

OATHS

Statutorily Mandated Language of Oaths

You asked whether the phrase “So help me God” is required to be included as part of the officer commissioning oath. Based on a review of the statute, relevant case law, and legislative history, we conclude that “So help me God” is a statutorily mandated part of the officer commissioning oath and it must be included in the oath taken by all officer candidates as a prerequisite to their receipt of a commission.¹

Federal law, in 5 U.S.C. §3331, prescribes an oath required of all individuals “appointed to an office . . . in the civil service or uniformed services.”² Air Force officer candidates are required by law to take this oath to be commissioned.³ This prescribed commissioning oath concludes with the language “So help me God.”

Congress explained the use of the phrase “So help me God” in federal oaths when it modified the enlistment oath in 1962. Congress stated,

The Supreme Court has said that the references to the Almighty which run through our laws, our public rituals, and our ceremonies do not violate the first amendment (*Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). Such references are, however, firm indications that we are a religious people whose institutions presuppose a supreme being. Recitation of such a reference, as required by the enlisted man’s oath, does not necessitate the profession of a belief or disbelief in any religion or theological concept, and therefore does not conflict with the Supreme Court’s recent decision in *Torcaso v. Walkins*, No. 373 (June 19, 1961).⁴

The enlistment oath which Congress is defending in the above language is modeled after the commissioning oath.⁵ This statement from Congress about the enlistment oath is more evidence that Congress intended to mandate the words “So help me God” in the officer commissioning oath.

When taking the officer commissioning oath, the officer candidate must orally recite the oath and then authenticate it on AF Form 133. AFI 36-2006 and AF Form 133 provide guidance for accurately taking and authenticating the officer commissioning oath. AFI 36-2006, paragraph 3 lists the individuals authorized to administer the commissioning oath. Following the administration of the oath, the officer candidate must authenticate the oral oath on AF Form 133 in accordance AFI 36-2006, paragraph 4 and the form’s instructions. Taking and authenticating

¹ The phrase “so help me God” has been part of the officer commissioning oath since 1862.

² Federal judges must take a second oath as prescribed in 28 USC §453, which also mandates the language “so help me God.” The oath for the President of the United States is prescribed in U.S. CONST. art. II § 1.

³ The statutory requirement is implemented by the Department of Defense in DoDI 1310.02, paragraph 6.2.1.1, and by the Air Force in AFI 32-2006, paragraph 2.5.

⁴ H.R. 782, 87th Cong., 1st Sess., 3-4 (1961).

⁵ *Id.* at 2.

the commissioning oath fulfills the statutory requirement of 5 U.S.C. §3331. It is required of all officer candidates in order to become a commissioned officer in the U.S. military.

Despite the formal requirements for taking and authenticating the commissioning oath, the wording of the commissioning oath is more flexible when used for ceremonial purposes. For example, ROTC or USAFA cadets who gather for a large ceremonial recitation of the commissioning oath may individually or collectively omit the words “So help me God.” Likewise, military members reciting the commissioning oath as part of an officer promotion ceremony may omit the words “So help me God.”⁶ However, using the commissioning oath for ceremonial purposes does not negate the statutory requirement associated with taking and authenticating the commissioning oath to satisfy the requirements of 5 U.S.C. §3331.

With respect to the enlistment/re-enlistment oath, the enlistee/re-enlistee must take the oath from a person authorized to administer the oath who must use the language mandated in 10 U.S.C. §502. Each enlistee/re-enlistee must confirm the administration of the oath in writing on a DD Form 4, and the person authorized to administer the enlistment/re-enlistment oath must attest on the requisite DD Form 4 that the oath was administered, subscribed, and duly sworn to (or affirmed).

We note that AFI 36-2606, *Reenlistment in the United States Air Force*, paragraph 5.6 previously read, “Airmen may omit the words ‘So help me God’, if desired for personal reasons.” However, paragraph 5.6 has been recently changed to reflect the aforementioned statutory requirement and Airmen are no longer authorized to omit the words “So help me God.”

The Religious Freedom Restoration Act (RFRA) provides generally that the Government shall not substantially burden a person’s exercise of religion except when it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.⁷ In order to make an argument that the oath required by 5 U.S.C. §3331 violates RFRA, an individual would have to show that the required recitation of the words “So help me God” substantially burdens his or her exercise of religion in violation of the Free Exercise clause of the First Amendment. However, it is important to point out that RFRA explicitly states that the Establishment Clause of the First Amendment is unaffected by this legislation.⁸ Any claim that 5 U.S.C. §3331 violates the Establishment Clause would likely not be a claim afforded protection pursuant to RFRA.

It should be noted that other Executive Branch and Congressionally mandated oaths provide flexibility with regards to the use of the phrase “So help me God.” For example, Rules for Courts-Martial 807(B) lists oaths used during the court-martial process which allow for individuals to exclude the words “So help me God.” Additionally, the Secretary of the Air Force has flexibility to change the language of the oath that cadets take before entering the United

⁶ Taking the officer commissioning oath is not required for promotion purposes in accordance with 10 U.S.C. 626 and 8394.

⁷ See 42 U.S.C. §2000bb, et al.

⁸ 42 U.S.C. §2000bb-4.

States Air Force Academy.⁹ Lastly, 8 C.F.R. §337.1(b) specifically states that the words “So help me God” can be excluded from the naturalization oath when an individual objects based on religious beliefs. However, this C.F.R. provision is implementing a statute, 8 U.S.C. §1448, which does not, itself, specify the content of the oath of renunciation and allegiance. Instead, the statute specifies the elements of the oath to be required by the Department of Justice. Despite the flexibility in the above-listed oaths, the language that Congress prescribed in 5 U.S.C. §3331 is mandatory and the only flexibility allowed is for the oath-taker to choose between swearing and affirming the oath.

This issue was also recently addressed by the United States Air Force Academy regarding the Honor Oath. The Honor Oath states: “We will not Lie, Steal, or Cheat, nor tolerate among us anyone who does. Furthermore, I resolve to do my duty and to live honorably, so help me God.” The Honor Oath is not created by statute, but instead is a creature of Air Force policy. The Honor Oath is orally recited by all new Cadets, during the Acceptance Parade, on the day the cadets are formally accepted into the Cadet Wing. It is our understanding that there is no written form of the oath which is required to be signed.¹⁰ The Superintendent of United States Air Force Academy recently elected to change that policy. During the oral recitation of the Honor Oath, cadets now have the option to recite the phrase “So help me God.” Because there is no statutory requirement to establish or recite the Honor Oath and its creation is a matter of Air Force policy, we find no legal objection to the Superintendent’s decision to change the policy allowing the use of the phrase “So help me God” to be optional. In the absence of a statutory mandate for the Honor Oath, USAFA’s requirement to recite it, in its current form including the phrase “So help me God,” may well present a more significant litigation risk to a legal challenge based on the Constitution’s First Amendment Establishment Clause which prohibits government from establishing religion.

We acknowledge that the Congressionally mandated words of “So help me God” in the commissioning oath may present (1) constitutional issues,¹¹ to include a potential Establishment Clause challenge;¹² or, (2) a potential challenge based on the Religious Freedom Restoration Act (RFRA)¹³ or recently enacted §533, FY13 NDAA.¹⁴ Regardless, in absence of a legislative

⁹ DoDD 1322.22, paragraph 4.3.8, allows Service Secretaries some latitude to prescribe an oath for Academy appointees. SecAF has adopted the 5 U.S.C. §3331 version for appointee obligations. See AFI 36-2019, paragraph 3.3 and Attachment 5.

¹⁰ We note that the USAFA publication known as “Contrails” does set out the Honor Oath in written form and basic cadets are required to memorize contents within the Contrails, or Knowledge book. To the extent that a basic cadet objects to reciting the words “So help me God” set out as a part of the Honor Oath in Contrails, it may be appropriate to ensure the same accommodation is allowed for as those who wish not to speak these words during the Acceptance Parade.

¹¹ U.S. CONST. art. VI states that “...all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

¹² The Supreme Court established a three-prong test for Establishment Clause violations in *Lemon v. Kurzman*, 403 U.S. (1971). In order to satisfy the *Lemon* test, the government practice must (1) reflect a clearly secular purpose, (2) have a primary effect that neither advances nor inhibits religion; and (3) avoids excessive government entanglement with religion. In *Lee v. Weisman*, 505 U.S. 577, 633 (1992), Justice Scalia suggested in his dissent that he would uphold oaths of office that incorporate historical uses of religion in their execution.

¹³ The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb, et al., provides generally that the Government shall not substantially burden a person’s exercise of religion except when it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental

change or a successful court challenge, the Department of Defense has no authority to alter the statutory language. As such, to the extent that any Air Force or DoD officials authorize the deletion of the phrase “So help me God” from the written or verbal commissioning oath (but not ceremonial oaths), that direction is *ultra vires*, or beyond the power of Air Force or DoD officials and may well call into question the legitimacy of the specific commissioning. Any such direction is unlawful and without force or effect.

OpJAGAF 2014/7 3 September 2014

interest. In order to make an argument that the Oath required by 5 U.S.C. §3331 would create a claim pursuant to violates RFRA, an individual would have to claim the requirement to recite the words “so help me God” creates a substantial burden on his or her religious exercise, in violation of the Free Exercise Clause of the First Amendment. However, it is important to point out that RFRA explicitly states that the Establishment Clause of the First Amendment is expressly unaffected by this legislation 42 U.S.C. §2000bb-4. Any claim that 5 U.S.C. §3331 violates the Establishment Clause would not be a proper claim afforded protection pursuant to RFRA.

¹⁴ FY13 NDAA, §533 provides that “the Armed Forces shall accommodate the beliefs of a member of the armed forces reflecting the conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such beliefs as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.” This statutory provision, to the extent it may be applicable to the administration of the commissioning/enlistment oath, addresses issues relating to “free exercise” and has the same effect as the RFRA analysis in footnote 13.