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On Language, Lawyers and Judges Don't Have All the Answers

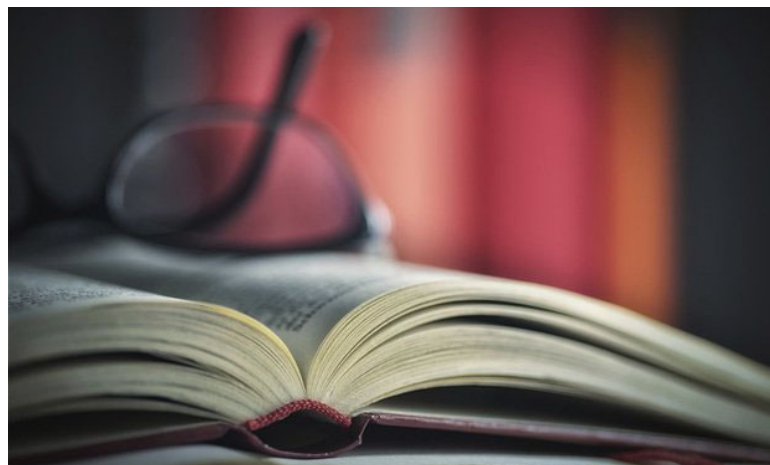
Attorneys and jurists should not exercise any monopoly power on the authoritative approaches to interpreting the language of the law.

By **Law Journal Editorial Board** | March 22, 2019

An essential tool in the chest of legal practice is the accurate, or at least persuasive, interpretation of the language of the law. It begins in law school where students are trained in legal maxims obscured in Latin diction, hoary canons of statutory construction, and all manner of legal doctrines and concepts bearing coded labels. As applied in later practice, lawyers advocate for particular renditions of language to advance their cause. But

ultimately it is our judiciary, of course, that is the final arbiter of the meaning of the law.

Enter originalism, a doctrine that came on the legal stage in the 1980s, proposing a textual



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approach to legal interpretation. Its proponents saw this as the solution to ascertaining the original understanding of a particular law, either by focusing on the original intent of the authors of the law, but more often by examining original public meaning as gauged by the common understanding of persons at the time of the law's creation. This required resort to contemporaneous (though limited) sources, such as dictionaries, grammar books, other legal documents, and even public debates and events. Other interpretive methods, such as legislative history, were discounted. The understanding discerned was then adopted as a singular objective proposition of legal interpretation, rendering constitutional meaning static in time, without regard to evolving legal, social, and political norms, which were precluded as too subjective to convey authentic meaning. Alternative meanings could only be recognized by constitutional amendment. This original public meaning approach was perhaps most notably advanced by the late Justice Scalia. As he wrote in *District of Columbia v. Heller*, the theory of original public meaning is premised on "the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning'."

An amicus brief recently filed in *In re Trump*, No. 18-2486 (4th Cir.) by Professors Clark D. Cunningham and Jesse Egbert "on behalf of neither party" offers a different perspective, based on historical and linguistic analysis. In this case, the State of Maryland and the District of Columbia brought suit against the president for alleged violations of the Foreign and Domestic Emoluments Clauses, U.S. Const. Art. I, §9, cl. 8 & Art. II, §1, cl. 7. The dispositive issue was "whether the two Emoluments Clauses provide plaintiffs with a cause of action." Plaintiffs urged a broad definition of "emoluments," subsuming "anything of value" received from a foreign or domestic government by the businesses in which the president retained a financial interest. The District Court denied the president's motion to dismiss, adopting the plaintiffs' broad definition. That decision was appealed, where the matter is currently pending.

According to the professors as amici, on appeal, the president "posits that the term 'emolument' had two distinct meanings in the founding era—a 'narrow' sense limited to 'profit arising from an office or employ' and a 'broad' sense meaning 'benefit, advantage or

profit’—and that “emolument” in the Constitution only referred to the narrow meaning,” relying primarily on a 1774 dictionary entry. In stark contrast, the professors noted that “[l]inguists generally consider dictionaries an unreliable source for scientific research of actual usage.” They also criticized the District Court, observing that “[t]here is no scientific basis for using a handful of definitions written by individual, idiosyncratic dictionary authors and evaluating sixteen sentences, as the District Court did, in order to prove common usage by the population of late 18th century America.”

Instead, the professors utilized a scientifically based quantitative and qualitative methodology for researching original public meaning, called “corpus linguistics.” This entailed “the tools of linguistic analysis to newly available ‘big data’ collections encompassing written language in common usage at the time of ratification.” That collection is “accessible on the public website of the *Corpus of Founding Era American English (COFEA)*, which contains in digital form over 95,000 texts created between 1760 and 1799, totaling more than 138,800,000 words.” After analyzing “over 2500 examples of actual usage” of the term, “emoluments,” using “three different computerized search methods,” the professors concluded that there was “no evidence that *emolument* had a distinct narrow meaning of ‘profit arising from an office or employ.’ All three analyses indicated just the opposite: *emolument* was consistently used and understood as a general and inclusive term.” The professors were careful to note that they took no position on the merits.

We too take no position on the resolution of this appeal. But this amicus brief certainly offers a compelling ground of verifiable support for plaintiffs’ legal interpretation. More importantly, its analytical method illustrates that attorneys and jurists do not, and should not, exercise any monopoly power on the authoritative approaches to interpreting the language of the law. The legal methods of statutory construction are often confusing, narrow, and outcome-biased. Indeed, there is much we can learn about the relative merits of legal interpretation from qualified non-legal professionals, particularly acknowledged scholars in linguistic analysis. However skilled we legal professionals are at rhetorical advocacy and “wordsmithing,” we should not be so confident in our own a priori assumptions and competence that we blindly reject the value added to our own work by

the empirical erudition of others more learned in the interpretation of language.

Any serious consideration of the merits deserves no less.

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