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## FAITHFULLY INTERPRETING "FAITHFULLY"

Ryan S. Killian<sup>†</sup>Abstract

*Currently, debate swirls over "Executive Disregard" — the purported presidential prerogative to disregard laws deemed unconstitutional. Scholars on both sides of the issue have latched on to the Constitution's use of the word faithfully. To Professors Michael Stokes Paulsen, Saikrishna Prakash and other proponents of Executive Disregard, the Take Care Clause demands that the President act faithfully to the Constitution. To Professor Christopher May and others, the Constitution clearly commands that the President "faithfully execute" laws passed by Congress.*

*As this essay demonstrates, neither side is correct. By undertaking a brief but rigorous review of texts and speeches at the time of the founding, I demonstrate that the clause represents mere boilerplate language then found in a wide variety of contexts. That is not to say the clause is meaningless. It demands a minimum level of conduct—with honesty and integrity—that applies to the President himself and everyone under him in the Executive Branch. This conclusion fits neatly with recent scholarship recognizing an anti-corruption principle underlying many provisions of the Constitution.*

*The scope of this essay is concededly narrow—a single word used only twice in the Constitution. But a better understanding of the word should sharpen the greater debate over Executive Disregard, requiring both sides to cast aside their convenient assumptions about the word and focus instead on arguments with merit. Further, the essay makes a second, not inconsequential, observation: There exists a constitutional standard of conduct for the President, and the President must "take care" that subordinates in the Executive Branch also satisfy that standard.*

## INTRODUCTION

A classic rule of interpretation is that, to the extent possible, every word of a provision should be given meaning.<sup>1</sup> If the word can be omitted without changing your preferred interpretation, you should stop and ask yourself if you have erred. *What is this word doing here?*

This Essay is about one word, *faithfully*. Used twice in the Constitution—once in describing the President's duties and once in the oath he must swear (or affirm) upon entering office—the word has been wrestled over but never wrestled with.

Like every President since and including Ronald Reagan,<sup>2</sup> President Barack Obama has refused to defend a federal law on the grounds that it is, in his view, unconstitutional.<sup>3</sup> At times, Presidents are tempted to go even further when faced with a statute they believe to be unconstitutional. The bold option is to unilaterally refuse to enforce a statute that Congress has

<sup>1</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) ("When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has

<sup>2</sup> Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 77 n.1 (citing examples).

<sup>3</sup> See Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), available at <http://www.nytimes.com/2011/02/24/us/24marriage.html?pagewanted=all>.

lawyers for its audience, in which case the rule that each word be given meaning has substantial force. Treating the ratifiers like they were lawyers, however, simply makes little sense.<sup>19</sup>

For the reasons given below, the word *faithfully* should not be saddled with too much import. It simply describes a standard of conduct—with honesty and integrity. Its inclusion in the Constitution says more about the Framers' Montesquieu-fueled "obsession with corruption" than it does the scope of presidential power.<sup>20</sup> The implications of this conclusion are clear. Opponents and proponents of Executive Disregard would do well to abandon arguments that rely on a particular reading of the word. Such contentions are not supported by a close examination of the word. And, properly understood, an Executive could *faithfully* execute the law while subscribing to either theory, so long as he acted in accordance with a good faith belief that his approach was the right one.

## II. FRAMING THE DEBATE

Article II of the Constitution defines the powers and duties of the President.<sup>21</sup> Section 1 requires that:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."<sup>22</sup>

Section 3 requires, among other things, that the President "shall take Care that the Laws be faithfully executed."<sup>23</sup> At a glance, these might appear to be two separate requirements. The President must faithfully execute the law and his office,<sup>24</sup> and he must "preserve, protect, and defend" the Constitution "to the best of [his] Ability."<sup>25</sup> Professor Prakash has already explained why the Faithful Execution clause cannot be separated from the oath to defend the Constitution.<sup>26</sup> Per the Supremacy Clause, there can be no doubt that not only do "the Laws" include the Constitution, but indeed, the Constitution is the *supreme* law.<sup>27</sup> Thus, "[t]aken

<sup>19</sup> See *id.* (requiring that words in the Constitution be given "their normal and ordinary as distinguished from technical meaning").

<sup>20</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 347 (2009); see also Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180, 208 [hereinafter Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*] ("[C]orruption-speak dominated the worldview of the Framers, and of the ratifiers, and of the public of 1787-1789."). Cf. Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U.L. Rev. 399, 419 (recognizing that "[t]he Anti-Corruption Principle has profound implications for many constitutional provisions").

<sup>21</sup> See U.S. CONST. art. II.

<sup>22</sup> See *id.* at art. II, § 1.

<sup>23</sup> See *id.* at art. II, § 3.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* at art. II, § 1.

<sup>26</sup> See Prakash, *supra* note 5, at 1617.

<sup>27</sup> *Id.*

Even dictionaries that did not specifically define the word *faithfully* consistently used it in a manner that simply answered *how* a duty was to be done. Thomas Blount, in his 1717 *A Law-Dictionary and Glossary*, used the word only twice in the entire course of the work. In the first instance, he defined an official whose job it was to "receive and faithfully distribute" certain donated goods.<sup>61</sup> Here again, *faithfully* seems simply to mean honestly. The second time Blount uses the word, he is defining the term *broker* and describing required qualifications for certain sorts. Such men had to be "Freemen of the City of London" and "allowed and approved by the Lord Mayor and Alderman for their Ability and Honesty, and they took an Oath to behave themselves faithfully."<sup>62</sup> Again it makes little sense trying to read the word as anything but a synonym for *honestly* or *with integrity*. And given that Blount is discussing oaths specifically, the description of a required level of integrity is particularly telling.

Indeed, such a use was consistent with other oaths of the time. The Federal Judiciary Act of 1789 uses the word *faithfully* five times. The first two times it is used in one oath—that required of federal court clerks. The clerk was required to swear or affirm that he would "truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and that [he would] faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding."<sup>63</sup> Additionally, he was required to post a bond "in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."<sup>64</sup> Likewise, court marshals were required to post a bond "for the faithful performance" of their duties and to "solemnly swear or affirm, [to] faithfully execute" the office.<sup>65</sup> Likewise, Supreme Court justices and district judges were required to swear they would "faithfully and impartially discharge and perform all the duties incumbent on me as, according to the best of [their] abilities and understanding, agreeably to the constitution, and laws of the United States."<sup>66</sup>

In *Marbury v. Madison*,<sup>67</sup> Chief Justice John Marshall quoted from the oaths required of court clerks and federal judges.<sup>68</sup> When reinforcing the primacy of the Constitution, and the judiciary's role in enforcing it, he did not turn to the word *faithfully*. Such disregard of the word is consistent with the idea that it was a boilerplate term of art.<sup>69</sup> Rather, Marshall asked rhetorically, "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?"<sup>70</sup> Just as the presidential

<sup>61</sup> THOMAS BLOUNT, A LAW-DICTIONARY AND GLOSSARY 30 (3d ed. 1717).

<sup>62</sup> *Id.* at 63.

<sup>63</sup> Judiciary Act of 1789, ch. 20, § 7.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at § 27.

<sup>66</sup> *See id.* at § 8.

<sup>67</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>68</sup> *See id.* at 140, 180.

<sup>69</sup> By describing the term as "boilerplate," I do not mean to denigrate it or suggest the clause "is intended to be without effect." *See id.* at 174. The interpretation I propose—that the phrase establishes a standard of conduct—is meaningful and consistent with the anti-corruption principle recognized by Professors Teachout, Tillman, and others.

<sup>70</sup> *Id.* at 180.

receive by the laws of this government.”<sup>77</sup> Vermont’s Constitution of 1777 uses the words faithful or faithfully five times, and where fidelity *to* is required, it is explicitly stated—officers of the state were required to swear to “be true and faithful to the State of Vermont.”<sup>78</sup> In the next clause, those same officers were required to swear to “faithfully execute” their office.<sup>79</sup> Tellingly, the first oath was denominated “The Oath Or Affirmation of Allegiance,” while the latter was “The Oath or Affirmation of Office.”<sup>80</sup> Finally, the Preamble to the Massachusetts Constitution described it as “the duty of the people” to draft a constitution that would “provide for . . . faithful execution of” the law.<sup>81</sup>

Beyond the vital observation that the phrase, as used in these various oaths and job descriptions, seems plainly to call for a standard of conduct (honestly, with integrity), the common thread that runs through these usages is that the oath is required of men who are put into positions of trust and have the opportunity to do wrong: the bailee holding the bailment; the Stamp Act Commissioner collecting money, the Vermont court employee taking fees, and of course, public official wielding power. Read this way, the phrase is an example of the “anti-corruption principle” animating the Constitution.<sup>82</sup>

#### D. *The Voice*

Thus far, the analysis has implicitly concentrated on the presidential oath, wherein the phrase *faithfully execute* is used in the active voice. In Section 3, however, it is used in the passive voice: the President “shall take care that the Laws be faithfully executed.” Requiring the President to take care that the law be executed with honesty and integrity seems a bit stilted. Better, it might seem, to phrase it in the active voice, mandating that he faithfully execute his office. Thus, here, interpreting the word to require faithfulness *to* the Constitution or *to* Congress arguably makes more sense. Except that the executive branch is not a one-man show. The Constitution contemplates that the President will serve a supervisory role over a fairly large

<sup>77</sup> The Frame of Government of the Province of Pennsylvania, and the Territories Thereunto Belonging (1696), available at [http://avalon.law.yale.edu/17th\\_century/pa06.asp](http://avalon.law.yale.edu/17th_century/pa06.asp).

<sup>78</sup> Constitution of Vermont, ch. 2, § XXXVI (1777), available at [http://avalon.law.yale.edu/18th\\_century/vt01.asp](http://avalon.law.yale.edu/18th_century/vt01.asp).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See MASS. CONST. pmbl.

<sup>82</sup> See generally Teachout, *supra* note 20; see also Tillman, *The Original Public Meaning of the Foreign Emoluments Clause*, *supra* note 20, at 184 (“agree[ing] with Professor Teachout] that the Constitution’s text embraces an anti-corruption principle of constitutional dimension”). In Professor Teachout’s view:

[T]he fight against corruption is a central part of the United States Constitution—its historical origins, the language of the debates around it, its substance and its structure. It is not an overstatement to say that, above all else, the Framers of the Constitution saw the document as a structure to fight corruption.

Teachout, *supra* note 19, at 347.

Such a drafting history is at least consistent with the theory that the term was boilerplate.

Concededly, however, the drafting history likely presents the largest obstacle to interpreting the Faithful Execution clause as imposing a standard of conduct rather than establishing a duty to enforce laws. Nonetheless, "the Constitution should be interpreted in accordance with what the text would reasonably have been understood to express rather than what the Drafters or Ratifiers intended."<sup>88</sup> These types of originalism are dubbed, respectively, "original public meaning" and "original intent," and (four sound reasons beyond the scope of this Essay) "modern originalists have moved steadily towards" original public meaning.<sup>89</sup> The contemporary dictionaries and legal treatises cited in this Essay are probative of the original public meaning—what the *ratifiers* of the Constitution, *i.e.*, "We the People," would understand the clause to mean—whereas for example, subsequent writings of James Wilson, "one key member of the Constitutional Convention," who later "describe[d the] clause as providing that the President holds 'authority, not to make, or alter, or dispense with the laws, but to execute and act the laws'" evidences only the framer's intent.<sup>90</sup> Even assuming the framers of the Constitution intended the Faithful Execution clause to establish a duty to execute the laws, a contrary original public meaning should trump.

#### IV. CONCLUSION

The scope of this Essay has been as modest as its objective—an examination of one word, seeking to show that the word should be given little emphasis in debates concerning the President's role in interpreting the Constitution. By its original public meaning, faithful execution is a standard of conduct rather than a directive to execute. And it requires not fidelity (to either the Constitution or congressionally enacted law) but honesty and integrity. The word has no religious connotation in the Constitution and bears no relation to the phrase *Full Faith* seen in Article IV. Rather, it was standard boilerplate designed to protect against corruption, and thus embodies a major constitutional theme.

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<sup>88</sup> Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 Geo. L.J. 569, 578 (describing Justice Scalia's position on originalism).

<sup>89</sup> Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENTARY 47, 48 (2006)

<sup>90</sup> Price, *supra* note XX, at 20–21 & n.74 (quoting 2 ROBERT GREEN MCCLOSKEY, ED., WORKS OF JAMES WILSON 829, 878 (1967)).