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## The Congressional Oath of Office: Responses to Congressman Vic Snyder

### Cover Page Footnote

In Volume 23, Issue 4, the Law Review published an essay by Congressman Vic Snyder discussing the congressional oath of office and a legislator's "sacred obligation" to support the Constitution. In response to that essay, the Law Review received replies from several of Congressman Snyder's colleagues and is pleased to publish these reflections on the essay and on the oath's significance.

## THE CONGRESSIONAL OATH OF OFFICE

DALE BUMPERS

*Senator from the State of Arkansas, 1975-1999*

Vic Snyder deserves high praise for his article on the Constitution and what the oath of office should mean to those who solemnly swear to “support and defend the Constitution of the United States.” It is a powerful reminder to all of us that the Constitution is sacred, that it is the longest living organic law in the world, and that it is the reason the United States is the oldest democracy in the world.

The Constitution can be a real pain at times because the lengthy amendatory process precludes our codifying our prejudices on whatever happens to be trendy at any given moment. Since 1787, there have been roughly 12,000 resolutions introduced in the House and Senate to amend the Constitution. The lion’s share of those have been in the last fifty years, and recently the number of proposals has become an absurdity. The American people in their infinite wisdom, excluding the Bill of Rights, have only seen fit to amend the Constitution seventeen times. When you take out the Eighteenth Amendment and its repeal by the Twenty-first Amendment, only fifteen remain. It is a testimonial to the common sense of the People.

In my late years, I have replaced Thomas Jefferson with James Madison as my number one hero because of his craftsmanship of so many provisions in the Constitution. He understood the vagaries of men’s thinking, and did an excellent job of making sure political expediency never became a substitute for serious governance.

I would be more than happy if historians consider the legacy of my twenty-four year Senate tenure to be that I voted against thirty-eight constitutional amendments, or amendments which would lead to the forced vote on a proposed amendment. This is not to say that I do not believe the Constitution should ever be amended. On the contrary, I believe the framers erred in not granting House members four-year terms. Nevertheless, on balance, it is always wise to have a long, measured debate on any proposed amendment. In practice, the longer the debate, the less chance of passage.

One interesting point that has always intrigued me is that it is the conservatives who should be most protective of the Constitution, yet, invariably, in the last few years, it has been the conservatives who offered the vast majority of amendments.

Congressman Snyder’s salient and unassailable point is that swearing to support and defend the Constitution is a deadly serious oath, not to be trashed on a whim.



## THE CONGRESSIONAL OATH—HISTORY AND TRADITION

BOB FILNER

*United States Representative from the State of California*

Those reading Vic Snyder's article who are *not* Members of Congress might not fully understand the uniqueness of his contribution: he has actually *thought* about what he is doing! As Snyder indicates, the pace of Congressional life is so manic, there is virtually no time for reading or reflecting on the earth-shaking issues we deal with on a daily basis. My own introduction to life on Capitol Hill was as an American Political Science Association Legislative Fellow—on leave from my university job as a Professor of the History of Science—in the office of Senator Hubert Humphrey. He once told me he had not had time to read a single book in the previous thirty years! As an academic, I was horrified—how could he do his job without thought and reflection? And yet, my over twenty years in public office produced almost the same result! So, thank you, Vic Snyder, for providing a new paradigm.

I am also glad Snyder had not started his congressional career two years earlier—he might have just quit in disgust. Newt Gingrich and his gang had come to power running against the whole institution of Congress. They denigrated it, belittled it, attacked it mercilessly. And they introduced a whole slew of constitutional amendments to undercut its role in American society. Several actually passed the House—others gained a *majority* of votes, but not the necessary two thirds. Very few of this new group took their oath of office with the seriousness that Snyder understands it.

The rapid turnover of House membership since 1990, the Gingrich revolution, the astonishing lack of legislative experience of a large percentage of the body all combine to leave very few in the “House of the people” today who understand the history and truly respect—even love—the institution. Our leaders today pale in comparison to the greats of the past—where are the Mo Udalls, Phil Burtons, Dick Bolands, Don Frasers, Les Aspins, Jamie Whittens, William Natchers, Henry Gonzalezes? Who in the House understands our body the way Robert Byrd understands the Senate?

We come to office running down the institution, we are trained by our leadership to engage in partisan trench warfare, we get co-opted by the perks of office—and we move onto a “higher” office. The history and traditions of the House, the meaning of such seemingly simple actions as the oath of office, the meaning of the “People’s Body” within American society, a vision of what a legislative body can be in the twenty-first century given the incredible technological changes of recent decades—all are completely ignored in our orientation, our caucuses, our day-to-day discussions.

Just reading Snyder's article brought me up short—why are we not discussing such ideas as an ordinary and necessary part of our job?

# THE CONGRESSIONAL OATH OF OFFICE—A PERSPECTIVE FROM THE SPEAKER

J. DENNIS HASTERT  
*Speaker of the House*

Few moments are as great for newly-elected members as the day that they take the oath of office from the floor of the House of Representatives. Alongside of you stand more than 400 of your new colleagues, and in unison, you swear to support and defend the United State Constitution. As you recite the oath, in this historical chamber, you cannot help but be filled with awe by the tremendous obligations you are accepting.

I was first elected in the mid-1980s, and therefore, have taken this sacred oath several times. Each time, I am renewed by this pledge to faithfully carry out the duties of my office in the tradition of our Founding Fathers.

While every oath has been personally significant, the oath I took on January 6, 1999 stands out among them all. It was on that day that I was first elected Speaker of the House. As you can imagine, this was a day filled with many honors—none the least was my new duty to administer the oath of office to my colleagues. After being sworn in by the most senior member of the House, John Dingell, I led the rest of the chamber in their pledge.

I have now had two opportunities to administer the oath of office, and I have to say that it is one of my most distinguished privileges as Speaker. Those of us elected to the House of Representatives have tremendous respect for the Constitution, the document that laid out the system of government for the greatest democracy in the world. As legislators, we believe it is our job to be true to the Constitution, uphold it and protect it, so that we can continue to keep our government free and strong. You can imagine, then, what an honor it must be to lead fellow members in a promise to carry out their Congressional duties and by doing so, preserve our nation. Even more of an honor is helping newer members understand their oaths, so they can live up to their potentials, adhere to the Constitution, and be the kind of representatives our Founding Fathers envisioned.

Of course, to be true to the oath, we must understand the oath. To do so, we must look back to the Constitution itself. The Constitution requires all members to take an oath, but it does not specify the precise wording of the oath. It says only that members “shall be bound by Oath or Affirmation, to support the Constitution, but no religious test shall ever be required as a qualification to any office of public trust under the United States.”<sup>1</sup> The instructions are short, and limited. Nonetheless, the Founding Fathers wanted to be sure that all members swore allegiance to the Constitution. No

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

doubt they felt belief in the Constitution was essential for effective governance, and they believed strongly in the Constitution's power to guide members through future decision-making.

With the simple, but strong message contained in the Constitution, we are always reminded that as members, we cannot make congressional decisions on a whim. Every decision must be made in accordance with our nation's Constitution. And, we must never lose sight of this very important responsibility. Of course, we are not so limited by the Constitution that we cannot change it. That may seem contradictory, considering the oath we take to support the Constitution, but I do not believe it is. The framers knew that the Constitution must be solid enough to last for generations and generations, yet flexible enough to meet the changing needs of changing times. It is for that very reason that they provided us with a means to amend the Constitution as necessary. The key is to keep in mind the general intentions of the framers whenever we consider an amendment. In that way, we can both support the Constitution and amend it.

Finally, I find it interesting to note that our Constitution requires that members take an oath to support the Constitution, but not to "faithfully discharge the duties of the office." Nonetheless, such a phrase is included in the oath members take. Naturally, the framers intended for officeholders to honor the responsibilities of their office, and by including this wording in our pledge, we remind ourselves that we must do the job that the American people elected us to do.

While members must live up to this oath day in and day out, we do not regard the oath as a chore. The great majority of us—if not all of us—come into office determined to keep these promises even before we formally take the oath. But by taking the oath on the House floor, before our colleagues, and before all those in America who are watching, we put what is in our hearts and minds into words, and accept our responsibilities in the future shaping of this government and our nation. And, as Speaker, I will always see it as one of my greatest obligations to make sure the House honors its promise and lives up to the sacred pledge we proclaim.

## THE CONGRESSIONAL OATH—PRIVILEGES AND RESPONSIBILITIES

BLANCHE LAMBERT LINCOLN

*United States Senator for the State of Arkansas*

I enjoyed reading the essay by my good friend, United States Representative Vic Snyder, regarding the congressional oath of office, and am pleased to add my views to this scholarly analysis of the oath.

Members of the United States House of Representatives and the United States Senate take the same oath of office. In that oath, we swear to “support and defend the Constitution of the United States against all enemies, foreign and domestic.”<sup>1</sup> The events of September 11, 2001, drove home this obligation with mind-searing emphasis.

During a tour of Ground Zero a few days after the attacks on the World Trade Center, as I inhaled the smoke rising from the smoldering heap of twisted metal and concrete, I shuddered with the realization that the devastation wreaked by the terrorists was a very personal attack on each and every American. While all Arkansans were traumatized by the images on television, most of us did not know any of the victims in New York, Pennsylvania, and Virginia. Yet something that each of us holds dear had been threatened—the American way of life. And that way of life has its foundation in the United States Constitution.

The terrorists who manned the airplanes and the people who danced in the streets after America was attacked share a hatred for American culture. I firmly believe their hatred is based on a jealousy for comforts they have never known. Those comforts emanate from our Constitution. Religious tolerance. The right to speak freely. The ability to assemble with whomever we choose. And the right for both men and women to choose our leaders in free elections. These are rights not experienced in the shadows of caves where terrorists hide.

During times of peace, it has been easy to take these comforts for granted. But each Sunday when I walk into my church, I am reminded that I have a privilege the terrorists did not take away. And when I stand on the Senate floor and speak my mind, I think of the women in Afghanistan who are prevented from leaving their homes without a male escort.

The privileges that we enjoy as Americans come with responsibilities as well. Each of us must tend to these responsibilities regardless of whether we have taken an oath of office to uphold the Constitution. At a minimum, every American should exercise his right to vote. It has been said that “bad

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1. 5 U.S.C. § 331 (1994)

officials are elected by good citizens who do not vote.”<sup>2</sup> During my travels throughout Arkansas, I occasionally encounter people who have a complaint about their government or one of their elected officials. It never ceases to amaze me when I hear these same people confess that they have never voted.

Fewer than half of the voting age residents of Arkansas—47.8%—turned out to vote in the 2000 presidential election.<sup>3</sup> That is less than the national turnout of voting age Americans, which was a measly 51.3%.<sup>4</sup> The close results of that election were a clear indication that every person’s vote counts.

Each of us should consider our role as stewards of our rule of law. The rights that we enjoy come with responsibilities. If we shirk those responsibilities, we are giving the terrorists another foothold on American soil.

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2. THE AMERICAN TREASURY, 1455-1955 at 344 (Clifton Fadiman ed., 1955) (quoting George Jean Nathan, unverified in Nathan’s works).

3. *Voter Registration and Turnout 2000*, Federal Election Commission, at <http://www.fec.gov/pages/2000turnout/reg&to00.htm> (last visited April 18, 2002).

4. *Id.*

## THE CONGRESSIONAL OATH AND CONSTITUTIONAL MORALITY

DAVID E. PRICE

*Representative from the State of North Carolina*

Representative Vic Snyder has rendered an important service to the Congress and the broader public by reminding us of the history of the congressional oath of office and pressing the question of the oath's significance for those who take it.<sup>1</sup> I am pleased to write in response to his essay.

Focusing as it does on the promise to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same," the oath places an obligation on members to abide by the Constitution's dictates and, when proposing changes in law and policy, to do so with due regard for authoritative constitutional precedent. This latter obligation may be subject to varying interpretations in a given instance, however, for the Constitution provides means for its own alteration and the current bounds of constitutionality are often open to debate. Snyder is careful to defend a legislator's ability to advocate constitutional amendments even as he decries the proliferation of such attempts in recent years and the intense "politicizing" of these debates.<sup>2</sup> I want to add a few thoughts on a matter he touches on more briefly: "the duty to sort out the constitutional from the unconstitutional" in considering ordinary legislation.<sup>3</sup>

During my years in the Congress, however, there is one landmark test of constitutional morality that stands out. It is a test the House utterly failed: the impeachment of President Bill Clinton.<sup>4</sup> I am aware that others disagree vigorously with this judgment, but I cannot escape it. I believe history will bear me out. The power of impeachment is granted to the House by the Constitution, and it is a critical component of the balance of powers between the executive and legislative branches. If there is any congressional action that should be driven by a sense of constitutional obligation and bounded by constitutional morality, it is surely impeachment. Yet House Republicans, in marked contrast to the 1973-74 impeachment proceedings against President Nixon, impeached Clinton in 1998 in an atmosphere of intense partisanship and with manipulations of process and procedure that provoked a deep sense of unfairness and constitutional violation.

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1. Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897 (2001).

2. *Id.* at 898-99, 918-19, 921-22.

3. *Id.* at 917.

4. This account draws on DAVID E. PRICE, *THE CONGRESSIONAL EXPERIENCE 181-85* (2d ed. 2000).

The Republican strategy, driven by House Whip Tom DeLay, had two major elements: denying members an opportunity to vote on censure as the constitutionally appropriate alternative to impeachment, and "defining down" impeachment itself, portraying it as the equivalent of an indictment (with definitive judgment to be rendered by the Senate) and/or a rebuke that the House could administer without further consequences (since the Senate was unlikely to convict). Impeachment proponents downplayed the historical and constitutional gravity of the step they were advocating and in the process misrepresented the threshold question facing the House. Most Democratic members, Republican rhetoric to the contrary notwithstanding, were appalled at the president's behavior and were prepared to hold him accountable. The threshold question was not whether the president had engaged in the behavior of which he was accused—which turned only partially on the legalistic definitions on which he and his lawyers insisted—nor whether that behavior deserved condemnation. Rather, the question was whether impeachment, reserved by the framers of the Constitution for "treason, bribery, or other high crimes and misdemeanors [against the State]," was the appropriate remedy.<sup>5</sup> That decision was the House's to face, hardly a matter to be blithely bucked to the Senate.

In the case of impeachment, Alexander Hamilton presciently predicted, "there will always be the greatest danger that the decision will be regulated more by the comparative strength of the parties, than by the real demonstrations of innocence or guilt."<sup>6</sup> The Clinton impeachment was indeed so decided, with proponents offering only strained argument—when they bothered to address the issue at all—to square the Clinton case with the constitutional standard for impeachment. The future may show the 1998 exercise to have dangerously lowered the barriers to politically motivated impeachment, although in light of the adverse public and political reactions to the House's action and the subsequent acquittal verdict in the Senate, the lesson may well be the opposite. In any event, the Clinton impeachment stands as a limiting case both of partisan excess and of the congressional abandonment of constitutional constraints.

This recklessness was perhaps encouraged by the cavalier attitude toward altering and bending the Constitution that many members of Congress had developed and displayed throughout the 1980s and 1990s. Snyder, citing Justice Ruth Bader Ginsburg, notes ten thousand instances of members

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5. See the discussions recorded in JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (W.W. Norton 1987) (1893) for the dates of July 20 and September 8, 1787. The words "against the State" were dropped by the Committee of Style, but with no intent to broaden the application of the terms.

6. THE FEDERALIST NO. 65, at 396-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

of Congress proposing amendments to the Constitution; he also recalls the spectacle of nine slightly varying term limit amendments being voted on in sequence in the House in 1997.<sup>7</sup> At a minimum, this suggests that too few members of Congress appreciate the virtues—in terms of legitimacy, durability, and adaptability to evolving historical conditions—of a Constitution that remains brief and largely free of specific policy prescriptions. With respect to the congressional oath, however, I believe the issue is not merely what James Madison described as “render[ing] the Constitution too mutable.”<sup>8</sup> There is a need for particular scrutiny of the subset of proposed amendments that would alter bedrock principles or delicate balances contained in the text of the Constitution and the Bill of Rights.

Two recent examples come to mind: the so-called Religious Freedom Amendment, which fell short of the required two-thirds vote in the House in 1998, and amendments permitting Congress to forbid the physical desecration of the United States flag, which passed the House but not the Senate in the 104th, 105th, and 106th Congresses. The Religious Freedom Amendment, a project of the religious right, purported to improve upon the First Amendment in ways that could have broken down barriers to state-sponsored religious exercises and government aid to sectarian institutions. The debate mounted by opponents in the House was notable not only in invoking the Establishment Clause and the freedom from religious coercion it seeks to ensure, but also in stressing the twin principle of religion’s “free exercise.” Religious freedom—and the delicate balance struck in the First Amendment—concerns not only civil liberty, but also the unimpeded expression of religious faith and conviction.<sup>9</sup>

Congress’s recurring flag-burning debates raise (or *should* raise) issues of constitutional obligation with respect to both the amending process and the passage of statutes. I have always voted against such amendments, which set out to overturn unexceptionable Court rulings and which, for the first and only time in our history, would write a loophole into the First Amendment. I also voted for statutory alternatives to the proposed amendment, reasoning that they would not tear the constitutional fabric and would subsequently be construed by the courts in a way that passed constitutional muster. I must acknowledge, however, that the position argued by Representative (and Stanford law professor) Tom Campbell has merit:

[I] thought the statute was unconstitutional, but supported an amendment to the Constitution.... I thought, “Sorry, the Supreme Court got it right. The First Amendment does protect flag burning. Wish it didn’t; don’t think it’s really important that it does, so I would support a constitu-

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7. Snyder, *supra* note 1, at 898-99.

8. THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

9. See PRICE, *supra* note 4, at 215.

tional amendment to take this [sort of] expression away. But you can't do it by statute . . . .<sup>10</sup>

For the reasons I have suggested, proposing such an amendment poses its own questions of constitutional fidelity, but it does have the merit of acknowledging the constitutional problem directly and taking the constitutionally prescribed path to its resolution. Fortunately, current versions of the statutory alternative have been much more carefully drafted to conform to judicially approved limits on freedom of speech.<sup>11</sup>

The congressional tendency to "hide behind the Court"—to think, as Representative Barney Frank puts it, "Oh, well, we'll vote for this because it's popular; we'll let the Court [deal with] it"—extends far beyond First Amendment issues.<sup>12</sup> The House's periodic debates of anti-crime bills offer many examples; I particularly remember a dispiriting debate on the eve of the 1990 elections when members were urged to vote for far-reaching restrictions on the rights of habeas corpus and of competent counsel for indigents, leaving it to the courts to clean up any problems. But this is surely an area where congressional oath should raise warning flags, even if it does not always offer a sure guide for action.

Senator Slade Gorton invoked the oath directly in a 1984 debate over a statute that would have given the president item-veto authority over appropriations bills, with an override vote consisting of a majority of each chamber. Noting that none of the proponents seemed to regard the proposal as constitutional, Gorton called them to task:

[Y]ou swore an oath, as I did, when you became Members of this body, to uphold the Constitution of the United States. You cannot hide behind the fact that the Supreme Court of the United States has final authority on constitutional questions. You cannot . . . ignore your own duty properly to interpret the Constitution, which you have inherited after 200 years of history. It is your duty to make a judgment as to whether or not this amendment is constitutional.

. . . [T]o duck your responsibility on the ground that [at] sometime . . . the Supreme Court will have final authority over the question is to ig-

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10. *Congress, the Court, and the Constitution: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 14 (1998) [hereinafter *Hearings*] (statement of Rep. Tom Campbell from the State of California).

11. See H.R. Res. 2312, 107th Cong. (2001), offered by Representative Rick Boucher; and the amendment in the nature of a substitute offered by Representative Melvin Watt during debate on House Joint Resolution 36, July 17, 2001. The original Flag Protection Act, passed by the 101st Congress, was invalidated by the United States Supreme Court in *United States v. Eichman*, 496 U.S. 310 (1990).

12. See *Hearings*, *supra* note 10, at 11 (statement of Rep. Barney Frank from the State of Massachusetts).

nore the oath which you swore when you became a Member of this body.<sup>13</sup>

Representative Robert Kastenmeier, long-time chairman of the House Judiciary Committee's Subcommittee on Courts, went so far as to institute a "constitutional impact statement" as part of the Subcommittee's report on any bill that raised a substantial constitutional question.<sup>14</sup> Taking such impacts into account does not require members to follow Court rulings in a rigid or mechanical fashion. Constitutional interpretations may be uncertain or in flux and, in any event, Congress has a legitimate role to play in what Alexander Bickel called the Court's "continuing colloquy with the political institutions and with society at large"—a colloquy whereby legal principles are "evolved conversationally not perfected unilaterally."<sup>15</sup> Louis Fisher notes several areas, including child labor, civil rights, and the rights of criminal suspects, where Congress has played a "coordinate" role with the courts in shaping constitutional interpretations.<sup>16</sup>

Recognizing the contribution Congress properly makes to constitutional understanding, far from justifying a legislative roll of the dice on constitutional matters, instead argues for more detailed and conscientious attention to the constitutional aspects of legislation. Is this something the institution is competent to undertake? As Paul Brest notes:

Many legislators are not lawyers; the legislative process is not structured to allow constitutional questions to be examined systematically or dispassionately; and many constitutional problems arise only as legislation is implemented. Although these points may argue for judicial review, they do not argue against an initial legislative examination. The modern legislative committee, staffed by lawyers and others having expertise in particular areas of policy and law, is competent to consider the constitutional implications of pending measures . . . . To be sure, legislatures will seldom engage in the disinterested and detailed analysis that we expect of courts. One can reasonably demand, however, that the lawmaking process take explicit account of constitutional values threatened by pending legislation.<sup>17</sup>

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13. Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 721 (1985) (quoting Sen. Gorton).

14. See Linda Greenhouse, *What's a Lawmaker to Do About the Constitution?*, N.Y. TIMES, June 3, 1988, at B6.

15. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 240, 244 (2d ed. 1986).

16. Fisher, *supra* note 13, at 744-46.

17. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 588 (1975).

It is indeed a "reasonable demand," and it is given particular force by the oath of office each us takes as we assume our seats in each new Congress.