Draft—comments welcome

"FAITHFUL EXECUTION" AND ARTICLE II

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INTRODUCTION

The faithfulness of a president to the Constitution, the laws, and the ideals and traditions of the United States is at issue as never before. The American people today are confronted with questions that go to the foundations of our constitutional system as a "government of laws, and not of men"[1] (or women). Presidential powers previously understood as plenary are being used in ways that many see as destructive of constitutional principles and norms. May a president fire senior law enforcement personnel, if the purpose is to protect himself or close associates from a criminal investigation? May a president use the pardon power or his control over classification and declassification of information for the same purposes? May a president choose not to enforce statutes relating to immigration or health care, for example? Does the Constitution have a plan for when it appears that a president may be motivated not by a view of the public good but by self-regarding or bad faith purposes?

We think that two frequently cited but poorly understood parts of the Constitution speak to these questions. Article II of the U.S. Constitution twice imposes a duty of "faithful execution" on the President, who must "take Care that the Laws be faithfully executed"[2] and take an oath or affirmation to "faithfully execute the Office of President."[3] Although other public servants are "bound by Oath or affirmation[] to support [the] Constitution,"[4] no other officeholder has the same constitutional command of fidelity. And the language of faith appears nowhere else in the document, save the requirement that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[5]

The two clauses requiring faithful execution look somewhat different from each other. One is a straightforward legal command imposing a duty

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). The phrase is older. *See, e.g.*, John Adams, *Novanglus, or A History of the Dispute with America from Its Origin in 1754 to the Present Time, No. VII*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 220, 226 (C. Bradley Thompson ed., 2000) ("Aristotle, Livy, and Harrington . . . define a republic to be *a government of laws, and not of men*.").

[2] U.S. CONST. art II, § 3.

[3] U.S. CONST. art II, § 2. We are not the first to note that these two clauses share the element of faithful execution. *See, e.g.*, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1772 (2016); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994).

[4] U.S. CONST. art VI, cl. 3.

[5] U.S. CONST. art IV, § 1.

throughout tenure in office, albeit utilizing the passive voice. The other requires a promissory oath or affirmation upon taking office, a single occasion speech-act with, in Anglo-American culture, a heavily religious flavor, notwithstanding the Constitution's command that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[6] Edward Coke, the seventeenth century jurist revered by many American framers, wrote that an oath necessarily involves "calling Almighty God to witnesse."[7] Yet there is a conceptual as well as textual link between the clauses: ensuring that the laws are faithfully executed seems to be a lesser-included duty within the obligation to faithfully execute the office.[8]

Over the centuries, the Faithful Execution Clauses have produced wide-ranging jurisprudences and have been invoked in many constitutional debates. The President's oath, often in combination with the so-called Take Care Clause, is invoked by participants in debates about the power of the President not to enforce or defend congressional laws on the ground of unconstitutionality.[9] Both clauses have been cited by the Executive Branch as supporting an executive privilege to withhold internal documents,[10] and an authority to go beyond or even defy standing law to protect the nation in emergencies.[11] The Supreme Court has agreed with the less aggressive

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[6] U.S. CONST. art VI, cl. 3.

[7] EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES, at 164 c. 74 (London, E. & R. Brooke, 1797) (1644). At the time the Constitution was written, the affirmation option was not viewed as an accommodation for atheists or non-Christians—it was for most Americans unthinkable that such persons would hold public office. Rather, the affirmation was an accommodation for devout Christians who belonged to dissenting Protestant sects (non-Anglicans) which viewed oath-swearing as profane. On the history of oaths, see Helen Silving, *The Oath: I*, 68 YALE L.J. 1329 (1959); Helen Silving, *The Oath: II*, 68 YALE L.J. 1527 (1959).

[8] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 178 (2005).

[9] *See, e.g.*, *Issues Raised by Section 129 of Pub. L. No. 102-138 & Section 503 of Pub. L. No. 102-140*, 16 U.S. Op. Off. Legal Counsel 18, 31, 33 (1992); AMAR, *supra* note 8, at 178-79; Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012); Prakash, *supra* note 3; Paulsen, *supra* note 3; Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994).

[10] *See, e.g.*, *Constitutionality of the OLC Reporting Act of 2008*, 2008 WL 5533799, at *3 (O.L.C. Nov. 14, 2008); *Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act*, 10 U.S. Op. Off. Legal Counsel 68, 79 (1986).

[11] *See, e.g.*, President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 432 (Roy P. Basler ed., 1953); Brief for Petitioner Secretary of Commerce at 2-4, 27-28, 98-100, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (No. 745). *See also* Michael Stokes Paulsen, *The*

proposition that the two clauses together convey a large measure of authority to defend the government and interests of the United States in the absence of standing law.[12]

The Take Care Clause is also part of the justifications for, among other things, the President's unfettered ability to remove the heads of at least some types of executive agencies;[13] federal courts' strict requirement of Article III standing, limiting Congress's ability to grant broad citizen-standing;[14] and presidentially-imposed oversight of agency rule-making, such as mandatory cost-benefit analysis.[15] Proponents of broader or narrower views of civil and criminal prosecutorial discretion both invoke the Take Care Clause,[16] as do participants in related debates about policy-based nonenforcement or suspension of the statutes,[17] and presidential

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Constitution of Necessity, 79 NOTRE DAME L. REV. 1257, 1257-58 (2004) (locating in the Presidential Oath Clause and constitutional structure "an overriding principle of constitutional and national self-preservation . . . that may even, in cases of extraordinary necessity, trump specific constitutional requirements").

[12] *See* In re Neagle, 135 U.S. 1, 63-64 (1890).

[13] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 503-04 (2010); Myers v. United States, 272 U.S. 52, 117 (1926); *see also Suspension of Officer*, 18 U.S. Op. Atty. Gen. 318, 319 (1885) (citing the Presidential Oath Clause also).

[14] *See, e.g.*, Lujan v. Def. of Wildlife, 504 U.S. 555, 577 (1992); Allen v. Wright, 468 U.S. 737, 761 (1984); FEC v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting).

[15] *See, e.g.*, Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2295 (2006) (discussing Executive Order No. 12,291, 3 C.F.R. 128 (1981) and Exec. Order No. 12,866, 3 C.F.R. 638 (1993)).

[16] *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996); Heckler v. Chaney, 470 U.S. 821, 832 (1985); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

[17] *See, e.g.*, Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (presidential authority for a deferred action immigration program); United States House of Representatives v. Burwell, 130 F. Supp. 3d 53 (D.D.C. 2015) (non-statutorily authorized delay in implementing part of Affordable Care Act); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 92-97 (2015) (exploring whether the "Faithful Execution Clause" was written to bar suspensions and dispensations); Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1878 (2015) (arguing that "the [Take Care] Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power"); Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 748 (2013) (arguing "that the Constitution's Take Care Clause imposes on the President a duty to enforce all constitutionally valid acts of Congress in all situations and cases. In other words . . . there is simply no general presidential nonenforcement power").

impoundment of appropriated funds.[18] Most concede that the clause's imposition of a duty to execute law implies that the President cannot make law,[19] but some argue that it allows presidential "completion" of incomplete statutory regimes.[20]

And in recent shorter works, we have suggested that the Take Care Clause and Presidential Oath Clause also speak to contemporary controversies about President Trump's use of the pardon power, his control over removal of Executive Branch officials, and his amenability to subpoena in the Russia investigation.[21]

Notwithstanding all of these claims about the clauses by the executive, courts, and scholars, no one has actually figured out where the clauses came from or what they were understood to mean when they were drafted and adopted.[22] Speaking recently about the Take Care Clause, but making a point that applies also to the Presidential Oath Clause as well, John Manning and Jack Goldsmith note that courts tend to "treat[] the meaning . . . as obvious when it is anything but that," and courts fail to "parse the text" or "examine the clause's historical provenance."[23] Little was said explicitly during the Philadelphia Convention or the ratification debates in the states about the Faithful Execution Clauses.[24] And some scholars have noted that the Take Care Clause mirrors language found in the post-independence

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[18] *See, e.g.*, Neil M. Soltman, *The Limits of Executive Power: Impoundment of Funds*, 23 CATHOLIC UNIV. L. REV. 359, 366-67 (1973).

[19] *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 532 (2008); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

[20] *See, e.g.*, Goldsmith & Manning, *supra* note 20.

[21] *See* Ethan J. Leib & Jed Shugerman, *Fiduciary Constitutionalism and "Faithful Execution": Two Legal Conclusions*, 16 GEO. J.L. & PUB. POL'Y _ (forthcoming 2018); Andrew Kent, Ethan J. Leib & Jed Shugerman, *Self-Pardons, Constitutional History, and Article II*, TAKE CARE BLOG, takecareblog.com/blog/self-pardons-constitutional-history-and-article-ii; Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST, Mar. 14, 2016, http://wapo.st/2pdoIzK; and Ethan J. Leib & Jed Shugerman, *Mueller's Recourse*, SLATE, Mar. 19, 2018, slate.com/news-and-politics/2018/03/if-a-trump-official-fires-the-special-counsel-to-protect-trump-mueller-can-sue-to-keep-his-job.html.

[22] *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 UNIV. PENN. L. REV. 1837, 1840 (2016).

[23] *Id.*

[24] *See, e.g.*, MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS 107 (1999) (noting that the "wording of the oath "occasioned little serious discussion during the Constitutional Convention"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 63 (1994) ("[A]t the Founding, the [Take Care Clause] received relatively little consideration by practically everyone in the debate.").

constitutions of Vermont, New York, and Pennsylvania, and a frame of government for colonial Pennsylvania.[25] But essentially nothing has yet been discovered or written about the origin and historical meaning of the "faithful execution" language.

This Article, then, is the first substantial effort to pursue the historical origins of the twin commands of faithful execution,[26] and to link these findings to the original meaning of Article II.[27] We do not enter the debates about how heavily originalist findings should weigh in the calculus of contemporary constitutional meaning, or about the best form of originalism. We are satisfied that our archaeological project here is justified by the fact that all or nearly all constitutional interpreters consider original textual meaning, informed by historical context, to be at least important factors in constitutional interpretation,[28] and that all or nearly all varieties of originalists will find our methods reasonable.[29]

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[25] See *infra* notes 225, 288, and 291, and accompanying text (New York and Pennsylvania provisions). *See generally* PRAKASH, *supra* note 20, at 93 (noting the linguistic similarities); Delahunty & Yoo, *supra* note 20, at 802-03 (same); Bellia, *supra* note 3, at n.118 (same); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 693 n.75 (2014) (same).

[26] *But see* Ryan S. Killian, *Faithfully Interpreting 'Faithfully'* (manuscript 17 Feb. 2014), at ssrn.com/abstract=2226297 (concluding in a short essay drawing upon contemporaneous usage that "faithful execution" was both "boilerplate" and a "term of art" but also an example of the "anti-corruption principle animating the Constitution").

[27] A search for original public meaning of the Constitution's text is currently the most widely-accepted form of originalist inquiry. This method is sometimes also called "new originalism," "new textualism," or other names. It seeks to discern, as of the time of ratification of the constitutional text, "the meaning actually communicated to the public by the words on the page." Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 413 (2013). *See also* Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*. 82 FORDHAM L. REV. 757, (2013) (stating that new originalism seeks to find "the objective linguistic meaning that the text of the Constitution would likely have had to an American audience at the time of adoption").

[28] *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7-8 (1982); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1797–98 (1997); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244-46, 1252-58 (1987).

[29] Because we present overwhelming evidence that the Faithful Execution Clauses were written in the language of the law, *see* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018), our findings are applicable to "original-methods originalism," *see, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009). Because we show that the concept of faithful execution of office was so commonly used and well-known, other original-public-meaning originalists who seek to discern how informed lay people would

So what does our new history show? The Faithful Execution Clauses are linked not only by common words, but also by a common historical purpose over many centuries: to limit the discretion of public officials. The language of "faithful execution" at the time of the Framing was very commonly associated with the performance of public and private offices—especially but by no means only those in which the officer had some control over the public fisc. The drafters at Philadelphia did not *ex nihilo* come up with the idea of having a chief magistrate who would take an oath of faithful execution and be bound to follow and execute legal authority faithfully. The models were everywhere. Governors of American colonies pre-independence, post-independence state governors, executive officers under the Articles of Confederation government and powerful executive officers such as mayors, and governors of corporations, were required, before entering office, to take an oath for the due or faithful execution of their office. These officials were directed to follow the standing law and stay within their limited authority as they executed their offices—just as the British monarch was. Any one experienced in law or government in 1787 would have been aware of this because it was so basic to what we might call the law of executive office-holding.

Yet one of our most interesting findings here is that commands of faithful execution with duties that parallel Article II applied not only to senior government officials who might have been plausible models for the presidency in Article II, but also to a vast number of less significant officers too. It turns out that the U.S. President, who today bestrides the globe in the world's most powerful office, has antecedents dating back centuries in humble offices like town constable, weigher of bricks, vestryman of the church, recorder of deeds, and inspector of flax and hemp.

As we will trace below, this imposition of a duty of fidelity on officers—through oaths and otherwise—had three basic components or substantive meanings. Our first finding, consistent with usage reported in contemporaneous dictionaries, is that faithful execution was repeatedly associated in statutes and other legal documents with true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office.

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have understood the Constitution should find our results valuable too. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 9 (2004) (looking to the understanding of the "reasonably informed" reader of the Constitution); Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 975 (2008) ("educated and informed speakers of the time"). Finally, because most of the important drafters of the Constitution were lawyers or at least literate in law and government, *see* National Archives, *Meet the Framers of the Constitution*, https://www.archives.gov/founding-docs/founding-fathers, originalists who focus on the intentions of the drafters should find our research about the legal and political meaning of "faithful execution" useful.

Second, the faithful execution duty was often imposed to prevent officeholders from misappropriating profits that the discretion inherent in their offices might afford them. Third, the duty was imposed because of a concern that officers might act *ultra vires*; the duty of faithful execution helped the officeholder internalize the law, instrument, instruction, charter, and/or authorization that created the officer's power.

What these three aspects of the duty of fidelity have in common is that they look a lot like *fiduciary* duties in the private law, as we understand them today.[30] Although decades of scholarship has traced the idea of public offices as "trusts"—private law fiduciary instruments—from Plato through Cicero and Locke,[31] and several scholars have found ways to make points of contact between that tradition and our constitutional tradition,[32] the Faithful Execution Clauses are substantial textual and historical commitments to what we would today call fiduciary obligations of the President. We do not claim that the drafters at Philadelphia took ready-made fiduciary law off the shelf and wrote it into Article II, but that the best historical understanding of the meaning of the Faithful Execution Clauses is that they impose duties that we today—and some in the eighteenth century as well—would call fiduciary.[33]

Our narrative history takes the following form: Part I retells the story of the role of the Faithful Execution Clauses at the Constitutional Convention and in the ratification debates in the states. We also pursue linguistic usage and social practice of the eighteenth century to clarify what the founding generation would have thought was involved with swearing an oath or affirming to faithfully execute an office, and being commanded to ensure that the laws are faithfully executed. And although our access to new databases on ratification has revealed important sources on some key

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[30] *See* Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016).

[31] *See* J.W. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 136 (1950); C.E. VAUGHAN, STUDIES IN THE HISTORY OF POLITICAL PHILOSOPHY 143–57 (1939); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Principles and Public Office*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan Criddle et al. eds., forthcoming 2018).

[32] *See, e.g.*, GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010); Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007) [hereinafter, *Judicial Review*]; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) [hereinafter, *The Public Trust*]; Paul Finn, *Public Trust and Accountability*, 3 GRIFFITH L. REV. 224 (1994); Paul Finn, *The Forgotten "Trust": The People and the State*, *in* EQUITY: ISSUES AND TRENDS 131, 131 (Malcolm Cope ed., 1995).

[33] *See infra* note 319.

questions, the traditional sources of original meaning—framing debates, ratification, dictionaries, linguistic context—remain insufficient.

Part II thus performs a deeper historical inquiry into the meaning of faithful execution in the centuries leading up to the framing of the U.S. Constitution. Our archaeology starts in English law in the period of Magna Carta, and proceeds through the early modern era. We then explore the tumultuous seventeenth century of Stuart kings and two revolutions, where we can identify meaningful change in the meaning of "faithful execution." We move through English law in Hanoverian Britain until 1787. Yet we also focus attention on the other side of Atlantic, studying colonial governments from their earliest days through the revolution of 1776. We then examine post-independence governance in the states and at the national level under the Continental/Confederation Congress. On both sides of the pond, then, we reveal oaths, commands, and bonds of faithfulness that have for centuries in the Anglo-American tradition applied to executive officers. We hope to delineate which offices were given these duties of loyalty and to whom.

We then take these histories together in Part III to sketch an account of what the Faithful Execution Clauses in the U.S. Constitution would likely have been understood to mean in 1787. Our history supports readings of Article II of the Constitution that limit presidents only to exercise their power when it is motivated in the public interest rather than in their private self-interest, consistent with fiduciary obligation in the private law. It also supports readings of Article II that tend to subordinate presidential power to congressional direction, requiring the President to follow the laws, instructions, and authorizations set in motion by the legislature. As a corollary, the conclusions tend undermine imperial and prerogative claims for the presidency, claims that are sometimes, in our estimation, improperly traced to dimensions of the Take Care and Presidential Oath Clauses.

It is, ultimately, not easy to know how to enforce the constitutional obligations we uncover—because the correct method of interpreting and applying the Constitution in the present day is endlessly contested, because it is unclear how to evaluate a president's subjective motives and what to do about mixed motive cases,[34] and because the enforcement mechanisms we found for commands of faithful execution run the gamut from judicial enforcement via damages, fines, injunctions, bond forfeiture, and criminal penalties, to impeachment and removal from office. But on the substance of the President's faithful execution duties in Article II, we conclude that they

[34] For a recent example of these difficulties, see the conflicting views in the briefs and opinions of the justices in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the travel ban case. *See also* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018).

include at least no-profit, no-bad faith, no-self-dealing proscriptions, a strong concern about avoiding *ultra vires* action, and a duty of diligence.

I. "FAITHFUL EXECUTION" IN 1787-88: EVIDENCE FROM FRAMING, RATIFICATION, AND LINGUISTIC USAGE

The primary sources for discovering the original meaning of the Constitution—the records of debates about the framing and ratification of the Constitution, and documents evidencing contemporary linguistic usage, such as dictionaries—provide only some assistance with uncovering the meaning of the Faithful Execution Clauses. We briefly explore these sources here, both to emphasize some new findings in our revisiting of this material and to motivate the need for much deeper historical investigation to get at the real meaning of the clauses. We also address the meaning of three other linguistic components of the Clauses, the command to "take care," just what counts as "the laws," and the aspect of the presidential oath promising to "preserve, protect and defend the Constitution."

A. The Philadelphia Convention

It is widely-accepted that many delegates arrived in Philadelphia in the summer of 1787 convinced that the national government needed a strong executive power.[35] The government under the Articles of Confederation produced legislative resolves that were nominally binding on the states, but there were no means of enforcement, making them in practice precatory. After a few years of chaotic execution through ad hoc delegation and temporary committees, Congress placed management of war, diplomacy, public funds, and a postal system first in standing committees and then national-level officers or small departments answering directly to the Congress.[36] But the Congress was a large multi-member body with frequently changing membership, meaning that executive management lacked stability, unity, efficiency, and secrecy.

The experience under post-independence state constitutions also convinced many Philadelphia Convention delegates and other nationalists

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[35] *See, e.g.*, MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 213, 215 (2016); CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY 65-70 (2007 ed.).

[36] *See, e.g.*, JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 193-203, 282-84 (1979); EDMUND CODY BURNETT, THE CONTINENTAL CONGRESS: A DEFINITIVE HISTORY 118-21, 488-92 (1964 ed.); JENNINGS B. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS, 1774-1789 (1935).

that a strong executive was important to political stability. The new constitutions showed what Thomas Jefferson later called "jealousies" of "executive Magistrates."[37] The legislatures dominated these governments. Many governors were selected by state legislatures; most had short terms, restrictions on re-eligibility, and shared executive authority with a governing council.[38] Historians have traced how the lone early constitution with a strong executive—New York's 1777 document—and the 1780 Massachusetts constitution largely drafted by John Adams, a believer in vigorous executive power, came to be seen as models for many Philadelphia framers because of concerns about legislative abuses and the need for an executive counterweight who would also vigorously execute the laws.[39]

Of course there were some who resisted a strong national executive, believing that fidelity to principles of the Revolution and republicanism mandated that, in Roger Sherman's words to his Philadelphia colleagues, the executive should be "nothing more" than an agent "for carrying the will of the Legislature," and should be "absolutely dependent on that body."[40]

As a result, there was vigorous disagreement at Philadelphia between people holding views like Sherman's and the proponents of an independent, powerful executive, men like James Wilson, Gouverneur Morris, and Alexander Hamilton. They battled over whether the executive would be single or plural; whether the executive would be selected by the legislature or have an independent electoral base; and whether the executive would have elements of the old royal prerogative such as a veto over legislation or any ability to pardon.[41] We accept the historians' account of determined contestation at Philadelphia over these issues, and a final result in which the proponents of a strong executive—desiring to preserve the structural unity and some powers of the British monarchy—got much but not all of what they wanted.[42]

In comparison, the disputes were mild with regard to components of Article II central to our project, and so our account is one of near consensus.

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[37] 1 THE WRITINGS OF THOMAS JEFFERSON 112 (Paul Leicester Ford ed., 1892).

[38] *See, e.g.*, KLARMAN, *supra* note 35, at 213; THACH, *supra* note 35, at 16-17; WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 270-72 (2001 ed.); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 136-40 (1998 ed.).

[39] *See, e.g.*, WOOD, *supra* note 38, at 403-09, 431-36.

[40] 1 MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65, 68 (1911).

[41] *See, e.g.*, THACH, *supra* note 35, at 65-123.

[42] *See, e.g.*, ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 184-226 (2014).

The Virginia Plan, presented at the outset of the Convention in May by the Virginia delegation—which included James Madison, George Washington, and Edmund Randolph—proposed "a National Executive be instituted . . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation."[43] Adopted by the Convention as a basis for its opening discussions, this plan proposed an oath for state officers, binding them to support the national government,[44] but contained no oath for national officials. Debate revealed that many but not all delegates believed that oaths were an important security that could help hold officers to their duty.[45] Some, like Wilson, voiced doubts about the efficacy of government-mandated oaths, however.[46] As discussed in Part II below, oaths were used for centuries by the English state—and continued to be used at the time the U.S. Constitution was written—to exclude Catholics and dissenting (non-Anglican) Protestants from public office, to formally mandate allegiance to the crown, and to assert royal control over church affairs. They were thus heartily disliked by many religious minorities. Wilson was born into a Presbyterian Scottish family, and may have learned early that religious test oaths were oppressive.[47] In addition, some Protestant sects—including some Presbyterians and most Quakers, who were a large and powerful group in Pennsylvania (Wilson's home state)—refused to take oaths because they found them to be a profane taking of the Lord's name in vain. But the supporters of oaths in the Constitution greatly outnumbered opponents at Philadelphia.

An amended Virginia Plan on June 13 contained a chief magistrate "with power to carry into execution the National Laws… [and] removable on impeachment and conviction of mal practice or neglect of duty."[48] William Paterson for New Jersey introduced an alternate plan (the "New Jersey Plan"), with a structurally weaker executive, but one that still had

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[43] 1 FARRAND, *supra* note 40, at 21.

[44] *Id*. at 22 ("Resd. that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.").

[45] *Id*. at 203 (Randolph); *id*. at 583-84 (Gouverneur Morris); 2 *id*. at 84, 87 (Elbridge Gerry). *See also* HAROLD HYMAN, TO TRY MEN'S SOULS (1959) (explaining how revolutionary leaders turned to oaths to promote concrete legal obligation among military and civil officers in the Revolutionary and early constitutional eras).

[46] 2 FARRAND, *supra* note 40, at 87-88.

[47] *See* CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 17-42-1798 (1956); SCOTLAND IN THE AGE OF TWO REVOLUTIONS 181-82 (Sharon Adams & Julian Goodare eds., 2014) (discussing Scottish Presbyterian objections to the religious test oaths).

[48] 1 FARRAND, *supra* note 40, at 230.

"general authority to execute the federal acts."[49] Hamilton proposed an elected "Governour" who would "serve during good behavior," and "have . . . the execution of all laws passed."[50] There was no oath for the chief magistrate and nothing resembling a Take Care Clause.

In late July, a Committee of Detail was formed to produce a draft constitution based on the votes and discussions that had occurred to date. The Committee was chaired by John Rutledge of South Carolina, and included Randolph, Oliver Ellsworth of Connecticut, Wilson, and Nathaniel Gorham of Massachusetts. Both Faithful Execution Clauses—the President's oath of office and the Take Care Clause—emerged during this process from a draft by Wilson, edited by Rutledge. Wilson and Rutledge agreed that:

> The Executive Power of the United States shall be vested in a single Person. His Stile shall be, "The President of the United States of America."[51]

They also agreed on an oath:

> Before he shall enter on the Duties of his Department, he shall take the following Oath or Affirmation, "I—solemnly swear, — or affirm, — that I will faithfully execute the Office of President of the United States of America."[52]

There was some difference about wording of what would become the Take Care Clause. Wilson wrote, likely borrowing directly from his home state's constitution and William Penn's famous charter:[53] "He shall take Care to the best of his Ability, that the Laws of the United States be faithfully executed."[54] Rutledge edited this to read: "It shall be his duty to provide for the due & faithful exec — of the Laws of the United States to the best of his ability."[55] The Committee of Detail reported a version that stated that the President "shall take care that the laws of the United States

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[49] *Id*. at 244.

[50] *Id*. at 292. Hamilton's longer outline from September reflecting the final draft has sometimes been mistakenly attributed to this June debate.

[51] 2 id. at 171.

[52] *Id*. at 172.

[53] See *infra* notes 225, 288, and 291, and accompanying text (New York and Pennsylvania provisions).

[54] *Id*. at 171.

[55] *Id*. See the discussion at *id*. at 163 n.17 for the authorship of Wilson and Rutledge.

be duly and faithfully executed."[56] Both versions—by use of the passive voice in Wilson's formulation and by referring to a "duty to provide for" in Rutledge's—seem to convey that the president would have an oversight role, making certain that other officials faithfully execute the laws.[57] But this of course does not exclude personally law execution by the president, especially since "the executive power" was vested in this office by the first sentence of Article II. The various proposals for what became the Take Care Clause all seem to contemplate that the laws to be executed would include, at a minimum—and perhaps at a maximum—acts of the national legislature.[58]

After more debate, and an addition to the oath of "preserve, protect and defend" language on motion of Madison and George Mason,[59] a Committee of Style was commissioned to produce a new draft. In early September, the committee—comprised of Hamilton, William Johnson of Connecticut, Rufus King of Massachusetts, Madison, and Gouvernour Morris—issued a draft with the following language of faithful execution and oaths:

> 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 judgment and power, preserve, protect and defend the constitution of the United States." . . . . [H]e shall take care that the laws of the United States be faithfully executed….[60]

Two changes of interest were made. First, the Committee of Style had deleted "duly and" before "faithfully" in the Take Care Clause, seemingly because duly executing was redundant with faithfully executing.[61] And the oath would be changed so that the President did not promise to use his or her "best . . . judgment and power," but rather "the best of [his or her] ability."[62] Convention notes do not reveal the reason for this change, but it does seem

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[56] *Id*. at 185.

[57] *See, e.g.*, Metzger, *supra* note 17, at 1875-76 (making this point about the "take care" formulation).

[58] See *supra* notes 48-50 and accompanying text.

[59] *Id*. at 427.

[60] *Id*. at 599-600.

[61] Farrand records Madison's notes from September 12 without the word "duly." *Id.* at 590, 600. Farrand also records a version from an editor of the convention proceedings on September 10 with the word "duly." *Id.* at 565, 574.

[62] U.S. CONST., art. II, § 1, cl. 8.

to eliminate some discretion by removing the words "judgment" and "power" and tends to emphasize instead a need for diligence and effort.

From the outset of its drafting, the presidential oath allowed affirming rather than swearing, showing that the framers were sensitive to the views of Protestant sects (such as the Quakers) who viewed oath taking as profane. Also notable is the clause that ended up in Article VI,[63] banning any "religious test" for any office under the Constitution—a short sentence that swept away centuries of English practice that had limited the holding of important government offices to people who would swear allegiance to and take the sacraments of the established Anglican Church.

Taking an oath of office was both commonplace and immensely significant. In seventeenth century England—even before the massive growth of government and offices of the eighteenth century—about one-twentieth of adult males held public office in a given year, and about one-half did so in a given decade.[64] Nearly all of these offices—whether constable, bailiff, alderman, aletaster, or the like—would have required oaths upon entry.[65] At the same time, one oath of office in particular had enormous constitutional importance for the country. The coronation oath, in which the new king or queen was required to pledge to govern according to law, was a conceptual key to England's uniquely-limited monarchy.[66]

There was a "dog that didn't bark" at the Convention. In the recorded debates, we find no one arguing that either of the Faithful Execution Clauses somehow empower the President. Instead, they were discussed as duties or restrictions. To wit, proposals that the chief executive have an absolute veto or a power to suspend legislation for a period of time were unanimously rejected by the convention,[67] but a qualified veto (which could be overridden by the Congress) was later accepted.

Legal scholarship has often overemphasized oaths as the basis for powers, framed most famously by Chief Justice John Marshall's invocation of his oath in *Marbury v. Madison* to underwrite the Court's power of judicial review.[68] But the Framing records, as well as prior history, reflect a

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[63] U.S. CONST., art. VI, cl. 3.

[64] Mark Goldie, *The Unacknowledged Republic: Officeholding in Early Modern England*, in THE POLITICS OF THE EXCLUDED, C. 1500-1800, at 153, 161-62 (Tom Harris ed., 2001).

[65] See *infra* Part II.

[66] *See, e.g.*, DAVID MARTIN JONES, CONSCIENCE AND ALLEGIANCE IN SEVENTEENTH CENTURY ENGLAND: THE POLITICAL SIGNIFICANCE OF OATHS AND ENGAGEMENTS 19 (1999).

[67] 1 FARRAND, *supra* note 40, at 98-104. It was James Wilson who proposed an absolute veto power for the President, and Pierce Butler who proposed a power to suspend existing laws. On these debates, see May, *supra* note 9.

[68] *See, e.g.*, Paulsen, *supra* note 3; Patrick O. Gudridge, *The Office of the Oath*, 20 CONST

belief that oaths were instead discretion-limiting, with significant binding effect in legal or political terms. Even Wilson, who was so skeptical of oaths' efficacy, acknowledged that he "was afraid they might too much trammel the Members of the Existing Govt in case future alterations should be necessary; and prove an obstacle…"[69]

B. Ratification Debates

As at Philadelphia, divergent views about the proper structure and power of a national executive were voiced during the ratification process in state conventions,[70] but there was little discussion of the Faithful Execution Clauses, and neither generated any sustained controversy. To the extent they were discussed, the clauses tended to be viewed as real limits on presidential power. In a *Federalist* essay, Madison wrote that "the executive magistracy is carefully limited . . . in the extent . . . of its power."[71] Hamilton suggested in another Publius number that, in the Take Care Clause, "the power of the President will resemble equally that of the king of Great Britain and of the governor of New York"[72]—two officials who were bound by oath to faithfully follow and execute standing law and certainly had no suspension authority. In a Virginia newspaper, "Americanus" ridiculed the claim that the president possessed "kingly" or "mighty powers" and cited the Take Care Clause in support.[73] James Wilson, in the Pennsylvania ratifying convention, did state that the Take Care Clause was a "power of no small magnitude," but that was in response to a claim that the president would be a mere "tool" of an over-powerful Senate.[74]

At the Massachusetts ratifying convention, former governor James Bowdoin listed the Presidential Oath Clause as one of the "great checks" in the document against abuse of power.[75] "A Jerseyman" wrote in a Trenton

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COMMENT. 387 (2003).

[69] 2 FARRAND, *supra* note 40, at 87.

[70] *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 151, 189-90, 286, 371 (2010).

[71] CLINTON ROSSITER ED., THE FEDERALIST PAPERS 309 (1961) (No. 48, Madison) [hereinafter FEDERALIST].

[72] *Id*. at 417 (No. 69, Hamilton).

[73] Americanus I, VA. INDEPENDENT CHRONICLE, Dec. 5, 1787, in 8 JOHN P. KAMINSKI ET AL. EDS., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 203 (1988) [hereinafter DOCUMENTARY HISTORY].

[74] Statement of James Wilson in Pennsylvania Ratifying Convention, Dec. 11, 1787, in 2 *id*. at 568.

[75] Statement of James Bowdoin in Massachusetts Ratifying Convention, Jan. 23, 1788, in

newspaper that the presidential oath "guarded" against abuse of office.[76] "A Native of Virginia" published a pamphlet which called the oath "an additional check upon the President."[77]

Oaths of office in general were discussed as real and meaningful checks on official behavior by figures such as Hamilton in a *Federalist* essay,[78] the influential essayist Brutus (likely Governor Clinton of New York),[79] and others.[80] There was some, but not much dissent from that theme.[81] "[N]o objection has been made," Hamilton wrote in another *Federalist* essay, "nor could they possibly admit of any," to the requirement that the president faithfully execute the laws.[82]

He exaggerated slightly: there was some dissent about the oath because it was not religious enough. For example, a South Carolina pastor complained at that state's ratification convention that the sacred, Christian character of the oaths of office was undermined by the "no religious test" clause.[83] Governor Oliver Wolcott of Connecticut told his state's convention for ratifying the Constitution that an oath of office "is a direct appeal to that God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence."[84] Edmund Pendleton

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6 *id*. at 1322.

[76] A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, in 3 *id*. at 149.

[77] Observations upon the Proposed Plan of Federal Government, Apr. 2, 1788, in 9 *id*. at 680-81.

[78] FEDERALIST, *supra* note 71, at 177 (No. 27, Hamilton) (referencing "the sanctity of an oath" of office).

[79] Brutus VI, N.Y. JOURNAL, Dec. 27, 1787, in 15 DOCUMENTARY HISTORY, *supra* note 73, at 112 (lamenting that state government officials "will be subordinate to the general government, and engaged by oath to support it").

[80] *See, e.g.*, Statement of John Smilie in Pennsylvania Ratifying Convention, Nov. 28, 1787, in 2 *id*. at 410 (giving as one reason that the national government will be too powerful that "[o]aths [are] to be taken to the general government").

[81] *See* Statement of Benjamin Rush in Pennsylvania Ratifying Convention, Nov. 30, 1787, in 2 *id*. at 433 ("The constitution of Pennsylvania, Mr. President, is guarded by an oath, which every man employed in the administration of the public business is compelled to take; and yet, sir, examine the proceedings of the Council of Censors and you will find innumerable instances of the violation of that constitution, committed equally by its friends and enemies.").

[82] FEDERALIST, *supra* note 71, at 463 (No. 77, Hamilton).

[83] Statement of Francis Cummins in South Carolina Ratifying Convention, May 20, 1788, in 27 DOCUMENTARY HISTORY, *supra* note 73, at 360.

[84] Speech of Oliver Wolcott to Connecticut Ratifying Convention published in *Connecticut Courant*, Jan. 14, 1788, in 3 DOCUMENTARY HISTORY, *supra* note 73, at 558.

agreed, writing to James Madison that "a belief of a Future State of Rewards & Punishments" is what "give[s] consciensious Obligation to Observe an Oath" of office.[85] A few other people made similar points.[86]

We found no evidence that either clause was viewed during ratification as allowing the President either policy-based or unconstitutionality-based authority to suspend execution of the laws, and a substantial amount of evidence cutting the other way. Wilson, for example, told the Pennsylvania convention that after being enacted, laws could not be left "a dead letter" but must be "honestly and faithfully executed."[87] Pendleton wrote that the president would "hav[e] no latent Prerogatives, nor any Powers but such as are defined & give him by law."[88]An anonymous writer during the New Jersey and Pennsylvania conventions stated similarly that the clause meant "complete execution," and then includes the oath of office as a further command for full execution.[89] Other observers explained that "faithful execution" was a legal limitation on executive discretion. One writer, Cassius (James Sullivan, a Massachusetts lawyer, later the governor), explained that the oath of faithful execution distinguished the President from a monarch, and that violation of it would "arrest" his career (civilly, not criminally) and be justiciable.[90]

A number of writers and speakers during ratification seem to have understood the Take Care Clause's reference to "laws" to mean statutes of Congress,[91] but whether it meant more than that was not expressly debated.

A final point of interest is that the ratification debates were filled with

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[85] Letter from Edmund Pendleton to James Madison, Oct. 8, 1787, in 10 *id*. at 1774.

[86] *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-88, at 152 (2010).

[87] Statement of James Wilson in Pennsylvania Ratifying Convention, Dec. 1, 1787, in 2 DOCUMENTARY HISTORY, *supra* note 73, at 450.

[88] Letter from Edmund Pendleton to James Madison, Oct. 8, 1787, in 10 *id*. at 1772.

[89] A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, in 3 *id*. at 148-49.

[90] Cassius VI, *To the Inhabitants of this State*, MASS. GAZETTE, Dec. 21, 1787, in 5 *id*. at 500 ("Instead of the president's being vested with all the powers of a monarch . . . he is under the immediate controul of the constitution, which if he should presume to deviate from, he would be immediately arrested in his career and summoned to answer for his conduct before a federal court . . . .").

[91] *See, e.g.*, Statement of James Wilson in Pennsylvania Ratifying Convention, Dec. 1, 1787, in 2 *id*. at 450; A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, in 3 *id*. at 148-49; Philadelphiensis IX, PHILADELPHIA FREEMEN'S J., Feb. 6, 1788, in 16 *id*. at 58.

references to public offices as "trusts,"[92] and officers as "servants," "agents," or "trustees" of the people,[93] language that implied a special obligation by the officeholder to act for the benefit of the public, not himself personally.

C. Linguistic Meaning

The phrase "faithfully execute" or its variants (such as "faithful execution") is not defined as a term of art in eighteenth century legal dictionaries.[94] But general dictionaries did agree on the meaning of the component words – and like the Convention and ratification evidence above reinforce the narrative of "faithful execution" as limiting device.

In some contexts, the word "faithfully" had and still has a religious significance, but there is no reason to think that was the sense in which it was used in the Constitution. According to Samuel Johnson's leading dictionary, faithfully meant, in its non-religious senses: "With strict adherence to duty. . . Without failure of performance. . . Sincerely; with strong promises. . . Honestly; without fraud. . . . Confidently; steadily."[95] Noah Webster's first dictionary, which slightly post-dates the Framing period, defines faithfully as "honestly, sincerely, truly, steadily."[96] Other dictionaries agree,[97] but with many omitting the usage as steadily or

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[92] FEDERALIST, *supra* note 71, at 350 (No. 57, Madison) (stating that rulers exercise a "public trust" for "the common good of the society"); Statement of Richard Harison in New York Ratifying Convention, July 14, 1788 (calling the powers lodged in government officials by the proposed constitution "a sacred trust"), in 23 DOCUMENTARY HISTORY, *supra* note 73, at 2171.

[93] *See, e.g.*, FEDERALIST, *supra* note 71, at 294 (No. 46, Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designated for different purposes."); Statement of Edmund Pendleton in Virginia Ratifying Convention, June 2, 1788, in 9 *id*. at 911 (referring to ratifying convention delegates as trustees). On writer referred to the president as the "supreme conservator of laws." Republicus, KENTUCKY GAZ., Mar. 1, 1788, in 8 *id*. at 448.

[94] *See, e.g.*, JACOB GILES, A NEW LAW-DICTIONARY (London, 10th ed., 1782); TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR GENERAL ABRIDGMENT OF THE LAW (London, 1771); RICHARD BURN, A NEW LAW DICTIONARY (London, 1792); JOHN COWELL, THE INTERPRETER OF WORDS AND TERMS, USED EITHER IN THE COMMON OR STATUTE LAWS OF THIS REALM (London, 1701).

[95] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan, 7th ed., 1783).

[96] NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (New Haven, Sidney's Press, 1806).

[97] *See, e.g.*, WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (Worcester MA, Isaiah Thomas, 1788) ("honestly, sincerely; steadily"); THOMAS SHERIDAN, A

confidently, and focusing on the meaning as sincerely, honestly, or true to one's trust or duty.[98] In a vast number of English and colonial legal precedents imposing oaths for faithful execution or directions to faithfully execute (see Part II below), faithfulness is described as a "duty" being owed to a "trust" or to the intent and meaning of a law or other legal directive. A sense of "confidence" seems inapposite, though steadiness has resonance because— as we will discuss—"diligently" was frequently used alongside faithfully to describe how officers should execute their office or laws.

To execute something meant in the eighteenth century, as it does today, to carry or put into effect or force, to enforce, to administer.[99] The oath requires the President to faithfully execute the office of the President. Implementing and carrying out the duties of the presidency, then, is what must be done faithfully. The Take Care Clause requires the President to faithfully execute "the laws"—to put them into force and effect. We discuss below whether "the laws" includes only statutes of Congress, or perhaps also the Constitution, international law, or various types of common law. But the core lesson from dictionaries is the same as what the evidence shows from the Convention and ratification debates.

D. The Other Components of the Clauses

Each of the clauses imposing faithful execution obligations contain additional language which could affect their meaning. Based on historical research, we have concluded as follows.

COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia, William Young, 1789) ("with strict adherence to duty; sincerely; honestly; confidently, steadily"); FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London, T. Evans, 1772) ("With strict adherence to duty, loyalty, and the discharge or an obligation or promise. Honestly, or without fraud. Fervently, earnestly, confidently."); WILLIAM CRAKELT, ENTICK'S NEW SPELLING DICTIONARY (London, Charles Dilly, 1788) ("sincerely, honestly, truly, steadily"); JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly, 1775) ("with strict adherence to duty; sincerely, honestly, steadily, confidently").

[98] *See, e.g.*, NATHAN BAILEY, DICTIONARIUM BRITANNICUM OR A MORE COMPLEAT UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1736) ("honestly, sincerely, trustly"); DANIEL BELLAMY, A NEW, COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (London, J. Fuller, 4th ed., 1764) (faithful: "loyal, just, upright, honest, sincere; true to one's trust"); A GENERAL AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Peacock, 1785) ("sincerely, honestly").

[99] Julian Davis Mortenson, *The Executive Power is the Power to Execute* (manuscript on file with authors).

1. "Take Care"

The original meaning of "take care" is relatively clear. A "take care" command is found in a vast number of legal documents in the centuries before 1787. In those contexts, "take care" was a directive from a superior to an agent, directing that special attention be paid to ensure that a command or duty was carried out. This usage is found in everything from corporate charters for businesses,[100] and colonial settlements,[101] to orders of the crown issued to colonial governors,[102] to statutory definitions of duties of an office,[103] and military orders of General George Washington. [104]

The language was also used in other contexts, and had a similar meaning. It was found in treaties, in which one of both sovereigns promised to accomplish something specific.[105] And it had meanings in everyday speech—to look out for or provide for another person, or to accomplish a task[106]—just as it does today.

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[100] S*ee, e.g.*, Charter of London Goldwiredrawers company, Patent Rolls 21 James I, pt. ii (1623-24), in 28 PUBLICATIONS OF THE SELDEN SOCIETY: SELECT CHARTERS OF TRADING COMPANIES, A.D. 1530-1707, at 132 (Cecil T. Carr, ed., 1913) (providing that the governor of the corporation should "take care (so far as in you lieth) that provision of bullion be duly made and brought in bona fide from foreign parts").

[101] S*ee, e.g.*, Charter of Massachusetts Bay granted by Charles I (1629), in 3 FRANCIS NEWTON THORPE ED., FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 1852 (1909) (directing that the governor and other corporate officers "shall applie themselves to take Care for the best disposeing and ordering of the generall buysines and Affaires" of the colony and company).

[102] S*ee, e.g.*, 1 LEONARD WOODS LABAREE, ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at 43-44 § 78 (1935) (noting frequent instructions to governors that "you are to take care that the Oaths of Obedience and Supremacy be administered to all persons whatsoever that bear any part of the government").

[103] S*ee, e.g.*, An Act for the More Effectual Suppression of Piracy, § 7, 11 William III, c. 7 (1698-99) (providing that the register of an ad hoc admiralty court for trying pirates "shall prepare all Warrants and Articles, and take care to provide all Things requisite for any Trial, according to the substantial and essential Parts of Proceedings in a Court of Admiralty").

[104] S*ee, e.g.*, General Orders (July 4, 1775), Founders Online, http://founders.archives.gov/documents/Washington/03-01-02-0027 ("All Officers are required and expected to pay diligent Attention, to keep their Men neat and clean . . . . They are also to take care that Necessarys be provided in the Camps and frequently filled up to prevent their being offensive and unhealthy.").

[105] *See, e.g.*, Treaty of Peace between Lord Protector Oliver Cromwell and Louis XIV of France (1655), art. XXIII (promising that both parties "shall take care that justice be done incorruptedly" to subjects of the other).

[106] *See, e.g.*, THE HARDSHIPS OF THE ENGLISH LAWS IN RELATION TO WIVES 18 (London,

2. "[T]he laws"

We have not reached a confident answer to the question whether, in its original meaning, the faithful execution of "the laws" commanded by the Take Care Clause encompasses only statutes of Congress, or something more—perhaps the Constitution, treaties, common law, or the law of nations, too. The issue does not seem to have been expressly taken up in recorded debates at Philadelphia or during ratification. Some scholars have plausibly suggested that "the laws" in Article II cross-references the Supremacy Clause. But even if true, this does not definitively resolve the question because the cross-reference could to be to "*the laws* of the United States which shall be made in pursuance" to the Constitution,[107] that is, statutes of Congress. Or "the laws" in Article II might encompass the three kinds of federal law that constitute "the supreme law of the land"[108]: the Constitution, congressional statutes, and treaties. We think either answer is plausible, and conclude that this question likely is one that will need to be resolved by structural inferences, functional considerations, liquidation in post-framing practice,[109] or subsequent judicial doctrine, rather than original meaning.

3. "Preserve, Protect and Defend"

The faithful execution aspect of the oath is conjoined with a promise to "preserve, protect, and defend the Constitution" "to the best of [the President's] ability."[110] As discussed above, this language was suggested to the Philadelphia Convention by James Madison and George Mason, and adopted without recorded debate. (In fact, most of what was said at Philadelphia was not recorded.[111]) Scholars have not uncovered any clear

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W. Bowyer, 1735) (stating that a mother "is more inclined by Nature, to take Care of the Children").

[107] U.S. CONST. art VI, cl. 2 (emphasis added).

[108] *Id*.

[109] *See* FEDERALIST, *supra* note 71, at 229 (No. 37, Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); *see also* Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (New York, R. Worthington 1884) (explaining that ambiguities in the Constitution "might require a regular course of practice to liquidate & settle the meaning").

[110] U.S. CONST. art II, § 2.

[111] James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary*

precedents or determinate meanings of this language, and our investigations have been largely unavailing. Unlike "faithful execution," this is not a term with clear historical roots.

The exact phrase seems to have been hardly ever used prior to the Philadelphia Convention.[112] But similar phrases—protect and defend, preserve and maintain, defend and preserve, support and protect, etc.—were commonly used over many centuries, in an array of contexts. This kind of language was frequently used to describe God's care for his church or for particular people.[113]

Similar language was also used to establish and buttress the Protestant basis of the English monarchy. For example, the coronation oath of Stuart kings certainly prefigured the language of Article II. James I swore to his bishops "to grant and to preserve" their churches and "Canonical Privileges," and to "protect and defend us, as every good King in his Kingdoms ought to be Protector and Defender of the Bishops and the Churches."[114] This was changed slightly by Parliament in the aftermath of the Glorious Revolution, so that monarchs were required to swear to "maintain the laws of God, the true profession of the gospel and the Protestant reformed religion established by law, and . . . preserve unto the bishops and clergy of this Realm . . . all such rights and privileges as by law do or shall appertain unto them."[115] Later statutes reinforcing the Protestant nature of the monarchy used similar language.[116]

Record, 65 TEX. L. REV. 1, 34 (1986).

[112] One of the few examples we found: THE CONFESSION AND CONVERSION OF THE CHIEFEST AND GREATEST OF SINNERS 109 (London, T. Hayes, 1662) ("But now I know (and for which I heartily and sincerely desire ever to praise thee) that thine anger is turned away, and that thine hand is stretched out still over me, to preserve, protect, defend, maintaine, and to do me good."). *See also* WILLIAM DODD, REFLECTIONS ON DEATH 53 (Dublin, 4th ed., Thomas Walker, 1773) (recounting a prayer to God to "preserve, protect and defend" orphans).

[113] *See, e.g.*, WILLIAM SHERLOCK, SERMONS PREACH'D UPON SEVERAL OCCASIONS: SOME OF WHICH WERE NEVER BEFORE PRINTED 76 (London, William Rogers, 1702) ("God will always preserve and protect the Christian Church, that the true Faith of Christ, and his true and sincere Worshippers shall never wholly fail in the World . . . . [W]e learn by that Example, how he will protect, defend, and support the Christian Church to the end of the world . . . "); THOMAS DEACON, A BOOK OF COMMON PRAYER OR CLEMENTINE LITURGY ACCORDING TO THE USE OF THE PRIMITIVE CATHOLIC CHURCH (London 1734) (reprinting a "Prayer of Benediction": " . . . but sanctify and keep them, protect, defend, and deliver them from the Adversary and from every enemy; guard their habitations, and preserve their going out and their coming in . . . . . ").

[114] THE HISTORY OF PUBLICK AND SOLEMN STATE OATHS 15-16 (London, A. Bettesworth, 1716).

[115] An Act for establishing the Coronation Oath, 1 William & Mary sess. 1, c. 6.

[116] *See, e.g.*, Security of Succession Act (or Abjuration Oath Act), 13 & 14 William III, c.

Language of protecting, defending, maintaining, supporting, or preserving was also used in the sense of military support or at least physical protection from harm. Letters of protection or safe conduct given by English monarchs used this language,[117] as did treaties of military alliance.[118] Perhaps the most interesting examples of the latter usage are found in treaties of the United States negotiated in the pre-constitutional period.[119] Somewhat similarly, it was frequently said that monarchs had to duty to protect and defend (or synonyms) their subjects from violence or oppression.[120]

Finally, we see language evocative of the later Article II formulation in some oaths required of governors and other state and national officials in the post-independence era. Some were directed to protecting and defending the constitution. For example, the 1776 South Carolina Constitution required state officials to swear to "support, maintain, and defend the constitution of South Carolina."[121] Other oaths, framed during the

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6 (1702) (requiring an oath to, among other things, "support, maintain and defend the Limitation and Succession of the Crown, against him the said James," the Catholic pretender).

[117] *See, e.g.*, 1 CALENDAR OF THE CLOSE ROLLS, EDWARD III, A.D. 1327-1330, at 200-05 (London, Her Majesty's Stationery Office 1896) ("To the sheriff of Oxford and Berks. Order to cause proclamation to be made prohibiting any one, under pain of forfeiture, from invading by armed force the abbey of Abyndon . . . or any of its manors, or from attempting anything to the breach of the king's peace, or from inflicting damage or annoyance upon the abbot and monks in their persons and goods . . . . The sheriff is ordered to maintain, protect, and defend the abbot and convent and men from such oppressions and wrongs to the best of his power.").

[118] Treaty of mutual defence between King George I and Prince Charles VI, Emperor of Germany (1716). If either's territory is invaded, the other will come to aid so that territory "be preserved, defended, and maintained inviolable, against all aggressors" (art. II).

[119] *See, e.g.*, 1778. US-France Treaty of Amity and Commerce, art 6 ("The most Christian King shall endeavour by all the means in his Power to protect and defend all Vessels and the Effects belonging to the Subjects, People or Inhabitants of the said United States . . ."); id. art. 7 ("In like manner the said United States and their Ships of War sailing under their Authority shall protect and defend, conformable to the Tenor of the preceeding Article, all the Vessels and Effect belonging to the Subjects of the most Christian King . . ."). The "protect and defend" language comes from Model Treaty or Plan of 1776, adopted by the Continental Congress. In addition to the treaty with France, it also appeared in a 1782 treaty with the Netherlands and a 1785 treaty with Prussia.

[120] For example, Algernon Sidney, the seventeenth century republican martyr revered by many American framers, wrote that government must be designed so that magistrates "might not be able to oppress and destroy those [the people] they ought to preserve and protect." ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 561 (Thomas G. West ed., Liberty Fund 1996) (first published 1698, written circa 1681-83).

[121] S.C. CONST. (1776), art. XXXIII. *See also* Virginia, An Ordinance to enable the present Magistrates and Officers to continue the administration of Justice (1776) (requiring state officeholders to swear to "be faithful and true to the Commonwealth of Virginia; that

exigencies of civil war, had military and loyalty connotations. Connecticut, for example, in 1776 required state office holders to swear to "maintain and defend the Freedom, Independence and Privileges of this State against all open Enemies or traitorous Conspiracies whatsoever."[122] And the Continental Congress required first all army officers, and then also all civil officers of the national government, to take an oath "to the utmost of my power, [to] support, maintain, and defend" the United States.[123]

We discern no clear and determinate meaning emerging from these various predecessors of the "preserve, protect, and defend" oath. As suggested by the plain or dictionary meaning of the words, the phrase seems to suggest both a conceptual fidelity to the Constitution and its principles and a kind of magisterial and even martial promise of physical protection as well. But since that protection is pledged to a document, rather than a state, community, or particular persons, it is hard to say exactly how this protective sense should be understood. As discussed above, oaths were not viewed during framing and ratification as sources of power, but rather as restraints. Thus the power to carry out these meanings would likely have to come from other parts of the Constitution or other law.

* * *

Since the meaning of "take care" is clear, and the meaning of "preserve, protect and defend" is not made determinate by historical antecedents, Philadelphia drafting history, or ratification debates, we proceed in the rest of this paper to focus solely on the language of "faithful execution" in the Take Care Clause and Presidential Oath Clause. We analyze the "faithful execution" component of these clauses together not only because they share diction (which "full faith and credit" clearly does not) but because we found such commands and oaths to occur in tandem so often in our historical investigations.

The brief survey of the state of play during the Convention and ratification debates, and in American culture circa 1787-88, illuminates something about the original meaning of the Faithful Execution Clauses: that these were clauses of limitation, not empowerment. Even this is more content based in original meaning than anyone else has squeezed out of the clauses, which are otherwise used too often as rhetoric unmoored from

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I will, to the utmost of my power, support, maintain, and defend, the Constitution and Government thereof").

[122] ACTS AND LAWS MADE AND PASSED BY THE GENERAL COURT OR ASSEMBLY OF THE STATE OF CONNECTICUT (New-London, Timothy Green, 1776), EAII no. 14691.

[123] 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 893-94 (1906); 10 *id.* at 114-16.

historical provenance. But there is so much more history to these clauses. We introduce that history now in Part II.

II. "FAITHFUL EXECUTION" FROM MAGNA CARTA TO THE U.S. CONSTITUTION

A vast array of English public and private officers took oaths or were bound by commands of faithful execution of office and law. We start our history in the medieval period, around the time of Magna Carta. Oaths of office and directives to officeholders certainly long pre-date medieval England, having been found, for example, in both Greek and Roman contexts more than a millennium earlier. But we are here concerned with models and strategies of English governance, not with a comparative history, because they are most probative of the original meaning of the U.S. Constitution.

A. The Medieval Period and the Multiplicity of Oaths

Oaths to faithfully execute or perform the duties of an office date back in English law to at least the 1200s. In that and the following century, we see mayors,[124] bailiffs,[125] coroners,[126] wardens,[127] keepers of the rolls of

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[124] *See, e.g.*, ADOLPHUS BALLARD & JAMES TAIT, BRITISH BOROUGH CHARTERS, 1216-1307, at 366 (1923) (provision of 1284 royal charter for Conway that the mayor "shall swear to . . . faithfully do those things which pertain to the mayoralty in the same borough"); *id.* at 365 (provision of 1299 royal charter for Northampton that the mayor chosen at Michaelmas each year "shall then and there take his oath to execute faithfully those things which pertain to the mayoralty of the aforesaid town . . . ."); CALENDAR OF LETTER-BOOKS PRESERVED AMONG THE ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON: LETTER-BOOK C. CIRCA A.D. 1291-1309, at 174 (Reginald R Sharpe ed., London, 1901) (reporting 1303 installation ceremony for new mayor of London at which an oath was "there taken of him to keep the City well and faithfully to the use of Sir Edward, the illustrious King of England, and his heirs, &c., and to do right and justice to poor and rich alike, &c").

[125] Statutes of Exeter, 14 Edward I (1285-86) (requiring bailiffs "to swear, that they will well and faithfully do that which they shall give them in charge on the King's Behalf"); BALLARD & TAIT, *supra* note 124, at 355 (provision of 1284 royal charter for Cardigan that the bailiff "shall take his oath before the same constable for the performance and faithful execution of those things which pertain to the bailliwick of the same town").

[126] *Id.* at 360 (provision of 1284 royal charter for Hull that the coroner "shall swear that he will faithfully do and keep those matters which pertain to the duty of a coroner in the borough aforesaid").

[127] *Id.* at 366 (provision of 1299 royal charter for Hull that the warden before assuming office "shall first take his corporeal oath before the aforesaid burgesses on the holy gospels of God that he will preserve undiminished all the liberties granted by us to the same

Chancery,[128] tax collectors,[129] and many other officers required, as a condition of taking office, to swear an oath to execute it well and faithfully. Magna Carta required such an oath. The great charter imposed on King John in 1215 provided that barons would monitor the king's compliance with the charter's terms, declaring that "the said twenty-five [barons] shall swear that they shall faithfully observe"—*fideliter observabunt*—"all that is aforesaid, and cause it to be observed with all their might." [130]

It was not only persons holding what we would see as traditional public offices who were required to take such oaths, either. Holders of only quasi-public offices like brokers of woad (a flowering plant valued for dye-making),[131] "weighers of the Great Balance" (the public scale in a town's market square) appointed by a pepper and spice merchants guild,[132] and surgeons[133] also took oaths for the faithful execution or performance of

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burgesses and borough, and will faithfully and diligently do all things pertaining to the office of warden in the aforesaid borough").

[128] 4 CALENDAR OF THE CLOSE ROLLS, EDWARD II, A.D. 1323-1327, at 386 (London, Her Majesty's Stationery Office 1898) (recording that the king committed rolls of chancery to king's clerk Master Henry de Clyf, and Henry "took oath to execute the office well and faithfully"); 3 CALENDAR OF THE CLOSE ROLLS, EDWARD III, A.D. 1333-1337, at 295 (London, Her Majesty's Stationery Office 1898) (recording that the king committed rolls, writs, and memoranda of chancery to Sir Michael de Wath, clerk, "to hold in the same manner as Master Henry de Clyf, deceased, had that custody," and Michael "took the oath to exercise that custody well and faithfully").

[129] 3 CALENDAR OF THE CLOSE ROLLS, EDWARD III, A.D. 1333-1337, at 676 (London, Her Majesty's Stationery Office 1898) (recording that the king had in letters patent appointed "John Dyn and John de Hemenhale . . . to seek and receive the fifteenth and tenth granted to him by the laity in the last parliament at Westminster, in co. Essex, and to answer therefor at the exchequer at certain days about to come," and that the king had appointed "the abbot of Waltham Holy Cross . . . to receive their oath to well and faithfully execute everything contained in the said letters").

[130] Magna Carta ch. 61, in WILLIAM SHARPE MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 467 (2d ed. 1914) (providing Latin original and English translation).

[131] CALENDAR OF LETTER-BOOKS PRESERVED AMONG THE ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON: LETTER-BOOK D. CIRCA A.D. 1309-1314, at 258 (Reginald R Sharpe ed., London, 1902) (recording that Fulbert Pedefer de Wytsand, elected by merchants to be broker of woad, "was presented and sworn before the Mayor to faithfully execute the office between buyer and seller to the west of London Bridge and not elsewhere").

[132] CALENDAR OF LETTER-BOOKS PRESERVED AMONG THE ARCHIVES OF THE CORPORATION OF THE CITY OF LONDON: LETTER-BOOK H. CIRCA A.D. 1375-1399, at 22 (Reginald R Sharpe ed., London, 1907) (recording "John Lokes elected by good men of the mistery of Pepperers to be weigher of the Great Balance, and sworn before John Warde, the Mayor, to faithfully execute the office").

[133] MEMORIALS OF LONDON AND LONDON LIFE IN THE XIIITH, XIVTH AND XVTH

office.

Not all offices had such simple oaths requiring only faithful or due execution. Members of the king's council, for instance, took a detailed oath to "well and truly . . . counsel the king," "guard and maintain and . . . preserve and restore the Rights of the King," keep secrets discussed in council, act impartially, and eschew bribes.[134] Similarly, sheriffs took an oath which detailed specific responsibilities of the office, required impartiality, and barred self-dealing.[135] These oaths effectively specified what it meant to faithfully execute that particular office.[136] But at the same time, use of government office for private gain was widespread; many medieval officials paid the monarch for their offices and then farmed them out to deputies for a fee, while keeping most of the fees and emoluments of office for themselves.[137]

Oaths—whether simple or more detailed—were sometimes supplemented by sovereign commands directing how officers were to execute their offices. And faithfulness in the duties of the office was a

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CENTURIES 337 (Henry Thomas Riley ed., London, 1868) (reporting that in 1369 several named men were sworn as master surgeons of the City of London that "they would well and faithfully serve the people, in undertaking their cures" and "faithfully to do all other things touching their calling").

[134] 1 STATUTES OF THE REALM 348. *See also* James F. Baldwin, *Antiquities of the King's Council*, 21 ENG. HIST. REV. 1, 2-4 (1906) (reprinting and discussing Latin and French versions of the oath).

[135] 1 STATUTES OF THE REALM 247 (requiring sheriffs to swear "well and truly you will serve the King in the Office of Sheriff, and to the Profit of the King will do in all Things which to you belong to do and his Rights, and whatever to his Crown belongeth, you will truly guard, and that you will not assent to the Decrease or Concealment of the King's Rights or Franchises; . . . And the Debts of the King, neither for Gift nor for Favour will you respite . . .; and that lawfully and right you will treat the People of your Bailiwick, and to every one you will do right, as well to the Poor as the Rich, in that which to you belongeth . . . .").

[136] Indeed, John Fortescue, Chief Justice of King's Bench, wrote in his famous dialogue *De Laudibus Legum Angliae* (Commendation of the Laws of England, circa 1543), that a sheriff must swear "well, faithfully and indifferently to execute and do his duty." [Sir John] FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE: THE TRANSLATIONS INTO ENGLISH 81 (Cambridge, J. Smith printer, A. Amos trans., 1825).

Philip Hamburger, writing about judicial oaths in English history, concludes similarly that differing forms of oaths for different judges likely reflected policy concerns particular to certain offices, and that a failure in some judicial oaths to mention the baseline requirement of every judicial office—faithful adherence to English law—should not be understood to mean that requirement had been dispensed with. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 106-11 (2008).

[137] *See* KOENRAD WOLTER SWART, SALE OF OFFICES IN THE SEVENTEENTH CENTURY 45-48 (1949).

frequent directive. In 1299, for example, the King-in-Parliament ordered sheriffs in Sumerset and Dorset, in order to prevent debased coin from entering England, in each port to "choose two good and lawful men . . . who, together with the Bailiffs of the same Port, shall arrest and search, faithfully and without sparing, all those who shall arrive within their Wards."[138] Henry de Bracton's *De Legibus et Consuetudinibus Angliae (The Laws and Customs of England*, circa 1230s-1260) reports that the king's writ to his justices ordered them to "faithfully and diligently apply yourself to the execution of these matters so that we ought deservedly to commend both your loyalty and your diligence in this matter."[139] Later, in 1346, a statute of Parliament which survived until the late nineteenth century,[140] directed all the king's justices to "henceforth do equal Law and Execution of right to all our Subjects, rich and poor, without having regard to any Person," and required an oath "they shall not from henceforth, as long as they shall be in the Office of Justice, take Fee nor Robe of any Man, but of Ourself, and that they shall take no Gift nor Reward by themselves, nor by other, privily nor apertly, of any Man that hath to do before them by any Way, except meat and drink, and that of small value."[141]

In the medieval period, these oaths were not just widespread but had tremendous importance in legal, political, religious, and social life. In the feudal system, the obligation of vassal to lord was marked by an oath of fealty which, as Bracton relates, involved swearing before God that one's body, goods, and honor were at the disposal of the lord.[142] According to

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[138] 1 STATUTES OF THE REALM 131-32.

[139] Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, *available at* http://bracton.law.harvard.edu/cgi-bin/brac-hilite.cgi?Unframed+English+2+309+faithfully.

[140] Enid Campbell, *Oaths and Affirmations of Public Office Under English Law: An Historical Retrospect*, 21 J. LEGAL HIST. 1, 5 (2000).

[141] 20 Edward III, c. 3, 1 STATUTES OF THE REALM 303-04. Scholars have noted the biblical roots of part of this command. *See, e.g.*, Richard M. Re, *"Equal Right to the Poor,"* 84 U. CHI. L. REV. 1149, 1158 (2018) (quoting Leviticus 19:15 (King James Version) ("Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty.") and Deuteronomy 1:17 (King James Version) ("Ye shall not respect persons in judgment; but ye shall hear the small as well as the great.")). And both Re and Hamburger, *supra* note 136, have written illuminatingly about the significance of English judicial oaths. There are likely points of contact between their projects and ours that could be explored in future work.

[142] Bracton, *supra* note 139, http://bracton.law.harvard.edu/cgi-bin/brac-hilite.cgi?Unframed+English+2+232+faithfully. Coke reports the oath of homage or fealty from a vassal to his lord as follows: "I become your man from this day forward of life and limbe, and of earthly worship, and unto you shall bee true and faithfull, and beare you faith for the Tenements that I claime to hold of you (saving the faith I owe unto our Sovereigne

Bracton, the oath often added that the vassal would serve his lord and his heirs "faithfully and without diminution, contradiction, impediment, or wrongful delay."[143] Vassalage to a specific lord can be seen as a kind of office, and so perhaps there is little real distinction between an oath of fealty and an oath of faithful execution of office. In addition to fealty to one's immediate lord, English law also imposed oaths of fealty to the king on all adult male subjects,[144] as well as specific commands of fealty to the crown in many legal documents such as commissions and charters.[145]

At the same time, barons, earls, church officials and other leading men of the realm desired that monarchs respect custom and law, rather than rule arbitrarily. There thus emerged the practice of the coronation oath to which we alluded in Part I, a series of formal promises made at the time monarchical investiture. In 1216, Henry II's coronation oath, which apparently was quite similar to his predecessors', involved three promises (*tria precepta*), to "preserve peace and protect the church, to maintain good laws and abolish bad, to dispense justice to all."[146] But soon coronation oaths changed somewhat.[147] In addition to promising to preserve the church and clergy, do rightful justice with mercy and discretion, and strengthen and defend the laws concerning worship, monarchs were pointedly required to affirm that they would grant and keep both the people's and clergy's laws and customs.[148] While monarchs and their intellectual defenders claimed that these duties made a king accountable only to God, an important strand of English thought contended that the king was subservient to the law and, as confirmed in the coronation oath, owed a duty to the people to govern well and for their benefit.[149] On this view of the coronation oath, it

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Lord the King)." EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: OR A COMMENTARY UPON LITTLETON, § 85 at 64-65 (London, printed by M.F.I.H. and R.T., 1633).

[143] Bracton, *supra* note 139, http://bracton.law.harvard.edu/cgi-bin/brac-hilite.cgi?Unframed+English+2+232+faithfully.

[144] Caroline Robbins, *Selden's Pills: State Oaths in England, 1558-1714*, 35 HUNTINGTON LIBRARY Q. 303, 308 (1972) (oath of fealty to the monarch existed from the time of William the Conqueror until the Revolution).

[145] BALLARD & TAIT, *supra* note 124, at 121, 367.

[146] H.G. Richardson, *The English Coronation Oath*, 23 TRANSACTIONS OF THE ROYAL HIST. SOCIETY 129, 129 (1941) (summarizing the oath); Coronation of Richard I (1189), in LEOPOLD G. WICKHAM LEGG, ED., ENGLISH CORONATION RECORDS 51-52 (1901).

[147] Richardson, *supra* note 146, at 146-47.

[148] *See, e.g.*, Little Device for the Coronation of Henry VII (circa 1487), in LEOPOLD G. WICKHAM LEGG, ED., ENGLISH CORONATION RECORDS 230 (1901). *See also* Introduction, in *id*. at xxxi.

[149] *See* JONES, *supra* note 66, at 18-20.

undergirded and confirmed a constitutionally limited monarchy.

B. The Early Modern Era, the Tudors, and More Specification of Faithful Execution

The early modern period saw many oaths for the faithful execution of office, both those contained in statutes or custom. In a development that would impact the Americas soon, the royal charters of some of the new overseas trading corporations required oaths of faithful execution for their officers and directors, too.[150]

Whether in oaths or in other statutory directives to officeholders, Parliament continued to specify what faithful execution meant for various offices, as well. Commissioners charged with tax collection, building sewers, readying castles and fortifications, among other duties, were obliged to act diligently, truly, effectually, and impartially.[151] Parliament started adding requirements to oaths of office or specifications of duties that the holder stay within his authority and abide by the intent of the legislation empowering him.[152] Other statutes charged officeholders, usually by oath,

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[150] *See* Charter of The Governor and Company of Merchants of London, Trading into the East-Indies (1660), in JOHN SHAW, ED., CHARTERS RELATING TO THE EAST INDIA COMPANY FROM 1600 TO 1761, at 4 (Madras, R. Hill, 1887) (requiring that the governor take an oath "well and truly execute the Office of Governor of the said Company," the deputy take an oath "well, faithfully and truly to execute his said Office of Deputy to the Governor of the said Company," and committee members take an oath "well and faithfully perform their said Office").

[151] *See, e.g.*, The Subsidye, § 5, 6 Henry VIII, c. 26 (1514-15) (commissioners charged with raising the king's revenue "shall truely effectually and diligently wythout omyssyon favour affeccon fere drede or malice execute" the office); 23 Henry VIII, c. _ (1531-32) (commissioner for sewers to take oath "That you and to your cunning, wit, and power shall truly and indifferently execute the Authority given by this Commission of Sewers, without any favour, affection, corruption, dread, or malice, to be born to any manner of person or persons . . . ."); An Acte for the Reedyfieng of Castelles and Fortes, and for thenclosing of Grownde from the Borders towardes and against Scotlande, § 2, 2 & 3 Philip & Mary, c. 1 (1555) (providing that the crown shall appoint commissioners in northern areas of England to inquire into state of castles, fortresses and the like, to plan their upkeep, to tax and assess landowners for that purpose. Commissioners must take corporal oath that to your "cuning witt & power shall truly & indifferently execute thaucthorite to your gyven by this Comission, w[ith]out any favour affeccon corruption dreade or malice to bee borne to any maner pson or psones . . . .").

[152] *See, e.g.*, An Acte for a Subsidie to the Kyng and Que[en], § 6, 2 & 3 Philip & Mary, c. 23 (1555) (commissioners for examining value of people's holdings and assessing a tax are directed that they "shall truly effectually and diligently for their pte execute theeffecte of this [present] Acte accordyng to the tenor thereof in ev[er]y behalfe, and none otherwise, by any meanes, w[ith]out omission favor dreade malice or any other thynge to be attempted and done by them or any of them to the contrary thereof"); An Acte for the graunte of one

to take no profits from the office beyond what was allowed by law or custom.[153] The important Sale of Offices Act of 1551 banned the sale of any public office relating to the administration of justice, taxation and customs, the surveying or auditing of the king's properties, or the keeping of castles and fortifications.[154] An earlier statute had barred any senior crown officeholder—"the Chancellor, Treasurer, Keeper of the Privy Seal, Steward of the King's House" and the like—from appointing a lower officer "for any Gift or Brocage, Favour or Affection."[155] And statutes or royal directives also sometimes specified that an officeholder's failure to well and faithfully execute the office—sometimes phrased as a failure to demean oneself well in office—were cause for removal.[156] Later, it would be said that this condition was implied by law in every public office.[157]

Henry VIII's break from the Church of Rome produced the most consequential developments in this period, for both officeholders and

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entier Subsidie and Twoe Fifteenes and Tenthes graunted by the Temporaltie, § 8, 29 Eliz. c. 8 (1586-87) (same).

[153] *See, e.g.*, An Acte for the swearinge of Under Sherifes and other Under Officers and Mynisters, § 1, 27 Eliz. c. 12 (1584-85) (providing that undersheriffs, bailiffs, and their deputies take a corporal oath that they "shall not use of exercise the office of . . . corruptly during the tyme that I shall remaine therein, neither shall or will accept receive or take by any Colour Meanes or Devise whatsoever, or consent to the taking of, any maner of Fee or Rewarde of any person or persons, for the impanelling or returning of any Inquest Jurie or Tales in any Court of Record for the Queens, or betwixt partie and partie, above Two shillinges or the vallue thereof, or such Fees as are alowed and appoynted for the same by the Lawes and Statutes of this Realme . . . .").

[154] 5 & 6 Edward VI, c. 16 (1551).

[155] 12 Richard II, c. 2 (1388). Brocage meant "[t]he corrupt farming or jobbing of offices; the price or bribe paid unlawfully for any office or place of trust." OXFORD ENGLISH DICTIONARY ONLINE, www.oed.com.

[156] *See, e.g.*, An Acte for the swearinge of Under Sherifes and other Under Officers and Mynisters, §§ 4-5, 27 Eliz. I, c. 12 (1584-85) (providing that any undersheriff, bailiff, or deputy who violates the statute and its oaths forfeits the office, and this can be enforced by justices of the peace and justices of the assize); Charter of The Governor and Company of Merchants of London, Trading into the East-Indies (1660), in SHAW, *supra* note 150, at 4 (stating that the "Governor, not demeaning himself well in his said Office, we will to be removeable at the Pleasure of the said Company"). An earlier statute directed justices of the assizes to hear and determine complaints at the suit of the king or a private party against sheriffs, escheators, bailiffs, and other offices who abused their offices. *See* 20 Edward III, c. 6 (1346).

[157] *See* 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW, at § Offices & Officers(M) (Dublin, Luke White, 1793) ("It is laid down in general, that if an Officer acts contrary to the Nature and Duty of his Office, or if he refuses to act at all, that in these Cases the Office is forfeited. . . . for that in the Grant of every Office it is implied, that the Grantee execute it faithfully and diligently.").

ordinary subjects. Mandatory religious test oaths—enforcing Anglican orthodoxy, denying the power and jurisdiction of the Church of Rome, and pledging fealty to the English monarch as the head of both church and state—became an enormously significantly part of English public life for centuries to come.[158]

C. Faithful Execution and Oaths of Office in the Tumultuous Seventeenth Century

1. Within the Realm

Many English offices continued to have requirements, by oath or otherwise, of faithful execution of duties. Examples of offices of this kind are varied, from officers of trading, merchant, or exploration corporations,[159] to wardens, porters, and keepers of the gates of London,[160] commissioners of the excise,[161] auditors of the kingdom's accounts,[162]

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[158] *See* An Acte for the establishment of the Kynges succession, 25 Henry VIII, c. 22 (1534); An Acte ratyfienge the othe [oath] that everie of the Kynges Subjectes hath taken and shall hereaftr be bounde to take, 26 Henry VIII, c. 2 (1534); An Acte conc[e]nynge the Kynges Highnes to be supreme heed of the Churche of Englande, 26 Henry VIII, c. 1 (1534); An Act Extinguishing the authority of the bishop of Rome, 28 Henry VIII, c. 10 (1536); An Acte restoring to the Crowne thauncyent Jurisdiction over the State Ecclesiasticall and Spirituall (Act of Supremacy), 1 Eliz. I, c. 1 (1558); An Acte for thassurance of the Quenes Ma[jesty's] Royall power of all Estates and Subjectes within her Highnes Dominions, 5 Eliz. I, c. 1 (1561).

[159] Charter of the Spanish Company (1605), in THE SPANISH COMPANY, ED. PAULINE CROFT (London, 1973) (providing that "assistants" of the corporation "before they be admitted to the execution of their offices shall take a corporal oath . . . that they and every of them shall well and faithfully perform their offices of assistants in all things concerning the same"); Charter of the East India Company (1609), in SHAW, *supra* note 150, at 21 (providing that the governor must take an oath to "well and truly execute the Office of Governor of the said Company" and the deputy to the governor to "well, faithfully and truly to execute his said Office ").

[160] 2 JOHN STOW, A SURVEY OF LONDON: REPRINTED FROM THE TEXT OF 1603, at 146 (C. L. Kingsford, ed., 1908) (recording that these officials took an oath before assuming office "[t]hat they should well and faithfully keep" the gates and ports of entry).

[161] An Ordinance and Declaration Touching the Sallery and Allowance to be made to the Commissioners and Auditors for the Excise (Sept. 18, 1643), in 1 C. H FIRTH & R. S. RAIT, EDS., ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 288 (1911) ("You shall sweare to be faithfull and true in your place of Commissioner for the Excise . . . according to the Ordinance of both Houses of Parliament in that behalfe made. You shall according to your knowledge execute the same diligently and faithfully, having no private respecte to your selfe in prejudice of the Common-wealth.").

[162] *See* An Ordinance for taking and receiving of the Accompts of the whole Kingdom (Feb. 22, 1643/44), in 1 FIRTH & RAIT, *supra* note 161, at 388 ("I, A.B., do swear, that

surveyors of confiscated church lands,[163] excise officers,[164] customs officers,[165] tax assessors,[166] brokers between merchants,[167] and officers of

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according to my best skill and knowledge, I shall faithfully, diligently, and truly demean my self, in taking the Accompts of all such persons as shall come before me, in execution of an ordinance, entituled [this act named], according to the tenour of the said Ordinance : And that I shall not for fear, favour, reward or affection, give any allowance to conceal, spare, or discharge any. So help me God."); An Act for Appointing and Enabling Commissioners to Examine Take and State the Publicke Accounts of the Kingdome, 2 William & Mary, c. 11 (1690) (providing that, to ensure that moneys raised for war with France were expended for correct purposes, named individuals appointed "Commissioners for takeing of the Accounts," who shall "Sweare That according to the best of my Skill and Knowledge I shall Faithfully Impartially and Truely demeane myselfe in examining and taking the Accounts of all such Summe .. . of Money and other Things brought or to be brought before me in Execution of one Act [this act named] to examine take and state the Publicke Accounts of the Kingdome according to the Tenour and Purport of the said Act").

[163] An Ordinance for the abolishing of Archbishops and Bishops (Oct. 9, 1646), in 1 FIRTH & RAIT, *supra* note 161, at 881 ("I will faithfully and truely according to my best skill and knowledge, execute the place of a Surveyor, according to the purport of an ordinances [this named act]. . . .I shall justly and faithfully execute . . . . without any gift or reward, directly or indirectly, from any person or persons whatsoever.").

[164] An Tenures Abolition Act, § 47, 12 Charles II, c. 24 (1660) ("That no Person or Persons shall be capable of intermeddling with any Office or Imployment relating to the Excise, until he or they shall" take the oath: "You shall swear to execute the Office of truly and faithfully, without Favour or Affection, and shall from Time to Time true Account make and deliver to such Person or Persons as his Majesty shall appoint to receive the same, and shall take no Fee or Reward for the Execution of the said Office from any other Person than from his Majesty."); A Grant of certain Impositions upon Beer, Ale, and other Liquors, and for the Increase of his Majesty's Revenue during his Life, § 33, 12 Charles II, c. 23 (1660) (same).

[165] An Act for preventing Frauds, and regulating Abuses in his Majesty's Customs, § 33, 13 & 14 Charles II, c. 11 (1662) (providing that no person "shall hereafter be employed or put in Trust in the Business of the Customs, until he shall first have taken his Oath . . . for the true and faithful Execution and Discharge, to the best of their Knowledge and Power, of the several Trusts").

[166] An Act for granting a Subsidy to his Majesty, § 15, 22 & 23 Charles II, c. 3 (1670-71) (providing that assessors under this tax law must take an oath "well and truely to execute the Duty of an Assessor . . . [and] you shall spare noe Person for Favour or Affection, nor any person grieve for Hatred or ill Will").

[167] An Act to Restraine the Number and Ill Practice of Brokers and Stock-Jobbers, 8 & 9 William III, c. 32 (1696-97) (providing that brokers in London and Westminster must be licensed, must follow specified practices, must take "Corporal Oath . . . That I will truely and faithfully execute and performe the Office and Employment of a Broker betweene Party and Party . . . without Fraud or Collusion to the best of my Skill and Knowledge and according to the Tenour and Purport of the Act [this act named]," and "enter into one Obligation [bond] to the Lord Mayor Citizens and Comonalty of the City of London," the obligation of which is to "truely use execute and performe the Office and Employment of a Broker between Party and Party without Fraud Covin or any corrupt or crafty Devices

merchant or craft guilds.[168] One can get some sense of what the relevant words meant by observing that in statutes and other legal commands, faithful execution was often linked with true, diligent, well, due, skillful, careful, and impartial discharge of the duties of office. One also sees misgovernment by ministers and other royal officials condemned, during impeachment proceedings or in other fora, as "unfaithfulness and carelessness,"[169] "contrary to his oath and the faith and trust reposed in him,"[170] and "contrary to the laws of this kingdom, and contrary to his oath" "for his faithful discharge of his said office."[171] Reviews of parliamentary impeachments show a "public trust theory" at work, in which "acting contrary to oath, to the duty of the official position, to the great trust reposed in the accused by the King, and to the laws of the Realm" were key elements.[172]

During the Parliament's long struggle with Charles I, which ended with his trial and execution in 1649, Parliament frequently remonstrated that malicious ministers surrounding the king had failed to duly execute laws of land[173] and had betrayed their "trusts" by acting against Parliament and the common good.[174] And finally, Charles was executed because, among other things, "trusted with a limited power to govern by and according to the laws

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according to the Purport true Intent and Meaning of [this act named]").

[168] An Act for regulating the makeing of Kidderminster Stuffes, § 1, 22 & 23 Charles II, c. 8 (1670-71) (providing that persons who are master weavers in the parish of Kidderminster will be appointed to offices of President, Warden, or Assistants of the Trade of Clothiers and Stuff-Weavers, so that cloth is not debased, and must take oath "faithfully and honestly performe and discharge the Office").

[169] Resolutions on Religion by a Sub-Committee of the House of Commons (Feb. 24, 1628-29), in SAMUEL RAWSON GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625-1160, at 77 (Oxford, Clarendon Press, 1899).

[170] Proceedings against Sir Richard Gurney, [Knight and Baronet], Lord Mayor of London, on an Impeachment of High Crimes and Misdemeanors, 18 Charles I. A.D. 1642, in 4 A COMPLETE COLLECTION OF STATE TRIALS 160, 161 (T.B. Howell, ed., London, T.C. Hansard 1816) [hereinafter HOWELL].

[171] Articles of Impeachment against Sir Thomas Gardiner, Recorder of the City of London, for High Crimes and Misdemeanors, 18 Charles I. A.D. 1642, in *id*. at 167. 167.

[172] E Marbry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1040 (1975).

[173] *See, e.g.*, Nineteen Proposition Sent by Parliament to the King at York (June 1, 1642), in GARDINER, *supra* note, at 252 ("That the laws in force against Jesuits, priests, and Popish recusants, be strictly put in execution, without any toleration or dispensation to the contrary.").

[174] *See, e.g.*, Proceedings against Sir Edward Herbert [Knight] the King's Attorney General Upon an Impeachment for High Crimes and Misdemeanors, 17 Charles I. A.D. 1642, in HOWELL, *supra* note 170, at 120, 123, 125.

of the land, and not otherwise; and by his trust, oath and office, being obliged to use the power committed to him, for the good and benefit of the people," he instead acted tyrannically, violated his oath, failed to follow the law, made war on his people, and violated their rights and liberties.[175]

Consistent with the findings discussed in Part I.C above, there appeared during this time period several distinctive strands of faithful execution, namely rules against self-dealing and unjustified profit from office, constraining the kinds of motives appropriate to executing an office, and the requirement of staying within authority and abiding by the intent of the legislation or other positive law empowering the officeholder.

During the time in which England was ruled, effectively and then *de jure*, without a king—periods of the Civil War, Commonwealth, and Protectorate, from 1642 until 1660—there is frequent linkage of a rule against self-dealing with faithful execution, particularly for offices dealing with the receipt, account, or payment of moneys.[176] Parliament, for example, directed oaths of faithful execution with the addendum that the oath-taking officeholder would have "no private respecte to your selfe in prejudice of the Common-wealth;"[177] would not be diverted from duty by "fear, favour, reward or affection;"[178] or would not take "any gift or reward, directly or indirectly, from any person or persons whatsoever" but what was allowed by law or superior officer.[179] Perhaps reflecting their republican

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[175] A Charge of High Treason . . . Against Charles Stuart King of England, in *id*. at 1079.

[176] This period also saw the widespread use of loyalty oaths to attempt to bind and affect the behavior of officials and members of the public. *See* John Walter, *Crowds and Popular Politics in the English Revolution*, *in* THE OXFORD HANDBOOK OF THE ENGLISH REVOLUTION 330, 341-42 (Michael J. Braddick ed., 2015).

[177] *See supra* note 161; see also An Act for the speed, raising and levying of Moneys by way of New Impost or Excise (Aug. 14, 1649), § 3, in 2 FIRTH & RAIT, *supra* note 161, at 214 (providing that commissioners of the excise and impost "shall swear to be true and faithful to the Commonwealth of England, . . .; you shall according to your knowledge, power and skill execute the same diligently and faithfully, having no private respect to your self, in prejudice of the Commonwealth.").

[178] *See supra* note 162; see also An Act for Transferring the Powers of the Committee for Indempnity (June 23, 1652), § 5, in 2 FIRTH & RAIT, *supra* note 161, at 590 (providing that commissioners who would determine the indemnity due to persons who acted for Parliament during the civil wars must take an oath "That I will, according to my best skill and knowledge, faithfully discharge the Trust committed unto me in Relation to an Act [this act named]. And that I will not for favor or affection, rewards or gifts, or hopes of reward or gift break the same").

[179] *See supra* note 163; *see also* An Act for the Deafforestation, Sale and Improvement of the Forests and of The Honors, Manors, Lands, Tenements and Hereditaments within the usual Limits and Perambulations of the same. Heretofore belonging to the late King, Queen and Prince (Nov. 22, 1653), § 15, in 2 FIRTH & RAIT, *supra* note 161, at 789-90 (providing that surveyors of lands confiscated from the family of Charles I must take an oath "That I

views,[180] the Commonwealth and Protectorate parliaments also began to describe public offices as "trusts" much more frequently than previous parliaments,[181] suggesting a special obligation to act for the good of the public. During the interregnum, Parliament also declared, in its statute announcing that England was a Commonwealth, that officers and ministers would be selected and appointed "for the good of the people,"[182] that is, not for the good of the government or the private benefit of the officeholder. The famous Self-Denying Ordinance of 1645 required members of Parliament to resign any other civil or military offices they held, and declared that officeholders "shall have no profit out of any such office, other than a competent salary for the execution of the same, in such manner as both Houses of Parliament shall order and ordain."[183]

Leading thinkers in this "Commonwealth" tradition, whose influence on the American revolutionary generation was immense, wrote and spoke repeatedly in favor of the public good being the measure of government policy and the aim of all government offices, and against various kinds of corruption and abuse of public office, including the use of office for private profit.[184]

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will, by the help of God, faithfully and truly, according to my best skill and knowledge, execute the place of Surveyor according to the purport of the Act [this act named] . . . and this I shall justly and faithfully execute, without any Gift or Reward, or hope of Reward, directly or indirectly, from any person or persons whatsoever (Except such Alowances as the said Trustees or four or more of them shall think fit to make unto me, for my pains and charges in the executing of the said Place and Office).").

[180] *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 361-422 (1975).

[181] The Sale of Offices Act, 5 & 6 Edward VI, c. 16 (1551), had described as "Services of Truste" offices involved with receipt, account, or disbursement of public moneys, *see id*. §§ 1-2, but that was an infrequent locution in parliamentary statutes on the medieval and early modern period. During the interregnum this descriptor became much more common, and its use seemed to broaden. *See, e.g.*, An Ordinance to disable any person within the City of London and Liberties thereof to be of the Common-Councell (Dec. 20, 1643), in 1 FIRTH & RAIT, *supra* note 161, at 359 (describing London government offices as "publique Offices and places of Trust"); An Act for Subscribing the Engagement (Jan. 2, 1649/50), in 2 id. at 325 (imposing a loyalty oath of "all and every person" holding "any Place or Office of Trust or Profit, or any Place or Imployment of publique Trust whatsoever").

[182] SAMUEL RAWSON GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625-1160, at 297 (Oxford, Clarendon Press, 1899).

[183] An Ordinance of the Lords and Commons assembled in Parliament for the discharging of the Members of both Houses from all offices both military and civil (Apr. 3, 1645), in *id*. at 288.

[184] The classic study is CAROLINE ROBBINS, THE EIGHTEENTH CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II

Although acts and ordinances of the interregnum were presumed to be and treated as void upon the restoration of the monarchy in 1660,[185] Parliament and other lawmakers continued the Commonwealth practice of frequently linking faithful execution to anti-self-dealing directives, particularly for offices concerning the public fisc.[186] And after the restoration important statutes about public employment continued the language of "trust" to describe offices.[187]

Parliament and other lawmakers requiring faithful execution of office also continued to link this concept to the officer staying within legal authority and abiding by the intent of the legislation or other positive law empowering the officeholder. Statutes frequently recited that officeholders bound to faithfully execute must do so according to the "tenor" or "purport" of the act,[188] or "according to the true intent and meaning" of the act.[189] The

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UNTIL THE WAR WITH THE THIRTEEN COLONIES (1959). For discussions of the public good, the proper role of public officials, abuses of public office, and the need for remedies, *see id*. at 28, 41, 46, 50, 76, 102-03, 112, 117, 129, 184-85, 187, 189, 209, 211, 376.

[185] *Introduction*, in 3 FIRTH & RAIT, *supra* note 161, at xxxii.

[186] See *supra* note 164; *see also*, *e.g.*, An Act for granting a Subsidy to his Majesty, § 15, 22 & 23 Charles II, c. 3 (1670-71) (providing that tax assessor must take an oath "well and truely to execute the Duty of an Assessor . . . [and] you shall spare noe Person for Favour or Affection, nor any person grieve for Hatred or ill Will"); An Act for Granting to their Majesties Certain Rates and Duties, § 43, 5 William & Mary, c. 7 (1693) (providing that commissioners collecting duties on imported goods must take an oath "to execute your Office truly and faithfully without favour or affection . .. and shall take no Free or Reward for the Execution of the said Office from any other Person then from their Majesties or those whom their Majesties shall appoint on their behalfe"); *id*. § 14 (creating a lottery scheme to raise public funds and providing that "Managers and Directors" of the lottery must "sweare that I will faithfully execute the Trust reposed in me And that I will not use and indirect art of meanes or permit or direct any person to use any indirect art or meanes to obtaine a Prize or fortunate Lott for my self or for any other person whatsoever").

[187] *See*, *e.g.*, An Act for Preventing Dangers which May Happen from Popish Recusants, 25 Charles II, st. 2, c. 2 (1672) (imposing loyalty and anti-Catholic oaths and declarations on anyone who received a salary or held any "Command or Place of Trust" from the king, except "inferior Civill Office[s]" like constables); An Act for the encouragement of Trade, § 8, 15 Charles II, c. 7 (1663) (referring to colonial governors as holding a "Trust or Charge" and requiring an oath to fully implement this navigation act); Corporation Act, § 3, 13 Charles II st. 2, c. 1 (1661) (imposing oaths on "persons then bearing any Office or Offices of Magistracy or Places or Trusts or other Imployment relating to or concerning the Government of the said respective Cities Corporations and Burroughs and Cinque Ports and theire Members and other Port Towns").

[188] See *supra* note 162. *See also* An Act for the Taking Examining and Stating the Publick Accounts, 7 & William III, c. 8 (1695-96) (commissions to examine public accounts shall "take an Oath . . . . That to the best of my Skill and Knowledge I shall faithfully impartially and truly demeane my selfe in examining & taking the Accounts of all such Summ or Summs or Money and other Things brought or to be brought before me

oaths of many officeholders during this period—for example, justices of the peace,[190] constables,[191] churchwardens,[192] auditors of public accounts,[193] and corporate officers[194]—required following governing law and staying within authority.

This emphasis on faithfulness of the officeholder to legislative supremacy and staying within granted authority created tension between Parliament and the senior-most magistrate in the kingdom, the monarch. The coronation oaths of the Stuart kings (James, Charles, Charles II, James II), contained the promise that they would "keep the Laws and Rightful Customs, which the Commonalty of this your Kingdom have."[195] But

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in Execution of one Act [this one named] and stating the Publick Accounts according to the Tenor and Purport of the said Act").

[189] See *supra* note 167. *See also* An Act for preventing Frauds and regulating Abuses in the plantation Trade, § 3, 7 & 8 William III, c. 22 (1695-96) (requiring all colonial governors to take a "solemne oath to doe their utmost that all the Clauses Matters and Things contained [several listed acts of Parliament concerning the plantations and colonies] bee punctually and bona fide observed according to the true intent and meaning thereof").

[190] THE BOOK OF OATHS AND THE SEVERAL FORMS THEREOF, BOTH ANCIENT AND MODERN 176-77 (London, H. Twyford, 1689) ("[I]n all Articles, in the Kings Commission to your directed, you shall do equal right to the Poor, and to the Rich after your cunning, wit, and power, and after the Laws and Customs of the Realm, and Statutes thereof made.").

[191] *Id*. at 43-44 ("[Y]e shall keep the peace of our Sovereign Lord the King well, and *lawfully* after your power . . .") (emphasis added).

[192] ARTICLES OF VISITATION AND INQUIRY CONCERNING MATTERS ECCLESIASTICAL 1 (Warwick-lane [London], A. Baldwin, 1700) (reporting that churchwardens and other officials in the Anglican church took oath to "faithfully Execute your several Offices . . . according to Law, to the best of your Skill and Knowledge").

[193] See *supra* note 188.

[194] Charter of London Goldwiredrawers company, Patent Rolls 21 James I, pt. ii (1623-24), in 28 PUBLICATIONS OF THE SELDEN SOCIETY: SELECT CHARTERS OF TRADING COMPANIES, A.D. 1530-1707, at 132 (Cecil T. Carr, ed., 1913) (providing that the governor of the corporation shall take a corporal oath "well and truly to the uttermost of your power execute the office of Governor. . . in all things to the said office appertaining. . . . And that you shall well and truly to the uttermost of your power observe perform fulfil and keep in all points all such lawful reasonable and wholesome acts statutes laws and ordinances as are or shall from time to time be made by Governor and Assistants of the said Company for the time being : So help you God").

[195] THE HISTORY OF PUBLICK AND SOLEMN STATE OATHS 15 (London, A. Bettesworth, 1716) (coronation oath of James I). For Charles I, see ELIAS ASHMOLE & FRANCIS SANDFORD, THE ENTIRE CEREMONIES OF THE CORONATIONS OF HIS MAJESTY KING CHARLES II AND OF HER MAJESTY QUEEN MARY, CONSORT TO JAMES II, at Appendix p. 40. For Charles II, see *id*. at 12. For James II, see LEOPOLD G. WICKHAM LEGG, ENGLISH CORONATION RECORDS 296-97 (Westminster, Archibald Constable & Co., 1901).

divine-rights arch-monarchists like Robert Filmer claimed that this only meant that, "in effect the king does swear to keep no laws but such as in his judgment are upright."[196] In keeping with this view of their oath of office, the Stuarts asserted the prerogative to suspend acts of Parliament, in whole or part, and dispense with application of acts of Parliament to specific individuals.

The controversy over the dispensing and suspending prerogative peaked during the short reign of James II (1685-88), the second post-restoration monarch. The story starts much earlier, however, with the Oath of Supremacy from the time of Elizabeth, and an Oath of Allegiance imposed during the reign of James I, after the Gunpower Plot.[197] These religious test oaths were imposed on all members of Parliament and all officers and other persons in the king's service, and effectively barred Catholics and dissenting Protestants from office.[198] After great gains by Puritans and Presbyterians during the Commonwealth and Protectorate, restoration in 1660 under Charles II brought a renewed emphasis on Anglican orthodoxy in public life. New statutes imposed more stringent religious test oaths and penalties for compliance on all officers of corporations, including all mayors, aldermen, recorders, bailiffs, town councilmen, and the like of all chartered cities, town, and boroughs,[199] then any person (peer or commoner) who received a salary or held any "Command or Place of Trust" from the king (except "inferior Civill Office[s]" like constables),[200] then members of Parliament.[201] Catholics and non-Anglican Protestants were barred from any important public office, unless they were willing to falsely swear and publicly receive Anglican sacraments.

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[196] ROBERT FILMER, PATRIARCHA OR THE NATURAL POWER OF KINGS 43-44 (1680). In a work written and published when he was James VI of Scotland but not yet king of England, the future James I wrote that by the coronation oath a Christian king promises "to maintaine all the lowable"—praiseworthy, admirable—"and good Lawes." THE TREW LAW OF FREE MONARCHIES: OR THE RECIPROCK AND MVTVALL DVETIE BETWIXT A FREE KING AND HIS NATURALL SUBJECTS (1599), in CHARLES HOWARD MCILWAIN ED., THE POLITICAL WORKS OF JAMES I, at 53, 55 (1918).

[197] Popish Recusants Act, 3 James I, c. 4 (1605); Oaths Act, 7 & 8 James I, c. 6 (1610).

[198] Campbell, *supra* note 140, at 7-8.

[199] *See* Corporation Act, 13 Charles II, st. 2, c. 1 (1661); Act of Uniformity, 14 Charles II, c. 4 (1662); Conventicle Act, 16 Charles II, c. 4 (1664); An Act for restraining Non-Conformists from inhabiting in Corporations (Five Mile Act), 17 Charles II, c. 2 (1665).

[200] An Act for Preventing Dangers which May Happen from Popish Recusants (Test Act), 25 Charles II, st. 2, c. 2 (1672).

[201] An Act for the More Effectuall Preserving the Kings Person and Government by Disableing Papists from sitting in either House of Parlyament (Parliamentary Test Act), 30 Charles II, st. 2, c. 1 (1678).

Charles II briefly provoked conflict with Parliament by purporting to suspend some of these laws, before backing down,[202] but his brother, James II, a Catholic, chose outright confrontation. He issued wide-ranging dispensations from the laws for certain favored persons, and then broad suspensions.[203] In response, leading men in the kingdom invited the Protestant William of Orange from the Dutch Republic—a grandson of Charles I who was married to James II's daughter Mary (also a Protestant)—to invade England and assume the crown. James II fled and the Glorious Revolution was underway.

As part of the Glorious Revolution, Parliament enacted a new coronation oath. As this statute recalled, previous coronation oaths had "beene framed in doubtfull Words and Expressions" concerning whether the monarch would strictly maintain all "ancient Laws and Constitutions," or only those with which he or she agreed.[204] To counter this evasion, Parliament specified a new, clearer oath, through which William and Mary, and subsequent monarchs would be required to pledge as follows: "Will you solemnely Promise and Sweare to Governe the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same? . . . I solemnly Promise soe to doe."[205] This oath to govern according to law dovetailed with the statement in the Bill of Rights, also adopted as part of the Glorious Revolution settlement between Parliament and the new king and queen, that the monarchy had no prerogative to suspend the laws or dispense with the application of law to any individual.[206] Later, foundational statutes reiterated this commitment to parliamentary supremacy.[207]

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[202] *See* PAUL L. HUGHES & ROBERT F. FRIES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND: A DOCUMENTARY CONSTITUTIONAL HISTORY, 1485-1714, at 276-78 (reprinting communications of Parliament denying the king's power to suspend statute law).

[203] Campbell, *supra* note 140, at 12.

[204] An Act for establishing the Coronation Oath, 1 William & Mary sess. 1, c. 6, pmbl.

[205] *Id*.

[206] Bill of Rights, 1 William & Mary sess. 2 c. 2 ("That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal; That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.").

[207] *See* Act of Settlement, 12 & 13 William III, c. 2 (1701) (establishing the Protestant succession to the crown through Sophia, granddaughter of James I, wife of the Elector of Hanover, and stating that "the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers

Of course, the fact that the English people had for the second time in a half century deposed their king because he had failed to rule for their benefit and according to the laws of the land, went a long way toward solidifying the monarch's subordination to the public good as communicated via Parliament.

As Blackstone summarized the state of things brought about by these acts, the king had "the whole executive power of the laws," a "great and extensive trust."[208] But English law imposed a "limitation on the king's prerogative," which was "a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws."[209] Thus the crown must do its duty to execute the laws "in subservience to the law of the land," this for "the care and protection of the community."[210] The Glorious Revolution settlement also involved Parliament specifying new, simpler versions of the oaths of allegiance and supremacy, which continued to deny the Church of Rome any authority or jurisdiction.[211] The coronation oath now also required upholding "the Protestant Reformed Religion Established by Law," [212] further cementing the Anglican basis of England's monarchy and governing class, and making the upholding of statutory law and the established Protestant church keys to the monarch's faithful execution of office.

2. The Early Settlements of American Colonies

The English colonization of America called into existence many new polities, corporations, and offices, requiring that conditions of office-holding be specified. Both authorities in England and the colonists themselves articulated these conditions, which contain important

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ought to serve them respectively according to the same"); An Act to provide for the Administration of the Government, § 8, 24 George II, c. 24 (1750) (providing, in the event of a regency by Augusta, Princes Dowager of Wales, that she must take an oath "[t]hat I will truly and faithfully execute the Office of Regent of the Kingdom" and "that I will administer the Government of this Realm, and of all the Dominions thereunto belonging, according to the Laws, Customs and Statutes thereof"); An Act to provide for the Administration of the Government, § 11, 5 George III, c. 27 (1765) (similar).

[208] 1 Blackstone *257.

[209] 1 *id.* * 136-37.

[210] 1 *id.* *183. *See also* 1 *id*. * 153 (stating that by "contract" with the people of Great Britain, the monarch must "govern according to law").

[211] Bill of Rights, 1 William & Mary sess. 2 c. 2.

[212] An Act for establishing the Coronation Oath, 1 William & Mary sess. 1, c. 6. *See also* 1 Blackstone * 153 (stating that by "contract" with the people of Great Britain, the monarch must "maintain the established religion").

foundational themes and language, some of which ultimately found their way into the 1787 Constitution, including in Article II.

The very earliest royal charters granted for exploration in America by Queen Elizabeth and then King James I were brief documents with no detail about executive management or no oaths. But in the first detailed charter, granted in 1629 by Charles I, for Massachusetts Bay, we see already two important components of Article II—to execute office well and faithfully and to govern according to standing law—as well as additional language that prefigures Article II. The charter directed that the governor, along with his deputy and assistants, "shall applie themselves to *take Care* for the best disposeing and ordering of the generall buysines and Affaires of, for, and concerning . . . the Government of the People there."[213] The governor and other officers of the company must "take their Corporal Oathes for the due and faithfull Performance of their Duties in their severall Offices and Places."[214] And the executive powers of the governor and other officers could only be exercised according to law, and interpreted according to the intent of the lawgiver.[215] Seventeenth century charters for other colonies in America contained similar provisions.[216]

From the outset, the colonists were not content to have all of their political and legal arrangements dictated from England. The two colonist-written documents, both of which historian Donald Lutz describes as "candidate[s] for the being the earliest written constitution in America," "prominently displays oaths for officeholders as an essential part of the agreement."[217] Both documents bind a governor to faithfully execute his office and the laws for the common good, and to follow the law and stay

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[213] Charter for Massachusetts Bay (1629), in 3 THORPE, *supra* note 101 , at 1852 (emphasis added).

[214] *Id*. at 1854

[215] *Id.* at 1858 And further the governor and officers were given "full and Absolute Power and Authoritie to correct, punishe, pardon, governe, and rule all such the Subjects of Us" as reside in the colony "according to the Orders, Lawes, Ordinances, Instruccons, and Direccons aforesaid, not being repugnant to the Lawes and Statutes of our Realm England." *Id.*

[216] *See, e.g.*, Charter of Connecticut granted by Charles II (1662), in 1 *id*. at 532, 534 (requiring officers to take the oaths of Supremacy and Obedience and a corporal oath "for the due and faithful Performance of their Duties in their several Offices and Places," and providing that "all such Laws, Statutes and Ordinances, Instructions, Impositions and Directions as shall be so made by the Governor, Deputy-Governor, and Assistants as aforesaid . . . shall carefully and duly be observed, kept, performed, and put into Execution, according to the true Intent and Meaning of the same").

[217] COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 210 (Donald S. Lutz ed., 1998).

within authority. The 1636 Pilgrim Code of Laws for New Plymouth provided that "[t]he office of the governor . . . consists in the execution of such laws and ordinances as are or shall be made and established for the good of this corporation according to the several bounds and limits thereof . . . ."[218] The governor's oath required that:

> You shall swear to be truly loyal; also, according to that measure of wisdom, understanding, and discerning given unto you faithfully, equally, and indifferently, without respect of persons, to administer justice in all cases coming before as the governor of New Plymouth. You shall, in like manner, faithfully, duly, and truly execute the laws and ordinances of the same . . .[219]

The Fundamental Orders of Connecticut (a provision for government established under commission from the Massachusetts Bay General Court in 1638-39), required an oath for the governor binding him "to p[ro]mote the publicke good and peace of the [colony], according to the best of my skill; as also will mayntayne all lawfull priuiledges of this Commonwealth; as also that all wholsome lawes that are or shall be made by lawfull authority here established, be duly executed; and will further the execution of Justice according to the rule of Gods word."[220]

Some Protestants from dissenting sects who settled in America objected to oath swearing, believing that it involved the profane taking of the Lord's name in vain.[221] In colonies controlled by people with such beliefs, faithful execution of the laws and abiding by the laws was still required of governors, but not by oath. (Note that Article II later required faithful execution using a package of tools, not just an oath. There was also an affirmation option, and the direct command of the Take Care Clause.) Thus the colony that became Rhode Island, founded by Roger Williams, wrote a frame of government in 1642 which provided that the free men would "make or constitute Just Lawes, by which they will be regulated, and . . . depute from among themselves such Ministers as shall see them faithfully executed between Man and Man."[222] In 1647, the Acts and Orders of the Generall Court of Elections for Providence Colonie [Rhode Island], required that officers, before taking office, "engage"—not swear an oath—

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[218] *Id*. at 63.

[219] *Id*. at 63-64.

[220] *Id*. at 522.

[221] *See* DAVID L. HOLMES, FAITHS OF THE FOUNDING FATHERS 5-7 (2006); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 28 (1988).

[222] LUTZ, *supra* note 217, at 173.

to "faithfully and truly to the utmost of your power to execute the commission committed vnto you; and do hereby promise to do neither more nor less in that respect than that which the Colonie [authorized] you to do according to the best of your understanding."[223]

For the colony of New Jersey or New Caesaria, the proprietors agreed to a frame of government in 1664 which provided that the governor and his council shall "execute their several duties and offices, respectively, according to the laws in force," and "act and do all other things that may conduce to the safety, peace and well-government of the said Province . . . so as they be not contrary to the laws of the said Province."[224]

William Penn wrote a frame of government for his new colony of Pennsylvania which provided that the governor and his council "shall take care, that all laws, statutes and ordinances, which shall at any time be made within the said province, be duly and diligently executed."[225] As a Quaker, Penn believed that oaths were profane,[226] and his frame did not contain any.

Still, when early colonial outposts created lower offices, they often imposed oaths, affirmations, or commands of faithful execution and faithfulness in following the law. In mid-seventeenth century Massachusetts Bay, for example, the surveyor of training bands of militia and the general auditor of the colony were both required to take an oath "for the faithful & diligent execution of his place" or "office,"[227] while a"publicke notary" in the colony took a slightly different oath, that the officeholder "shall demeane yo^{r}selfe diligently & faithfully, according to y^{e} duty of yo^{r} office . . . wthout dely or covin," that is, without delay or fraud.[228]

D. Mature Governments in Colonial America

There were differences in how the American colonies were governed.

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[223] *Id*. at 181.

[224] 5 THORPE, *supra* note 101, at 2539-40.

[225] Pennsylvania Frame of Government, or William Penn's Charter of Liberties (1682), § 8, in 5 *id*. at 3047, 3049; Pennsylvania Frame of Government (1683), § 6, in 5 *id*. at 3064, 3065.

[226] Penn was one of the prominent English Quakers involved in publishing a 1675 book describing religious and policy objections to oaths. *See* A TREATISE OF OATHS CONTAINING SEVERAL WEIGHTY REASONS BY THE PEOPLE CALL'D QUAKERS REFUSE TO SWEAR (Dublin, E. Ray, 1713) (reprinting the 1675 London edition).

[227] 2 NATHANIEL B. SHURTLEFF, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, 1642-1649, at 74, 141 (Boston, William White, 1853).

[228] *Id*. at 209.

For example, in the seventeenth century, some like Pennsylvania were proprietary, with the crown delegating authority to an individual proprietor or group of proprietors to manage; some like Massachusetts Bay were governed by a chartered joint stock company; and some like New York were controlled directly by the crown. By the eighteenth century, most had been converted to crown colonies. The degrees of self-government allowed to colonists through their elective assemblies also differed somewhat between colonies and over time. But despite these differences, officeholders from the lowest to the highest were bound to faithfully execute their offices and faithfully follow the law.

1. Governors

By the turn of the eighteenth century, when most American colonies had come to be governed directly by the crown, there was great uniformity in the duties imposed on governors. There was a standard form of the governor's commission, issued though the Privy Council, under the monarch's name, with advice of the Board of Trade. Each governor was commanded, *mutatis mutandis*, "to do and execute all Things in due manner that shall belong unto your said Command,"[229] to govern according to standing law and directions from the crown,[230] and to take the oaths specified by Parliamentary statutes (concerning allegiance to the crown and support for the Protestant succession), as well as an "Oath for the due Execution of the Office and Trust."[231] These commissions were required to

[229] Commission from Queen Anne to Edward Hyde, commonly known as Lord Cornbury, to be Governor and Captain General of New Jersey (1702), *in* THE GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 647-56 (Aaron Leaming & Jacob Spicer eds., 1758), Early American Imprints Series I [hereinafter EAII] no. 8205.

[230] *Id*. ("[A]ccording to the several Powers and Directions granted or appointed you by this present Commission, and the Instructions and Authorities herewith given you . . . . and according to such reasonable Laws and Statutes as shall be made and agreed upon by you, with the advice and consent of the Council and Assembly of our said Province, under your Government").

[231] *Id*. For commissions to other governors using the same form and language, see, for example, Commission by William & Mary to Benjamin Fletcher to be Governor of New-York (1692), in 3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK PROCURED IN HOLLAND, ENGLAND AND FRANCE 827-32 (Albany, Weed Parsons & Co., 1853); Commission by George II to William Crosby to be Governor of New-York (1736), EAII no. 4020; Commission by George II to George Clinton to be Governor of New-York (1741), in 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK PROCURED IN HOLLAND, ENGLAND AND FRANCE 189-95 (Albany, Weed Parsons & Co., 1855); Commission from George III to Benning Wentworth to be Governor of New Hampshire (1760), in 6 PROVINCIAL PAPERS: DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW-HAMPSHIRE FROM 1749-1763, at 908-13

be publicly published or displayed at the outset of every governor's time in office, meaning that their content was widely known. Due to spotty enforcement of the various navigation acts in the colonies, Parliament also required that all colonial governors take an additional oath to enforce them. The version of the Parliamentary oath found in the 1764 Sugar Act (an act loathed by American colonists), demanded that:

> [A]ll who hereafter shall be made governors or commanders in chief of the said colonies or plantations, or any of them, before their entrance into their government, shall take a solemn oath, to do their utmost that all the clauses, matters, and things, contained in any act of parliament heretofore made, and now in force, relating to the said colonies and plantations, and that all and every the clauses contained in this present act, be punctually and bona fide observed, according to the true intent and meaning thereof . . . .[232]

Crown records show that the Board of Trade frequently drafted, and the Privy Council sent under the monarch's name, reminders to colonial governors to take their various oaths of office.[233]

2. Offices of Chartered Corporations

In chartered colonies, governors of the colony were themselves corporate officers. Here, we discuss corporations that created municipalities and boroughs, charitable organizations, and business ventures. As in earlier periods, the officers of chartered corporations continued to be given requirements to faithfully and diligently execute office, follow standing law, and stay within authority. It was also frequently specified that misconduct

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(Nathaniel Bouton ed., 1872); Commission from George III to Arthur Dobbs to be Governor of North Carolina (1761), in 5 THE COLONIAL RECORDS OF NORTH CAROLINA 524-32 (William L. Saunders ed., 1888). Commissions of all the colonial governors of Massachusetts Bay are reproduced at https://www.colonialsociety.org/node/ (search for and click on "Commissions, Royal (1667–1774)).

[232] An act for granting certain Duties in the British Colonies and Plantations in America (Sugar Act), § 34, 4 George III, c. 15 (1764). A nearly identical oath was required by several earlier navigation acts. *See* An Act for the Encourageing and increasing of Shipping and Navigation, § 2, 12 Charles II, c. 18 (1660); An Act for the encouragement of Trade, § 8, 15 Charles II, c. 7 (1663); An Act for preventing Frauds and regulating Abuses in the plantation Trade, § 3, 7 & 8 William III, c. 22 (1695-96).

[233] 1 LEONARD WOODS LABAREE, ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, 1670-1776, at §§ 63, 69 & 78 (1935); 2 *id*. § 925. *See also* 1 *id*. at viii (noting the instructions were issued in name of King, reviewed by Privy Council, and generally drafted by the Board of Trade).

would result in loss of office.

The 1694 Charter of the City of New-York, for instance, required all city officers, recorders, town clerks, clerks of the market, aldermen, assistants, chamberlain or treasurers, high constables, petty constables, "[b]efore they, or any of them shall be admitted to enter upon and execute their respective Offices" to be "sworn, faithfully to Execute the same, before the Mayor."[234] The mayor and sheriff had to take corporal oaths before the governor and his council "for the due Execution of their respective Offices."[235] The charter for the College of William and Mary in Virginia required that the governing body, called the "Visitors and Governors," must be sworn "well and faithfully to execute the said Office."[236] In New Jersey, the charter granted to Queen's College (today's Rutgers) by George III required trustees to "take an oath for faithfully executing the office, or trust reposed in them."[237] The 1771 charter for the New-York Hospital in Manhattan (which still serves the city today), required that its officers and governors exercise power "according to the Laws and Regulations" governing the entity, take oaths or make affirmations "for the faithful and due Execution of their respective Offices," and be removed from office if they "shall become unfit or incapable to execute their said Offices, respectively, or shall misdemean themselves in their said Offices, respectively, contrary to any the Bye Laws and Regulations of our said Corporation, or refuse or neglect the Execution thereof."[238] And churches were sometimes incorporated, requiring oaths of faithful execution by vestrymen and other officials.[239]

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[234] EAII no. 706, at p. 7

[235] *Id*. at 6-7.

[236] THE CHARTER AND STATUTES OF THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA 35 (Williamsburg, William Parks, 1736), EAII no. 40109.

[237] CHARTER OF A COLLEGE TO BE ERECTED IN NEW-JERSEY BY THE NAME OF QUEEN'S-COLLEGE 4 (New-York, John Holt, 1770), EAII no. 42168.

[238] CHARTER FOR ESTABLISHING AN HOSPITAL IN THE CITY OF NEW-YORK GRANTED BY THE RIGHT HON. JOHN, EARL OF DUNMORE 7-8, 10 (New-York, H. Gaine, 1771), EAII no. 12161.

[239] *See, e.g.*, Act of the Establishment of Religious Worship in this Province According to the Church of England (1701), in ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF MARYLAND FROM 1692 TO 1715, at 14, 16 (London, 1723) (requiring that vestrymen take an oath "[t]hat I will justly and truly execute the Trust or Office of a Vestryman of this Parish, according to my best Skill and Knowledge, without Prejudice, Favour or Affection" and churchwardens take an oath "well and faithfully to execute that Office for the ensuing Year, according to the Laws and Usages of the said Province, to the best of his Skill and Power"); An Act for incorporating the Vestry of St. Thomas (circa 1733-36), in ACTS PASSED BY THE GENERAL ASSEMBLY OF SOUTH-CAROLINA (Charles-Town, Lewis Timothy printer, 1736) (providing that vestrymen must take an oath "that I will well and faithfully

3. Other colonial public officials

In every colony, the assembly created offices and specified by oath or command that officeholders were bound to faithfully execute them. We furnish some illustrative examples here to show the diversity of offices that had these requirements, but we could have chosen from hundreds more.

In Massachusetts, for example, the gager of casks swore an oath to "diligently and faithfully discharge and execute the Office of a Gager . . . impartially without Fear or Favour,"[240] and managers of the Massachusetts public lottery had a detailed oath to faithfully execute, eschew corruption, and follow the intent of the legislature,[241] as did lottery managers in other colonies like New York.[242] The Rhode Island assembly required the general treasurer of the colony to post bond "for the faithful Execution of his Office, and the Trust reposed in him,"[243] while trustees charged with making loans with government-issued bills of credit were required to "give personal security" "to the Amount of the several Sums by them receiv'd, for the faithful Execution of their Trust and Office."[244] In Connecticut, constables, [245] town clerks,[246] sergeants major of the militia,[247] fence-

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execute the Office. . . and to the utmost of my Power, observe and follow the Directions of the Act of the General Assembly [this act named]").

[240] TEMPORARY ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 53 (1763) (1747 statute).

[241] ACTS AND LAWS PASSED BY THE GREAT AND GENERAL COURT OR ASSEMBLY OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 145 (Boston, Kneeland & Green, 1745), EAII no. 5628 ("I will faithfully execute the Trust reposed in me, and that I will not use any indirect Art or Means to obtain a Prize or Benefit-Lot for my self or any other Person whatsoever . , , , and that I will, to the best of my Judgment, declare to whom any Prize, Lot or Ticket does of Right belong, according to the true Intent and Meaning of the Act of this Province made in the eighteenth Year of His Majesty's Reign in that Behalf. So help me God.").

[242] ANNO REGNI GEORGII II REGIS MAGNAE BRITANNIEAE, FRANCIAE & HIBERIAE, VICESSIMO, AT A GENERAL ASSEMBLY BEGUN AND HOLDEN AT BRUCKLYN, ON NASSAU ISLAND, THE THIRD DAY OF JUNE, ANNO DOMINI 1746, at 37 (New-York, James Parker, 1746)

[243] An Act Stating the General Treasurer's Salary and for Taking Security, &c. (Oct. 1729), EAII no. 5683

[244] EAII no. 40604

[245] ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND 89 (Boston, Bartholomew Green & John Allen, 1702) (requiring an oath that "you will faithfully Execute the place and Office of a Constable . . . and will do your best endeavor to see all Watches and Wards executed and duly attended, and obey and execute all lawful Commands and Warrants . . . as shall be commtted to your care, according to your best

viewers,[248] tything men,[249] and many other officials took oaths to faithfully discharge or execute their office.

In Pennsylvania, keepers of the alms-houses were required to give bond with sureties "for the due and faithful Execution of his Office, and for the Care and good Management of what shall be committed to his Trust,"[250] while the register general for probating wills and granting letters of administration had to give bond with sufficient sureties "for the true and faithful Execution of his Office, and for the delivering up the Records, and other Writings belonging to the said Office . . . ."[251] The Delaware assembly required the recorder of deeds to post bond, with at least one surety, "conditioned for the true and faithful Execution of his Office, and for delivering up the Records and other Writings belonging to the said Office."[252] Sheriffs in Maryland had to post bond, the "Condition" of which was that he "well and faithfully execute the same Office; and also shall render His said Majesty, and His Officers, a true, faithful, and perfect Account of all and singular His Said Majesty's Rights and Dues . . . [and] a true and just Account of their Fees ."[253]

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skill").

[246] *Id*. at 89 (requiring an oath that "you will truly and faithfully attend and execute the place and Office of a Town Clerk for . . .. according to your best skill: and make Entry of all such Grants, Deeds of Sale, or Gift, Town Votes, Mortgages and Alienations of Land, as shall be compleated according to Law . . . .").

[247] *Id*. at 87 (requiring an oath that "according to your Commission, you Swear by the Ever-living God, that according to your best skill and ability, you will faithfully discharge the trust committed to you, and according to such Commands and directions as you shall receive form time to time, from the General Court, and the Governour and Council, and according to the Laws and Orders of this Colony . . . .").

[248] This officer administered fence laws and settled disputes about fencing—``for example, involving escaped livestock. For the oath, see *id*. at 89 (requiring an oath to "diligently and faithfully discharge and execute the Office").

[249] This was a low-level elected office in England and New England, charged with overseeing the conduct of neighbors, policing taverns for drunkenness and rowdy behavior, and the like. For the oath, see ACTS AND LAWS OF HIS MAJESTY'S ENGLISH COLONY OF CONNECTICUT IN NEW-ENGLAND IN AMERICA 181 (New London, Timothy Green, 1750) (requiring an oath to "faithfully Execute the Place, and Office . . . Impartially, according to Law, without Fear, or Favour, according to your best Skill, and Knowledge").

[250] EAII no. 6395 (1749 statute).

[251] An Act concerning Probates for Written and Nuncupative Wills, c. XIX, in THE LAWS OF THE PROVINCE OF PENNSYLVANIA COLLECTED INTO ONE VOLUME 47-48 (Andrew Bradford, Philadelphia, 1714).

[252] LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE 207 (Philadelphia, B. Franklin, 1741).

[253]ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF MARYLAND FROM 1692 TO 1715, at

In Virginia, a surveyor of land took an oath "truly and faithfully, to the best of His Knowledge and Power, discharge and execute his Trust, Office, and Employment," and enter into bond with sureties "for the true and faithful Execution and Performance of his Office."[254] In North Carolina, officers like searchers for weapons among slaves,[255] collectors of liquor duties,[256] sheriffs,[257] and commissioners to oversee the emission of public bills of credit,[258] among many other officers, took oaths or posted bonds to faithfully execute their offices. South Carolina also created many offices with that requirement, including the pilot of Charles-Town harbor,[259] surveyors of hemp, flax, and silk,[260] and the "public packer" of beef and pork for export.[261] And finally, in the southern-most colony of Georgia,

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179 (London, 1723).

[254] An Act directing the Duty of Surveyors of Land, c. XIV, EAII no. 11511 (1748 statute).

[255] 2 A COLLECTION OF ALL THE ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH-CAROLINA IN FORCE AND USE 16 (Newbern, NC, 1765) (1753 statute required an "faithfully . . . discharge the Trust reposed in me, as the Law Directs, to the best of my Power").

[256] *Id*. at 25 (1754 statute required posting bond "with Condition, that he will honestly, faithfully, and justly execute the Office . . . and will fully account for and pay all such Sum or Sums of Money by him to be received and accounted for").

[257] *Id*. at 61-62 (1755 statute sets sheriff's oath as follows: "I will, truly and faithfully, execute the Office of the Sheriff of the Country of ___ to the best of my Knowledge and Ability, agreeable to Law; and that I will not take, accept, or receive, directly or indirectly, any Bribe, Gift, Fee or Reward, whatsoever, for returning any Man to serve as a Juror . . . or for making any false Return of Process to me directed. . . .").

[258] An Act for granting to his Majesty the Sum of Forty Thousand Pounds in Public Bills of Credit, c. 1, § 3, in EAII no. 7283 (1754 statute requiring that commissioner "shall, before he enters upon the Execution of his Office, give Bond . . . for the due and faithful Execution of his Office, according to the true Intent and Meaning of this Act . . . and also shall take an Oath, for the due and faithful Execution of his Office of Commissioner aforesaid").

[259] 2 THE LAWS OF THE PROVINCE OF SOUTH-CAROLINA IN TWO PARTS (Charles-Town, 1736) (1734 statute requiring an oath "that I will well and faithfully execute and discharge the Business and Duty of a Pilot . . . .").

[260] An Act for Encouraging the Raising of Hemp, Flax and Silk, c. VI, in ACTS PASSED BY THE GENERAL ASSEMBLY OF SOUTH-CAROLINA at 41 (Charles-Town, Lewis Timothy, 1736) (requiring an oath to "well & faithfully execute your said Office, after your best Skill and Cunning, with all Fidelity and without any Partiality, Favour or Affection . . . .").

[261] THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, at 210 (Philadelphia, 1790) (1746 statute requiring packers to take an oath "that I will faithfully and impartially execute the business and duty of a packer . . . without favour or prejudice to any person or party whatsoever, according to the best of my skill and judgment, and with the greatest

officers such as the harbor master of Savannah and the "Culler and Inspector of Lumber" took oaths of faithful execution as a condition of assuming office.[262]

4. Summing Up

As in prior eras of English history, during the period of mature colonial governments in America the concept of faithful execution was frequently linked with adjectives (or adverbs, as the case may be) such as true, diligent, due, honest, well, skillful, careful, and impartial. This period is also consistent in showing that faithful execution was often tied to staying within authority and abiding by standing law,[263] following the intent of the lawgiver,[264] and eschewing self-dealing and financial corruption.[265] This triptych of the meaning of faithful execution supervenes over both English and colonial office-holding.

To be sure, Parliament continued to create many offices with attached duties of faithful execution, frequently paired with these same features, too. Many of these were internal acts that did not directly affect the overseas colonies[266]—though they did generate complaints that resonated with

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expedition.").

[262] *See* An Act to regulate and ascertain the Rates of Wharfage of Shipping and Merchandize, § 7 (May 10, 1770), in ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA (Savannah, James Johnston, 1770) (oath "I will, to the best of my skill, knowledge, and ability, without partiality or prejudice, execute the office, and perform the duty of Harbour-Master . . . as directed in and by an act of the General Assembly entitled [this act named]."); EAII no. 41715 (1767 statute imposing oath that "I will faithfully, impartially, and without delay, execute the business and duty of a culler and inspector of lumber, in the town of ___ . . . ., to the best of my skill and judgment, agreeable to an act of the general assembly [this act named].").

[263] See authorities cited in *supra* notes 230, 239, 247, 249, and 255.

[264] See authorities cited in *supra* notes 241, 257, and 258.

[265] See authorities cited in *supra* notes 241, 253, 256, and 261.

[266] *See, e.g.*, An Act for Laying Certain Duties Upon Candles, § 52, 8 Anne, c. 5 (1709) (requiring this oath: "That I will faithfully execute the Trust reposed in me pursuant to the Act of Parliament [this act named] without Fraud or Concealment and shall from time to time true Account make of my doings therein . . . and shall take no Fee Reward or Profit for the Execution or Performance of the said Trusts or the Business relating thereto from any Person or Persons other than such as shall be paid or allowed by Her Majesty . . . ."); An Act for the better regulating the Office of Sheriffs and for ascertaining their Fees, § X, 3 George I, c. 15 (1716) (imposing a new oath on sheriffs, including this provision: "I will truly and diligently execute the good Laws and Statutes of this Realm . . . and discharge the same according to the best of my Skill and Power"); An Act for the better carrying on and regulating the Navigation of the Rivers Thames and Isis, 24 George II, c. 8 (1750) (providing that commissioners must take this oath: "I A. B. do swear, That I will without

colonial American concerns about the multiplication of crown offices, the corruption of members of Parliament and others by being given lucrative offices, and the growth of executive power.[267] But some were important statutes governing the colonies that by themselves attracted widespread attention in America, such as the Stamp Act.[268] In addition, one must keep in mind that standing laws from earlier centuries, such as those Parliamentary statutes banning sales of office and corruption in official appointments, and those requiring all excise and customs officers to truly and faithfully execute office,[269] continued to shape the law, culture, and politics of office-holding and helped define what it meant to be a faithful officer.

English criminal law and Parliamentary impeachments also helped to define faithfulness in office. At common law, "any publick officer" was "indictable for misbehaviour in his office,"[270] or could be pursued by criminal information at the suit of the crown or a private prosecutor.[271] The misdemeanors—failures to demean oneself appropriately in public office—which were actionable included knowing neglect of duty,[272] peculation,[273] exercising official discretion with a "corrupt"[274] or "partial motive"[275] rather

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Favour or Affection, truly, faithfully and impartially execute, perform and discharge the Office and Duty of a Commissioner, according to the Powers, Authorities and Directions given and established by an Act of Parliament [this act named] according to the best of my Skill and Knowlege").

[267] *See* MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 64-65 (2003); WOOD, *supra* note 38, at 143-46.

[268] An Act for granting certain Stamp Duties, and other Duties, in the British Colonies and Plantations in America (Stamp Act), § 12, 5 George III, c. 12 (1765) (providing that commissioners and other officers who will execute the act "shall take an Oath in the Words, or to the Effect following (that is to say) 'I A. B. do swear, That I will faithfully execute the Trust reposed in me, pursuant to an Act of Parliament [this act named], without Fraud or Concealment; and will from time to time true Account make of my Doing therein . . .; and will take no Fee, Reward, or Profit, for the Execution or Performance of the said Trust, or the Business relating thereto, from any Person or Persons, other than such as shall be allowed by his Majesty, his Heirs, and Successors, or by some other Person or Persons under him or them to that Purpose authorized").

[269] *See supra* notes 164 & 165.

[270] Anonymous, 87 Eng. Rep. 853, 853 (Q.B. 1704).

[271] *See, e.g.*, Bassett v. Godschall, 95 Eng. Rep. 967, 968 (K.B. 1770).

[272] *See, e.g.*, Crouther's Case, 78 Eng. Rep. 893, 894 (Q.B. 1599) (constable who refused to make the hue and cry).

[273] Queen v. Buck, 87 Eng. Rep. 1046, 1046 (Q.B. 1704) (defendant tax assessors and collectors imposed an "inequality of rates for the private advantage of some" and "put the money in their own pockets").

[274] Rex v. Hann, 97 Eng. Rep. 1062, 1062 (K.B. 1765).

than pursuing the public interest, and a breach of "trust," such as taking a bribe to recommend a candidate for a crown office.[276] Extortion was also a crime, which consisted "in any officers' unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due."[277]

Widely-noticed impeachments also conveyed information about the understood contours of faithful office-holding. For instance, Thomas Parker, Earl of Macclesfield, the Lord High Chancellor of England, was impeached for allowing the misappropriation of court and litigant property in his chancery office.[278] Macclesfield was deemed to have failed in "the faithful vigorous Discharge of the great Trust reposed" in him, having breached his oath of "due and faithful discharge and execution of [his] Duty."[279]

E. The Revolution and the Critical Period

The importance of oaths to Americans can be seen clearly during the break from Great Britain. Among the first things that new state governments did after independence was proclaimed was to set up new governments—sometimes temporary, sometimes more durable—and require oaths of allegiance and faithful execution for state officials. Many states also legislated new oaths for citizens, abjuring any allegiance to George III and Great Britain, and pledging allegiance to the new state and, sometimes, the United States also. Over the next few years, as state governments matured, every state created many offices that had faithful execution oaths or affirmations. The national government also created offices with faithful execution obligations.

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[275] Rex v. Justices of the Peace of the Corporation of Rye, 96 Eng. Rep. 791, 791 (K.B. 1752).

[276] Rex . Vaughan, 98 Eng. Rep. 308. 310 (K.B. 1769).

[277] 4 Blackstone *141.

[278] *See* Joshua Getzler, *Fiduciary Principles in English Common Law*, *in* OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 31, at __.

[279] *The Trial of Thomas, Earl of Macclesfield, Lord High Chancellor of Great Britain, for High Crimes and Misdemeanors in the Execution of his Office, May 6, 1725. 10 Geo. I*, *in* COMPLETE COLLECTION OF STATE-TRIALS 140, 181.

In 1771, immediately before the Revolution, historians uncovered the Secret Treaty of Dover of 1670, which revealed France's Louis XIV bribing Charles II and James II in the seventeenth century to secretly convert to Catholicism and enter an ill-fated military alliance. This revelation highlighted the problems of foreign affairs, faith, and faithlessness on the eve of the Revolution. *See* Jed Handelsman Shugerman & Gautham Rao, *Emoluments, Zones of Interests, and Political Questions*, 45 HASTINGS CONST. L. Q. 651, 661 (2018).

1. Chief magistrates of the newly-independent states

Most relevant for purposes of understanding Article II, the states through constitutions and statutes created chief magistrates—generally called governors or presidents—to be the primary executive official. These officers, along with the British monarch and colonial governors, are the most probable models for the presidency that were in the minds of the drafters of Article II. We have already seen that oaths of office were critical for the monarch and colonial governors. The monarch was required to pledge during the coronation oath to govern according to Parliamentary statutes. An oath-bound requirement to follow standing law was also required of colonial governors, who in addition pledged to duly execute their offices. Nearly every state replicated these requirements for their governors. The only exceptions were the two "charter states" of Connecticut and Rhode Island, which did not draft new constitutions but simply continued under their old charters, with some updated laws. All of the remaining states, plus one entity that was not yet a state—Vermont—imposed by law the twin securities on the executive power later found in Article II: requiring that the chief magistrate govern according to standing law and take an oath of faithful execution of office.

One of the first states to act was Virginia. In spring 1776, before independence was formally declared,[280] a general convention met and passed an ordinance prescribing the oath of office for the Virginia governor and other officials. The governor's oath required both faithful execution of the office and adherence to the laws of the state:

> I will, to the best of my skill and judgment, execute the said office diligently and faithfully, according to law, without favour, affection, or partiality; that I will, to the utmost of my power, support, maintain, and defend the commonwealth of Virginia, and the constitution of the same . . . and will constantly endeavour that the laws and ordinances of the commonwealth be duly observed, and that law and justice, in mercy, be executed in all judgments . . . .[281]

[280] On May 15, 1776, the Continental Congress resolved that governments should be formed "under the authority of the people of the colonies." 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 358 (1906). This spurred states to begin deliberating about new constitutions.

[281] ORDINANCES PASSED AT A GENERAL CONVENTION OF DELEGATES AND REPRESENTATIVES FROM THE SEVERAL COUNTIES AND CORPORATIONS OF VIRGINIA HELD AT THE CAPITOL IN THE CITY OF WILLIAMSBURG ON MONDAY THE 6TH OF MAY, ANNO

The state's new constitution, drafted soon afterward in the summer of 1776, provided that the governor "shall, with the advice of a Council of State, exercise the executive powers of government, according to the laws of this Commonwealth."[282] The famous Bill of Rights of Virginia contained a declaration against execution suspension or dispensation of the laws,[283] which re-appeared in identical language in the later constitutions of Maryland, North Carolina, Massachusetts, and New Hampshire.[284]

Other states followed with constitutions and statutes requiring that the chief magistrate govern according to standing law and take an oath of faithful execution of office, such as Delaware in fall 1776[285] and Maryland in late 1776.[286] Many of the early state constitutions were heavily slanted toward legislative power, giving selection of the chief magistrate to the legislature, and requiring consultation and sometimes approval of a council

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DOM: 1776, at 13 (Williamsburg, Alexander Purdie, 1776), EAII no. 15199.

[282] VA. CONST. (1776).

[283] VA. BILL OF RIGHTS (1776), § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.").

[284] *See* N.C. CONST. (1776), art. V; MASS. CONST. (1780), Part the First: Declaration of Rights, art. XX; N.H. CONST. (1784), Pt. 1: Declaration of Rights, art. XXIX.

[285] DEL. CONST. (1776), art. VII (providing that a president or chief magistrate would, with the advice of a privy council, "exercise all the other executive powers of government, limited and restrained as by this constitution is mentioned, and according to the laws of the State"); *id*. art. XXII (requiring the president and other state officers to swear or affirm that they would "submit to its [Delaware's] constitution and laws"); 6 PAPERS OF THE HISTORICAL SOCIETY OF DELAWARE: MINUTES OF THE COUNCIL OF THE STATE OF DELAWARE FROM 1776 TO 1792, at 210 (Wilmington, Historical Society of Delaware, 1887) (oath of President Cesar Rodney, taken April 2, 1778: "I will well and truly, according to the best of my abilities and judgment, execute the office of President of Delaware State, agreeable to the Laws and Constitution thereof."); *see also id*. at 679 (same oath taken by President John Dickinson on November 13, 1781).

[286] MD. CONST. (1776), art. XXXIII (providing that the governor, sometimes with required concurrence of a council, would exercise executive power "according to the laws of this State . . . but the Governor shall not, under any presence, exercise any power or prerogative by virtue of any law, statute, or custom of England or Great Britain"); An Act to direct the forms of the commissions to the judges and justices, c. 5, in 1 THE LAWS OF MARYLAND 323 (Virgil Maxy ed., Philip H. Nicklin & Co., 1811) ("I A.B. elected governor of the state of Maryland, by the senate and house of delegates thereof, do solemnly promise and that I will, to the best of my skill and judgment, execute the said office diligently and faithfully, according to the constitution and laws of the said state, without favour, affection or partiality; and that I will, to the utmost of my power, support, maintain and defend the state of Maryland . . .; and that the laws of the state be duly observed, and that law and justice, in mercy, be executed in all judgments . . .")

before the chief magistrate could take certain acts. Pennsylvania probably had the least powerful chief magistrate, because that officer had to act with the approval of the council: "The supreme executive power shall be vested in a president and council."[287] "The president . . . with the council . . . are to correspond with other states, and transact business with the officers of government, civil and military. . . . [T]hey are also to take care that the laws be faithfully executed."[288] The president and council, along with other government officers, were required by the constitution to swear or affirm "that I will faithfully execute the office of [office named] . . . and will do equal right and justice to all men, to the best of my judgment and abilities, according to law."[289]

Two important constitutions which gave more power and independence to chief executives—including an independent electoral base—and thus provided models for the presidency, were those of New York (1777) and Massachusetts (1780). But both states had the same restrictions on gubernatorial power: a faithful execution requirement and a directive to enforce and abide by standing law.[290] Like Pennsylvania and Vermont, New

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[287] PENN. CONST. (1776), § 3.

[288] *Id*. § 20.

[289] *Id*. § 40.

[290] MASS. CONST. (1780), Part II: Frame of Government, Ch. II, arts. II & IV (providing that the governor, called the "supreme executive magistrate," would, along with his council, "order[ ] and direct[ ] the affairs of the commonwealth, agreeably to the constitution and the laws of the land"); *id*., Part II: Frame of Government, Ch. VI, art. I (requiring the governor and other state officers to take an oath (or affirmation if Quaker) to "faithfully and impartially discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of the commonwealth: So help me, God"); N.Y. Const. (1777), art. XIX (providing that "[t]he supreme executive power and authority of this State shall be vested in a governor," who shall "take care that the laws are faithfully executed to the best of his ability"); An Ordinance of the Convention of the State of New-York for organizing and establishing the Government, in 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK, 1775-1776-1777, at 916-17 (Albany, Thurlow Weed, 1842) (requiring the governor, before taking office, to take an oath "in the presence of that Almighty and eternal God," to swear "that I will in all things, to the best of my knowledge and ability, faithfully perform the trust, so as aforesaid reposed in me, by executing the laws, and maintaining the peace, freedom, honour, and independance of the said State, in conformity to the powers unto me delegated by the Constitution"); An Act requiring all Persons holding Offices or Places under the Government of this State to take the Oath therein described and directed, § 2, c. 7 (March 5, 1777), in LAWS OF THE STATE OF NEW-YORK COMMENCING WITH THE FIRST SESSION OF THE SENATE AND ASSEMBLY AFTER THE DECLARATION OF INDEPENDENCE 8 (Poughkeepsie, John Holt, 1782) (providing that future governors and lieutenant governors to take an oath "faithfully perform the Trust reposed in me, as [office named], by executing the Laws, and maintain the Peace, Freedom and

York used the language "take care to faithfully execute the laws" to command its chief magistrate to enforce and follow the law.[291]

States made choices that differed from one another, and from the choices made by drafters of Article II in 1787, about whether the chief magistrate should preside alone, or with the mere advice of a council, or only with the approval of a council; by whom and for how long a term the chief magistrate would elected; whether that officer could serve multiple terms; whether the chief magistrate would have no power, a qualified (over-rideable) power, or an absolute power to veto legislation and to pardon convicted criminals. But all of the states agreed that a chief magistrate should be under oath to faithfully execute the office, should be required to both abide by and faithfully apply standing law, and had no power to suspend the laws or dispense with their application to specific persons. As noted, these requirements replicate what was imposed on colonial governors and the British monarch, with the exception that the coronation oath did not use the specific language of faithful execution. When they expressly required that the president faithfully execute his office and the laws, the Framers of the Constitution almost certainly imported the exact same package of restrictions into Article II, with all the meaning they had acquired over the centuries.

2. Executive offices created by the Continental Congress

In looking for models for Article II, the Framers also must have considered important executive offices created by the Continental/Confederation Congress in the 1774-1787. The Congress repeatedly created executive offices with faithful execution duties, used oaths and affirmations to solidify those obligations, and specified or implied that faithful execution included abiding by standing law, staying within authority, and refraining from self-dealing.

Even before independence, the Continental Congress created offices such as "Treasurers of the United Colonies," who were required to give bond "for the faithful performance of their office,"[292] and paymaster general and quartermaster general for the army, who were on oath to "truly and faithfully discharge the duties of their respective stations."[293] In October 1776, the Congress ordered that all officers of the Continental Army take an

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Independence of the said State, in Conformity unto the Powers delegated unto me by the Constitution of the said State, So help me God").

[291] N.Y. CONST. (1777), art. XIX.

[292] 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 221 (1905).

[293] 2 *id.* at 223.

oath pledging allegiance to the thirteen colonies, abjuring allegiance to George III, and promising "to the utmost of my power, support, maintain, and defend" the United States[294]—language sounding very similar to the second part of the president's oath of Article II. Some months later, when the positions of secretary to the Congress and assistants were created, the army oaths were required for them, along with a promise of secrecy and an oath to "well and faithfully execute the trust."[295] The same package of oaths were required for the office of secretary of the Committee of Secret Correspondence,[296] filled in 1777 by Thomas Paine of *Common Sense* and *The American Crisis* fame.

In early 1778 the Congress enacted a long resolve reaffirming or updating many oaths. The oath for army officers remained essentially the same, and was now also imposed an "all persons, holding any civil office of trust, or profit, under the Congress of the United States."[297] Additional promises were required of "every officer, having the disposal of public money," to "faithfully, truly and impartially execute the office," "render a true account," and "discharge the trust reposed in me with justice and integrity."[298]

As the war neared an end in 1781, the Congress began to re-organize itself to address apparent deficiencies, particularly flaws in execution. The major executive-type offices frequently were bound by oaths of faithful execution. The Secretary of Foreign Affairs, a position filled by John Jay for several years, took an oath of fidelity to the United States and an oath "for the faithful execution" of his trust.[299] The Agent of the Marine (a single officer replacing the previous multimember board handling naval affairs) took an oath "well and faithfully to execute the trust" and was required to be bonded "for the due and faithful performance of his office."[300] Finance officers took oaths "for the faithful execution of the trust reposed in them respectively."[301] The resolve creating the Post Office in 1782 required the Postmaster General and his deputies, clerks, and riders to swear to "well

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[294] 6 *id*. at 893-94.

[295] 7 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 193-94 (1907).

[296] 7 *id*. at 274.

[297] 10 *id.* at 114-16.

[298] *Id.*

[299] 19 *id.* at 44; 22 *id.* at 92. As Secretary of the Department, Jay wrote to Congress regarding negotiations of a treaty with Spain: "I know that it is with Congress to give Instructions, and that it is my Business faithfully to execute and obey them." 29 *id*. at 629.

[300] 21 *id.* at 919-20.

[301] 21 *id.* at 950. See also 22 id. at 245 (same oath for inspector to audit the army).

and faithfully do, execute, perform and fulfill every duty," and subjected them to civil and criminal penalties for defaults.[302] The Secretary of War, and his clerks and assistants, to an oath or affirmation of fidelity to the United States, to "support, maintain and defend" the United States, and to "faithfully, truly, and impartially execute the office."[303] When the U.S. Mint was created in 1786, officers were required to enter into bonds "for the faithful execution of the trust respectively reposed in them."[304]

There can be no doubt that the framers of the Constitution at Philadelphia in 1787 were intimately familiar with oaths of faithful execution. A great majority of the delegates must have taken such oaths, either for national, state, or local office, under the crown or post-independence. Most of the delegates in Philadelphia had served in the Continental/Confederation Congress, the body so active in specifying that offices be faithfully executed. And resolves and draft resolves of the Congress imposing oaths of faithful execution were penned by future Philadelphia Convention delegates Elbridge Gerry,[305] Gouverneur Morris,[306] John Rutledge,[307] James Madison,[308] Roger Sherman,[309] Hugh Williamson,[310] and John Dickinson.[311] Searches in eighteenth century legal databases also confirm that contemporaneous usage tracks our findings here. [312]

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[302] 23 *id.* at 671.

[303] 28 *id.* at 21-23.

[304] 31 *id.* at 877.

[305] 6 *id.* at 938.

[306] 11 *id.* at 784.

[307] 23 *id.* at 728.

[308] *Id*.

[309] 27 *id.* at 479-80.

[310] *Id.*

[311] 13 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 171-72, 599-600 (Paul H. Smith et al. eds, 1986).

[312] Search results for the term "faithful execution" (and variants) are dominated by references to public offices and oaths, including judicial roles like jurors. Somewhat less common were uses in more purely private contexts that we would now call fiduciary instruments, like wills and guardianship. Least common was use in ordinary private contracts. These findings come with the caveat that these databases are not clearly representative of the era, so these observations are offered in a tentative and confirmatory spirit. For these searchable databases, see Eighteenth Century Collections Online, at https://www.beyondcitation.org/database/eighteenth-century-collections-online-ecco/; Making of Modern Law, at https://www.gale.com/primary-sources/making-of-modern-law; and Founders Early Access (Rotunda), at

III. WHAT IT ALL MEANS

Our history here supports three core meanings of the Constitution's command of faithful execution. First, the President is constitutionally prohibited from using his office to profit himself and engage in financial transactions that primarily benefit himself. Although the Compensation Clause[313] and the Emoluments Clause[314] in Article II can be said to reinforce this intuitive conclusion, the history of the language of faithful execution we have adumbrated above requires this reading, too. The faithful execution requirement in the Presidential Oath Clause, which appears right after the Compensation and Emoluments Clauses, may be seen, perhaps, as a belt-and-suspenders effort[315] to help police conflicts of interests and proscribe self-dealing. More generally, faithful execution demands that the President act for reasons associated primarily with the public interest rather than his self-interest. Second, the Faithful Execution Clauses – derived as they are from commands upon both the highest and the lowest officeholders – clarify how important it was to the constitutional design that the President stay within his authorizations and not veer *ultra vires*. Third, the Faithful Execution Clauses reinforce that the President must act diligently, in good faith, and take affirmative steps to pursue what is in the best interest of his national constituency. Whereas the prohibitions on self-dealing sound in proscription, his command of diligence, care, and good faith contain an affirmative prescriptive component. As we will show in this Part, these three historical meanings of faithful execution furnish input into pressing contemporary debates about executive authority. Below, we discuss how our historical findings about the original meaning of the Faithful Execution Clauses align with core features of modern fiduciary law; what the three meanings we can attribute to the Clauses have in common is that they are all part of the basic ways the private law constrains fiduciary discretion and power.

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http://rotunda.upress.virginia.edu/founders/FOEA.html.

[313] U.S. CONST. art. II, § 1 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected.").

[314] *Id.* ("[A]nd he shall not receive within that Period any other Emolument from the United States, or any of them.").

[315] On belt-and-suspenders in legal design, see Ethan J. Leib & James J. Brudney, *The Belt-and-Suspenders Canon* (forthcoming 2019).

A. A Fiduciary Theory of Article II?

In the main, our findings vindicate what we have previously called the "fiduciary theory of Article II"[316] because the three major propositions we identify as the substantive original meaning of faithful execution—a no-self-dealing restriction; a subordination of the President to the laws, barring *ultra vires* action; and a requirement of affirmative diligence and good faith—taken together, reflect very fundamental obligations that are imposed upon fiduciaries of all kinds.

Although some fiduciary theorists of governmental authority have assumed that the framers of the Constitution drew upon prevalent private law ideas in fashioning their laws of office-holding,[317] our own evidence suggests something different. As Part II demonstrates, the fiduciary-like obligations of officeholders have their roots at least as far back as medieval and early modern England in a law of offices. This law was more deeply developed during the seventeenth century, and did not seem to change substantively over the eighteenth century leading up to the revolutionary and framing periods. Most of the offices involved had a clearly public cast: sheriff, constable, tax assessor, customs officer, governor, and the like. But other offices looked like what we would now call private offices (yet in those days were set in motion by public laws).[318] In either case, faithful execution applied broadly to such offices. By contrast, the "private" fiduciary law we would recognize today does not seem to have crystallized until the early eighteenth century in England, and the end of that century in America, after the Constitution was framed.[319] So a fiduciary law of

[316] Kent, Leib & Shugerman, *supra* note 21.

[317] *See* source cited *supra* note 32.

[318] A simple example is that corporate directors are paradigmatic private fiduciaries under modern law, of course; but because historically incorporation required the consent of a sovereign authority, corporate directors had something like quasi-public offices (and were routinely bound by oath and faithful execution duties). Another example might be guardians or trustees for the incompetent. Today, we would likely treat such guardians as private fiduciaries. But in the colonies as late as 1786, state legislatures would pass laws to install people in these offices. *See, e.g.*, MD. CHRON., Feb. 22, 1786 (reprinting "An Act to appoint a trustee to take care of the person and property of George Shipley, senior, who is insane").

[319] The seminal case for the fiduciary law of "private" offices is *Keech v. Sanford*, [1726] S.C. 2 Wh. & T. L. C. 693. This decision of the Court of Exchequer at Westminster cleanly and clearly imposed the basic no-conflict and no-profit proscriptions in a case concerning the law of private trusts. But by then the law of public office already had a deep concern with abuse of the public trust and corruption through self-dealing. Lord Chancellor Peter King, who wrote the *Keech* opinion, was surely influenced by an earlier impeachment trial over which he had presided, which removed his predecessor, the Earl of Macclesfield. *See*

"private" offices was not plucked off-the-rack by the Philadelphia Convention drafters and applied to public offices. Instead, the law of offices was applied, which already contained what we might today call duties of loyalty and care. This suggests, then, not that the project of fiduciary constitutionalism is misguided—because something like core fiduciary obligations were imposed on the President—only that it needs to be revised to accommodate the fact that the fiduciary obligations entailed by the Faithful Execution Clauses flow at least as much from the law of public office as they do from inchoate private fiduciary law from England. Indeed, one might argue that what presents to us as private fiduciary law today had some of its genesis in the law of public office-holding.

1. The President's Duty of Loyalty

What then can it mean to say that the Faithful Execution Clauses evidence what we would now see as fiduciary law's primary concern to avoid conflicts of interest and the misappropriation of profits?[320] It can't mean, for example, that presidents are disabled from campaigning for their own re-elections. Nor can it mean that they are prohibited from trying to help the fate of their political party in races down the ballot, even if there is a direct way the success of the political party which they lead is something in which they certainly have an important stake. But it still is likely to have certain constitutional ramifications that have been underappreciated because the history of the Faithful Execution Clauses has not heretofore been known.

First, the Faithful Execution Clauses reinforce that "that presidential actions motivated by self-protection, self-dealing, or an intent to corrupt . . . are unauthorized by and contrary to Article II of the Constitution."[321] In light of the framers' preoccupation with corruption, taking bribes, and the

supra notes 278 & 279 and accompanying text. And Lord Chancellor King is very likely to have been fluent in the political theory of John Locke, his cousin and routine correspondent for whom he served as a literary executor. Locke is often credited as having laid out a fiduciary theory of governmental authority. *See* JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE (Russell Kirk, intro. 1955) (1690). The relevant passages are discussed and analyzed in Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013). It was not until seven decades after *Keech*, and some years after the U.S. Constitution was framed, that the House of Lords fully embraced the *Keech* principles. *See* York Buildings v. Mackenzie, [1795] 7 Brown 42, 63-64, 3 ER 432, 446. More work is needed to understand when and how modern-looking fiduciary law fully crystallized in the United States.

[320] *See generally* MATTHEW CONAGLEN, FIDUCIARY LOYALTY (2010).

[321] *See* Law Professor Letter on President's Article II Powers (June 4, 2018), https://protectdemocracy.org/law-professor-article-ii/.

misappropriation of financial resources by officeholders for their own accounts,[322] it is no surprise that they sought to bind the President by oath to a requirement of faithful execution. That is how the law of office for centuries sought to constrain officeholders' self-dealing. To be sure, as we showed in Part II, officers often had to post bonds and securities in conjunction with their commitments of faithful execution not to misappropriate funds. Whether this was because, as Nick Parrillo has shown, many officeholders had no regular salary and were expected to be paid through services rendered by facilitative payments or bounties, [323] or whether this was just a simple enforcement mechanism to avoid courts and other more complex forms of adjudication like impeachment proceedings, the choice of "salarization" and "no other emoluments" in Article II reinforces the prohibition of self-dealing imposed on the President.[324] At the least, he clearly may not use his office to enrich himself monetarily.

But it may be, secondarily, that the President's duty of faithful execution supervenes over some of his other powers in Article II that otherwise look discretionary. For example, notwithstanding that the President is empowered by the Constitution to be the "commander in chief"[325] with no reservations in Article II, Section 2, the presidential oath of faithful execution in Article II, Section 1, probably prohibits him from

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[322] This republican concern of the framers has been widely discussed in, inter alia, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 276–90 (2014).

[323] *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013). It seems to us that Parrillo's recent effort to apply the lessons of his findings to "fiduciary thinking about public office," *see* Nicholas R. Parrillo, *Fiduciary Government and Public Officers' Incentives*, *in* FIDUCIARY GOVERNMENT 146, 146 (Evan J. Criddle et al. eds., forthcoming 2018), too quickly assumes that without "salarization," we can't have officeholders with fiduciary obligations, *id.* at 152. Just because an officer has poor incentives for self-dealing doesn't mean she isn't a fiduciary. Indeed, it is precisely poor incentives for self-control and difficulty of monitoring officer performance that often is the justification for strict fiduciary obligations to avoid opportunism in the first place. *See* Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking – Some Theoretical Perspectives*, 80 NW. U. L. REV. 1 (1985). The oath and the command of faithful execution was one way to have the officer internalize her fiduciary obligations – even without the additional help of "salarization."

[324] We do not opine on the way the framers envisioned enforcing the President's duty of loyalty. Impeachment was a common method to enforce public fiduciary obligations. *See, e.g.*, Robert G. Natelson, *Impeachment: The Constitution's Fiduciary Meaning of "High . . . Misdemeanors*," 19 FED. SOC. REV. 68 (2018). But there is evidence for many different enforcement mechanisms and we cannot here to commit to one.

[325] U.S. CONST. art. II, § 2.

choosing defense contractors that line his own personal pockets in derogation of the public interest. The seemingly discretionary pardon power in Section 2 may similarly be curtailed by the duty of faithful execution, prohibiting (at least) self-pardons.[326] And it may also restrict the President's power to dismiss officials for primarily self-protective purposes against the public interest, especially given that removal power is not explicitly mentioned in the text, while the requirement of faithful execution is, doubly.[327]

Ultimately, our effort here is not to develop clear rules of constitutional law. But the finding of a fiduciary duty of loyalty in the Faithful Execution Clauses is an important development.[328]

2. Legislative Supremacy and the President

For centuries, commands and oaths of faithful execution established relational hierarchy – and subordinated the officeholder to a principal or purpose. Whether it was a command to trustees of a lottery[329] or officers who collected tolls on colonial roads,[330] faithful execution establishes relationships of commander and executor. Today, we might very well call such a mix of empowerment with office and subordination to principal or purpose *fiduciary*,[331] reinforcing another dimension of the fiduciary theory of Article II.[332]

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[326] See sources cited in *supra* note 21.

[327] *See id*.

[328] Rob Natelson's fiduciary constitutionalism applies similar fiduciary obligations to many other governmental actors, *see* Natelson, *Public Trust*, *supra* note 32, at 1146-58. But our argument here flows from the Faithful Execution Clauses, which apply only to the President. This doesn't mean other officeholders aren't also bound by fiduciary obligations of loyalty. But the Constitution clearly imposes this set of fiduciary obligations upon the President in Article II based on the historical findings we report here.

[329] See *supra* notes 241 and 242 and accompanying text.

[330] *See An Act To Lay out Several Turnpike Roads in Baltimore County*, MD. J., May 18, 1787 ("[C]ommissioners may, out of the money arising as aforesaid, make allowance to such persons for their care and trouble, in the execution of their office, as to them shall seem proper, always taking bond, with good and sufficient security, from the persons appointed for the due and faithful execution of their office and rendering such account.").

[331] For the distinction between a "service" fiduciary like an agent for a principal and a "governance" fiduciary like a director of a charitable non-profit that serves a purpose, see Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513 (2015).

[332] Again here, Natelson finds the "duty to follow instructions and remain within authority" to apply to all officeholders in virtue of them all being agents. *See, e.g.*, Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, *in* THE ORIGINS OF

Others have argued that office-holding under the U.S. Constitution is sufficiently similar to a private law agency relationship[333] or is analogous to acting under a "power of attorney"[334] and have found some historical sources that tend to limit such private actors strictly to their authorizing instruments. Perhaps the most deliciously on point piece of evidence is from an anti-federalist writer, "A Citizen of Maryland:"

> My idea of government .... , to speak as a lawyer would do, is, that the legislatures are the *trustees* of the people, the constitution the *deed of gift*, wherein they stood seized to *uses* only, and *those uses being named*, they cannot depart from them; but for their due performance are accountable to those by whose conveyance the trust was made. The *right* is therefore *fiduciary*, the power *limited*.[335]

Indeed, the general legal idea that agents had an obligation to hew closely to their authorization and not veer outside it was well-established in the common law at the time of the Framing.[336] But where other fiduciary constitutionalists have struggled is in figuring out how to get from analogy to clear legal duty.

The Faithful Execution Clauses and their history, which we have explored here roots the legal concern about acting *ultra vires* right in Article II – at least with respect to the President. Whatever else is true about the law of office, the office of President explicitly requires faithful execution, subordinating the President to those who authorize what he is supposed to execute.

The reasonable legal implication here is that the language of faithful execution is for the most part a language of limitation, subordination, and proscription, not a language of empowerment and permission.[337] Gaining

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THE NECESSARY AND PROPER CLAUSE 57 (Gary Lawson et al. eds., 2010)

[333] *See, e.g.*, Natelson, *Public Trust*, *supra* note 32, at 1137-42.

[334] *See* LAWSON & SEIDMAN, *supra* note 32, at 23-25.

[335] LUTHER MARTIN, A CITIZEN OF THE STATE OF MARYLAND: REMARKS RELATIVE TO THE BILL OF RIGHTS (1788), *in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 92 (Merrill Jensen et al. eds., 1976).

[336] *See* Natelson, *Judicial Review*, *supra* note 32, at 256.

[337] Thus, Ed Corwin's meditation on the presidential oath expends too much effort exploring potential powers conferred by the oath rather than limitations it imposes. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 62-64 (4th ed., 1957).

the office is obviously a kind of empowerment that confers some important types of discretion but that power and discretion is constrained through the oath and requirement of faithful execution. That likely means, among other things, that the President cannot act with a motivation to undermine Congress's laws.

Over the past few decades, there has been increasing debate about the President's power of non-enforcement,[338] disregard,[339] or waiver (even "Big Waiver")[340] of statutes. Examples include: the increasing use of presidential signing statements;[341] President Bush's "deregulation through non-enforcement;"[342] President Obama's delays and waiver of provisions of the Affordable Care Act (ACA);[343] his waiver of aspects of welfare laws and the No Child Left Behind Act;[344] non-enforcement of marijuana offenses;[345] and Obama's policy of non-enforcement of some immigration laws.[346] More recently, the Trump administration has declined to enforce the individual mandate and other provisions of the ACA.[347] Our lessons

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[338] *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBLEMS 7 (2000); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).

[339] Prakash, *supra* note 3.

[340] *See* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2011).

[341] *See* Daniel B. Rodriguez, Edward H. Stiglitz & Barry R. Weingast, *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95 (2016).

[342] *See* Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010).

[343] *See* Simon Lazarus, *Delaying Parts of Obamacare: 'Blatantly Illegal' or Routine Adjustment?*, THE ATLANTIC, July 17, 2013, *available at* www.theatlantic.com/national/archive/2013/07/delaying-parts-of-obamacare-blatantly-illegal-or-routine-adjustment/277873/.

[344] *See* Molly Ball, *What Obama Really Did to Welfare Reform*, THE ATLANTIC, Aug. 9, 2012, *available at* www.theatlantic.com/politics/archive/2012/08/what-obama-really-did-to-welfare-reform/260931/; Forum, *Obama's NCLB Waivers: Are They Necessary or Legal?*, 12 EDUCATION NEXT 57 (2012).

[345] *See* Price, *supra* note 25.

[346] *See* Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 215 (2015).

[347] Nicholas Bagley & Abbe R. Gluck, *Trump's Sabotage of Obamacare Is Illegal*, N.Y. TIMES, Aug. 14, 2018, *available at* www.nytimes.com/2018/08/14/opinion/trump-obamacare-illegal.html.

about the original meaning of faithful execution might furnish some illumination about these contested areas of executive authority.

There are perhaps four categories of executive non-enforcement: non-enforcement for policy reasons, inability to enforce because of budgetary limitations or unclear congressional commands, non-enforcement for constitutional reasons, and prosecutorial discretion.[348] The historical evidence in this Article does not conclusively address the legitimacy of all of these powers, but it provides some clues.

Clearly, non-enforcement for policy reasons is most at odds with the historical meaning of the Faithful Execution Clauses. Faithful execution was understood as requiring deference to national laws, including those enacted by Congress. Waivers or refusals to enforce for policy reasons without clear congressional authorizations, then, appear to be invalid under the clauses.

By contrast, inability to enforce a congressional command because the command is essentially unfunded or is too vague to be enforced does not seem obviously implicated by our findings. Thus, the Supreme Court's willingness to defer to executive discretion in "failure to act" claims under the Administrative Procedure Act[349] in those cases of underfunding, imprecision, or lack of specificity by congressional command[350] are consistent with the history of faithful execution. So too is judicial deference to interstitial executive interpretation of ambiguous statutes in run-of-the-mill *Chevron* cases, in which courts allow the executive a range of discretion to develop statutory meaning in cases where Congress hasn't clearly spoken on the matter.[351] Although faithful execution does seem to require the executive to follow in good faith what he takes to be Congress's

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[348] A fourth might be non-spending of appropriated funds on policy grounds. Because there could be unique constitutional considerations about the legislative and executive for in spending, we will not here offer an opinion about the issue.

[349] *See* Administrative Procedure Act, 5 U.S.C. § 706(1) (2012) (providing courts the power to "compel agency action withheld").

[350] *See, e.g.*, Norton v. S. Ut. Wilderness Alliance, 542 U.S. 55 (2004). Myers v. United States, 272 U.S. 52, 291–92 (1926) (Brandeis, J., dissenting) ("Obviously, the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress ... declines to make the indispensable appropriation .... The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.").

[351] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Although *Chevron* did not cite the command of faithful execution, some courts have rooted the executive's power to interpret ambiguous statutes in the Take Care Clause. *See, e.g.*, Garfias-Rodriguez v. Holder, 702 F.3d 504, 515 (9th Cir. 2012).

instructions,[352] there obviously remains a berth of discretion in cases where Congress does not provide adequate funding or guidance. Indeed, the faithful execution command is imposed precisely because the President retains plenty of discretion in his office – and the framers worried about when that discretion could too easily bleed into *ultra vires* action.

Many supporters of a purported presidential power not to enforce a command based on his own interpretation of the Constitution rely on the presidential oath to "faithfully execute" the office and to "preserve" the Constitution. The reliance on faithful execution for a theory of "departmentalism" in which each branch gets its say on the meaning of the Constitution, however, may be misplaced. In light of our evidence that oaths in general and the faithful execution command in particular limited rather than enlarged an official's power and discretion, the record about "faithful execution" does not support presidential constitutional interpretation. Indeed, our history seems like a thumb-on-the-scales in favor of the view that the President must carry out Congress's views, at least with respect to legislation.

Does our evidence address prosecutorial discretion? Prosecutorial discretion has its own tradition, untethered to faithful execution. But what if an administration adopts a broad policy of prosecutorial discretion as a means of non-enforcement, triggering concerns about faithful execution? The historical evidence here does not answer such a question definitively, but it does offer some support for the argument against systematic executive discretion to "suspend" laws through an assertion of prosecutorial discretion.

As the Supreme Court has acknowledged, quoting the Take Care Clause, "[u]nder our system of government, Congress makes laws and the President . . . 'faithfully execute[s]' them."[353] The Faithful Execution Clauses, thus, underscore that "[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts."[354] This lesson is as basic as it is relevant to contemporary disputes about presidential power to undermine Obamacare without a congressional repeal;[355] presidential power to under-enforce

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[352] *See* Aaron J. Saiger, *Agencies' Obligation To Interpret the Statute*, 69 VAND. L. REV. 1231 (2016).

[353] Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2446 (2014).

[354] United States v. Midwest Oil Co., 236 U.S. 459, 505 (1915).

[355] *See, e.g.*, City of Columbus v. Trump, Case No. 18-cv-2364 (D. Md. 2018) (complaint by cities trying to enjoin presidential efforts to sabotage Obamacare, citing the President's duty of faithful execution).

congressional regulation of marijuana;[356] and presidential power to under-enforce or over-enforce immigration laws.[357] Yet it may also be relevant to controversial standing case law, which has relied on the idea of faithful execution to disable Congress from writing citizen suit provisions in their laws to help vindicate the "public interest" through "individual rights" to bring lawsuits against the executive.[358] Although *Lujan v. Defenders of Wildlife* clearly held this kind of congressional action to be in tension with "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,'"[359] that holding looks less convincing in light of our findings here about the relational structure imposed by faithful execution.

3. The President's Affirmative Obligation of Diligence

Our historical findings in Part II revealed not only proscriptive dimensions of the duty of faithful execution but prescriptive ones as well. Considering the meanings of faithfulness disclosed by dictionaries at the time of the Framing, we were able to highlight that faithful execution requires not only the absence of bad faith through honesty[360] but the presence of forms of "steadiness." The implication here is that faithful execution requires affirmative effort on the part of the President to pursue diligently and in good faith the interests of the principal or purpose specified by the authorizing instrument or entity. This is in keeping with many conceptualizations of fiduciary obligations, which treat loyalty and care as forming the core of fiduciary obligation.[361] And this makes sense of

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[356] *See, e.g.*, Price, *supra* note 17.

[357] *See, e.g.*, Brief for the Cato Institute, Professor Randy E. Barnett, and Professor Jeremy Rabkin as Amici Curiae Supporting Respondents at 10, United States v. Texas, 136 S. Ct. 2271 (2016) (No. --) ("It bears emphasis how strong the language of the Take Care Clause is. It is pitched at the highest register of constitutional obligation. The president shall—not may. He shall take care—not merely attempt. . . And he shall take care that they are executed faithfully. No other constitutional provision mandates that any branch execute a power in a specific manner").

[358] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

[359] *Id.* (quoting U.S. CONST. art II, § 3).

[360] *See generally* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

[361] To be sure, some see only the duty of loyalty at the core and the duty of care as a sideshow. *See* CONAGLEN, *supra* note 320, at 59 ("[F]iduciary duties are proscriptive rather than prescriptive"). But most conventional approaches to fiduciary obligation mention the duty of care as among the most common of fiduciary duties. *See* Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 401, 404-05 (D. Gordon Smith & Andrew Gold eds., 2018).

why although the standard of review for executive inaction is very deferential as we just discussed, the APA does make inaction reviewable: diligence will often require action that sometimes may be compelled.

What might this command mean for constitutional law? It likely means that when the executive acts or refrains from acting, he must be motivated by the right kinds of reasons.[362] Not only is the proscription on self-dealing relevant – but the executive must ensure ("take Care") that anyone under his command in the business of executing the law is doing so only in the best interests of his national constituency. Thus, the Faithful Execution Clauses do ultimately have lessons for how the administrative state must be run: the President as the head of the Executive Branch needs to follow the commands of Congress at the same time as he diligently ensures that the entire apparatus of the office and the Executive Branch is properly oriented in a steadfast and steady manner.[363] It is a derogation of duty not to pursue with diligence what Congress wants executed and that which is in the public interest,[364] further reinforcing that although there is a berth of discretion like all fiduciaries have, there is still an affirmative obligation not to use discretion as an excuse not to pursue the beneficiary's best interests. The constellation of proscription and prescription that our history reveals means that there is likely an interstitial power traceable to the obligation of diligence – something like a president's "completion power" – that is supported by the Faithful Execution Clauses.[365] This limited power gives the President authority to fill in incomplete legislative schemes to promote the best interests of the people, the ultimate beneficiary of his fiduciary obligation, whose interests are usually mediated through their representatives.

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[362] On the role of the right kinds of reasons in analyzing a fiduciary's conduct, see *id.* at 409-10.

[363] The fiduciary theory of administrative governance – most importantly explicated by Evan Criddle – thus gains further support from our historical findings about the Faithful Execution Clauses. *See* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010).

[364] The focus on the public interest is something generations of "republicans" have also traced to the framing period. *See* JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 165 (1992) ("Because of the critical important of virtue [to republican ideology], the proponents of the mixed constitution analyzed the ways to enhance men's capacity to place the public weal before their own self-interest.").

[365] *See* Goldsmith & Manning, *supra* note 15; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952) (Vinson, C.J., dissenting). Both sources allude to the Take Care Clause in their arguments for the "completion power" but neither supports their view with the original meaning of "faithful execution" we develop here.

CONCLUSION

The Constitution's twin clauses in Article II that require faithful execution from the President are the sources of a lot of rhetoric in law and politics. Much of that rhetoric gives the impression that the Faithful Execution Clauses confer upon the President immense powers that consolidate substantial authority within the Executive Branch. We have shown here that this rhetoric is radically disconnected from centuries of history that furnish a rather different substantive meaning to the Faithful Execution Clauses. That history points to faithful execution being a restrictive duty rather than an expansive power – and this requirement was as likely to be imposed on high-level office-holders as it was upon the lowest who was ordered not to self-deal, not to veer from the job he or she was assigned, and to do the job with diligence and care. This tripartite specification of faithful execution, tracking emerging fiduciary law, was as consistent as it was well understood at the time of the framing of the U.S. Constitution.

The original meaning of the Faithful Execution Clauses does not obviously dispose of many of the most significant and pressing contemporary issues implicated by assertions of presidential authority. But our findings here at least suggest that the President – by original design – is supposed to be like a fiduciary, who must pursue the public interest in good faith republican fashion rather than pursuing his own self-interest, and who must diligently and steadily execute Congress's commands.[366] Now that this original meaning is more clear, the Constitution can be applied more faithfully to the vision of the framers.

[366] For an effort to link republicanism and fiduciary theory, see Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993 (2017). Our Article shows these connections as a matter of constitutional history.