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# THE PRESIDENTIAL OATH, THE AMERICAN NATIONAL INTEREST AND A CALL FOR PRESIPRUDENCE

Robert F. Blomquist\*

In one sense, all Americans are deeply familiar with the presidential oath: during the course of a mythic quadrennial January ritual on the steps of the United States Capitol, we expect to see the black-robed figure of the Chief Justice leading the new, or re-elected, President of the United States in a unique and solemn oath of office. Then, amid public cheers and hurrahs, the Marine Corps Band plays the anthem of the President: *Hail to the Chief*. All this culminates with the President's inaugural address, the ride (or sometimes walk) up Pennsylvania Avenue, the viewing of the Inaugural Parade from the White House grounds, and, finally, one or more inaugural balls lasting well into the night.<sup>1</sup>

In another sense, however, we are mystified by the presidential oath. What are its origins? What does it mean? How has it been interpreted throughout the centuries? What possible new readings of its words remain to be discovered and applied? The purpose of this Article is to explore the palimpsest that is the presidential oath beginning with the debates during the Constitutional Convention of the summer of 1787, to the specific prescribed oath that became a part of Article II of the ratified Constitution in 1788, to the ceremonial "swearing in" of the individuals who have held the office of President of the United States, to the rhetoric and assumptions that have infused the words with meaning. This Article consists of four principal parts. Part I describes the invention of the presidential oath by the Founders. Part II canvasses what American Presidents themselves have said about the significance of their oath of office. Part III

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\* Professor of Law, Valparaiso University School of Law; B.S. 1973, University of Pennsylvania (Wharton School); J.D. 1977, Cornell Law School. This Article, with its hopeful view of the American President's power to lead the American people to achieve great and good national purposes, is dedicated to my wife, Teresa Faherty Blomquist, and to my two children, Drew Blomquist and Courtney Blomquist.

<sup>1</sup> See MARCUS CUNLIFFE, *THE AMERICAN HERITAGE HISTORY OF THE PRESIDENCY* 8-9 (Kenneth W. Leish ed., 1968):

In the nuclear age, when a misstep in foreign policy can result in the obliteration of humanity, when social injustices cry out for amelioration, no Chief Executive is likely to share the sentiments of Theodore Roosevelt, who wrote that although the Presidency "has been very wearing . . . I have thoroughly enjoyed it, for it is fine to feel one's hand guiding great machinery." To a beleaguered President, a remark of Harry Truman's may seem more apt: "There is no exultation in the office of the President of the United States - sorrow is the proper word."

On Inauguration Day, however, there is exultation. It is a majestic, solemn and hopeful moment when a President-elect - chosen by his fellow citizens - raises his right hand and repeats after the Chief Justice the portentous oath first sworn by George Washington in 1789.

*Id.* Apparently in the early years of the Republic, the President took his oath *after* his inaugural address. "The typical order now is that the presidential oath is taken first and then the Address is given, so that it is an inaugurated President who is speaking." George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 *BRANDEIS L. J.* 17, 217 n.518 (2000).

provides a concise intellectual history of the presidential oath; this will encompass an eclectic discussion of judicial interpretations, and legal scholarly exegeses. Finally, Part IV offers some possible future implications of the presidential oath.

## I. THE OATH INVENTED

### A. What Might Have Been

What is past is prologue. And, indeed, the Founders' spent most of the time they discussed and debated the Presidency talking about the nature, responsibilities, and powers of the office. At various junctures during the Constitutional Convention, held in Philadelphia during the summer of 1787, several proposals were considered that, had they been included in the final document signed by thirty-nine delegates on September 17<sup>th</sup>, might have affected the substantive provision of what became Article II, section 1, clause 8 of the Constitution which reads:

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 Ability, preserve, protect and defend the Constitution of the United States."<sup>2</sup>

The first unadopted proposal that might have transformed the President's oath was a portion of the Virginia Plan, offered to the Convention on May 29<sup>th</sup> by Edmund Randolph (in all probability composed by James Madison) that would have made the National Executive elected by the National Legislature.<sup>3</sup> Under this contingency, the Convention delegates might have wanted the presidential oath to contain language of fidelity to the National Legislature, or at least recognition of the trust reposed by the National Legislature in the person chosen to be the National Executive, in addition to language requiring support of the Constitution.<sup>4</sup>

Second, the Virginia Plan's conception of a "Council of Revision," that would have consisted of "the Executive and a convenient number of the National Judiciary" empowered to conditionally veto acts of the National Legislature could conceivably have created pressure for the Convention to adopt an added feature of the presidential oath regarding what might have been viewed as quasi-

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<sup>2</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>3</sup> See CUNLIFFE, *supra* note 1, at 32.

<sup>4</sup> Cf. U.S. CONST. art. VI, cl. 3 which states:

The Senators and Representatives before mentioned, and the Members of the several State Legislators, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

judicial powers.<sup>5</sup> Had such a Council of Revision been incorporated into the Constitution, delegates might have concluded that when acting as a member of the Council, the President should approach his decisions as a member of that group like a judge (where permissible grounds for veto would be based on infirmities of law rather than mere policy or political differences).

Third, as recorded by James Madison in his journal, Roger Sherman of Connecticut held the view that “the Executive magistracy [should be] nothing more than an institution for carrying the will of the Legislature into effect [and] that person or persons ought to be appointed by and accountable to the Legislature only.”<sup>6</sup> Sherman believed the members of Congress would be “the best judges of the business which ought to be done by the Executive department, and consequently of the number necessary from time to time for doing it.”<sup>7</sup> Therefore, he “wished the number of [Executives] might not be fixed, but that the legislature should be at liberty to appoint one or more as experience might dictate.”<sup>8</sup>

Had a majority of the Founders come to agree with Sherman’s model of a multiple Executive under strict congressional command, it is possible that they might have thought that, in addition to pledging fidelity to the National Legislature, a feature of the presidential oath should also include a commitment to support and cooperate with co-presidents.<sup>9</sup> Cutting against this contingency, however, is the barebones substance of the General Oath Clause that simply requires support of the Constitution by the multiple members of the state and federal legislatures, state and federal judges and state and federal executive officers, without requiring, as part of their oaths, support of fellow officials.<sup>10</sup>

Yet, the matter of the federal Executives would have been *sui generis* in light of the unprecedented centralized powers that would have inhered in such officials. A special oath of mutual support among co-presidents might have been deemed advisable by the Founders, especially if the Convention had settled on a proposal for three equal co-presidents. James Wilson of Pennsylvania asserted that such an arrangement would lead to “nothing but uncontroled [sic], continued, & violent animosities; which would not only interrupt the public administration; but diffuse their poison thro’ [sic] the other branches of Govt., thro’ [sic] the States, and at length thro’ [sic] the people at large.”<sup>11</sup>

<sup>5</sup> CUNLIFFE, *supra* note 1, at 33 (quoting language of Virginia Plan).

<sup>6</sup> *Id.* (quoting James Madison’s journal of the Constitutional Convention).

<sup>7</sup> *Id.* (quoting James Madison’s journal of the Constitutional Convention).

<sup>8</sup> *Id.* (quoting James Madison’s journal of the Constitutional Convention).

<sup>9</sup> See *supra* note 4 and accompanying text.

<sup>10</sup> See U.S. Const. art. VI, cl. 3.

<sup>11</sup> CUNLIFFE, *supra* note 1, at 34 (quoting James Madison’s journal of the Constitutional Convention). While the Convention settled on the one person Executive, George Mason of Virginia, who had not been present for the vote continued to support the idea of a tripartite Executive. The following speech, found among Mason’s personal papers, was “probably delivered on June 4 [1787].” *Id.* Mason contended:

The chief Advantages which have been urged in favour [sic] of Unity in the Executive, are Secrecy, the Dispatch, the Vigour [sic] and Energy which the

A fourth unadopted proposal that might have altered the President's oath was a suggestion by Oliver Ellsworth of Connecticut that a presidential cabinet, "composed of the President of the Senate, -the Chief Justice, and the Ministers as they might be estabd. [sic] for the departments of foreign & domestic affairs, war finance, and marine," be formally designated within the text of the Constitution.<sup>12</sup> Had a prescribed presidential cabinet been ensconced in the Constitution, some delegates might have wanted to ensure the President's convening of the group at prescribed intervals or wanted an assurance that the President would follow certain procedures in considering the Cabinet's advice. What better way to guarantee the result, some might have thought, than to include the obligation in the President's oath?

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Government will derive from it; especially in time of war. - That there are great Advantages, I shall most readily allow - They have been strongly insisted on by all monarchical Writers - they have been acknowledged by the ablest and most candid Defenders of Republican Government; and it cannot be denied [sic] that a Monarchy possesses them in a much greater Degree than a Republic - Yet perhaps a little Reflection may . . . lead us to enquire [sic] whether there is not some pervading Principle in Republican Governments which sets at Naught . . . this boasted Superiority . . . . [And which] is to be found in the Love, the Affection, the Attachment of the Citizens to their Laws, to their Freedom, and to their Country . . . . We have not yet been able to define the Powers of the Executive; and however moderately some Gentlemen may talk or think upon the Subject, I believe there is a genera[l] Tendency to a strong Executive and I am inclined to think a strong Executive necessary - if strong and extensive Powers are vested in the Executive, and that Executive consists only of one Person; the Government will of course degenerate . . . into a Monarchy . . . . If The Executive is vested in three Persons, one chosen from the northern, one from the middle, and one from the southern States, will it not contribute to quiet the Minds of the People, and convince them that there will be proper attention paid to their respective Concerns? Will not three Men so chosen bring with them, into Office, a more perfect and extensive Knowledge of the real Interests of this great Union? Will not such a mode of Appointment be the most effectual means of preventing Cabals and Intrigues between the Legislature and the Candidates for this Office? . . . Will it not be the most effectual means of checking and counteracting the aspiring Views of dangerous and ambitious Men, and consequently the best Security for the Stability and Duration of our Government upon the invaluable Principles of Liberty?

*Id.* at 34-35 (quoting George Mason's speech).

<sup>12</sup> *Id.* at 40 (quoting James Madison's journal).

## B. The Oath Prescribed

The Convention's Committee of Detail's<sup>13</sup> first proposal for a presidential oath merely prescribed that "[b]efore 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.'"<sup>14</sup> On August 27, 1787, George Mason and James Madison "moved to add to the oath to be taken by the supreme Executive . . . [the following clause]: [a]nd will to the best of my judgment and power

<sup>13</sup> See CONGRESSIONAL QUARTERLY'S GUIDE TO THE PRESIDENCY 18 (Michael Nelson ed. 1989) [hereinafter GUIDE TO THE PRESIDENCY].

On July 24, [1787], the convention voted to appoint a Committee of Detail to review all of its actions to date and to draft a plan of government that incorporated them. The five-member committee was representative by three main regions of the country - Nathaniel Gorham of New Hampshire and Oliver Ellsworth of Connecticut (a protégé of [Roger] Sherman) from New England, James Wilson of Pennsylvania from the middle states, and Edmund Randolph of Virginia and John Rutledge of South Carolina from the South. The committee worked while the rest of the convention adjourned until August 6.

One index of the committee's influence is that it took convention-passed resolutions amounting to twelve hundred words and transformed them into a draft of thirty seven hundred words. It drew also from a wide range of other sources in compiling its report - the Pinckney Plan, the New Jersey Plan, the Articles of Confederation, the rules of Congress, and some state constitutions, notably those of New York and Massachusetts.

Most of the memorable phrases in the Constitution were written by the Committee of Detail, including "state the Union" and "We the People." Institutions were named: the executive became the "president;" the national tribunal, the "Supreme Court;" and the legislature, "Congress," with its upper house called the "Senate," and the lower house "the House of Representatives."

For the most part, the committee, in keeping with its name, simply fleshed out the details of earlier convention decisions. It set procedures for the president's veto, defined the jurisdiction of the courts, and adjusted certain relations between the states. In some instances, however, the committee substituted its own judgments for the convention's. The power to impeach, for example, was vested in the House; the power to convict, in the Supreme Court. No property requirement for officeholders was included.

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The committee granted the president the power to recommend legislation to Congress, make executive appointments, receive ambassadors from other nations, issue pardons, "take care" that the laws be executed, and command the armed forces. (An oath to "faithfully execute the office of the President" was included, as was a provision that the president of the Senate would exercise the powers and duties of the presidency if the president died, resigned, or became disabled.)

*Id.*

<sup>14</sup> 3 THE FOUNDERS' CONSTITUTION 573 (Philip B. Kurland & Ralph Lerner eds., 2000) [hereinafter FOUNDERS' CONSTITUTION] (quoting James Madison's journal).

preserve, protect and defend the Constitution of the U.S.”<sup>15</sup> James Wilson, according to Madison’s notes, “thought the general provision for oaths of office, in a subsequent place, rendered the amendment unnecessary;”<sup>16</sup> however, the motion to amend passed by a vote of 7 to 1 with two states abstaining.<sup>17</sup>

After the aforementioned procedural history,<sup>18</sup> the Committee of Style issued a proposed presidential oath which read “[b]efore 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, and will to the best of my judgment and power, preserve, protect and defend the Constitution of the United States.’”<sup>19</sup> For unknown reasons, this language was modified in two ways before the printed version of the Constitution was signed by most of the delegates on September 17, 1787. First, the Committee of Style suggested the deletion of the phrase “the duties of his department” and in its place to substitute the phrase “on the execution of his office.”<sup>20</sup> Second, the Committee of Style proposed the deletion of the phrase “judgment and power” and in its place to add the word “Ability.”<sup>21</sup> The final version, which is reflected in Article II, Section 1, Clause 8 reads:

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 Ability, preserve, protect and defend the Constitution of the United States.”<sup>22</sup>

<sup>15</sup> *Id.* (quoting James Madison’s journal).

<sup>16</sup> *Id.* at 573-74 (quoting James Madison’s journal).

<sup>17</sup> *Id.* at 574.

<sup>18</sup> *See supra* notes 12-17 and accompanying text.

<sup>19</sup> FOUNDERS’ CONSTITUTION, *supra* note 14, at 574. On September 8, 1787, the delegates ended their business by voting to create a five-member Committee of Style “to write a polished, final draft for signing. Among the committee’s members were Madison, Hamilton, and Gouverneur Morris, who seems to have done most of the work.” GUIDE TO THE PRESIDENCY, *supra* note 13, at 20.

<sup>20</sup> FOUNDERS’ CONSTITUTION, *supra* note 14, at 574 (quoting James Madison’s journal).

<sup>21</sup> *Id.* (quoting James Madison’s journal).

<sup>22</sup> U.S. Const. art. II, § 1, cl. 8.

In contrast to the prevailing practice in most of the states at the time, the Constitution bars the imposition of religious oaths on the president and other officials of the national government. Some state constitutions required an adherence to Christianity as a condition for serving as governor, others to Protestant Christianity. (North Carolina, for example, insisted that its governor affirm the existence of God and the truth of Protestantism and hold no religious beliefs that were inimical to the peace and safety of the state). On August 30 [1787], Pinckney moved that “no religious test shall ever be required as a qualification to any office or public trust under the authority of the States.” Sherman said he “thought it unnecessary, the prevailing liberality being a sufficient security [against] such tests.” Nonetheless, Pinckney’s motion was approved.

GUIDE TO THE PRESIDENCY, *supra* note 13, at 33.

## II. PRESIDENTIAL MUSINGS ON THE OATH

### A. Inaugural Addresses

The various inaugural addresses of those Presidents who were formally inaugurated in the nation's capital at the start of a four-year term of office provide a collective treasure trove on the meaning of the presidential oath.<sup>23</sup> From the first presidential oath, taken by George Washington on April 30, 1789,<sup>24</sup> the presidential oath has been inextricably intertwined with a public

<sup>23</sup> Five presidents were never inaugurated: John Tyler; Millard Fillmore; Andrew Johnson; Chester A. Arthur; and Gerald R. Ford. All five held the office of Vice President before succeeding to the presidency upon the death or resignation of the previous President. Since they did not win an election to a full four-year term after their succession to the presidency, they were not inaugurated and, therefore, did not give an inaugural address. Thus, "Vice President John Tyler became President upon William Henry Harrison's death one month after his inauguration. U.S. Circuit Court Judge William Cranch administered the oath to Mr. Tyler at his residence in the Indian Queen Hotel on April 6, 1841." JOINT CONGRESSIONAL COMMITTEE ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 101-10, at iv (1<sup>st</sup> Sess. 1989) [hereinafter INAUGURAL ADDRESSES].

John Tyler . . . initially thought that he need not take a presidential oath. In his mind, the vice-presidential oath sufficed. Nevertheless, Tyler eventually took the presidential oath . . . two days after Harrison's death . . . 'for greater caution' – a practice that has been followed in similar circumstances since then.

GUIDE TO THE PRESIDENCY, *supra* note 13, at 263 (citation omitted). "Judge William Cranch administered the executive oath of office to Vice President Millard Fillmore on July 10, 1850, in the Hall of the House of Representatives. President Zachary Taylor had died the day before." INAUGURAL ADDRESSES, *supra* note 23 at v.

On April 15, 1865, after visiting the wounded and dying President Lincoln in a house across the street from Ford's Theater, the Vice President [Andrew Johnson] returned to his rooms at Kirkwood House. A few hours later he received the Cabinet and Chief Justice Salmon Chase in his rooms to take the executive oath of office.

*Id.*

"On September 20, 1881, upon the death of President Garfield, Vice President Arthur received a group at his home in New York City to take the oath of office administered by New York Supreme Court Judge John R. Brady." *Id.* at vi. The next day he "again took the oath of office, administered by Chief Justice Morrison Waite, in the Vice President's Office in the Capital in Washington D.C."

*Id.*

"The Minority Leader of the House of Representatives became Vice President upon the resignation of Spiro Agnew, under the process of the 25<sup>th</sup> Amendment to the Constitution." *Id.* "When President Nixon resigned on August 9, 1974, Vice President Ford took the executive oath of office administered by Chief Justice Warren Burger, in the East Room of the White House." *Id.*

<sup>24</sup> INAUGURAL ADDRESSES, *supra* note 23, at 1.

The Nation's first chief executive took his oath of office in April in New York City on the balcony of the Senate Chamber at Federal Hall on Wall Street. General Washington had been unanimously elected President by the first electoral college, and John Adams was elected Vice President because he received the second greatest number of votes. Under the rules, each elector cast two votes. The Chancellor of New York and fellow Freemason, Robert R. Livingston administered the oath of

declaration by the President of his dedication to the ideals of being the chief magistrate of the American constitutional republic. Indeed, the taking of the presidential oath derives from the concept of a profession, rooted in the Latin *professio* or *professionem*, “which means to make a public declaration.”<sup>25</sup> The term “profession” came “to describe the calling or an occupation that required new entrants to take an oath professing their dedication to the ideals associated with the learned calling.”<sup>26</sup> President Washington’s First Inaugural Address expressed his opinion of “the magnitude and difficulty of the trust to which the voice of my country called me”<sup>27</sup> and made his “first official act [the] fervent supplications to that Almighty Being who rules over the universe”<sup>28</sup> to watch over his Presidency, followed by a personal expression of public “duty” to renounce any salary for his services as President.<sup>29</sup> Upon his taking of the Presidential oath a second time on March 4, 1793,<sup>30</sup> in the Senate Chamber of Congress Hall, President Washington gave the shortest inaugural address in American history.<sup>31</sup> His two-paragraph address was a meditation on the legal and moral underpinnings of the presidential oath:

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office. The Bible on which the oath was sworn belonged to New York’s St. John’s Masonic Lodge. The new President gave his inaugural address before a joint session of the two Houses of Congress assembled inside the Senate Chamber.

<sup>25</sup> Edward D. Re, *The Profession of the Law*, 15 ST. JOHN’S J. LEGAL COMMENT. 109, 110 (2000).

<sup>26</sup> *Id.* Another author has pointed out that:

[T]he presidential oath derives from feudal, not Christian, practice and is familiar to many parts of the world. Reciting poetry on such occasions is an ancient custom, of which there are many examples - from ancient Greece as well as biblical Israel (some of the psalms are commonly taken to be coronation poems). The “address from the throne” is copied from monarchic regimes, where it is pretty much universal.

Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 621 (1999).

<sup>27</sup> INAUGURAL ADDRESSES, *supra* note 23, at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 4.

Washington was . . . the first president to take the oath of office with his left hand placed on the Bible and his right hand raised toward heaven. Although not required by the Constitution, the practice of taking oaths upon Bibles was deeply ingrained in English and American colonial history. For centuries, the kings and queens of Britain had taken their coronation oaths on Bibles, and the use of a Bible was an established practice in the administration of civil and ecclesiastical courts.

Nevertheless, no one thought to secure a Bible for Washington’s [first] inauguration until shortly before the general’s arrival at Federal Hall in New York City for his swearing in. Chief [J]ustice of the New York [S]tate [J]udiciary, Chancellor Robert R. Livingston, who was to administer the oath, feared *that the oath would lack legitimacy without a Bible*, but none could be found in the building. One was finally borrowed from St. John’s Masonic Lodge No. 1, a few blocks away on Wall Street, and used during the oath.

GUIDE TO THE PRESIDENCY, *supra* note 13, at 262 (emphasis added).

<sup>30</sup> INAUGURAL ADDRESSES, *supra* note 23, at 6. March 4<sup>th</sup> was the official date set for the presidential oath, pursuant to the Twelfth Amendment to the U.S. Constitution (ratified on June 15, 1804). Apparently the custom of administering the presidential oath on the March 4<sup>th</sup> following the presidential election originated with President Washington.

<sup>31</sup> *Id.* at 6.

Fellow Citizens:

I am again called upon by the voice of my country to execute the functions of its Chief Magistrate. When the occasion proper for it shall arrive, I shall endeavor to express the high sense I entertain of this distinguished honor, and of the confidence which has been reposed in me by the people of united America.

Previous to the execution of any official act of a President, the Constitution requires an oath of office. This oath I am now about to take, and in your presence: [t]hat if it shall be found during my administration of the Government I have in any instance violated willingly or knowingly the injunctions thereof, I may (besides incurring constitutional punishment) be subject to the upbraidings of all who are now witnesses of the present solemn ceremony.<sup>32</sup>

Following the bitter election of 1800,<sup>33</sup> on March 4, 1801, Thomas Jefferson took the first presidential oath (administered by Chief Justice John Marshall), the first taken in the new national capital of Washington D.C.<sup>34</sup> In Jefferson's first sentence of his First Inaugural Address, he expressed an awareness of the awesomeness of the duties he undertook pursuant to his oath of office. He said:

Called upon to undertake the duties of the first executive office of our country, I avail myself in the presence of that portion of my fellow-citizens which is here assembled to express my grateful thanks . . . to declare a sincere consciousness that the task is above my talents, and that I approach it with those anxious and awful presentiments which the greatness of the change and the weakness of my powers so justly inspire.<sup>35</sup>

Upon taking his second oath of office on March 4, 1805, President Jefferson, at the outset of his Second Inaugural Address, expressed his "zeal . . . to conduct myself as may best satisfy" the expectations of his countrymen.<sup>36</sup> He ended his address with a prayer and commitment to infuse his execution of office with high-mindedness, probity and divine guidance:

<sup>32</sup> *Id.*

<sup>33</sup> "President John Adams, who had run unsuccessfully for a second term, left Washington on the day of [Jefferson's] inauguration without attending the ceremony." *Id.* at 13.

<sup>34</sup> *Id.* Jefferson took his oath in the Senate Chamber of the partially built Capitol Building. *Id.*

<sup>35</sup> INAUGURAL ADDRESSES, *supra* note 23, at 13-14.

<sup>36</sup> *Id.* at 18.

The second inauguration of Mr. Jefferson followed an election under which the offices of President and Vice President were to be separately sought, pursuant to the newly adopted 12<sup>th</sup> Amendment to the Constitution. George Clinton of New York was elected Vice President. Chief Justice John Marshall administered the oath of office in the Senate Chamber at the Capitol.

*Id.* Marshall was appointed Chief Justice by the lame-duck President John Adams in January, 1801, and was sworn in on February 4, 1801. Harold H. Burton, *John Marshall - The Man*, 104 U. PA. L. REV. 3, 5 (1955).

I shall now enter on the duties to which my fellow-citizens have again called me, and shall proceed in the spirit of those principles which they have approved. I fear not that any motives of interest may lead me astray; I am sensible of no passion which could seduce me knowingly from the path of justice, but the weaknesses of human nature and the limits of my own understanding will produce errors of judgment sometimes injurious to your interests. I shall need, therefore, all the indulgence which I have heretofore experienced from my constituents; the want of it will certainly not lessen with increasing years. I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of our servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.<sup>37</sup>

The fourth President, James Madison, made explicit references to the presidential oath both times that he was inaugurated. At the outset of his First Inaugural Address on March 4, 1809, he stated:

Unwilling to depart from examples of the most revered authority, I avail myself of the occasion now presented to express the profound impression made on me by the call of my country to the station to the duties of which I am about to pledge myself by the most solemn of sanctions.<sup>38</sup>

In comparable, but somewhat different language, President Madison began his Second Inaugural Address on March 4, 1813, when the United States was at war with Great Britain,<sup>39</sup> with the following observation that linked the presidential oath with his past and future performance in office:

About to add the solemnity of an oath to the obligations imposed by a second call to the station in which my country heretofore placed me, I find in the presence of this respectable assembly an opportunity of publicly representing my profound sense of so distinguished a confidence and of the responsibility united with it. The impressions on me are strengthened by such an evidence that my faithful endeavors to discharge my arduous duties have been favorably estimated, and by a consideration of the momentous period at which the trust has been renewed.<sup>40</sup>

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<sup>37</sup> INAUGURAL ADDRESSES, *supra* note 23, at 22-23.

<sup>38</sup> *Id.* at 25.

<sup>39</sup> *Id.* at 29. Chief Justice John Marshall administered the oath of office to President Madison in the Hall of the House of Representatives. *Id.* "In a little more than a year, however, both the Capitol and Executive Mansion would be burned by an invading British garrison, and the city thrown into a panic." *Id.*

<sup>40</sup> INAUGURAL ADDRESSES, *supra* note 23, at 29.

James Monroe elaborated on the theme of trust in both of his inaugural addresses, and linked the meaning of his oath of office with the principles that would guide him in executing his duties.<sup>41</sup> In his First Inaugural Address, delivered on March 4, 1817, President Monroe opined on “the importance of the trust and of the nature and extent of its duties, with the . . . highest interests of a great and free people,” and how these considerations were “intimately connected.”<sup>42</sup> In his Second Inaugural Address of March 5, 1821,<sup>43</sup> Monroe reiterated his view of his renewed undertaking in office as a “high trust;”<sup>44</sup> he ended with a meditation on the connection between the presidential oath and the performance of this high trust:

Entering . . . the office which I have just solemnly sworn to execute with fidelity and to the utmost of my ability, I derive great satisfaction from a knowledge that I shall be assisted in the several Departments by the very enlightened and upright citizens from whom I have received so much aid in the preceding term. With full confidence in the continuance of that candor and generous indulgence from my fellow-citizens at large which I have heretofore experienced, and with a firm reliance on the protection of Almighty God, I shall forthwith commence the duties of the high trust to which you have called me.<sup>45</sup>

Four years later, in his one and only inaugural address, John Quincy Adams articulated a trilogy of supplemental “pledges” that he implicitly attached to his oath of office. He said, “[i]ntentions upright and pure, a heart devoted to the welfare of our country, and the unceasing application of all the faculties allotted to me to her service are all the pledges that I can give for the faithful performance of the arduous duties I am to undertake.”<sup>46</sup> Andrew Jackson, celebrating his inauguration on March 4, 1829, with his oath-taking on the East Portico of the Capitol Building,<sup>47</sup> summoned familiar presidential themes from past inaugural

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<sup>41</sup> *Id.* at 33-34.

<sup>42</sup> *Id.* at 34.

<sup>43</sup> *Id.* at 42. Arguably there was a gap of one day when the United States did not have a President: In 1821, March 4 fell on a Sunday for the first time that presidential inaugurations had been observed. Although his previous term had expired on Saturday, the President waited until the following Monday, upon the advice of Chief Justice Marshall, before going to the newly rebuilt Hall of the House of Representatives to take the oath of office.

*Id.* at 42.

<sup>44</sup> INAUGURAL ADDRESSES, *supra* note 23, at 42-43.

<sup>45</sup> *Id.* at 51-52.

<sup>46</sup> *Id.* at 59-60.

<sup>47</sup> *Id.* at 61.

The election of Andrew Jackson was heralded as a new page in the history of the Republic. The first military leader elected President since George Washington, he was much admired by the electorate, who came to Washington to celebrate “Old Hickory’s” inauguration. Outgoing President [John Quincy] Adams [like his father before him] did not join in the ceremony, which was held for the first time on the East

speeches in his First Inaugural Address. President Jackson implicitly melded his “undertak[ing] the arduous duties that I have been appointed to perform by the choice of a free people”<sup>48</sup> with the “customary and solemn occasion”<sup>49</sup> of his taking of the presidential oath, and promised “the zealous dedication of my humble abilities to their service and their good.”<sup>50</sup> In language that resonated with the presidential oath, itself,<sup>51</sup> Jackson noted:

As the instrument of the Federal Constitution it will devolve on me . . . to execute the laws of the United States, to superintend their foreign and their confederate relations, to manage their revenue, to command their forces, and, by communications to the Legislature, to watch over and to promote their interests generally.<sup>52</sup>

Jackson’s Second Inaugural Address<sup>53</sup> reiterated the same basic themes as his first address. However, he explicitly referenced the Presidential oath in noting that he was “under the obligation of that solemn oath . . . [to] continue to exert all my faculties to maintain the just powers of the Constitution and to transmit unimpaired to posterity the blessings of our Federal Union.”<sup>54</sup>

Jackson’s successor, Martin Van Buren, in a somewhat prolix and rambling inaugural address, intoned specific phrases of the presidential oath at the culmination of his speech on March 4, 1837:

For myself . . . I desire to declare that the principle that will govern me in the high duty to which my country calls me is a strict adherence to the letter and spirit of the Constitution as it was designed by those who framed it. Looking back to it as a sacred instrument carefully and not easily framed; remembering that it was throughout a work of concession and compromise; viewing it as limited to national objects; regarding it as leaving to the people and the States all power not explicitly parted with, I shall endeavor to

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Portico of the Capitol building. Chief Justice John Marshall administered the oath of office. After the proceedings at the Capitol, a large group of citizens walked with the new President along Pennsylvania Avenue to the White House, and many of them visited the [E]xecutive [M]ansion that day and evening. Such large numbers of people arrived that many of the furnishings were ruined. President Jackson left the building by a window to avoid the crush of people.

*Id.*

<sup>48</sup> INAUGURAL ADDRESSES, *supra* note 23, at 61.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 62.

<sup>51</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>52</sup> INAUGURAL ADDRESSES, *supra* note 23, at 62.

<sup>53</sup> *Id.* at 65.

Cold weather and the President’s poor health caused the second inauguration to be much quieter than the first. The President’s speech was delivered to a large assembly in the Hall of the House of Representatives. Chief Justice John Marshall administered the oath of office for the ninth, and last, time.

*Id.*

<sup>54</sup> *Id.* at 67.

preserve, protect, and defend it by anxiously referring to its provision for direction in every action.

....

In approaching . . . in the presence of my assembled countrymen, to make the solemn promise that yet remains, and to pledge myself that I will faithfully execute the office I am about to fill, I bring with me a settled purpose to maintain the institutions of my country, which I trust will atone through the errors I commit.<sup>55</sup>

President William Henry Harrison, who took the office on March 4, 1841, “has the dual distinction among all the Presidents of giving the longest inaugural address and of serving the shortest term of office”<sup>56</sup> - one month.<sup>57</sup> During the course of his speech, President Harrison made a curious reference to plural oaths, noting, “I appear before you, fellow-citizens, to take the oaths which the Constitution prescribes as a necessary qualification for the performance of [the President’s] duties.”<sup>58</sup> Making a reference to ancient history, Harrison went on to observe:

It was the remark of a Roman consul in an early period of that celebrated Republic that a most striking contrast was observable in the conduct of candidates for offices of power and trust before and after obtaining them, they *seldom carrying out in the latter case the pledges and promises made in the former*. However much the world may have improved in many respects in the lapse of upward of two thousand years since the remark was made by the virtuous and indignant Roman, I fear that a strict examination of the

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<sup>55</sup> *Id.* at 76-77.

The ailing President Jackson and his Vice President Van Buren rode together to the Capitol from the White House in a carriage made of timbers from the *U.S.S. Constitution*. Chief Justice Roger Taney administered the oath of office on the East Portico of the Capitol. For the first and only time, the election of the Vice President had been decided by the Senate, as provided by the Constitution, when the electoral college could not select a winner. The new Vice President, Richard M. Johnson, took his oath in the Senate Chamber.

INAUGURAL ADDRESSES, *supra* note 23, at 69.

<sup>56</sup> *Id.* at 79.

<sup>57</sup> *Id.*

Known to the public as “Old Tippecanoe,” the former general of the Indian campaigns delivered an hour-and-forty-five-minute speech in a snowstorm. The oath of office was administered on the East Portico of the Capitol by Chief Justice Roger Taney. The 68-year-old President stood outside for the entire proceeding, greeted crowds of well-wishers at the White House later that day, and attended several celebrations that evening. One month later he died of pneumonia.

*Id.*

<sup>58</sup> *Id.*

annals of some of the modern elective governments would develop similar instances of violated confidence.<sup>59</sup>

Later in his inaugural address, Harrison made reference to connotations of the Presidential oath, referring to his "office of high trust;"<sup>60</sup> the fact that the President is an "accountable agent, not the principal; the servant, not the master;"<sup>61</sup> his considering "himself bound by the most solemn sanctions to guard, protect, and defend the rights of all and of every portion, great or small, from the injustice and oppression of the rest;"<sup>62</sup> and the "pledge I have this day given to discharge all the high duties of my exalted station according to the best of my ability."<sup>63</sup>

When James Polk took the presidential oath on March 4, 1845, it was the first time the events of the inaugural ceremony were telegraphed to another city.<sup>64</sup> Noting that he was the youngest President to date, Polk offered a meditation on the presidential oath, past and present:

If the more aged and experienced men who have filled the office of President of the United States even in the infancy of the Republic distrusted their ability to discharge the duties of that exalted station, what ought not to be the apprehensions of one so younger and less endowed now that our domain extends from ocean to ocean, that our people have so greatly increased in numbers, and at a time when so great diversity of opinion prevails in regard to the principles and policy which should characterize the administration of our Government?

.....

In assuming responsibilities so vast I fervently invoke the aid of that Almighty Ruler of the Universe in whose hands are the destinies of nations and of men to guard this Heaven-favored land against the mischiefs which without His guidance might arise from an unwise public policy. With a firm reliance upon the wisdom of Omnipotence to sustain and direct me in the path of duty which I am appointed to pursue, I stand in the presence of this assembled multitude of my countrymen to take upon myself the solemn

<sup>59</sup> INAUGURAL ADDRESSES, *supra* note 23, at 80 (emphasis added). Perhaps Harrison's use of the plural "oaths" earlier in his speech (cited *infra* note 58 and accompanying text) was made to accommodate his later reference to the "pledges and promises" of prior executive officials in world history.

<sup>60</sup> INAUGURAL ADDRESSES, *supra* note 23, at 83.

<sup>61</sup> *Id.* at 83-84.

<sup>62</sup> *Id.* at 86.

<sup>63</sup> *Id.* at 97. A philosophical question is whether Harrison's Vice President, John Tyler, who succeeded him in office after Harrison's death, the first Vice President to do so, was morally bound to carry out Harrison's principles articulated in his inaugural address. See INAUGURAL ADDRESSES, *supra* note 23. This question has particular resonance for the five vice presidents who succeeded their presidents in office but who were never elected in their own right as President. *Id.*

<sup>64</sup> INAUGURAL ADDRESSES, *supra* note 23, at 97. "The events of the ceremony were telegraphed to Baltimore by Samuel Morse on his year-old invention." *Id.* The use of a Bible in the swearing-in ceremony was the first recorded use in a presidential oath-taking since Washington's first inauguration. See GUIDE TO THE PRESIDENCY, *supra* note 13, at 262.

obligation "to the best of my ability to preserve, protect, and defend the Constitution of the United States."<sup>65</sup>

The nation turned to yet another war hero in electing Whig candidate, Zachary Taylor, to a four-year term of office in 1848. President Taylor's Inaugural Address on March 5, 1849,<sup>66</sup> explicitly mentioned the presidential oath. In extended remarks, Taylor reiterated inaugural themes of his predecessors, noting the magnitude of the responsibilities of the presidency and his humble resolve to discharge the duties of his office with the help of others.<sup>67</sup> He asserted:

Elected by the American people to the highest office known to our laws, I appear here to take the oath prescribed by the Constitution, and, in compliance with a time-honored custom, to address those who are now assembled.

The confidence and respect shown by my countrymen in calling me to be the Chief Magistrate of a Republic holding a high rank among the nations of the earth have inspired me with feelings of the most profound gratitude; but when I reflect that the acceptance of the office which their partiality has bestowed imposes the discharge of the most arduous duties and involves the weightiest obligations, I am conscious that the position which I have been called to fill, though sufficient to satisfy the loftiest ambition, is surrounded by fearful responsibilities. Happily, however, in the performance of my new duties I shall not be without able cooperation. The legislative and judicial branches of the Government present prominent examples of distinguished civil attainments and matured experience, and it shall be my endeavor to call to my assistance in the Executive Departments individuals whose talents, integrity, and purity of character will furnish ample guarantees for the faithful and honorable performance of the trusts to be committed to their charge. With such aides and honest purpose to do whatever is right, I hope to execute diligently, impartially, and for the best interests of the country the manifold duties devolved upon me.

In the discharge of these duties my guide will be the Constitution, which I this day swear to "preserve, protect, and defend." For the interpretation of that instrument I shall look to the decisions of the judicial tribunals established by its authority and to the practice of the Government under the earlier Presidents, who had so large a share in its formation. To the example

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<sup>65</sup> INAUGURAL ADDRESSES, *supra* note 23, at 100.

<sup>66</sup> Taylor assumed office on March 5, instead of the prescribed inaugural date of March 4.

For the second time in the history of the Republic, March 4 fell on a Sunday. The inaugural ceremony was postponed until the following Monday, raising the question as to whether the Nation was without a president for a day. General Taylor, popularly known as "Old Rough and Ready," was famous for his exploits in the Mexican War. He never had voted in an election until his own contest for the Presidency. Outgoing President Polk accompanied the general to the ceremony at the Capitol. The oath of office was administered by Chief Justice Roger Taney on the East Portico.

*Id.* at 111.

<sup>67</sup> *Id.*

of those illustrious patriots I shall always defer with reverence, and especially to his example who was by so many titles "the Father of his Country."<sup>68</sup>

Franklin Pierce, a former U.S. Senator and Congressman, citing religious grounds, chose "to affirm" instead of "to swear" the presidential oath on March 4, 1853, becoming "the only President to use the choice offered by the Constitution."<sup>69</sup> President Pierce's Inaugural Address succinctly explicated his understanding of the affirmation he was making: "The circumstances under which I have been called for a limited period to preside over the destinies of the Republic fill me with a profound sense of responsibility, but with nothing like shrinking apprehension. I repair to the post . . . answerable only for a fearless, faithful, and diligent exercise of my best powers."<sup>70</sup>

As the nation quaked with the sectional tensions that would erupt four years later in the Civil War, James Buchanan repeated the full presidential oath in the first paragraph of his inaugural address on March 4, 1857.<sup>71</sup> He then told his audience how he interpreted his oath:

In entering upon this great office I must humbly invoke the God of our fathers for wisdom and firmness to execute its high and responsible duties in such a manner as to restore harmony and ancient friendship among the people of the several States and to preserve our free institutions throughout many generations.<sup>72</sup>

Ever the incisive lawyer, Abraham Lincoln took the presidential oath on March 4, 1861, amid a confederate uprising.<sup>73</sup> He delivered his First Inaugural Address that included a thoughtful lecture on the significance of his oath in a time of national crisis. Lincoln commenced his speech by stating:

In compliance with a custom as old as the Government itself, I appear before you to address you briefly and to take in your presence the oath prescribed by the Constitution of the United States to be taken by the President "before he enters on the execution of this office."

I do not consider it necessary at present for me to discuss those matters of administration about which there is no special anxiety or excitement.<sup>73</sup>

Referencing the federal laws on the books requiring northern states to return fugitive slaves, President Lincoln observed that when members of Congress take their oaths they "swear their support to the whole Constitution," and went on to compare the congressional oath to uphold the Constitution with the presidential

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<sup>68</sup> *Id.* at 111-12.

<sup>69</sup> *Id.* at 115.

<sup>70</sup> INAUGURAL ADDRESSES, *supra* note 23, at 115-16.

<sup>71</sup> *Id.* at 125. "Since James Buchanan in 1857, every president has taken the oath on a Bible except for Theodore Roosevelt in 1901, when he was hastily sworn in after the assassination of William McKinley." GUIDE TO THE PRESIDENCY, *supra* note 13, at 262.

<sup>72</sup> INAUGURAL ADDRESSES, *supra* note 23, at 125-26.

<sup>73</sup> *Id.* at 133-34.

oath.<sup>74</sup> Lincoln then linked the presidential oath with the history of the nation and with the obligation of the President to assure the perpetual union of the United States:

I take the official oath to-day with no mental reservations and with no purpose to construe the Constitution or laws by any hypercritical rules; and while I do not choose now to specify particular acts of Congress as proper to be enforced, I do suggest that it will be much safer for all . . . to conform to and abide by all those acts which stand unrepealed than to violate any of them trusting to find impunity in having them held to be unconstitutional.

It is seventy-two years since the first inauguration of a President under our National Constitution. During that period fifteen different and greatly distinguished citizens have in succession administered the executive branch of the Government. They have conducted it through many perils, and generally with great success. Yet, with all this scope of precedent, I now enter upon the same task for the brief constitutional term of four years under great and peculiar difficulty. A disruption of the Federal Union, heretofore only menaced, is now formidably attempted.

I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself.<sup>75</sup>

With the aforementioned rhetorical foundation, Lincoln tied together the imperative to sustain the Union, his constitutional duty to faithfully execute the laws of the country,<sup>76</sup> and the “ability”<sup>77</sup> to “defend”<sup>78</sup> language of the presidential oath, concluding:

I therefore consider that in view of the Constitution and the laws the Union is unbroken, and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part, and I shall perform it so far as practicable unless my rightful masters, the American people, shall withhold the requisite means or in some authoritative manner direct the contrary. I trust this will not be regarded as a

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<sup>74</sup> *Id.* at 135.

<sup>75</sup> *Id.* at 135-36.

<sup>76</sup> U.S. CONST. art. II, § 3, cl. 4 (“He[, the President,] shall take care that the laws be faithfully executed”).

<sup>77</sup> U.S. CONST. art. II, § 1, cl. 8 (“and will to the best of my ability”).

<sup>78</sup> *Id.* (“preserve, protect and defend the Constitution of the United States”).

menace, but only as the declared purpose of the Union that it *will* constitutionally defend and maintain itself.<sup>79</sup>

In what are perhaps the most memorable, or among the most notable, paragraphs of any inaugural address by any American president,<sup>80</sup> Abraham Lincoln closed out his First Inaugural Address with an explicit reference to the presidential oath:

In *your* hands, my dissatisfied fellow-countrymen and not in *mine*, is the momentous issue of civil war. The Government will not assail *you*. You can have no conflict without being yourselves the aggressors. *You* have no oath registered to heaven to destroy the Government, while I shall have the most solemn one to "preserve, protect, and defend it."

I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.<sup>81</sup>

In giving his First inaugural Address on March 4, 1869, President Ulysses S. Grant touched on familiar themes that had been expressed by earlier presidents in elaborating on his view of the meaning of the presidential oath.<sup>82</sup> Thus, he

<sup>79</sup> INAUGURAL ADDRESSES, *supra* note 23, at 136. Later in his speech, Lincoln reiterated these themes, noting:

The Chief Magistrate derives all his authority from the people, and they have referred none upon him to fix terms for the separation of the States. The people themselves can do this if also they choose, but the Executive as such has nothing to do with it. His duty is to administer the present Government as it came to his hands and to transmit it unimpaired by him to his successor.

*Id.* at 140.

<sup>80</sup> Another possible contender for the most memorable paragraph from an American presidential inaugural address is from Lincoln's Second Inaugural Address of March 4, 1865, where he said:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

*Id.* at 143.

<sup>81</sup> *Id.* at 141. Lincoln's second inaugural address of March 4, 1865, made only one explicit reference to the presidential oath, when he said at the outset: "At this second appearing to take the oath of the Presidential office there is less occasion for an extended address than there was at the first." *Id.* at 142. The entire address consisted of four paragraphs of approximately 705 words.

<sup>82</sup> General Grant was

the first of many Civil War officers to become President of the United States. He refused to ride in the carriage to the Capitol with President Johnson, who then decided not to attend the ceremony. The oath of office was administered by Chief Justice Salmon Chase on the East Portico. The inaugural parade boasted eight full divisions

observed that “in conformity to the Constitution of our country, [I have] taken the oath of office prescribed therein;”<sup>83</sup> that he took “this oath without mental reservation and with the determination to do to the best of my ability all that is required of me;”<sup>84</sup> that “[t]he responsibilities of the position I feel, but accept them without fear;”<sup>85</sup> and that he would “commence its duties untrammelled” and would “bring to it a conscious desire and determination to fill it to the best of my ability to the satisfaction of the people.”<sup>86</sup> Grant offered some original insights, however, on the pragmatic, no-nonsense view of his responsibilities undertaken pursuant to the presidential oath. In this regard he quipped, “[l]aws are to govern all alike – those opposed as well as those who favor them. I know of no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”<sup>87</sup>

Four years later, the crushing impact of his presidential duties and his resolve to finish another four year term in office consistent with the presidential oath is demonstrated when Grant, as part of his Second Inaugural Address, said:

I acknowledge before this assemblage . . . the obligation I am under to my countrymen for the great honor they have conferred on me by returning me to the highest office within their gift, and the further obligation resting on me to render to them the best services within my power. This I promise, looking forward with the greatest anxiety to the day when I shall be released from responsibilities that at times are almost overwhelming, and from which I have scarcely had a respite since the eventful firing upon Fort Sumter, in April, 1861, to the present day.<sup>88</sup>

In interpreting the duties set forth in the presidential oath, the inaugural addresses of both Presidents Rutherford B. Hayes, in 1877, and his successor, James A. Garfield, in 1881, referred to the presidency as a “great trust.”<sup>89</sup> Grover Cleveland, using religious parlance, called it “a supreme and sacred trust . . . consecrat[ing] himself [to the peoples’] service.”<sup>90</sup> Indeed, midway through his

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of the Army - the largest contingent yet to march on such an occasion. That evening, a ball was held in the Treasury Building.

INAUGURAL ADDRESSES, *supra* note 23, at 145.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 145-46.

<sup>87</sup> INAUGURAL ADDRESSES, *supra* note 23, at 146. In a similar vein, President Grant told his audience that “[i]t will be my endeavor to execute all laws in good faith, to collect all revenues assessed, and to have them properly accounted for and economically disbursed.” *Id.* at 147.

<sup>88</sup> *Id.* at 151-52.

<sup>89</sup> *See id.* at 154. Rutherford B. Hayes took the presidential oath on a Bible opened to Psalm 118:11-13 (“Thou has thrust sore at me that I might fall: but the Lord helped me”). GUIDE TO THE PRESIDENCY, *supra* note 13, at 262.

<sup>90</sup> INAUGURAL ADDRESSES, *supra* note 23, at 169. The opening line of President Cleveland’s First Inaugural Address of March 4, 1885, stated in reference to the presidential oath: “In the presence of this vast assemblage of my countrymen I am about to supplement and seal by the oath which I shall take the manifestation of the will of a great and free people.” *Id.*

First Inaugural Address, President Grover Cleveland made a striking and idiosyncratic comparison between the presidential oath and the so-called duties of the general citizenry. Cleveland contended:

But he who takes the oath today to preserve, protect, and defend the Constitution of the United States only assumes the solemn obligation which every patriotic citizen - on the farm, in the workshop, in the busy marts of trade, and everywhere - should share with him. The Constitution which prescribes his oath, my countrymen, is yours; the Government you have chosen him to administer for a time is yours . . . the laws and the entire scheme of our civil rule, from the town meeting to the State capitals and the national capital, is yours. Your every voter, as surely as your Chief Magistrate, under the same high sanction, though in a different sphere, exercises a public trust. Nor is this all. Every citizen owes to the country a vigilant watch and close scrutiny of its public servants and a fair and reasonable estimate of their fidelity and usefulness. Thus is the people's will impressed upon the whole framework of our civil polity - municipal, State, and Federal; and this is the price of our liberty and the inspiration of our faith in the Republic.<sup>91</sup>

Benjamin Harrison, who both succeeded Cleveland and preceded him (in Cleveland's second, non-consecutive term of office),<sup>92</sup> picked up on Cleveland's religious imagery in describing the presidential oath and also reiterated the parallel Cleveland had drawn four years earlier between the presidential oath and the covenant of the people. As President Harrison put it in his Inaugural Address of March 4, 1889:

There is no constitutional or legal requirement that the President shall take the oath of office in the presence of the people, but there is so manifest an

<sup>91</sup> *Id.* at 171. President Cleveland, in his Second Inaugural Address of March 4, 1893, in reference to the presidential oath, said:

The oath I now take to preserve, protect, and defend the Constitution of the United States not only impressively defines the great responsibility I assume, but suggests obedience to constitutional commands as the rule by which my official conduct must be guided. I shall to the best of my ability and within my sphere of duty preserve the Constitution by loyally protecting every grant of Federal power it contains, by defending all its restraints when attacked by impatience and restlessness, and by enforcing its limitations and reservations in favor of the States and the people.

*Id.* at 192.

<sup>92</sup> President Harrison was nominated on

the 8<sup>th</sup> ballot of the Republican convention, the Civil War veteran, jurist, and Senator from Indiana was the only grandson of a President to be elected to the office, as well as the only incumbent to lose in the following election to the person he had defeated. In a rainstorm, the oath of office was administered by Chief Justice Melville Fuller on the East Portico of the Capitol. President Cleveland held an umbrella over his head as he took the oath. John Philip Sousa's Marine Corps band played for a large crowd at the inaugural ball.

*Id.* at 175.

appropriateness in the public induction to office of the chief executive officer of the nation that from the beginning of the Government the people, to whose service the official oath consecrates the officer, have been called to witness the solemn ceremonial. The oath taken in the presence of the people becomes a mutual covenant. The officer covenants to serve the whole body of the people by a faithful execution of the laws, so that they may be the unflinching defense and security of those who respect and observe them, and that neither wealth, station, nor the power of combinations shall be able to evade their just penalties or to wrest them from a beneficent public purpose to serve the ends of cruelty or selfishness.

My promise is spoken; yours unspoken, but not the less real and solemn. The people of every State have their representatives. Surely I do not misinterpret the spirit of the occasion when I assume that the whole body of the people covenant with me and with each other to-day to support and defend the Constitution and the Union of the States, to yield willing obedience to all the laws and each to every other citizen his equal civil and political rights. Entering thus solemnly into covenant with each other, we may reverently invoke and confidently expect the favor and help of Almighty God - that He will give to me wisdom, strength, and fidelity, and to our people a spirit of fraternity and love of righteousness and peace.<sup>93</sup>

William McKinley started his First Inaugural Address, given on March 4, 1897, by referencing the presidential oath: "In obedience to the will of the people, and in their presence, by the authority vested in me by this oath, I assume the arduous and responsible duties of President of the United States, relying upon the support of my countrymen and invoking the guidance of Almighty God."<sup>94</sup> At the end of this speech, McKinley concluded by saying: "Let me again repeat the words of the oath administered by the Chief Justice which, in their respective spheres, so far as applicable, I would have all my countrymen observe."<sup>95</sup> After a verbatim repetition of the presidential oath,<sup>96</sup> President McKinley vowed: "This is the obligation I have reverently taken before the Lord Most High. To keep it will be my single purpose, my constant prayer; and I shall confidently rely upon the forbearance and assistance of all the people in the discharge of my solemn responsibilities."<sup>97</sup>

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<sup>93</sup> *Id.* at 175-76.

<sup>94</sup> INAUGURAL ADDRESSES, *supra* note 23, at 193.

<sup>95</sup> *Id.* at 202.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* In his Second Inaugural Address of March 4, 1901, a mere six months before he would be assassinated and Vice President Theodore Roosevelt would succeed him to the presidency, McKinley made the following reference to the presidential oath:

It encourages me for the great task which I now undertake to believe that those who voluntarily committed to me the trust imposed upon the Chief Executive of the Republic will give to me generous support in my duties to "preserve, protect, and defend, the Constitution of the United States" and to "[take] care that the laws be faithfully executed."

*Id.* at 204.

In his sole inaugural address of March 4, 1905, President Theodore Roosevelt, while making no explicit reference to the presidential oath,<sup>98</sup> implicitly averred to the duty he conceived as imbedded in the presidency, saying: "though the problems are new, though the tasks set before us differ from the tasks set before our fathers . . . the spirit in which these tasks must be undertaken and these problems faced, if our duty is to be well done, remains essentially unchanged."<sup>99</sup> Moreover, speaking in the first person plural pronoun, "we", Roosevelt ended his speech by delineating a cluster of issues that he seemed to pledge would characterize his next four years in office:

We in our turn have an assured confidence that we shall be able to leave this heritage unwasted and enlarged to our children and our children's children. To do so we must show, not merely in great crises, but in the everyday affairs of life, the qualities of practical intelligence, of courage, of hardihood, and endurance, and above all the power of devotion to a lofty ideal, which made great the men who founded this Republic in the days of Washington, which made great the men who preserved this Republic in the days of Abraham Lincoln.<sup>100</sup>

Theodore Roosevelt's successor, William Howard Taft, intoned a familiar presidential emotion about the presidential oath at the beginning of his Inaugural Address of March 4, 1909. Taft said:

Anyone who has taken the oath I have just taken must feel a heavy weight of responsibility. If not, he has no 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.<sup>101</sup>

Taft then launched upon a prolix set of specific policy proposals, ending with a plea for "the considerate sympathy and support of my fellow-citizens and the aid of the Almighty God in the discharge of my responsible duties."<sup>102</sup>

Four years later, on March 4, 1913, Woodrow Wilson took the presidential oath, filling his First Inaugural Address with the rhetoric of change and

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<sup>98</sup> This occasion was Theodore Roosevelt's second taking of the Presidential oath:

The energetic Republican President had taken his first oath of office upon the death of President McKinley, who died of an assassin's gunshot wounds on September 14, 1901. Mr. Roosevelt had been President himself for three years at the election of 1904. The inaugural celebration was the largest and most diverse of any in memory - cowboys, Indians (including the Apache Chief Geronimo), coal miners, soldiers, and students were some of the groups represented. The oath of office was administered on the East Portico of the Capitol by Chief Justice Melville Fuller.

INAUGURAL ADDRESSES, *supra* note 23, at 209.

<sup>99</sup> *Id.* at 211.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 213.

<sup>102</sup> *Id.* at 225.

renewal.<sup>103</sup> Without any explicit reference to the presidential oath, President Wilson closed his speech in a veiled allusion to his interpretation of the “great trust” of the presidency and the mandate for change inherent in the Election of 1912:

This is not a day of triumph; it is a day of dedication. Here muster, not the forces of party, but the forces of humanity. Men’s hearts wait upon us; men’s lives hang in the balance; men’s hopes call upon us to say what we will do. Who shall live up to the great trust? Who dares fail to try? I summon all honest men, all patriotic, all forward-looking men, to my side. God helping me, I will not fail them, if they will but counsel and sustain me!<sup>104</sup>

Four years later, with the threat of war with Germany palpably imminent,<sup>105</sup> President Wilson took the presidential oath two times: one privately on Sunday, March 4, 1917; and again on Monday, March 5, 1917.<sup>106</sup> This time, in the course of his Second Inaugural Address, Wilson made specific reference to the presidential oath, and alluded to the expectation of national unity in the context of the times when the United States was on the verge of war. President Wilson observed:

I stand here and have taken the high and solemn oath to which you have been audience because the people of the United States have chosen me for this august delegation of power and have by their gracious judgment named me their leader in affairs.

I know now what the task means. I realize to the full the responsibility[,] which it involves. I pray God I may be given the wisdom and the prudence to do my duty in the true spirit of this great people. I am their servant and can succeed only as they sustain and guide me by their confidence and their counsel. The thing I shall count upon, the thing without which neither

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<sup>103</sup> INAUGURAL ADDRESSES, *supra* note 23, at 227.

The election of 1912 produced a Democratic victory over the split vote for President Taft’s Republican ticket and Theodore Roosevelt’s Progressive Party. The Governor of New Jersey and former Princeton University president was accompanied by President Taft to the Capitol. The oath of office was administered on the East Portico by Chief Justice Edward White.

*Id.*

<sup>104</sup> *Id.* at 231.

<sup>105</sup> *Id.* at 232.

The specter of war with Germany hung over the events surrounding the inauguration. A Senate filibuster on arming American merchant vessels against submarine attacks had closed the last hours of the Sixty-fourth Congress without passage. Despite the campaign slogan “He kept us out of war,” the President asked Congress on April 2 to declare war. It was declared on April 6.

*Id.*

<sup>106</sup> INAUGURAL ADDRESSES, *supra* note 23, at 232. “March 4 was a Sunday, but the President took the oath of office at the Capitol in the President’s Room that morning. The oath was taken again the next day, administered by Chief Justice Edward White on the East Portico of the Capitol.” *Id.*

counsel nor action will avail, is the unity of America - an America united in feeling, in purpose and in its vision of duty, of opportunity and of service.<sup>107</sup>

The Roaring Twenties dawned with the election of Warren G. Harding's election as President.<sup>108</sup> Harding's Inaugural Address of March 4, 1921, sought to calm his fellow countrymen, who had just experienced the ravages of World War I, and to spur the country into peaceful prosperity.<sup>109</sup> At the end of his speech, with only a brief but powerful mention of the presidential oath, he spoke of his conception of the duties of the presidency and his presuppositions for carrying out those duties:

One cannot stand in this presence and be unmindful of the tremendous responsibility. The world upheaval has added heavily to our tasks. But with the realization comes the surge of high resolve, and there is reassurance in belief in the God-given destiny of our Republic. If I felt that there is to be sole responsibility in the Executive for the America of tomorrow I should shrink from the burden. But here are a hundred [if not] millions, with common concern and shared responsibility, answerable to God and country. The Republic summons them to their duty and I invite co-operation.

I accept my part with single-mindedness of purpose and humility of spirit, and implore the favor and guidance of God in His Heaven. With these I am unafraid, and confidently face the future.

I have taken the solemn oath of office on that passage of Holy Writ wherein it is asked: "What doth the Lord require of thee but to do justly, and to love mercy, and to walk humbly with thy God?" This I plight to God, and country.<sup>110</sup>

Calvin Coolidge was the only President to have the presidential oath administered by his father, on the occasion of the death of President Harding in

<sup>107</sup> *Id.* at 235. While the country was temporarily united in waging war against Germany and its allies, Republicans in the United States Senate were strongly opposed to Wilson's post-war proposal for a League of Nations. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 38-45 (2002).

<sup>108</sup> *INAUGURAL ADDRESSES*, *supra* note 23, at 237.

Senator Harding from Ohio was the first sitting Senator to be elected President. A former newspaper publisher and Governor of Ohio, the President-elect rode to the Capitol with President Wilson in the first automobile to be used in an inauguration. President Wilson had suffered a stroke in 1919, and his fragile health prevented his attendance at the ceremony on the East Portico of the Capitol. The oath of office was administered by Chief Justice Edward White, using the Bible from George Washington's first inauguration. The address to the crowd . . . was broadcast on a loudspeaker.

*Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 245. The Biblical passage Harding quoted is Micah 6:8.

1923.<sup>111</sup> Coolidge took the oath a second time on March 4, 1925, following his election as President in his own right in 1924.<sup>112</sup> Faithful to his taciturn, New England upbringing, President Coolidge, however, did not reflect, during the course of his Inaugural Address on the meaning of the presidential oath.

Herbert Hoover, -a former engineer, humanitarian and Secretary of Commerce,<sup>113</sup> spoke of the presidential oath as “the most sacred oath which can be assumed by an American citizen” in his Inaugural Address of March 4, 1929.<sup>114</sup> He went on to describe the presidential oath as “a dedication and consecration under God to the highest office in service of our people,<sup>115</sup> noting that he “assume[d] this trust in the humility of knowledge that only through the guidance of Almighty Providence can I hope to discharge its ever-increasing burdens.”<sup>116</sup>

When Franklin D. Roosevelt took the first of his record four presidential oaths on March 4, 1933, the economy of the United States was in a state of crisis.<sup>117</sup> President Roosevelt’s primary theme in his First Inaugural Address was “the only thing we have to fear is fear itself - nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert [national] retreat into advance.”<sup>118</sup> Trumpeting the need for a courageous spirit<sup>119</sup> and a committed vision,<sup>120</sup> President Roosevelt, while not explicitly reflecting on the presidential oath, implicitly spoke of his presidential duty in the following bold and memorable words:

It is to be hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it

<sup>111</sup> *Id.* at 247. “In 1923 President Coolidge first took the oath of office, administered by his father, a justice of the peace and a notary, in his family’s sitting room in Plymouth, Vermont. President Harding had died while traveling in the western States.” *Id.*

<sup>112</sup> INAUGURAL ADDRESSES, *supra* note 23, at 247. In 1924, Coolidge “was elected on the slogan ‘Keep Cool with Coolidge’. Chief Justice [and former President] William Howard Taft administered the oath of office on the East Portico of the Capitol. The event was broadcast to the nation by radio.” *Id.* William H. Taft is the only person in American history to have both taken the presidential oath and administered the oath.

<sup>113</sup> *Id.* at 257.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* President Hoover, an organized former engineer, delivered an inaugural address with subheadings - the first time a President had deployed this organizational device in the text of an inaugural address. *Id.* at 257-67.

<sup>117</sup> INAUGURAL ADDRESSES, *supra* note 23, at 269. President Roosevelt used one of the oldest inaugural Bibles of any President in American history during his first oath-taking ceremony, in addition to his three additional oath-takings: a 1686 Dutch Bible containing the Roosevelt family records. GUIDE TO THE PRESIDENCY, *supra* note 13, at 262. Franklin D. Roosevelt’s Bible was open to I Corinthians 13 for all four of his inaugurations: “Though I speak with the tongues of men and of angels, and have not charity, I am become as a sounding brass.” *Id.*

<sup>118</sup> INAUGURAL ADDRESSES, *supra* note 23, at 269.

<sup>119</sup> *Id.* at 270.

<sup>120</sup> *Id.*

may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.

I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.

But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis - broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.

For the trust reposed in me I will return the courage and the devotion that befit the time. I can do no less.<sup>121</sup>

Upon taking his second oath of office on January 20, 1937, the new date set by the Twentieth Amendment,<sup>122</sup> President Roosevelt dedicated his Second Inaugural Address<sup>123</sup> to the theme of helping the "one-third of [the] nation ill-housed, ill-clad, ill-nourished"<sup>124</sup> to obtain what he referred to as "the necessities of life."<sup>125</sup> Speaking of "[o]ur covenant with ourselves [to resolve] the ever-rising problems of a complex civilization;"<sup>126</sup> observing the 150<sup>th</sup> "anniversary of the Constitutional Convention which made us a nation,"<sup>127</sup> President Roosevelt told his countrymen that "[t]oday we reconsecrate our country to long-cherished ideals in a suddenly changed civilization."<sup>128</sup> In closing, he offered the following meditation on the presidential oath:

In taking again the oath of office as President of the United States, I assume the solemn obligation of leading the American people forward along the road over which they have chosen to advance.

While this duty rests upon me I shall do my utmost to speak their purpose and to do their will, seeking Divine guidance to help us each and every one to

<sup>121</sup> *Id.* at 273. At the very end of his speech, President Roosevelt said: "In this dedication of a Nation we humbly ask the blessing of God. May He protect each and every one of us. May He guide me in the days to come." *Id.*

<sup>122</sup> *Id.* at 274. According to the Twentieth Amendment to the U.S. Constitution (ratified on January 23, 1933): "The terms of the President and Vice President shall end at noon on the 20<sup>th</sup> day of January . . . and the terms of their successors shall then begin." U.S. CONST. amend. XX, § 1.

<sup>123</sup> INAUGURAL ADDRESSES, *supra* note 23, at 274.

<sup>124</sup> *Id.* at 277.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 274.

<sup>127</sup> *Id.* at 275.

<sup>128</sup> INAUGURAL ADDRESSES, *supra* note 23, at 278.

give light to them that sit in darkness and to guide our feet into the way of peace.<sup>129</sup>

President Roosevelt's Third Inaugural Address, given on January 20, 1941, seeking to buoy the nation in a time of impending war, can also be read as his personal commitment to the people of the United States in his assessment of the overriding purpose of his third term as President.<sup>130</sup> Explicitly referencing two of his predecessors, he said: "In Washington's day the task of the people was to create and weld together a nation;"<sup>131</sup> "[i]n Lincoln's day the task of the people was to preserve that Nation from disruption from within;<sup>132</sup> [but], [i]n this day the task . . . is to save the Nation and its institutions from disruption from without."<sup>133</sup> Four years later, in his Fourth Inaugural Address, given without fanfare on the South Portico of the White House,<sup>134</sup> President Roosevelt expressly linked the presidential oath with the wartime pursuit of victory. He said:

We Americans of today, together with our allies, are passing through a period of supreme test. It is a test of our courage - of our resolve - of our wisdom - our essential democracy.

If we meet that test - successfully and honorably - we shall perform a service of historic importance which men and women and children will honor throughout all time.

As I stand here today, having taken the solemn oath of office in the presence of my fellow countrymen - in the presence of our God - I know that it is America's purpose that we shall not fail.

In the days and in the years that are to come we shall work for a just and honorable peace, a durable peace, as today we work and fight for total victory in war.<sup>135</sup>

Harry Truman was preoccupied with discussing the dangers of communism and offering a vision of "justice, harmony and peace" in his Inaugural Address on January 20, 1949.<sup>136</sup> He made no explicit or implicit references to the presidential oath during the course of his speech.

<sup>129</sup> *Id.* A populist reference to "each and every one" echoed his reference in his first inaugural address. *See supra* note 121.

<sup>130</sup> "The only chief executive to serve more than two terms, President Roosevelt took office for the third time as Europe and Asia engaged in war. The oath of office was administered by Chief Justice Charles Evans Hughes on the East Portico of the Capitol." INAUGURAL ADDRESSES, *supra* note 23, at 279.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 283. "Because of the expense and impropriety of festivity during the height of the war, the oath of office was taken on the South Portico of the White House. It was administered by Chief Justice Harlan Stone. No formal celebrations followed the address." *Id.*

<sup>135</sup> INAUGURAL ADDRESSES, *supra* note 23, at 283.

<sup>136</sup> *Id.* at 285-91.

Dwight D. Eisenhower, however, incorporated the presidential oath into the early portion of his First Inaugural Address, given on January 20, 1953, stating:<sup>137</sup>

The world and we have passed the midway point of a century of continuing challenge. We sense with all our faculties that forces of good and evil are massed and armed and opposed as rarely before in history.

This fact defines the meaning of this day. We are summoned by this honored and historic ceremony to witness more than the act of one citizen swearing his oath of service, in the presence of God. We are called as a people to give testimony in the sight of the world to our faith that the future shall belong to the free.<sup>138</sup>

Four years later on Inauguration Day, 1957, President Eisenhower briefly mentioned the American peoples' witnessing of his "solemn oath of service."<sup>139</sup>

A former county judge, Senator and Vice President, Harry S. Truman had taken the oath of office first on April 12, 1945, upon the death of President Roosevelt. Mr. Truman's victory in the 1948 election was so unexpected that many newspapers had declared the Republican candidate, Governor Thomas E. Dewey of New York, the winner. The President went to the East Portico of the Capitol to take the oath of office on two Bibles - the personal one he had used for the first oath, and a Gutenberg Bible donated by the citizens of Independence, Missouri. The ceremony was televised as well as broadcast by radio.

*Id.* at 285.

<sup>137</sup> *Id.* at 293.

The Republican Party successfully promoted the candidacy of the popular general of the Army in the 1952 election over the Democratic candidate Adlai Stevenson. The oath of office was administered by Chief Justice Frederick Vinson on two Bibles - the one used by George Washington at the first inauguration, and the one General Eisenhower received from his mother upon his graduation from the Military Academy at West Point.

*Id.* In a novel beginning to his First Inaugural Address, President Eisenhower offered up a public prayer, as follows:

My friends, before I begin the expression of those thoughts that I deem appropriate to this moment, would you permit me the privilege of uttering a little prayer of my own. And I ask that you bow your heads:

Almighty God, as we stand here at this moment, my future associates in the executive branch of government join me in beseeching that Thou will make full and complete our dedication to the service of the people in this throng, and their fellow citizens everywhere.

Give us, we pray, the power to discern clearly right from wrong, and allow our words and actions to be governed thereby and by the laws of this land. Especially we pray that our concern shall be for all the people regardless of station, race or calling.

May cooperation be permitted and be the mutual aim of those who, under the concepts of our Constitution, hold two differing political faiths; so that all may work for the good of our beloved country and Thy glory. Amen.

*Id.* at 293-94.

<sup>138</sup> INAUGURAL ADDRESSES, *supra* note 23, at 294.

<sup>139</sup> *Id.* at 300.

John F. Kennedy took his oath of office and gave his Inaugural Address on January 20, 1961, in the aftermath of a heavy snow that had fallen on Washington, D.C. the night before.<sup>140</sup> In the memorable first lines of his speech, he looked back in American history and forward to the future, centering his attention on the significance of the presidential oath through the centuries:

[W]e observe today not a victory of party, but a celebration of freedom - symbolizing an end, as well as a beginning - signifying renewal, as well as change. For I have sworn before you and Almighty God the same solemn oath our forbears prescribed nearly a century and three quarters ago.<sup>141</sup>

President Kennedy's Inaugural Address provided a series of what he called "pledges" - apparently playing off his opening reference to the pledge he had taken by repeating the magisterial words of the presidential oath.<sup>142</sup> He delivered the additional pledges in the following poetic language: "Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and the success of liberty."<sup>143</sup> JFK seemed to ask every American to pledge to the serve the nation, as he had done in taking the presidential oath, with the following famous words: "And so, my fellow Americans: ask not what your country can do for you - ask what you can do for your country."<sup>144</sup>

Vice President Lyndon Baines Johnson took his first presidential oath aboard Air Force One on November 22, 1963, the day President Kennedy was assassinated in Dallas, Texas.<sup>145</sup> A year later, elected President by the landslide victory in the 1964 election, Johnson took his second presidential oath on the East Front of the Capitol with his wife at his side. Lady Bird Johnson was "the first wife to stand with her husband as he took the oath of office [as President]."<sup>146</sup> The opening words of Johnson's inaugural address claimed that

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January 20 occurred on a Sunday, so the President took the oath in the East Room at the White House that morning. The next day he repeated the oath of office on the East Portico of the Capitol. Chief Justice Earl Warren administered the oath of office on the President's personal Bible from West Point.

*Id.* Eisenhower entitled his Second Inaugural Address "The Price of Peace." *Id.*

<sup>140</sup> *Id.* at 305. "The oath of office was administered by Chief Justice Earl Warren. Robert Frost read one of his poems at the ceremony." *Id.*

<sup>141</sup> *Id.* at 305.

<sup>142</sup> *Id.* at 306-07.

<sup>143</sup> INAUGURAL ADDRESSES, *supra* note 23, at 306.

<sup>144</sup> *Id.* at 308.

<sup>145</sup> *Id.* at 309.

[T]he period between the death of a President and the swearing in of his successor remains a gray area. [After President John F. Kennedy's assassination] there was some question whether Lyndon B. Johnson should take the oath immediately in Dallas or wait until his return to Washington. Attorney General Robert F. Kennedy advised that the oath should be administered immediately, and it was, by federal district judge Sarah Hughes aboard *Air Force One*.

GUIDE TO THE PRESIDENCY, *supra* note 13, at 263.

<sup>146</sup> INAUGURAL ADDRESSES, *supra* note 23, at 309.

he had taken the presidential oath that was, rightly, the oath of all Americans: “*My fellow countrymen*, on this occasion, the oath I have taken before you and before God is not mine alone, but ours together. We are one nation and one people. Our fate as a nation and our future as a people rest not upon one citizen, but upon all citizens.”<sup>147</sup> In his speech, Johnson described this presidential oath taken jointly with all American citizens as “[t]he American Covenant:”

They came here - the exile and the stranger, brave but frightened - to find a place where a man could be his own man. They made a covenant with this land. Conceived in justice, written in liberty, bound in union, it was meant one day to inspire the hopes of all mankind; and it binds us still. If we keep its terms, we shall flourish.<sup>148</sup>

When Richard Milhouse Nixon took his first presidential oath on January 20, 1969, the United States was bogged down in an interminable war in Vietnam and riven asunder by rising domestic discontent.<sup>149</sup> Nixon mentioned his oath-taking toward the end of his First Inaugural Address, adding a special commitment to pursue the cause of peace; using space-age imagery and events to demonstrate his message, he said:

I have taken an oath today in the presence of God and my countrymen to uphold and defend the Constitution of the United States. To that oath I now add this sacred commitment: I shall consecrate my office, my energies, and all the wisdom I can summon, to the cause of peace among nations.

. . . .

The peace we seek to win is not victory over any other people, but the peace that comes “with healing in its wings;” with compassion for those who have suffered; with understanding for those who have opposed us; with the opportunity for all the peoples of this earth to choose their own destiny.

Only a few short weeks ago, we shared the glory of man’s first sight of the world as God sees it, as a single sphere reflecting light in the darkness.

As the Apollo astronauts flew over the moon’s gray surface on Christmas Eve, they spoke to us of the beauty of the earth - and in that voice so clear across the lunar distance, we heard them invoke God’s blessing on its goodness.

In that moment, their view from the moon moved poet Archibald MacLeish to write: “To see the earth as it truly is, small and blue and beautiful in that eternal silence where it floats, is to see ourselves as riders on the earth

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 310. Johnson, like Hoover before him, utilized subheadings in his Inaugural Address. See *supra* note 117.

<sup>149</sup> See generally, TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987). As President Nixon said himself four years later at the start of his Second Inaugural Address: “When we met here [in 1969], America was bleak in spirit, depressed by the prospect of seemingly endless war abroad and of destructive conflict at home.” *INAUGURAL ADDRESSES*, *supra* note 23, at 321.

together, brothers on that bright loveliness in the eternal cold - brothers who know now they are truly brothers."<sup>150</sup>

At the end of his Second Inaugural Address on January 20, 1973, President Nixon made an oblique reference to a mutual pledge, inspired by the presidential oath, by both himself and the American people: "Let us pledge together to make these next four years the best four years in America's history so that on its 200<sup>th</sup> birthday America will be as young and as vital as when it began, and as bright a beacon of hope for all the world."<sup>151</sup> But Richard Nixon did not preside over the country during the bicentennial year of 1976; instead, he resigned under political pressure in August, 1974, and Vice President Gerald Ford became President.<sup>152</sup>

Ford was defeated by Georgia Governor Jimmy Carter in the Election of 1976.<sup>153</sup> Referring to the presidential oath and the circumstances of his oath-taking, Carter told his audience:

Here before me is the Bible used in the inauguration of our first President, in 1789, and I have just taken the oath on the Bible my mother gave me a few years ago, opened to a timeless admonition from the ancient prophet Micah: "He hath showed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God." (Micah 6:8)<sup>154</sup>

Ronald Reagan beat Jimmy Carter in the presidential election of 1980.<sup>155</sup> After discussing the economic problems besetting the nation and his view that government was not the solution,<sup>156</sup> President Reagan made the following explicit reference to the presidential oath: "Can we solve the problems confronting us? Well, the answer is an unequivocal and emphatic 'yes.' To paraphrase Winston Churchill, I did not take the oath I have just taken with the intention of presiding over the dissolution of the world's strongest economy."<sup>157</sup> At the end of his speech, implying a shared oath or pledge by all Americans to uphold the values of the United States, Reagan said:

<sup>150</sup> INAUGURAL ADDRESSES, *supra* note 23, at 320. President Nixon placed his hand on the Bible on which he had taken the Presidential oath open to Isaiah 2:4 ("[A]nd they shall beat their swords into plowshares, and their spears into pruning hooks: nations shall not lift up sword against nation, neither shall they learn war anymore.") GUIDE TO THE PRESIDENCY, *supra* note 13, at 262 (citation omitted).

<sup>151</sup> INAUGURAL ADDRESSES, *supra* note 23, at 325.

<sup>152</sup> *Id.* at 327.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 327-28. This Biblical passage was the same verse specifically mentioned by Warren Harding in his inaugural address as the open passage on which Harding took the presidential oath. See *supra* notes 109-11 and accompanying text.

<sup>155</sup> *Id.* at 331.

<sup>156</sup> INAUGURAL ADDRESSES, *supra* note 23, at 331-32.

<sup>157</sup> *Id.* at 334.

This is the first time in history that the ceremony has been held . . . on this West Front of the Capitol. Standing here, one faces a magnificent vista, opening up on this city's special beauty and history. At the end of this open mall are those shrines to the giants on whose shoulders we stand.

Directly in front of me, the monument to a monumental man: George Washington, Father of our Country. A man of humility who came to greatness reluctantly. He led America out of revolutionary victory into infant nationhood. Off to one side, the stately memorial to Thomas Jefferson. The Declaration of Independence flames with his eloquence.

And then beyond the Reflecting Pool, the dignified columns of the Lincoln Memorial. Whoever would understand in his heart the meaning of America will find it in the life of Abraham Lincoln.

Beyond those monuments to heroism is the Potomac River, and on the far shore of the sloping hills of Arlington National Cemetery with its row on row of simple white markers bearing crosses or stars of David. They add up to only a tiny fraction of the price that has been paid for our freedom.

Each one of those markers is a monument to the kinds of hero I spoke of earlier. Their lives ended in places called Belleau Wood, The Argonne, Omaha Beach, Salerno and halfway around the world on Guadalcanal, Tarawa, Pork Chop Hill, the Chosin Reservoir, and in a hundred rice paddies and jungles of a place called Vietnam.

Under one such marker lies a young man - Martin Treptow - who left his job in a small barber shop in 1917 to go to France with the famed Rainbow Division. There, on the western front, he was killed trying to carry a message between battalions under heavy artillery fire.

We are told on his body was found a diary. On the flyleaf, under the heading, "My Pledge," he had written these words: "America must win this war. Therefore, I will work, I will save, I will sacrifice, I will endure, I will fight cheerfully and do my utmost, as if the issue of the whole struggle depended on me alone."

The crisis we are facing today does not require of us the kind of sacrifice that Martin Treptow and so many thousands of others were called upon to make. It does require, however, our best effort, and our willingness to believe in ourselves and to believe in our capacity to perform great deeds; to believe that together, with God's help, we can and will resolve the problems[,] which now confront us.

And, after all, why shouldn't we believe that? We are Americans. God bless you, and thank you.<sup>158</sup>

The near zero winter temperatures of the winter of 1985 forced President Reagan's second inaugural ceremony to be held inside the Capitol.<sup>159</sup> "For the first time a President took the oath of office in the Capitol Rotunda."<sup>160</sup> During the course of his Second Inaugural Address, Reagan cited the occasion as the 50<sup>th</sup>

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<sup>158</sup> *Id.* at 336-37.

<sup>159</sup> *Id.* at 338.

<sup>160</sup> *Id.* Chief Justice Warren Burger administered the presidential oath.

time that the United States had celebrated a president's inauguration.<sup>161</sup> Using the presidential oath as a marker in time, President Reagan said:

When the first President, George Washington, placed his hand upon the Bible, he stood less than a single day's journey by horseback from raw, untamed wilderness. There were 4 million Americans in a union of 13 States. Today we are 60 times as many in a union of 50 States. We have lighted the world with our invention, gone to the aid of mankind wherever in the world there was a cry for help, journeyed to the Moon and safely returned. So much has changed. And yet we stand together as we did two centuries ago. When I took this oath four years ago, I did so in a time of economic stress.<sup>162</sup>

Vice President George W. Bush, elected President in 1988, noted in his inaugural address that he had "just repeated word for word the oath taken by George Washington 200 years ago, and the Bible on which I placed my hand is the Bible on which he placed his [hand]."<sup>163</sup> William J. Clinton also made a reference to the first presidential oath when, in his First Inaugural Address on January 20, 1993, he said: "When George Washington first took the oath I have just sworn to uphold, news traveled slowly across the land by horseback and across the ocean by boat. Now, the sights and sounds of this ceremony are broadcast instantaneously to billions around the world."<sup>164</sup>

George H.W. Bush, in the most recent presidential inaugural address, spoke of the meaning of the presidential oath in his Inaugural Address on January 20, 2001, observing: "The peaceful transfer of authority is rare in history, yet common in our country. With a simple oath, we affirm old traditions and make new beginnings."<sup>165</sup> Following up on this express reference, Bush embellished the oath with what he called a "solemn pledge . . . [to] work to build a single nation of justice and opportunity,"<sup>166</sup> and a further pledge that "[w]hen we see that wounded traveler on the road to Jericho, we will not pass to the other side."<sup>167</sup>

### B. A Synoptical Meaning of the Inaugural Musings

The Constitution does not prescribe the ceremonies attendant to the administration of the presidential oath, "but the inaugural ceremony where it is

<sup>161</sup> INAUGURAL ADDRESSES, *supra* note 23, at 338.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 345.

<sup>164</sup> 1 PUB. PAPERS OF WILLIAM J. CLINTON 1 (1994). President Clinton did not mention the presidential oath, explicitly or implicitly, in his second Inaugural Address on January 20, 1997. *See* 1 PUB. PAPERS OF WILLIAM J. CLINTON 43-46 (1998).

<sup>165</sup> 1 PUB. PAPERS OF GEORGE W. BUSH 1 (2003).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2. This reference was preceded by the following observation in President Bush's speech: "Many in our country do not know the pain of poverty. But we can listen to those who do." *Id.*

administered has become one of the U.S. government's most important traditions and the president's first chief of state function."<sup>169</sup>

Like a coronation, the inaugural ceremony symbolically invests presidents with the power of their office. At the inauguration the [P]resident appears before the people not as the manager of one of the three coequal branches of government but as the paternal leader of the nation who swears to "preserve, protect, and defend" the Constitution.<sup>168</sup>

Presidential musings about the presidential oath in the course of their inaugural addresses have "conjure[d] up heroic images of the nation's heritage."<sup>169</sup> Many presidents have observed in their inaugural speeches that their recitation of "the same oath" that famous predecessors such as Washington, Jefferson, Lincoln, Wilson, and FDR have recited conveys "historic continuity, [thus] link[ing] the incumbent to the glories of past presidencies."<sup>170</sup> Numerous inaugural addresses have stressed the historical continuity of the presidency, as symbolized by the presidential oath, by highlighting themes of unity, optimism and challenge during the course of their addresses.<sup>171</sup> The hand of the past is palpable on every occasion of the taking of the presidential oath; every president has followed the lead of George Washington in adding the words "so help me God" after the formal, prescribed constitutional oath.<sup>172</sup> Indeed, following Washington's example, every President has explicitly mentioned God in his inaugural address,<sup>173</sup> seeking the blessings of the Almighty on the execution of the duties of the presidency.

From the time of Jefferson to the present, the presidents have voiced their awe and humility in the face of the enormous responsibilities of the presidency.<sup>174</sup> From the time of Monroe onward, presidents have expressed comfort and succor in the support and assistance offered by other citizens and members of other branches of the federal government.<sup>175</sup> Sometimes, as illustrated in inaugural speeches by George Washington,<sup>176</sup> John Quincy Adams,<sup>177</sup> Theodore Roosevelt,<sup>178</sup> and John F. Kennedy,<sup>179</sup> presidents have supplemented the text of the presidential oath with their own special pledges.

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<sup>168</sup> *Id.* at 574.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 575.

<sup>172</sup> GUIDE TO THE PRESIDENCY, *supra* note 13, at 588.

<sup>173</sup> *Id.*

<sup>174</sup> See *supra* notes 34-36 and accompanying text.

<sup>175</sup> See *supra* notes 42-46 and accompanying text.

<sup>176</sup> See *supra* notes 27-32 and accompanying text.

<sup>177</sup> See *supra* note 46 and accompanying text.

<sup>178</sup> See *supra* notes 99-100 and accompanying text.

<sup>179</sup> See *supra* notes 142-43 and accompanying text.

Lincoln, in his First Inaugural Address, was the first president to especially privilege national unity as an overriding purpose of the presidential oath;<sup>180</sup> later presidents have reiterated this meaning of their oath-taking.<sup>181</sup> Cleveland initiated the comparison of the presidential oath with a "citizens' oath;"<sup>182</sup> this analogy was repeated and extended by way of illustration by Benjamin Harrison,<sup>183</sup> William McKinley,<sup>184</sup> Theodore Roosevelt,<sup>185</sup> Warren Harding,<sup>186</sup> Dwight Eisenhower,<sup>187</sup> and Lyndon Johnson.<sup>188</sup>

### III. AN INTELLECTUAL HISTORY OF THE PRESIDENTIAL OATH

#### A. Judicial Opinions

The presidential oath has been an infrequent subject of judicial examination. A sampling of major federal cases to date reveals that the oath has been cited in six Supreme Court opinions,<sup>189</sup> four court of appeals opinions,<sup>190</sup> and

<sup>180</sup> See *supra* notes 74-81 and accompanying text.

<sup>181</sup> See, e.g., Theodore Roosevelt's discussion of national unity, *supra* note 100 and accompanying text; Wilson's view, *supra* note 107 and accompanying text; Franklin D. Roosevelt's conception in peace time as well as war, *supra* 130-35 and accompanying text.

<sup>182</sup> See *supra* note 91 and accompanying text.

<sup>183</sup> See *supra* notes 92-93 and accompanying text.

<sup>184</sup> See *supra* notes 94-97 and accompanying text.

<sup>185</sup> See *supra* notes 99-100 and accompanying text.

<sup>186</sup> See *supra* notes 108-10 and accompanying text.

<sup>187</sup> See *supra* notes 137-39 and accompanying text.

<sup>188</sup> See *supra* notes 147-48 and accompanying text.

<sup>189</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 631-33 (1992) (Scalia, J., dissenting) (citing religious secular traditions including presidential oath-taking sworn on the Bible); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 681-82 (1952) (Vinson, C.J., dissenting) (citing the Presidential Oath Clause as a reason, among others, for expansively interpreting the President's constitutional powers); *Everson v. Bd. of Educ.*, 330 U.S. 1, 44 n.37 (1947) (Rutledge, J., dissenting) (citing the Presidential Oath Clause and noting that it provides for an alternative oath or affirmation); *Cramer v. U.S.*, 325 U.S. 1, 42 (1945); *U.S. v. MacIntosh*, 283 U.S. 605, 630 (1931) (Hughes, C. J., dissenting) (comparing presidential oath to other kinds of oaths); *Cunningham v. Neagle*, 135 U.S. 1, 82-83 (1890) (Lamar, J., dissenting) (extended discussion of the importance of the presidential oath).

<sup>190</sup> *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1221 n.3 (5th Cir. 1991) (referring to the "unique presidential oath or affirmation" which is specifically prescribed in the text of the U.S. Constitution); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1121-22 (9th Cir. 1988) (discussing, but rejecting, the theory that the President has independent power to declare a law unconstitutional and suspend its operation); *Bogen v. Doty*, 598 F.2d 1110, 1115 n. 5 (8th Cir. 1979) (noting that the presidential oath could be sworn or affirmed and omitted any reference to a deity); *U.S. v. Nat'l. Comm. for Impeachment*, 469 F.2d 1135, 1146-47 (2d Cir. 1972) (quoting from proposed, but unenacted House of Representatives' resolution to impeach President Richard M. Nixon for violation of presidential oath, among other alleged offenses).

three district court opinions.<sup>191</sup> Among state court judicial opinions, the presidential oath has been referenced in five opinions.<sup>192</sup> Of the judicial opinions which have addressed the presidential oath, only the 1988 U.S. Circuit Court of Appeals for the Ninth Circuit's opinion in *Lear Siegler, Inc. v. Lehman*<sup>193</sup> is worthy of extended discussion.

*Lear Siegler* involved a bid protest brought by the plaintiff against the U.S. Navy for alleged failure to follow procurement procedures in awarding a government contract to provide fuel tanks for the Navy F/A-18 aircraft.<sup>194</sup> The appeal arose out of "the Executive Branch's constitutional challenge to legislation regulating procedures for the award of procurement contracts by federal agencies,"<sup>195</sup> known as the Competition in Contracting Act of 1984 ("CICA").<sup>196</sup> The key issue in the case centered on whether CICA's automatic stay or suspension of an awarded contract provision, triggered upon a bid protest, was, as President Reagan contended when he signed the legislation into law, "an unconstitutional attempt to delegate to the Comptroller General, an officer of Congress, duties that may only be performed by executive [branch] officials."<sup>197</sup> The Ninth Circuit rejected the Justice Department's arguments in support of the President's unilateral suspension of CICA's stay provisions, finding that the federal government's refusal to comply with a statutory and constitutional duty was in bad faith.<sup>198</sup> In this regard, the Ninth Circuit rejected the following argument:

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<sup>191</sup> *Miller v. Johnson*, 541 F. Supp. 1165, 1171 (D.D.C. 1982); *People Versus Porn v. Nixon*, 465 F. Supp. 340, 341 (N.D. Cal. 1978) (referring to and rejecting plaintiffs' theory that President Nixon, by having taken the presidential oath, became a trustee for plaintiffs and breached his fiduciary duties); *Stewart v. Washington*, 301 F. Supp. 610, 611 (D.D.C. 1969) (comparing presidential oath and Article VI constitutional oath with invalid loyalty oath for a substitute teacher).

<sup>192</sup> *State v. Harrold*, 750 P.2d 959, 964 (Idaho 1988) (observing that the presidential oath as well as the oath adopted for members of Congress did not contain words of invocation to God); *Oliver v. State Tax Comm.*, 37 S.W.3d 243, 247-48 (Mo. 2001) (comparing presidential oath with other types of oaths, observing that the Constitution does not prescribe the ending phrase, "so help me God," but that George Washington in the first presidential oath-taking of 1789 added those words, which have been added, by way of tradition, by later presidents); *Imbrie v. Marsh*, 71 A.2d 352, 367 (N.J. 1950) (Oliphant, J., dissenting) (observing that the presidential oath is a "self-executing and complete provision" that the presidential oath is "free from encroachment by the Legislature;" that Congress has never passed a single act or provision adding or detracting from the oath of the President); *Engel v. Vitale*, 206 N.Y.S. 2d 183, 188 (N.Y. Sup. Ct. 1960) (comparing the New York Regents Prayer for public school students with, among other things, the customary invocation of God by Presidents in taking the presidential oath); *Lewis v. Allen*, 159 N.Y.S.2d 807, 812 (N.Y. Sup. Ct. 1957).

<sup>193</sup> 842 F.2d 1102 (9th Cir. 1988).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1104.

<sup>196</sup> Pub. L. No. 98-369, 98 Stat. 1199, 31 U.S.C.S. §§ 3551-56 (1984).

<sup>197</sup> *Lear Siegler*, 842 F.2d at 1104.

<sup>198</sup> *Id.* at 1121.

The President, upon assuming office, swears that he “will faithfully execute the Office of President” and will “preserve, protect and defend the Constitution of the United States.” Art. II, § 1, cl. 8. The President is further charged with the duty to “take care that the laws be faithfully executed.” Art. II, § 3. According to the government, these clauses empower the President to take the action he did in this case: essentially, to declare a law unconstitutional and suspend its operation.<sup>199</sup>

Moreover, the Ninth Circuit found unpersuasive the government’s further argument that language in the Supreme Court’s opinion in *United States v. Nixon*<sup>200</sup> suggested “that the President’s oath carries with it an independent responsibility to assess the constitutionality of legislation.”<sup>201</sup>

In contrast to judges,<sup>202</sup> legal scholars have expressed more interest in the meaning of the presidential oath. The scholarly literature can be divided into two parts: first, articles that have made isolated references to the presidential oath,<sup>203</sup> and second, writings that have analyzed the presidential oath in some detail.<sup>204</sup>

### 1. Scholarly Literature: Short Takes

Several major points can be discerned from the writings of legal commentators who have cited the presidential oath in passing:

1. *Religious Connotations.* It is significant that the presidential oath is taken with a hand on the Bible, although the constitutionally-prescribed language of the oath allows the alternative of “affirmation.”<sup>205</sup>

2. *Oath-Taking Thoughts.* Presidential reflections upon the occasion of taking their oath of office provides us with insights on their presidential leadership style.<sup>206</sup>

<sup>199</sup> *Id.*

<sup>200</sup> 418 U.S. 683 (1974).

<sup>201</sup> *Lear Siegler*, 842 F.2d at 1122.

<sup>202</sup> *See supra* notes 189-201 and accompanying text.

<sup>203</sup> *See infra* notes 205-26 and accompanying text.

<sup>204</sup> *See infra* notes 227-76 and accompanying text.

<sup>205</sup> *See* Sherman J. Clark, *Promise, Prayer, and Identity*, 38 TULSA L. REV. 579, 593 n.35 (2003). *Cf.* Grant Garrard Beckwith, Comment, *Uzbekistan: Islam, Communism, and Religious Liberty - an Appraisal of Uzbekistan’s 1998 Law “On Freedom of Conscience and Religious Organizations,”* 2000 B.Y.U. L. REV. 997, 1004 n.24 (noting that the president of Uzbekistan took his presidential oath of office on the Koran). *See also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1630 n.298 (1989) (noting that “[t]he wording of the presidential oath undoubtedly derived from the same religious considerations that motivated the words of [A]rticle VI, [Clause 3 of the Constitution]”).

<sup>206</sup> *See, e.g.,* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 374-75 (2003) (discussing that when Franklin D. Roosevelt took the presidential oath he was thinking that his oath to uphold the Constitution was based on his conception of a Constitution “flexible enough to meet any new problems”); *see also* William A. Galston, *The Limits of Privacy: Culture, Law and Public Office*, 67 GEO. WASH. L. REV. 1197, 1200 (1999) (discussing John F. Kennedy’s addressing whether, as a

3. *Preserving the Union.* The President has a unique constitutional responsibility to take all prudent measures to preserve the Union, as expressed in the oath of office.<sup>207</sup>

4. *Conflicts of Interest and the Oath-Administrator.* The person who administers the oath to the President should not be a person with a conflict of interest.<sup>208</sup>

5. *Necessity of the Oath.* Uncertainty exists, in the case of the death or incapacity or term expiration of a President, whether the presidential oath is necessary, or whether there is “an automatic constitutional vesting.”<sup>209</sup>

committed Catholic, he could fulfill the terms of the presidential oath); Gary Lawson, *Everything I Need to Know About Presidents I Learned from Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y. 381, 382 (2001) (arguing that “[t]he President . . . must have a very clear picture of what the presidential oath of office requires” and should not take an oath he is not prepared to keep).

<sup>207</sup> See, e.g., Jarrold L. Steigman, *Reversing Reform: The Handchu Settlement in Post-September 11 New York City*, 11 J. L. & POL'Y 745, 799 n.178 (2003). See also Philip C. Aka, *The Military, Globalization, and Human Rights in Africa*, 18 N.Y. L. SCH. J. HUM. RTS. 361, 398 n.226 (2002) (“President Lincoln argued that his oath as president to preserve the constitution to the best of his ability imposed upon [him] the duty of preserving, by every indispensable means, that government - that nation - of which that constitution was the organic law”); William C. Banks & M. E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 51, 130 n. 386 (arguing that the President’s Oath Clause is sufficient to authorize electronic surveillance against those who plan unlawful acts against the government); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 238 n.76 (2002) (“The Presidential Oath Clause does not appear, at least in form, to be a grant of power to the President”).

<sup>208</sup> See Michael L. Closen, *To Swear . . . Or Not to Swear Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths*, 50 BUFF. L. REV. 613, 678 n. 330 (2002) (“In a notorious historical incident the Presidential oath of office was administered by notary public John Coolidge to his son Calvin Coolidge in 1923. That oath ceremony should not have occurred, for a father simply cannot be an impartial witness to a notarial service for his own son”). See also Michael L. Closen & Trevor J. Orsinger, *Family Ties That Bind and Disqualify: Toward Elimination of Family-Based Conflicts of Interest in the Provision of Notarial Services*, 36 VAL. U. L. REV. 505, 553 (2002)

Unfortunately, the most famous of all notarial oaths was administered by a father to his son, and therefore should not have been undertaken. It happened in 1923 when word of the death of President Warren Harding was received by Vice-President Calvin Coolidge at the family homestead in Vermont. Coolidge’s father, Colonel John Coolidge was a Vermont notary public, was present at the home and gave the ceremonial oath of office of the Presidency to his son. Later, in Washington, D.C., due to some concern about the validity of that oath, Calvin Coolidge was given the presidential oath of office a second time by a member of the United States Supreme Court.

*Id.*

<sup>209</sup> See Closen & Orsinger, *supra* note 204, at 553. See also Scott E. Gant & Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and “Headless Monsters,”* 14 CONST. COMMENT 83 (1997) (arguing that taking of that presidential oath is required for a President to legally assume the Office of President). *But see* William F. Brown & Amerigo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones,”* 75 GEO. L.J. 1389, 1401 n.47 (1987) (arguing that it is not necessary for the Vice President to take the presidential oath prior to the assumption of the presidency).

6. *Impeachment as a Remedy for Breaching the Oath.* Congress has a general constitutional ground for impeachment and conviction of the President if he breaches of his oath of office.<sup>210</sup>

7. *Withholding the Administration of the Oath.* Whether the Chief Justice of the United States may refuse to administer the presidential oath to a President-elect if there is a pending question concerning the constitutionality of the underlying election procedure is a tantalizing question.<sup>211</sup>

8. *The Oath as a Limitation on Presidential Power.* The presidential oath can be viewed as a check, or limitation, of the President's powers, rather than an enhancement of those powers. Examples of possible limitations on presidential power are on the President's judicial appointment powers and power to investigate and prosecute wrongdoing by himself.<sup>212</sup>

<sup>210</sup> See Muna Ndulo, *Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power*, 26 VT. L. REV. 769, 793 (2002) (referring to American constitutional law). See also Frank O. Bowman III & Stephen L. Sepinuck, "High Crimes & Misdemeanors": *Defining the Constitutional Limits on Presidential Impeachment*, 72 S. CAL. L. REV. 1517, 1563 (1999) ("[A] president's oath of office imposes a special trust. Violation of that trust is undeniably germane to the impeachment calculus"); Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U. L. REV. 17, 27-28 n. 25 (1995) ("The only legal method for enforcing the president's oath is through impeachment proceedings"); Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 HARV. J. L. & PUB. POL'Y. 647, 734 (1999). But see Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 620-21 (1999) (arguing that "it is not clear that the President's oath obligates the President in his private capacity to comply with every single law"); Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 728 (1999) (disagreeing with House of Representatives that the nation's chief law enforcement officer breaches the presidential oath when he lies under oath in a legal proceeding).

<sup>211</sup> See Vasana Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1776 (2002).

<sup>212</sup> See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 324-25 n.539 (2002). See also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 248 n.53 (1994) (arguing that the president's oath implies a prohibition on the President and executive officials from enforcing laws they deem unconstitutional and that "serious separation of powers issues could arise if the executive attempted to nullify putatively unconstitutional legislation except through the veto power or perhaps the pardon power"); Arthur M. Schlesinger, Jr., *The Constitutional and Presidential Leadership*, 47 MD. L. REV. 54, 66 (1987) (opining that the report by the Tower Commission on the Iran-Contra Affair "leaves little doubt that the presidential oath and the constitutional command [that the President 'take care that the Laws be faithfully executed'] have been violated by the Reagan administration"); J. Gregory Sidak, *True God of the Next Justice*, 18 CONST. COMMENT. 9, 15 (2001) (arguing that a "president's use of an abortion litmus test that relied on the religious beliefs of a prospective judicial nominee" would violate the presidential oath); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 122 (1993) (arguing that the Presidential oath, like all oaths, "is limiting, not empowering."); John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 2D 277, 283 (1998) (noting the argument that the presidential oath requires the President to "appoint only those judges whom he believes will interpret the Constitution faithfully").

9. *The Oath as an Expansion of Presidential Power.* Another view provides, however, that the presidential oath encompasses an implicit expansive duty for the President to protect the institution of the presidency from congressional encroachment.<sup>213</sup>

10. *The Oath Does Not Require Human Perfection.* While the presidential oath is daunting, the language of the oath “recognizes inevitable human limitations by only imposing a duty to defend the Constitution ‘to the best of my ability,’ which acknowledges that perfection is unattainable, and probably undesirable given its likely cost.”<sup>214</sup>

11. *The Uniqueness of the Constitutionally-Specified Presidential Oath.* The presidential oath is a “special oath,” with its language specified in the text of the Constitution; “in no other constitutional provision are the precise words of the actual oath to be taken themselves set forth, as opposed to a general command that there be some oath.”<sup>215</sup>

<sup>213</sup> See Roy E. Brownell II, *The Constitutional Status of the President’s Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 83 (2001) (citation omitted). See also RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 309 (1974) (arguing that the presidential oath posits both a right and a duty to protect his own constitutional functions from Congressional impairment); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 14 (1992) (collecting sources for the proposition that when the President is implementing presidential policy alone, the presidential oath, in conjunction with other Article II powers, creates a distinct “constitutional vocabulary” of empowerment); Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief’s Spending Power*, 81 IOWA L. REV. 79, 146 (1995) (arguing that the presidential oath requires the President to legally resist restrictive national security appropriation riders); Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 455 (1990) (noting that “President Reagan’s Attorney General, Edwin Meese, suggested that the power not to enforce laws deemed unconstitutional by the President was inherent in the President’s oath to preserve, protect and defend the Constitution”); James A. Thomson, *Not A Trivial Pursuit: Salmon P. Chase and American Constitutional Law* (Book Review), 23 N. KY. L. REV. 205, 307 n. 158 (1996) (discussing Chase’s view that President Lincoln derived the power to issue the Emancipation Proclamation from the presidential oath).

<sup>214</sup> Lawson, *supra* note 208, at 388.

<sup>215</sup> Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1314 (2000). See also David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 187-88 (1995) (noting that “[a]part from prescribing the exact terms of the oath the President was to take before entering upon his duties, however, Article II said very little about how the President was to perform his functions”); Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L. J. 791, 829 (1999) (“Other officials must simply promise to ‘support’ the Constitution; the President must preserve, protect and defend it”) (footnote omitted); John McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 661 (1999) (labeling the Presidential oath an “emphatic oath”); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 378 n.10 (1993) (noting that the presidential oath is “more elaborate in form than that required of any other constitutional actor”).

12. *The Oath as a Reason Not to Enforce Laws.* Presidents should not be too aggressive in independently judging the actions of Congress or the Judiciary as being unconstitutional; only when “the Congress has taken measures unmistakably incompatible with the expressed or implied terms of the Constitution, taking account of relative interpretations by the courts” should the President, relying on his presidential oath of office, refuse to enforce the laws.<sup>216</sup>

13. *Complex Ends Contemplated by the Oath.* In requiring that he “faithfully execute the office of President,” the presidential oath contemplates the complex “pursuit of many ends that may to some extent conflict”<sup>217</sup> and requires skillful reconciliation.

14. *Acting Presidents and the Oath.* What is one to make of the Constitutional provision for an Acting President? While Section 3 of the Twenty-Fifth Amendment designates the Vice-President as Acting President “[w]henver the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office,”<sup>218</sup> does such a provision require that the Vice-President take the presidential oath as a condition of becoming Acting President? Such an oath, which, by its terms, specifies the analytically distinct “office of President of the United States”<sup>219</sup> Moreover, what is the significance of Section 4, Clause 1 of the Twenty-Fifth Amendment specifying that in the event of a written declaration by the Vice-President a majority of federal officials and their “written declaration that the President is unable to discharge the powers and duties of his office, the Vice President *shall immediately assume the powers and duties* of the office as Acting President[?]”<sup>220</sup> And what happens under Section 4, Clause 2 of the Twenty-Fifth Amendment when various scenarios are outlined for the President “to

<sup>216</sup> Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 118-19 (2000). See also J. Randy Beck, *Presidential Defiance of “Unconstitutional” Laws Reviving the Moral Prerogative*, 16 CONST. COMMENT. 419, 419 (1999) (book review). But see, John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS. 1, 4 (1998). The author points out that

[a]s Thomas Jefferson forcefully argued concerning his position that the Executive Branch ought not enforce the Alien and Sedition Acts because he believed them to be unconstitutional; “[t]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.”

*Id.* (citation omitted). Yoo also notes that “[b]ased on similar reason, President Lincoln argued that the Executive Branch had no obligation to enforce Dred Scott beyond the parties to the case itself.”

*Id.*

<sup>217</sup> Nelson Lund, *The President as Client and the Ethics of the President’s Lawyers*, 61 LAW & CONTEMP. PROBS. 65, 74 (1998).

<sup>218</sup> U.S. CONST. amend. XXV, § 3.

<sup>219</sup> *Id.*, art. II, § 1, cl. 8.

<sup>220</sup> *Id.*, amend. XXV, § 4, cl. 1 (emphasis added).

resume the powers and duties of his office"?<sup>221</sup> Must the formerly disabled President renew his presidential oath, or does his resumption of duties relate back to the original oath? These are illustrative questions that a few scholars have explored.<sup>222</sup>

15. "*Faithfully.*" What is the significance of the qualifying phrase "faithfully" in the presidential oath?<sup>223</sup> The word, itself, denotes a covenant or promise involving both a "pledge of fidelity"<sup>224</sup> and a "strict adherence to duty."<sup>225</sup> At least one sense of the word *faithfully* is "the duty of telling unwelcome truths or giving unwelcome counsel,"<sup>226</sup> something a President of the United States is probably expected to do from time to time.

### C. Scholarly Literature: Longer Takes

A handful of legal commentators have provided extended discussion of the meaning of the presidential oath. This literature, to date, consists of several law review articles<sup>227</sup> and one book.<sup>228</sup>

#### 1. Law Review Articles

Several articles offer substantial commentary on the presidential oath. In a 1987 article, William F. Brown and Americo R. Cinquegrana discuss various constitutional, statutory and historical aspects of presidential succession;<sup>229</sup> the questionable necessity of the Speaker or President pro tempore of the Senate taking the presidential oath if they succeed to the presidency;<sup>230</sup> the explicit requirement of Cabinet officers to "take the presidential oath of office prior to succession to the presidency;"<sup>231</sup> the experiences of assorted Vice Presidents

<sup>221</sup> *Id.*, amend. XXV, § 4, cl. 2.

<sup>222</sup> See, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?* 48 STAN. L. REV. 113, 139 (1995); John F. Manning, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 STAN. L. REV. 141-45 (1995). Cf., Americo R. Cinquegrana, *Presidential Succession Under 3 U.S.C. § 19 & The Separation of Powers: "If at First You Don't Succeed, Try, Try Again,"* 20 HASTINGS CONST. L. Q. 105, 113-14 (1992) (discussing the Presidential Succession Act and the analogous issue of whether a cabinet officer or congressional officer who becomes Acting President is required or expected to take the presidential oath).

<sup>223</sup> See Stephanie A. J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L. J. 1069, 1077 n. 54 (1990) (pointing out that the presidential oath mentions the word "faithfully" as a qualifying word).

<sup>224</sup> V THE OXFORD ENGLISH DICTIONARY 679 (2d. ed. 1989).

<sup>225</sup> *Id.* at 680.

<sup>226</sup> *Id.* at 679.

<sup>227</sup> See *infra* notes 231-55 and accompanying text.

<sup>228</sup> See *infra* notes 256-79 and accompanying text.

<sup>229</sup> Brown & Cinquegrana, *supra* note 205.

<sup>230</sup> *Id.* at 1433.

<sup>231</sup> *Id.* at 1434 (citation omitted).

taking the presidential oath (often a considerable time after their predecessor in office had died);<sup>232</sup> and the observation that, although the Vice President is “authorized [by federal statute] to administer any federal oath only in the most bizarre circumstances would the Vice President give, rather than take, the presidential oath.”<sup>233</sup>

In a significant 1994 article, Steven G. Calabresi and Saikirshna B. Prakash compare various constitutional provisions with the Presidential Oath Clause to elucidate the President’s power to execute federal laws.<sup>234</sup> In general, Calabresi and Prakash argue that by virtue of the Presidential Oath Clause, “the President must have a means of refusing to enforce laws that violate the supreme law of the Constitution, particularly where those laws usurp the constitutional prerogatives.”<sup>235</sup> They conclude that they “do not believe that the President must helplessly ‘take care’ to execute (or abide by) a statute that takes away his constitutionally granted authority [since] [i]t makes little sense to establish a Constitution with a President as Chief Executive and then force that Chief Executive to relinquish his powers in the face of an unconstitutional statute.”<sup>236</sup>

Michael Stokes Paulsen, in his noteworthy 1994 article, explores the President’s constitutional power to interpret federal law.<sup>237</sup> Paulsen’s main theme is that the “Take Care” clause supplements and complements the President’s oath as a textual [constitutional] justification for independent interpretive authority.<sup>238</sup> Moreover, he observes that “the executive’s power to interpret the law is not only an inference from another [constitutional textual] power (as in the case of the judiciary’s power to decide cases), but also the necessary consequence of an explicit textual command,” stemming from the

<sup>232</sup> See *id.* at 1396 n.23. (Theodore Roosevelt did not take the presidential oath until twelve hours after President McKinley had died); *id.* at 1396 n.29 (noting that Vice President John Tyler “was responsible for beginning the tradition of administering the presidential oath to a Vice President who succeeds to the presidency, an event that serves as a symbol of the transfer of authority, but is not based on any constitutional requirement”); *id.* at 1396 n.30 (Vice President Millard Fillmore took the presidential oath after the death of President of Zachary Taylor); *id.* at 1396 n.47 (pointing out that “both Vice President Arthur and Vice President Coolidge [took the presidential oath twice]. . . because the first oath had been taken before a state, not federal, officer” and observing that “[t]he additional oaths administered to Arthur and Coolidge would not be necessary today” because of the enactment of a federal statute, codified at 5 U.S.C. § 2903(c)(2002) - that allows any individual authorized by local law to administer oaths within the jurisdiction granting that power to administer oaths “required under the laws of the United States”).

<sup>233</sup> Brown & Cinquegrana, *supra* note 209, at 1453, n. 47. Could a Vice President, upon the death of the President, give *himself* the presidential oath as Napoleon crowned himself Emperor? Probably not, because of an inherent conflict of interest in doing so. See *supra* note 207 and accompanying text.

<sup>234</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L. J. 541 (1994).

<sup>235</sup> *Id.* at 621.

<sup>236</sup> *Id.* at 621-22 (citations omitted).

<sup>237</sup> Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

<sup>238</sup> *Id.* at 261.

Presidential Oath Clause and the Take Care Clause.<sup>239</sup> Thus, Paulsen concludes: “[t]aken seriously, the President’s oath *requires* that the President exercise full legal review over the lawfulness of other branch’s acts whenever he is called upon to employ the executive power in furtherance of those acts.<sup>240</sup> In addition, “[t]he President’s oath is to uphold the laws as he faithfully interprets them, not as they are understood by others (including the courts).”<sup>241</sup> Accordingly, he urges a constitutional need “for a theory of executive restraint as to the exercise of the power of executive review in a manner faithful to the President’s oath and the Take Care Clause, but also respectful of the views of other branches and modest about the executive’s competence as an interpreter.”<sup>242</sup>

Joel K. Goldstein, writing in a 1999 article, probed the presidential oath in order to explore the meaning of the rule of law within the institution of the presidency.<sup>243</sup> In this regard, Goldstein noted that, by broadly interpreting his oath of office, “[n]o President acted so openly contrary to the letter of the law as . . . [President] Abraham Lincoln.”<sup>244</sup> Emphasizing his duty to preserve the Union to the best of his ability, Goldstein pointed out that

Lincoln blockaded southern ports without Congressional authorization. He increased the size of the army and navy beyond statutory ceilings despite Congress’ power to raise and support the military. He spent funds for military purposes[,] which Congress had not appropriated. He suspended the writ of habeas corpus, thereby holding thousands of southern sympathizers without trial for months. Lincoln offered legal justification of some of these actions. But his defenses did not rest on law alone. He argued that these measures were appropriate “whether strictly legal or not” due to four criteria: (1) “a popular demand,” (2) “a public necessity,” (3) a belief they were within Congress’ power, and (4) his faith that Congress would ratify his actions. Moreover, Lincoln suggested that a President could violate a law, like the habeas guarantee, to save the Union. “[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”<sup>245</sup>

Yet, Goldstein concedes that the President’s oath imposes a duty on the President “that goes well beyond simple support [of the Constitution]. He is its guarantor.”<sup>246</sup> Thus, according to Goldstein, “[t]his suggests that the President has a unique relationship to the Constitution, that in addition to his discrete Article II powers and duties, he has special responsibilities to make certain that

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 262.

<sup>241</sup> *Id.* at 277.

<sup>242</sup> Paulson, *supra* note 237, at 331 (alteration in original).

<sup>243</sup> Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791 (1999).

<sup>244</sup> *Id.* at 813.

<sup>245</sup> *Id.* (citations omitted).

<sup>246</sup> *Id.* at 829.

the Constitution survives his watch;”<sup>247</sup> moreover, he should skillfully utilize this unique relationship to enhance his four special perspectives: “security responsibility, substantive expertise, a national perspective and popular connection.”<sup>248</sup>

Vic Snyder’s 2001 article compares the congressional oath of office, derived from Article IV, Clause 3, with the presidential oath of Article II, section 1, clause 8.<sup>249</sup> During the course of his essay, Snyder, a member of Congress who took a congressional oath of office, reflects that the presidential oath provides a kind of self-restraint on the President. This self-restraint is as important as potential for impeachment or future electoral defeat in altering the behavior of the Chief Executive.<sup>250</sup> In addition, Snyder explores the importance of the presidential oath, and by implication all oaths of office, as a formal reminder of the duties of public office.<sup>251</sup>

*The Legislator-in-Chief*, a 2002 article by Vasam Kesavan and J. Gregory Sidak, is an extended scholarly discussion of the significance of the presidential oath in American law review literature.<sup>252</sup> These scholars contend that the presidential oath limits the discretion of the President in deciding what “measures” to recommend to Congress pursuant to the State of the Union and Recommendation Clauses of Article II, section 3 of the Constitution.<sup>253</sup>

## 2. Pauley’s Book

Matthew A. Pauley’s 1999 book *I Do Solemnly Swear: The President’s Constitutional Oath - Its Meaning and Importance in the History of Oaths*<sup>254</sup> has been given short shrift in law review literature. This formidable treatise deserves our respect and admiration for its erudite scholarship.

Pauley’s book consists of three parts. After some introductory comments,<sup>255</sup> Part One, called “Building Up to the American Experience,”

<sup>247</sup> *Id.*

<sup>248</sup> Goldstein, *supra* note 243, at 846 (citation omitted).

<sup>249</sup> Vic Snyder, *You’ve Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897 (2001).

<sup>250</sup> *Id.* at 900.

<sup>251</sup> *Id.* at 901.

<sup>252</sup> Vasam Kesavan & J. Gregory Sidak, *The Legislator-In-Chief*, 44 WM. & MARY L. REV. 1 (2002).

<sup>253</sup> *Id.* at 60. The State of the Union Clause is found in Article II, Section 3, Clause 1 of the Constitution. The Recommendation Clause is found at Article II, Section 3, Clause 2.

<sup>254</sup> MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH - ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS* (1999) [hereinafter *THE PRESIDENT’S CONSTITUTIONAL OATH*].

<sup>255</sup> *See id.* at 1-23. Pauley quotes from Chief Justice Warren Burger’s incisive observation that it is important to pay close attention to the “very precise language [that] the President must pledge” in taking the presidential oath. *Id.* at 3 (endnote omitted). Among other interesting historical tidbits, Pauley mentions the irony of the adoption of a provision in the Constitution of the Confederate States of America that required the President of the Confederacy to “preserve, protect and defend” its constitution in nearly identical language to that of United States. U.S. CONST. art. II, § 1, cl. 8.

canvasses the history of oaths with emphasis on the social contract theory of Thomas Hobbes;<sup>256</sup> oaths among the Greeks, Romans, and early Christians;<sup>257</sup> and oaths in the ensuing centuries up to the time of the American Revolution.<sup>258</sup>

Part Two of Pauley's book, "The Social-Contract Moment," examines the "role of oaths in the social-contract moment of the American and French Revolutions."<sup>259</sup> In one insightful paragraph, Pauley conceptualizes the President's keystone role in the American scheme of government and the critical role of the presidential oath in forging this outcome:

From the standpoint of the history of contract theories of government, the oath of office of the American President brings to juridical completeness the particular contract ordained and established by, "We the People of the United States" in the words of the fundamental law or Constitution. In that written Constitution, the executive branch is ordained and established by Article II, placed between the Articles devoted to the legislative and judicial branches, the three together forming the large governing arch of the sovereign Union of sovereign states. Within Article II, the President, with his prescribed oath, is plainly the center stone, without which, as the critics of the Articles of Confederation insisted, the arch of government would almost inevitably collapsed. In other words, the swearing in of a President of the United States may be said to provide, figuratively, the keystone of the nation's governing arch - the stone which . . . being the last put in, is regarded as keying or locking the whole structure together. The President is the keystone not only because the other branches of the government depend on him for what [Woodrow] Wilson and more contemporary scholars have called leadership. He is the keystone also because, in the society at large, advocates of special points of view tend to look to him for direction and support. Then too, most importantly, the President is the keystone because he is *sworn* to preserve, protect and defend the *whole*. Only he must stand before the American

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*Id.* at 7. Pauley identifies in his introduction, the focus of his book: "The President's oath as the *point* of our institutional government where it defends itself against the pressures that are brought to bear on it from our domestic civil society and from foreign regimes." *Id.* at 18. Pauley then goes on to assert: "[t]wo fundamental questions are posed and answered" by his book: (1) "Is the President's oath important enough to be taken seriously?" and (2) "What does the President's oath mean?" THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 18..

<sup>256</sup> *Id.* at 27-42.

<sup>257</sup> *Id.* at 43-69.

<sup>258</sup> *Id.* at 71-122. Summarizing Part I of his book, Pauley contends:

Oaths have plainly had a very long history, in civil and criminal as well as in military law. And they have been taken most seriously by great nations and great men, in the past as well as sometimes also in the present. Indeed, one can truly say that, at every important turn in the history of political thought and statecraft, oaths have been of enormous significance and have greatly influenced peoples' behavior.

*Id.* at 84.

<sup>259</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 18.

people and solemnly swear to safeguard the Constitution, in words which the American people themselves made part of our fundamental law.<sup>260</sup>

In Part Three, entitled "The President's Oath and the Stages of American Political Development", unquestionably the sweet core of the book, Pauley traces philosophical and political underpinnings of the presidential oath from 18<sup>th</sup> century America up to modern times.<sup>261</sup> An important component of this portion of Pauley's study is his exegesis of the late constitutional scholar, Edward S. Corwin's classic work entitled *The President: Office and Powers: 1787-1957*.<sup>262</sup> In a whole chapter devoted to the enterprise,<sup>263</sup> Pauley "elaborates on Corwin's account of presidential interpretations of the [presidential] oath, bringing to bear on his analysis . . . some lessons from Roman law."<sup>264</sup> The gist of Pauley's

<sup>260</sup> *Id.* at 95 (citations omitted). Later, Pauley asserts that "[i]n short, the constitutionally-prescribed President's oath of office - which has a traditional pledge of loyalty or allegiance in it - can be called a conditionally imposed (corporate) affirmative, promissory (and generally corporal) oath." *Id.* at 118. In other words, "[t]he President freely swears (or affirms) that he will do what his office obliges him to do, and he swears it as a condition for entering upon the office." *Id.* "When George Washington first took that oath on April 30, 1789, he made the written Constitution a living reality." *Id.*

<sup>261</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 137-219.

<sup>262</sup> EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS - 1787-1957 (4<sup>th</sup> rev. ed. 1957) (1940).

<sup>263</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 169-98.

<sup>264</sup> *Id.* at 19. Pauley provides a marvelous summary of "lessons from Roman law," that amplifies his review of Corwin's book. *Id.* at 184-93, 197-98. Pauley brilliantly points out in this regard:

The President's oath has two parts. The first part - in which the President swears to "faithfully execute the Office of President" - is clearly *consular* in the etymological sense. The relevant Roman republican meaning of the verb *consulere*, in Cicero and his peers, is to take care of some person or thing, its opposite being to neglect (*neglegere*).

....

Accordingly, in the first part of his oath, the President swears, like a Roman consul, to consider himself bound in conscience to do what the details of Article II, apart from the oath, already oblige him to do. As a chief magistrate or Chief Executive, he swears to execute or "follow out" his prescribed duty or office.

....

In his consular status, the American President is head of the second or *executive* branch of our checked and balanced mixed *federal government*.

*Id.* at 184 (third emphasis added) (citations omitted). Pauley, then, goes on to wisely explicate the second part of the presidential oath

in which the President swears to "preserve, protect and defend" the Constitution, "is less consular but rather more *monarchic* and even *imperial*, in the Roman, juridical-etymological senses of those terms. It refers us to nothing that is in any sense *detailed* for us elsewhere in Article II but specifies that the President should consider himself bound in conscience to do nothing less than to save the Union of the people of the United States (of which the Constitution is the organic law) *for* those people, as a unique embodiment of their united will.

analysis of Corwin's book, supplemented by a close reading of complimentary political science and philosophical articles by other presidential scholars, is as follows:

- The Constitutional text of the Presidential Oath Clause does not add to the President's constitutional powers.
- The Constitutional text of the Presidential Oath Clause does not add to the President's constitutional powers.<sup>265</sup>
- The intent of the Framers - as found in available records of the proceedings as well as "background antecedents," does not even remotely suggest that the Presidential Oath Clause was designed to augment the President's constitutional powers.<sup>266</sup>
- The presidential oath was taken "very seriously by strong Presidents, who plainly resisted any temptation to let it pass . . . as a mere ceremony."<sup>267</sup> In a series of historical incidents, outside presidential musings on their oath of office during the course of their inaugural addresses,<sup>268</sup> Presidents of the United States have staked out their political-legal position that the presidential oath enhanced their constitutional powers. Prominent examples include: Jefferson's aborted denunciation of the Sedition Act with a reference to the presidential oath; Jackson's "Protest to the Senate" of April 15, 1834, which quoted the presidential oath and characterized the President as the unique "direct representative of the American people,"<sup>269</sup> Jackson's Bank Veto Message of 1832 which invoked the oath;<sup>270</sup> Andrew Johnson's

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The second part of the President's oath does clearly add to his consular functions, however. He is a consul, not a king or master; he takes care of things for others. In times of emergency, when the mixed constitutional system is in danger, he is sworn to assume dictatorial powers to save the Union, but he is not to be a dictator. All the while he is saving the Union, his purpose must be to preserve, protect, and defend the duly-constituted mixed system of government, only one of the branches of which he heads.

*Id.* at 184-85.

<sup>265</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 169.

<sup>266</sup> *Id.* According to Pauley, Corwin explained that the framers of the presidential oath looked to the provisions of the constitutions of Pennsylvania, Georgia and South Carolina in which the governors of those states were required to take an oath of office, which was not viewed by legal authorities in these three states as augmenting the governors' powers. *Id.* at 169-70.

<sup>267</sup> *Id.* at 170.

<sup>268</sup> See *supra* notes 23-166 and accompanying text.

<sup>269</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 171 (citation omitted). Pauley points out, however, that three prominent United States Senators objected to Jackson's expansive interpretation of the presidential oath and the notion that the President was a special "direct representative" of the American people. *Id.* at 172-73.

<sup>270</sup> *Id.* at 173. In the course of this veto message:

Impeachment Lawyer's Defense that the President is bound by his oath not to execute or obey any law which is upon its very face in contradiction to plain express provisions of the Constitution<sup>271</sup> and Lincoln's July 4, 1861, Message to Congress in defense of his unilateral suspension of the writ of habeas corpus that relied on the presidential oath as a justification for his action.<sup>272</sup>

Matthew A. Pauley sums up his book with what he calls "[a] [f]inal [w]ord on the [m]eaning and [i]mportance of the President's [o]ath."<sup>273</sup> For Pauley, the essential meaning of the presidential oath boils down to the intertwined juxtaposition of twin presidential responsibilities: "[p]erfecting the Union vs. [p]rotecting it."<sup>274</sup> Pauley observes that "while very little of the President's oath swearing ceremony is, in fact, in the Constitution." Yet "the President's *oath*, and *only* the *President's* oath, is in the Constitution - and *that* fact . . . is of a significance that has grown over the course of our history."<sup>275</sup> He amplifies this conclusion by stating:

[O]aths [are] important . . . the President's oath is important, and . . . many modern scholars and public figures fail to recognize its importance because they remain trapped in a rigid pluralism which denies any reality or enduring significance to the nation as a whole or to the public oaths that have made that nation possible.<sup>276</sup>

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Jackson . . . asserts his right to veto, on the grounds of unconstitutionality, an act of Congress that the Supreme Court had already declared to be perfectly constitutional. Moreover, Jackson's language suggests that he felt he had the right to *refuse to enforce* statutes and Court decisions if his conscience told him that they violated the very Constitution he had sworn to uphold.

*Id.* (citation omitted).

<sup>271</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 174 (alteration in original) (citation omitted).

<sup>272</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 181-82. Pauley summarizes Corwin's scholarship that helps illuminate "the tremendous importance of Abraham Lincoln in the historically evolving meaning of the President's oath." *Id.* at 183. In this regard Pauley goes on to opine:

Corwin . . . focuses on Lincoln, touching on virtually all the essential aspects of the President's oath that have occupied scholars to date - with, of course, ever diminishing interest. On the strength of his view of the oath, Lincoln [in Corwin's words] was led to become a dictator even exceeding the Roman model. And yet, Corwin says he acted in accordance with the most ancient traditions of Anglo-American law for meeting emergencies.

*Id.* at 183. (alteration in original) (citation omitted).

<sup>273</sup> *Id.* at 221.

<sup>274</sup> *Id.*

<sup>275</sup> THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 221-23.

<sup>276</sup> *Id.* at 226.

#### IV. CALL FOR PRESIPRUDENCE

A proper understanding of the *national unifying* function of the presidential oath should help enlarge American jurisprudence, broadly construed.<sup>277</sup> *Jurisprudence*, however, in a narrow sense, focuses on judicial reasoning and judicial opinions.<sup>278</sup> Thus, in order to focus on “the systematic analysis of statutes within the framework of jurisprudential philosophies about the role and nature of law,” the term “*legisprudence*” was invented.<sup>279</sup>

In a similar spirit, a term must be invented to describe the systematic analysis of all public legal actions, legal statements and interpretations of law that the President of the United States engages in within the framework of jurisprudential philosophies about the role and nature of law.<sup>280</sup> I suggest the term “*presiprudence*.”

*Presiprudence* would not be merely the systematic study of the federal executive branch; such a study is properly within the ambit of the fields of *administrative law* or *regulation*.<sup>281</sup> Rather, *presiprudence*, as I conceive of this new theoretical approach to the law and presidency, would seek to make use of the theoretical tools and insights of legal theory to explore the creation of law by the President. Within this new approach, a variety of problems traditionally

<sup>277</sup> Jurisprudence, broadly defined, is equivalent to philosophy of law. Under a broad conception of jurisprudence, scholars consider big questions relating to such matters as the sources, functions and meaning of the law. See, e.g., THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995).

<sup>278</sup> See COLEMAN & SHAPIRO, *supra* note 277.

<sup>279</sup> LEGISPRUDENCE: STATUTES IN THE CREATION OF PUBLIC POLICY 559 (William N. Eskridge, Jr. et al. eds. 3<sup>rd</sup> ed. 2001) (citing the seminal article, Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L. J. 886 (1950)). See also LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION (Luc J. Wintgens ed., 2002) [hereinafter LEGISPRUDENCE]. One commentator has provided the following extended definition of legisprudence and how it differs from jurisprudence:

Legisprudence has as its object legislation and regulation, making use of the theoretical tools and insights of legal theory. The latter predominantly deals with the question of the *application* of the law by the *judge*. Legisprudence enlarges the field of study to include the *creation* of law by the *legislator*.

Within this new approach, a variety of new questions and problems are raised (including the validity of norms, their meaning and the structure of the legal system) that are traditionally dealt with from the perspective of the judge or are taken for granted by classical legal theory. However, by shifting the attention to the legislator, the same questions arise, such as in what sense the legislator has to take the systematicity of the legal order into account, what counts as a valid norm and what meanings can be created and how, to mention just a few.

Luc J. Wintgens, *Rationality in Legislation - Legal Theory as Legisprudence: An Introduction*, in LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION (Luc J. Wintgens ed., 2002).

<sup>280</sup> A cognate term to describe the systematic analysis of all public legal actions, legal statements and legal interpretations of law that state governors engage in might be “gubiprudence.” For purposes of this article, however, I limit my discussion to the broad contours of presiprudence.

<sup>281</sup> See generally, THE OXFORD COMPANION TO AMERICAN LAW 692-99 (Kermit L. Hall ed., 2002).

handled from the perspective of judges or legislators or are taken for granted by classical legal theory need to be raised.

By shifting our attention to the President's constitutional responsibility to *pursue American national interests* (i.e. interests of the whole) stemming from his unique and enduring Presidential oath,<sup>282</sup> as opposed to the factional pluralism of Congress and the judiciary, legal scholars<sup>283</sup> should begin to seriously probe, by way of illustration, some of the following problems:

- In what sense must the President take the existing systematicity of the American legal order into account?
- What counts as a valid American national interest norm?
- What meanings of American national interest can be created by a President?
- What national interest meanings can be transformed into law or inchoate law by the President by which means (such as judicial and executive appointments, vetoes, veto messages, bill signings, bill signing statements, executive orders, State of the Union messages, inaugural messages, news conference statements, national security directives and the like)?
- What failures to pursue the American national interest through law are serious enough to justify impeachment of a President?

## V. CONCLUSION

The constitutional and legal meaning of the presidential oath has been undertheorized. Only a handful of judicial opinions have explored the purpose of

<sup>282</sup> The presidential oath is most decidedly *not* a "mere formality." THE PRESIDENT'S CONSTITUTIONAL OATH, *supra* note 254, at 215. Indeed, I agree with Pauley when he states:

If there really is no such thing as national interest, how can an obligation [by the President] to "preserve, protect, and defend" that national interest – to unify *the nation under the Constitution* – have any meaning? Contrary to that position . . . there stands a long tradition in the history of political thought and statecraft in which oaths of high office and of allegiance have been of extraordinary importance at every turn. *Coupled with the living words of Presidents from Washington to the present, that tradition speaks volumes about the importance of the American President's oath as the true crown of American constitutionalism.*

*Id.* (emphasis added).

<sup>283</sup> Legal scholars need to find ways to imaginatively provide *legal meanings* to what political scientist Richard Neustadt has called the power of the President to "persuade." *See generally*, RICHARD NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER (1980).

the presidential oath.<sup>284</sup> With the single exception of Matthew A. Pauley's book on the subject, recent legal scholarship about the presidential oath has been moribund.<sup>285</sup>

The presidential oath is properly understood as the constitutional keystone of the American Republic: it commands the President of the United States to preserve, protect and defend, -as well as articulate, pursue, and achieve, - *the legal embodiment of the American national interest*.<sup>286</sup> A new field of inquiry, which I have coined *presiprudence*, may help scholars elaborate theoretical insights on the President's pursuit of the legal national interest.

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<sup>284</sup> See *supra* notes 191-204 and accompanying text.

<sup>285</sup> See *supra* notes 254-76 and accompanying text.

<sup>286</sup> See *supra* notes 277-83 and accompanying text.