

## IMPERFECT OATHS, THE PRIMED PRESIDENT, AND AN ABUNDANCE OF CONSTITUTIONAL CAUTION

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### INTRODUCTION

Presidential inaugurations frequently invite widespread civic celebration, the broad rhetoric of an incoming Chief Executive, and traditions stretching back for decades and even centuries. The inaugural ceremonies of January 20, 2009 offered all this and something more: a set of important constitutional puzzles radiating from Barack Obama's imperfect recitation of his oath of office.

At 12:04 p.m., Mr. Obama attempted to fulfill the Constitution's requirement that each President take a prescribed thirty-five word oath "[b]efore he enter on the Execution of his Office . . ."<sup>1</sup> During the recitation, Chief Justice John Roberts (who was administering the oath) prompted Obama with both an incorrect word and several improper word sequences. At the end of their verbal exchange, Obama had uttered an inexact version of the presidential oath, including a pledge to execute "the office of President of the United States faithfully" rather than promising to "faithfully execute" that office.<sup>2</sup>

The errors in the oath-taking prompted immediate and widespread speculation and commentary: did problems with the administration and recitation of the presidential oath somehow render it invalid? If so, had Obama failed to become President, perhaps leaving us with some other Chief Executive, or even no President at all?<sup>3</sup>

On the evening of January 21, news sources began reporting that Mr. Obama had invited Chief Justice Roberts to the White House to administer

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<sup>1</sup> U.S. CONST. art. II, § 1, cl. 8 (link).

<sup>2</sup> Michael C. Dorf, *When Did Barack Obama Officially Become Eligible to Act as President? What the Oath "Do-Over" Reveals About Legal Interpretation*, FINDLAW, Jan. 26, 2009, <http://writ.news.findlaw.com/DORF/20090126.html> (link). According to Professor Dorf, Mr. Obama also omitted the word "the" in the phrase "to the best of my ability." *Id.* Moreover, consistent with a longstanding tradition, Obama inserted his own name into the oath.

<sup>3</sup> See Scott E. Gant & Bruce G. Peabody, *Musings on a Constitutional Mystery: Missing Presidents and "Headless Monsters"?*, 14 CONST. COMMENT. 83, 88–89 (1997) (examining whether delays in the 1997 inauguration of Bill Clinton left the nation temporarily "without a President").

the oath a second time.<sup>4</sup> White House Counsel Greg Craig released a statement indicating that although administration officials “believe[d] that the oath of office was administered effectively and that the President was sworn in appropriately [at the January 20th inauguration ceremony,] . . . out of an abundance of caution, because there was one word out of sequence, Chief Justice Roberts administered the oath a second time.”<sup>5</sup> The second oath was taken without mishap.<sup>6</sup>

Like other phrases intended to be reassuring, “abundance of caution” is partly discomfiting: Exactly what was the Obama administration being cautious about? This Essay explores that question by considering whether the flaws in Obama’s initial presidential oath had a legal impact on executive branch policies enacted before the second oath was rendered. It also examines whether the 2009 “oath episode” has broader implications for how we should approach future inaugurations and oaths.

Part I of this Essay considers several possible relationships between the presidential oath and the start of a President’s term, and assesses whether recitation of the oath is strictly necessary before a President can constitutionally exercise presidential powers. Part II turns to the significance of the particular words set out in the presidential oath, and offers reflections on how we might judge whether deviations from the oath “script” should be considered consistent with the Constitution. Part III checks my preliminary conclusion (that the Constitution requires a President to recite the oath verbatim before exercising the full powers of the presidency) against an “absurdity test.” The Conclusion reviews the Essay’s core contentions about the oath and evaluates the real world consequences of my argument, if any, for both President Obama and for Presidents and inaugurations yet to come.

## I. PRESIDENTIAL OATHS, TERMS, AND EXERCISING EXECUTIVE POWER

What is the relationship between the presidential oath and the presidential term? The Constitution specifies that the President’s term shall be “of four Years” and “[t]he terms of the President and Vice President shall end

<sup>4</sup> See, e.g., Anne E. Kornblut & Michael D. Shear, *Obama Takes His Oath of Office Again*, WASHINGTONPOST.COM, Jan. 21, 2009, [http://voices.washingtonpost.com/44/2009/01/21/obama\\_takes\\_his\\_oath\\_of\\_office.html?hpid=topnews](http://voices.washingtonpost.com/44/2009/01/21/obama_takes_his_oath_of_office.html?hpid=topnews) (link).

<sup>5</sup> Press Release, The White House, Statement from White House Counsel (Jan. 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/StatementfromWhiteHouseCounsel/](http://www.whitehouse.gov/the_press_office/StatementfromWhiteHouseCounsel/) (link). It is unclear precisely when Craig’s statement was released. According to the White House press release, the statement was issued “Wednesday, January 21st, 2009 at 12:00 a.m.” *Id.* If one presumes this “time stamp” means midnight on January 21, it is clearly erroneous since this would have been before the second oath was completed.

<sup>6</sup> Press Release, The White House, Press Briefing by Press Secretary Robert Gibbs (Jan. 22, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Press\\_Briefing\\_1-22-09/](http://www.whitehouse.gov/the_press_office/Press_Briefing_1-22-09/) (link). When asked about the two oaths the following day, President Obama’s press secretary Robert Gibbs reiterated the Office of the White House Counsel’s position.

at noon on the 20th day of January . . . and the terms of their successors shall then begin.”<sup>7</sup> In the context of the 2009 Obama inauguration, a number of scholarly and legal commentators drew upon these constitutional provisions and concluded that whether the presidential oath is properly recited is immaterial as a legal matter, so long as a new presidential term has commenced, the incoming President has been validly elected, and he or she otherwise qualifies for office.<sup>8</sup> In this conception, once the clock struck noon on January 20, 2009, Mr. Obama, as a properly selected and certified President-elect, was transformed into a fully functional President of the United States.

At first glance, this particular text-based argument seems rather appealing. Unlike the other branches of government, the executive is in a kind of perpetual session, ensuring that “the nation’s heart [will] never cease to beat.”<sup>9</sup> Congress, in contrast, regularly schedules recesses during and between its sessions, moving in and out of formal operation. Moreover, the federal legislature’s capacity to conduct its work is always contingent on its members’ presence since Congress must maintain a quorum even when in session.<sup>10</sup> The comparative constancy of executive leadership—and, by extension, the continuing operation of the federal government as a whole—might be jeopardized if we did not recognize that a new President assumes his or her office as soon as the old presidential term expires.

Emphasizing the importance of an unbroken executive presence in our constitutional system does not, however, conclusively address the impact of a flawed inaugural oath on the status and power of an incoming President. Both the Constitution and federal statutes provide for continued executive leadership during circumstances where an elected President is unable to serve or assume office. Most famously, the Vice President succeeds to the

<sup>7</sup> U.S. CONST. art. II, § 1, cl. 1 (link); U.S. CONST. amend. XX, § 1 (link). Prior to the Twentieth Amendment, the date on which the President’s new term was to start was fixed first by statute and then by the Twelfth Amendment (with March 4 as the chosen date). Act of Mar. 1, 1792, ch. 8, 1 Stat. 239; U.S. CONST. amend. XII (link).

<sup>8</sup> See, e.g., Garance Franke-Ruta, *Obama Isn’t the First President to Retake Oath—or Forgo Bible*, WASH. POST, Jan. 23, 2009, at A3 (discussing a view attributed to Laurence Tribe that “the presidency automatically transfers to the elected successor upon the departure of the previous president from the White House”) (link).

<sup>9</sup> James Ceasar, *In Defense of Separation of Powers*, in SEPARATION OF POWERS—DOES IT STILL WORK? 168, 168 (Robert A. Goldwin & Art Kaufman eds., 1986).

<sup>10</sup> The federal judiciary presents a slightly more complex picture, but again, relative to an executive branch presided over by a Chief Executive, the institutional presence of U.S. courts and their leadership is not as constant. Federal law, for example, requires merely that the Supreme Court begin its term “on the first Monday in October of each year,” allows the Court to adjourn, and stipulates that in the absence of more than three justices, the Court lacks a quorum for conducting business. 28 U.S.C. § 2 (2006) (link); 28 U.S.C. § 1 (2006) (link); see also 28 U.S.C. § 48 (2006) (requiring only that the “courts of appeals shall hold regular sessions”) (link), and 28 U.S.C. § 139 (2006) (“The times for commencing regular sessions of the district court for transacting judicial business at the places fixed by this chapter shall be determined by the rules or orders of the court.”) (link).

head of the executive branch upon a President's "removal . . . death, resignation, or inability to discharge the powers and duties of the said office . . ." <sup>11</sup> Any constitutional problems arising from Obama's initial oath would not, therefore, automatically disrupt what appears to be a constitutionally based commitment to uninterrupted executive leadership.

So how *should* we understand the connection between the presidential oath and the start of a new presidential term? Article II stipulates that "[b]efore he enter on the Execution of his Office, [the President] shall take" the designated presidential oath. There seem to be three plausible interpretations of this provision.<sup>12</sup> First, we might read the requirement that a person recite the oath as a bright-line barrier to becoming President. In other words, a President-elect does not assume the status and powers of the President until she takes the oath. Completing the oath, under this conception, is part of an obligatory constitutional threshold that a person must reach before she can assume and exercise the powers of President.<sup>13</sup>

Second, and at the opposite end of the spectrum, we might contend that the oath is not constitutionally required before a person may exercise the powers of the Chief Executive. In this view, the oath is essentially a ceremonial reminder of both the President's duty to execute the law and the status of the Constitution as supreme law. Such a "non-obligate" reading of the oath-provision could be based in part on the observation that the Consti-

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<sup>11</sup> U.S. CONST. art. II, § 1, cl. 6 (link).

<sup>12</sup> This Essay sets aside a complete parsing of what behavior, activities, and powers are encompassed by the phrase "[b]efore he enter on the Execution of his Office." For purposes of clarity and simplicity, I assume that this provision refers generally to the exercise of the specific powers delineated in Article II. But this view does not explain whether a President could use less formal power and authority without reciting the oath. Could a President who has not completed the oath properly still greet and even engage in diplomatic discussions with heads of state? Speak to the nation from the Oval Office as a Chief Executive? Threaten to issue a presidential veto? These issues are complicated by the observation that in the United States, the head of the federal executive branch is a political and legal figure—armed with specific constitutional and policy powers—as well as an informal head of state. See THOMAS E. CRONIN & MICHAEL A. GENOVESE, *THE PARADOXES OF THE AMERICAN PRESIDENCY* 15 (1993) ("The United States is one of the few in the world that calls on its chief executive to serve as its symbolic, ceremonial head of state *and* as its political head of government.").

<sup>13</sup> It is also beyond the scope of this Essay to consider whether the Constitution's distinction between "becoming" a President and "acting" as President makes a difference in the context of the presidential oath. See U.S. CONST. art. II, § 1, cl. 6 (allowing Congress to provide for a person who will "act as President" if the President and Vice President are unable to discharge the powers of the office) (link); U.S. CONST. amend. XX, § 3 ("if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified") (link); U.S. CONST. amend. XXV, § 4 (allowing the Vice President to serve as "Acting President" if the President cannot "discharge the powers and duties of his office") (link). It seems plausible to conclude that the Article II oath language only refers to a "traditional" (as opposed to "Acting") President, and therefore does not require an Acting President to recite the oath prior to performing his or her powers, whatever they might be. See generally Gant & Peabody, *supra* note 3, at 87 n.14 (reflecting upon the constitutional "distinction between *becoming* a President and *acting* as President").

tution lays out the “eligibility” requirements for the presidency in Article II, section 1, and, notably, the oath is not listed among these prerequisites.<sup>14</sup>

A third reading of the relationship between the oath, the presidential term, and the assumption of executive power is seemingly more idiosyncratic. Under this approach, a President-elect automatically becomes President upon the start of his new term, but is unable to “enter on the *Execution* of his Office”<sup>15</sup> until he recites the oath. The primed President must complete the oath before she can constitutionally tap the power of the presidency.<sup>16</sup> According to this view, if one concludes that Obama’s January 20, 2009 oath was fatally flawed, then he was, for a period of just over thirty-one hours, a primed President incapable of fully executing his office.

As each of the three conceptions delineated above leads to quite different claims about the significance of the presidential oath and the full assumption of presidential power, this Essay evaluates each approach from a variety of perspectives and interpretive modalities, beginning with the Constitution’s text.

#### A. *Constitutional Text*

As noted, the Constitution states: “Before he enter on the Execution of his Office, he shall take” the presidential oath. But to whom exactly does the “he” in this sentence refer? As the clause immediately prior to the oath provision references “[t]he President,” and bars adjustments of presidential “compensation . . . during the Period for which he shall have been elected,” it seems reasonable to postulate that the subsequent oath language refers to the President.

If this interpretation is correct, then the text casts considerable doubt on a reading of the oath provision that presumes that recitation of the oath is strictly required in order for a President-elect to be changed into the Presi-

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<sup>14</sup> The presidential eligibility clause includes, among other requirements, that individuals must be at least thirty-five years old and be a “natural born Citizen” in order to be “eligible to the Office of President.” U.S. CONST. art. II, § 1, cl. 5. *But cf.* MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH—ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS* 170 (1999) (arguing that the presidential oath was taken “very seriously by strong Presidents, who plainly resisted any temptation to let it pass . . . as a mere ceremony.”).

<sup>15</sup> U.S. CONST. art. II, § 1, cl. 8 (emphasis added).

<sup>16</sup> U.S. law is not without analogous arrangements to the primed President concept. Under state law, marriage requires both the acquisition of a state-issued wedding license as well as execution of that license by the parties identified therein, typically through a ceremony that involves the recitation of vows (or some other affirmation) to signal mutual intention to go forward with the nuptials. In other words, the license only primes—or initiates—the legal union, which still requires some more formal approval or oath to bring it into effect. Our political system has somewhat similar assumptions for the other federal branches as well; both Congress and the Supreme Court have quorum requirements, leaving us with the possibility that otherwise valid institutions and officials cannot exercise their powers absent the fulfillment of specific triggering conditions.

dent.<sup>17</sup> If the constitutional text requires that the *President* recite the oath, then the presidential oath cannot itself be the mechanism that completes the President-elect's transformation into the Commander in Chief.

Stated slightly differently, the text of the oath clause appears to require the existence of a sitting President.<sup>18</sup> And if the oath clause specifically anticipates that a President—as opposed to a President-elect—will recite the oath, then only the ceremonial “non-obligate” approach (holding that the oath is not required for exercising the powers of the Chief Executive) or the primed President approach (holding that a President must recite the oath, but cannot exercise the Office's powers until she does so) remain potentially valid.

As there seems to be a sound, text-based rationale for rejecting the presidential oath as the mechanism for turning Presidents-elect (or other individuals) into Presidents, we must now sort through these remaining views of the oath's relationship to the assumption of presidential power: the non-obligate and primed President models. Because the constitutional text alone is unlikely to resolve this choice, this Essay next examines the history of the oath provision. It might be noted in passing, however, that the conditional wording of Article II, stipulating that “[b]efore he enter on the Execution of his Office, he shall take the following oath or affirmation,” is rather strong. Constitutional language is generally sparse,<sup>19</sup> especially with respect to the executive branch. It might be odd, therefore, to discount the oath provision's relatively direct commands as essentially ritualistic and nonbinding as a legal matter.<sup>20</sup>

<sup>17</sup> Presumably, a restrictive reading of the oath would also require a Vice President to recite the presidential oath before exercising the full powers of President.

<sup>18</sup> One potential counterargument to the primed President approach to the oath arises from the observation that many of the Chief Justices who administer the presidential oath do not refer to the individuals who take the oath as “President” beforehand, but by some other appellation (Roberts referred to Mr. Obama as “Senator,” for example). The implication might be that the Chief Justices do not believe that the oath-taker is President until he completes the oath. But this is hardly compelling. Even if, say, Chief Justice Roberts had decided that Mr. Obama was not yet President before the oath, it would surely make more sense to address Mr. Obama as “President-elect” rather than Senator (since Mr. Obama had resigned his Senate seat over two months prior). Consequently, it seems difficult to conclude that the practice of the Chief Justices in this regard necessarily reflects a carefully considered evaluation of the oath's meaning and importance.

<sup>19</sup> See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 91 (1989) (arguing that “[a]lthough the Constitution is often praised for its relative spareness . . . it is striking that the authors of the 1787 document twice saw fit to write in requirements of oath-taking by governmental officials”).

<sup>20</sup> Cf. Robert F. Blomquist, *The Presidential Oath, the American National Interest, and a Call for Presiprudence*, 73 UMKC L. REV. 1, 5–6 (2004) (reviewing discussions of the presidential oath at the constitutional convention). The version of the oath originally proposed by the convention's Committee of Style required the recitation of the oath before the president “shall enter on the Duties of his Department,” but this language was changed “[f]or unknown reasons” when the final copy of the Constitution was printed. *Id.* at 6.

### B. History and the Oath

There is additional evidence to review in sorting through whether the “primed President” thesis is superior to a view of the oath as essentially unrelated to the President’s initial assumption of power. Consider first the example of George Washington. There appears to be little contemporary doubt that Washington had, prior to his inauguration and oath, already been President for a period of weeks. Although Congress had fixed March 4, 1789 as the start of the first President’s term, the legislature did not even count the Electoral College votes for Washington until the end of March. On April 6 of that year, the presiding officer of the nascent U.S. Senate, John Langdon, sent a note to Washington informing him of his “unanimous election to the Office of President of the United States of America.”<sup>21</sup> After receiving the letter on April 14, Washington made a gradual, triumphal trip from his Mount Vernon home to the nation’s capital in New York.<sup>22</sup> Throughout the tour, and upon his appearance in New York, both members of the public and government officials addressed Washington as “President.”<sup>23</sup> Washington finally took his oath and was inaugurated on April 30, 1789.<sup>24</sup> There does not seem to be any historical record of Washington taking the presidential oath while he was President-elect or, indeed, at any point prior to his inauguration in New York.<sup>25</sup>

While these observations could lead one to surmise that Washington’s status and powers as President were already in place prior to his taking the oath, Washington himself was rather explicit in insisting, during his second inaugural address, that “[p]revious to the execution of any official act of a President, the Constitution requires an oath of office.”<sup>26</sup> Washington referred to his inauguration and oath-taking as a “solemn ceremony,” a detail

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<sup>21</sup> Letter from John Langdon to George Washington (Apr. 6, 1789), in THE GEORGE WASHINGTON PAPERS 205 (Frank Donovan ed., 1964), available at <http://www.myloc.gov/Exhibitions/creatingtheus/BillofRights/ForgingaFederalGovernment/ExhibitObjects/UnanimouselectionofGeorgeWashington.aspx> (link). See also RICHARD BROOKHISER, FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON 72–73 (1996) (discussing Washington’s election).

<sup>22</sup> BROOKHISER, *supra* note 21, at 73. Even after arriving in New York, Washington waited a week while the House and Senate determined how to conduct his inauguration.

<sup>23</sup> HARLOW GILES UNGER, AMERICA’S SECOND REVOLUTION 199 (2007) (noting that prior to the inauguration churches in New York City called for the public to pray for the “preservation of the President,” and quoting Washington’s private secretary Tobias Lear’s discussion of how “the committees of Congress and heads of departments” greeted “the President” prior to his taking the oath (internal quotation marks omitted)); RICHARD M. KETCHUM, THE WORLD OF GEORGE WASHINGTON 217 (1974) (explaining that as Washington made his way to be inaugurated, “towns turned out en masse to do the new President honor”).

<sup>24</sup> STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 45–46 (1995) (describing the events leading up to Washington’s first inauguration).

<sup>25</sup> Blomquist, *supra* note 20, at 7 (declaring Washington’s April 30 oath to be “the first presidential oath”).

<sup>26</sup> *Id.* at 9.

that casts additional doubt on the notion that the oath was completely unrelated to his assumption of power.<sup>27</sup>

A letter written by Chief Justice John Marshall in 1821 further corroborates the view that election and the start of a new presidential term make a President eligible to take the oath, but only after reciting the oath is a President constitutionally empowered to exercise the full powers of the office. John Quincy Adams, then serving as Secretary of State, asked Marshall to address a question about the start of President James Monroe's second term. Monroe's old term was set to end, and his new term to commence, on March 4, 1821, but that date fell on a Sunday.<sup>28</sup> Consequently, Adams inquired about the consequences of Monroe deferring the oath until Monday, March 5.<sup>29</sup>

Marshall wrote that the precise timing of the oath-taking was "in some measure at the discretion of [the President]."<sup>30</sup> As a result, "some interval is inevitable" between the start of a presidential term and the moment when the incoming President takes the oath.<sup>31</sup> During this interregnum, Marshall concluded, "the executive power could not be exercised" and is "suspended."<sup>32</sup> Marshall noted that the Washington presidency had experienced a "prolonged" interval in which this state of affairs prevailed.<sup>33</sup> Indeed, Marshall stated that "there has been uniformly and voluntarily an interval of twelve hours during which" the executive power could not be employed by a President (because federal law at the time stipulated midnight at the end of March 3 as the time when a new term began, and a President customarily did not take the oath until noon the following day).<sup>34</sup>

The State Department reached a similar conclusion nearly a century later. This time, the issue arose when considering the potential effect of the delay between the start of Woodrow Wilson's second term on March 4,

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<sup>27</sup> *Id.* Other Presidents have expressed similar thoughts about both the oath's general importance and its specific status as a prerequisite to the exercise of Chief Executive powers. *See, e.g., id.* at 13 (quoting William Henry Harrison, who remarked: "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" (internal quotation marks omitted)); *id.* at 21 (quoting William McKinley, who said, "[B]y the authority vested in me by this oath, I assume the arduous and responsible duties of President of the United States" (internal quotation marks omitted)); *id.* at 12 (quoting Andrew Jackson, who declared in his Second Inaugural Address that "he was 'under the obligation of that solemn oath . . . [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>28</sup> *Wilson to Take the Oath Sunday*, N.Y. TIMES, Nov. 15, 1916, at 4.

<sup>29</sup> *Id.* (quoting Letter from John Marshall, Chief Justice of the United States, to John Quincy Adams, Secretary of State (Feb. 20, 1821)) (internal quotation marks omitted).

<sup>30</sup> *Id.*

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

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

<sup>33</sup> *Id.* The interval was a result of, among other factors, the delays in Congress's counting of the electoral college votes and the protracted nature of Washington's trip from Virginia to the nation's capital in New York.

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

1917 (again, falling on a Sunday), and the scheduled time for the presidential oath (the following Monday, March 5, at noon). According to *The New York Times*, the State Department concluded that “there is no interval between the term of one President and the beginning of his successor[’s], although there may be a slight interval when the executive power is suspended.”<sup>35</sup> Presumably influenced by the State Department’s conclusion, Wilson took the oath in the morning on Sunday, March 4, and again during his public, formal inauguration on March 5.<sup>36</sup>

Although both the constitutional text and our political history provide substantial credence to the primed presidency theory, the concept is more problematic when looked at from another perspective.

### C. Constitutional Structure and “Blocked” Executive Power

As argued above, a defining feature of the American presidency is its constancy or “duration”—the availability of the Chief Executive to respond to national threats and to infuse his distinctive “energy,” decisionmaking, “activity, secrecy, and dispatch” throughout the constitutional order as a whole.<sup>37</sup> To conclude that Presidents-elect automatically become President at the start of their terms, but cannot constitutionally exercise their presidential powers until after they have recited the oath, seems to create the possibility that under the Constitution the exercise of federal executive power can be “blocked.” According to the primed President interpretation, a President who does not recite the oath is still President, and so the executive power cannot automatically devolve to, say, the Vice President. Rather, the executive power might exist in a state of semi-suspension. Does our Constitution really permit such a curious arrangement?

Looked at more carefully, this concern is less worrisome than it may initially seem. If a primed President blocks the exercise of executive power because she or he is unable to recite the oath due to “Death, Resignation, or Inability to discharge the Powers and Duties of the [ ] Office,” the Constitution allows the Vice President (or some other eligible figure) to assume these powers.<sup>38</sup>

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<sup>35</sup> *Id.* (quoting ruling of the State Department).

<sup>36</sup> The actions of several other Presidents-elect provide additional credence to the primed President concept. Facing similar intervals between the start of the term and the scheduled inaugural oath, Presidents Rutherford B. Hayes, Dwight Eisenhower, and Ronald Reagan also took preliminary presidential oaths, presumably to stave off any questions about when they could exercise their presidential powers. See Franke-Ruta, *supra* note 8.

<sup>37</sup> THE FEDERALIST NO. 70, at 422–23 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Cf. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 23–24 (2003) (arguing that one of the “positive” features of the separation of powers is its “tendency to foster special qualities associated with good governance . . . [and] linked with individual departments”) (link).

<sup>38</sup> U.S. CONST. art. II, § 1, cl. 6.

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If, on the other hand, a President were *unwilling* to recite the oath, the situation would presumably be an extreme form of other circumstances in which a President refuses to exercise core executive powers (such as if a President declined to nominate individuals to fill vacancies in his or her Cabinet or the federal judiciary). In general, and with important exceptions,<sup>39</sup> sustained presidential non-performance of executive functions is rare. It would certainly seem unlikely for a President to forswear the oath and with it the execution of the full powers of the office of President. In any event, a President who refused to take the oath would, I presume, be subject to impeachment or the removal provisions of the Twenty-Fifth Amendment.<sup>40</sup>

The greatest concerns about primed Presidents potentially blocking the exercise of executive power would, therefore, seem to involve that subset of circumstances in which a President is delayed, perhaps through no fault of his or her own, from taking the oath. Imagine what would happen if a terrorist attack disrupted the inauguration festivities prior to a primed President's recitation of the oath. Americans might be left with great, and possibly dangerous, uncertainty about the status of our Chief Executive and the powers of the office.

The potential for confusion under such circumstances is considerable and represents a specific problem within the more general set of puzzles posed by our desire to maintain smooth presidential succession and the continuity of executive leadership during a crisis.<sup>41</sup> But it is not clear that this problem can be traced strictly to the primed presidency perspective, or that alternate views of the oath-term relationship would entirely address the difficulty.

Consider, for example, the approach that assumes the oath is a bright-line prerequisite for turning a President-elect into a President. Under this view, a President-elect who fails to take the oath (or, presumably, takes an invalid oath) before his or her term begins does not "qualify" for the office of President, prompting the Vice President (or the other figures identified under federal succession law) to assume the presidency under the terms of the Twentieth Amendment.<sup>42</sup> But even though this interpretation would unblock presidential power, it would also offer the following strange conclusion: it would render the presidential oath so important that a President-elect who failed to take it would be automatically replaced by the constitutionally (or statutorily) designated successor. The presidential successor,

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<sup>39</sup> See PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002) (detailing strategies Presidents use to resist enforcing federal law and policies).

<sup>40</sup> See Scott E. Gant, *Presidential Inability and the Twenty-Fifth Amendment's Unexplored Removal Provisions*, 1999 L. REV. M.S.U.-D.C.L. 791 (1999).

<sup>41</sup> *Cf.*, e.g., CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF CONGRESS (2003), available at [http://www.aei.org/docLib/20030605\\_FirstReport.pdf](http://www.aei.org/docLib/20030605_FirstReport.pdf) (providing recommendations for the continuity of congressional leadership in emergency situations) (link).

<sup>42</sup> See U.S. CONST. amend. XX, § 3 (link).

however, will, most likely, only have taken the (non-presidential) oath set out under the terms of Article VI of the Constitution and federal law.<sup>43</sup> Such a result would seem particularly perverse given that the (bypassed) President-elect who failed to take the presidential oath is nevertheless likely to have taken the very same (non-presidential) oath recited by the Vice President or the other designated successor.<sup>44</sup>

Alternatively, we might try to unblock presidential power by resorting to a view that holds the presidential oath to be essentially nonbinding as a legal matter. An attack on Inauguration Day that disrupted a President-elect's ability to recite the oath would not matter, because he or she would automatically assume the full powers of the office at noon on January 20. But again, this approach seems to ignore both the unqualified constitutional language regarding the presidential oath as well as the considerable significance oath-taking had to those who designed our constitutional order.

So what would happen if an attack or other crisis prevented a President-elect from reciting the oath under the primed President view? During such an exigency, legal chaos would more likely be sown by uncertainty over the identity of the President, as opposed to misgivings about whether he or she has correctly stated the oath. As a practical matter, then, even the problems posed by a crisis that disrupts the normal oath process can be seen as an argument for the primed President model; at a minimum, this understanding of the relationship between the oath and presidential power makes clear that a President-elect automatically becomes President at the start of his or her term. Ordinarily, we ask individuals to recite the presidential oath before executing the powers of the office of the President. If fulfilling that obligation is temporarily impossible or impractical due to an emergency, however, we might presume that a President's commitment to sustained executive leadership and preservation of the nation would trump our concerns about constitutional literalism.<sup>45</sup>

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<sup>43</sup> 5 U.S.C. § 3331 (2006) (setting out the oath for any "individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services") (link).

<sup>44</sup> Contemporary Presidents invariably have had a record of prior public service that included at least one position covered by the oath provision in Article VI of the Constitution (requiring an oath of all "Senators and Representatives . . . and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several states") (link). President Obama is the most recent example, having been a U.S. Senator and a member of the Illinois state legislature before becoming President. Although there is no constitutional requirement that a President have previously served in a position requiring a constitutional oath, it is reasonable to expect that many future Presidents will have such a background and therefore will have taken an Article VI oath prior to taking a presidential oath.

<sup>45</sup> This position is arguably implicit in the Constitution's Article II vesting of the "executive power . . . in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1 (link). See generally Robert Scigliano, *The President's "Prerogative Power,"* in *INVENTING THE AMERICAN PRESIDENCY* 236 (Thomas E. Cronin ed., 1989) (discussing the argument for the "Lockean prerogative" and the limits of such a prerogative in the American context), and JOHN E. FINN, *CONSTITUTIONS IN CRISIS* (1991) (delineating a theory of constitutional emergency powers). One might also note that there is no obvious

Therefore, in light of the arguments derived from the Constitution's text and purposes, as well as a review of our political history, we might reasonably conclude that while the start of the presidential term does indeed bring in a new President, such a person is (ordinarily) unable to execute the powers of the office before reciting the oath. Accordingly, President-elect Obama may have been a primed President from noon on January 20 until whenever he properly stated the oath—either a few minutes past noon or, if the initial oath was flawed, until the evening of January 21 when he took the oath, without any problems, a second time.

To the extent that this primed President perspective on the oath prevails, we can conclude that the oath should be performed after the start of a President's term (that is, under the terms of the Twentieth Amendment, at noon or later on January 20).<sup>46</sup> One potential advantage of this approach is that it gives some clarification to the question of how long “[b]efore” executing the presidential office a person can recite the oath. If the Constitution permits Presidents-elect to take the oath, they might, logically, be able to do so months before assuming the presidency (during some interval between becoming President-elect and the start of their presidential term). At a minimum, this would seem to be a somewhat curious result given our traditional efforts to “time” the oath to take place at the start of the new presidential term. Reading the Constitution as requiring a *President* to recite the oath reinforces what appears to be our longstanding historical sense that the oath should be rendered at the time when the President assumes his or her powers. Still, clarifying when the presidential oath may be taken does not shed much light on what, exactly, the President must say during the oath's affirmation. It is to this question that this Essay now turns.

## II. OATHS AND THE IMPORTANCE OF WORDS

Even though it is, admittedly, a pretext for a broader exploration of constitutional issues, this Essay is animated by a core inquiry: does the imperfect presidential oath of January 20, 2009 have an enduring and significant impact on the policies or legal authority of the Obama administration? If the preceding analysis is correct, a strong case can be made that Mr. Obama became President at noon on January 20, but did not have the full legal capacity to exercise the powers of his office until after he recited the oath. The pivotal question, then, is whether Obama's deviation from the precise language<sup>47</sup> of the presidential oath was sufficient to render his oath invalid.

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constitutional prohibition against a President taking an “emergency” oath in private, in front of whatever witnesses are available.

<sup>46</sup> See *infra* Part IV.B (recommending a change in existing inauguration policy so that future Presidents would take the presidential oath after noon on January 20). Rutherford B. Hayes took the oath before his term began but took the oath a second time afterward, perhaps reflecting misgivings about the validity of the first recitation. See Franke-Ruta, *supra* note 8.

<sup>47</sup> A different question relates to the precise timing of the oath. This Essay addresses that issue by arguing that an oath must be rendered by a President. See *infra* Part IV.B.

If so, serious questions about Obama's (mis)use of executive power between January 20 at noon, and his retaking of the oath on January 21, may arise.

We might begin by observing that the semantic meaning conveyed by an oath surely matters. If a President announced during an inauguration that he or she would "denigrate" the Office of President or "faithlessly" execute its powers, we would likely conclude that the oath was not properly rendered.<sup>48</sup> Obama's verbal miscues, including his misplacement of the word "faithfully," did not obviously amount to this sort of substantive defect; they did not alter the meaning of the oath.

Nevertheless, we need to consider whether the Constitution's presidential oath clause should be treated as a rigid script or whether it can be upheld through variations that affirm its basic purpose. The answer to this query turns on how we understand the oath and the method or mode of constitutional interpretation we adopt.

Textual and historical analyses seem to point us in different directions when considering how literally we should construe the oath provision. A textualist approach might lead to the conclusion that the President must repeat the presidential oath verbatim. After all, the full text of the oath is set forth with precision in Article II. This contrasts with the somewhat unspecified command of the Constitution's Article VI, which only requires that members of Congress 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."<sup>49</sup> The absence of specific constitutional oaths for these non-presidential officials seems to imply that, while they must pledge some general allegiance to the Constitution, the particulars of the *presidential* oath are the most important.<sup>50</sup>

A review of the relevant constitutional history paints a more ambiguous picture of how we should interpret the oath's language in Article II. President Herbert Hoover's oath deviated from the precise constitutional

<sup>48</sup> Cf. Dorf, *supra* note 2 (discussing hypothetical invalid recitations of the presidential oath).

<sup>49</sup> U.S. CONST. art. VI, cl. 3 (link).

<sup>50</sup> See, e.g., Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1314 (2000) (observing that "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") (link). In addition, one might note that a widely accepted doctrine of constitutional interpretation insists upon greater interpretive literalism where textual provisions are relatively clear. See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down a statutory "line item veto" on the grounds that the power deviated from the explicit constitutional requirements regarding bill passage) (link); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 790 (1995) (holding that the explicit constitutional language regarding the "qualifications" for members of Congress is "fixed and exclusive") (link); *INS v. Chadha*, 462 U.S. 919, 956 (1983) (invalidating a one-house "legislative veto" on the grounds that such a provision "is not authorized by the constitutional design of the powers of the Legislative Branch") (link). The reasoning in these cases might incline one to accept the importance of reading the presidential oath verbatim.

language by pledging to “maintain” rather than “protect” the Constitution, and President Lyndon Johnson spoke the word “presidency” rather than “President” in his 1965 presidential oath.<sup>51</sup> There does not appear to be any historical evidence suggesting that these mistakes brought their oaths into question at the time they were rendered or at any time thereafter.

Moreover, for several decades, the prevailing method of oath administration had the oath administrator embed the oath in a question to which the President would simply say, “I do” or “I swear.” One consequence of this affirmation or approval mode is that the oath is not stated verbatim, since the administering official changes the pronoun “I” to “you” when reciting the oath. More recently, all of our Presidents have strayed from the Constitution’s language in adding their own names between the words “I” and “do solemnly swear” at the outset of their oath-taking.<sup>52</sup> Prior to the Obama-Roberts gaffe, however, it seems no President has retaken his oath on account of any deviation from the text.<sup>53</sup>

The somewhat variable content of and practices surrounding prior recitations of the oath are, to some extent, offset by the frequency with which presidents have invoked the special significance of the presidential oath—that it is a requirement laid out by the Constitution and a tether between current and past Commanders in Chief.<sup>54</sup> Arguably, this emphasis underscores the importance of reiterating the presidential oath as precisely as possible. During his inaugural address in 1989, for example, George H.W. Bush

<sup>51</sup> See Posting of Tony Mauro, *No Problems with Today’s Oath at the Supreme Court*, to The BLT: The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2009/01/no-problems-with-todays-oath-at-the-supreme-court.html> (Jan. 21, 2009, 14:09 EST) (link); Posting of Jan Crawford Greenburg, *Chief Justice Fumbles*, to Legalities Blog of ABC News, <http://blogs.abcnews.com/legalities/2009/01/chief-justice-f.html> (Jan. 20, 2009, 12:45 EST) (discussing how Taft “flubbed the oath” when administering it to Hoover in 1929) (link); Inauguration of Lyndon Johnson (Jan. 20, 1965), (transcript on file with the Miller Center for Public Affairs), available at <http://millercenter.org/scripps/archive/speeches/detail/4031> (link).

<sup>52</sup> The inclusion of a President’s name could perhaps be construed as being different from other oath “deviations,” insofar as this alteration of the constitutionally provided oath actually clarifies a President’s intent to uphold the oath. Likewise, the nearly unbroken tradition of adding “so help me God” at the end of the oath seems to differ in character from other oath variations, because the addition does not change the wording of the constitutional oath, but simply appends it.

<sup>53</sup> John Tyler, who became president after the death of William Henry Harrison, apparently believed that he was already qualified to serve as President by virtue of his vice presidential oath. Nevertheless, on April 6, 1841, two days after the death of President Harrison, Tyler took the presidential oath word for word “for greater caution,” an approach adopted by subsequent Vice Presidents who achieved the presidency through succession rather than election. Blomquist, *supra* note 20, at 7 n.23 (quoting CONGRESSIONAL QUARTERLY’S GUIDE TO THE PRESIDENCY 263 (Michael Nelson ed., 1989)) (internal quotation marks omitted). Both Calvin Coolidge and Chester Arthur retook their oaths out of apparent misgivings about the status of the person who administered them. See William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: “The Emperor Has No Clones,”* 75 GEO. L.J. 1389, 1401 n.47 (1987).

<sup>54</sup> See Blomquist, *supra* note 20, at 7–33 (surveying presidential understandings of the oath from Washington to George W. Bush).

reflected that he had “just repeated word for word the oath taken by George Washington 200 years ago . . . .”<sup>55</sup>

For what it is worth,<sup>56</sup> the founding generation regarded political oaths seriously.<sup>57</sup> Fueled by their contemporary anxieties about executive power and its potential for abuse, the Framers seem to have intended the presidential oath to be at least semi-contractual and restrictive of the actions of the President.<sup>58</sup> The most extensive discussion of the presidential oath clause at the time of the Constitution’s debate, drafting, and ratification occurred at the Philadelphia convention. However, according to James Madison’s notes, the pertinent convention discussions focused on differing conceptions of the nature and sources of presidential power (such as whether the President should be selected by Congress) and whether the content of the oath needed to be adjusted accordingly.<sup>59</sup> Apparently, the convention debates did not consider whether the oath’s specific language needed to be pledged or affirmed word for word.<sup>60</sup>

There is little case law directly relevant to the issues posed in this Essay.<sup>61</sup> Although a handful of state and federal cases have referenced the presidential oath, most of their discussions focus on the ways in which the presidential oath informs us about other mandated oaths,<sup>62</sup> or what, if anything, the presidential oath implies about the President’s powers (including

<sup>55</sup> *Id.* at 33 (quoting JOINT CONG. COMM. ON INAUGURATION CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101-10, at 345 (1st Sess. 1989)) (internal quotation marks omitted).

<sup>56</sup> *Cf.* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 60–75 (2002) (offering criticisms of “framer’s intent” as a mode of constitutional interpretation).

<sup>57</sup> *See, e.g.*, LEVINSON, *supra* note 19, at 91–94 (discussing the significance of oaths and the perspectives of the Constitution’s authors and the founding generation more generally).

<sup>58</sup> *See* 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, 900 (2001) (attributing to Chief Justice Warren Burger the “observation that the framers placed great importance on [the] exact choice of language” of the presidential oath). Setting aside historical considerations, analysis of the presidential oath clause in the context of constitutional structure is not especially revealing. We may note that the presidential oath is found in Article II, § 1, which deals generally with limits on the presidency, as opposed to Article II, § 2, which sets out executive powers. Matthew Pauley makes a similar point in noting that the President’s “constitutionally prescribed oath is indeed prescriptive: properly understood, it tells our Presidents what they are obliged to do.” PAULEY, *supra* note 14, at 19.

<sup>59</sup> *See* Blomquist, *supra* note 20, at 2–6.

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 35–37 (reviewing cases related to the oath).

<sup>62</sup> *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 633–34 (1992) (Scalia, J., dissenting) (discussing Presidents’ use of the Bible in presidential oaths) (link); *U.S. v. Macintosh*, 283 U.S. 605, 630 (1931) (Hughes, C. J., dissenting) (comparing the presidential oath to other oaths) (link).

his or her ability to make independent judgments about constitutional interpretation).<sup>63</sup>

At this point, we can summarize this Essay's prior analysis with the following observations: a plausible case can be made for (a) requiring the oath to be recited by a President and not by a President-elect; (b) denying the President the full powers of the office until the oath is recited—potentially “blocking” the exercise of the federal executive power; and (c) requiring the oath to be repeated or affirmed verbatim by those who wish to exercise the powers of the Chief Executive.<sup>64</sup>

Before considering the implications of these conclusions—both with respect to the Obama administration specifically and to our understanding of inaugurations and oaths more generally—it is worth considering a final challenge to their validity by asking the following question: does the analysis of this Essay fail an “absurdity” test?

### III. THE ABSURDITY TEST

Can we really countenance the primed presidency view and presidential oath literalism if it leads to seemingly “stupid” results (such as the possibility of “blocked” executive power)? Alternatively, might we not dismiss as “frivolous” a set of arguments that leaves open the possibility that even trivial flaws in the oath process could actually jeopardize the power of a duly elected President?<sup>65</sup>

We certainly reject literal constitutional interpretation in other contexts where it leads to perverse outcomes or conclusions. Despite the unqualified language of the First Amendment, for example, we do not read it as barring Congress from making *any* “law . . . abridging the freedom of speech.”<sup>66</sup>

<sup>63</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 681–82 (1952) (Vinson, C.J., dissenting) (referencing the presidential oath in an argument for broadly interpreting the President's constitutional powers) (link). In addition to the absence of even generally pertinent case law, one may note that it is an open and serious question whether evaluation of the status of an imperfect presidential oath is a justiciable question. Given the Court's decision to abstain from the workings of the constitutional amendment process, on the grounds that such questions about the internal workings of government are political questions best left for resolution by a “political department,” it seems at least plausible that it would find a challenge to how the President attempted to take the oath and assume the powers of the office of President to also be a question not subject to judicial review. See *Coleman v. Miller*, 307 U.S. 433 (1939) (holding that Congress, not the Court, should define critical aspects of the constitutional amendment process, including whether too much time has lapsed between an amendment's proposal and its ratification by states) (link).

<sup>64</sup> While hardly decisive, as explained above, the constitutional text and some aspects of our historical practice lend support to constitutional literalism during recitation of the oath.

<sup>65</sup> See generally Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995) (discussing seemingly “stupid outcomes” coming out of dutiful textual interpretations of the Constitution). Cf. Dorf, *supra* note 2 (arguing that many semantic deviations do not “count[] as a failure to take the oath” because they still provide “substantial compliance with the terms of the oath”).

<sup>66</sup> U.S. CONST. amend. I (link). See, e.g., *U.S. v. Hicks*, 980 F.2d 963 (5th Cir. 1992) (upholding a statute regulating airline passenger speech) (link).

But, of course, there is another tradition in constitutional interpretation that insists that one of the potentially painful consequences of being committed to the rule of law is that “sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.”<sup>67</sup> Jordan Steiker, Sanford Levinson, and Jack Balkin put it more acidly in noting that “it is not at all clear that stupid outcomes are necessarily precluded by the standard norms of constitutional interpretation.”<sup>68</sup>

Accordingly, perhaps the “absurdity” question should be recast as asking whether we can “develop criteria for assessing substantial compliance with the terms of the oath,” criteria that would allow us to recognize, in a consistent and sensible manner, technically “deviant” oaths that nevertheless uphold the underlying purposes of the oath clause.<sup>69</sup> The advantage of such an approach would be obvious—it would overcome the necessity of perfect oath recitation as a prerequisite for exercising executive power, vindicating common sense and the practices of many past presidents.

The disadvantage of a “substantial compliance” norm is its imprecision; it invites controversy over how it will be defined and applied. Moreover, as previously noted, interpreting the oath clause as requiring only “substantial compliance” is a view in tension with both the precise constitutional language and some elements of constitutional history that support a more rigid approach. Although we might ultimately choose to reject oath literalism, to insist otherwise does not seem to be an obviously frivolous or stupid reading of the Constitution’s text.<sup>70</sup>

In light of these observations, the burden would appear to be on a “substantial compliance” advocate to identify relatively clear standards to distinguish between valid and invalid oath variations. Presumably, just as the contemporary reading of the First Amendment’s speech protection substitutes a balancing test for a literal, restrictive reading, we might be able to assess the validity of a President’s recitation by weighing several factors, including: (a) the proximity of the words spoken to those set out in the Constitution; (b) whether the underlying purposes of the oath are met or supported by the actual words spoken; and, more controversially perhaps, (c) the subjective intentions of the uttering President in deviating from the oath’s text.

Fully identifying and applying these criteria is no small undertaking—it is not even clear who would articulate, develop, defend, and judge these

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<sup>67</sup> *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) (link).

<sup>68</sup> Steiker et al., *supra* note 65, at 246. We do not seem to have obviously clear or consistent norms governing when we can use an “absurdity test” to nullify the results of plausible constitutional interpretation.

<sup>69</sup> Dorf, *supra* note 2.

<sup>70</sup> Michael Dorf goes so far as to say that it would be difficult for someone committed to textualism to justify anything but a rigid, literalist approach to the presidential oath. *Id.*

standards. Would we lay such responsibilities in the hands of the judiciary<sup>71</sup> or Congress (potentially posing threats to the separation of powers), the executive branch (raising conflict-of-interest problems, particularly if a President evaluated his or her own “imperfect” oath against substantial compliance standards), or in several of these institutions? Lack of consensus on these issues would likely generate sustained attention and continued debate about the validity of each imperfect presidential oath, potentially distracting the President and even eroding some of his or her political legitimacy. The distraction and national disunity would likely be even worse, however, if these issues were litigated before a judicial body. Even if we assume such questions would be deemed non-justiciable, the mere filing of a lawsuit challenging the presidential oath-taking would surely be politically disruptive.<sup>72</sup>

Because of the serious concerns accompanying the formulation of a “substantial compliance” test, a prudent President might well retreat from identifying compliance criteria, embracing instead a rigid, literal reading of the presidential oath clause. The decision of Mr. Obama to retake the oath under the watchful eyes of members of the press corps could well be a prominent example of this conclusion.

#### IV. CONCLUSION: OATH PROBLEMS & SOLUTIONS

This Essay has advanced the following basic points about the presidential oath, the start of the new presidential term, and the “primed presidency” thesis:

1. At the start of a new presidential term (January 20 at noon), a President-elect who has been validly selected and meets the Constitution’s other qualifications becomes President.
2. Such an individual cannot, however, exercise the full powers of the office of President until he or she has completed the presidential oath.

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<sup>71</sup> A court that attempted to devise and apply “substantial compliance” standards for the presidential oath would expose itself to the charge that it was engaging a political question best resolved by another branch. Moreover, judicial examination of presidential oath compliance might sanction similar review of purported deviations and problems with non-presidential oaths rendered by thousands of other federal and state officials, opening a potential floodgate of controversial, divisive litigation.

<sup>72</sup> This Essay does not explore the considerable challenges one would face in attempting to bring a legal challenge against the President or some other executive branch official based on a flawed presidential oath. Presidents generally enjoy considerable immunity for their official actions. Moreover, as noted, it is easy to imagine that courts would not be interested in passing judgment on a dispute over an oath and would cite either non-justiciability or the political question doctrine to avoid reviewing the matter.

3. The oath must be taken by a President as opposed to a President-elect; it is essentially unavoidable, therefore, that there will be some period, however short, between when a person becomes the (primed) President and when he or she can fully execute the office.
4. While hardly conclusive, a plausible legal and pragmatic case can be made that the presidential oath should be repeated or affirmed verbatim.

Having advanced these basic claims in the preceding analysis, we can now move on to a more focused and applied consideration of their practical consequences for the current and future administrations.

#### A. *Problems, Solutions, and the Initial Obama Oath*

According to my thesis, although Barack Obama became President of the United States at noon on January 20, 2009, it is not at all obvious he was authorized to exercise the powers of his office until roughly 7:35 p.m. on January 21 (when he repeated the presidential oath without mishap). During the intervening period, President Obama's most significant official acts included the issuance of two executive orders, one bearing on access to presidential records and the other on ethics in the executive branch.<sup>73</sup> This Essay suggests that the legal standing of these measures is in some doubt, notwithstanding the insistence of Obama's Press Secretary that the Office of Legal Counsel "continues to believe that the President was sworn in appropriately and effectively."<sup>74</sup>

One response to this conclusion is simply to maintain that any legal challenges to the first two executive orders based upon questions about the status of the initial Obama oath would be dismissed by the courts on the grounds that the party or party bringing suit lacked standing, or by invoking various non-justiciability claims. But this outcome would hardly eliminate potential controversy about the status of the executive orders. Even if the Obama administration contended that the two orders were valid, Congress might disagree, and, in any event, their continued effectiveness would likely be undermined if individuals challenged their status, even without any hope of judicial disposition.

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<sup>73</sup> Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 21, 2009) (easing access to executive branch records by revoking a more restrictive Bush administration executive order) (link); Exec. Order No. 13,490, 74 Fed. Reg. 4,673 (Jan. 21, 2009) (preventing administration officials who were previously lobbyists from participating in any matters related to their prior lobbying activities for two years after being appointed, as well as providing other ethics guidelines) (link).

<sup>74</sup> See Press Release, The White House, *supra* note 6.

Alternatively, Michael Dorf has argued that if these initial executive orders were ever questioned as a legal matter, and someone were “deemed to have legal standing to argue that [they were] void, President Obama could simply sign them again.”<sup>75</sup> But this response is not wholly satisfactory. If, for example, a former Obama administration employee attempted to join a lobbying firm under circumstances that violated the (invalid) Obama ethics order, re-signing the executive order would have no bearing on the legality or propriety of the employee’s prior conduct.<sup>76</sup> Presumably, employees working under the invalid order would only be bound by whatever administrative rules (and federal laws) were validly in place during their employment. As a consequence, President Obama should reissue these two orders as soon as possible, to satisfy, at a minimum, the same “abundance of caution” standards that originally animated his decision to recite the presidential oath for a second time.<sup>77</sup>

### *B. Presidential Oaths Going Forward*

Setting aside the inauguration of 2009, this Essay has several implications for the presidential oath process going forward. In most regards, my analysis does not suggest the need for significant constitutional or procedural changes. With few exceptions, the presidential oath has been recited very close to noon on the first day of the new President’s term, leaving the nation with a primed (though not fully operational) President for a brief period that is usually measured in minutes.

One might note, however, that recent inaugurations have scheduled the oath to occur before noon (Obama’s oath, for example, was originally scheduled to be administered at 11:56 a.m.). For first-time Presidents, this is a mistake. Although delays are typically incipient to inaugural ceremonies, this Essay’s claim that oaths must be taken by Presidents, rather than Presidents-elect, suggests that the oath process should only take place after the start of the President’s new term (noon or later). The official inaugural schedule should, therefore, be adjusted accordingly.<sup>78</sup>

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<sup>75</sup> Dorf, *supra* note 2.

<sup>76</sup> Indeed, the Constitution’s prohibition against bills of attainder and ex post facto laws would seem to provide some protection under these circumstances. See U.S. CONST. art. I, § 9, cl. 3 (link).

<sup>77</sup> One might imagine that the Obama administration could explore whether a court would be willing to issue a *nunc pro tunc* order, which would authorize the executive order retroactively. But these orders are generally issued based on an error or delay caused by the court itself, which is not at issue with respect to Obama and his initial executive orders.

<sup>78</sup> It is not entirely clear what implications this argument has for a President who wishes to exercise presidential power in more than one presidential term—a person who has already taken a valid presidential oath in one term who is then elected to a second term (or otherwise becomes or acts as President in a second term). This person has already taken the oath “[b]efore . . . [entering] on the Execution of his Office” for his or her first term. Must this President recite the oath again before the second term in order to exercise presidential powers? Does it matter if the two terms are consecutive? While interesting, these questions move us beyond the 2009 oath and are, therefore, beyond the primary focus of this Essay.

Furthermore, in order to help alleviate concerns about oath errors or the potential that delays in taking the oath could lead to interruptions in the President's full assumption of power, a President could take the oath privately, at noon or later, before the formal inauguration ceremony—at which point he or she could take it again.<sup>79</sup>

Finally, one may note that although different proverbial reasonable minds might reach varied conclusions on the topic, constitutional prudence suggests that Presidents should endeavor to recite an oath that adheres precisely to the text laid out in Article II of the Constitution. Such a “conservative” approach would presumably satisfy the most restrictive readings of the oath clause, while not foreclosing other interpretations.

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<sup>79</sup> As noted, having a private oath immediately after noon and prior to a more public oath would also have the additional advantage of “unblocking” the executive power in the event of a crisis, ensuring not only that the identity of the President is continuous but also that executive power could be wielded without interruption or confusion. This Essay also points to the wisdom of continuing our current practice of having Vice Presidents-elect recite their own oath before Presidents recite their oaths. If a primed President is incapacitated or otherwise unable to exercise her duties, the Vice President is still affected by the existing constitutional (and statutory) law regarding succession. See U.S. CONST. art. II, § 1, cl. 6 (link).