
FAITHLESS EXECUTION[†]

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Occasionally something might seem plain and evident and yet still be somewhat unknown and mysterious. “Faithfully execute[.],” found in two constitutional provisions — the Take Care and the Presidential Oaths Clauses — has a comforting tone and familiarity. But what does the phrase mean, concretely, in these faithful execution clauses? The Faithful Trio — Professors Andrew Kent, Ethan Leib, and Jed Shugerman — have done yeoman’s work in fleshing out the background of “faithfully execute[.]” After examining centuries’ worth of usage, a truly herculean task, they conclude the phrase has three components: (1) a duty not to misuse or misappropriate funds or property; (2) a responsibility not to act *ultra vires*; and (3) an obligation to be diligent, careful, honest, and impartial.¹

I see no reason to doubt these claims, especially as the assertions are so well documented and because they cohere with common sense. Few could suppose that, as a matter of constitutional law, Presidents may treat their tenures as a means of enriching themselves. Presidents lack a license to treat the White House or the Treasury as cash grab booths, where one is free to snatch as much as one can before time expires.² Likewise, the obligation to stay within one’s constitutional lane — to abjure *ultra vires* acts — also seems implicit in any office. It is elementary that an enumeration of powers generally presupposes something unenumerated and therefore not vested.³ For good reason, no one supposes that the original Constitution authorizes Presidents to transgress their office’s original bounds and metes, whatever those limits are. Finally, to be diligent, careful, honest, and impartial — these seem to form the core of the obligation of faithfulness. In one — the Take Care Clause — the President is to be the loyal servant of the lawmaker —

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¹ Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2178 (2019).

² And yet, no one should doubt that at least some recent Presidents have made a good deal of money after leaving the office, cashing in on their fame. See Grant Suneson, *The Net Worth of Every U.S. President from George Washington to Donald Trump*, USA TODAY (Feb. 13, 2019, 6:00 AM), <https://www.usatoday.com/story/money/2019/02/13/donald-trump-george-washington-net-worth-us-presidents/39011559> [<https://perma.cc/3U77-74F6>].

³ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

Congress — as he executes federal law.⁴ In the other — the Presidential Oath Clause — he must vow to be the devoted agent of “We the People of the United States” as he exercises his constitutional powers and satisfies his presidential duties.

Little wonder that I agree with much in their careful and splendid article. Here I focus on areas where I lack faith in their conclusions. First, I discuss faithfulness as a meta principle and what it means for the Trio’s assertions. Second, I consider whether the Take Care Clause imposes a duty or whether it also grants or suggests powers. Third, I examine the Faithful Trio’s speculations about executive review, prosecutorial discretion, and pardons. Despite their spadework, the Take Care Clause has an opacity that their research does not dispel. They sometimes argue as if the Clause creates a clear rule, when the Clause clearly adopts a hazy standard. Finally, I consider what to make of these faithful execution clauses in light of our Living Constitution. The two clauses remain the same. But do we continue to have a meaningful requirement of presidential faithfulness? Nope.

I. FAITHFULNESS AS A META-PRINCIPLE

The Faithful Trio place great weight on “faithfully.” They stress that the *President* must be *faithful*. They draw a sharp contrast with the British Crown’s eighteenth-century coronation oath.⁵ Though that King had to govern according to the laws, he did not have to promise *faithful* execution of those laws, or so they claim.⁶ After all, “faithfully” (and related words) was absent. Our presidential oath is thus quite different from the coronation oath.⁷

They are certainly right, for the longer coronation oath deals with matters wholly alien to our system — like the Church of England.⁸ But I doubt that the Crown lacked a duty of faithful execution. A faithless execution by the Crown would not honor the coronation oath. If the Crown twisted parliamentary laws or seized powers belonging to others,

⁴ I agree that the Take Care Clause applies no less to treaties and the Constitution because I believe the Supremacy Clause makes clear that the Constitution, laws, and treaties are each a species of law, and I believe that the Take Care Clause applies to the three forms of law made “Supreme Law.”

⁵ Kent, Leib & Shugerman, *supra* note 1, at 2157–59. The coronation oath required the British King to swear to “[m]aintaine the Laws of God and the true Profession of the Gospell and the Protestant Reformed Religion Established by Law[,] [a]nd . . . Preserve unto the Bishops and Clergy of this Realme . . . all such Rights and Priviledges as by Law doe or shall appertaine unto them.” *Id.* at 2138 (alterations in original) (quoting An Act for Establishing the Coronation Oath 1688, I W. & M. sess. I c. 6).

⁶ *Id.* at 2159.

⁷ *Id.* at 2176.

⁸ See An Act for Establishing the Coronation Oath 1688, I W. & M. sess. I c. 6.

the Crown certainly would not be ruling according to “laws and customs” as the oath required.⁹ It would be ruling by executive fiat. On this point, as on others, I believe the monarchy and the original presidency were more similarly situated.¹⁰

Am I minimizing the absence of “faithfully” from the coronation oath? No. Some constraints are often left unsaid. The Constitution requires legislators and officers, federal and state, to take an oath “to support” the Constitution.¹¹ If a Senator said, “I half-heartedly support the Constitution 70% of the time and thereby fully honor my oath,” I rather doubt that we would agree with the Senator’s assertion. Despite the absence of “faithfully,” we recognize that to actually support the Constitution is to support it faithfully. Unfaithful, or fair-weather support, is not *true* support, at least as the Constitution uses “support.”

Consider another comparison. Federal judges must faithfully execute federal law.¹² If a judge said, “I need not execute federal law, but when I do, my execution can be quite unfaithful,” she fundamentally misunderstands her office. Even though there is no Take Care Clause for judges, they too must faithfully execute federal law, albeit in their own unique way.

Expressio unius has misled the Faithful Trio. They want to emphasize faithfulness as a uniquely *presidential* obligation, but it is really a requirement of all federal and state offices, whether or not the office’s organic law — the Constitution or statute — declares as much. Some duties are express and other obligations are implied. For instance, the Oaths Act of 1789 somewhat redundantly requires various people to “swear or affirm . . . that I will support the Constitution.”¹³ Yet it also requires that two particular officers of Congress — the Secretary of the Senate and the Clerk of the House — take an oath to “truly and faithfully discharge” their offices.¹⁴ Based on the requirement of faithfulness in one section and its absence elsewhere, I certainly would not draw the shaky inference that those taking the statutory oath of constitutional support may provide untrue and unfaithful “support.” I do not deny that the presidency is unique and powerful — it surely is. Yet I do utterly deny the supposedly unique nature of the *presidential* duty of faithfulness. Every officer, federal and state, must faithfully support the Constitution.

⁹ *Id.*

¹⁰ See SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING* 12–28 (2015).

¹¹ U.S. CONST. art. VI, cl. 3.

¹² See, e.g., *Federal Farmer No. 15* (Jan. 18, 1788), in 2 *THE COMPLETE ANTI-FEDERALIST* 315 (Herbert J. Storing ed., 1981) (“The business of the judicial department is, properly speaking . . . faithfully to decide upon, and execute the laws, in judicial cases, between the public and individuals, between man and man.”).

¹³ Act of June 1, 1789, ch. 1, § 1, 1 Stat. 23.

¹⁴ *Id.* § 5, 1 Stat. at 24.

At times, the Faithful Trio manages to escape the gravitational force of *expressio unius*. They note that some early oaths mentioned both faithfulness and anti-self-dealing.¹⁵ They admit that the faithful execution clauses lack text specifically barring self-dealing. But they nonetheless argue that the rule against self-dealing is part of the general requirement of faithfulness.¹⁶ I completely concur. But what is true for rules that do not expressly bar self-dealing can be equally true for rules that do not expressly bar faithlessness. The obligatory oath of support to the Constitution implicitly requires *faithful* support of the Constitution and *faithful* conduct in office.

II. FAITHFUL EXECUTION: DUTY, POWER, OR BOTH?

I agree with the Faithful Trio that the “faithfully execute[]” phrases don’t grant powers but instead impose duties. For instance, if the recitation of the presidential oath grants power, anyone could acquire constitutional powers just by incanting it.¹⁷ Vice President Mike Pence could acquire whatever power that comes from part of the oath by saying that he too will “preserve, protect, and defend the Constitution of the United States.” For that matter, House Speaker Nancy Pelosi could acquire presidential power merely by uttering the presidential oath.

Having said that, I also agree with the view that imposing a duty on someone strongly implies that the duty-bearer has some means, often granted elsewhere, to satisfy the duty.¹⁸ One would not impose a duty on infants to preserve, protect, and defend a family, in part because we recognize that babies wholly lack the capacity to satisfy the obligation.

The duty to faithfully execute the office of the President, turns in large measure, on the personal efforts of the incumbent. Although assistance from Congress is extremely useful — in terms of funds and personnel — so long as the President is diligent and conscientious, stays in his lane, and does not peculate, grift, or self-deal, he has faithfully executed the office.

The duty to see the laws faithfully executed implies that the President has the power — the executive power — to see the laws faithfully executed.¹⁹ The executive power is principally a power to execute the law. That is why Alexander Hamilton was right when he said the

¹⁵ Kent, Leib & Shugerman, *supra* note 1, at 2142–44.

¹⁶ *Id.* at 2188–90.

¹⁷ See PRAKASH, *supra* note 10, at 301–03.

¹⁸ Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1854–55 (2016).

¹⁹ See generally Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701.

President is the “constitutional executor” of the laws.²⁰ The Chief Executive also may direct and remove executive officers, as James Madison said: “If the duty to see the laws faithfully executed be required at the hands of the executive magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end,” namely the constitutional power to direct and remove.²¹ In other words, Presidents can satisfy their duty to see the laws faithfully executed because they have constitutional means — the executive power to superintend and oust officers — to ensure faithful execution.

Because duty often implies power, it is not surprising that many early readers of the Take Care Clause understood it as granting power, something the Faithful Trio unduly minimize. President John Adams said of the President: “[H]e has the Right [power] and his is the duty to take Care that the Laws be faithfully executed.”²² He was hardly alone. Alexander Hamilton referred to the Take Care Clause as a “power” not once, but twice.²³ James Wilson said this: “There is another power of no small magnitude intrusted to this officer. ‘He shall take care that the laws be faithfully executed.’”²⁴ He was saying that the Clause conveys quite significant power. A Jerseyman quoted the Take Care Clause and said: “It will be readily agreed that it would be highly ridiculous to send representatives . . . to make laws for us, if we did not give power to some person or persons to see them duly executed.”²⁵

One can, of course, read too much into presidential duties. At times, President Abraham Lincoln read his duty to preserve, protect, and defend the Constitution as if it authorized him to take whatever measures he deemed necessary to save the Union. But just as a duty to fight fires does not necessarily suggest a power to purchase a fire truck, so too does a duty to preserve the Constitution not inescapably imply a right to all

²⁰ Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in *THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING* 16 (Morton J. Frisch ed., 2007).

²¹ 10 REG. DEB. 2439 (1834).

²² Letter from John Adams to Roger Sherman (July 18, 1789), reprinted in 6 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 427, 429 (Charles Francis Adams ed., 1851).

²³ *THE FEDERALIST NO. 69*, at 417 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *THE FEDERALIST NO. 77*, *supra*, at 463 (Alexander Hamilton).

²⁴ *NEW YORK STATE BAR ASSOCIATION, PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING* 182 (1911) (quoting U.S. CONST. art. II, § 3).

²⁵ A Jerseyman, *To the Citizens of New Jersey*, *TRENTON MERCURY*, Nov. 6, 1787, in 3 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 148-49 (Merrill Jensen ed., 1978); see also Cassius VI, *To the Inhabitants of this State*, *MASS. GAZETTE*, Dec. 21, 1787, reprinted in *RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS* 513-14 (John P. Kaminski et al. eds., 1998) (discussing presidential powers and listing Take Care Clause).

the means that Presidents believe necessary to protect and defend it.²⁶ The keys are what powers the Constitution confers upon the presidency and what means and resources Congress supplies by law. Grants of constitutional and statutory power are the proper means by which Presidents may satisfy their constitutional duties.

III. OVERREADING THE TAKE CARE CLAUSE

Because the President must faithfully execute the law and because the Faithful Trio read the Take Care Clause as a duty (and not a power), they conclude that the President might have to enforce laws he regards as unconstitutional.²⁷ But the conclusion does not follow from the premises, and they read too much into the Clause's interstices. Nothing in the Take Care Clause specifies whether unconstitutional "laws" are laws to be faithfully executed. In particular, the Clause does not tell Chief Executives what to do when they believe putative laws are unconstitutional. Relatedly, nothing in the Clause tells us whose judgments, if anyone's, Presidents must adopt as to which supposed "laws" are actual laws.

Despite what the Faithful Trio says, I suspect that the Trio believes that Presidents may ignore at least some "laws." Imagine that Congress passes a simple law, enacted over the incumbent's veto. Section 1 commands that the Executive put rebels to death without trial. Section 2 declares that executive officers shall ignore all contrary court judgments. Must the sitting President faithfully enforce this new law? However unequivocal the Take Care Clause may appear at first glance, I rather doubt that the Faithful Trio believes that a President must be diligent in enforcing this supposed "law." It violates the federal bar against bills of attainder and it overrides the implicit duty that Presidents owe to judicial judgments.

But one does not need extremes. Suppose the Supreme Court has said that a particular federal law is unconstitutional. Must the President continue to attempt to faithfully execute it? Again, I doubt the Faithful Trio would demand as much. But this just shows that faithfulness does not command at least this form of legislative supremacy.

What happens if the courts have yet to opine on the constitutionality of a putative law? I would argue that the American tradition has been to conclude that a "law" that is unconstitutional at enactment is actually no law at all.²⁸ That is to say, some "acts" are unconstitutional, and are therefore nullities, without regard to whether a court has so declared. This tradition extends back to the earliest days of the Constitution.²⁹

²⁶ Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1389 (2013).

²⁷ Kent, Leib & Shugerman, *supra* note 1, at 2186–88.

²⁸ Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard*, 96 GEO. L.J. 1613, 1638 (2008).

²⁹ *See id.* at 1648–59.

What happens in the case where courts adjudge that a law is constitutional, but the Executive continues to reject that assertion? This is a seemingly harder case. But when it comes to constitutional interpretation, the Constitution never establishes one branch to rule them all. Though many moderns genuflect before the Supreme Court, the original Constitution supplies no reason for the President to kowtow. The Executive's constitutional opinions, expressed in veto messages and the like, are no more binding on the Court than are the Court's constitutional opinions binding upon the executive.³⁰ To be sure, the Supreme Court is supreme when it comes to who wins or loses cases. But that Court is not the ultimate expositor of what the Constitution means or whether a law is constitutional. It is the Supreme *Court*, not the supreme *interpreter*.³¹

When the Faithful Trio suggests that Presidents may lack the authority (or the duty) to refuse to enforce unconstitutional laws, the Trio misfires. That the President has a duty to see to the faithful execution of the laws simply does not tell us what to do with parchments that pretend to be law but are, in fact, at war with the Constitution.

For similar reasons, the authors' comments on executive discretion and pardons are misbegotten. The Take Care Clause does not mean that President Barack Obama violated the Constitution by prioritizing the deportation of migrant criminals and deprioritizing the deportation of other migrants. Nor does it mean that a decision not to prosecute someone guilty of a crime constitutes unfaithful execution. When President George Washington ordered a *nolle prosequi* in 1793, he was not the first President to violate the Take Care Clause.³² That Clause does not bar discretion or a shrewd judgment that surrendering Whiskey rebels ought not to be prosecuted.

Relatedly, the Faithful Trio suggests that the Take Care Clause modifies the Pardon Clause. They believe that former limits the latter. I suggest the exact converse. The more specific trumps the general. If not, it would seem that most pardons are *unconstitutional*. *Every single* pardon to the guilty is a negation of law because the law promises punishment and yet the President has forgiven the trespass. The President is not guilty of unfaithful execution of a murder statute when he pardons the murderer or commutes her sentence. I would not read the principle use of the pardon power — the pardon of the guilty — as faithless execution and therefore unconstitutional. One additional wrinkle: Suppose an incumbent pardons himself, because though he is utterly innocent of

³⁰ See Andrew Jackson, Veto Message (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajvetoo1.asp [<https://perma.cc/MQH5-7Q6U>].

³¹ See Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1554–64 (2005).

³² See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 1701, 1738–43 (2005).

some crime, he faces the prospect of a spiteful prosecution from a malicious successor. I would argue that the incumbent has not violated the Take Care Clause because in that case, the President furthers the faithful execution of the law. If he is innocent, the pardon certainly does not transgress the Take Care Clause.

The recurring difficulty is that the Faithful Trio has put too much faith in the clarifying power of the Take Care Clause. The Clause enacts a soft, laudable, and redundant standard. It simply cannot resolve the more difficult questions about unconstitutional statutes, prosecutorial discretion, and pardons. Williams Symmes said as much at the Founding.³³ He was right. Standards are maddening precisely because they lack the clarity of rules.

IV. FAITHFUL EXECUTION IN A FAITHLESS SYSTEM OF CONSTITUTIONAL CHANGE

Whatever the original meaning of “faithfully execut[ing]” the laws and the office of the presidency, Presidents have, in the words of the old Virginia Slims ad, “come a long way, baby.” Presidents often act *ultra vires* and repeatedly eschew what Congress decrees. More concretely, modern Chief Executives spend money without a proper appropriation. They evade congressional statutes that limit the expenditure of funds. They start wars on their own say-so. Under *Chevron* and otherwise, Presidents and their administrations eschew the best reading of a statute for any reasonable one that better advances their policy agendas.³⁴

I suspect that some or all of this unfaithfulness troubles the Faithful Trio. But I am unsure why. The Faithful Trio does not appear to be comprised of originalists. Rather, the authors seem rather open to a Bobbittian multifactored approach to constitutional meaning, where one considers (1) structure; (2) text; (3) ethics; (4) prudence; (5) history; and (6) doctrine.³⁵ At times they suggest that where the original meaning is clear, there is less room for recourse to other factors like practice. When less clear, however, we can welcome the mishmash of factors.³⁶

A multi-factored approach to meaning, where one is dealing with factors traditionally unassociated with meaning (like history or ethics), is hardly a recipe for faithfulness. Rather it is tailor made for unfaithfulness. Specifically, if we can utilize six factors to fill in the modern

³³ Letter from William Symmes to Capt. Peter Osgood Jr. (Nov. 15, 1787), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 60–61 (Herbert Storing ed., 1981).

³⁴ I discuss such episodes in a forthcoming book: THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST THE PRESIDENCY’S EVER-EXPANDING POWERS (forthcoming 2020).

³⁵ See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (1982).

³⁶ Compare Kent, Leib & Shugerman, *supra* note 1, at 2134, with *id.* at 2137–40.

meaning of the Take Care Clause and the Presidential Oath, there is nothing that we cannot derive or concoct. The Bobbittian six factors make anything possible, rendering faith to pre-existing conceptions of faithfulness something of a chimera.

Imagine giving a master chef six ingredients. And imagine telling her that she can use these ingredients in whatever proportions she wishes. Under such a regime, there is nothing that the chef cannot overwhelm, and almost nothing that she cannot make.³⁷

Another way of putting the point is that whatever faithful execution meant two centuries ago, it need not have the same meaning today. And it need not have the same meaning today no matter how clear the original meaning was two centuries ago. What a Washington, a Madison, or a Wilson took the faithful execution duties to mean matters little for today's faithful execution duties. There is no necessary relationship between the two. What the Constitution means today often has rather little relationship to what it meant in 1789, as those familiar with the Contracts Clause and its remarkable history surely know.

This makes sense under a Living Constitution. If members of Congress can, consistent with their oath to faithfully support the Constitution, rely upon updated understandings of the Constitution as they legislate, why cannot Presidents, consistent with their duties, rely upon living statutes and a Living Constitution to adapt, reform, and refurbish their constitutional office to better reflect modern realities and needs? If a horse-and-buggy conception of the Commerce Clause is inadequate, why should a quill-and-cannon conception of executive power continue to hold sway?

The Living Constitution has killed and buried the faithful execution duties. I do not deny that people wail about the lack of faithful execution. But most of these people are fair-weather friends of the old concept. Politics generally explains when commentators bemoan faithless execution or when they take a decidedly different tack and proclaim the benefits of a flexible Constitution and mutating statutes. Unless we are willing to revive the ancient regime of a fixed Constitution and fixed laws, the faithful execution duties that the Faithful Trio discusses are relics of an earlier, more static era. Under more living and dynamic approaches, Faithless Execution is the new coin of the realm.

³⁷ See generally Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO L.J. 407 (2003) (reviewing RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001)).