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Constitutional Guidance for Lawmakers

Support and Defend: Understanding the Oath of Office

At the start of each new Congress, all Members beginning a new term of office (the entire House of Representative and one-third of the Senate) take an oath to support and defend the Constitution of the United States. In doing so, the Members of Congress perform an act that harkens back to the country's founding and its first principles. As it applies to Members of Congress, the "Oaths Clause" plays an important role by obliging them to observe the limits of their authority and act in accordance with the powers delegated to them by the Constitution. The oath also serves as a solemn reminder that the duty to uphold the Constitution is not the exclusive or final responsibility of the Judiciary but is shared by Congress and the President (per Article II, Section 1) as co-equal branches of the United States government. This essay is adapted from The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, 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…."
— Article VI, Clause 3

Although the practical application of the Constitution is largely in the hands of state judges, the primacy of the Constitution ultimately depends on officers of the law—in particular, officers of each branch of government—being equally bound to its support. In this sense, the Oaths Clause is the completion of the Supremacy Clause.

In England, subjects were required to swear loyalty to the reigning monarch; many early American documents included oaths of allegiance to the British king. During the American Revolution, General George Washington required all officers to subscribe to an oath renouncing any allegiance to King George III and pledging their fidelity to the United States. Most of the new state constitutions included elaborate oaths that tied allegiance to and provided a summary of the basic constitutional principles animating American constitutionalism. There was no oath in the Articles of Confederation.

At the Constitutional Convention, Edmund Randolph proposed, as part of the Virginia Plan, "that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to sup-

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port the articles of Union." When it was objected that this would unnecessarily intrude on state jurisdiction, Randolph responded that he

> considered it as necessary to prevent that competition between the National Constitution & laws & those of the particular States, which had already been felt. The officers of the States are already under oath to the States. To preserve a due impartiality they ought to be equally bound to the Natl. Govt. The Natl. authority needs every support we can give it.

The Oaths Clause helps to fulfill the Framers' plan to integrate the states into the electoral, policy-making, and executory functions of the federal union, subject to the limits of the Tenth Amendment. For example, the Supreme Court has held that Congress may not "conscript" the legislatures or executive officers of a state directly into federal service. *New York v. United States* (1992); *Printz v. United States* (1997). In *The Federalist* No. 27, Alexander Hamilton offered a careful and nuanced description of the Oaths Clause: "thus, the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and it will be rendered auxiliary to the enforcement of its laws."

For the sake of consistency and unity, the delegates amended the Oaths Clause to cover officers of the national government as well. Later, the delegates added the words "or affirmation" (to oblige the Quakers, who were circumspect of taking oaths, as a matter of religious doctrine) as well as the ban on federal religious tests (in the next clause).

The simple declaration to "support the Constitution" has constitutional significance at all levels of government. An opinion of the Attorney General in 1875 declared that Members of Congress do not assume office until the completion of the oath, but that a state may not question a state representative's motives and refuse to allow him to take the oath and his seat. *Bond v. Floyd* (1966). The oath was at the heart of John Marshall's opinion in *Marbury v. Madison* (1803) obliging judges to give priority to the Constitution over ordinary legislative acts. Justice Joseph Story likewise stated in his *Commentaries on the Constitution of the United States* that officers sworn to support the Constitution are "conscientiously bound to abstain from all acts inconsistent with it," and that in cases of doubt they must "decide each for himself, whether, consistently with the Constitution, the act can be done." But taking the oath does not relieve a judge from obedience to higher judicial authority, even if he thinks the higher court was acting contrary to the Constitution. *Glassroth v. Moore* (2003). Beyond the mechanism of the separation of powers, the Oaths Clause places an independent obligation on officeholders to observe the limits of their authority. The Framers included a specific oath for the President in Article II, Section 1, Clause 8.

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The Framers' general understanding was that proscribing religious tests did not necessarily remove the religious significance of the general oath. "The Constitution enjoins an oath upon all the officers of the United States," Oliver Wolcott noted at the Connecticut ratifying convention. "This is a direct appeal to that God who is the avenger of perjury." Customarily, officeholders add the words "so help me God" at the completion of their oaths.

The very first law passed by the first session of the House of Representatives was "An Act to regulate the Time and Manner of administering certain Oaths." Two days later, the Chief Justice of New York administered to the Representatives an oath to "solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." The Senate amended the legislation to apply to state officers, who are also subject to Article VI. When Representative

Elbridge Gerry objected that Congress had no authority to specify the oath of state officers, the response was that Congress was implicitly authorized by Article VI itself, if not by the Necessary and Proper Clause, to prescribe oaths. This broad interpretation of implied congressional power was used as a precedent to justify the Fugitive Slave Act in 1793, later upheld on similar grounds by the Supreme Court in *Prigg v. Commonwealth of Pennsylvania* (1842).

During the Civil War, Congress promulgated an oath to require civil servants and military officers to not only swear allegiance to the United States but also affirm that they had not engaged in any previous disloyal conduct. Congress repealed the latter condition in 1884, leaving wording that is nearly identical to the current oath taken by Members and federal employees.

Under current law any individual elected or appointed to an office of honor or profit in the civil service or uniformed services, except the President, shall take the following oath: "I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter." (33 U.S.C. § 3331.) By federal statute, all state officers shall take an oath in the simple form first promulgated in 1789. (4 U.S.C. § 101.)

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