
THE PRESIDENT AS OFFICER NOT SOVEREIGN[†]

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The authors of *Faithful Execution and Article II*¹ adduce a wealth of historical evidence to make the provocative and convincing argument that the language of “faithful execution” in Article II of the U.S. Constitution imposes a set of constraints upon the manner in which the President may act.² The article suggests not that these limitations can be easily cashed out in doctrinal terms, but rather that they contravene expansive readings of the Take Care Clause as authorizing a host of presidential actions inconsistent with the steady implementation of congressional policy, a view of the President as a direct inheritor of royal prerogative and hence immune to legal efforts at policing the office, and the theory of the “unitary executive,” which insists that the President enjoys expansive authority to remove officers within the executive branch.³ The phrase “faithful execution” itself appears both in the clause requiring that the President “take Care that the Laws be faithfully executed”⁴ and in the constitutional oath of office by which the President must proclaim that “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States.”⁵ *Faithful Execution and Article II* carefully traces the source of that language, finding that it emerges not from rhetoric surrounding the king, but instead from requirements placed upon mid-level officers.⁶ Fundamentally, *Faithful Execution and Article II* supports a vision of the presidency that emphasizes its status as an *office* and rejects the residues of sovereignty. In doing so, the piece speaks to two recently developing literatures on offices. While the first tends to emphasize the constraints on the British king himself derived from thinking of the Crown as an office to be held, the second unearths the significance of officeholding in structuring the English and American polities, including at the time of the Founding, as well as the importance of officeholding within the

[†] Responding to Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

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¹ 132 HARV. L. REV. 2111 (2019).

² See *id.* at 2113.

³ See *id.* at 2114–16 & nn.9–22, 2184–88 & nn.431–58.

⁴ U.S. CONST. art. II, § 3.

⁵ *Id.* § 1, cl. 7.

⁶ As Kent, Leib, and Shugerman contend, “the drafters, notably, did not borrow language from the coronation oath but rather from the oaths of lesser officers, which frequently invoked faithful execution.” Kent et al., *supra* note 1, at 2128.

Framers' political consciousness.⁷ Taking these two literatures together suggests that the Founders were deeply enmeshed within a social framework of officeholding and that they saw the presidency as one office among others.

In their article, Professors Andrew Kent, Ethan J. Leib, and Jed Handelsman Shugerman substitute a new story about the relation between the President and intermediate officeholders for an older genealogy tracing power from the king to the President.⁸ One strand of the history of political thought has, however, begun to question whether the sovereignty of the king himself was as absolute as has sometimes been posited and to suggest that the Crown itself should be construed as an office. The first step this criticism takes is to separate sovereignty from government and claim a reduced role for the former within classical political theory, particularly the works of Jean Bodin, often taken as the foundational theorist of absolute sovereignty, and the writings of Thomas Hobbes, who has been especially influential within Anglo-American political systems.⁹ Hence Professor Daniel Lee argues that Bodin's conception of officeholding furnishes a limitation upon the sovereignty of the king. According to Lee's interpretation, Bodin endorsed the idea that "sovereignty is necessary for the very existence of the state as an independent order, yet on the other hand, sovereignty must, in a sense, be 'de-politicized' or 'de-activated' in order for it to function as a stable and reliable source of order and legitimacy," and, for this reason, "public power must be delegated to others, acting as agents or 'keepers in trust' of the sovereign power."¹⁰ This meant that "[o]fficers of state" would fulfill most functions of government.¹¹ With regard to these

⁷ On the former points, see DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT (2016) [hereinafter LEE, POPULAR SOVEREIGNTY]; J.G. Allen, *The Office of the Crown*, 77 CAMBRIDGE L.J. 298 (2018); David Kearns, *Sovereignty and Common Law Judicial Office in Taylor's Case (1675)*, 37 LAW & HIST. REV. 397 (2019); and Daniel Lee, "Office Is a Thing Borrowed": Jean Bodin on Offices and Seigneurial Government, 41 POL. THEORY 409 (2013) [hereinafter Lee, "Office Is a Thing Borrowed"]. On the latter, see NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013); Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013); Mark Goldie, *The Unacknowledged Republic: Officeholding in Early Modern England*, in THE POLITICS OF THE EXCLUDED, C.1500-1850, at 153 (Tim Harris ed., 2001); and Bernadette Meyler, *Originalism and a Forgotten Conflict over Martial Law*, 113 NW. U. L. REV. 1335 (2019).

⁸ Recent work by Julian Mortenson has suggested a similar narrative. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Julian Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. (forthcoming Apr. 2020).

⁹ See, e.g., RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2016); see also LEE, POPULAR SOVEREIGNTY, *supra* note 7, at 187-224; Lee, "Office Is a Thing Borrowed," *supra* note 7.

¹⁰ Lee, "Office Is a Thing Borrowed," *supra* note 7, at 419.

¹¹ *Id.* at 422; see *id.* at 420.

offices, neither the king nor the officeholder owned them, but tenure was instead conceptualized “in the formal juridical terms of a commercial transaction regulated by law, such as a trust, a mortgage, a purchase, or a loan.”¹² The contract was “reciprocally binding not only on the officer but also, significantly, on the sovereign making such a grant”; hence “[t]he sovereign could not arbitrarily interfere in the affairs of state officers.”¹³ Ultimately, Lee concludes, Bodin suggested that “offices belonged not to a person, but to the *respublica*” and that it was from the state, not the king, that they were borrowed.¹⁴ The structure of officeholding here assists in establishing the independence of the state from the dominion of the sovereign.

Those examining judicial office within England have posited a further limitation upon sovereignty in relation to the self-conception of common law judicial officers. As David Kearns argues in *Sovereignty and Common Law Judicial Office in Taylor’s Case (1675)*, Hobbes himself presented the model of sovereignty in opposition to claims of judicial autonomy raised by his contemporary Sir Matthew Hale, whose “rhetoric of office eschewed the language of hierarchical sovereignty.”¹⁵ For Hale, “[j]udicial office was grounded in part upon laws made by the king, but more significantly, it was grounded upon ancient laws developed beyond sovereign purview, which in some cases limited the monarch.”¹⁶ If the framework of contract restrained the power to disturb office under Bodin, within English history, ancient laws, or what has been called the ancient constitution, helped to establish the independence of judicial office.

Fast forwarding to present theories of the role of the British Crown, J.G. Allen has suggested unifying various ways of speaking about the institution of the Crown in its relation to the particular monarch under an idea of the Crown as office. Usefully illuminating the displacement of the tradition of officeholding by the rise of salaried employment, a story that Professor Nicholas Parrillo has persuasively outlined in the American context, Allen explains that this displacement represents an analytical loss, because the contemporary civil service retains many of the conceptual features of officeholding.¹⁷ Furthermore, he contends,

¹² *Id.* at 420.

¹³ *Id.* at 423.

¹⁴ *Id.* at 427.

¹⁵ Kearns, *supra* note 7, at 426. For a similar set of arguments about the relationship between the assertion of sovereignty and defense of the common law within seventeenth-century England, see BERNADETTE MEYLER, *THEATERS OF PARDONING* (2019).

¹⁶ Kearns, *supra* note 7, at 410.

¹⁷ See Allen, *supra* note 7, at 308–09 (“Rather than building on traditional legal controls over officials, therefore — for example by characterising offices as property encumbered by a ‘public trust’ — office was cast off entirely and the new public service was erected on a model of salaried employment and managerial control.” *Id.* at 308.); see also PARRILLO, *supra* note 7 (treating the

conceiving of the Crown itself as an office helps explain and bind together various historical theories of the role of the Crown. Several of the dimensions of officeholding that Allen identifies overlap with the significance of faithful execution for Kent, Leib, and Shugerman. In particular, Allen follows Professor Meyer Fortes in suggesting that “officeholders must conform to certain modes of behaviour connected with the office” and that “offices have a mandate from society, through its other organs and institutions, giving each office a moral and jural sanction to exercise its stipulated function.”¹⁸

According to these political theories of office, office presented a model of government inconsistent with an absolutist vision of sovereignty, one that would have affected the view of the Founding generation. The very invocation of office and officeholding within Article II, not only the choice of constraints upon mid-level officers, would have resonated with a political vision incompatible with an imperial presidency.

A second and still-emerging literature emphasizes the importance of officeholding within popular consciousness during early modern England and eighteenth-century America. An important essay by Professor Mark Goldie, which *Faithful Execution and Article II* relies upon, emphasizes officeholding as a form of civic participation within seventeenth-century England, and unearths the fact that “an astonishingly high proportion of early modern people held office.”¹⁹ As he observes, officeholding entailed various obligations, and Cicero’s *Offices* was a crucial textbook for official service.²⁰ Within early America, manuals abounded for justices of the peace, one of the important and widespread varieties of colonial officers.²¹ Others have demonstrated the significance for members of the Founding generation of the duties attached to office and whether these offices were held by local or national, or military or civilian personnel.²² As in England, the centrality of officeholding and its entailments has been eclipsed by the

transition between 1780 and 1940 from a system in which “officers’ incomes depended, immediately and objectively, on the delivery of services and the achievement of outputs,” *id.* at 1, to one in which government employees received fixed salaries).

¹⁸ Allen, *supra* note 7, at 308 (citing Meyer Fortes, *Ritual and Office in Tribal Society*, in *ESSAYS ON THE RITUAL OF SOCIAL RELATIONS* 53, 58–59 (Max Gluckman ed., 1962)).

¹⁹ Goldie, *supra* note 7, at 161.

²⁰ *Id.* at 181.

²¹ For a discussion of these manuals, see John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257 (1985). More recently, scholars have demonstrated the significance of justices of the peace within localized legal regimes both before and after the American Revolution. See LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009); JESSICA K. LOWE, *MURDER IN THE SHENANDOAH: MAKING LAW SOVEREIGN IN REVOLUTIONARY VIRGINIA* (2019).

²² See, e.g., Campbell, *supra* note 7; Meyler, *supra* note 7.

rise of the bureaucratic state, but they were widely recognized in late eighteenth-century America.

The concept of office and the constraints it entails extend to the highest levels of American government — including the presidency — while office dignifies other roles, including those of executive branch employees. Under this account, Article II’s invocation of “the Office of President” is not mere verbiage but carries important implications for how we construe the tenor and nature of the President’s power. Imagining the President as part of a continuum within which other executive-branch officers also fall might additionally encourage us to adopt a narrower understanding of the nature of the President’s power to remove subordinate officials and the appropriate grounds for doing so. Not only focusing our attention on the phrase “faithful execution,” the authors of *Faithful Execution and Article II* lay the groundwork for reanimating the idea of office itself within the U.S. constitutional frame.