

A dark, high-contrast photograph of Barack Obama and Mitt Romney in profile, facing each other. The background is dark with faint, golden, radiating lines behind the title.

THE OATH

THE
OBAMA
WHITE HOUSE
AND THE
SUPREME COURT

Jeffrey Toobin

Bestselling author of **THE NINE**

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THE
OATH

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To McIntosh, of course

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PROLOGUE

THE OATHS

So let me ask you this,” Greg Craig said, “does anyone there think he’s *not* the president?”

It was about 10:30 on the morning of January 21, 2009. Craig was settling into his first day of work as counsel to the president when he received an unexpected phone call.

David Barron was on the line. He, too, had just reported for duty, as the second-in-command in the Office of Legal Counsel, which served as the in-house legal team for the attorney general-designate, Eric Holder.

In the excitement and chaos of the previous day—when Barack Obama was sworn in as the forty-fourth president of the United States—neither Craig nor Barron had paid much attention to the peculiar way Chief Justice John G. Roberts Jr. had administered the oath of office. Early the next morning, Barron had read several newspaper articles about the botched oath and decided to look into the issue. He was concerned enough about what he found to place the call to Craig.

So was Obama really the president?

Barron’s answer was, well, complicated.

The Constitution for the most part speaks in majestic generalities and employs the first person—“I” and “my”—in only a single provision. Article II, Section 1, states: “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.' "

Article I of the Constitution, which defines the powers of Congress, is more than twice as long as Article II, about the presidency. This difference reflected the framers' belief that the legislative branch of government would be the most powerful. (Article III, which creates the judicial branch, is just 376 words, half again as short as Article II.) Still, the inclusion of a formal oath in the constitutional text reflected the importance of the presidency—and, more to the point, the president. It is the only oath spelled out in the Constitution. In contrast, the vice presidential oath was established by act of Congress, and the current version has been in use only since 1884.

The model for the framers was England's Coronation Oath, which had been promulgated in 1689, but the differences between the two oaths were as significant as the similarities. The King had to swear before a bishop or archbishop in the Church of England; there was no such requirement in the United States, and George Washington began the tradition of judicial administration of the oath in 1789. New York chancellor Robert Livingston conducted the first inauguration. (At that point, of course, Washington had not had the chance to nominate anyone to the Supreme Court, and it was four years later that a justice, William Cushing, swore in Washington for his second term.) The ecumenical nature of the presidential oath is reflected also in the option of "swear (or affirm)." Some Christian sects, notably the Quakers, did not believe in the use of the word "swearing," so the Constitution made sure they were not excluded. (Only Franklin Pierce, in 1853, chose to affirm his presidential oath.)

Many of the traditions associated with the inauguration began with Washington, as the first president knew they would. "As the first of everything in *our situation* will serve to establish a precedent, it is devoutly wished on my part that these precedents may be fixed on true principles," Washington wrote to James Madison shortly after his inauguration. On the occasion, which took place April 30, 1789, on the steps of Federal Hall, in lower Manhattan, Washington took the oath from a judge, not a cleric; he wore civilian garb, not a military uniform; he placed his hand on a Bible as he recited the words; he gave a brief, inspirational speech immediately after the ceremony; he made sure that any citizen who so desired could attend and view the swearing

in. Washington Irving, who was six years old in 1789 but apparently a spectator at the inauguration, recounted in the 1850s that the new president had concluded the oath by saying, "So help me God." No contemporary account mentioned Washington's use of that phrase, and it remains unclear whether he did. In any event, all modern presidents have chosen to follow the oath with those words.

Like many other aspects of American government, the administration of the presidential oath evolved in a haphazard manner. In 1797, Oliver Ellsworth became the first chief justice to administer the oath (to John Adams), and thus the tradition began of the nation's highest legal officer performing the honors. But sometimes he didn't. (John Tyler and Millard Fillmore were sworn in by lower court judges.) Assassinations led to improvisations. Following the murder of James A. Garfield, in 1881, Chester A. Arthur was sworn in by a judge of the New York Supreme Court; following William McKinley's death, in 1901, Theodore Roosevelt took the oath from a federal district court judge. Most famously, Sarah T. Hughes, a federal district judge in Texas, administered the oath to Lyndon B. Johnson, on Air Force One, on November 22, 1963. Sentiment sometimes played a part, too. Calvin Coolidge took the oath from a lowly notary public—John C. Coolidge, his father. In 1933, Franklin D. Roosevelt recited the full oath without interruption by Chief Justice Charles Evans Hughes.

Notwithstanding the constitutional text, the precise words of the oath varied over time. When Chief Justice William Howard Taft swore in Herbert Hoover in 1929, he said, "preserve, maintain, and defend" the Constitution. The error was largely ignored at the time, but a thirteen-year-old girl who had been listening on the radio wrote to the chief justice about it. Taft responded, and disclosed still another, earlier mistake. "When I was sworn in as President by Chief Justice Fuller, he made a similar slip," Taft wrote to the girl, Helen Terwilliger, "but in those days when there was no radio, it was observed only in the Senate chamber where I took the oath. . . . You are mistaken in your report of what I did say. What I said was 'preserve, maintain and protect.' . . . You may attribute the variation to the defect of an old man's memory." In 1945, Harlan Fiske Stone began the oath with "I, Harry Shipp Truman . . ." Truman, who had a middle initial but no middle name, responded, "I, Harry S Truman . . ." Twenty years later, Lyndon Johnson forgot to raise his right hand until halfway through

the oath, and Chief Justice Earl Warren said “office of the Presidency,” not “President.”

On the morning of January 21, 2009, David Barron had only a brief chance to dip into this peculiar corner of American history. What mattered more to him than these historical curiosities was the law, which was . . . not entirely clear. A professor on leave from Harvard Law School (one of many in the new administration), Barron recognized quickly that there was no single authoritative source to instruct him about the legal significance of the oath. For starters, it wasn't even apparent whether the oath mattered at all. Under the Twentieth Amendment, George W. Bush's term ended at noon on January 20. The electoral college had met and certified Obama as the winner of the election. Thus, Obama may have become president the previous day at noon, even if he never took the oath. But the Constitution also said that “*before* he enter on the execution of his office, he *shall*” take the oath. The Constitution, of course, abounds in such ambiguities.

So, like any other good lawyer, Barron looked for precedents. There was no Supreme Court ruling on the subject, but the Office of Legal Counsel issues formal opinions on a variety of matters, and Barron found one from 1985, regarding presidential succession. The Twenty-fifth Amendment to the Constitution, which was ratified in 1967, lays out what happens when a president dies or becomes incapacitated. The OLC opinion noted that, although the Constitution, “which sets forth the Presidential oath, is not entirely clear on the effect of taking the oath, the weight of history and authority suggests that taking the oath is not a necessary step prior to the assumption of the office of President and is not an independent source of Presidential power. It is, nonetheless, an obligation imposed on the President by the Constitution, and should be one of the first acts performed by the new President.” So taking the oath was recommended but not mandatory—probably.

For Barron and his colleagues at OLC, this was not just an abstract legal problem. There was a political dimension as well. Obama had made commitment to the rule of law a centerpiece of his campaign. How would it look if he skirted the rules on the oath? Perhaps more importantly, what would Obama's political adversaries do? Article II also states that “no Person except a natural born Citizen” is eligible to be president, and a persistent group of critics claimed that Obama was not, in fact, born in Hawaii in 1961. Was it wise to tempt another

potential constitutional challenge to his qualification to serve as president?

Barron, too, saw the issue of the oath in the context of larger developments in constitutional law. Starting in the 1960s, liberals on the Supreme Court and elsewhere developed a theory built around the idea of “unenumerated rights.” Even if a right was not specifically mentioned in the Constitution, the Court could draw on the implications of the explicit provisions of the Constitution, prior decisions, and the broader evolution of American society, to expand the liberties of Americans. Most famously (or notoriously) during this period, the Court recognized a constitutional right to privacy, which became the basis for protecting a woman’s right to choose abortion.

In recent years, though, the doctrine of unenumerated rights had come under ferocious attack by conservatives. On the Supreme Court, Antonin Scalia and Clarence Thomas had led the charge for what became known as “textualism,” which said that if the Constitution did not explicitly create a right, it did not exist. A close cousin to textualism was originalism, which asserted that the words of the Constitution must be interpreted as they were understood by the men who wrote and ratified it. Under either textualism or originalism, there was no such thing as a right to privacy and, of course, no constitutional right to abortion.

As Barron knew, textualism was ascendant, and that might have implications for the presidential oath. There might be judges out there who took a literal—a textual—approach to the oath of office. If Obama had not said the precise words mandated by Article II, perhaps—just perhaps—he was not actually the president. And on that ground, any formal action Obama took might be challenged in court. At a minimum, some federal district judge might be tempted to hold a hearing on the issue. Such a legal proceeding would be a distraction, to say the least. That, certainly, was not how Obama wanted to spend his first days in office.

All in all, Barron told Craig, it might be a good idea for Roberts and Obama to redo the oath and get it right.

Greg Craig listened in amazement as Barron spelled out his concerns. It was at that point that Craig realized that he was missing a key fact. At the moment Obama took the oath the previous day, Craig had been standing by the doorway to the Capitol, awaiting the new president,

who would sign a ceremonial proclamation before heading inside to the luncheon. Craig had been sufficiently distracted that he barely heard the oath or Obama's inaugural address.

So almost twenty-four hours later, Craig had to ask himself: What exactly *did* Obama and Roberts say?

It's that time again!

In September 2008, well before Election Day, Cami Morrison sent that message to Vanessa Yarnall. Morrison was usually a staffer for the Senate sergeant at arms, but she had been detailed to the newly reconstituted Joint Congressional Inaugural Committee. Yarnall was the assistant to Jeffrey Minear, the counselor to the chief justice and his chief aide for all nonjudicial matters. Morrison and Yarnall had worked together on the presidential inauguration of 2005, and they were now starting to plan the events of January 20, 2009.

Yarnall knew that the late Chief Justice William H. Rehnquist had taken a methodical approach to the oath, and she started reassembling the paperwork he had last used. Rehnquist had sworn in five presidents, and he took an extra step to make sure that he and the president would be on the same page. Shortly before the inauguration, Rehnquist sent the White House counsel a card illustrating how he would divide up the words. In 2001, the card read:

PRESIDENT'S OATH

I, GEORGE WALKER BUSH, DO SOLEMNLY SWEAR//

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.//

SO HELP ME GOD.

On December 10, 2008, Yarnall sent Morrison a PDF of Rehnquist's oath card. She removed Bush's name and left a space for Obama's name. In her e-mail, Yarnall asked how Roberts should address the new president: With his middle name? Just middle initial? Just first and last? Yarnall and her boss, Minear, assumed that Morrison would forward the card to representatives of the president-elect. They were wrong. Morrison either never noticed the PDF, lost it, ignored it, or forgot about it. In any case, the oath card never reached anyone on Barack Obama's staff.

On December 15, Senator Dianne Feinstein, the chair of the Congressional Inaugural Committee, formally invited Roberts to administer the oath of office to Obama. The chief justice quickly accepted, and Feinstein's letter prompted him to sit down with Minear and discuss the ceremony for the first time. They went over Rehnquist's oath card with care. They added a comma after the word "ability." They discussed whether "So help you God" was a question or a statement. And since Yarnall's questions to Morrison had gone unanswered, they wondered what name Obama wanted to use. On December 17, Minear e-mailed Greg Craig to introduce himself and ask about Obama's name and "So help me God." Craig wrote back that the president-elect was on vacation, so it might take a few days for an answer.

On December 30, Michael Newdow filed a lawsuit in federal district court in Washington seeking to prevent Roberts from referring to "God" following the oath of office. In 2002, Newdow became famous when he won a ruling in the Ninth Circuit court of appeals that the Pledge of Allegiance in public schools should not include the phrase "under God." (The Supreme Court later overturned that decision on procedural grounds.) The Justice Department lawyers handling Newdow's latest case asked Minear to file an affidavit about how the chief justice would be administering the oath. But Minear had still not heard back from Craig. This time, Minear reached Craig by phone. Craig said that Obama wanted to include his middle name in the oath and that Roberts should say "So help you God" as a question. On January 8, 2009, Minear included Craig's responses in an affidavit in the Newdow lawsuit, which was quickly dismissed by a local federal judge.

Craig's answers allowed Minear to put Roberts's presidential oath card into final form. It now read:

PRESIDENT'S OATH

I, BARACK HUSSEIN OBAMA, DO SOLEMNLY SWEAR//

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. //

SO HELP YOU GOD?

Vanessa Yarnall e-mailed the revised version to Cami Morrison, who again did not pass it along to the president-elect's team. Indeed, in the days leading up to the inauguration, neither Obama himself, Craig, nor anyone else associated with them knew that the card existed.

At this point, with the text in final form, John Roberts set about memorizing the oath.

There never was a student like John Roberts at the La Lumiere School in LaPorte, Indiana, a quiet town near Lake Michigan, on the outer edges of the gravitational pull of Chicago. It was a Catholic school, but it was independent of any order or diocese; the founders, all laymen, built the institution around an ideal of academic excellence.

Roberts was not just the valedictorian of the class of 1973. He served as captain of the football team, a varsity wrestler, member of both the student council and the drama club. (He played Peppermint Patty in *You're a Good Man, Charlie Brown*; the school was all boys in Roberts's day.) He continued taking Latin, as a tutorial, after the school dropped the language as a requirement. La Lumiere had a traditional curriculum, but there was one slight novelty. Every year, the students were expected to participate in what was known as a declamation contest, where they would write and memorize their own speeches. In this Roberts excelled, too.

Over time, Roberts became famous for his superb memory. As a law-

yer, both in the solicitor general's office and in private practice, he was known as perhaps the finest Supreme Court advocate of his generation. But it was not just his arguments that dazzled. Roberts's personality inspired confidence, especially because when he stepped to the podium to argue before the justices, Roberts brought nothing with him—no pad, no notes. He carried the facts and the law of each case in his head.

Roberts relied on his memory—and, as always, hard work—in preparing to administer the oath. He rehearsed many times. He recited the words so often at his home in suburban Maryland that he irritated his wife. "At this point the dog thinks it's the president," Jane Roberts told her husband.

On the late afternoon of January 13, 2009, Roberts went to the west front of the Capitol for a walk-through of the inauguration. A handful of congressional staffers showed him his assigned seat and told him when and where he would stand. Toward the end of the meeting, one of the aides offered a card to Roberts with the text of the oath. Did he want to rehearse?

"That's OK," Roberts said, declining the text, "I know the oath."

A week later, on the morning of the inauguration, the justices gathered at the Supreme Court for a small reception, before heading across First Street as a group to the Capitol. The chief justice is a largely invisible figure to most Americans, except for this single appearance every four years. Roberts seemed uncharacteristically subdued as he waited.

A throng of more than a million people filled the National Mall all the way to the Washington Monument. At the stroke of noon, Dianne Feinstein introduced Roberts and asked the audience to stand. (Feinstein called Roberts by his correct title, chief justice of the United States; four years earlier, Trent Lott, in the same role, managed two breaches of protocol in less than a minute. He incorrectly called Rehnquist the chief justice of the Supreme Court and then summoned him to the podium as "Justice Rehnquist." Rehnquist was a stickler for being called "Chief Justice.")

"That's for you," Obama whispered to his wife, Michelle, as she reached for the "Lincoln Bible," which had last been used when the sixteenth president placed his hand upon it in 1861.

"Are you prepared to take the oath, Senator?" Roberts said.

"I am," said Obama.

Roberts raised his right hand at a crisp right angle. Unlike Rehnquist, Roberts did not carry a copy of the oath in his left hand. The chief justice began, "I, Barack Hussein Obama, do so—"

Obama jumped in and began to recite, "I, Barack . . ."

Roberts and Obama clearly had different ideas about whether "do solemnly swear" would be included. Roberts's oath card included "do solemnly swear" in the first line—but Obama had never seen this text.

Recognizing that he had interrupted Roberts, Obama paused to let Roberts continue. Obama then recited correctly, "I, Barack Hussein Obama, do solemnly swear."

But Roberts—most uncharacteristically—became flustered when he thought that Obama had jumped the gun and interrupted him, and he said next, "That I will execute the office of President to the United States faithfully." "To" the United States? "Faithfully" after United States? Obama gave a half smile. He could tell it was wrong.

"That I will execute . . ." Obama said, but then he saw that Roberts was again trying to speak, endeavoring to salvage the situation on the fly.

"The off—" Roberts stumbled again. "Faithfully the office of President of the United States." This time he had left out "execute."

Obama was confused. He said, "the office of President of the United States faithfully"—incorrectly putting "faithfully" at the end of the sentence. The two men finally put that troublesome phrase behind them.

"And will to the best of my ability," Roberts said.

"And will to the best of my ability," Obama repeated.

"Preserve, protect and defend the Constitution of the United States," Roberts said quickly, trying to finish without further problems.

Obama repeated.

"So help you God?"

"So help me God."

"Congratulations, Mr. President," Roberts said, extending his hand. "All the best wishes."

Now what? Craig wondered.

Later on January 21—in a few minutes, in fact—Obama was to sign