

**Policy Analysis**  
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**April 26<sup>th</sup> 2006**  
**Political Science 629-75 – Seminar in American Politics**

**Part I: Introduction to the Issue and its Politics**

On the surface, The Pledge Protection Act of 2005 (HR 2389) is a highly politicized bill that directly confronts mainstream cultural wedge issues pertaining to church-state separation and religious freedoms. However, when the facade cloaking HR 2389 is chipped away, a complicated and entangled web reveals itself as extending far beyond the constitutional legality of the “under God” phrase. The Pledge Protection Act is replete with the age-old competing tensions embedded in the United States constitution. HR 2389 addresses the conflict inherent in reconciling majority and minority rights, provokes the cleavages of Federalism, and most immediately challenges the balance of power between the legislative and judicial branches. The bill is one of several recent attempts by social conservatives in Congress to assert its constitutionally defined authority over the federal Judiciary (H. Rpt. 108-691; CQ September 18<sup>th</sup> 2004; Article III, Sections I and II of the Constitution).

The major backers of HR 2389 are Republicans, although the Pledge Protection Act and related bills solicit bipartisan support. The Pledge Protection Act of 2005 has a complex history containing many related bills, resolutions, amendments, and constitutional amendments. While some have been passed, the activity varies across both chambers. In order to gain a clear understanding of who supports the legislation, it is necessary to look at the historical impetus and also assess the related Congressional actions.

The first amendment to the Constitution, which states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”, was ratified on December 15<sup>th</sup> 1791 (see FindLaw.com accessed on 4/6/2006 from

<http://caselaw.lp.findlaw.com/data/constitution/amendments.html>). The phrase “under God” was not added to the Pledge of Allegiance by Congress until June 15<sup>th</sup> 1954 and was signed into public law by President Dwight Eisenhower (see AmericanAtheists.org website accessed on 4/23/2006 from <http://www.atheists.org/flash.line/pledge8.htm>; also see H. Rpt. 108-691). HR 2389 stems back to the 2002 court case, *Newdow v. U.S. Congress* (herein referred to as *Newdow I*). The 9<sup>th</sup> U.S. Circuit Court of Appeals held in *Newdow I* that the phrase “under God” was an endorsement of monotheism in violation of the first amendment establishment clause incorporated to the states via the 14<sup>th</sup> amendment (*Newdow v. U.S. Congress* at FindLaw.com accessed 4/6/2006 from <http://files.findlaw.com/news.findlaw.com/wp/docs/conlaw/newdowus62602opn.pdf>). In reaction to the court’s decision siding in favor of an atheist religious minority, the 107<sup>th</sup> Congress introduced and passed resolutions (H Res 459 passed 416-3; S Res 292 passed 99-0) in both chambers stating the position that the case was erroneously decided and reaffirming the “under God” reference in the Pledge of Allegiance. House Committee on the Judiciary Chairman, James Sensenbrenner Jr. (R – WI), sponsored the resolution in the House. Senate Democratic Leader Tom Daschle (D – SD) sponsored the resolution in the Senate. The passing of a Congressional resolution technically has no impact on public policy, although it can pave the way for future legislation. CQ Weekly notes that passing a resolution is an easy means to inoculating oneself from constituents (CQ Weekly Volume 60 No. 26). Therefore, it is likely that the bipartisan support shown for these resolutions was purely political in nature.

Subsequently, the Pledge Protection Act (HR 2028) was born in 2003. It was introduced in the House on May 8<sup>th</sup>, 2003 and sponsored by Todd Akin (R-MO). However, the legislation did not mirror the bi-partisan support that the 2002 resolutions enjoyed. HR 2028 remained in the House Committee on the Judiciary for a total of 15 months. The bill eventually came to a

full floor vote in the House on September 23, 2004 and passed by 247-143, of which 34 Democrats joined the majority and 6 Republicans dissented. HR 2028 was received in the Senate, and no action was taken. HR 2028 is the most robust piece of legislation in the series of Pledge-related bills to date (in terms of actual deliberation). The House Committee on the Judiciary produced a report that is over 100 pages long, which will be discussed in part two of this paper when looking at the legal arguments supporting and opposing the legislation. In the Senate, Orrin Hatch (R-UT) introduced a twin bill (S 1297) on June 19th, 2003 with the same title. It never left the Senate Judiciary committee (all bill history, <http://thomas.loc.gov>).

This led to the creation of the Pledge Protection Act of 2005. In the House, HR 2389 was introduced by Todd Akin (R-MO), again. In the Senate, the same bill (S1046) was introduced by Jon Kyl (R-AZ). Both pieces of legislation remain in committee to date. In addition to the Pledge Protection Act, 2005 was a busy year for Congressional activity concerning the Pledge of Allegiance, the national motto, the Ten Commandments, religious freedom, school prayer, and court jurisdiction over these issues. Constitutional amendments, amendments to the federal Judiciary code, general legislation and also resolutions were brought forward in both chambers. Interestingly, these were all Republican sponsored, except for a constitutional amendment proposed in the Senate by Mary Landrieu (D-LA) (all bill histories, <http://thomas.loc.gov>).

Democratic Senator Landrieu's proposed constitutional amendment (S.J. RES. 24), "declares that a reference to God in the Pledge of Allegiance or on U.S. currency shall not be construed as affecting the establishment of religion under the first article of amendment of the Constitution." Senator Landrieu first introduced this amendment during the 108<sup>th</sup> Congress (S.J. Res. 7) on March 3<sup>rd</sup>, 2003. This is an interesting move for a Democrat to make in the Senate, because she proposed an amendment to the Constitution, not just a simple piece of

legislation to restrict court jurisdiction, or a resolution to express the sentiment of Congressional disapproval. Searches failed to recover any mention of S.J. RES. 24 or S.J. Res. 7 on Ms. Landrieu's official website (<http://landrieu.senate.gov/>), and she is not up for reelection until 2008. The constitutional amendment Ms. Landrieu proposed could potentially be interpreted as a strategic means for maneuvering around the court-stripping legislation that most Democrats oppose. Through the constitutional amendment, the majority supported "under God" sentiment can be fully expressed while the court-stripping language contained in the Pledge Protection Act would be avoided. The outcome would constitutionally deny the courts and religious minorities, such as atheists, the ability to challenge the monotheistic "under God" profession. It would also serve to prevent the establishment of a legislative precedent that could potentially lead to a series of court-stripping legislation that would likely follow HR 2389. Although, Senator Landrieu's testimony before the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights, in which she expresses her position on the issue, makes this assumption unlikely (see the subcommittee website accessed on 4/23/2006 from [http://judiciary.senate.gov/member\\_statement.cfm?id=1218&wit\\_id=3561](http://judiciary.senate.gov/member_statement.cfm?id=1218&wit_id=3561)). Ms. Landrieu also represents Louisiana, which is a southern state that has a traditionalistic political culture (see Nelson, pgs. 2-6 for discussion on the South). Even though the introduction of the proposed Constitutional amendment is a break from the Democratic Party's position on the issue, it is likely that she is being consistent with the wishes of her constituency. Other Democrats in Congress (Daschle proposed S. Res. 292 and Steve Israel proposed H. Res. 466) proposed resolutions to express support for the Pledge and disagreement with the *Newdow 1* court decision, rather than legislation.

President George W. Bush is widely known for proudly endorsing a faith-based platform, so it is logical that his position would be in favor of the Pledge Protection Act. The GOP

website features the President's remarks delivered on the National Day Of Prayer, in which he notes the history of a reliance on God in the United States and that:

"...we pray to acknowledge our dependence on the Almighty. ...And so we pray as Americans have always prayed: with confidence in God's purpose, with hope for the future, and with the humility to ask God's help to do what is right. (Accessed 4/21/2006 from <http://www.gop.com/News/Read.aspx?ID=5429>)."

Additionally, the President and the GOP have been known to rail against the courts and what they perceive to be judicial activism (Nelson, pgs. 13-14). Conservative interest group Eagle Forum quotes the President on its website:

"We will not stand for judges who undermine democracy by legislating from the bench and try to remake America by court order (Accessed 4/21/2006 from <http://www.eagleforum.org/psr/2004/oct04/psroct04.html>)."

Legal reform is a main platform of the GOP, which offers a section on the topic under its "issues" portion of the national website (accessed on 4/21/2006 from <http://www.gop.com/Issues/LegalReform/>).

The interest groups lining up in support of the legislation are socially conservative and/or members of the religious right. The Campaign for Working Families refers to the "liberal judicial activists in San Francisco" that found the pledge to be unconstitutional. In their position statement, they claim:

"Polling indicates that 90% of the American people want the words "under God" to remain the pledge, yet arrogant, unelected federal judges think they know better! (See Campaign for Working Families website accessed on 4/0/2006 from [http://capwiz.com/cwf/index\\_frame.dbq?url=http://capwiz.com/cwf/issues/bills/?bill=8022091](http://capwiz.com/cwf/index_frame.dbq?url=http://capwiz.com/cwf/issues/bills/?bill=8022091)).

The Campaign for Working Families website also has a list of all the Democratic non-cosponsors of the Pledge Protection Act (for all states), and a form letter to "defend the Pledge" that constituents can fill out to send to their representative regarding HR2389.

Eagle Forum is another interest group actively supporting the legislation. The founder and President of Eagle Forum is a conservative woman named Phyllis Schlafly, who is known for

her notoriously anti-feminist rhetoric, and her proud efforts that led to the legislative defeat of the "radical feminist" Equal Rights Amendment (Ms. Schlafly's bio can be found at Eagle Forum <http://www.eagleforum.org/misc/bio.html> accessed on 4/6/2006). Ms. Schlafly has also testified before the House Subcommittee on the Constitution in a hearing on "Limiting Federal Court Jurisdiction to Protect Marriage for the States" on June 24, 2004, which focused on Congress's constitutional authority to limit the jurisdiction of the Federal courts (see H. Rpt. 108-691). The Eagle Forum website lists position statements for all the legislation they are in support of (including H.R. 997, English Language Unity Act of 2005; S. 8 / H.R. 748, Child Interstate Abortion Notification Act; H.R. 1357 / S. 658, Human Cloning Prohibition Act of 2005; H.R. 1100, Marriage Protection Act of 2005; H.R. 4313 TRUE Enforcement and Border Security Act of 2005; S. 2117 Engaging the Nation to Fight for Our Right to Control Entry (ENFORCE Act), in addition to HR2389. Eagle Forum also "strongly opposes" S. 1197, To Reauthorize the Violence Against Women Act (VAWA). Their advertised position in favor of HR2389 publicly states:

"Due to the outrageous June 2002 ruling by the Ninth Circuit Court of Appeals regarding the reference to God in the Pledge of Allegiance, Congress voted to reaffirm the phrase "One Nation, Under God." Rep. Todd Akin (R-MO) wants to move a step further by removing the jurisdiction of the federal courts (including the U.S. Supreme Court) from cases involving the Pledge of Allegiance. Therefore, only state courts whose judges are elected (or retained in office) by the voters would hear Pledge cases. This bill is a practical legislative tool to check the power of the courts. The bill awaits action in the House Judiciary Committee's Subcommittee on the Constitution (accessed from Eagle Forum on 4/6/2006 from <http://www.eagleforum.org/alert/bills/bills-to-watch.shtml>)."

When tracking the interest group connection to the legislation in terms of their financial influence on politicians, OpenSecrets.org reveals a money trail in the expected direction. Eagle Forum supports most of the Republicans who are pushing for the Pledge Protection Act. Although their contributions are not extremely large, there are many across the board which further demonstrates their commitment to the socially conservative agenda. The information in

the chart below was abstracted from OpenSecrets.org on 4/6/2006. The names in bold red text represent the politicians who are co-sponsors of HR2389. The most notable observation is that Eagle Forum strictly gives only to members of the Republican Party.

Additionally, Orrin Hatch is a Republican Senator who is co-sponsoring the reauthorization of the Violence Against Women Act. The legislation, which Eagle Forum “strongly opposes,” covers many aspects of violence against women, including authorizing increased appropriations for grants to combat violent crimes against women (STOP grants), expansion of the grants to include use for underserved populations and for forensic medical exams of sex offense victims, and encouragement of arrests and enforcement of emergency protection orders in domestic violence and stalking cases (Bill history accessed on 4/6/2006 from <http://thomas.loc.gov>). Senator Hatch is not listed as a recipient of PAC contributions from the organization.

<b>Eagle Forum</b>			
<b>PAC Contributions to Federal Candidates 2006 Cycle (to date 4/5/06)</b>			
<b>House Candidate</b>		<b>House Candidate (Continued)</b>	
<b>Akin, Todd (R-MO)</b>	<b>\$1,000</b>	<b>Pence, Mike (R-IN)</b>	<b>\$1,000</b>
Bachmann, Michele Marie (R-MN)	\$3,000	Roskam, Peter (R-IL)	\$2,000
Franks, Trent (R-AZ)	\$4,000	Salvi, Kathleen R (R-IL)	\$2,000
<b>Garrett, Scott (R-NJ)</b>	<b>\$2,000</b>		
Graf, Randy (R-AZ)	\$2,000	<b>Senate Candidate</b>	
<b>King, Steven A (R-IA)</b>	<b>\$4,000</b>	<b>Vitter, David (R-LA)</b>	<b>\$1,000</b>
<b>McHenry, Patrick (R-NC)</b>	<b>\$750</b>		

**Eagle Forum**  
**PAC Contributions to Federal Candidates 2004 Cycle**

House Candidate		House Candidate (Continued)	
<b>Akin, Todd (R-MO)</b>	<b>\$6,180</b>	<b>McHenry, Patrick (R-NC)</b>	<b>\$3,500</b>
<b>Alexander, Rodney (R-LA)</b>	<b>\$1,000</b>	<b>McMorris, Cathy (R-WA)</b>	<b>\$7,258</b>
Assini, Mark W (3-NY)	\$2,000	<b>Mica, John L (R-FL)</b>	<b>\$124</b>
<b>Barrett, Gresham (R-SC)</b>	<b>\$92</b>	<b>Miller, Jeff (R-FL)</b>	<b>\$124</b>
<b>Bartlett, Roscoe G (R-MD)</b>	<b>\$500</b>	<b>Musgrave, Marilyn (R-CO)</b>	<b>\$4,613</b>
<b>Beauprez, Bob (R-CO)</b>	<b>\$1,113</b>	<b>Neugebauer, Randy (R-TX)</b>	<b>\$1,382</b>
<b>Bilirakis, Michael (R-FL)</b>	<b>\$124</b>	Oller, Rico (R-CA)	\$2,000
<b>Blunt, Roy (R-MO)</b>	<b>\$1,180</b>	<b>Pence, Mike (R-IN)</b>	<b>\$1,000</b>
Bowling, Janice H (R-TN)	\$4,000	<b>Putnam, Adam H (R-FL)</b>	<b>\$124</b>
<b>Brown, Henry (R-SC)</b>	<b>\$92</b>	Reichert, Dave (R-WA)	\$258
<b>Brown-Waite, Ginny (R-FL)</b>	<b>\$124</b>	<b>Renzi, Rick (R-AZ)</b>	<b>\$3,853</b>
Burns, Max (R-GA)	\$4,590	<b>Sessions, Pete (R-TX)</b>	<b>\$1,467</b>
Christian, Walter Wayne (R-TX)	\$2,500	<b>Stearns, Cliff (R-FL)</b>	<b>\$124</b>
<b>Cole, Tom (R-OK)</b>	<b>\$124</b>	<b>Sullivan, John (R-OK)</b>	<b>\$124</b>
Coronado, Alexandria A (R-CA)	\$1,500	Swallow, John (R-UT)	\$1,682
Crane, Phil (R-IL)	\$4,419	<b>Tancredo, Tom (R-CO)</b>	<b>\$113</b>
<b>Crenshaw, Ander (R-FL)</b>	<b>\$124</b>	Taubenberger, Alfred W (R-PA)	\$3,000
<b>Cubin, Barbara (R-WY)</b>	<b>\$500</b>	Walcher, Greg (R-CO)	\$3,113
<b>Davis, Geoff (R-KY)</b>	<b>\$3,769</b>	<b>Weldon, Dave (R-FL)</b>	<b>\$624</b>
Diedrich, Larry William (R-SD)	\$199	<b>Wilson, Joe (R-SC)</b>	<b>\$92</b>
<b>Emerson, Jo Ann (R-MO)</b>	<b>\$1,180</b>	Wohlgemuth, Arlene (R-TX)	\$9,136
Farr, Leslie (R-MO)	\$180		
Federer, Bill (R-MO)	\$5,180	<b>Senate Candidate</b>	
<b>Feeney, Tom (R-FL)</b>	<b>\$124</b>	Bond, Christopher S 'Kit' (R-MO)	\$2,361
<b>Franks, Trent (R-AZ)</b>	<b>\$1,000</b>	Cain, Herman (R-GA)	\$3,000
<b>Garrett, Scott (R-NJ)</b>	<b>\$500</b>	<b>Coburn, Tom (R-OK)</b>	<b>\$7,497</b>
<b>Gohmert, Louis B Jr (R-TX)</b>	<b>\$142</b>	Collins, Mac (R-GA)	\$2,000
<b>Graves, Sam (R-MO)</b>	<b>\$180</b>	Coors, Peter (R-CO)	\$569
<b>Harris, Katherine (R-FL)</b>	<b>\$229</b>	DeMint, James W (R-SC)	\$5,369
<b>Hastings, Doc (R-WA)</b>	<b>\$258</b>	Humphreys, Kirk (R-OK)	\$2,000
<b>Hefley, Joel (R-CO)</b>	<b>\$113</b>	Keyes, Alan L (R-IL)	\$500
<b>Hulshof, Kenny (R-MO)</b>	<b>\$180</b>	<b>Martinez, Mel (R-FL)</b>	<b>\$3,504</b>
Inglis, Bob (R-SC)	\$92	Miller, Mike (R-AK)	\$2,500
<b>Istook, Ernest J (R-OK)</b>	<b>\$124</b>	Nethercutt, George R Jr (R-WA)	\$2,128
<b>Keller, Ric (R-FL)</b>	<b>\$124</b>	Schaffer, Bob (R-CO)	\$4,000
<b>Kennedy, Mark (R-MN)</b>	<b>\$1,631</b>	<b>Thune, John (R-SD)</b>	<b>\$5,777</b>
Kerr, Alice Forgy (R-KY)	\$3,000	Toomey, Pat (R-PA)	\$2,000
Kilmer, Bev (R-FL)	\$5,624	<b>Vitter, David (R-LA)</b>	<b>\$7,725</b>
Kobach, Kris (R-KS)	\$8,179		
Lucas, Frank D (R-OK)	\$124		

The House Committee of the Judiciary report (H. Rpt. 108-691) listed the most prominent interest groups in opposition to the legislation. The list was promulgated as part of the dissenting opinion argument dated 9/15/2004. Again, it is important to note that the report was in regards to HR2028, the precursor to HR2389. Interestingly, some of the groups in opposition to the Pledge Protection Act are religiously oriented organizations. This observation

implies that the Republican Party might not necessarily have a monopoly in the God-politics arena.

<b>Interest Groups in Opposition to HR2028</b>	
Leadership Conference on Civil Rights The American Civil Liberties Union People for the American Way The Human Rights Campaign Americans United for Separation of Church and State American Jewish Committee Anti-Defamation League Baptist Joint Committee	National Council of Jewish Women Union for Reform Judaism U.S. Action Human Rights Watch The Unitarian Universalist Association The Anti-Defamation League The Interfaith Alliance The Constitution Project

In summary, the movement surrounding the “under God” reference, the Pledge, and related religious issues are largely backed by congressional Republicans, although there are a number of supporting Democrats and a small number of dissenting Republicans. The break in party lines surrounding this issue, such as the provided example of supporting Democrat Ms. Landrieu, helps to illustrate depth and political complexity. The issues are definitely newsworthy today, as God-politics are emerging to the forefront in America. Common criticisms of the Democratic Party, generally coming from the Religious Right, are that they turn their backs on God and religion, and that they have become the “...immoral party in our nation” because they support abortion, gay rights, and separation of church and state (accessed on 4/21/2006 from <http://www.republicans.org/>; also see the private website <http://law.brotherofyeshua.com/democrat.htm> for an example of Right extremism accessed on 4/21/2006 that states “Satan works through the Democratic Party to turn the children away from God -- and bring them into servitude to the demonic forces of darkness.”). Democrats have been losing traditionally Democratic-leaning votes because of the Republican’s streamlined faith-based campaign, which is successfully capturing the religious vote across America. In response, there have been recent calls for Democrats to begin reclaiming part of the God-

politics and morality debate (BeliefNet.com story accessed 4/21/2006 from [http://www.beliefnet.com/story/149/story\\_14990\\_1.html](http://www.beliefnet.com/story/149/story_14990_1.html); Common Dreams.org story accessed 4/21/2006 from <http://www.commondreams.org/views04/1104-01.htm>; Tikkun.org article accessed on 4/21/2006 from <http://www.tikkun.org/magazine/050111a.html>; AlterNet.org article accessed on 4/21/2006 from <http://www.alternet.org/story/32037>). It is likely that the discussion of religion will shape the next decade of American politics. Power struggles between the court and the legislature do not appear to be waning and have no promising resolution on the horizon. As long as the Republicans remain in the majority, it is not probable that they will relent in their crusade to strip the courts of their ability to make decisions that they perceive as being inconsistent with the majority (i.e. Republican) mainstream opinion in America.

### **Part II: The Story of the Bills**

HR 2389 (The Pledge Protection Act of 2005) is extremely complex and there are numerous related bills, resolutions, and amendments that have been introduced in both chambers over time. Section two of this paper attempts to present the history of these issues in chronological order across both chambers of Congress. As noted in the preceding section, HR 2389 can be directly linked to the 9<sup>th</sup> U.S. Circuit Court of Appeals decision in *Newdow I*. Newdow, an atheist father whose daughter attended a public elementary school in the Elk Grove Unified School District in California claimed that his daughter was injured when she was compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God'" (accessed 4/21/06 from [www.lexnotes.com/legalnews/pledge\\_newdow\\_9thcir.shtml](http://www.lexnotes.com/legalnews/pledge_newdow_9thcir.shtml)).

*Newdow I* was later overturned on procedural grounds, in which the Supreme Court ruled that Newdow lacked "prudential standing to bring this suit in federal court (accessed 4/21/06 from [www.lexnotes.com/legalnews/pledge\\_newdow\\_9thcir.shtml](http://www.lexnotes.com/legalnews/pledge_newdow_9thcir.shtml))."

In essence, the

child's mother filed a motion to intervene because even though the two parents shared "physical custody" of the child, she had been granted "exclusive legal custody" by the state "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare." The mother further claimed that her daughter was Christian and believed in God and that she had no objection to reciting or hearing the Pledge (accessed 4/21/06 from [www.lexnotes.com/legalnews/pledge\\_newdow\\_9thcir.shtml](http://www.lexnotes.com/legalnews/pledge_newdow_9thcir.shtml)). The reversal of *Newdow I* on procedural grounds, rather than on the constitutionality of the "under God" phrase, ignited a series of protective measures in Congress designed to restrict the court's ability to hear cases related to the Pledge and to insulate various references to "God" from future legal challenges.

The 107 <sup>th</sup> Congress																													
Chamber	Number	Title	Sponsor	Introduced																									
House	HRS 459	Expressing the sense of the House of Representatives that <i>Newdow v. U.S.</i> Congress was erroneously decided, and for other purposes.	James F. Sensenbrenner, Jr. (R-WI)	6/27/2002																									
<p><b>Actions</b></p> <p>6/26/2002: Referred to the House Committee on the Judiciary.  6/26/2002: Referred to the Subcommittee on the Constitution.  6/27/2002 2:46pm: Mr. Sensenbrenner moved to suspend the rules and agree to the resolution.  6/27/2002 2:46pm: Considered under suspension of the rules. (consideration: CR <a href="#">H4125-4136</a>)  6/27/2002 4:13pm: On motion to suspend the rules and agree to the resolution Agreed to by the Yeas and Nays: (2/3 required): 416 - 3, 11 Present (<a href="#">Roll no. 273</a>). (text: CR <a href="#">H4125</a>)  6/27/2002 4:13pm: Motion to reconsider laid on the table Agreed to without objection.</p> <p><b>Party Break-down</b></p> <table> <thead> <tr> <th></th> <th><u>Yeas</u></th> <th><u>Nays</u></th> <th><u>PRES</u></th> <th><u>NV</u></th> </tr> </thead> <tbody> <tr> <td>Republican</td> <td>220</td> <td></td> <td></td> <td>2</td> </tr> <tr> <td>Democratic</td> <td>194</td> <td>3</td> <td>11</td> <td>3</td> </tr> <tr> <td>Independent</td> <td>2</td> <td></td> <td></td> <td></td> </tr> <tr> <td><b>TOTALS</b></td> <td><b>416</b></td> <td><b>3</b></td> <td><b>11</b></td> <td><b>5</b></td> </tr> </tbody> </table>						<u>Yeas</u>	<u>Nays</u>	<u>PRES</u>	<u>NV</u>	Republican	220			2	Democratic	194	3	11	3	Independent	2				<b>TOTALS</b>	<b>416</b>	<b>3</b>	<b>11</b>	<b>5</b>
	<u>Yeas</u>	<u>Nays</u>	<u>PRES</u>	<u>NV</u>																									
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<b>TOTALS</b>	<b>416</b>	<b>3</b>	<b>11</b>	<b>5</b>																									
House	H.RES.466	Expressing the sense of the House of Representatives that reciting the Pledge of Allegiance in schools is constitutional, that the Congress deplores the decision of the 9th Circuit	Steve Israel (D-NY)	6/26/2002																									

		Court of Appeals and that the House of Representatives encourages every American to start their day by reciting the Pledge.		
<b>Actions</b> 6/26/2002: Referred to the House Committee on the Judiciary. 6/26/2002: Referred to the Subcommittee on the Constitution.				
<b>House</b>	<b>H.J.RES.108</b>	Proposing an amendment to the Constitution of the United States to guarantee the right to use and recite the Pledge of Allegiance to the Flag and the national motto.	Charles Pickering (R-MS)	7/25/2002
<b>Actions</b> 7/25/2002: Introductory remarks on measure. (CR <a href="#">E1374</a> ) 7/25/2002: Referred to the House Committee on the Judiciary. 8/20/2002: Referred to the Subcommittee on the Constitution.				
<b>House</b>	<b>H.CON.RES.428</b>	Expressing the sense of the Congress that recitation of the Pledge of Allegiance in schools is consitutional under the First Amendment to the Constitution, and urging the Supreme Court to uphold the constitutionality of such practices.	Van Hilleary (R-TN)	6/26/2002
<b>Actions</b> 6/26/2002: Referred to the House Committee on the Judiciary. 7/18/2002: Referred to the Subcommittee on the Constitution. 7/19/2002: For Further Action See <a href="#">H.Res. 459</a>				
<b>House</b>	<b>H.J.RES.103</b>	Proposing an amendment to the Constitution of the United States with respect to the Pledge of Allegiance.	Gene Green (R-TX)	6/27/2002
<b>Actions</b> 6/27/2002: Referred to the House Committee on the Judiciary. 7/18/2002: Referred to the Subcommittee on the Constitution.				
<b>Senate</b>	<b>S RES 292</b>	A resolution expressing support for the Pledge of Allegiance.	Tom Daschle (D-SD)	6/26/2002
<b>Actions</b> 6/26/2002: Submitted in the Senate, considered, and agreed to without amendment by Yea-Nay. 99 - 0. <a href="#">Record Vote Number: 163</a> . (consideration: CR <a href="#">S6105-6106</a> ; text as passed Senate: CR <a href="#">S6105</a> ; text of measure as introduced: CR <a href="#">S6132</a> )				
<b>Senate</b>	<b>S 2690</b>	A bill to reaffirm the reference to one Nation under God in the Pledge of	Tim Hutchinson (R-AR)	6/27/2002

		Allegiance.		
<p><b>Actions</b>  6/27/2002: Introduced in the Senate, read twice, considered, read the third time, and passed without amendment by Yea-Nay. 99 - 0. <a href="#">Record Vote Number: 166</a>. (consideration: CR <a href="#">S6225-6228</a>; text as passed Senate: CR <a href="#">S6227</a>)  6/27/2002: Message on Senate action sent to the House.  6/27/2002 6:37pm: Received in the House.  6/27/2002: Referred to the House Committee on the Judiciary.  7/18/2002: Referred to the Subcommittee on the Constitution.  8/29/2002: Subcommittee on the Constitution Discharged.  9/10/2002: Committee Consideration and Mark-up Session Held.  9/10/2002: Ordered to be Reported (Amended) by Voice Vote.  9/17/2002 2:53pm: Reported (Amended) by the Committee on Judiciary. H. Rept. <a href="#">107-659</a>.  9/17/2002 2:54pm: Placed on the House Calendar, Calendar No. 211.  10/7/2002 1:06pm: Mr. Sensenbrenner moved to suspend the rules and pass the bill, as amended.  10/7/2002 1:06pm: Considered under suspension of the rules. (consideration: CR <a href="#">H7028-7030</a>)  10/7/2002 1:12pm: At the conclusion of debate, the Yeas and Nays were demanded and ordered. Pursuant to the provisions of clause 8, rule XX, the Chair announced that further proceedings on the motion would be postponed.  10/8/2002 11:23am: Considered as unfinished business. (consideration: CR <a href="#">H7186-7187</a>)  10/8/2002 11:48am: On motion to suspend the rules and pass the bill, as amended Agreed to by the Yeas and Nays: (2/3 required): 401 – 5 (<b><i>**5 dissenting were Democrats</i></b>), 4 Present (<a href="#">Roll no. 445</a>). (text: CR 11/7/2002 <a href="#">H7028-7029</a>)  10/8/2002 11:48am: Motion to reconsider laid on the table Agreed to without objection.  10/9/2002: Message on House action received in Senate and at desk: House amendment to Senate bill.  10/17/2002: Senate agreed to House amendment by Unanimous Consent. (consideration: CR <a href="#">S10628-10629</a>; text as Senate agreed to House amendment: CR <a href="#">S10628-10629</a>)  10/17/2002: Cleared for White House.  10/18/2002: Message on Senate action sent to the House.  11/4/2002: Presented to President.  11/13/2002: Signed by President.  11/13/2002: Became Public Law No: 107-293.</p>				
<b>Senate</b>	<b>S.J.RES.43</b>	A joint resolution proposing an amendment to the Constitution of the United States to guarantee the right to use and recite the Pledge of Allegiance to the Flag and the national motto.	Trent Lott (R-MS)	8/1/2002
<p><b>Actions</b>  8/1/2002: Read the first time. Placed on Senate Legislative Calendar under Read the First Time.  9/3/2002: Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 559.</p>				
<b>Senate</b>	<b>S.3125</b>	A bill to designate "God Bless America" as the national song of the United States.	Sam Brownback (R-KS)	10/16/2002
<p><b>Actions</b>  10/16/2002: Introductory remarks on measure. (CR <a href="#">S10586</a>)  10/16/2002: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: CR <a href="#">S10586</a>)</p>				

The 108 <sup>th</sup> Congress					
House	H.R.2028	To amend title 28, United States Code, with respect to the jurisdiction of Federal courts over certain cases and controversies involving the Pledge of Allegiance.	Todd Akin (R-MO)	5/8/2003	
<b>Actions</b>					
<p>5/8/2003: Referred to the House Committee on the Judiciary.</p> <p>6/25/2003: Referred to the Subcommittee on the Constitution.</p> <p>9/10/2004: Subcommittee on the Constitution Discharged.</p> <p>9/15/2004: Committee Consideration and Mark-up Session Held.</p> <p>9/15/2004: Ordered to be Reported (Amended) by the Yeas and Nays: 17 - 10.</p> <p>9/21/2004 2:47pm: Reported (Amended) by the Committee on Judiciary. H. Rept. <a href="#">108-691</a>.</p> <p>9/21/2004 2:47pm: Placed on the Union Calendar, Calendar No. 424.</p> <p>9/21/2004 7:54pm: Rules Committee Resolution <a href="#">H. Res. 781</a> Reported to House. Rule provides for consideration of <a href="#">H.R. 2028</a> with 1 hour of general debate. Previous question shall be considered as ordered without intervening motions except motion to recommit with or without instructions. Measure will be considered read. Specified amendments are in order.</p> <p>9/22/2004 6:45pm: Rule <a href="#">H. Res. 781</a> passed House.</p> <p>9/23/2004 11:33am: Considered under the provisions of rule <a href="#">H. Res. 781</a>. (consideration: CR <a href="#">H7451-7478</a>; text of measure as reported in House: CR <a href="#">H7470</a>)</p> <p>9/23/2004 11:33am: House resolved itself into the Committee of the Whole House on the state of the Union pursuant to <a href="#">H. Res. 781</a> and Rule XVIII.</p> <p>9/23/2004 11:33am: The Speaker designated the Honorable Mike Pence to act as Chairman of the Committee.</p> <p>9/23/2004 12:51pm: <a href="#">H.AMDT.774</a> Amendment (A001) offered by Mr. Sensenbrenner. (consideration: CR <a href="#">H7471-7472</a>; text: CR <a href="#">H7471</a>) Amendment clarifies that the local courts of the District of Columbia may consider cases relating to the Pledge of Allegiance.</p> <p>9/23/2004 12:59pm: <a href="#">H.AMDT.774</a> On agreeing to the Sensenbrenner amendment (A001) Agreed to by voice vote.</p> <p>9/23/2004 1:00pm: <a href="#">H.AMDT.775</a> Amendment (A002) offered by Mr. Watt. (consideration: CR <a href="#">H7472-7475</a>, <a href="#">H7477</a>; text: CR <a href="#">H7472</a>) Amendment sought to preserve Supreme Court review of appeals related to the constitutionality of the Pledge of Allegiance.</p> <p>9/23/2004 1:26pm: <a href="#">H.AMDT.776</a> Amendment (A003) offered by Ms. Jackson-Lee (TX). (consideration: CR <a href="#">H7475-7477</a>; text: CR <a href="#">H7475</a>)</p> <p>Amendment sought to provide an exception to the preclusion provisions of the bill for instances alleging coerced or madatory recitation of the Pledge of Allegiance in violation of the First Amendment.</p> <p>9/23/2004 1:35pm: <a href="#">H.AMDT.776</a> On agreeing to the Jackson-Lee (TX) amendment (A003) Failed by voice vote.</p> <p>9/23/2004 1:59pm: <a href="#">H.AMDT.775</a> On agreeing to the Watt amendment (A002) Failed by recorded vote: 202 - 217 (<a href="#">Roll no. 466</a>).</p> <p>9/23/2004 1:59pm: The House rose from the Committee of the Whole House on the state of the Union to report <a href="#">H.R. 2028</a>.</p> <p>9/23/2004 2:00pm: The previous question was ordered pursuant to the rule.</p> <p>9/23/2004 2:17pm: On passage Passed by the Yeas and Nays: 247 - 173 (<a href="#">Roll no. 467</a>).</p> <p>9/23/2004 2:17pm: Motion to reconsider laid on the table Agreed to without objection.</p> <p>9/23/2004 2:18pm: The title of the measure was amended. Agreed to without objection.</p> <p>9/27/2004: Received in the Senate.</p>					
<b>Party Break-down</b>					
		<u>Yeas</u>	<u>Nays</u>	<u>PRES</u>	<u>NV</u>
Republican		213	6		8

Democratic		34	166	5
Independent			1	
<b>TOTALS</b>		<b>247</b>	<b>173</b>	<b>13</b>
<b>House</b>	<b>H.J.RES.46</b>	Proposing an amendment to the Constitution of the United States restoring religious freedom.	Ernest Istook, Jr. (R-OK)	4/9/2003
<b>Actions</b> 4/9/2003: Referred to the House Committee on the Judiciary. 5/5/2003: Referred to the Subcommittee on the Constitution.				
<b>House</b>	<b>H.RES.132</b>	Expressing the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in <i>Newdow v. United States Congress</i> is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned, and for other purposes.	Doug Ose (R - CA)	3/6/2003
<b>Actions</b> 3/6/2003: Referred to the House Committee on the Judiciary. 3/6/2003: Referred to the Subcommittee on the Constitution. 3/7/2003: Subcommittee on the Constitution Discharged. 3/12/2003: Committee Consideration and Mark-up Session Held. 3/12/2003: Ordered to be Reported by the Yeas and Nays: 22 - 2. 3/18/2003 6:06pm: Reported by the Committee on Judiciary. H. Rept. <a href="#">108-41</a> . 3/18/2003 6:06pm: Placed on the House Calendar, Calendar No. 13. 3/19/2003 11:36am: Mr. Sensenbrenner moved to suspend the rules and agree to the resolution. 3/19/2003 11:37am: Considered under suspension of the rules. (consideration: CR <a href="#">H1976-1981</a> ) 3/19/2003 12:14pm: At the conclusion of debate, the Yeas and Nays were demanded and ordered. Pursuant to the provisions of clause 8, rule XX, the Chair announced that further proceedings on the motion would be postponed. 3/20/2003 10:49am: Considered as unfinished business. (consideration: CR <a href="#">H2137</a> ) 3/20/2003 10:57am: On motion to suspend the rules and agree to the resolution Agreed to by the Yeas and Nays: (2/3 required): 400 - 7, 15 Present ( <a href="#">Roll no. 77</a> ). (text: CR 3/19/2003 <a href="#">H1976-1977</a> ) 3/20/2003 10:57am: Motion to reconsider laid on the table Agreed to without objection.				
<b>Party Break-down</b>				
		<u><b>Yeas</b></u>	<u><b>Nays</b></u>	<u><b>PRES</b></u>
		<u><b>NV</b></u>		
Republican		218		10
Democratic		181	7	15
Independent		1		2
<b>TOTALS</b>		<b>400</b>	<b>7</b>	<b>15</b>
<b>House</b>	<b>H.J.RES.26</b>	Proposing an amendment to the Constitution of the United States to protect the Pledge of Allegiance.	Frank Lucas (R-OK)	2/27/2003
<b>Actions</b>				

<p>2/27/2003: Introductory remarks on measure. (CR <a href="#">E328</a>)  2/27/2003: Referred to the House Committee on the Judiciary.  3/6/2003: Referred to the Subcommittee on the Constitution.</p>				
<b>House</b>	<b>H.J.RES.39</b>	Proposing an amendment to the Constitution of the United States relative to references to God in the Pledge of Allegiance and on United States coins and currency.	John Carter (R-TX)	3/13/2003
<p><b>Actions</b>  3/13/2003: Referred to the House Committee on the Judiciary.  5/5/2003: Referred to the Subcommittee on the Constitution.</p>				
<b>House</b>	<b>H.J.RES.40</b>	Proposing an amendment to the Constitution of the United States to guarantee the right to use and recite the Pledge of Allegiance to the Flag and the national motto.	Charles Pickering (R-MS)	3/18/2003
<p><b>Actions</b>  3/18/2003: Referred to the House Committee on the Judiciary.  5/5/2003: Referred to the Subcommittee on the Constitution.</p>				
<b>House</b>	<b>H.R.3190</b>	To safeguard our religious liberties.	Charles Pickering (R-MS)	9/25/2003
<p><b>Actions</b>  9/25/2003: Referred to the House Committee on the Judiciary.  10/22/2003: Referred to the Subcommittee on the Constitution.</p>				
<b>Senate</b>	<b>S.RES.71</b>	A resolution expressing the support for the Pledge of Allegiance.	Lisa Murkowski (R-AK)	3/4/2003
<p><b>Actions</b>  3/4/2003: Submitted in the Senate and ordered held at desk.  3/4/2003: Measure laid before Senate by unanimous consent. (consideration: CR <a href="#">S3074-3076</a>; text of measure as introduced: CR <a href="#">S3101</a>)  3/4/2003: <a href="#">S.AMDT.249</a> Amendment SA 249 proposed by Senator Murkowski. (consideration: CR <a href="#">S3075-3076</a>; text: CR <a href="#">S3075</a>) Making certain technical corrections.  3/4/2003: <a href="#">S.AMDT.249</a> Amendment SA 249 agreed to in Senate by Unanimous Consent.  3/4/2003: Resolution agreed to in Senate with an amendment and with a preamble by Yea-Nay Vote. 94 - 0. <a href="#">Record Vote Number: 39</a>. (text: CR 3/5/2003 <a href="#">S3204</a>; wrong version inadvertently printed on 3/4/2003 CR <a href="#">S3076</a>)</p>				
<b>Senate</b>	<b>S.RES.378</b>	A resolution designating June 14, 2004, as "National Pledge of Allegiance to the Flag Day".	John Cornyn (R-TX)	6/14/2004
<p><b>Actions</b>  6/14/2004: Submitted in the Senate, considered, and agreed to without amendment and with a preamble by Unanimous Consent. (consideration: CR <a href="#">S6743-6745</a>; text as passed Senate: CR <a href="#">S6745</a>; text of measure as introduced: CR <a href="#">S6741</a>)</p>				

<b>Senate</b>	<b>S.1297</b>	A bill to amend title 28, United States Code, with respect to the jurisdiction of Federal courts inferior to the Supreme Court over certain cases and controversies involving the Pledge of Allegiance to the Flag.	Orrin Hatch (R-UT)	6/19/2003
<b>Actions</b> 6/19/2003: Introductory remarks on measure. (CR <a href="#">S8242</a> ) 6/19/2003: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: CR <a href="#">S8242</a> )				
<b>Senate</b>	<b>S.J.RES.7</b>	A joint resolution proposing an amendment to the Constitution of the United States relative to the reference to God in the Pledge of Allegiance and on United States currency.	Mary Landrieu (D-LA)	3/3/2003
<b>Actions</b> 3/3/2003: Introductory remarks on measure. (CR <a href="#">S3035</a> ) 3/3/2003: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: CR <a href="#">S3035</a> )				
<b>Senate</b>	<b>S.1558</b>	A bill to restore religious freedoms.	Wayne Allard (R-CO)	8/1/2003
<b>Actions</b> 8/1/2003: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: CR <a href="#">S10910-10911</a> )				
<b>The 109<sup>th</sup> Congress</b>				
<b>House</b>	<b>H.R.2389</b>	Pledge Protection Act of 2005: To amend title 28, United States Code, with respect to the jurisdiction of Federal courts over certain cases and controversies involving the Pledge of Allegiance.	Todd Akin (R-MO)	5/17/2005
<b>Actions</b> 5/17/2005: Referred to the House Committee on the Judiciary.				
<b>House</b>	<b>H.J.RES.57</b>	Proposing an amendment to the Constitution of the United States protecting religious freedom.	Ernest Istook (R-OK)	6/30/2005
<b>Actions</b> 6/30/2005: Referred to the House Committee on the Judiciary.				
<b>House</b>	<b>H.CON.RES.253</b>	Expressing the sense of the Congress that reciting the	Henry Bonilla (R-TX)	9/27/2005

		pledge of allegiance by students attending public schools contributes to the moral foundation of our Nation and urging the Supreme Court to uphold the pledge's constitutionality.		
<b>Actions</b> 9/27/2005: Referred to the House Committee on the Judiciary.				
<b>House</b>	<b>H.RES.453</b>	Expressing the sense of the House of Representatives with respect to a court decision relating to the Pledge of Allegiance.	Thaddeus McCotter (R-MI)	9/20/2005
<b>Actions</b> 9/20/2005: Referred to the House Committee on the Judiciary.				
<b>House</b>	<b>H.CON.RES.245</b>	Expressing the sense of Congress that the United States Supreme Court should speedily find the use of the Pledge of Allegiance in schools to be consistent with the Constitution of the United States.	Darrell Issa (R-CA)	9/15/2005
<b>Actions</b> 9/15/2005: Referred to the House Committee on the Judiciary. 9/28/2005 1:44pm: Mr. Sensenbrenner moved to suspend the rules and agree to the resolution. 9/28/2005 1:44pm: Considered under suspension of the rules. (consideration: CR <a href="#">H8418-8422</a> ) 9/28/2005 2:11pm: At the conclusion of debate, the Yeas and Nays were demanded and ordered. Pursuant to the provisions of clause 8, rule XX, the Chair announced that further proceedings on the motion would be postponed. 9/29/2005 12:20pm: Considered as unfinished business. (consideration: CR <a href="#">H8530-8531</a> ) 9/29/2005 12:29pm: On motion to suspend the rules and agree to the resolution Agreed to by the Yeas and Nays: (2/3 required): 383 - 31, 8 Present ( <a href="#">Roll no. 504</a> ). (text: CR 9/28/2005 CR <a href="#">H8418</a> ) 9/29/2005 12:29pm: Motion to reconsider laid on the table Agreed to without objection. 9/30/2005: Received in the Senate and referred to the Committee on the Judiciary.				
<b>House</b>	<b>H.R.4576</b>	To amend title 28, United States Code, with respect to the jurisdiction of Federal courts over certain cases and controversies involving the Ten Commandments, the Pledge of Allegiance, and the National Motto.	Charles Pickering (R-MS).	12/16/2005
<b>Actions</b> 12/16/2005: Referred to the House Committee on the Judiciary				
<b>Senate</b>	<b>S.1046</b>	A bill to amend title 28, United States Code, with respect to the jurisdiction of Federal courts over certain	Jon Kyl	5/17/2005

		cases and controversies involving the Pledge of Allegiance.		
<b>Actions</b> 5/17/2005: Read twice and referred to the Committee on the Judiciary.				
<b>Senate</b>	<b>S.RES.243</b>	A resolution expressing Support for the Pledge of Allegiance.	Jim Talent (R-MO)	9/15/2005
<b>Actions</b> 9/15/2005: Introductory remarks on measure. (CR <a href="#">S10105</a> ) 9/15/2005: Submitted in the Senate, considered, and agreed to without amendment and with a preamble by Unanimous Consent. (consideration: CR <a href="#">S10147-10148</a> ; text as passed Senate: CR <a href="#">S10148</a> ; text of measure as introduced: CR <a href="#">S10131</a> )				
<b>Senate</b>	<b>S.J.RES.24</b>	A joint resolution proposing an amendment to the Constitution of the United States relative to the reference to God in the Pledge of Allegiance and on United States currency.	Mary Landrieu (D-LA)	9/14/2005
<b>Actions</b> 9/14/2005: Introductory remarks on measure. (CR <a href="#">S10046-10047</a> ) 9/14/2005: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: CR <a href="#">S10047</a> )				
<b>**All bill history accessed from Thomas on 4/21/2006 - <a href="http://thomas.loc.gov">http://thomas.loc.gov</a></b>				

As previously noted, HR2028 is the most robust of all Pledge-related activity in Congress. The House Report from the Judiciary Committee (H. Rpt. 108-691), in which the bill was held up for a total of 15 months, provides a detailed history of the deliberation process on both sides of the issue. The remaining portion of part two of this paper consists of a summary of the arguments made, both for and against, the legislation as described in H. Rpt. 108-691.

The proponents of HR2028 note that there is an impending danger of a future challenge to the pledge because *Newdow I* was overturned on procedural grounds. They claimed that this allowed the Supreme Court to avoid having to address the question of the "under God" phrase's constitutionality. HR2028 was motivated by the end desire to insulate the Pledge from future legal challenges. Restricting the court's jurisdiction and denying the court the ability to

hear a class of cases related to Pledge challenges was the means by which proponents believed they could achieve the end goal. The legal basis of the proponents' argument is that the lower Federal courts are entirely creatures of Congress, because Congress was vested with the constitutional power to establish them as deemed necessary. They cite Article III, Sections I, Clause I of the Constitution, which provides that "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In terms of the Supreme Court, they point to the original jurisdiction ascribed by the Constitution to the Supreme Court in Article III, Section II, Clause II that the Supreme Court has "...in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other cases . . . the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations as the Congress shall make." In other words, the original jurisdiction ascribed to the Supreme Court is not within the authority of Congress to regulate. However, its appellate jurisdiction does fall under Congressional authority. The 9<sup>th</sup> U.S. Circuit Court of Appeals acts out of appellate jurisdiction, which therefore constitutionally places the *Newdow I* case under the ultimate authority of Congress.

The argument in favor of the Pledge Protection Act further states legal precedent (as they interpret it) that establishes that the Supreme Court does not have a constitutional endowment of exclusive legal jurisdiction (meaning that they are not the supreme legal authority of the land on every aspect of the law). The cases cited are:

- *California v. Arizona (1979)*
- *Illinois v. City of Milwaukee (1972)*
- *Ohio ex rel popovici v. Agler (1930)*

They continue by citing Hamilton's commentary in Federalist Papers numbers 80 and 81. They point to the Judiciary Act of 1789, which was legislation in which Congress established some lower courts and hence, it also asserted the subordinated position of those courts relative to Congress as the body who granted their authority.

The argument continues with the citation of similar court-stripping legislative acts. The advocates, in an attempt to demonstrate bi-partisan support for court-stripping legislation (and also, to likely point out what they view as being hypocrisy amongst the Democratic Party), call public law number 107-206 into the debate. Public law 107-206 was sponsored by Senate Minority Leader Tom Daschle. The law denies the Federal Courts jurisdiction over the procedures governing timber projects "...in order to expedite forest clearing and save forests from destruction." The proponents scathingly argue:

"If Congress can deny all Federal courts the authority to hear a class of cases to protect trees, certainly it should do so to protect a state's policy regarding the Pledge of Allegiance."

They point to additional court-stripping legislation to underscore the proliferation of such acts by Congress:

- Terrorism Risk Insurance Act (P.L. No. 107-297) – precludes judicial review of certifications by the secretary of the treasury that terrorist events have occurred
- Small Business Liability Relief and Brownfields Revitalization Act (P.L. No. 107-118) – precludes judicial review of hazardous waste cleanup programs
- Amendment S.U. 70 to S. 450 during the 96<sup>th</sup> Congress - denies lower courts and the Supreme Court jurisdiction to hear cases regarding state laws relating to voluntary prayers in public schools and public buildings)
- The Marriage Protection Act (HR 3313) – prevents courts from striking down the provision of the Defense of Marriage Act (DOMA) that provides that no state shall be required to accept same-sex marriage licenses granted in other states

The champions of the Pledge Protection Act also outline a slew of case law precedents, which they interpret as being court decisions that are consistent with their agenda to restrict jurisdiction:

- *Wiscart v. D'Auchy*
- *Turner v. Bank of North America*
- *Cary v. Curtis*
- *Barry v. Mercein*
- *Sheldon v. Sill*
- *Major v. Cooper*
- *United States v. Klein*
- *Stevenson v. Fain*
- *Kline v. Burke Construction Co.*
- *Lauf v. E.G. Shinner and Company*
- *Lockerty v. Phillips*

The proponents of HR2028 also provide historical and contemporary arguments for their legislative push. The historical argument consists of a sweeping account of the acknowledgement of God and religion in America since Christopher Columbus set sail across the Atlantic Ocean:

- Christopher Columbus set sail "...by the grace of God" with the "hope that by God's assistance..."
- Virginia's first charter granted by King James I states "...by the providence of Almighty God..."
- The Mayflower Compact said "Having undertaken, for the glory of God, and advancement of the Christian faith..."
- The Massachusetts 1629 charter read "...true God and savior of mankind, and the Christian faith..."
- The Charter of Privileges granted by William Penn to Pennsylvania in 1701 claimed "...and Almighty God being the only Lord of conscience..."
- The Fundamental Orders of Connecticut called for "...decent government established according to God."
- Alexander Hamilton wrote about "...the law dictated by God himself."
- The Declaration of Independence has numerous God references:
  - "nature's God"
  - "endowed by their Creator"
  - "appealing to the Supreme Judge of the world"
  - "a firm reliance on the protection of divine providence"

The contemporary portion of their argument is structured on the current inclusions of God references in Federal offices and national monuments:

- National motto "in God we trust"
- "So help me God" when people are swearing in (under oath)
- Arlington National Cemetery is federal property with thousands of God references on the headstones
- The national holidays ("holy days") are religious

- Christmas
- Thanksgiving
- St. Valentine's Day
- St. Patrick's Day
- City names are religious
  - St. Petersburg
  - Los Angeles
  - San Francisco
  - St. Paul
  - Santa Fe
- Art galleries and museums receive government subsidies and their collections contain religious works
- Churches and clergy receive a tax-exempt status
- Many state constitutions recognize God
- Many examples of Presidents, Justices, and leaders referencing God

The dissenting opinion is substantially shorter. However, it presents a series of like arguments (their interpretation of previous legislation, case law, and their reasons for opposing the bill) and "findings" to counter the supporters of HR2028. The main theme of their argument is that HR2028 has no legal precedent, and they assert:

"The majority attempts in vain to find precedent for court-stripping bills, but none has ever been enacted into law. They point to several laws they're touting as precedent and misstate them, they constitute only partial restrictions on Federal Judicial review, or do not even involve issues of Constitutional review."

They also go on the record arguing the following major points:

- Eliminating the possibility of operating under a uniform Federal code divides the nation into 50 different legal regimes and is the anti-thesis of the Pledge's principles of unity
- The Pledge Protection Act and the Marriage Protection Act are efforts by the majority to use social wedge issues to divide the nation for political gain, which is why they are bringing the issue up at election time when they know it has no chance of passing in the Senate
- The legislation precludes people in D.C. and the territories from bringing suit regarding the pledge because they are not states and have no state courts
- It is unconstitutional
- It is unnecessary because the case has been overturned
- It intrudes on the separation of powers and provokes inter-branch confrontation thus places undue tensions on the separation of powers and the framework of government
- It is contradictory legislation because the majority seeks to undermine Federal judicial power with respect to Constitutional law, but in other contexts (such as state class action claims, state drug laws, and state abortion rights) the majority seeks to expand Federal judicial power at the expense of state court authority.

They also discuss *Marbury v. Madison* as a precedent for the separation of powers, noting that Justice Marshall declared unconstitutional the provision of the Judiciary Act of 1789 that the proponents of the Pledge Protection Act are citing as precedent for their legislation (also see Aberback and Peterson, p. 455). The dissenting opinion notes that in *Marbury*, the court enunciated the principal of Federal Judicial review of all federal laws. They refer to this decision, which led to 200+ years of judicial review, serving as the touchstone of our constitutional system and democracy. They also marshal additional legal precedents that prevented Congressional interference in judicial review:

- *United States v. Klein* – the only case in which the Supreme Court directly addressed the question of whether Congress can impose a legislative restriction on court power if framed in jurisdictional terms, and the court made it clear that the language of the challenged law plainly showed that it did not intend to withhold appellate jurisdiction except as a means to an end.
  - Therefore, the dissenting voices state this case as proof that the majority is passing the limit that separates the legislative from the judicial power.
- *City of Boerne v. Flores* – ruled it unconstitutional for Congress to legislate its view of the free exercise clause of the first amendment.
- *Dickerson v. United States* – Struck down an executive branch attempt to withdraw certain Habeas Corpus cases from Federal Court jurisdiction.

The Pledge Protection Act of 2005 has a hidden history of partisan struggles that surfaced in the House Judiciary Committee Report (H. Rpt. 108-691). Both sides of the debate were clearly outlined and detailed in the report, some of which was summarized and presented in the above section. Additionally, the record of actual verbal debate between committee members contains heated criticisms in which members bluntly confront one another while declaring their positions on the issue. The report provides insight into the process of deliberation and reveals the complex history behind the Pledge Protection Act that would otherwise go unnoticed when looking only at the surface. By drilling down into the depths of the report, a true impression of the legislative process is uncovered. The legislation no longer

seems lifeless, but rather becomes animated and full of energy, telling a story that is unique to the legislation and is representative of the politics and individuals of its time.

### **Part III: Analyzing Assigned Course Readings**

The first portion of the course defined the underlying values encapsulated in American politics by the Constitution. Part three of this paper discusses HR2389 in the context of the structure of American government and how it facilitates peaceful conflict resolution through process. The Pledge Protection Act manifests examples of conflict in terms of competing majority and minority rights, the divisions of federalism, and also inter-branch competition for authority. Democracy is a two-fold theme running through HR2389, as the Republican majority attempts to assert the will of the people over the judiciary's defense of a minority group, and politically appointed federal justices are deciding the Pledge's constitutionality as opposed to elected state court judges. The members of Congress supporting HR2389 are attempting to play with the divisions in the federalist system by placing the authority of deciding in state courts, which could lead to the proliferation of state power and an ambiguous future for America. Additionally, the balance of power is being tested, as Congress employs legislative tools to check the Judiciary by restricting its jurisdiction and asserting Congressional authority.

The House Report on HR2028 (H. Rpt. 108-691) provided a clear example of how the committee system serves Congressional function by gathering information and shaping legislation (Quirk and Binder, p. 207). H. Rpt. 108-691 illustrated the intense partisan conflict over HR2028 (a political wedge issue), and members of Congress were taking their opportunity to publicly state their positions on the record (Quirk and Binder, p. 207-211). The sheer amount of Pledge-related legislative activity provided an example consistent with Sinclair's description of majority party agenda setting and P.R. politics for the purpose of promoting the Party's image with the public (Quirk and Binder, p. 236). In the same thread, Sinclair's P.R.

politics were at play, as the social conservatives framed the debate in their favor by associating themselves with popular opinion and depicting the dissenting voices in a negative and absurd manner (Quirk and Binder, p. 248). In terms of Democracy, the minority party has essentially been stampeded in the House as the legislation has passed in each Congress, but in the Senate the legislation consistently dies because its stark partisan lines fosters stalemate in the higher chamber where a majority is not a mandate for passing (Quirk and Binder, pgs. 246-276).

Unity between the Executive branch and Congress has enabled the majority party to develop a strong hold on their power because they dominate public discourse across the board. The message coming out of the White House is streamlined with the actions of Republicans in Congress, in terms of the socially conservative legislation this paper is concerned with. As the Nelson book points out, Bush has been a builder, leader, and unifier of his Party (Nelson, p. 2). He engaged in the 2002 mid-term election on behalf of his Party, and in return the republican members of Congress are in support of his socially conservative policy initiatives (Nelson, p. 12; Aberbach and Peterson, p. 194-205). Bush campaigned on the themes of tort reform, stamping out judicial activism, and appealed to a religious partisan base (Nelson, p. 14; Aberbach and Peterson, p. 194, 205-207). HR2389 represents a culmination of the strength and unity of the Republican Party, its domination of both the Executive and Legislative branches, and the adoption of a highly politicized social wedge issue to construct the public appearance of delivering on the Party's promises of checking the Judiciary and preserving conservative values.

If HR2389 were to pass the Senate, Bush would certainly sign the bill into law, which would give the appearance of true Democracy in action as the majority rules. However, democracy is not necessarily determined by which Party has a majority in the two political branches of government. Nor is democracy necessarily undermined by the minority party in the Senate when a piece of legislation fails to pass. The two-Party and federalist systems combine

to obscure the “majority” in American politics (Hall and McGuire, p. 121-124; Fiorina, 99-104). Since the Republicans currently hold the majority position in government, they claim to represent the majority interests. Although, Nelson notes that Bush was elected by a narrow victory to his second term (only beating Kerry within 5% of a tie in 20 states), and his election in 2000 is still a point of contention (Nelson, p. 45). The Federal hierarchy of constitutional interpretation reinforces the superior position of the national majority in American politics (Hall and McGuire, p. 121-124), but the socially conservative Federal legislation coming out of Congress is not necessarily consistent with the majority at the state-level of government (especially in the Northeast and on the west coast) which is closer to the people. Democracy on a national scale, in terms of a majority, could be construed as being undermined when legislation dies in the Senate. However, in terms of state-based representation and also representation of the minority party (which is not as small as the term “minority” implies), democracy is in action when a bill dies in the Senate. The Senate provides a safety net by filtering out highly controversial legislative acts that undermine minority interests.

In the *Newdow 1* decision, the court decided in favor of protecting an unpopular minority's (atheists) rights over the majority (religious) sentiment. Conceptually, the struggle wrapped up in HR2389 is exactly what the Founders feared would play out; national majority tyranny over a very narrow minority. Even though their fears were economically-driven and dealt with completely different issues, they constructed a system that includes provisions for the facilitation of conflict resolution between groups, large and small, and the protection of narrow minority interests. Though the process of judicial review, the court held that the majority (U.S. Congress by via the Congressional act of adding the words “under God” to the Pledge) was unconstitutionally violating minority rights. Judicial review in the *Newdow 1* case is anti-democratic because it produced a highly politicized counter-majoritarian decision upholding an

atheist's minority rights (Hall and McGuire, p. 120-121). Even though the case was later overturned, the struggle between democracy and individual liberties continues to play out because HR2389 is a product of the national majority's attempt to further assert its authority and dominance.

The various congressional tools for checking the courts are contained in the mass of Pledge-related legislative activity. HR2389 is a congressional attempt to check the judiciary's power by restricting its jurisdiction and denying the court the authority to interpret the constitutional legality of the profession "under God" (Hall and McGuire, p. 110; 132-136). There were also attempts by the legislature to override the court decision. The court realized the political timing of the decision was incorrect and therefore defaulted to using judicial restraint to avoid the controversy by overturning the case on procedural grounds. The court's power to overturn a decision based on its rules of access is a tool for avoiding inter-branch conflict over a highly partisan wedge issue against an unsympathetic majority controlling Party. It is also an example of the court using deference as a means to tabling the issue of the Pledge's constitutionality until a later date when the political climate in the country is more feasible for looking at the question (Hall and McGuire, p. 94-95). The Supreme Court overturned the appellate court decision. If the legislation to strip the appellate court's jurisdiction over Pledge issues were to pass, the court would likely defer to Congressional authority because it allows the high court to avoid touching having to touch the issue.

HR2389 would place the question of the Pledge's constitutionality in the jurisdiction of state courts. State court judges are elected in most states, and unlike the federally appointed court justices, they do not enjoy the amenity of life tenure. When considering the issue of democracy, it seems much more democratic for the state courts to have this power. The judges are democratically elected by the people and can therefore be held accountable. They

are not an unelected group of elite justices who are legislating public policy from the bench (Hall and McGuire, p. 120-121). At one level, this is a more democratic means for handling social wedge issues. The states are closer to the citizens, are more reflective of their values, and the judges are elected. California can have a secular version of the Pledge and Kentucky can have a version that recognizes the Christian deity. However, individual liberties are in danger of being denied if minority groups are deprived of representation by politically responsive state court judges deciding cases in ways that are conducive to their reelection. The insular nature of the federal court system allows judges to make counter-majoritarian decisions. Additionally, state court judicial review of federal law is always subordinated to federal judicial review (Hall and McGuire, p. 121-124). So, while placing the issue in the state court system might be a temporary fix for dealing with a highly political issue, it is only a nominal solution because the Pledge challenge deals with a national law that is subject to federal review.

The Judiciary committee report on HR2028 chronicles the process of deliberation between members. The dialogue exhibits their underlying concerns regarding the substantive social issues and political consequences of the legislation (Quirk and Binder, p. 316-317). For example, the Republican advocates of the legislation make a case for the legislation in terms of upholding the "under God" phrase as a permanent addition to the Pledge. They frame the argument in a purely religious and political manner. They point to the historical uses of the word God, or references to God. They cite examples of the current nationally accepted uses of the references. They shore up examples that would be absurd to challenge, such as national holidays, the national monuments, Arlington National Cemetery, and even city names that have religious affiliations. To drive their point home, they even point to art galleries that receive public subsidies which have religious works of art in their collections. The social conservatives are identifying art galleries as having direct association with, or being threatened by, the

repercussions of a constitutional challenge to the Pledge. This strategy is a direct appeal for Democratic support, and is also a threat that it could be used as grounds to challenge or revoke funding for culturally liberal arts-supporting initiatives later down the road. Democrats must heed those warnings, as it is a part of estimating the consequences of policy and comparing the options (Quirk and Binder, p. 316-317). As well, the Republicans assert the ethical and emotional consequences of removing “under God” from the Pledge. They highlight the need for recognizing the importance religion has played in the establishment of America. They spend little time addressing the issue of restraining the courts and preventing judges from setting social policy, even though that is the main underlying theme of their legislative agenda. They focus on building the argument from the religious perspective to appeal to the majority public sentiment in support of the Pledge, and to please their partisan base.

The discourse related to the Pledge Protection Act shows members of Congress who support the legislation advocating their cause. The dissenting voices have the ability to criticize the bill (Quirk and Binder, p. 317-320). The interest groups who are affected are defending their interests. Siding with the advocates of the Pledge Protection Act, interest group support was traced to socially conservative organizations such as Eagle Forum and the Campaign for Working Families. Those groups siding with the dissenting members of Congress (such as the ACLU, People for the American Way, and National Council of Jewish Women) are defending their interests. However, the dissenting voices frame the debate in a different way. They do not point to the suppression of religious sentiment. Rather, they frame the debate in terms of the devastating impact that court-stripping legislation could have on America, and how the rights of minority groups could be trampled if the legislation shuts the courthouse doors on certain groups. The House Report shows a deliberation failure, because the partisans debating the issue are not recognizing the other side’s concerns. The outcome is a socially conservative

push for a piece of legislation that will die in the Senate, but will appease House member constituents (Quirk and Binder, p. 317-320). The members and the interest groups paint their conflict as an irreconcilable disagreement, and focus their attention on the negative outcomes (Quirk and Binder, p. 317-320). The interest group involvement is a constant reminder of the political consequences of the members' decisions and positions, as they contribute to the campaigns of members, but more importantly, they launch massive campaigns to compel the constituency to place pressure on their representatives (Quirk and Binder, p. 322-330).

The Pledge Protection Act serves as a great example in which to observe and analyze the structure and process of American politics. The bill stimulates a great degree of conflict because it is a heated social wedge issue. It also illustrates how the system is used to exploit issues that the public likely has a strong feeling about, in order to generate political support for the party. HR2389 and most of the bills in this class will never pass the Senate because of the potential substantive impact the court-stripping legislation could lead to. However, Republicans in both chambers and also in the executive branch can use the issue to draw public attention to their positions, while at the same time using the opportunity to deflect public attention away from other issues that could potentially undermine their power. The bill also highlights the balance of power between the court and the legislature. The court manages to check itself through deference to congress and by using restraint to avoid political controversy. Congress can mobilize to assert to the judiciary that they are elected representatives who determine social policy, and if the court is challenging their position, they can use a variety of tools and techniques to put them in their proper place. HR2389 touches on issues of democracy at many levels. In addition, the conflict surrounding religious social issues is thick. The Pledge Protection Act provides a complex picture of how the system and its processes facilitate solutions, or at the very least, discussion of the issues driving American politics.

## **Additional Resources**

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*House OKs bill to block court rulings on 'under God'.* Christian Century, 10/19/2004, Vol. 121, Issue 21.

*House Orders U.S. Courts Out of Pledge Controversy.* Human Events, 10/4/2004, Vol. 60, Issue 34.

*House Preserves 'Under God' in Pledge.* Smallen, Jill, Mitchell, Charlie, Koffler, Keith, National Journal, 9/25/2004, Vol. 36, Issue 39.

## **CQ Weekly**

Volume 60 No. 26 – June 29<sup>th</sup> 2002; pages 1708  
Pledge Flap Ruffles Hill: Are Amendments Ahead?

Volume 61 No. 10 – March 8<sup>th</sup> 2003; page 575  
Senate Votes

Volume 61 No. 12 – March 22<sup>nd</sup> 2003; page 708.  
House Action Redux on Pledge of Allegiance

Page 720.  
(H Res 132) Pledge of Allegiance/Adoption.

Volume 61 No. 30 – July 26<sup>th</sup> 2003; pages 1906-1907  
C-J-S Spending Bill Becomes Venue for Wide Range of Policy Disputes

Volume 62 No. 36 – September 18<sup>th</sup> 2004; pages 2148-2153  
'Heightened Tensions' Fray Judicial-Legislative Relations

Volume 62 No. 37 – September 25<sup>th</sup> 2004; page 2253  
House Bill Aims to Keep Federal Courts Away From Pledge of Allegiance Cases

Volume 63 No. 26 – June 27<sup>th</sup> 2005; Pages 1704-1711  
Fitting the Nine In A New Docket

Volume 63 No. 27 – July 4<sup>th</sup> 2005; page 1793  
Long March of the Circuit Breakers: GOP Might Finally Split the 9<sup>th</sup> Circuit

## **Thomas**

TITLE: Pledge Protection Act of 2004  
CIS-NO: 2004-H523-45  
SOURCE: Committee on the Judiciary. House  
DOC-TYPE: Report  
DOC-NO: [H. Rpt. 108-691](#)  
DATE: Sept. 21, 2004  
LENGTH: 111 p.  
CONG-SESS: 108-2  
ITEM-NO: 1008-C; 1008-D  
SUDOC: Y1.1/8:108-691

COMMITTEE REPORTS  
108th Congress, 2d Session  
House Report 108-691  
108 H. Rpt. 691

CONGRESSIONAL RECORD -- *HOUSE*  
Thursday, June 27, 2002  
107th Congress, 2nd Session  
148 Cong Rec H 4125

Bill Tracking Report  
107th Congress  
2nd Session  
U. S. House of Representatives  
HRS 459  
2002 Bill Tracking H. Res. 459; 107 Bill Tracking H. Res. 459

Pledge Protection Act of 2005 (Introduced in House)  
HR 2389 IH  
109th CONGRESS  
1st Session  
H. R. 2389 To amend title 28, United States Code, with respect to the jurisdiction of Federal courts over certain cases and controversies involving the Pledge of Allegiance.

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Testimony of Mary Landrieu

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Senator Mary Landrieu website

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Senator Jon Kyl website

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Representative Ernest Istook website

<http://www.house.gov/istook/>

Representative Charles "Chip" Pickering website

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GOP Website

President Bush Delivers Remarks On National Day Of Prayer

<http://www.gop.com/News/Read.aspx?ID=5429>

Private Right-Wing Extremist Website

<http://law.brotherofyeshua.com/democrat.htm>

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