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Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, (2008).
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NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY **(FORTHCOMING)**

Draft of November 19, 2008

Electronic copy available at: http://ssrn.com/abstract=1304952

HONOR'S CONSTITUTIONAL MOMENT: THE OATH AND PRESIDENTIAL TRANSITIONS

Paul Horwitz*

INTRODUCTION

Ever since Bruce Ackerman introduced us to the phrase, constitutional lawyers have come to think of "constitutional moments" as momentous and irregular.[1] They are assumed to be singular and rare occasions on which the nation, by means of repeated ratification through the political and judicial process, rethinks its constitutional commitments and, in effect, rewrites them outside the process of constitutional amendment set forth in Article V of the Constitution. In over two centuries of experience under the Constitution, Ackerman identifies only three such constitutional moments, including the Founding itself.[2] The rest of the time, constitutional government exists in the realm of "ordinary politics."

I want to suggest another way of looking at things. Ackerman is right that constitutional moments are momentous. But they are not irregular. To the contrary, they are momentous and *routine*.

In particular, the changeover of executive power that we are undergoing right now, and the ceremonies that accompany it, bear witness to a simple proposition: *Every presidential transition is a constitutional moment*.

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* Associate Professor, University of Alabama School of Law. I am grateful to my fellow participants in this symposium on presidential transitions for their participation and comments.

1 *See generally* 1 Bruce Ackerman, *We the People: Foundations* (1991); 2 Bruce Ackerman, *We the People: Transformations* (1998) (setting out and elaborating on his theory of "constitutional moments" in American history).

2 *See, e.g.,* Steven G . Calabresi, *The President, The Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. Chi. L. Rev. 469, 471 (2006) (nothing Ackerman's claim that "the United States has had three and only three constitutional regimes or constitutional moments"). The other two constitutional moments identified by Ackerman are the Civil War and Reconstruction, and the New Deal.

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It is a common trope in American politics to treat the peaceful transition of executive power as evidence of the continuity and stability of the Republic. That is not the whole story, however. Each presidential transition is also a moment in which at least one branch of the federal government must reconsider what the Constitution means and what it demands, (re)commit itself to that meaning, and ratify or rescind the constitutional readings that have come before. We are thus in the midst of a quadrennial constitutional moment. Every such succession embodies the tension inherent in constitutional moments – the tension between consistency and change.

In this Essay, I argue that the constitutional moment represented by the presidential transition is figured by and instantiated in a single act: the taking of the presidential oath. Since the first such oath-taking by President George Washington, that oath has been both an official action and a deeply personal one. That combination of the personal and the official is no accident. Rather, it suggests the intimate connection between the official duties assigned to the President by Article II of the Constitution and the personal honor of the individual who occupies the office of President. By committing himself to the preservation of the Constitution and the fulfillment of his Article II duties, the President ties his own honor to a particular understanding of the Constitution.[3] That understanding is indefeasible: he cannot simply defer to the understanding of the courts, of Congress, of prior presidents, or even of We the People. In taking the measure of the Constitution under oath, the President is ultimately on his own.

We have come to think of honor as a largely obsolete virtue.[4] But it has not yet vanished, and its importance crests in the moment of the taking of the presidential oath, as virtually every individual to take the oath has recognized. Barack Obama is now preparing to take his own oath as the 44th President of the United States. If he is a conscientious

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3 I use the masculine throughout this Essay for convenience only.

4 For a classic discussion, see Peter Berger, *On the Obsolescence of the Concept of Honour*, 11 Eur. J. Soc. 39 (1970), reprinted in *Liberalism and its Critics* 149 (Michael J. Sandel ed, 1984).

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oath-taker, he will be confronted in a single moment with all the deepest questions about the scope, meaning, and obligations of the Constitution. It is thus worth considering what that oath means, and what implications it has for his presidency.

I.

Let us begin with the language of the oath itself, and something of its history. The President is not, of course, the only office-holder to take a constitutional oath. To the contrary, under Article VI of the Constitution, *every* federal and state officer takes an oath or affirmation to "support this Constitution."[5] The language of the federal statute implementing this command requires office-holders to swear or affirm to "support and defend the Constitution of the United States against all enemies, foreign and domestic."[6]

But only the presidential oath is set out in specific terms in the constitutional text itself. That language says that, "[b]efore he enters on the Execution of his Office," the president shall swear or affirm the following:

> I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.[7]

Two aspects of the presidential oath are worth noting. The first is simply its unique status: the Framers considered it

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5 U.S. Const., art. VI, cl. 3. The clause adds that "no religious Test shall ever be required as a Qualification to any Office or public trust under the United States." *Id.* For explorations of the implications of the Religious Test Clause, see Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 Wm. & Mary Bill Rts. J. 75 (2006); Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, U. Memphis L. Rev. (forthcoming 2009).

6 5 U.S.C. §3331. Federal judges are also required to swear or affirm a judicial oath with somewhat different language. *See* 28 U.S.C. § 453. The history and meaning of the federal judicial oath are the subject of a separate project that I am undertaking.

7 U.S. Const., art. II, § 1.

necessary to offer specific language in the Constitution itself for no other constitutional officer. The second is its distinct language. Other office-holders promise to "support and defend the Constitution of the United States"; only the President is sworn to "*preserve, protect* and defend" it.[8]

Whether these subtle distinctions matter has been a subject of some debate. That debate largely divides along two closely related lines of contention. The first division is between those who see the Presidential Oath Clause as containing a general authority to act, extraconstitutionally if need be, to preserve the nation, and those who believe that the Constitution confers no such authority on the President.

On the first view, stated most energetically by Michael Stokes Paulsen, "the Constitution itself embraces an overriding principle of constitutional *and* national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements."[9] The responsibility for judging whether and how the meta-rule applies is vested most directly in the President, by virtue of his "special sworn duty" to preserve, protect and defend the Constitution.[10] This view finds its most pithy expression in Justice Jackson's classic observation that the Constitution is not a "suicide pact."[11] Authors like Paulsen root the meta-rule in the "awesome and personal" duty of the President created by the Presidential Oath Clause to protect the Constitution by protecting, preserving and defending "the nation whose

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8 *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1261 (2004) ("Even more clearly so than with the universal oath requirement [of] Article VI of the Constitution . . . , the Presidential Oath Clause cannot be reduced to a general political loyalty requirement."); *see also* Akhil Reed Amar, *America's Constitution: A Biography* 180 (2005) (to same effect).

9 *Id.* at 1257 (emphasis added); *see also* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1 (1993) (arguing, somewhat differently and on different grounds, that the President has a "general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm.").

10 *Id.* at 1258.

11 *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

Constitution it is . . . , by every indispensable means within his power."[12]

Other authors deny that "the Constitution grants the President a latent . . . powerful authority to sacrifice constitutional provisions in order to preserve and defend the Constitution and the nation as a whole."[13] Sai Prakash puts the point powerfully: "though the Constitution creates a powerful chief executive, it does not empower the President to suspend the Constitution in order to save it."[14] This line of argument takes issue with Paulsen's argument that the duty to preserve the Constitution implies an underlying duty to preserve the United States itself, arguing that it "too quickly and easily equates preserving the Constitution with preserving the nation."[15] Against Paulsen's "suicide pact" argument, Professor Prakash observes that "[s]ome would argue that a system that values self-preservation at all costs is a suicide of another sort, for the system sacrifices all other ideals on the false altar of survival."[16]

A second but closely related debate relates to the meaning of the Presidential Oath Clause itself. Does the Clause confer *power* on the President, or does it define and even constrain the exercise of power granted to the President elsewhere in the Constitution? Although he denies that the Presidential Oath Clause is a freestanding grant of executive power, Professor Paulsen argues that the Clause incorporates and reinforces "the power to preserve, protect, and defend *the nation* and its constitutional order that inheres in the traditional understanding of the 'executive Power' of a nation."[17] By contrast, others emphasize that the Clause "does not grant power," but rather "creates a duty" to obey the Constitution, even if the President might wish for extraconstitutional powers in extraordinary cases.[18]

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12 Paulsen, *supra* note 8, at 1261, 1263.

13 Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 Notre Dame L. Rev. 1299, 1300 (2004).

14 *Id*.

15 Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. Rev. 221, 244 (2008).

16 Prakash, *supra* note 13, at 1320.

17 Paulsen, *supra* note 8, at 1263 n.14 (emphasis added).

18 Prakash, *supra* note 13, at 1301.

Although I find Professor Prakash's argument convincing, we need not resolve the debate here. What is important is that a careful and serious reading of the Presidential Oath Clause carries with it significant and potentially diverging implications for an understanding of the President's role, duties, and powers under the Constitution he is sworn to preserve, protect, and defend. Unless he treats the oath as a mere formality, the President cannot shrink from grappling with the meaning of the Presidential Oath Clause.

If we are willing to judge the nation's presidents by their words as well as their deeds, our chief executives have understood this. From the first presidential oath-taking to the present day, they have recognized that the presidential oath is intimately connected to the nature of their duties in office, and thus that it serves as a public pledge to stand accountable for the actions they commit in the name of the Constitution.

This connection would have been obvious to the founding generation. In that era, the oath tied the performance of public office closely to "human honor and obligation."[19] Honor was all the more important in a new nation "lacking an established aristocracy," in which the display of public virtue and trustworthiness was one of the few "proving ground[s]" available, "a source of stability in [a] contested political [and social] landscape."[20] Honor, as students of this trait have noted,[21] was emphatically not simply a private virtue; to the contrary, it depended on its public nature. Honor was "determined before the eyes of the world; it did not exist unless bestowed by others. Indeed, a man of honor was defined by the respect that he received in public."[22] The Presidential Oath thus tied the President's personal honor to the conscientious performance of his duties – linking him, in Alexander

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19 Paulsen, *supra* note 8, at 1263 n.13.

20 Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* xix (2001).

21 *See, e.g.,* Frank Henderson Stewart, *Honor* (1994).

22 Freeman, *supra* note 20, at xvi.

Hamilton's words, to "the restraints of public opinion" and "the jealousy and watchfulness of the people."[23]

The connection between the Presidential Oath and the President's own conception of his duties, and the threat of dishonor as a mechanism for ensuring the President's fealty to that oath, is apparent not only at the Founding, but throughout our history. It is evident in many, if not most, presidential inaugural addresses, from Washington's own to the present day. And it is present in a factor that could be easily overlooked, but should not be – the public nature of the oath itself, which most Presidents have taken in the presence of We the People.[24]

George Washington, for example, in his second inaugural address emphasized the fact that he took the oath in public, and pledged, if he failed in the performance of his duties, to be "subject to the upbraidings of all who are now witnesses of the present solemn ceremony."[25] In his 1837 inaugural address, Martin Van Buren noted "the presence of my assembled countrymen" as he prepared "to make the solemn promise that yet remains, and to pledge myself that I will faithfully execute the office I am about to fill."[26] Benjamin Harrison, in 1889, noted that although there was "no constitutional or legal requirement that the President shall take the oath in the presence of the people," to do so was "manifest[ly] appropriate[ ]," because it rendered the oath "a mutual covenant" between the President and the citizenry.[27] In this century, William Howard Taft noted that any presidential oath-taker who does not "feel a heavy weight of responsibility" either "has no

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[23] *The Federalist No. 70*, at 477-79 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* Freeman, *supra* note 20, at xix (noting Hamilton's argument that "only personal responsibility before the eyes of the public – the threat of dishonor before an ever-vigilant audience – could restrain self-serving, ambitious politicians").

[24] For a discussion of both the public nature of most presidential oath-taking ceremonies and the presidents' own recognition of the connection between the oath and their obligations in office, see Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. Rev. 1, 7-33 (2004).

[25] *Id.* at 9.

[26] *Id.* at 13.

[27] *Id.* at 20-21.

conception of the powers and duties of the office upon which he is about to enter, or he is lacking in a proper sense of the obligation which the oath imposes."[28]

In short, the Presidential Oath Clause is a deeply – and, in the Ackermanian sense, literally – momentous text. The act of oath-taking ties the President's own public reputation to his satisfaction of the oath. The act is pregnant with meaning precisely because taking an oath to preserve, protect, and defend the Constitution calls on the oath-taker to consider what that oath means – and, in turn, what the *Constitution* means. Whether it calls on the President to preserve the nation at all costs, even if it means violating specific provisions of the Constitution, or whether it calls for the President to hold the Constitution itself above all else, is a question each presidential oath-taker must answer for himself. Each president, every four years, thus becomes the sole participant in a constitutional convention of one.

II.

What are the implications of the Presidential Oath Clause? What does it mean for the new President – for *this* new President, and the men and women who will come after him?

One possibility is that the President can view his new term as the opening prospect in an effort to answer that question. That is, he can treat his oath as beginning with his actions as President – and *only* his actions as President. Any actions by prior oath-takers whose own views about the scope of the Constitution might be different from his own lie in the past and must be given some measure of repose. The President's oath-bound obligations, in short, could be treated as prospective, not retrospective.

There is something attractive about this approach. By refusing to disturb what has come before, it acknowledges that each President faces his own constitutional moment, and his own interpretation of the Constitution's commands. It

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[28] *Id.* at 22.

recognizes that the new President's obligations under the oath commence only once he has spoken the words of the oath; until then, the duty of the oath attaches only to the current office-holder.[29] Finally, such an approach might ease the inevitable tensions between outgoing and incoming administrations,[30] tensions that would be exacerbated if each new President were viewed as sitting in judgment on the previous administration's actions – a threat that, taken to its extremes, might lead to a flurry of pardons and other preemptive actions by the outgoing administration.

It is not clear, however, that such an approach is realistic, let alone true to the oath. This is so because of both the nature of the law itself and the sources of law confronted by a president. A president's actions do not cease when he leaves office. Agency regulations and policies, executive orders, and other administrative actions have continuing force unless and until they are revisited, unless they are either short-term actions or come equipped with sunset provisions.

Moreover, the President's legal obligations hardly arise solely by virtue of law generated within the Executive Branch. To the contrary, the President's foremost duty is to "take Care that the Laws be faithfully executed,"[31] and that most prominently includes the continuing obligation to execute the laws enacted by Congress. And the Executive Branch may be subject to ongoing orders of the Judicial Branch. Thus, no new President is completely free to set the constitutional clock to zero upon taking the oath. Indeed, the presidential oath itself suggests as much: the duty to "preserve" the Constitution implies that the President *must* engage in a retrospective examination of at least some prior executive actions.[32]

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[29] *Cf.* Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. Rev. 1253, 1271-73 (2006) (discussing the Term Clauses of Article II), 1285 (noting that a sitting President "enjoys an electoral mandate for the full four-year period" of his term).

[30] *See id.* at 1263-69.

[31] U.S. Const., Art. II, § 3.

[32] *Cf.* Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 Geo. L.J. 1613, 1632 (2008) (arguing that the President's oath "bars [him] from violating the Constitution himself or aiding and abetting the violations of others, for when he takes either measure, he is not preserving, protecting, and defending the Constitution.").

The other stark possibility is, simply, to revisit *every*thing. The President might view the oath-taking as presenting not only the opportunity, but the obligation, to examine every continuing legal obligation requiring the action of the Executive Branch, whether those obligations were generated by Congress, by the courts, or by previous administrations. In each instance, the new President would have to determine whether those obligations were consistent with his own view of the Constitution; to decide whether any conflicting views about the constitutionality of those obligations required the Executive Branch to refuse to enforce those legal commands;[33] and perhaps, in extreme cases, to undertake enforcement actions against those members of prior administrations whose actions, in the view of the new administration, violated the Constitution or laws of the United States.

Putting the matter this starkly suggests two things. First, in practice, opening the books of the prior administration, and evaluating every current legal obligation of the new one, is unlikely to require wholesale reversal of what has come before. Most laws and most actions of prior administrations are likely to prove uncontroversial. Still, the fact that *every* law and legal obligation pressing upon the Executive Branch would, on this view, be up for ratification or rejection suggests something of the awesome implications of the Presidential Oath Clause.

Second, this approach, like the approach of resetting the constitutional clock, has its practical difficulties. Those difficulties are as much constitutional as political. Politically, such an approach would expend significant resources and risk serious political tension, thus threatening to derail an administration's plans for its crucial first months in office. Beyond these political concerns, though, presidential transitions are about stability as well as change. Although the Presidential Oath Clause, properly understood, might obligate the new President to reconsider the constitutional soundness of the legal order, too radical a redrawing of constitutional lines might damage the symbolic and practical role played by

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33 For more on this issue, see, Prakash, *id.*

presidential transitions in emphasizing the continuity of the Constitution and the government it establishes.

I will not offer a strong view of which choice the new President ought to make – leave the existing landscape undisturbed, or treat the oath as obliging him to revisit the whole legal order – although I will have something more to say about this below. It is sufficient for now to note again that, however much they may attempt to steer a middle path, incoming presidents are not spared the necessity of making *some* decision about how to proceed. With the oath, each new President is required to consider this question all over again. In that sense, too, each transition is a genuine constitutional moment.

Our sense of the literal momentousness of the occasion is surely heightened by the transition we find ourselves in this time. Justly or not, President Bush has been the subject of a long list of particulars by those who believe he has repeatedly exceeded his constitutional authority in the name of national security.[34] In an important sense, this transition raises starkly the contrasts we have seen in discussing the Presidential Oath Clause. Is the correct reading of the Clause one that stresses the President's inherent authority to act to preserve the *United States* as a nation, or is it one that stresses the primacy of the Constitution rather than national survival? Is the Clause an assignment of power, or a reminder of the President's duties under a Constitution that cabins his authority? Should President Obama let lie the current administration's actions, or even ratify some of them; or should he re-examine and rescind many of those actions, and even pursue investigations and prosecutions where appropriate?[35] If he is a conscientious oath-taker, President Obama must confront all of these questions, and thus put his own stamp on the Constitution.

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[34] *See, e.g.,* Michael P. Allen, *George W. Bush and the Nature of Executive Authority*, 72 Brook. L. Rev. 871 (2007).

[35] *See, e.g.,* James Risen & Eric Lichtblau, *Early Test for Obama on Domestic Spying Views*, N.Y. Times, Nov. 17, 2008 (noting that the Obama administration will face a number of early decisions about whether to ratify decisions made by the Bush administration with respect to domestic surveillance, to "disclose publicly more information about how the program was run," and "whether to work with the Democratic-controlled Congress to investigate the Bush administration officials who approved and ran the wiretapping program").

III.

In facing all of these questions, one thing the presidential oath-taker cannot do is pass the buck. If, as I have argued, the President's duty as an oath-taker is personal, then his obligation to consider the scope and meaning of his constitutional authority, whatever the precise contours of that obligation may be, is indefeasible.[36] The President may take advice on these questions – from Congress, from his cabinet officers,[37] and from others inside and outside his administration – but he remains the sole "decider."[38]

In deciding what the Constitution means, what authority it confers on the president, and what obligations the Constitution and his oath impose on him, the President will certainly be influenced by a variety of factors apart from his own views. We might divide these into two categories: informational influences and policy constraints.

Informational influences on the President's views on the Constitution and the oath are likely to come from a variety of sources inside and outside the Executive Branch. First, Congress itself will have spoken on a number of constitutional questions – both informally and in the formal sense that any legislation passed by both houses of Congress implies that the Legislative Branch has passed on the constitutionality of that legislation. A new president wondering whether he can enforce an existing act of Congress might wish to defer to Congress's judgment that the act is constitutional. But, as Professor Prakash has pointed out, the duty to decide whether that legislation is constitutional ultimately remains with the President.[39]

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36 *Cf.* Paulsen, *supra* note 8, at 1261 ("[T]he President has an independent, personal, and *nonabdicable* constitutional responsibility of faithful constitutional interpretation and execution") (emphasis added).

37 *See* U.S. Const., art. II, § 2, cl. 1 (empowering the President to require opinions from his heads of department).

38 *See* Ed Henry & Barbara Starr, *Bush: "I'm the Decider" on Rumsfeld*, CNN.com, Apr. 18. 2006, http://www.cnn.com/2006/POLITICS/04/18/rumsfeld.

39 *See generally* Prakash, *supra* note 32.

Similarly, the President *may* consider himself bound to defer to any clearly stated views of the Judicial Branch on questions touching on presidential power. He may do so because he considers those rulings binding in particular cases, or because he wishes to defer to the federal courts as epistemic authorities, or because he believes that abiding by the constitutional decisions of the federal courts is itself an implied requirement of the Constitution he has sworn to preserve. How far the President's obligations to the courts run, and whether he is ultimately free to ignore them where they conflict with his own constitutional judgments, are questions that have roiled constitutional scholarship in the past few years. But even a decision to defer is itself a form of decision.[40] Again, then, the presidential oath-taker may listen to others – even other coordinate branches – but cannot simply slough off his obligation to decide for himself what the Constitution means.

A more interesting informational influence comes from the actions of previous administrations. In considering what his oath requires, the new president may listen closely to what former administrations have said, either through their actions or through statements by the Office of Legal Counsel and other sources of executive opinion. Let us call this "presidential precedent." A new president might decide to adhere to the decisions of previous administrations just as the Supreme Court, under the principle of stare decisis, adheres to its prior decisions.[41]

There are many practical reasons to adhere to presidential precedent. But, like stare decisis in the Supreme Court, presidential precedent cannot be absolute. The President takes an oath to the *Constitution*, not to his predecessors' vision of the Constitution; he may listen to those who have occupied the office before him, but cannot treat them as binding. Indeed,

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[40] *See* Paul Horwitz, *Three Faces of Deference*, 83 Notre Dame L. Rev. 1061, 1077 (2008).

[41] *See* Prakash, *supra* note 32, at 1634 n.74 (noting that "[w]henever presidential administrations confront legal questions previously addressed by their predecessors, there is the question of whether they ought to defer to the statutory and constitutional judgments of their predecessors."). For an instructive discussion of precedent outside the Judicial Branch, see Michael J. Gerhardt, *Non-Judicial Precedent*, 61 Vand. L. Rev. 713 (2008).

that is precisely the point of the oath: it is *personal*. Each new president must ultimately decide what the Constitution requires of him.

A final source of information is We the People. In contemplating his oath and its implications, the President might listen to those who have selected him for the office. At transition times, we often discuss matters in precisely these popular terms. We ask whether the President has a "mandate" for particular changes, or (as in this past election, to a substantial degree) treat the election as a referendum on the outgoing President's policies, including those decisions that have constitutional overtones.

This language is understandable and has some truth to it. But it is also importantly incomplete. The oath may tie the President's fortunes to the people who stand witness to his pledge; but it remains a personal pledge. The question is not simply whether the new President will gratify the wishes of the people, but whether he will honor the promise that he made to them, to preserve the Constitution *as he understands it*. Thus, the oath's obligation to independently consider the meaning of the Constitution and its obligations is truly indefeasible. Even the people the President serves cannot lift the burden from his shoulders.

Apart from these informational influences on a President's assessment of his oath and its obligations, a host of practical constraints may influence how a President proceeds. Outgoing and incoming administrations, each of them focused on establishing or maintaining a legacy, may clash over various administrative and policy matters.[42] Those tensions, which will increase when the administrations are of two different parties, could be further complicated by significant disagreement on constitutional questions. In rare cases, as in the transition from the Nixon to the Ford administrations and, perhaps, the current transition, further tensions may arise if members of the incoming president's party or staff believe the outgoing administration should be investigated for possible

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[42] *See generally* Beermann & Marshall, *supra* note 29.

wrongdoing.[43] The potential wrangling in such cases may include whether the outgoing administration ought to issue pardons to its own staff, and whether the incoming administration should devote its resources to correcting past wrongs. All of this may convince the incoming administration that it is best to focus on its own agenda rather than incur the costs of correcting past constitutional errors. That conclusion may be buttressed by the fact that every incoming president may be thinking about how his own actions will be treated by his successor.

Finally, there is the simple fact of limited resources. As Professor Prakash writes, "If the President had infinite resources, both mental and monetary, satisfaction of his oath might require nothing less than his unremitting attention coupled with perfection."[44] But he does not. The new President has a host of policy *and* constitutional obligations, from staffing the new administration to faithfully executing the laws on the books to pursuing a wide range of domestic and foreign policy objectives. These obligations make it difficult for the President to "act as if his only objective was to assure that his administration never executed an unconstitutional statute."[45]

All this suggests that even a conscientious presidential oath-taker may find it both unwise and difficult, if not impossible, to engage in a wholesale revisiting of the body of law he is charged with executing, in keeping with his own oath-bound interpretation of the Constitution. Those individuals who have urged President-elect Obama to treat his administration as an opportunity to reverse every constitutional error allegedly made by President Bush may be making unreasonable demands, especially if they also believe that President Obama ought to be working toward an agenda of his own.

As important as these practical constraints are, however, they do not render the President's obligations under the oath any less indefeasible. How the President balances his own

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43 *See* Risen & Lichtblau, *supra* note 35.

44 Prakash, *supra* note 32, at 1675.

45 *Id.* at 1676.

vision of the Constitution with the host of informational influences and practical constraints that hedge him in is up to him. He will build his legacy from the moment he takes the oath, as he considers how to meet his obligations to the Constitution while balancing them with the practical needs of administration and the constitutional views of others.[46]

IV.

I have argued so far that the President faces an indefeasible personal obligation under the Presidential Oath Clause to decide what the Constitution means, what powers it confers upon him, and what duties it involves. That obligation may extend as far as literally opening the books on every law he is required to execute, and re-examining and ratifying or rescinding every action taken by the preceding administration. Given the welter of practical constraints on the President, that duty is likely to be imperfectly fulfilled; but it is a duty nevertheless.

What does this suggest for the Obama administration itself? As President-elect Obama prepares to take the oath, what should he be thinking about? Let me suggest four considerations the putative oath-taker might keep in mind, moving from the practical to the abstract.

First, and despite its tension with the President's general duty under the oath to preserve the whole Constitution, the President-elect must pick his battles. The costs of treating each presidential constitutional moment as an absolute referendum on the entire corpus of executive law, including all the actions taken by his predecessors, are too great to allow the President to focus his complete and "unremitting attention" on these issues.[47] That does not mean the President should treat his administration as a tabula rasa. The oath to preserve the Constitution surely requires the President to take at least some actions with respect to the prior administration; for example, to

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46 *See id.* at 1677 ("There is a difference between making a decision about how best to allocate scarce resources in a manner that satisfies multiple duties and choosing to turn a blind eye to the potential constitutional infirmities of a law.").

47 *Id.*at 1675.

reconsider executive policies on surveillance, on interrogation policies, and on the constitutional status of Guantanamo Bay. But the President cannot simultaneously attempt to achieve his policy goals while also treating his administration as a wholesale revisiting of the prior administration. To the extent that the President, in taking the oath, arrives at a different vision of what is constitutional or unconstitutional than the prior administration, he ought to focus on re-examining the most important and continuing cases in which he believes the constitutional oath requires him to chart a different course.

Second, the new President should keep in mind the virtues of transparency. It is no accident, after all, that most presidents have chosen to take the oath in public. As we have seen, they understood that in doing so they were tying their honor to the *public* fulfillment of their oath. In keeping with this, a President who sees his oath as demanding a different interpretation of the Constitution, and of his duties under the Constitution, ought to make some effort to explain that vision to the people, and to the other constitutional actors – the courts, Congress, and state officials – who also take oaths to the Constitution and may interpret the document differently. He should do so not only because honor, and the oath, demand it, but because those actors may have something useful to say about his interpretation of the Constitution. Moreover, transparency in these circumstances, by signaling the President's seriousness and sincerity, may enhance his effectiveness in office.[48]

Third, the new President should consider a range of other practical measures he can take to enhance his credibility. In a useful article, Eric Posner and Adrian Vermeule have discussed a host of measures that a good-faith President may take to demonstrate that he is a "credible executive." That includes the use of independent commissions, the making of bipartisan appointments within the Executive Branch, the use of the media, and the use of both informal and statutory "precommitments" binding the President to particular

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[48] *See* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. Chi. L. Rev. 865, 903-05 (2007) (discussing the signaling benefits of transparency in enhancing the credibility of a good-faith executive).

policies.[49] The virtue of all of these measures is that, by establishing the President's good faith and credibility, they may give him some breathing room as he attempts to fulfill his oath to independently understand and apply the Constitution. Given the controversial choices that such a duty may require, the President needs all the credibility he can get.

Finally, and more abstractly, the President must *decide*. However much President Bush may have been derided for calling himself the "decider," under the Presidential Oath Clause that is precisely what he is, at a fundamental level. The President, on taking the oath, must decide for himself precisely what that oath entails: what the Constitution means in his own view, what authority he has, what executive measures he may advance or must rescind, and what future obligations of legal enforcement or non-enforcement he has. The President may read the Constitution and the oath in the light of history, including the weight of prior presidential practice and the views of other constitutional actors; he may also consider the policy constraints that hem him in. But at the end of the day he must *decide* for himself where his obligations lie.

We may be reassured in all of this by the fact that the President-elect is a former constitutional law professor. But that optimism should be tempered by two things we also know about constitutional law professors. First, too many of them focus, understandably but lamentably, on the encrustations of judicial interpretations of the Constitution rather than on the constitutional text itself; under the oath, the President must crack open the Constitution for himself rather than rely on the Supreme Court's glosses on that document. Second and relatedly, most constitutional law proceeds from the perspective of what the courts have said and done. The "'interpretive stance' of someone swearing the oath of office as President of the United States"[50] is different. It may be influenced by judicial, congressional, and presidential precedent, but it is ultimately singular and independent. Each new President, including this one, will have to relearn and

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49 *See id.* at 897-910.

50 Paulsen, *supra* note 8, at 1261.

rethink the Constitution, both in the abstract and from a peculiarly presidential perspective.

CONCLUSION

The devil is in the details, of course, and this Essay has of necessity left many details to be sorted out. It could not be otherwise. How the new President answers these questions – what the oath means and what it requires of him; whether he is sworn to preserve the Constitution or the nation itself; whether he must re-examine his predecessors' actions or whether he may treat his oath-taking as Day One; and how be balances his obligations under the oath with the host of informational influences and policy constraints that will confront him – is finally in his hands alone. The Presidential Oath, like all constitutional oaths, ties his *personal* and professional honor to the Constitution, individually and indefeasibly. In making these decisions, the President will be alone, confronted with all the questions of constitutional meaning and obligation that have been with us since Philadelphia. He, and we, will face another in an unbroken line of constitutional moments.