} Several of the Justices have repeatedly questioned whether the exercise of executive authority can be permissible absent presidential power to appoint.\textsuperscript{60}

The apparent counterargument is that the template Memorandum of Agreement makes clear that individual officers’ involvement in the 287(g) program is subject to the approval of ICE, and that ICE retains the power to withdraw the immigration authority delegated to these officers at will. Thus, it may be said that even if the President does not have the power to vest the 287(g) official with all of that official’s power, the relevant federal power nevertheless devolves to the state official from the President. Accordingly, it might be argued that even if the President cannot appoint these officers to their positions as state or local officials, the President retains sufficient power over the appointment of these officers to satisfy the unitary executive.

However, even allowing that the 287(g) program permits presidential subordinates to approve individual officers’ exercise of federal immigration authority, this arrangement disrupts the formal unity that the unitary executive theory seeks to preserve. The Constitution entrusts all executive power to “a single President”\textsuperscript{61} and includes among its “structural protections” the consolidation of executive power in the hands of those who are subordinate only to the Chief Executive.\textsuperscript{62} According to this formal understanding of Article II, placing executive power in the hands of officers who are appointed by both the Chief Executive and by state or local government erodes the unity of the Executive Branch by dividing control over and accountability of 287(g) officers between two executives.\textsuperscript{63} In addition, because 287(g) officers may be responsible for discharging both their executive and non-executive functions in

\textsuperscript{60} Id. (questioning whether there can be “meaningful Presidential control” absent “the power to appoint and remove” the officer exercising executive functions); Lara, 541 U.S. at 216 (Thomas, J., concurring) (noting that the appointment and removal power is a minimal requirement of executive control).
\textsuperscript{63} See Printz, 521 U.S. at 922 (emphasizing the role of the unitary executive in ensuring accountability for subordinates’ conduct).
The midst of the same law enforcement activity, the 287(g) program threatens the unitary executive's separation of executive from non-executive functions. Both features of the 287(g) program conflict with the “structural protections” that, according to the unitary executive theory, are embodied by Article II.

The 287(g) program's incompatibility with the unitary executive theory is even more pronounced in the conditions of removal of 287(g) officers. Both the power to appoint and the power to remove are indispensable to the unity of the Executive, because “as [the President’s] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.” The President’s power of removal is exclusive in regard to officers who, like 287(g) officers, are charged with carrying out “purely executive” functions. However, in the case of the 287(g) program, participating officers are subject to removal by their superiors in state or local government in addition to the Chief Executive’s power to revoke their authority to enforce immigration law. At any point, these state or local officials may terminate a 287(g) officer’s employment or limit the scope of his or her duties, regardless of whether ICE or any other federal program administrator accountable to the President agrees. In simplest terms, an officer may be removed from her position, notwithstanding that the President approves of her performance.

64. See supra note 37 and accompanying text.
65. Myers v. United States, 272 U.S. 52, 117 (1926); see also Morrison v. Olson, 487 U.S. 653, 709 (1988) (Scalia, J., dissenting) (“It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are.”).
66. See supra notes 56–58 and accompanying text. Further, the law enforcement functions of 287(g) officers are in no way “quasi-legislative” or “quasi-judicial,” see Humphrey’s Executor v. United States, 295 U.S. 602, 629 (1935), nor are they functions for which independence from the Executive Branch is desirable, see Morrison, 487 U.S. at 603 (noting that limitation on removal of independent counsel was considered “essential . . . to establish the necessary independence of office”). Thus, even under the approach to the removal power articulated in Humphrey’s Executor and by the Court in Morrison, the President’s removal power of 287(g) officers may not be limited. See Humphrey’s Executor, 295 U.S. at 628 (“[A]n executive officer restricted to the performance of executive functions . . . is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable removal power by the Chief Executive, whose subordinate and aid he is.”).
67. Morrison, 487 U.S. at 704 (Scalia, J., dissenting); see Myers, 272 U.S. at 122 (“[T]he power to remove [subordinates] may therefore be regarded as confined for very sound and practical reasons[] to the governmental authority which has administrative control.”).
As a consequence of this division of supervisory authority and accountability, it is as true in the case of the 287(g) program as it was in Free Enterprise Fund that “[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over” 287(g) officers, because these officers may be removed from their positions by, and held accountable to, superiors other than the Chief Executive. As in Free Enterprise Fund, this “diffusion of power carries with it a diffusion of accountability,” a result that the unitary executive does not tolerate. Further, the fact that the 287(g) agreements allow ICE to revoke the participation of a local law enforcement agency unilaterally does not redeem this constitutional flaw. Indeed, the Court rejected a similar argument in Free Enterprise Fund itself, where the Court refused to find that the Securities and Exchange Commission’s authority to strip a subordinate board’s powers cured the constitutional defect in the Commission’s lack of adequate power to remove individual members of the Board. Accordingly, the 287(g) program disrupts the unitary executive’s exclusive power to remove those entrusted with carrying out purely executive functions.

Moreover, the response that the Executive Branch itself, rather than Congress, has yielded its executive authority to state officials in the 287(g) program provides no answer to these objections. According to the unitary executive theory, the Take Care Clause of Article II not only authorizes, but also obligates the President to exercise control over those entrusted with executive powers. Thus, the President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it because Article II makes a single President responsible for the actions of the Executive Branch.” The President

69. See Bowsher v. Synar, 478 U.S. 714, 732 (1986) (holding that Congress may not retain authority to remove an official entrusted with executive powers).
70. Free Enter. Fund, 130 S. Ct. at 3155.
71. See id.; see also Printz v. United States, 521 U.S. 898, 922 (1997) (“The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.”).
72. See Free Enter. Fund, 130 S. Ct. at 3158 (“Broad power over Board functions is not equivalent to the power to remove Board members.”).
73. Id. at 3154 (quoting Clinton v. Jones, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in judgment)) (internal quotation marks omitted); see Morrison v. Olson, 487 U.S. 653, 693 (discussing the President’s “constitutional obligation to ensure the faithful execution of the laws”); Myers v. United States, 272 U.S. 52, 52 (1926) (affirming that the President’s “administrative control of those executing the laws” is the corollary of “his obligation to take
cannot avoid the obligation to ensure faithful execution of the laws by vesting this responsibility in officers who, like 287(g) officers, are only partially subject to presidential control and for whose actions the President cannot be held solely accountable.\footnote{See Free Enter. Fund, 130 S. Ct. at 3155 (“Without a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’” (quoting THE FEDERALIST NO. 70, at 467 (Alexander Hamilton) (J. Cooke ed. 1961))).}

Accordingly, because the recipients of the immigration authority delegated by the 287(g) agreements are not appointed to their offices by the President or by someone acting on his behalf, are removable by authorities other than the President and without the President’s consent, and are entrusted with carrying out executive and non-executive functions simultaneously,\footnote{The 2009 template agreement anticipates that 287(g) officers acting in both the “jail model” and the “task force model” will blend their activities pursuant to 287(g) with those attendant upon their normal law enforcement functions. See Memorandum of Agreement, supra note 17, at 21 (noting that “jail model” officers will “exercise their immigration-related authorities only during the course of their normal duties”); id. at 19 (providing that task force officers will “exercise their immigration-related authorities during the course of criminal investigations involving aliens”).} the program violates fundamental principles of the unitary executive theory.

C. Constitutional Inadequacy of the 287(g) Supervisory Provisions

In addition to these flaws in the manner of appointing state officers involved in the 287(g) program, the delegation of executive power effected by the 2009 template agreement also saps the constitutional role of the unitary executive by failing to provide adequate presidential control over 287(g) officers in their execution of their delegated duties. Compliance with the limitations of the Appointments Clause, including the power to appoint and remove officers and employees, comprises a necessary but not sufficient ingredient in the President’s power to control those wielding executive authority.\footnote{United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring) (emphasizing that “the Power to appoint and remove’ those exercising [executive] power” is a minimum requirement of compliance with the unitary executive theory (quoting Printz v. United States, 521 U.S. 898, 922 (1997))).} Those exercising this authority also must remain
subject to “meaningful Presidential control.”

The Supreme Court has had little opportunity to trace the boundaries of how much control over subordinates carrying out executive functions is required to register as constitutionally “meaningful.” Thus far, the Court has had to decide only easier cases, in which the degree of presidential control from meaningful to none has fallen decidedly on the “none” side of the spectrum. In Printz, the Court concluded that the interim regulations on firearm transfer under the Brady Handgun Violence Prevention Act requiring local law enforcement authorities to receive certain data about handgun purchasers and check it against local databases impermissibly eroded presidential authority by failing to include any means of executive oversight. Similarly, in United States v. Lara, Justice Thomas’s concurrence considered the application of the “meaningful control” rule to a statute authorizing Indian tribes to prosecute non-members whose alleged crimes were committed on tribal lands and found that the statute would undermine the unitary executive if interpreted as delegating federal authority because it allowed the Executive Branch no oversight role. Most recently, the Court struck down the double-for-cause removal provision at issue in Free Enterprise Fund, but did so because of a provision that restricted the President’s removal power rather than the President’s power to supervise the conduct of subordinates through mechanisms other than removal.

The only clue as to the metes and bounds of how the meaningful control limitation used in Printz might be applied in a context where the President retains some degree of supervisory control comes from Justice Scalia’s dissent in Morrison, which predated Printz. In Morrison, Justice Scalia found inadequate the intentionally sparse controls allotted to the Executive Branch over an independent counsel created by Congress to investigate alleged malfeasance by Reagan administration officials, including then-Assistant Attorney

---

77. Printz, 521 U.S. at 922.
78. See id. at 922–23 (voiding the interim reporting provisions based on erosion of executive power).
80. See id. at 216 (Thomas, J., concurring) (considering application of Printz to the facts at hand).
General Theodore Olson. The seven other Justices who heard the case concluded that the limited executive controls allowed by Congress did not impermissibly erode executive power. In particular, the majority pointed to the fact that the special counsel’s tenure was strictly limited; that her jurisdiction was restricted to subject matter specified by statute; that she was subject to removal, albeit only for cause, by the Attorney General; that the Attorney General could disapprove the initiation of her investigation upon finding reasonable grounds to conclude that no crimes had taken place; and, finally, that the special counsel lacked an independent policymaking function.

Justice Scalia’s dissent emphasized perceived constitutional flaws in the “for cause” removal provision, but also discussed the reasons for his disagreement with the Court’s conclusion that the other checks on executive control did not eliminate the Executive’s authority. In particular, Justice Scalia took account not only of the statute’s formal provisions, but also acknowledged practical limitations on the statute’s operation; specifically, he noted that the statute “effectively compelled” the Attorney General to acquiesce in the initiation of the special counsel’s investigation because political pressures would inhibit the Attorney General from exercising his statutory power to quash the investigation within an initial ninety-day window.

Justice Scalia’s dissent in *Morrison* clarifies that, for purposes of the unitary executive theory, not only formal limitations—such as the absence of power to appoint and remove—but also practical impediments to the President’s ability to supervise executive officers are relevant in ascertaining whether these officers are subject to the “meaningful presidential control” required by his opinion for the Court in *Printz*. In the context of the 287(g) program, the amalgamation of executive and non-executive functions performed by 287(g) officers presents such an impediment. In the most literal terms,

83. *See id.* at 660–69 (majority opinion) (describing how the independent counsel would be nominated and overseen).
84. *See id.* at 696–97 (holding that the appointment does not violate the Appointments Clause or the separation of powers principle).
85. *Id.* at 670–77.
86. *Id.* at 679 (Scalia, J., dissenting).
87. *Id.* at 703.
88. *See id.* at 705 (arguing that any impediment that deprives the President of power that is purely executive is an infringement of the separation of powers principle).
the President cannot effectively control the actions of 287(g) field officers taken pursuant to delegated executive authority when those officers and their superiors can claim that the very same actions were in fact authorized by, and taken pursuant to, local law, and therefore were outside the President’s supervisory authority. Indeed, the 2009 template agreement apparently anticipates such conflicts, as it requires the signatory local law enforcement agency to report any conflicts between ICE directives and the agency’s rules or policies. 90 However, the agreement fails to provide any specific procedure for resolving the conflict, nor does it indicate that orders issued by ICE and by the President take precedence over conflicting local laws or policies. 91 Thus, the agreement apparently contemplates that orders issued by federal authorities could be abrogated by state or local authority. This result is incompatible with the “meaningful Presidential control” 92 over executive functions that the unitary executive demands.

The lack of meaningful executive control over 287(g) officers undermines the normative rationales of ensuring “vigor and accountability” 93 in the enforcement of federal law that underpin the unitary executive theory. 94 The public cannot know who to hold responsible when actions are taken pursuant to such unclear lines of authority. 95 Nor can the President energetically direct the enforcement of immigration law through 287(g) officials when, as demonstrated by empirical research, 96 the 287(g) program is directed by local priorities rather than national policy.

90. Memorandum of Agreement, supra note 17, at 6.
91. See id.
92. Printz, 521 U.S. at 922.
93. Id. at 922; see also Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 23, 37–45 (1994).
94. See Calabresi, supra note 93, at 37–45 (describing the qualities Hamilton believed were necessary for the executive to maintain a strong stance vis-à-vis the other powers and outside governments).
96. See supra note 30 and accompanying text.
CONCLUSION

The Obama administration's announcement that it will allow existing 287(g) program agreements to expire marks the end of the program's turbulent history. However, despite its impending closure, the 287(g) program presents an instructive case study in the practical and theoretical problems inherent in delegating federal immigration enforcement power to state and local officers. Whereas other studies have concentrated on the implications of this delegation for federalism, the effects of delegation on the scope of presidential power under the Take Care Clause and Appointments Clause of Article II also must be considered. In particular, the unitary executive theory’s strict emphasis on formal division of authority and executive control poses doctrinal problems for delegation of federal immigration enforcement authority in the manner devised by section 287(g). The architects of new federal immigration legislation should take account of the Article II problems raised by delegation without greater presidential control. Further, opponents of new federal immigration enforcement authority that is delegated to state and local entities should incorporate in their arguments not only federalist norms and civil rights concerns, but also those norms of executive “vigor and accountability” that are embodied and protected by Article II.

97. See discussion supra note 2.
98. See discussion supra note 31.