RSC
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Legislative Bulletin……..……July 19, 2006

Contents:
H.R. 2389 — Pledge Protection Act of 2005

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: $0

Effect on Revenue: $0

Total Change in Mandatory Spending: $0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of *Bills* Without Committee Reports: 0

Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 2389 — Pledge Protection Act of 2005 — *as introduced* (Akin, R-MO)

Order of Business: The bill is scheduled for consideration on Wednesday, July 19, 2006, under a structured rule (H.Res. 920), which makes in order three amendments (summarized below).

An almost identical, H.R. 2028, passed the House during the 108th Congress by a vote of 247-173 (Roll Call 467) on September 23, 2004. The House also passed H.Res. 132 in 2003, reaffirming the phrase "one Nation, under God" in the Pledge and repudiating the Ninth Circuit Court's decision in the *Newdow v. United States Congress* case.

Summary: H.R. 2389 would prohibit any federal court – including the U.S. Supreme Court in an appellate situation – from hearing or deciding any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance (4 U.S.C. 4). As such, the bill would not affect any state court's ability to hear a state case regarding the Pledge, though any decision from such a case would affect only that one state. Further, H.R. 2389 provides two exceptions to the above prohibition. The bill's prohibition would not apply to:

1) any congressionally established court created to make regulations regarding the territory of the United States;
2) District of Columbia Superior Court, and
3) District of Columbia Court of Appeals.

This provision would exempt courts (from the prohibition to hear Pledge cases) that are established by Congress for the various U.S. territories, such as U.S. Virgin Islands and Puerto Rico, since these courts essentially function as state courts (as they do not have state courts due to their territory status). Note: This above exception was part of a Sensenbrenner manager's amendment to H.R. 2028 in the 108th Congress, which was adopted by a voice vote.

Additional Information: Article II, Section 1 of the U.S. Constitution states in part:

> 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**.

Article III, Section 2, Clause 2 of the U.S. Constitution states:

> 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 other Cases before mentioned, 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** [emphasis added].

The Pledge of Allegiance, as stated in current law (4 U.S.C. 4), is:

> "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

On June 14, 2004, the U.S. Supreme Court reversed and remanded the Ninth Circuit's *Newdow vs. U.S. Congress (Elk Grove Unified School District) et al.* decision that the Pledge is unconstitutional (due to the "under God" phrase), but did so on the grounds that Mr. Newdow (the plantiff) lacked the legal standing to bring the case. Thus, the Supreme Court majority opinion in the case did not address the underlying question regarding whether the phrase "under God" was constitutional. To read the full opinion, please visit: http://www.law.cornell.edu/supct/html/02-1624.ZS.html. The *Newdow* case was returned to the Ninth Circuit Court, where briefs are due in July 2006, and a ruling is expected after March 2007.

On September 14, 2005, a federal U.S. District Judge ruled that the Pledge's reference to "under God" violates school children's right to be "free from a coercive requirement to affirm God" and further stated that he was bound by precedent of the Ninth Circuit Court of Appeals earlier decision to rule in that manner.

Administration Policy: A Statement of Administration is not available, and the Administration's position on this bill is unknown.

Amendments Made in Order under the Rule: Below are the summaries of the three amendments made in order under the rule (H.Res. 920). Summaries are based on RSC staff's review of actual amendment text.

Watt (D-NC). Allows the U.S. Supreme Court to decide cases involving whether or not the Pledge is constitutional. The underlying bill specifically prohibits appellate jurisdiction of the Supreme Court, and this amendment would strike that language. This amendment was offered on H.R. 2028 in the 108th Congress and failed on a vote of 202 – 217 (Roll Call 466). The sponsor of the underlying bill views this as a gutting the bill and is strongly opposed to this amendment.

Jackson-Lee (D-TX). Adds an exception to the bill's prohibition on federal courts ability to rule on Pledge cases, in instances where a claim alleges "coerced or mandatory recitation of the Pledge of Allegiance, including coercion in violation of the protection of the free exercise of religion." Thus, under this amendment, both federal courts and the Supreme Court would be allowed to hear and decide Pledge cases that have a claim or coerced or mandatory recitation. This amendment was offered on H.R. 2028 in the 108th Congress and failed on a voice vote. The sponsor of the underlying bill is strongly opposed to this amendment.

Akin (R-MO). Directs that this Act (and all approved amendments) would take effect immediately upon enactment, and would apply to any pending or commenced court cases as of the enactment date.

Committee Action: H.R. 2389 was introduced on May 17, 2005, and referred to the Committee on the Judiciary. The bill was considered in Committee on June 28, 2006, which failed to report the bill to the House by a full committee vote of 15-15.

Cost to Taxpayers: A CBO score of H.R. 2389 is not available, but the bill does not authorize new expenditures, and would not have any cost to the taxpayers.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: A committee report citing constitutional authority is unavailable. House Rule XIII, Section 3(d)(1), requires that all committee reports contain "a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution" *[emphasis added]*.

However, in the committee report (H. Rept. 108-691) for the bill passed during the 108th Congress (H.R. 2028), the Judiciary Committee cites constitutional authority for this legislation in Article I, Sec. 8 (enumerated powers of Congress); Article III, Sec. 1, Clause 1 (the power of Congress to establish lower federal courts); and Article III, Sec. 2, Clause 2 (the power of Congress to determine the jurisdiction of federal courts) of the Constitution.

Outside Organizations: The following organizations are publicly supporting and scoring a Yes vote H.R. 2389: Family Research Council (FRC), Eagle Forum, and Traditional Values Coalition. In addition, FRC and Eagle Forum are scoring a No vote on the Watt amendment.

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