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YOU'VE TAKEN AN OATH TO SUPPORT THE CONSTITUTION, NOW WHAT? THE CONSTITUTIONAL REQUIREMENT FOR A CONGRESSIONAL OATH OF OFFICE

*Vic Snyder**

January 7, 1997, was a raucous day on the floor of the United States House of Representatives. Representative Newt Gingrich's re-election as Speaker was not at all a sure thing, even though his Republican Party had retained control of the House. The floor of the House had the feel of a Jacksonian inauguration day: babies crying, kids playing, the temperature rising as the hot lights for television cameras heated up the atmosphere of an interior world that usually is a cool, cavernous chamber. As the roll call proceeded through the 435 members, each rose upon hearing his or her name and announced a choice for Speaker. None of the spectators left, but they stayed not out of interest in the Speaker's race. The kids, parents, husbands and wives, friends, and supporters sat through the laborious vote to see their special friend or loved one take the oath of office as a member of the United States House of Representatives; that oath had to be administered by the new or newly re-elected Speaker.

Taking the oath of office is special. Being on the House floor for the first time as a new member of the people's house in the world's greatest democracy is special. For me and my freshmen colleagues, that day is unforgettable, and continues to be upon re-election every two years; but the pace of events and the excitement on swearing-in day does not allow for much reflection on what the oath of office means, where it came from, and what effect, if any, it should have on future behavior of members of Congress. Granted, the oath serves one practical function: if you do not take the oath of office, you do not get paid. If for some reason a member is unable to take the oath of office at the beginning of the term, such as for medical reasons, once the oath is administered, the member is paid from the beginning of the term of office.¹ But only the most hardened cynic would believe that the formal recitation of the following words would elicit such excitement merely because they ensure a paycheck:

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1. See 14 Op. Att'y Gen. 406, 408 (1875) (reprinting Attorney General opinion of June 6, 1874, which stated that a person elected to the House of Representatives becomes a representative only upon taking the oath of office).

I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.²

Those are the words that I proudly and respectfully repeated that particularly rowdy January day. But they are not the words that triggered this inquiry. The oath of office is administered because of a constitutional requirement contained in Article VI, Clause 3:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.³

"To support this Constitution." What does that mean? And how is that consistent with the prolific output that members of Congress have had in introducing over ten thousand proposed amendments to the Constitution?⁴ And not even a constitutional demand that elected officials faithfully perform their duties, only that they "support this Constitution." During the 1998 campaign, the National Taxpayers Union ("NTU") distributed the 1998 National Taxpayers Union Poll of Congressional Candidates. Of the eight questions asked, four were inquiries regarding whether the candidate would support a constitutional amendment, specifically the Balanced Budget Amendment, the Tax Limitation Amendment, the Taxpayer Protection Amendment, and Major Constitutional Tax Reform.⁵ The NTU has every right to support any and as many amendments as they desire, and any member of Congress has the right to do the same; but does the oath to "support this Constitution" affect the member's deliberation that occurs in consideration of these amendments? Should it? During the 105th Congress, of which I was a member, on February 12, 1997, a series of

2. 5 U.S.C. § 3331 (1994).

3. U.S. CONST. art. VI, cl. 3.

4. See Ruth Bader Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L.J. 677, 679 (1990).

5. See Letter from Al Cors, Jr., Vice President for Government Affairs, Nat'l Taxpayers Union, to Vic Snyder, United States Representative (May 29, 1998) (on file with author).

votes occurred on various term limit amendment proposals. Nine states had passed state ballot initiatives requiring their members of Congress to support a specific variation, specifying that if a member from that state's congressional delegation did not support that specific version, a notation that the member had not followed the instructions of the voters would be placed by his name on the ballot at the next election. A rule for the debate was constructed that allowed each of the nine states to have their proposals come to the floor for brief debate and a vote even though the members knew there was only minimal support for any of these measures; each was overwhelmingly defeated.⁶ Does such a rule of debate trivialize the process of amending the Constitution such that it is inconsistent with a pledge to "support this Constitution"? Or is it the kind of political debate the framers expected out of a lively American democracy?⁷ Such events were a motivation to learn more about the constitutional requirement to "support this Constitution," and while such musings might seem removed from the reality of today's American political life, at least one motivated citizen does not think so. An anonymous fax recently arrived in my office in support of Senator John Ashcroft for Attorney General. It concluded, "ENOUGH IS ENOUGH! REMEMBER YOUR OATH TO THE CONSTITUTION OR BE REMEMBERED A TRAITOR."⁸ While constitutional journeys never arrive at the end of the road, what follows is some of the landscape seen on my personal exploration of remembrance.

I. THE PRESIDENT AND THE JUDGES

In contrast to the undefined congressional oath, the concluding sentence of Article II, Section 1 specifies the exact wording of the oath of office for the President:

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."⁹

6. 143 CONG. REC. H458-512 (daily ed. Feb. 12, 1997).

7. See *Cook v. Gralike*, 531 U.S. 510 (2001).

8. See Facsimile from Anonymous Sender to Vic Snyder, United States Representative (Jan. 30, 2001) (on file with author).

9. U.S. CONST. art. II, § 1, cl. 8.

Matthew A. Pauley, in *I Do Solemnly Swear, The President's Constitutional Oath, Its Meaning and Importance in the History of Oaths*, thoroughly examines the presidential oath and notes Chief Justice Warren Burger's observation that the framers placed great importance on this exact choice of language. "The Constitution stipulates in very precise language what the President must pledge."¹⁰ The differences in constitutional treatment are substantial, evincing the framers' desire that the respective office holders view their obligations differently. And while the language of the congressional oath is not prescribed and the President's job responsibilities are more extensive, the one requirement for members of Congress is very clearly laid out: constitutional support. But Pauley's main theme is that the presidential oath requirement is very important. In his concluding paragraph he expresses how important:

The prescribed oath can be . . . a vital restraint on our Presidents even when, as in the case of Lincoln, they are constrained by reasons of state to apply Caesarian remedies. It is a self-restraint, to be sure, but a restraint certainly as important as the impeachment or the threat of electoral defeat.¹¹

The constitutional requirement for federal judges is contained in the Article VI, Clause 3 language of the Constitution, and the significance and power of that oath was made clear in *Marbury v. Madison*.¹² *Marbury* established the power of the federal judiciary to ultimately determine whether laws or actions are consistent with the language of what was then a relatively new Constitution:

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!¹³

10. MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH* 3 (1999) (quoting Warren Burger, *A Republic If You Can Keep It*, The Harry Sievers Memorial Lecture at Fordham University School of Law (Jan. 28, 1988)).

11. *Id.* at 243.

12. 5 U.S. (1 Cranch) 137, 180 (1803).

13. *Id.* See also *Eakin v. Raub*, 12 Serg. & Rawle 330, 339 (Pa. 1825); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 92-93 (1988).

This power of the judicial oath of office is articulated as well by modern-era judges. Said Earl Warren, "We are oath-bound to defend the Constitution."¹⁴

A presidential oath that is as important an influence over presidential behavior as the threat of election defeat or impeachment, according to Pauley, and a judicial oath that in *Marbury v. Madison* shaped the power of the federal judiciary are tough competition for the legislative branch mass oath of 435 House members in a rowdy Capitol chamber.

II. THE CEREMONY

Family and friends waited the day of my first swearing in, which was in January 1997. It was not until a speaker was elected and sworn in that members of the House would take the oath, as the Speaker was the one who would administer the oath. Once Representative Newt Gingrich was elected Speaker, Representative John Dingell, the longest serving member in the House, administered the oath of office to the Speaker. None of this ceremony is contained in the Constitution, and in fact, with the exception of the wording of the Presidential oath, none of the ceremony associated with the inauguration of a President is contained in the Constitution either, not even the presence of the Chief Justice of the Supreme Court.¹⁵ Yet the formality can be important. De Tocqueville talks of the importance in democratic societies of formalities, but acknowledges that democratic societies resist such ceremony.¹⁶ Sanford Levinson, in one of his discussions of loyalty oaths, notes the importance of the formality of an oath: "Their formal nature may remind one of the 'contentless' seals once thought necessary to give legal validity to contracts."¹⁷ The argument has been made that the defined wording of the presidential oath relegates that oath to one of mere ceremony because there is no authority for the legislative branch to freshen it up as circumstances and the demands on our chief executive change,¹⁸ but Pauley rejects that idea if for no other reason than the formality of it is a reminder of the importance of the duties and

14. PAULEY, *supra* note 10, at 189.

15. *See id.* at 223.

16. *See id.* at 242.

17. Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1447 (1986).

18. *See* PAULEY, *supra* note 10, at 199, 201 (quoting EDWARD DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 275-76 (1964)).

the office.¹⁹ Certainly the administration of the congressional oath also imparts a formal reminder of the importance of the office, even though administered to 434 members as a group. The Senate augments the potential benefit of the formal oath-taking by administering the oath to four new members at a time, and repeats the formal oath administration until all the new members have taken the oath. If one were to accept the argument that the precise wording reduces the importance of the presidential oath, one could argue that the absence of precise wording for the congressional oath enables Congress to maintain the relevance and power of the oath by updating it statutorily as circumstances change.²⁰ While I do not agree with that argument, the congressional oath required by Article VI, Clause 3, is not the same oath today as first legislated in 1789, and the history begins before the American Revolution and extends beyond the Civil War.

III. THE HISTORY

American colonists from England brought with them a recollection of oath requirements to hold office, and the history was not always a good one. Contained in *Huntamer v. Coe* is the following summary:

The abuse of oaths of allegiance seems to have centered around two things: (a) oaths designed to disqualify from office individuals of a particular religious belief or association; and (b) oaths designed to disqualify individuals from office because of past conduct, usually involving past political beliefs or activities. In England, the oath of supremacy, required under a statute enacted in the year 1562, made it necessary for members of the House of Commons to swear that the queen was supreme in spiritual as well as temporal causes, and that no foreign person or potentate had any authority, ecclesiastical or spiritual, within the realm. In 1609, a requirement was added to the effect that the king was lawfully king, and that the pope had no power to depose him. The final result of this legislation and the oaths required thereby was that both houses of Parliament for some time were effectually closed to members of the Roman Catholic Church.²¹

With this legacy it is not surprising to see the Article VI, Clause 3 oath requirement immediately followed by the language "but no religious

19. See *id.* at 207.

20. See *id.* at 201.

21. *Huntamer v. Coe*, 246 P.2d 489, 492-93 (Wash. 1952); see also *Imbrie v. Marsh*, 71 A.2d 352, 357 (N.J. 1950).

Test shall ever be required as a Qualification to any Office or public Trust under the United States.”²² And because expressions of loyalty to royalty had no place in the new American union, the framers replaced an oath such as “I will be faithful and bear true allegiance to King William and Queen Mary”²³ with an expression of support for the new United States Constitution. But these decisions by the framers were a century away, and the American colonies had their own oath history yet to come, a history that also demonstrated the potential abuse of loyalty oaths, including oaths of office.

Harold M. Hyman’s book, *To Try Men’s Souls: Loyalty Tests in American History*, reviews the American experience with loyalty oaths beginning with the colonial period.²⁴ Oaths were important to the colonies from the earliest days of settlement. The first printing press in the English-speaking colonies in Boston began production by printing as its first item a loyalty oath,²⁵ and Roger Williams was one colonialist who could not tolerate the Massachusetts colonial oath.²⁶ The use of loyalty oaths sometimes produced chaos. In Maryland, in 1689, two different governments expected to govern and wanted the undiluted loyalty of the colonists.²⁷ The result: “Confusion reigned in Maryland. Political murders became common; offices remained vacant for want of men willing to take a partisan plunge by swearing loyalty to one side or the other.”²⁸ But for the most part, formal professions of loyalty to royalty became a routine that colonials performed to achieve some goal, even colonials destined to become future revolutionaries. Benjamin Franklin and George Washington held government positions after swearing the royal oath, Franklin as a postal employee and Washington as an officer in the militia.²⁹

Dissatisfaction with the king’s taxation and economic policies prompted organized efforts by local Whig committees, led by men such as John Hancock, Thomas Jefferson, Patrick Henry, and Sam Adams, to boycott British imports.³⁰ The First Continental Congress met in 1774, still professing loyalty to the king but focusing on the rights of

22. U.S. CONST. art. VI, cl. 3.

23. *Imbrie*, 71 A.2d at 357.

24. See generally HAROLD M. HYMAN, *TO TRY MEN’S SOULS, LOYALTY TESTS IN AMERICAN HISTORY* (1981).

25. See HYMAN, *supra* note 24, at 15; Levinson, *supra* note 17, at 1449.

26. See LEVINSON, *supra* note 13, at 100.

27. See HYMAN, *supra* note 24, at 29.

28. *Id.* at 30.

29. See *id.* at 60.

30. See *id.* at 63.

colonials. A uniform boycott regulation was adopted that in effect was the first standard loyalty test in America. Because the Continental Congress had no enforcement power, the end was accomplished by physical fear and social and economic pressure; the resulting success nurtured the Whig organization throughout the colonies.³¹ The initiation of armed conflict at Lexington and Concord in 1775 increased the colonial enthusiasm for aggressive enforcement of the boycott,³² although enforcement varied from colony to colony.³³ George Washington's Chief Surgeon was found to be a traitor to the colonial cause, but legal action for traitorous actions was difficult when the colonial organizations were still formally professing loyalty to the crown.³⁴ Washington became convinced that a recrudescence of loyalty to the crown could be curtailed by enforcement of loyalty oaths, as evidenced by this December 1775 writing:

I think as you do that it is high time a test act was prepared and every man called upon to declare himself; that we may distinguish friends from foes; nor have I any idea of a set of men being exempt from the common duties of society in any country, or community where they have been fostered in the sweet enjoyment of its liberties.³⁵

But even with the Continental Army in the enforcement business, obtaining a statement of loyalty from a Tory did not necessarily guarantee true allegiance.³⁶ The Continental Congress took the enforcement function away from Washington's army and left it with state assemblies and local committees,³⁷ but yet another treason case pushed the Continental Congress to act. In June 1776, the Continental Congress declared that Americans owed allegiance to the colony in which they lived, not to the crown, and that treason should be enforced accordingly; not a great step away from a July 4, 1776, Declaration of Independence.³⁸ Professions of loyalty, now to the Declaration of Independence, continued to be sought by Washington and the newly

31. *See id.* at 64-66.

32. *See id.* at 70.

33. *See* HYMAN, *supra* note 24, at 72.

34. *See id.* at 73-74.

35. *Id.* at 74.

36. *See id.* at 75.

37. *See id.* at 76-77.

38. *See id.* at 77-78.

independent America,³⁹ but soon became primarily a local function.⁴⁰ While the Continental Congress was content to let local enforcement handle any disloyalty from private citizens, allegiance from federal officials was a different matter. In February 1778, the Continental Congress adopted an oath for federal officers, both military and civilian:

I _____ do acknowledge the United States of America to be free, independent and sovereign states, and declare the people thereof owe no allegiance or obedience to George the 3d, King of Great Britain; and I renounce, refuse and abjure any allegiance or obedience to him; and I do swear (or affirm) that I will, to the utmost of my power, support, maintain, and defend the said United States against the said King George 3d and his heirs and successors, and his and their abettors, assistants and adherents, and I will serve the said United States in the office of _____ which I now hold, with fidelity, according to the best of my skill and understanding. So help me God.⁴¹

Lofty words that left no doubt as to the intent of the oath-taker, if sincere, but the majority of traitors, including Benedict Arnold, signed the oath.⁴² British authorities, in their efforts to obtain statements of loyalty to the crown, had similar unsatisfactory experiences.⁴³ Under the Articles of Confederation enthusiasm for loyalty oaths and for punishment of Tories waned.⁴⁴ Hyman summarizes the American experience with loyalty oaths: "In the United States as in England, men had learned to disbelieve the efficacy of enforced loyalty tests as valid guides to future good conduct."⁴⁵

Hyman concludes that the unreliability of loyalty oaths and the colonial experience with them led the framers to a minimal oath requirement in the Constitution. "The Constitution of 1787 finally contained a provision specifying a mere oath of office for the President, and a provision requiring an unspecified oath for federal and state officers."⁴⁶ Pauley takes issue with Hyman's dismissive treatment of the Article VI, Clause 3 oath requirement and points out that Hyman's

39. See HYMAN, *supra* note 24, at 80.

40. See *id.* at 82.

41. *Id.* at 82-83.

42. See *id.* at 83-84.

43. See *id.* at 109.

44. See *id.* at 113-14.

45. HYMAN, *supra* note 24, at 114.

46. *Id.*

work focuses on loyalty oaths, not oaths of office.⁴⁷ Despite the painful history with loyalty oaths, the framers placed importance on an oath of office requirement for both the President and state and federal officials, either because they distinguished an oath of office from a general loyalty oath or because oaths of office were valuable enough to be included as a constitutional requirement, despite the colonial experience. Levinson, in his book *Constitutional Faith*, reaches a different conclusion than Hyman:

Whether because of the Protestant background of colonial America or not, the framers of the Constitution took immense care to require oaths of allegiance as part of a sound framework of government. Although the Constitution is often praised for its relative spareness—John Marshall described it as consisting more of “great outlines” and “important objects” than as “an accurate detail of all the subdivisions of which its great powers will admit”—it is striking that the authors of the 1787 document twice saw fit to write in requirements of oath-taking by governmental officials.⁴⁸

The framers' debate is limited but reflects the colonial difficulties with oaths. From the Journal of the Constitutional Convention: “Mr. Wilson said he was never fond of oaths, considering them as a left handed security only. A good Gov[’t] did not need them, and a bad one could not or ought not to be supported.”⁴⁹ What debate that is recorded mostly deals with the relationship between the state and federal government.⁵⁰ The resulting constitutional language mandating an oath of office for members of Congress was fulfilled by the first act of Congress under the new Constitution in 1789. “I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.”⁵¹

The subsequent upheaval of the Civil War produced changes in the oath of office. On July 2, 1862, new and more complicated language was adopted:

That hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in

47. See PAULEY, *supra* note 10, at 99.

48. LEVINSON, *supra* note 13, at 91.

49. 2 JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 304 (Gallard Hunt & James Brown Scott eds., 1987).

50. See *id.* at 301-11.

51. Act of June 1, 1789, ch. 1. 1 Stat. 23 (regulating the time and manner of administering certain oaths).

the civil, military or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation: "I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power or constitution with the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God;" which said oath, so taken and signed, shall be preserved among the files of the court, House of Congress, or Department to which the said office may appertain.⁵²

This "Ironclad Test Oath" requirement as it became known was a high hurdle for any former confederate to jump. Said Senator Trent Lott, "Many of the oath's drafters specifically had in mind blocking the return of one of my direct Senate predecessors—Jefferson Davis."⁵³ It was even too much for one principled Democratic senator from Delaware, a supporter of the Union, who resigned rather than take such an oath, and he suffered accusations of disloyalty from Radical Republicans.⁵⁴ Another senator, from Tennessee, David T. Patterson, also had unquestioned loyalty to the Union, but had occupied one minor government position in the Confederacy to protect his Unionist neighbors. While the Republicans would accept him in the Senate, he was pressured into perjuring himself with his oath of office in which he swore he had never held any Confederate office rather than have the Ironclad Oath be seen as ineffective in keeping out former Confederate officeholders.⁵⁵ Disputed elections resulted in congressional commit-

52. Act of June 5, 1862, ch. 128, 12 Stat. 502 (prescribing oath of office).

53. 143 CONG. REC. S4-5 (daily ed. Jan. 7, 1997).

54. See HYMAN, *supra* note 24, at 262.

55. See *id.* at 258-59.

tees functioning as "loyalty review boards" in determining whether a member-elect had been sufficiently loyal to take the Ironclad Oath.⁵⁶ The Reconstruction emotion of the time is captured by a letter from a Union army officer on duty in Arkansas:

My God—Can any sane man look at the men who fill the so-called State Legislatures and then say that the [Southern] States are loyal? Who are the men they send to Congress and then ask that you give them seats? Majors, Colonels, and Generals of the rebel army from whose foul hands we have just wrested the sword of rebellion. To admit such men into the councils of the nation would disgrace every soldier who fought in the late war and I for one would curse the day I ever drew my sword in defence of such a Union.⁵⁷

The Fourteenth Amendment to the United States Constitution was ratified July 9, 1868.⁵⁸ Section 3 addressed the problem of former Confederates elected to the House and Senate and also affirmed once again constitutional support for an oath of office for members of Congress.⁵⁹

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.⁶⁰

On July 11, 1868, a new statute prescribed the oath of office to be taken by former Confederates from whom the legal disability had been removed by a vote of Congress, language that is identical to the oath taken by members of Congress today.⁶¹ In 1871, a new statute set up a more relaxed bifurcated oath of office in which former Confederates recited the 1868 language, and those members who had never supported

56. See *id.* at 263.

57. *Id.* at 257 (quoting a letter from a Union army staff officer, posted in Arkansas, to Thaddeus Stevens).

58. See William Morse and Stuart Myerurg, *Constitution of the United States* (visited Apr. 5, 2001) <<http://www.law.emory.edu/FEDERAL/usconst/amend.html#14sec-5>>.

59. See LEVINSON, *supra* note 13, at 92.

60. See U.S. CONST. amend. XIV, § 3.

61. Act of July 11, 1868, ch. 139, 15 Stat. 85.

the Confederacy recited the Ironclad Oath.⁶² In 1884, the final revision of the oath requirement occurred with the repeal of the Ironclad Oath, and in the words of Hyman, "the nation took a long step forward on the road to reunion. In their lifetimes the loyalty-testing laws reflected little credit upon their defenders or their attackers, nor, history indicates, did they have very much to do with loyalty."⁶³ The Congress adopted the 1868 language for everyone elected to the House or Senate, not just former supporters of the Confederacy; and it is this language that is the current oath of office.⁶⁴

IV. THE CONSTITUTIONAL STRUCTURE

Article VI, Clause 3 includes language prohibiting any religious test for holding office. The turmoil caused by such religious tests in England provided weight against such tests in America, but Thomas Grey carries this analysis a bit further:

The "but" suggests that the Framers considered the constitutional oath a substitute for the religious tests the colonists were familiar with under the English established church. To push the point a bit: America would have no national church, as the First Amendment later made explicit, yet the worship of the Constitution would serve the unifying function of a national civil religion.⁶⁵

Levinson makes a similar point in his article *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*⁶⁶ This pledge of faith in our basic document of government comes from the required oath of office to support the Constitution and, like religious pledges of faith, argues that such a formal statement of support ought not be taken casually.

Perhaps of greater significance is the presence of the oath requirement in the same Article containing the Supremacy Clause, which clearly states federal law and the Constitution prevail in disputes with state law or constitutions.⁶⁷ During the Constitutional Convention,

62. See Act of Feb. 15, 1871, ch. 53, 16 Stat. 412 (repealed 1884).

63. HYMAN, *supra* note 24, at 265.

64. See Act of May 13, 1884, ch. 46, 23 Stat. 21; see also *Imbrie v. Marsh*, 71 A.2d 352, 365 (N.J. 1950).

65. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

66. Sanford Levinson, *Pledging Faith in the Civil Religion: Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 120 (1987).

67. In Arkansas, elected officials take the following oath of office: "I _____do solemnly swear (or affirm) that I will support the Constitution of the United States and

the written record reflects the framers' perceived relationship between the principle of the Supremacy Clause and the oath requirement. Referring to the resolution that contained the oath requirement:

[Mr. Gerry] thought one good effect would be produced by it. Hitherto the officers of the two Governments had considered them as distinct from, and not as parts of the General System, and had in all cases of interference given a preference to the State Gov'ts. The proposed oath will cure that error.⁶⁸

The Federalist Papers also demonstrate the close relationship between the Supremacy Clause and the oath requirement. From Alexander Hamilton:

It merits particular attention in this place, that the laws of the confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the Supreme Law of the land; to the observance of which, all officers legislative, executive and judicial in each State, will be bound by the sanctity of an oath.⁶⁹

The meaning of this oath was tested by the 1830s debate in South Carolina over nullification, a test that was the precursor of secession. Federal tariff laws hurt the slave economy of agricultural states like South Carolina. John Calhoun believed that states had the power to reject federal law that the citizens of that state believed to be unjust, in effect nullifying the federal law as applied to that state. South Carolina passed a nullification statute and required state officials, except legislators, to swear an oath to enforce it. The result was that pro-Union South Carolinians could not hold office without swearing an oath to support state actions over federal law and the United States Constitution.⁷⁰ This conflict was ultimately resolved by the Civil War, but both sides used oaths of office in their pre-war battles, and the legal skirmishes and rhetoric were training for future secessionist leaders such as Calhoun.⁷¹

Certainly the relationship between the Supremacy Clause and the oath requirement should influence the office holder who reflects on the

the Constitution of the State of Arkansas, and that I will faithfully discharge the duties of the office of _____, upon which I am now about to enter." ARK. CONST. art. IXX, § 20.

68. MADISON, *supra* note 49, at 256.

69. THE FEDERALIST NO. 27, at 594 (Alexander Hamilton) (Bernard Bailyn ed., 1993).

70. See HYMAN, *supra* note 24, at 118-19.

71. See *id.* at 138.

meaning of the oath of office; but "support" aims at the entire Constitution, not just the principles in the Supremacy Clause. Had support for the Supremacy Clause been the sole intent of the oath of office, the framers could have constructed the oath requirement to articulate that more limited goal.

V. THE STATUTORY LANGUAGE

Pauley's book focuses on the meaning of the specific language required by presidents on assuming office. "[T]he constitutionally *prescribed* oath is indeed prescriptive: properly understood, it tells our Presidents what they are *obliged* to do against the *pressures* that are brought to bear on them from our society and from foreign regimes."⁷² The congressional oath of office is not prescribed in the Constitution, not even an admonition to faithfully discharge the duties of the office. The simple articulation of the 1789 Congress, "I, A.B., do solemnly swear or affirm that I will support the Constitution of the United States" is now replaced by words drafted during the bloody heat of the Civil War, words drafted in a spirit of keeping the class of former Confederates out of office. The words chosen reflect the wartime environment: "to defend the Constitution of the United States against all enemies, foreign and domestic." Part of Hyman's criticism of loyalty oaths is that they "are crisis products. They emerge from the felt needs of authorities during wars, rebellions, and periods of fear of subversion."⁷³ The creation of this statutory oath of office occurred during such a period, but does this resultant statutory oath encompass the full meaning of the constitutional requirement "to support this Constitution"? A general understanding of the word "support" includes activities that sustain and nourish, a broader concept perhaps than defending against enemies or of bearing "true faith and allegiance." During the 1997 debate and votes on the many term limit amendment proposals, there were no foreign or domestic enemies of the Constitution on the floor of the House advocating the various proposals; but maybe more focus on the word "support" would have led to a conclusion that a series of meaningless votes to amend our most revered governmental document cannot do much to nurture our Constitution. Judicial opinion might well conclude that words such as "faith" and "allegiance" and concepts such as defending from enemies are

72. PAULEY, *supra* note 10, at 19.

73. HYMAN, *supra* note 24, at vii.

essentially synonymous with "support"; but if the bulk of the positive benefit of an oath of office for members of Congress comes from the impression left by the formally repeated words, our Constitution would do best if members recite the most supportive choice of words. The current phraseology may have too much emphasis on enemies and not enough on supportive nourishment.

VI. THE CONSCIENCE

Justice Douglas expressed the opinion that in America "the domains of conscience and belief have been set aside and protected from government intrusion" except for the Article VI oath requirement mandating officials to swear they support the Constitution.⁷⁴ It is the only place of thought control in the Constitution, and the Supreme Court has upheld such mandated thinking as consistent with the First Amendment, noting that it was the same men who approved both the Constitution and the Bill of Rights.⁷⁵ But swearing and believing are different, and attempts to differentiate the two are always confusing, at best unsatisfactory, and at times prejudicial. Richard Nixon said that during the recitation of the Presidential oath, he was dedicating his administration to the goal of world peace. Pauley asks, was Nixon's interpretation of the oath in fact an expansion of the constitutional duties of the Presidency?⁷⁶ During the Bolshevism fears after World War I, Victor Berger was twice elected to the United States House from Wisconsin as a Socialist; twice he was refused a seat in Congress because the House voted to exclude him as being too disloyal to take the oath of office. Berger was subsequently convicted of espionage-related charges, but the House had in effect tried to read his mind before the conviction. He never had the opportunity to take the oath of office.⁷⁷

Julian Bond was elected to the Georgia legislature in June 1965. At the time, the Vietnam War had begun to divide America, and Bond had publicly expressed his opposition to the war. The Georgia legislature refused to seat him, saying that his actions were inconsistent with his oath to support the Constitution. The United States Supreme Court disagreed, saying that the legislature does not have the authority

74. *Speiser v. Randall*, 357 U.S. 513, 536 (1958) (Douglas, J., concurring) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

75. See *Cole v. Richardson*, 405 U.S. 676, 682 (1972).

76. See PAULEY, *supra* note 10, at 231.

77. See HYMAN, *supra* note 24, at 319.

to judge the sincerity of a member willing to take the oath, especially when Bond had made no statements disavowing his belief in that oath. Legislators do not lose their First Amendment rights at the House door.⁷⁸ Like Berger, Bond was re-elected while the litigation progressed.⁷⁹ Hamilton Long considers the thought control contained in the oath requirement to be quite limited:

The oath provision of Article VI has nothing whatever to do with—does not trespass upon—any freedom, or right, guaranteed by the Constitution, as amended; it does not violate freedom to believe or not believe in God, nor freedom of conscience, nor freedom of thought, nor any other freedom. It merely expresses the sovereign people's mandate as to one important condition, or qualifications pertaining to the *privilege* (there is no right) of holding office, federal or state.⁸⁰

The challenge and hazards of judging sincerity is not new, nor is the trap that sincere men fall into when they refuse for reasons of principle to swear to words they may deem to be inappropriate. The Englishman John Lilburne in 1647 expressed his dissatisfaction with oaths:

Oaths . . . now are nothing but cloaks of knavery, and breeders of strife and mischief. Therefore for shame lay them all down and press them no more upon any man whatsoever, for he that conscientiously makes nothing of an oath, will make as little of breaking his oath, whensoever it shall make for his profit, ease, or preferment, whereas to him that conscientiously scruples an oath, his bare word . . . is the sincerest tie in the world.⁸¹

VII. THE DUTY

Oaths of office, loyalty oaths, juror oaths, oaths on becoming a member of the bar: all have some similarities. Certainly, formality is one, the sense that the ceremony itself, the act of swearing conveys a sense of importance and duty. But what is the duty contained within a pledge to do as the Constitution mandates, "to support this Constitution"? An abundance of law from a variety of cases discusses the burden that comes from swearing an oath. Two examples: the swearing

78. See *Bond v. Floyd*, 385 U.S. 116, 132 (1966).

79. See *id.* at 117.

80. Hamilton A. Long, *The Oath of Office*, A.B.A. J., Sept. 1962.

81. HYMAN, *supra* note 24, at 23.

party is "bound in conscience to perform the act faithfully and truly,"⁸² he may be bound "to act faithfully or speak truly."⁸³ Other oaths have special requirements, such as immigrants who must be "attached to the principles of the Constitution."⁸⁴ Joseph Story in his 1847 discussion applies the principles gleaned from oaths in general to the congressional oath mandate:

That all those, who are intrusted with the execution of the powers of the National Government, should be bound, by some solemn obligation, to the due execution of the trusts reposed in them, and to support the Constitution, would seem to be a proposition too clear, to render any reasoning necessary in support of it. It results from the plain right of society, to require some guarantee from every officer, that he will be conscientious in the discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a deep sense of accountability to a Supreme being. If, in the ordinary administration of justice, in cases of private rights, or personal claims, oaths are required of those, who try the cause, as well as of those, who give testimony, to guard against malice, falsehood and evasion, surely like guards ought to be interposed in the administration of high public trusts, and especially in such, as may concern the welfare and safety of the whole community.⁸⁵

Conscience and moral obligation permeate the older discussions of oaths, and as Pauley says, the old American revolutionaries knew honor and conscience.⁸⁶ But duty to do what?

The Constitution is words, and words have meaning. In 1825, Judge Gibson disagreed with the broad mandate that the Supreme Court in *Marbury v. Madison* drew from the constitutional oath taken by judges. He noted that many people take similar oaths including "a recorder of deeds," and therefore the purpose of the oath must be a test of the "political principles of the man," not a granting of a specific duty with regard to the Constitution. What could a recorder of deeds have to do with defense of the Constitution?⁸⁷ In *Cole v. Richardson*,⁸⁸ the

82. *Greenwald v. State*, 155 A.2d 894, 897 (Md. 1959).

83. *In re Williamson*, 43 B.R. 813, 821 (Bankr. D. Utah 1984).

84. LEVINSON, *supra* note 13, at 103. See also Levinson, *supra* note 17, at 1452.

85. PAULEY, *supra* note 10, at 225 (quoting JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 252 (1847)).

86. See *id.* at 92.

87. See LEVINSON, *supra* note 13, at 121-23 (quoting *Eakin v. Raub*, 12 Serg. & Rawle 330, 339. (Pa. 1825) (Gibson, J., dissenting)).

88. 405 U.S. 676 (1972).

United States Supreme Court discusses oath cases, and while expressing concern that vagueness in oaths may give the oath taker the false impression that certain activities are prohibited, it goes on to say that such is not the case with an admonition to support the Constitution.

One could make a literal argument that “support” involves nebulous, undefined responsibilities for action in some hypothetical situations We have rejected such rigidly literal notions and recognized that the purpose leading legislatures to enact such oaths, just as the purpose leading the Framers of our Constitution to include the two explicit constitutional oaths, was not to create specific responsibilities but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system.⁸⁹

Further on, the Court refers to “support” as “simply a commitment to abide by our constitutional system,”⁹⁰ although not surprisingly, at least one court believes that part of such a definition of support may also be to defend the laws.⁹¹ “Live by constitutional processes” and “abide by our constitutional system:” how do those duties compare with the Article II presidential oath? Pauley believes that the presidential oath to “preserve, protect and defend the Constitution” mandates the President to be “bound in conscience to do nothing less than to save the Union of the people of the United States (of which the Constitution is the organic law) for those people, as a unique personal embodiment of their united will.”⁹² Perhaps comparing the somewhat minimalist language of the Court in *Cole* on congressional oath responsibilities with the expansive expressions of Pauley on the presidential oath overstates the differences. Justice Thurgood Marshall bridged the gap somewhat in one of the many cases involving state oaths for public employment, in this case one that required the employee to “uphold and defend” the state and federal constitutions. Said Marshall: “The first half of the oath, requiring an employee to indicate a willingness to ‘uphold and defend’ the state and federal constitutions, is clearly constitutional. It is nothing more than the traditional oath of support that we have unanimously upheld as a condition of public employment.”⁹³

89. *Id.* at 683-84.

90. *Id.* at 684.

91. See *Huntamer v. Coe*, 246 P.2d 489, 494 (Wash. 1952) (en banc).

92. PAULEY, *supra* note 10, at 185.

93. *Cole*, 405 U.S. at 692 (Marshall, J., dissenting).

Ought a duty to support the Constitution, to abide by the constitutional processes, affect a legislator's consideration of proposed legislation that may be unconstitutional? Certainly some judges think it should. Justice Scalia, for example: "The Louisiana legislators who passed the 'Balanced Treatment for Creation-Science and Evolution-Science Act,' . . . each of whom had sworn to support the Constitution, were well aware of the potential Establishment Clause problems and considered that aspect of the legislation with great care."⁹⁴ In fact, in a footnote he cites the Article VI, Clause 3 obligation that state legislators have to support the Constitution.⁹⁵ Justice Souter expresses a similar view also in a dissenting opinion: "Indeed, Members of Congress must take an oath or affirmation to support the Constitution, and we should presume in every case that Congress believed its statute to be consistent with the constitutional commands."⁹⁶ How far can this line of reasoning extend? In a 1944 New York case, a court rejected the view that it must follow the precedent of a United States Supreme Court opinion:

Article 6 of the Federal Constitution requires that all members of the Legislature and all executive and judicial officers of the several states shall take an oath to support that Constitution. It does not require an oath to support an act of Congress or any law promulgated by any Federal official or any Court decision. The Constitution alone, as it is written, is the sole test.⁹⁷

While one can argue that this viewpoint may not be consistent with abiding by the constitutional process, President Andrew Jackson expressed a similar view in his veto message of July 10, 1832, in which he explained his veto of a bill the Supreme Court had already upheld:

Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of

94. *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting).

95. *See id.* at n.1.

96. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 604 n.3 (1998) (Souter, J., dissenting) (internal citation omitted).

97. *Wuebker v. James*, 58 N.Y.S.2d 671, 677 (Schenectady County Ct. 1944).

Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.⁹⁸

Levinson, in his book *Constitutional Faith*, discusses the problems with such a duty on legislators:

A conscientious legislator, for example, might well have an independent duty to measure suggested legislation against his or her thought-out conception of the Constitution and, albeit reluctantly, reject those bills which do not pass muster. Such a belief in conscientiousness, wherever found, rests on several assumptions, not the least being that the Constitution can be sufficiently “decoded” to provide firm guidance to the political officials who have solemnly agreed to obey it. Practically speaking, though, few treat the Constitution as having an easily knowable, fixed identity.⁹⁹

In my experience as both a state senator and member of Congress, legislators are sensitive to constitutional problems in proposed legislation; but we are not judges: there is no case and controversy; there will be no formal hearing and presentation of argument; and most of us are not lawyers. The duty to sort out the constitutional from the unconstitutional is recognized by many legislators as part of our obligation to “support this Constitution,” but the duty of legislators voting on bills is obviously different from the duty of judges.

VIII. THE ARTICLE V QUESTION

What does it mean to “support this Constitution” when Article V provides a mechanism for it to be changed? Does the oath mean that members of Congress should oppose all amendments? The framers did not think so. From the records of the Constitutional Convention:

Mr. Ghorum did not know that oaths would be of much use; but could see no inconsistency between them and . . . any regular amend’t of the Constitution. The oath could only require fidelity to the existing Constitution. A constitutional alteration of the Constitu-

98. American Heritage Library, Internet Brigade, *President Andrew Jackson’s Veto of the Bank of the United States, July 10, 1832* (visited Apr. 5, 2001) <<http://www.buchanan.org/h-176.html>>; see also PAULEY, *supra* note 10, at 173.

99. LEVINSON, *supra* note 13, at 123-24.

tion, could never be regarded as a breach of the Constitution, or of any oath to support it.¹⁰⁰

Washington listed as one reason for supporting the Constitution that a mechanism exists for changing it.¹⁰¹ Pre-Civil War members opposed to slavery took the oath knowing that the Constitution recognized slavery, yet many desired that slavery end.¹⁰² In fact, many members of Congress take the oath to support the Constitution simultaneously believing that our country would benefit from a constitutional change. I am one of those. Perhaps I am influenced by my niece, who was adopted from overseas when she was an infant, but I believe the prohibition against naturalized citizens becoming President no longer serves a useful purpose and probably causes some harm to the hopes and dreams of thousands of our youngsters.

In a symposium entitled *Constitutional Stupidities*, several legal authorities were asked to briefly describe the part of the Constitution deemed to be the most imperfect. In Mark Tushnet's piece entitled *The Whole Thing*, he expressed concern that perhaps "the basic structure of our national government may be unsuitable for contemporary society," and suggested that perhaps we should look at a parliamentary system.¹⁰³ Yet throughout this writing, one senses respect and "support" for the Constitutional process. Levinson points out that it would trivialize the oath if a member completely opposed to the American Constitution could take the oath in good faith merely by recognizing that through Article V it can be changed.¹⁰⁴ There is one intriguing theory, fortunately as yet untested, that a ratified amendment could in fact be struck down as unconstitutional, the idea being that an amendment could be so dramatically in conflict with our constitutional democracy that the United States Supreme Court ought to strike it down.¹⁰⁵ Could the oath of support be for that portion of the Constitution that would not and should not ever be changed, a tricky determination for 435 excited members holding babies waiting for a Speaker to be elected? Another perspective: perhaps supporting the core values contained in our Constitution means sometimes recognizing the need to amend it. I would argue that adopted children naturalized as American citizens ought to have the same right to run for the Presidency as any native-

100. MADISON, *supra* note 49, at 304; *see also* PAULEY, *supra* note 10, at 114.

101. *See* PAULEY, *supra* note 10, at 114.

102. *See* LEVINSON, *supra* note 13, at 65, 139.

103. Mark Tushnet, *The Whole Thing*, 12 CONST. COMMENTARY 223, 224 (1995).

104. *See* LEVINSON, *supra* note 13, at 138.

105. *See id.* at 150.

born American, and that such language in our Constitution would be reflective of our American democratic heritage guaranteed by the Constitution. Such a change would be a healthy nurturing of our most fundamental document, a show of "support [for] this Constitution." However, perhaps most advocates of the 10,000 amendments that have been proposed over the life of the Constitution share the same sentiment.

IX. THE SACRED OBLIGATION

In his last days, Andrew Johnson expressed his intent to be buried with a copy of the Constitution beneath his head.¹⁰⁶ Such professions of profound respect for our founding document and the duties contained therein may seem quaint now, but are not inconsistent with the views of others in our American past. George Washington, for example, believed that "the Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all."¹⁰⁷ Justice Story's comments previously noted also used the phrase "sacred obligation" when referring to support for the Constitution and the duties of the office.¹⁰⁸ Washington's admonition that "the Constitution . . . be sacredly maintained," as well as Madison's belief in "veneration" of the Constitution by the citizenry are both cited by Levinson in his article *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*¹⁰⁹ Levinson concludes that making a decision as a modern-day American to sign the Constitution is a "commitment to taking political conversation seriously . . . I do indeed believe that the Constitution is best understood as supportive of such conversations and of government predicated on respect for their maintenance."¹¹⁰ One cautionary note: such seriousness toward these Constitutional obligations can be used as a divisive wedge. During Reconstruction, both Democrats and Republicans used charges of disloyalty to hurt the opportunity for newly elected members of Congress to be seated,¹¹¹ essentially accusing an individual of not fulfilling, in Washington's words, the sacred obligation.

106. See PAULEY, *supra* note 10, at 181.

107. *Id.* at 115 (quoting Washington).

108. *Id.* at 225.

109. See Levinson, *supra* note 66, at 115.

110. *Id.* at 144.

111. See HYMAN, *supra* note 24, at 263.

X. THE OATH AND ETIQUETTE

The House vote on the articles of impeachment at the end of 1999 and the subsequent Senate vote on the future of the Presidency of Bill Clinton generated much serious discussion in Congress. It was common to hear members publicly and privately talk of the gravity of the vote and the role that conscience plays in such votes. It was indeed a serious time, but what about other times? What role should the oath play, if any, in the day-to-day job of legislating? What might we do to enhance the opportunity for the oath requirement to produce what Levinson called "serious political conversation"? What follows are some suggestions offered in the spirit of "support for this Constitution." These suggestions are not meant to be legalisms or rules but instead more of an etiquette that enhances respect both for the document but also for members and candidates, often in disagreement on important issues, working to do the best job they can of supporting our Constitution.

First, after election but before the beginning of the new Congress, a formal orientation is held for new members. Several think-tanks also put on issues conferences. A formal discussion of the oath, its history, and what it means to members would be a worthwhile topic. Most of orientation week for House members is partisan in that each party puts on the program for its respective new members, but a discussion of the oath would be an opportunity for an additional bipartisan event. In my experience, some of the best interpersonal relationship building occurs at small dinners hosted by senior members. Similar informal discussions, with new and old members of both parties, following the formal tutorial on the oath, could be helpful in encouraging members to learn from each other what "veneration" of the Constitution means in the reality of a pressured political life.

Second, in the House, all 435 members are sworn in simultaneously. The numbers are too large to do small groups as the Senate does; but the good that comes from the formality of the oath might be augmented in the House by a brief historical discussion similar to what Senator Lott has done on the floor of the Senate.

Third, the wording of the current oath is a product of the most divisive period in the history of our country, the Civil War. The history of the adoption of this language is consistent with the production of what Hyman called a "crisis product."¹¹² The Congress should consider

112. See HYMAN, *supra* note 24, at vii.

a return to the very straightforward language first adopted in 1789 that endured until the Civil War, and had as its only obligation the one contained in Article VI, Clause 3, to support the Constitution.

Fourth, probably no debate warrants more serious political conversation than that discussion which occurs in considering amendments to the Constitution. The framers desired veneration of the Constitution, but they also expected amendments to it. They wanted the oath of support for the Constitution to encompass pledging faith to a document that would change. As part of etiquette consistent with serious political conversation on proposed amendments, the debates ought not be politicized; but what does that mean when what one member dismisses as politicization another may consider sound tactic? Here are some possibilities for consideration. Members and candidates should exercise caution in stating a position of support for a proposed amendment until they have all the information and opinion they need. The midst of a heated campaign is an incredibly rushed and haphazard time to formalize a position on an issue as complicated as supporting an amendment to the Constitution, yet there can be much pressure to do so. Voters and advocacy groups should be respectful of members and candidates who demonstrate reluctance to support amendments, an attitude that can be difficult if the member changed his or her mind from a previous posture of support for the amendment. For example, one opinion writer referred to Senators Robert Byrd and Richard Bryan's change of mind regarding previous support for a flag desecration amendment as having "turned their backs on Old Glory."¹¹³ Senator Byrd's statement, "Why I voted against flag amendment" seems to demonstrate heartfelt support for and veneration of the Constitution when he concludes:

I believe in this Constitution deeply. That flag is the symbol of our nation. That flag is the symbol of our nation's history. That flag is the symbol of our nation's values. We love that flag. It symbolizes the nation. But we must love the Constitution more. It is not just a symbol; it is the thing itself.¹¹⁴

Another recent example: should voters judge a member who has a change of heart regarding previous support for a term limits amend-

113. Alan W. Dowd, *Washington Wake-up Call*, AMERICAN LEGION MAG., June 2000 (last updated May 29, 2001), available at <<http://www.legion.org/pubs/2000/wake6f.htm>>.

114. Robert C. Byrd, *Why I Voted Against Flag Amendment*, BOSTON GLOBE, Mar. 31, 2000, at A19.

ment differently than they would a member who changes his or her mind regarding a personal pledge to serve no more than three or four terms? Etiquette consistent with veneration of the Constitution argues that the two decisions warrant different treatment.

In the past, political leaders in the two major parties reached informal agreements not to give financial support to challengers who attack incumbents for their support of a congressional pay raise, believing that such a vote ought not be politicized. And candidates and members for the most part avoid attacking each other for job related foreign travel because in our complicated modern world it is not helpful to have decision-makers without personal exposure to the world's international problems. It would be consistent with "support for this Constitution" to have some kind of similar respect for the reluctance of challengers and incumbents to change the Constitution even though their electoral defeat might be a much sought-after goal. On the other hand, proposed amendments are important to their advocates and are fair game for politics, including elections, but the quality of the debate would perhaps be elevated by remembering the framers' intent to have legislators bound very seriously to the Constitution.

Positions in support of amending the Constitution are probably best not formed by the sometimes surprisingly strong winds of political pressure. Former Senator Dale Bumpers told me that one of his favorite senatorial tasks was to go back home to Arkansas and talk to his constituents about why he voted the way he did, and he used his opposition to a flag desecration amendment as the example. He compared changing the words of the Constitution and the First Amendment to changing the words of the Bible: neither appealed to him. Perhaps pledging faith to the Constitution means sometimes having that kind of potentially difficult conversation with constituents when a proposed amendment appears to have popular support, but the member concludes that it is wrong for America and the Constitution.

Fifth, committee treatment, the rules of the debate, and all similar procedural considerations ought to be supportive of the Constitution. It is my opinion that the rules of the debate which brought to the floor of the House nine different versions of a term limits amendment, all with meager support, may have been more respectful of potential political problems back home for some members than they were of our most basic document. Veneration of the Constitution ought to occur at all stages of the process, not just in the formulation of each member's individual vote.

Finally, we must not forget history. Hyman in great detail articulated the hazards befalling societies that attempt to enforce loyalty oaths. My musings are offered as support for an atmosphere of respect for those elected officials for whom the oath of office is a source of motivation for upgrading the level of political discourse, especially a decision on a proposed amendment. All members of Congress and the public have every right to support any amendment or issue they choose, and it would be disappointing if at some point in our nation's history increased focus on the oath of office produced caustic and politically inspired accusations of disloyalty and failure to uphold the oath. Efforts in the past to judge the sincerity of oath-takers have been problematic and should not be pursued. Application of similar energy to judge oneself against a constitutional standard can be just as difficult,¹¹⁵ but such personal effort is itself consistent with an oath to "support this Constitution."

XI. CONCLUSION

All American legislators, state and federal, formally pledge support to the Constitution as they embark on a public life of excitement, frustration, success, failure, fast pace, long days, and tough challenges. Remembering the excitement of those first few minutes as an elected official is easy; the meaning of the oath and its potential impact on the significant decisions of a legislator are more difficult to determine. This discussion has attempted to pull together some of the history, court cases, and commentary on the Article VI, Clause 3 oath requirement. Perhaps for some it might be an aid to the public and personal commitment, the "sacred obligation," to support the Constitution.

115. See LEVINSON, *supra* note 13, at 123.

