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December 16, 2004

By Facsimile: 202-228-1264

Hon. Bill Frist
United States Senate
416 Senate Dirksen Office Building
Washington, D.C. 20510-4205

By Facsimile: 202-224-6603

Hon. Thomas A. Daschle
United States Senate
509 Senate Hart Office Building
Washington, D.C. 20510-4103

Dear Senators Frist and Daschle:

We write on behalf of the Council on Judicial Administration of the Association of the Bar of the City of New York. The Association is 125-years-old, with over 40,000 members nationwide. We wish to express our deep concern about several bills, now pending in the Senate, which would restrict federal court jurisdiction over specific constitutional issues. These bills, H.R. 3313, the "Marriage Protection Act of 2004;" H.R. 3799/S. 2082/S. 2323, the "Constitution Restoration Act of 2004;" and H.R. 2028, the "Pledge Protection Act of 2003;" were either passed this year by the House or are now before the Senate as counterparts to House bills.

Our concern over jurisdiction-stripping legislation does not stem from opposition to the particular social policies expressed in these bills, but rather, as set forth at greater length below, is motivated by our belief that laws which purport to restrict judicial review set dangerous precedents, and this technique could, if pushed to extremes, upset the delicate balance of powers created by the Framers of the Constitution. Legislative majorities and their agendas change, often radically. Judicial review is the Constitution's prime protection, and often in our history it has been the *only* protection, against unwise legislation of whatever social stripe, pushed through by hasty majorities.

The Pending Bills

On July 23, 2004, the House passed H.R. 3313 by a vote of 233-194. This Act purports to bar lower federal courts, and limit the Supreme Court's appellate jurisdiction from exercising jurisdiction over questions of the interpretation or validity of Section 2 of the Federal

Defense of Marriage Act (DOMA, 28 U.S.C. § 1738), enacted in 1996, or the Marriage Protection Act. Section 2 of DOMA provides that no state shall be required to give effect to any act or proceeding of another state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, or a right of claim arising from such relationship. In doing so, it runs directly against the Full Faith and Credit Clause of the Constitution, which expressly requires states to recognize the "public Acts, Records, and judicial Proceedings of every other State." Article IV, Sec. 1.

On September 13, 2004, the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property held a hearing on H.R. 3799, the "Constitution Restoration Act of 2004," introduced on February 11, 2004 by Representative Robert Aderholt (R-AL). The Subcommittee, however, has taken no further action on this bill. According to the bill's sponsor, H.R. 3799 would protect public displays of the Ten Commandments, the Pledge of Allegiance in the classroom and nativity scenes at Christmas, "since it is in essence the acknowledgment of God." (Feb. 17, 2004 press release.) Title I of the bill purports to prohibit federal courts, including the Supreme Court, from exercising jurisdiction over any matter in which relief is sought against a federal, state or local government (or officer of such government) by reason of that government's (or officer's) acknowledgment of God as the sovereign source of law, liberty or government. Title II provides that in interpreting and applying the Constitution of the United States, federal courts may not rely upon any foreign law of any type other than English constitutional and common law. Title III, addressing law enforcement, specifies that prior federal court decisions pertaining to such issues shall not be binding precedent on state courts. It also purports to make the assertion by a federal judge of jurisdiction of these topics an impeachable offense, and a violation of the "good behavior" language in Article III. An identical bill, S. 2082, is pending in the Senate, introduced by Senator Richard Shelby (R-AL). On April 20, 2004, Senator Shelby and others introduced a revised version of the Constitution Restoration Act as S. 2323.

On September 23, 2004, the House passed H.R. 2028, the "Pledge Protection Act of 2003" by a vote of 247-173. This bill provides that no court established by Congress shall have jurisdiction over any claim that the recitation of the Pledge of Allegiance violates the First Amendment to the Constitution. Prior to being reported out of the House Judiciary Committee, a substitute version was adopted that was described as replacing the implementing language with the wording used in H.R. 3313, the Marriage Protection Act.

Other bills also attempt to preclude United States district and circuit courts from exercising jurisdiction over important constitutional issues: S. 1297 regarding the Pledge of Allegiance (introduced by Senator Orrin Hatch, R-UT), H.R. 3190 on the Ten Commandments, the Pledge of Allegiance and the motto, "In God We Trust" (introduced by Rep. Charles Pickering, R-MS) (a companion bill, S. 1558 was introduced by Senator Wayne Allard, R-CO) and H.R. 1547 pertaining to "religious freedom-related cases" (introduced by Rep. Ron Paul, R-TX). It is our understanding that no action has been taken on these measures.

Discussion

The pending bills, if enacted would seriously jeopardize our system of government. In our view, they seek to expunge the separation of powers that has served and preserved our nation for more than 200 years, and indeed has made our Constitution envied throughout the world. A strong, independent judiciary is, in deToqueville's words, the "barrier against tyranny." [1]

The federal judiciary has long played a vital role in this scheme of checks and balances through the judiciary's exercise of the power of judicial constitutional review. This power of judicial constitutional review is exercised by the courts through the judicial determinations rendered in individual cases properly brought before the courts, by parties having standing, regarding actions taken by the political branches of the federal government or by the states that either conform with or contravene our supreme law, the United States Constitution. It is principally through the mechanism of judicial constitutional review that the Constitution's limitations on the other branches of government are enforced.

Although Article III of the Constitution grants to Congress the power to regulate the jurisdiction of the federal courts, we believe that this power should not be so construed to permit Congress to deprive the courts of jurisdiction to hear claims arising under the Constitution itself, particularly on an issue-by-issue basis. If Congress' power were so extensive, it would undo the elaborate system of checks and balances that the Framers of the Constitution so carefully crafted, and this cannot be the case. This proposed legislation now pending in the Senate (and in the House of Representatives) would eliminate the judiciary as a check upon unconstitutional actions of the political branches by the simple expedient of removing their jurisdiction to consider challenges to such actions. It also would disrupt the allocation of power between the federal government and the states by eliminating the power of the federal judiciary to restrain acts of the states that violate the Constitution. Finally and most significantly, these bills would alter the constitutional balance between individual rights and majority will, since the judiciary is the only branch of government that is institutionally suited to protect the rights that our Constitution guarantees to individuals against the wishes of a strong-willed majority. To the extent the legislation attempts to eliminate retroactively the precedential effect of constitutional decisions rendered by federal courts with jurisdiction, and thereby modify the Supremacy Clause, it would clearly appear to violate the Constitution.

Furthermore, it should be recognized that, even if Congress had the power to divest the federal courts of their ability to hear constitutional claims, Congress cannot divest the state courts of such power. Thus, e.g., even if H.R. 3799 purportedly divested all federal courts, including the Supreme Court, of jurisdiction over cases involving governmental displays acknowledging God, a private party wanting to challenge, e.g., a display in a public school of the

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[1] In 1981, the Association's Committee on Federal Legislation issued a report containing a more expansive analysis with supporting authorities, of the fundamental constitutional principles summarized in this letter. The report's analysis remains sound, and we commend it to your attention. *Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review,* 36 Rec. A.B. City N.Y. 557 (1981).

Ten Commandments, could still file an action in state court, challenging the display under the United States Constitution. That case could be appealed to the highest court of that state, but no further. Thus, the highest courts in some states could hold the displays unconstitutional, and those in other states could find the displays constitutional. Since, under H.R. 3799, the United States Supreme Court would have no jurisdiction, The United States Constitution could end up meaning different things in different states--a serious re-entrenchment from our federal system of government.

Over the course of the history of our Republic, even when Congress and the courts have disagreed, Congress has respected the role of the courts as vital to protecting the basic structure of our government, particularly the principle of the separation of powers. As Chief Justice Warren Burger wrote in *Nixon v. Administrator of General Services,* 433 U.S. 425, 506-07 (1977) (Burger, C.J. dissenting):

> Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government. . . . Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, [the statute in question] can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles.

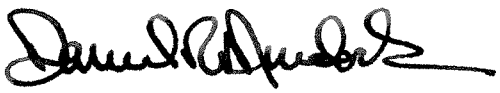
The Framers envisioned the Senate as a forum in which the popular passions of the day would be tempered by consideration of the long term best interests of the Republic. The proposed legislation would constitute an unwise and probably unconstitutional precedent that would irrevocably alter the basic framework of our system of tripartite government beneath whose protections we all take shelter. Indeed, our history demonstrates that those who today feel aggrieved by federal review might regret its absence when they are unable to seek such judicial review tomorrow in order to protect their basic rights. The plan of our government so painstakingly crafted by the Framers should not be tampered with because some federal court constitutional decisions are perceived to be out of step with public favor or even wrong.

We believe that the Senate should be guided by the example of the Senate Judiciary Committee in 1937, when it rejected then President Roosevelt's court-packing proposal in favor of preserving a federal judiciary, where judges may deliver their honest opinions, without fear of their appointing power or factional pressure. We urge the Senate, when it considers the pending bills, to vote against them, and champion an independent federal judiciary.

Thank you for your consideration of this letter. Please advise if we can be of further assistance to you.

Very truly yours,

Council on Judicial Administration



Daniel R. Murdock, Chair

cc:

Hon. Orrin Hatch, Chair, Senate Judiciary Committee
Members of the Senate Judiciary Committee
Hon. John M. Walker, Jr., Chief Judge, Second Circuit
Leonidas Ralph Mecham, Director, Administrative Office of the U.S. Courts
Bettina Plevan, President, ABCNY
Members of the ABCNY Council on Judicial Administration