



June 7, 2006

United States House of Representatives
Washington, D.C. 20510

Dear Committee member:

On behalf of the more than 900,000 members and activists of People For the American Way, we write to urge you to oppose H.R. 2389, the “Pledge Protection Act of 2005,” when it comes before the Committee today, June 7. This legislation would violate the First Amendment, and would set a terrible precedent against the separation of powers embodied in our Constitution that protects the fundamental rights of all Americans.

H.R. 2389 would eliminate any role for the federal courts, including the U.S. Supreme Court, in challenges concerning the constitutionality of the Pledge of Allegiance. This would have an immediate and dramatic impact on the ability of individual Americans to be free from government-coerced speech or religious expression. For example, this legislation would bar the federal courts from enforcing the U.S. Supreme Court's 1943 decision in *West Virginia State Board of Education v. Barnette*, which barred a local school district from forcing children to recite the Pledge of Allegiance over their religious objections.

Apart from being unwise as a matter of policy, H.R. 2389 appears to be an unconstitutional overreach of Congress' power under Article III regarding the federal judiciary, particularly in light of the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause. Further, it would contradict common sense, and more than 200 years of constitutional history, to allow Congress to circumvent the words “Congress shall make no law” by eliminating effective enforcement of the First Amendment by the courts and the U.S. Supreme Court. We agree with U.S. Senator Barry Goldwater who stated about a similar attempt to strip federal courts of jurisdiction over fundamental rights more than twenty four years ago: “If there is no independent tribunal to check legislative or executive action all the written guarantees or rights in the world would amount to nothing.”¹

Nor are state courts the appropriate sole and final venue for enforcement of federal constitutional rights. Indeed, H.R. 2389 raises the prospect of 50 different interpretations of the First Amendment. Guarantees of such fundamental rights as freedom of religion, freedom of speech and freedom from governmental religious coercion should not and cannot properly be relegated to such jurisprudential uncertainty. We note that the Reagan Administration, hardly an opponent of federalism, rejected historical and textual arguments for removing jurisdiction over federal constitutional questions to state courts:

¹ Quoted in: Stuart Taylor Jr., *Attacks on Federal Courts Could Shift Historic Roles*, New York Times, May 16, 1982.

“Nor does it seem likely that the [Constitutional] Convention would have developed the Exceptions Clause as a check on the Supreme Court in such a manner that an exercise of power under the Clause to remove Supreme Court appellate jurisdiction would...vest [the power] in the state courts. Hamilton regarded even the possibility of multiple courts of final jurisdiction as unacceptable.”²

In addition, H.R. 2389 expressly sets the precedent for future Congresses to completely bar U.S. citizens from raising *any* judicial challenge to federal action. State courts can only assert jurisdiction over the federal government if it consents to be sued. Failing that consent, individuals would be left without recourse to unconstitutional actions of the Congress or the executive branch. Unreviewable federal power to infringe on fundamental individual rights of American citizens is alien to our republic.

Finally, H.R. 2389 threatens to disrupt the framework of checks and balances on governmental power embodied in the U.S. Constitution through the separation of powers by setting the precedent for Congress to remove legislation from constitutional review by the judicial branch. For all practical purposes, Congress could become the sole arbiter of constitutionality on any subject within its powers – or indeed outside its powers since it could legislate away any challenge to congressional interpretation of its own authority. Litigation over the meaning of Article III, a necessary part of the inevitable court challenge to H.R. 2389, could in of itself result in a constitutional crisis deeply damaging to the separation of powers.

H.R. 2389 would set a terrible precedent for separation of powers and protection of individual rights. We urge you to reject the premise that Congress is above the Constitution and vote no on this legislation.

Sincerely,



Ralph G. Neas
President



Tanya Clay
Director, Public Policy

² Letter of Attorney General William French Smith to Senate Judiciary Chairman Strom Thurmond on S. 1742, May 6, 1982. S. 1742 would have stripped the U.S. Supreme Court and lower federal courts of jurisdiction over cases involving public school-sponsored prayer.