
Coates' Canons Blog: One Oath or Two? What is THE Oath of Office?

By Trey Allen

Article: <https://canons.sog.unc.edu/one-oath-or-two-what-is-the-oath-of-office/>

This entry was posted on January 27, 2017 and is filed under Appointments & Oaths, Board Structure & Procedures, General Local Government (Miscellaneous)

Article VI, Section 7 of the North Carolina Constitution instructs anyone elected or appointed to public office in this state to take and subscribe – that is, swear (or affirm) and sign – the oath prescribed therein before entering upon the duties of the office. A number of statutes echo this requirement. For example, G.S. 153A-26 and 160A-61 collectively direct all county and city officeholders to take and subscribe the constitutional oath. The oath is expressly required by several statutes pertaining to designated local government offices, including those of mayor and councilmember (G.S. 160A-68(b)), police chief and police officer (160A-284), tax assessor (105-295), and tax collector (105-349(g)).

General Statute 11-7 sets out another oath that, according to the statute, must be taken and subscribed by every person elected or appointed to public office in the state. Despite obvious similarities, the wording of the constitutional and statutory oaths is not identical. This blog post considers whether it is really necessary for incoming officeholders to swear and sign both oaths. It also offers a combined version of the two oaths that incoming officeholders could use.

Why It Matters

The question of which oath(s) an incoming officeholder must take is not purely academic. It is a misdemeanor to enter upon the duties of a public office without first taking, subscribing, and filing “the oath of office prescribed.” G.S. 14-229. (The oath of a city or county officeholder has to be filed with the clerk to the governing board. G.S. 153A-26; 160A-61.) Moreover, an officeholder who fails to take “the oath appointed” for anyone who holds office in this state may suffer a \$500 forfeiture and ejection from office. G.S. 128-5. (For an explanation of what constitutes a “public office,” see the blog posts by my retired colleague Fleming Bell available here and here.) On the other hand, the failure to take one of the oaths does not create a basis on which to challenge the validity of the officeholder’s subsequent actions. See David M. Lawrence, *The Law of De Facto Officers*, Local Government Law Bulletin No. 124, pp. 2, 5-6 (Oct. 2010) (noting that, under the de facto officer doctrine, the actions of an unsworn officeholder are generally just as valid as those of one who took the prescribed oath).

Given the penalties that can apply when an officeholder has not taken the correct oath, anyone elected or appointed to public office might reasonably opt to swear and sign both the constitutional oath and the statutory oath. It sometimes happens, though, that incoming officeholders take and subscribe one of the oaths but not both. In such circumstances, do they violate the law when they undertake the duties of their offices? As explained below, the probable answer to this question is “No.”

Historical Background

Each of North Carolina’s three constitutions – approved in 1776, 1868, and 1971 – has mandated that persons selected for public office take an oath of office. Unlike the 1868 and 1971 constitutions, the 1776 constitution did not dictate the wording of the oath, leaving it up to the legislature to formulate the oath as it saw fit. See N.C. Const. of 1776, § 12.

In 1791 the General Assembly adopted an oath for incoming officeholders that incorporated a pledge to support the United States Constitution, which the state had ratified in 1789. The oath set out in that 1791 law is the same oath now codified in G.S. 11-7.

In 1868 delegates gathered in Raleigh to draft a new state constitution pursuant to legislation passed by Congress after the Civil War. See generally John V. Orth and Paul Martin Newby, *The North Carolina State Constitution 19-32* (2d ed.) (2013) (summarizing the history of the 1868 Constitution). In addition to requiring that public officeholders take an oath, the resulting constitution prescribed the oath’s text. N.C. Const. of 1868, art. VI, § 4. That text contained a promise to

support and maintain not only the U.S. Constitution but also the “laws of the United States,” this last phrase amounting to recognition that officeholders were bound by the Fourteenth Amendment and federal Reconstruction legislation, much of which was unpopular in the states that had made up the Confederacy. Joseph S. Ferrell, *Questions I Am Frequently Asked: What Form of Oath Should a Public Officer Take?*, p. 43, *Popular Government*, Fall 1996, Vol. 62, No. 1.

The 1971 constitution preserved the 1868 constitution’s oath of office, which appears almost entirely unchanged in Article VI, Section 7. (The 1971 version of the oath substitutes “therewith” for “there with” and uses a blank line to signal that the taker should state the title of his or her office.)

Equivalent Oaths?

In my view, a person elected or appointed to public office who takes and subscribes *either* the constitutional oath *or* the statutory oath satisfies *both* Article VI, Section 7 and G.S. 11-7. This opinion rests on (1) the two oaths’ shared substance and (2) the judiciary’s treatment of the two oaths as equivalent in recent cases.

Substance of the Oaths

The substance of the constitutional and statutory oaths is indistinguishable in important respects, as shown by an examination of their wording:

Article VI, Sec. 7 Oath

I, _____, **do solemnly swear** (or affirm) **that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as _____, so help me God.**

G.S. 11-7 Oath

I, _____, **do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God.**

Both oaths require takers to swear or affirm – G.S. 11-4 allows “affirm” to be substituted for “swear” in the statutory oath – that they will uphold the U.S. Constitution and the state constitution except insofar as it conflicts with the U.S. Constitution. The principal differences are that

- the statutory oath omits any reference to the “laws of the United States” or the “laws of North Carolina,”
- the constitutional oath lacks a loyalty declaration to the state and its government, and
- the statutory oath leaves out a promise to faithfully discharge one’s duties.

These differences do not strike me as significant, for the following reasons:

- By pledging to support the U.S. Constitution, takers of the statutory oath implicitly acknowledge that valid federal statutes preempt any state laws at odds with their provisions. Article VI of the Constitution expressly declares that the Constitution “and the Laws of the United States which shall be made in Pursuance thereof[,] . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”
 - The absence of the phrase “the laws of United States” in the statutory oath is not evidence of hostility towards federal statutes. When the General Assembly enacted the statutory oath in 1791, Congress was a new creation, having assembled for the first time in 1789. There were relatively few federal statutes on the books, especially compared with the volume of laws in existence today. It is thus easy to understand why legislators thought to insert a reference to the U.S. Constitution but not to federal laws generally.
- By promising to uphold the state constitution and bear true allegiance to the state and its constitutional powers and authorities, takers of the statutory oath necessarily commit themselves to honor duly enacted state laws.
- Although no loyalty pledge to the state or its lawfully established government appears in the constitutional oath, the vow to support and maintain the state’s constitution and laws encompasses such a promise. To take an extreme example, armed insurrection against the state’s duly constituted authorities by officeholders who have taken the constitutional oath will violate the promise to uphold the state’s constitution and laws.
- A pledge to discharge one’s duties faithfully is easily read into the statutory oath. Faithless officeholders cannot be said to “bear true allegiance” to the state and its lawful government or to support and maintain the state

constitution "to the best of [their] knowledge and ability."

The Courts' Treatment of the Oaths

Two relatively recent opinions from our state's appellate courts indicate that the judiciary sees the two oaths as functionally the same.

In *State v. Sullivan*, 201 N.C. App. 540 (2009), the defendant argued that his convictions for offenses related to his operation of an unregistered automobile should be overturned because the oath of office on file for the trial court judge was not the constitutional oath. The court of appeals made short work of the defendant's argument. "After reviewing the trial court's oath," the court said, "we find that it complies with both the United States and the North Carolina Constitutions, as well as [G.S.] 11-7." *Id.* at 548.

The court of appeals did not quote the trial judge's oath in its opinion, and the oath was not part of the record on appeal, but the defendant did attach a copy of the trial court's oath to his reply brief. (Appellant's Reply Brief, Attachment A.) The text is that of the statutory oath (along with the oath prescribed in G.S. 11-11 for judges and magistrates). The constitutional oath does not appear on the document. The clear inference from these facts and the appellate court's rejection of the defendant's argument is that the trial judge satisfied both Article VI, Section 7 and G.S. 11-7 by taking and subscribing the statutory oath.

In *Baxter v. Nicholson*, 363 N.C. 829 (2010), the North Carolina Supreme Court held that a member of the Industrial Commission retains his or her position until an appointed successor takes and subscribes the oath of office. Although the case did not squarely present the question of whether an incoming officeholder may substitute the statutory oath for the constitutional oath or vice-versa, the court's opinion arguably takes it for granted that Article VI, Section 7 and G.S. 11-7 mandate the same oath. It describes Article VI, Section 7 and G.S. 11-7 as "the constitutional and statutory requirements that an elected or appointed officer must take *the* oath of office '[b]efore entering upon the duties' of that office." *Baxter*, 363 N.C. at 836 (emphasis added). In another place, the opinion quotes with evident approval the state's characterization of G.S. 11-7 as "requiring *the* oath of office before taking office." *Id.* at 835 (emphasis added). Finally, the opinion cites both Article VI, Section 7 and G.S. 11-7 in support of its assertion that a successor qualifies for office "by taking *the* oath." *Id.* (emphasis added).

In sum, a comparison of the constitutional and statutory oaths reveals that they say essentially the same thing. It is therefore not surprising that decisions by our appellate courts appear to treat the oaths as equivalent.

Options for Current and Incoming Officeholders

Current Officeholders

So what should a person who holds elective or appointive office do if he or she took and subscribed the constitutional oath or the statutory oath but not both? One perfectly rational option is to do nothing. The omission is highly unlikely to become the subject of litigation, and even if that were to happen, the court would probably conclude that the individual successfully qualified for office by taking and subscribing one of the oaths. Similarly, as already noted, a challenge to the validity of any actions taken by the officeholder would be unsuccessful.

The officeholder may, however, decide to take and subscribe whichever oath has been overlooked. No law requires that this occur in public, so the officeholder may take and subscribe the oath in private with the assistance of anyone authorized to administer oaths under G.S. 11-7.1 or 11-8.

Incoming Officeholders

The risk-free course for individuals who are about to assume elective or appointive office is to take and subscribe both the constitutional oath and the statutory oath. If an incoming officeholder wants to cover all bases but avoid the awkwardness of being sworn twice, he or she might consider combining the two oaths. That approach has traditionally been taken by our state's newly elected governors and members of the Council of State. Ferrell, *supra*, p. 43.

It seems to me that the most efficient way to combine the two oaths is to add key phrases from the constitutional oath to

the statutory oath at the appropriate points. I have done that below, putting my additions to the statutory oath in italics.

I, _____, do solemnly and sincerely swear (or affirm) that I will support the Constitution *and laws* of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain and defend the Constitution *and laws* of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; *and that I will faithfully discharge the duties of my office as* _____, so help me God.

What if the incoming officeholder decides to swear and sign one but not both of the oaths? For reasons discussed earlier in this blog post, I think that is a legally permissible option. Nonetheless, if an individual who is about to assume elective or appointive office chooses that route, I recommend going with the constitutional oath in deference to the state constitution's primacy over statutes.

A Case for Legislative Action?

The General Assembly could easily eliminate the confusion caused by the minor inconsistencies between the constitutional and statutory oaths by amending the wording of G.S. 11-7 to match that of Article VI, Section 7. Alternatively, the General Assembly could simply repeal the statutory oath.

Additional Oaths

Many local government officeholders, including all county officeholders and city and county law enforcement officers, are subject to additional statutory oath requirements. For more information on those requirements, see the blog post by my retired colleague David Lawrence available here.

Links

- www.ncleg.net/Legislation/constitution/article6.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-26
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-61
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-68
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-284
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=105-295
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=105-349
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=11-7
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-229
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=128-5
- canons.sog.unc.edu/whats-a-public-office/
- canons.sog.unc.edu/wearing-several-hats-multiple-and-ex-officio-office-holding/
- sogpubs.unc.edu/electronicversions/pdfs/lglb124.pdf
- avalon.law.yale.edu/18th_century/nc07.asp
- www.ncleg.net/library/Documents/Constitution_1868.pdf
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=11-4
- www.archives.gov/founding-docs/constitution-transcript#toc-article-vi
- www.ncappellatecourts.org/show-file.php?document_id=55036
- www.ncappellatecourts.org/show-file.php?document_id=55040
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=11-11
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=11-7.1
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=11-8
- www.youtube.com/watch?v=RSMsOYxg4_U
- canons.sog.unc.edu/oaths-of-office-how-many-and-by-whom/