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EXPRESSING THE SENSE OF THE HOUSE OF REPRESENTATIVES THAT THE NINTH CIRCUIT COURT OF APPEALS RULING IN *NEWDOW* V. *UNITED STATES CONGRESS* IS INCONSISTENT WITH THE SUPREME COURT'S INTERPRETATION OF THE FIRST AMENDMENT AND SHOULD BE OVERTURNED, AND FOR OTHER PURPOSES

MARCH 18, 2003.—Referred to the House Calendar and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H. Res. 132]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 132) expressing the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in Newdow v. United States Congress is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the resolution be agreed to.

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PURPOSE AND SUMMARY

The purpose of H. Res. 132, introduced by Rep. Doug Ose on March 6, 2003, is to express the sense of the House of Representatives that the phrase, "one Nation under God," should remain in the Pledge of Allegiance[1]; that the Ninth Circuit Court of Appeals ruling in *Newdow* v. *U.S. Congress*[2] is inconsistent with the Supreme Court's interpretation of the First Amendment; that the Attorney General of the United States should appeal the Ninth Circuit's ruling; and that the President should nominate, and the Senate confirm, Federal circuit court judges who will interpret the Constitution consistent with the Constitution's text. It also encourages school districts across the Nation to continue reciting the Pledge daily and praises the Elk Grove, California School District for its defense of the Pledge of Allegiance against this constitutional challenge.

BACKGROUND AND NEED FOR THE LEGISLATION

THE NINTH CIRCUIT'S RULINGS IN *NEWDOW* V. *U.S. CONGRESS*

Michael Newdow is an atheist whose daughter attends Elk Grove Unified School District ("EGUSD") in California. Under California's Education Code, public schools are required to begin each school day with an "appropriate patriotic exercise[s]."[3] Accordingly, EGUSD instituted a policy under which "'[e]ach elementary school class shall recite the pledge of allegiance to the flag once each day.'"[4] Under these policies, the Pledge of Allegiance was recited at the start of each school day in EGUSD classrooms, including Newdow's daughter's class.

Objecting to this practice, Newdow filed suit, seeking declaratory and injunctive relief, against the U.S. Congress, the United States of America, the President, the State of California, and the EGUSD, challenging the constitutionality of the 1954 Act amending the Pledge to include the phrase, "one Nation under God," the California Statute, and the school district's policy of requiring teachers to lead willing students in the recitation of the Pledge.[5] Newdow's suit, however, did not assert that his daughter was required to recite the Pledge but, rather, that her First Amendment rights were violated by her being required to "watch and listen as her state-employed teacher in her state-run school leads her classmates in

[1] The Pledge reads, "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." 4 U.S.C. § 4.

[2] No. 00–16423, 2003 WL 554742, (9th Cir. Feb. 28, 2003) (*Newdow II*).

[3] "In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the school day, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." CAL. EDUC. CODE § 52720 (1989).

[4] *Newdow II* at 14.

[5] *See Newdow* v. *U.S. Congress*, 292 F.3d 597 (9th Cir. 2002) *(Newdow I)*.

a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"[6]

The U.S. Congress, the United States, and the President of the United States joined in the motion to dismiss filed by the EGUSD. The Federal district court granted this motion to dismiss, Newdow appealed, and on June 26, 2002, a panel of the Ninth Circuit, in *Newdow I*, reversed this dismissal.[7] As to Newdow's standing to challenge the recitation of the Pledge, the panel concluded that Newdow had standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter"[8]; that he may challenge the EGUSD's policy and practice regarding the Pledge because his daughter currently attends one of the school district's schools[9]; and that he has suffered an "'injury in fact' that is 'fairly traceable' to the enactment of the 1954 Act."[10]

As for its Establishment Clause analysis, the panel held that the Pledge of Allegiance as currently written to include the phrase, "one Nation under God," was unconstitutional for three reasons: the inclusion of "one Nation under God," unconstitutionally endorses religion,[11] the phrase was added to the Pledge in 1954 only to advance religion in violation of the Establishment Clause,[12] and that the recitation of the Pledge in public schools at the start of every school day coerces students who choose not to recite the Pledge into participating in a religious exercise in violation of the Establishment Clause of the First Amendment.[13] The panel also

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[6] *Newdow II* at *14.

[7] *See Newdow I.* The panel, however, did affirm the district court's dismissal of the U.S. Congress and the President as parties. *See id.* The State of California did not join the motion to dismiss nor did it otherwise participate in the district court proceedings so the *Newdow I* panel declined to address the validity, separately, of the California Statute. *See id.* at 602. The panel's decision was not unanimous. Circuit Judge Goodwin authored the panel's opinion and Circuit Judge Reinhardt joined in that opinion. Circuit Judge Fernandez concurred with the panel opinion on the issues of jurisdiction and standing but dissented from the panel's Establishment Clause holding. *See id.* at 612.

[8] *Id.* at 602.

[9] *See id.* at 603.

[10] *See id.* at 605.

[11] "In the context of the Pledge, the statement that the United States is a nation 'under God' is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation 'under God' is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase 'one nation under God' in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge, codified in Federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God." *Id.* at 607.

[12] "[T]he legislative history of the 1954 Act reveals that the Act's sole purpose was to advance religion, in order to differentiate the United States from nations under communist rule" and to "take a position on the question of theism, namely, to support the existence and moral authority of God, while 'deny[ing] . . . atheistic and materialistic concepts.' Such a purpose runs counter to the Establishment Clause, which prohibits the government's endorsement or advancement not only of one particular religion at the expense of other religions, but also of religion at the expense of atheism." *Id.* at 610.

[13] "[T]he policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting." *Id.* at 608. The panel reasoned that, "[a]lthough the defendants argue that the religious content of 'one nation under God' is minimal, to an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it may reasonably appear to be an attempt to enforce a 'religious orthodoxy' of monotheism, and is therefore impermissible. The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher, and their fellow students. Furthermore, under *Lee*, the fact that students are not required to participate is no basis for distinguishing *Barnette* from the case at bar because, even without a recitation require-

Continued

held the EGUSD's policy of reciting the Pledge unconstitutional as having the effect of endorsing the existence of a "monotheistic God."[14] Thus the panel reversed the Federal district court's dismissal and the case was remanded for further proceedings.

Following its June 2002 ruling, the Ninth Circuit immediately issued a stay to allow parties to file rehearing petitions. In August 2002, the defendants filed a petition for rehearing and a petition for a rehearing *en banc*. On February 28, 2003, the panel denied these petitions and amended its June 26, 2002, ruling.[15] In its amended ruling, *Newdow II*, the panel held that the EGUSD's policy and practice of opening each school day with the voluntary recitation of the Pledge "impermissibly coerces a religious act" on the part of those students who choose not to recite the Pledge and thus violates the [E]stablishment [C]lause of the [F]irst [A]mendment.[16]

Citing to *Lee* v. *Weisman*[17] in which the U.S. Supreme Court held unconstitutional the practice of public schools assisting in the composition of a graduation prayer that was later led by a member of the clergy, the panel in *Newdow II* concluded that, "The school district's policy here, like the school's action in *Lee*, places students in the untenable position of choosing between participating in an exercise with religious content or protesting."[18] The panel reasoned that,

> "[t]he coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students. Furthermore, under *Lee*, non-compulsory participation is no basis for distinguishing *Barnette* from the case at bar because, even without a recitation requirement for each child, the mere presence in the classroom every day as peers recite the statement 'one nation under God' has a coercive effect."[19]

The panel responded to the dissent's criticism that *Newdow II*'s holding is inconsistent with Supreme Court precedent by boldly stating, "[t]he Supreme Court has addressed the Pledge in passing, and we owe due deference to its dicta. . . . Our opinion, however, is not inconsistent with this dicta."[20] The panel attempted to distinguish the Pledge from the recital of other historical documents,

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ment for each child, the mere fact that a pupil is required to listen every day to the statement 'one nation under God' has a coercive effect." *Id.* at 609.

[14] "Given the age and impressionability of schoolchildren, as discussed above, particularly within the confined environment of the classroom, the policy is highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God." *Id.* at *611.

[15] *See Newdow II.* There are 24 active judges sitting on the Ninth Circuit Court of Appeals. The case would have been reheard if a majority, in this case thirteen, of the active judges voted in favor of a rehearing. In addition to the panel's amended ruling, including an amended concurrence and partial dissent from Judge Fernandez, Judge O'Scannlain issued a dissent from the court's denial of rehearing *en banc* in which five judges joined. Judge Reinhardt filed an opinion concurring in the order.

[16] "We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the Lemon Test as well." *Id.* at *18.

[17] 505 U.S. 577 (1992).

[18] *Newdow II* at *19.

[19] *Id.* at *20.

[20] *Id.*

"[t]he Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design, an affirmation by the person reciting it,"[21] and the recitation of the Pledge by adults in other public contexts, "[w]e may assume arguendo that public officials do not unconstitutionally endorse religion when they recite the Pledge, yet it does not follow that schools may coerce impressionable young schoolchildren to recite it, or even to stand mute while it is being recited by their classmates."[22]

The panel then proceeded to attack the Seventh Circuit Court of Appeals' conclusion in *Sherman* v. *Community Consolidated School District 21*,[23] the only other circuit to consider the recitation of the Pledge of Allegiance by public school students at the commencement of the school day. It concludes that the Seventh Circuit's holding was flawed because it did not apply *Lee*'s coercion test.[24]

In contrast to *Newdow I*, *Newdow II* fails to address plaintiff-appellant Newdow's standing to challenge the 1954 act.[25] Although the court refused to reach the question of Newdow's standing to challenge the 1954 statute, the statute, in a practical sense must be considered unconstitutional, at least as applied to its voluntary recitation in the public school classroom; the inclusion of "under God" no longer renders that statute, on its face, suspect as an unconstitutional endorsement of religion but its mere recitation in the presence of children, or dissenting children, is unconstitutional.[26]

On March 4, 2003, the panel issued a 90-day stay of its order in *Newdow II*. The ruling affects public school systems at which the Pledge is recited in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Norther Mariana. The 9.6 million public school students in these states and territories account for approximately one-fifth of the Nation's public school students.[27]

CONGRESSIONAL RESPONSE TO *NEWDOW* V. *U.S. CONGRESS*

Congressional reaction to the Ninth Circuit's ruling in *Newdow I* was immediate. On June 26, 2002, Judiciary Committee Chairman F. James Sensenbrenner introduced H. Res. 459, in which the House reaffirmed the Pledge as currently written, to include the phrase, "one Nation under God," and urged the Ninth Circuit to rehear the panel's ruling. H. Res. 459 passed by a 416 to 3 vote, with

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[21] *Id.*

[22] *Id.*

[23] 980 F.2d 437 (7th Cir. 1992).

[24] "Instead of applying any of the tests announced by the Supreme Court, the Seventh Circuit simply frames the question as follows: 'Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?' 980 F.2d at 445. For the reasons we have already explained, this question is simply not dispositive of whether the school district policy impermissibly coerces a religious act." *Newdow II* at *21.

[25] Because the amended ruling did not dismiss the United States as a party or rule conclusively that Newdow lacked jurisdiction to challenge the 1954 statute, it should be assumed that the United States is still a party to the suit and as such retains an interest in the outcome of the litigation and will have standing to appeal the ruling in *Newdow II*. In addition, the United States operates several schools that fall within the territory of the Ninth Circuit and thus retains standing in its capacity of operating those schools.

[26] As Justice O'Scannlain stated, "the Pledge was unconstitutional for everybody; in *Newdow II* the Pledge is only unconstitutional for public school children and teachers." *Newdow II* at *4 (O'Scannlain, J., dissenting.

[27] *See* U.S. Dept. of Ed., Nat'l. Ctr. For Ed. Statistics, *available at* http://nces.ed.gov/pubs2002/snf—report/table—01—1.asp.

11 Members voting present. On June 26, 2002, the Senate approved S. Res. 292, reaffirming its support for the Pledge of Allegiance, by a 99 to 0 vote. Similarly, on June 27, 2002, Sen. Tim Hutchinson introduced and the Senate approved, by a 99 to 0 vote, S. 2690 which reaffirmed that the language of the Pledge of Allegiance should continue to include the phrase "one Nation under God" and that the national motto should remain, "In God we trust." The Judiciary Committee considered S. 2690 in a markup session on September 12, 2002, and reported out the bill with an amendment.[28] S. 2690 was then approved by the House by a 401 to 5 vote, with 4 Members voting present.

In the days following the Ninth Circuit panel's issuance of its amended ruling, the Senate approved S. Res. 71, expressing its support for the Pledge of Allegiance, stating that the Senate "strongly disapproves" of the panel's amended ruling, *Newdow II*, and the decision of the Ninth Circuit not to rehear the case, and authorizing and instructing Senate Legal Counsel to seek to intervene in the case or to file an *amicus curiae* brief in support of the constitutionality of the Pledge as currently drafted. S. Res. 71 passed the Senate on March 4, 2003, by a 94 to 0 vote.

CONSTITUTIONAL ANALYSIS

The Ninth Circuit clearly erred when it concluded, as a matter of Supreme Court precedent, that the voluntary recitation of the Pledge of Allegiance is a religious act. To conclude otherwise is to have misinterpreted the last 40 years of Supreme Court precedent.[29] Justice O'Scannlain, dissenting in *Newdow II*, summarized the numerous instances in which the Court has distinguished the Pledge from otherwise prohibited activity:

> Several other Supreme Court cases contain explicit references to the constitutionality of the Pledge. *See Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) ("[The Pledge] in no way run[s] contrary to the First Amendment") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3); *Schempp*, 374 U.S. at 304 (Brennan, J., concurring) ("[R]eciting the Pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address."); Wallace, 472 U.S. at 78 n.5 (O'Connor, J., concurring) ("[T]he words 'under God' in the Pledge . . . serve as an acknowledgment of religion."); *Co. of Allegheny* v. *ACLU*, 492 U.S. 573, 602–03, 109 S.Ct. 3086, 106 L.Ed.2d 472 (Blackmun, J., for the court) ("Our previous opinions have considered in dicta . . . the Pledge, characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief."); *Lynch* v. *Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604, 676 (1984) (Burger, C.J., for the court)

[28] Mr. Nadler and Mr. Scott offered an amendment to S. 2690 to clarify that section 4 of title 4's requirement that men, who are not in uniform, 'remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart' prior to reciting the Pledge only applies to a 'non-religious' headdress. The amendment was agreed to by a voice vote. *See* H.R. Rep. No. 107–659, at 8 (2002).

[29] *See Newdow II. See also id.* at *4 (O'Scannlain, J., dissenting) ("With grim insistence, the majority in *Newdow II* continues to stand by its original error—that voluntary recitation of the Pledge of Allegiance in public school violates the Establishment Clause because, according to the two-judge panel majority, it is 'a religious act.'").

("Other examples of reference to our religious heritage are found . . . in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That Pledge is recited by many thousands of public school children—and adults—every year.").[30]

Is the Pledge of Allegiance A Religious Act?

Simply put, reciting the Pledge of Allegiance is not a religious act. To conclude otherwise is to misinterpret the last 40 years of Supreme Court precedent. Yet, "[w]ith grim insistence, the majority in *Newdow II* continues to stand by its original error—that voluntary recitation of the Pledge of Allegiance in public school violates the Establishment Clause because, according to the two-judge panel majority, it is 'a religious act.'"[31] In the words of Judge O'Scannlain in dissent, "[n]o court, state or federal, has ever held that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observance."[32] The importance of this distinction is that as a result, no court has ever applied the indirect coercion analysis to public school activities that are not a formal religious exercise. This is the crucial mistake made by the *Newdow II* panel, "[t]he panel majority simply ignores . . . the 'dominant and controlling facts'" in the school prayer cases "that Establishment Clause violations in public schools are triggered only when 'State officials direct the performance of a *formal religious exercise*.' 505 U.S. at 586."[33]

It's instructive to look at the circumstances under which the Pledge is recited in American culture. The Pledge is recited in schools and at most public government ceremonies including naturalization ceremonies. One can recall from personal experience, however, that the Pledge is never, or very rarely, recited at religious worship ceremonies held in houses of worship. Unlike reciting the Pledge, "to pray is to speak directly to God, with bowed head, on bended knee, or some other reverent disposition. It is a solemn and humble approach to the divine in order to give thanks, to petition, to praise, to supplicate or to ask for guidance."[34]

In *Engel* v. *Vitale*[35] the Court considered a school policy under which public school children were required to recite a state composed prayer at the commencement of each school day. It's instructive to review the Court's analysis of what it ultimately determined was proscribed by the Establishment Clause of the First Amendment. In *Engel*, the state-composed prayer read, "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'"[36] Of this prayer, the recitation of which is clearly a religious activity, the Court stated, "[t]here can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings, as prescribed in the Regents' prayer, is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the

[30] *Newdow II* at *11.
[31] *Id.* at *4 (O'Scannlain, J., dissenting).
[32] *Id.* at *9 (O'Scannlain, dissenting).
[33] *Id.* (emphasis in original).
[34] *Id.* at *10.
[35] 370 U.S. 421 (1962).
[36] *Id.* at 422.

Almighty."[37] Throughout its opinion in *Engel*, the Court referred to the prayer as the offending act. In fact, the Court made this distinction quite clear:

> There is of course nothing in the decision reached here that is inconsistent with the fact that schoolchildren and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the *unquestioned religious exercise* that the State of New York has sponsored in this instance.[38]

This statement would certainly support the assertion that California's statute and the EGUSD's policy, under which the pledge is recited daily, directs schools to do just as the *Engel* court suggested that it could, "encourage[d] [students] to express love for our country," and there should be little doubt that such policies are within the bounds of constitutionally accepted activity under the Establishment Clause.

In *School District of Abington Township* v. *Schempp*[39] the Court held that a Pennsylvania statute under which Bible verses were required to be read aloud at the opening of each public school day and a school district's policy under which this was followed by the Lord's prayer, unconstitutional.[40] Significantly, the Bible reading and prayer at issue in *Schempp* were followed by a recitation of the Pledge of Allegiance which was not challenged by plaintiffs and was not questioned by the Court. The *Schempp* court, affirming the holding of the district court, cited from the findings of fact in *Schempp*:

> The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer."[41]

It is difficult to argue that reciting the Pledge of Allegiance "possesses a devotional and religious character" similar to that of reading the Bible, of which the majority opinion in *Schempp* observed, "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid."[42] Furthermore, if the Bible reading was suspect in part because of the context surrounding its recital, the recitation of the Lord's Prayer immediately following, then certainly the

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[37] *Id.* at 424.
[38] *Id.* at 435 n.21 (emphasis added).
[39] 374 U.S. 203 (1963).
[40] Characterizing the practice at issue in *Schempp* as the majority opinion referred to the "pervading religious character of the ceremony." *Id.* at 224.
[41] *Id.* at 210. *See also id.* at 277–78 (Brennan, J., concurring) ("the panorama of history permits no other conclusion than that daily prayers and Bible readings in the public schools have always been designed to be, and have been regarded as, essentially religious exercises").
[42] *Id.* at 224.

Court should have, and would have, included the Pledge as another contextual element making the Bible reading suspect and, similarly, found the Pledge equally suspect as another religious exercise. Yet, the Court made absolutely no mention of the practice in its analysis.

Justice Brennan, concurring in *Schempp*, was also of the opinion that the Pledge was not a religious act, the recitation of which in a public school classroom would have to thus be prohibited by the Establishment Clause. Speaking of "less sensitive materials" that "might equally well serve" the purpose of "fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline," Brennan declared that, "readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class" might "adequately serve the solely secular purposes of the devotional activities" that had been found unconstitutional in the *Schempp* case.[43] Justice Brennan expanded,

> The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various *patriotic* exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The *reference to divinity in the revised pledge of allegiance*, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' *Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.*"[44]

Even if the recitation of the Pledge and various other founding documents containing religious references or statements of the religious beliefs of the authors does become an act of religious worship for some public school students, the government cannot prohibit certain non-religious activities simply because some participants may privately use the act of reciting these documents as an opportunity for a spiritual, religious exercise.

Justice Douglas, concurring in *Schempp*, agreed that the activity at issue in the case was constitutionally suspect because "the State is conducting *a religious exercise*."[45] Justice Goldberg, similarly, described the constitutionally suspect activity at issue in *Schempp*

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[43] *Id.* at 280–81.

[44] *Id.* at 303–04 (emphasis added). A review of the House of Representatives Committee Report filed in conjunction with the passage of legislation adding "under God" to the Pledge of Allegiance only adds support to Brennan's analysis,

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

H.R. Rep. 83–396 (1954).

[45] *Id.* at 229 (Douglas, J., concurring) (emphasis added).

as follows, "[t]he state has ordained and has utilized its facilities to engage in unmistakably religious exercises—the devotional reading and recitation of the Holy Bible."[46] Goldberg continued and described the "pervasive religiosity . . . inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day."[47]

Justice O'Connor is also of the opinion that the inclusion of "under God" in the Pledge reflects a historical fact and does not turn the pledge into a statement of religious faith or belief, "In my view, the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'"[48] Referring to the Court's opinion in both *Engel* and *Schempp* O'Connor has stated,

> The *Engel* and *Abington* decisions are not dispositive on the constitutionality of moment of silence laws. In those cases, public school teachers and students led their classes in devotional exercises. In *Engel*, a New York statute required teachers to lead their classes in a vocal prayer. The Court concluded that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." 370 U.S., at 425, 82 S.Ct., at 1264. In *Abington*, the Court addressed Pennsylvania and Maryland statutes that authorized morning Bible readings in public schools. The Court reviewed the purpose and effect of the statutes, concluded that they required religious exercises, and therefore found them to violate the Establishment Clause. 374 U.S., at 223–224, 83 S.Ct., at 1572. Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her nonconformity. The decisions acknowledged the coercion implicit under the statutory schemes, *see Engel*, supra, at 431, 82 S.Ct., at 1267, but they *expressly turned only on the fact that the government was sponsoring a manifestly religious exercise.*"[49]

For O'Connor, Alabama's moment of silence law, which was struck down as violating the Establishment Clause in *Jaffree*, was constitutionally suspect because the State "intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer."[50]

Finally, in *Lee* v. *Weisman*,[51] the case the *Newdow II* panel relied so heavily upon, in which the Court struck down a school district's practice of inviting a clergy member to give a graduation prayer

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[46] *Id.* at 307.
[47] *Id.IIII*
[48] *Wallace* v. Jaffree, 472 U.S. 38, 78 n.5 (1985) quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).
[49] *Wallace* v. *Jaffree*, 472 U.S. 38, 71–2 (1985) (O'Connor, J., concurring) (emphasis added).
[50] *Id.* at 84.
[51] 505 U.S. 577 (1992).

authored with the assistance of school officials, the Court continued to clearly limit its holding to the facts at hand, the formal religious exercise of prayer. As in *Schempp*, the activity at issue in *Lee* occurred in conjunction with the recitation of the Pledge of Allegiance.[52] Justice Kennedy, writing for the majority, began his analysis stating that "the significance of the prayers lies . . . at the heart" of the case.[53] Kennedy continued,

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.[54]

Significantly, for the *Newdow II* panel's holding, the *Lee* court stated, "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity."[55] That the *Newdow II* panel would not even acknowledge the clear distinctions between the facts at issue in Newdow and those at issue in *Lee* understandably causes observers to question the *Newdow II* panel's willingness or ability to interpret the Constitution and apply U.S. Supreme Court precedent.

The Constitution Prohibits Compelling Public School Students To Recite the Pledge of Allegiance

It's important that we recognize the right of those who do not share the beliefs expressed in the Pledge to refrain from its recitation, and under *West Virginia Board of Education* v. *Barnette* individuals cannot be compelled to recite the Pledge of Allegiance or to engage in any speech with which they disagree.[56] In *Barnette*, the Board of Education passed a resolution which required that all teachers and pupils participate in the salute to the flag.[57] Barnette, a Jehovah's Witness, brought suit claiming that the resolution denied him "freedom of speech" and "freedom of worship" under the First Amendment, because it required him to bow to a "graven image" which is prohibited under the Jehovah's teachings.[58] Writ-

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[52] "There the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers." *Lee* at 583.

[53] *Id.* at 584.

[54] *Id.* at 586. Justice Kennedy continued, "Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us." *Id.* at 587.

[55] *Id.* at 597–98.

[56] *See* 319 U.S. 624 (1943).

[57] *See id.* at 627.

[58] *See id.* at 630. "The Jehovah's Witnesses' religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it. *Id.*

ing for the majority, Justice Frankfurter contended, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[59] The Court concluded that the resolution amounted to compelled speech which "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[60]

While we affirm the principles of *Barnette*, the *Newdow* case did not involve compelled speech and accordingly, does not implicate *Barnette*. Thus, the Ninth Circuit's conclusion is troubling because it appears to reflect the flawed belief that any religious reference presents an inherent danger to individuals who hear it, the result of which would be the banishment of all such references from the public arena. Clearly, this is inconsistent with any reasonable interpretation of the Establishment Clause of the First Amendment. Thus it has become necessary for Congress to reaffirm its understanding that the text of both the Pledge and our national motto are legally and historically consistent with a reasonable interpretation of the First Amendment.

The Effect of Newdow II *on The Voluntary Recitation of Other Founding Documents in the Public School Context*

The constitutionality of the voluntary recitation by public school students of numerous historical and founding documents, such as the Declaration of Independence, the Constitution, and the Gettysburg Address, has been placed into serious doubt by the Ninth Circuit's decision in *Newdow II*.[61] As Judge O'Scannlain stated in his dissent, "[i]f reciting the Pledge is truly 'a religious act' in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem."[62] The Founders based their right to "dissolve the Political Bands which [have] connected them with another" on the "Laws of Nature and of Nature's God." They then went on to proclaim that men "are endowed by their *Creator* with certain unalienable Rights," appealed to "the Supreme Judge of the World for the Rectitude" of their intentions, and with "a firm Reliance on the Protection of divine Providence," "mutually pledge[d] to each other" their "Lives," "Fortunes," and "sacred Honor."[63] Article VII in the U.S. Constitution refers to "the Year of Our Lord."[64] On November 19, 1863, President Lincoln stated "that this Nation, under God, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth."[65] Our national motto is "in God we trust"[66] and the fourth stanza of the statutorily prescribed National Anthem includes in part the

[59] *Id.* at 643.
[60] *See id.*
[61] "[O]nly the purest exercise in sophistry could save multiple references to our religious heritage in our national life from *Newdow II*'s axe." *Newdow II* at *10.
[62] *Id.* at *4.
[63] The Declaration of Independence.
[64] U.S. Const. art. VII.
[65] Gettysburg Address. There are 14 references to God in the 669 words comprising the Gettysburg Address.
[66] 36 U.S.C. § 302.

following, "Blest with victory and peace, may the heaven-rescued land, Praise the Power that hath made and preserved us a nation. Then conquer we must, when our cause is just, And this be our motto: 'in God is our trust.'"[67]

Thus the U.S. Supreme Court has recognized the similarities between the Pledge, the Declaration of Independence, the Constitution and the Gettysburg Address in that they represent the authors' reference to the history of the Nation's founding which is clearly intertwined with fervent faith in God and religious beliefs. For example, Justice Brennan, in *Schempp*, offered that "[t]he reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."[68]

To conclude otherwise, would clearly lead to an interpretation of the Constitution that would call into question the meaning of the First Amendment given to it by our Nation's founders. Judge O'Scannlain's dissent is, again, instructive on this point,

> The majority's unpersuasive and problematic disclaimers notwithstanding, *Newdow II* precipitates a "war with our national tradition," *McCollum* v. *Bd. of Ed.*, 333 U.S. 203, 211, 68 S.Ct. 461, 92 L.Ed. 649 (1948), and as Judge Fernandez so eloquently points out in dissent, only the purest exercise in sophistry could save multiple references to our religious heritage in our national life from *Newdow II*'s axe. Of course, the Constitution itself explicitly mentions God, as does the Declaration of Independence, the document which marked us as a separate people. The Gettysburg Address, inconveniently for the majority, contains the same precise phrase—"under God"—found to constitute an Establishment Clause violation in the Pledge. After *Newdow II*, are we to suppose that, were a school to permit—not require—the recitation of the Constitution, the Declaration of Independence, or the Gettysburg Address in public schools, that too would violate the Constitution? Were the "founders of the United States . . . unable to understand their own handiwork[?]" *Sherman*, 980 F.2d at 445. Indeed, the recitation of the Declaration of Independence would seem to be the better candidate for the chopping block than the Pledge, since the Pledge does not require anyone to acknowledge the personal relationship with God to which the Declaration speaks. So too with our National Anthem and our National Motto.[69]

The Ninth Circuit's Ruling in Newdow II *Has Created A Split Among the Circuits*

The Ninth Circuit's ruling in *Newdow II* has placed the circuit in direct conflict with the Seventh Circuit Court of Appeals which,

[67] 36 U.S.C. § 301(a).
[68] *School District of Abington Township* v. *Pennsylvania*, 374 U.S. 203, 303–04 (1963).
[69] *Newdow II* at *10.

in *Sherman* v. *Community Consolidated School District*,[70] held that a school district's policy allowing for the voluntary recitation of the Pledge of Allegiance in public schools does not violate the Establishment Clause of the First Amendment.

The Seventh Circuit in *Sherman* concluded that the voluntary recitation of the Pledge in public schools is not a violation of the Establishment Clause of the First Amendment. That court did not make the analytical mistake so fatal to the *Newdow II* panel's analysis. Describing the practice that it was about to review it stated,

> Recall that for now we are treating the Pledge as a patriotic expression, even though the objections to public patriotism may be religious (as they were in *Barnette*). Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that justify its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.[71]

In response to the assertion that the voluntary recitation of the Pledge is offensive to those student who don't choose to recite it, that court stated,

> Students not only read books that question or conflict with their tenets but also write essays about them and take tests—questions for which their teachers prescribe right answers, which the students must give if they are to receive their degrees. The diversity of religious tenets in the United States ensures that anything a school teaches will offend the scruples and contradict the principles of some if not many persons. The problem extends past government and literature to the domain of science; the religious debate about heliocentric astronomy is over, but religious debates about geology and evolution continue. *An extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in every classroom.*[72]

Recognizing that its analysis presumed that the Pledge was not a "prayer or other sign of religious devotion," the court then proceeded to discuss whether the Pledge was in fact a religious or patriotic exercise.[73] After extensive discussion about the founding documents and other religious references sprinkled throughout the Nation's history and civic discourse, the *Sherman* panel concluded, "Unless we are to treat the [F]ounders of the United States as unable to understand their handiwork (or, worse, hypocrites about it), we must ask whether those present at the creation deemed ceremonial invocations of God as 'establishment.' They did not."[74]

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[70] 980 F.2d 437 (7th Cir. 1992).
[71] *Sherman* v. *Community Consolidated School District*, 980 F.2d 437, 444 (7th Cir. 1992).
[72] *Id.* (emphasis added).
[73] *Id.* at 445.
[74] *Id.*

Newdow II *and The Nomination of Federal Court Judges*

The clearly erroneous nature of the panel's ruling highlights not only the need for the U.S. Supreme Court to correct this incorrect interpretation of its holdings by a lower court, but also the importance of nominating and appointing Federal judges who will interpret the Constitution consistent with its text. There has been much debate, both on the Court and within the legal community, surrounding the Court's recent jurisprudence regarding the Establishment Clause. Yet, despite what is admittedly a confused area of the law, the Court has shown clear consistency with regard to the recitation of the Pledge. The Ninth Circuit's failure to follow the Supreme Court's pronouncements and precedent in this area of the law will justifiably lead many to question whether the judges sitting on this panel have made a good faith attempt to interpret the Constitution consistent with its text.

The following testimony was submitted by the Honorable Alan G. Lance, Attorney General, State of Idaho, on July 23, 2002, at the Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property's Legislative Hearing on H.R. 1203, the "Ninth Circuit Court of Appeals Reorganization Act of 2001":

> The Ninth Circuit has earned a national reputation as a frequently reversed court. This reputation has factual support. Consider the following:
>
> 1. From 1990 to 1996, the Supreme Court struck down 73% of the Ninth Circuit decisions it reviewed. The other circuits averaged 46%. Jeff Bleich, *The Reversed Circuit: The Supreme Court versus the Ninth Circuit*, 57 Oregon State Bar Bulletin 17 (May 1997).
> 2. In 1997, the Supreme Court reversed 27 out of 28 Ninth Circuit decisions.
> 3. Since 1998, the Supreme Court has granted review in 103 Ninth Circuit cases, affirming only 13. Moreover, the Supreme Court has unanimously reversed or vacated 26 Ninth Circuit decisions since 1998.
>
> The Ninth Circuit's number and rate of reversals is troubling. The number of unanimous reversals is perhaps even more troubling. Make no mistake about this—the reputation, which is founded in fact, has caused serious erosion in confidence for our Federal circuit court.
>
> The New York Times, generally considered to be the newspaper of record for the country, began its recent story on the pledge of allegiance decision with the following line: "Over the last 20 years, the Court of Appeals for the Ninth Circuit has developed a reputation for being wrong more often than any other Federal appeals court." Adam Liptak, *Court that Ruled on Pledge often Runs Afoul of Justices*, N.Y. Times, July 1, 2002.
>
> In response to a question about the high number of unanimous reversals by the Supreme Court, Yale University law professor Akhil Amar bluntly stated: "When you're not picking up the votes of anyone on the Court, something is screwy." *Id.*

> In response to three former Chief Judges of the Ninth Circuit who denied that the Ninth Circuit has a poor track record in the Supreme Court, Justice Scalia said: "There is no doubt that the Ninth Circuit has a singularly (and, I had thought, notoriously) poor record on appeal. That this is unknown to its chief judges may be yet another sign of an unmanageably oversized circuit." *Id.*[75]

Recent reports indicate that the Ninth Circuit's reversal rate last term, 2001–02, was 71%, consistent with the average reversal rate of the other circuits.[76] However, the *Newdow II* panel's disregard for Supreme Court precedent will certainly serve to further its reputation as the Federal circuit most in need of Supreme Court reversal.

HEARINGS

No hearings were held on H. Res. 132.

COMMITTEE CONSIDERATION

On March 12, 2003, the Committee met in open session and ordered favorably reported the bill H. Res. 132, without amendment, by a recorded vote of 22 to 2, with 8 members voting present, a quorum being present.

VOTE OF THE COMMITTEE

The motion to report H. Res. 132 favorably passed by a rollcall vote of 22 yeas, 2 nays and 8 voting present.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers	X		
Mr. Berman			X
Mr. Boucher			

[75] *Ninth Circuit Court of Appeals Reorganization Act of 2001: Hearing on H.R. 1203 Before the House Comm. on the Judiciary, Subcomm. on Courts, the Internet, and Intellectual Property,* 107th Cong. 15 (2002) (statement of the Honorable Alan Lance, Attorney General, State of Idaho).

[76] *See* Marisa Taylor, *Influential Ninth Circuit Assembles in S.D.: Weighty Issues are on Agenda for Judges Who Defy Consensus*, San Diego Union Tribune, July 15, 2002, at A1.

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			X
Ms. Lofgren			X
Ms. Jackson Lee			X
Ms. Waters			X
Mr. Meehan			X
Mr. Delahunt			X
Mr. Wexler	X		
Ms. Baldwin			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			X
Mr. Sensenbrenner, Chairman	X		
Total	22	2	8

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

H. Res. 132 does not authorize funding. Therefore, clause 3(c) of rule XII of the Rules of the House of Representatives is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee believes that the resolution will have no budget effect.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8, clause 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

H. Res. 132 expresses the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in Newdow v. United States Congress is inconsistent with the Supreme Court's interpretation of the First Amendment and should be overturned, and for other purposes.

In paragraph one, Congress finds that on June 26, 2002, the Ninth Circuit Court of Appeals, in Newdow v. United States Congress (292 F.3d 597; 9th Cir. 2002) *(Newdow I)*, held that the Pledge of Allegiance to the Flag as currently written to include the phrase, "one Nation, under God", unconstitutionally endorses religion, that such phrase was added to the pledge in 1954 only to advance religion in violation of the Establishment Clause, and that the recitation of the pledge in public schools at the start of every school day coerces students who choose not to recite the pledge into participating in a religious exercise in violation of the Establishment Clause of the First Amendment.

In paragraph two, Congress finds that on February 28, 2003, the Ninth Circuit Court of Appeals amended its ruling in this case, and held (in *Newdow II*) that a California public school district's policy of opening each school day with the voluntary recitation of the Pledge of Allegiance to the Flag "impermissibly coerces a religious act" on the part of those students who choose not to recite the pledge and thus violates the Establishment Clause of the First Amendment.

In paragraph three, Congress finds that the Ninth Circuit's ruling in *Newdow II* contradicts the clear implication of the holdings in various Supreme Court cases, and the spirit of numerous other Supreme Court cases in which members of the Court have explicitly stated, that the voluntary recitation of the Pledge of Allegiance to the Flag is consistent with the First Amendment.

In paragraph four, Congress finds that the phrase, "one Nation, under God", as included in the Pledge of Allegiance to the Flag, reflects the notion that the Nation's founding was largely motivated by and inspired by the Founding Fathers' religious beliefs.

In paragraph five, Congress finds that the Pledge of Allegiance to the Flag is not a prayer or statement of religious faith, and its recitation is not a religious exercise, but rather, it is a patriotic exercise in which one expresses support for the United States and pledges allegiance to the flag, the principles for which the flag stands, and the Nation.

In paragraph six, Congress finds that the House of Representatives recognizes the right of those who do not share the beliefs expressed in the pledge or who do not wish to pledge allegiance to the flag to refrain from its recitation.

In paragraph seven, Congress finds that the effect of the Ninth Circuit's ruling in *Newdow II* will prohibit the recitation of the pledge at every public school in 9 states, schooling over 9.6 million students, and could lead to the prohibition of, or severe restrictions on, other voluntary speech containing religious references in these classrooms.

In paragraph eight, Congress finds that rather than promoting neutrality on the question of religious belief, this decision requires public school districts to adopt a preference against speech containing religious references.

In paragraph nine, Congress finds that the constitutionality of the voluntary recitation by public school students of numerous historical and founding documents, such as the Declaration of Independence, the Constitution, and the Gettysburg Address, has been placed into serious doubt by the ninth circuit's decision in *Newdow II*.

In paragraph ten, Congress finds that the Ninth Circuit's interpretation of the First Amendment in *Newdow II* is clearly inconsistent with the Founders' vision of the Establishment Clause and the Free Exercise Clause of the First Amendment, Supreme Court precedent interpreting the First Amendment, and any reasonable interpretation of the First Amendment.

In paragraph eleven, Congress finds that this decision places the Ninth Circuit in direct conflict with the Seventh Circuit Court of Appeals which, in *Sherman* v. *Community Consolidated School District* (980 F.2d 437; 7th Cir. 1992), held that a school district's policy allowing for the voluntary recitation of the Pledge of Allegiance to the Flag in public schools does not violate the Establishment Clause of the First Amendment.

In paragraph twelve, Congress finds that it has consistently supported the Pledge of Allegiance to the Flag by starting each session with its recitation.

In paragraph thirteen, Congress finds that the House of Representatives reaffirmed its support for the Pledge of Allegiance to the Flag in 107th Congress by adopting House Resolution 459 on June 26, 2002, by a vote of 416–3.

In paragraph fourteen, Congress finds that the Senate reaffirmed support for the Pledge of Allegiance to the Flag in the 107th Congress by adopting Senate Resolution 292 on June 26, 2002, by a vote of 99–0.

Congress adopts the following resolutions:

In section (1), Congress resolves that the phrase "one Nation, under God," in the Pledge of Allegiance to the Flag reflects that religious faith was central to the Founding Fathers and

thus to the founding of the Nation.

In section (2), Congress resolves that the recitation of the Pledge of Allegiance to the Flag, including the phrase, "one Nation, under God," is a patriotic act, not an act or statement of religious faith or belief.

In section (3), Congress resolves that the phrase "one Nation, under God" should remain in the Pledge of Allegiance to the Flag and the practice of voluntarily reciting the pledge in public school classrooms should not only continue but should be encouraged by the policies of Congress, the various States, municipalities, and public school officials.

In section (4), Congress resolves that despite being the school district where the legal challenge to the pledge originated, the Elk Grove Unified School District in Elk Grove, California, should be recognized and commended for their continued support of the Pledge of Allegiance to the Flag.

In section (5), Congress resolves that the Ninth Circuit Court of Appeals ruling in *Newdow* v. *United States Congress* has created a split among the circuit courts, and is inconsistent with the Supreme Court's interpretation of the first amendment, which indicates that the voluntary recitation of the pledge and similar patriotic expressions is consistent with the first amendment.

In section (6), Congress resolves that the attorney general should appeal the ruling in *Newdow* v. *United States Congress*, and the Supreme Court should review this ruling in order to correct this constitutionally infirm and historically incorrect holding.

In section (7), Congress resolves that the President should nominate and the Senate should confirm Federal circuit court judges who interpret the Constitution consistent with the Constitution's text.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MARCH 12, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

Pursuant to notice, I now call up the resolution, H. Res. 132, a resolution stating the Pledge of Allegiance should be upheld, for purposes of markup and move its favorable recommendation to the House. Without objection, the resolution will be considered as read and open for amendment at any point.

[The resolution follows:]

108TH CONGRESS
1ST SESSION

H. RES. 132

Expressing the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in Newdow v. United States Congress is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 6, 2003

Mr. OSE (for himself, Mr. SENSENBRENNER, Mr. CHABOT, Mr. CUNNINGHAM, Mr. CARDOZA, Mr. HERGER, Mr. OTTER, Mr. DOOLITTLE, Mrs. NAPOLITANO, Mr. PORTER, Mr. FRANKS of Arizona, Mr. OXLEY, Mr. HENSARLING, Mrs. BONO, Mr. KENNEDY of Minnesota, Mr. WALSH, Mr. BARRETT of South Carolina, Mr. ISAKSON, Mr. EVERETT, Mr. GARY G. MILLER of California, Mr. FROST, Mr. ROGERS of Alabama, Mr. HAYES, Mr. WILSON of South Carolina, Mr. RENZI, Mr. FOLEY, Mr. NEY, Mr. BEAUPREZ, Mrs. CAPITO, Mrs. NORTHUP, Ms. GINNY BROWN-WAITE of Florida, Mr. CHOCOLA, Mr. SHUSTER, Mr. BURNS, Mr. HAYWORTH, Mr. MATHESON, Mr. STEARNS, Mr. SWEENEY, Mr. GERLACH, Mr. GOODE, and Mr. NUNES) submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Expressing the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in Newdow v. United States Congress is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned, and for other purposes.

Whereas on June 26, 2002, the Ninth Circuit Court of Appeals, in Newdow v. United States Congress (292 F.3d

597; 9th Cir. 2002) (Newdow I), held that the Pledge of Allegiance to the Flag as currently written to include the phrase, "one Nation, under God", unconstitutionally endorses religion, that such phrase was added to the pledge in 1954 only to advance religion in violation of the establishment clause, and that the recitation of the pledge in public schools at the start of every school day coerces students who choose not to recite the pledge into participating in a religious exercise in violation of the establishment clause of the first amendment;

Whereas on February 28, 2003, the Ninth Circuit Court of Appeals amended its ruling in this case, and held (in Newdow II) that a California public school district's policy of opening each school day with the voluntary recitation of the Pledge of Allegiance to the Flag "impermissibly coerces a religious act" on the part of those students who choose not to recite the pledge and thus violates the establishment clause of the first amendment;

Whereas the ninth circuit's ruling in Newdow II contradicts the clear implication of the holdings in various Supreme Court cases, and the spirit of numerous other Supreme Court cases in which members of the Court have explicitly stated, that the voluntary recitation of the Pledge of Allegiance to the Flag is consistent with the first amendment;

Whereas the phrase, "one Nation, under God", as included in the Pledge of Allegiance to the Flag, reflects the notion that the Nation's founding was largely motivated by and inspired by the Founding Fathers' religious beliefs;

Whereas the Pledge of Allegiance to the Flag is not a prayer or statement of religious faith, and its recitation is not

a religious exercise, but rather, it is a patriotic exercise in which one expresses support for the United States and pledges allegiance to the flag, the principles for which the flag stands, and the Nation;

Whereas the House of Representatives recognizes the right of those who do not share the beliefs expressed in the pledge or who do not wish to pledge allegiance to the flag to refrain from its recitation;

Whereas the effect of the ninth circuit's ruling in Newdow II will prohibit the recitation of the pledge at every public school in 9 states, schooling over 9.6 million students, and could lead to the prohibition of, or severe restrictions on, other voluntary speech containing religious references in these classrooms;

Whereas rather than promoting neutrality on the question of religious belief, this decision requires public school districts to adopt a preference against speech containing religious references;

Whereas the constitutionality of the voluntary recitation by public school students of numerous historical and founding documents, such as the Declaration of Independence, the Constitution, and the Gettysburg Address, has been placed into serious doubt by the ninth circuit's decision in Newdow II;

Whereas the ninth circuit's interpretation of the first amendment in Newdow II is clearly inconsistent with the Founders' vision of the establishment clause and the free exercise clause of the first amendment, Supreme Court precedent interpreting the first amendment, and any reasonable interpretation of the first amendment;

Whereas this decision places the ninth circuit in direct conflict with the Seventh Circuit Court of Appeals which, in Sherman v. Community Consolidated School District (980 F.2d 437; 7th Cir. 1992), held that a school district's policy allowing for the voluntary recitation of the Pledge of Allegiance to the Flag in public schools does not violate the establishment clause of the first amendment;

Whereas Congress has consistently supported the Pledge of Allegiance to the Flag by starting each session with its recitation;

Whereas the House of Representatives reaffirmed support for the Pledge of Allegiance to the Flag in the 107th Congress by adopting House Resolution 459 on June 26, 2002, by a vote of 416–3; and

Whereas the Senate reaffirmed support for the Pledge of Allegiance to the Flag in the 107th Congress by adopting Senate Resolution 292 on June 26, 2002, by a vote of 99–0:

1 *Resolved*, that it is the sense of the House of Rep-
2 resentatives that—
3 (1) the phrase "one Nation, under God," in the
4 Pledge of Allegiance to the Flag reflects that reli-
5 gious faith was central to the Founding Fathers and
6 thus to the founding of the Nation;
7 (2) the recitation of the Pledge of Allegiance to
8 the Flag, including the phrase, "one Nation, under
9 God," is a patriotic act, not an act or statement of
10 religious faith or belief;

(3) the phrase "one Nation, under God" should remain in the Pledge of Allegiance to the Flag and the practice of voluntarily reciting the pledge in public school classrooms should not only continue but should be encouraged by the policies of Congress, the various States, municipalities, and public school officials;

(4) despite being the school district where the legal challenge to the pledge originated, the Elk Grove Unified School District in Elk Grove, California, should be recognized and commended for their continued support of the Pledge of Allegiance to the Flag;

(5) the Ninth Circuit Court of Appeals ruling in Newdow v. United States Congress has created a split among the circuit courts, and is inconsistent with the Supreme Court's interpretation of the first amendment, which indicates that the voluntary recitation of the pledge and similar patriotic expressions is consistent with the first amendment;

(6) the Attorney General should appeal the ruling in Newdow v. United States Congress, and the Supreme Court should review this ruling in order to correct this constitutionally infirm and historically incorrect holding; and

1 (7) the President should nominate and the Sen-
2 ate should confirm Federal circuit court judges who
3 interpret the Constitution consistent with the Con-
4 stitution's text.

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Chairman SENSENBRENNER. The Chair recognizes the gentleman from Ohio, Mr. Chabot, Chairman of the Subcommittee on the Constitution, for 5 minutes to explain the resolution.

Mr. CHABOT. Thank you, Mr. Chairman. H. Res. 132 expresses the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in *Newdow* v. *United States Congress*, is inconsistent with the Supreme Court's interpretation, and urging the Attorney General to appeal the ruling. Specifically, H. Res. 132 expresses the sense of the House of Representatives that the phrase "One Nation under God" should remain in the Pledge of Allegiance, that the Ninth Circuit Court of Appeals ruling in the *Newdow* v. *U.S. Congress* is inconsistent with the Supreme Court's interpretation of the First Amendment, urges the Attorney General of the United States to appeal the Ninth Circuit's ruling, and urges the President to nominate and the Senate to confirm Federal Circuit Court Judges who will interpret the Constitution consistent with the Constitution's text.

It also encourages school districts across the Nation to continue reciting the pledge daily, and praises the Elk Grove School District for its defense of the Pledge of Allegiance against this constitutional challenge.

On February 28th, 2003 the Ninth Circuit Court of Appeals refused to rehear its June 2002 ruling that the Pledge of Allegiance as currently written to include the phrase "One Nation under God" unconstitutionally endorses religion, and that the recitation of the Pledge in the public schools at the start of every school day coerces students who choose not to recite the Pledge, in participating in a religious exercise in violation of the establishment clause of the First Amendment.

Additionally, it amended its opinion in its June ruling, and held that a California public school district's policy of opening each school day with a voluntary recitation of the Pledge of Allegiance to the flag, quote, "impermissibly coerces a religious act," unquote, on the part of those students who choose not to recite the Pledge and thus violates the establishment clause of the First Amendment.

That the Ninth Circuit's amended *Newdow* ruling contradicts any reasonable interpretation of the First Amendment should be clear to the average observer. The Pledge of Allegiance is clearly not a religious statement or prayer. It is a statement of allegiance to the ideas and principles upon which our Nation was founded. It's a historical fact that our Nation's founding principles were based upon the founding fathers' deeply held religious views. The Pledge of Allegiance simply refers to this fact. The reasoning and holding of the Ninth Circuit in its recent *Newdow* ruling turns historical fact, as well as Supreme Court precedent, on its head.

It's interesting to note that this ruling comes from the circuit holding the dubious distinction of being reversed by the U.S. Supreme Court more than any other circuit in recent history.

Those who do not share the beliefs expressed in the Pledge or those who do not wish to pledge allegiance to the flag have a right to refrain from its recitation. Indeed, it is a cornerstone of the religious faith that the founding fathers held dear, that no man can force another to say or believe that which their conscience would not allow. Thus, I would hope that no court would issue a ruling

that tramples upon this right. However, the Ninth Circuit in *Newdow* simply ignored Supreme Court precedent, and essentially gave those who don't wish to recite the Pledge, and who possess the right to refrain from reciting the Pledge, a heckler's veto over those who do wish to recite the Pledge.

The effect of the Ninth Circuit's ruling is to prohibit the recitation of the Pledge at every public school in 9 States, 9.6 million students, and could lead to the prohibition of or severe restrictions on other voluntary speech containing religious references in these classrooms. Similarly, the constitutionality of the voluntary recitation by public school students of numerous historical and founding documents, such as the Declaration of Independence, the Constitution and the Gettysburg Address, has been placed into serious doubt. This ruling also places the Ninth Circuit in direct conflict with the Seventh Circuit Court of Appeals, which in *Sherman* v. *Community Consolidated School District*, held that a school district's policy allowing for the voluntary recitation of the Pledge of Allegiance in public schools does not violate the establishment clause of the First Amendment.

Congress has consistently supported the Pledge of Allegiance by starting each session with its recitation. The House reaffirmed support for the Pledge, when on June 27, 2002, it adopted H. Res. 459 introduced by our Chairman, Chairman Sensenbrenner, by a vote of 416 to 3. The House should do the same with H. Res. 132. Both the Chairman and I are original co-sponsors of this resolution introduced by Representative Ose on March 6, 2003.

I urge my colleagues on this Committee to approve this resolution so that during this time of international conflict in which our young men and women may be days away from going to war to fight for those values based upon which our founding fathers gave birth to this Nation, our youngest Americans, our children, may pledge their allegiance to those same values.

I yield back the balance of my time.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Michigan informs me that he does not wish to make an opening statement. Without objection, opening statements by other Members will be included in the record at this point.

Are there amendments?

The Gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. I appreciate the gentleman's comments and——

Chairman SENSENBRENNER. Does the gentleman have an amendment?

Mr. BERMAN. I do have an amendment.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H. Res. 132, offered by Mr. Berman. Amend paragraph 7 beginning at page 5, line 23, to read as follows:

(7) the President should nominate and the Senate should confirm Federal judges who interpret the Constitution consistent with the Constitution's text, including interpreting Section 2 of Article III and Amendment 6 to strictly adhere to the actual text of those constitutional provisions.

Chairman SENSENBRENNER. I believe it's amendment 11.
The CLERK. Yes, sir.
Chairman SENSENBRENNER. XI is 11.
The CLERK. Excuse me.
[The amendment follows:]

AMENDMENT TO H.RES. 132

OFFERED BY MR. BERMAN

Amend paragraph 7, beginning at page 5, line 23, to read as follows:

1 "(7) the President should nominate and the Senate should confirm Federal
2 judges who interpret the Constitution consistent with the Constitution's text,
3 including interpreting Section 2 of Article III and Amendment XI to strictly
4 adhere to the actual text of those Constitutional provisions."

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. BERMAN. Thank you, Mr. Chairman. This amendment is focused only on one portion of this resolution, and that is paragraph 7 of the "be it resolved" clause, whereas the gentleman mentioned in his opening statement that Congress resolves that the President should nominate and the Senate should confirm Federal Circuit Court Judges who interpret the Constitution consistent with the Constitution's text.

My assumption in offering this amendment is that the gentleman felt strongly about that principle, not simply as applied to this particular issue, but generally in terms of court interpretations of constitutional questions in the many cases that it gets. And it's because of that that I am offering this amendment to help establish that principle I think more fully.

This amendment would make this paragraph apply to all Federal judges and would specify Article III, Section 2, and the Ninth Amendment as two type of constitutional provisions that Federal judges should interpret with strict adherence to their text.

In the series of cases interpreting Section 2 of Article III and the Eleventh Amendment, Federal courts have not strictly adhered to the plain wording of these constitutional provisions. In fact, in many of these cases Federal courts have issued decisions that run directly counter to the text of these constitutional provisions or have no basis in the text of the Constitution itself. Section 2 of article III states that the judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority.

The eleventh amendment states the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens who are subjects of any foreign

state. In other words, Article III gives full and complete authority to the Judicial Branch to determine all cases arising under this Constitution. The Eleventh Amendment constrains that general grant by saying that the judicial power shall not extend to any suit commenced against one of the States of the United States by citizens of another State or a foreign nation.

These words are very plain, and these words are very clear, and by that, one is forced to come to the conclusion interpreting the text literally and strictly, as the gentleman has proposed in this resolution, we do not limit suits against a State brought by a citizen of that same State, because the Eleventh Amendment simply refers to citizens of other States or foreign states. Despite the plain wording of Article III, Section 2 and the Eleventh Amendment, Federal courts have interpreted these constitutional provisions in ways that directly contradict the plain text. In some instances Federal courts have entirely abandoned any pretense of textual interpretation of those constitutional provisions. Instead these courts base their opinion solely on fundamental postulates implicit in the constitutional design that can be gleaned from the mere existence of those constitutional provisions. Relying on these nontextual interpretations of the Constitution, these activist Federal judges and courts have struck down a wide variety of Federal statutes.

In *Seminole Tribe* v. *Florida*, Chief Justice Rehnquist, writing for a 5–4 majority, relied on a non-textual activist interpretation of Article III, Section 2 and the Eleventh Amendment, to find that the Eleventh Amendment prohibits the Seminole Indian tribe, located in the State of Florida, from suing the State of Florida under the Indian Gaming Regulatory Act of 1988. The majority opinion candidly acknowledged that the text of the amendment would appear to restrict only the Article III diversity jurisdiction of the Federal court. Despite the acknowledged plain meaning of the Eleventh Amendment, the 5 Justice majority decided that State sovereign immunity bars suits against States based on Federal question jurisdiction as well as on diversity jurisdiction.

In the Florida Prepaid cases, the U.S. Supreme Court employed this activist interpretation of Article III, Section 2——

Chairman SENSENBRENNER. The gentleman's time is——

Mr. BERMAN. I would ask unanimous consent for three additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. BERMAN. In the Florida Prepaid case the U.s. Supreme Court employed this activist interpretation of Article III, Section 2, and the Eleventh Amendment. Justice Scalia, writing for a 5–4 majority, held that State sovereign immunity prohibited Congress's efforts to subject States to liability for patent infringement under the Patent and Plat Variety Protection Remedy Clarification Act, and for false advertising under the Lanham Act.

Relying on the activist interpretation employed in the Florida Prepaid cases, the Fifth Circuit in Chavez found that States were immune from suits for copyright infringement.

In Kimmel, the Supreme Court utilized a particularly activist interpretation of the Eleventh Amendment to avoid the plain meaning of that amendment. Writing for 5 Justices, Justice O'Connor held that the Eleventh Amendment protected States against suits by its own citizens under the Federal Age Discrimination and Em-

ployment Act of 1967. Since Kimmel involved ADEA suits brought by citizens of Alabama and Florida against the States of Alabama and Florida, it represents an egregiously activist interpretation of the Eleventh Amendment prohibition on suits in Federal court against a State by citizens of another State.

The Garrett decision also was based on this egregiously activist interpretation of the Eleventh Amendment. Writing once again for a 5–4 majority, Chief Justice Rehnquist held the Eleventh Amendment bars suits to recover monetary damages by State employees under Title I of the Americans with Disabilities Act. Since this case involved an ADA suit brought by citizens of Alabama, again against the State of Alabama, it also ignores the plain meaning of the

Eleventh Amendment.

In Alden the Supreme Court extended its activist interpretation of State sovereign immunity, far beyond the bounds of Article III, Section 2, and the Eleventh Amendment. Justice Kennedy, writing for a 5–4 majority, held that a constitutional doctrine of State sovereign immunity prohibited a resident and employee of the State of Maine from suing the State of Maine in State Court, not Federal court, in State court, under the Federal Fair Labor Standards Act, because Article III, Section 2, and the Eleventh Amendment only refer to the judicial power of the United States, and thus only address Federal court jurisdiction. The Alden majority apparently recognized that even the most tortured reading of those constitutional provisions could not justify their holding with regard to suits in State courts. Thus, the Alden majority found that the scope of the State's immunity from suit is demarcated not by the text of the Eleventh Amendment alone, but by fundamental postulates implicit in the constitutional design. Sounds like the penumbra in Griswold that led to *Roe* v. *Wade*. In other words, the Alden majority decided the case based on a theory of State sovereign immunity that is not supported by any text in the Constitution, but rather it's by its interpretation of the Constitution's unspoken meaning.

By this resolution that's before us, and by the gentleman's decision——

Chairman SENSENBRENNER. The gentleman's time has once again——

Mr. BERMAN. One additional minute, Mr. Chairman.

Chairman SENSENBRENNER. Reluctantly without objection.

Mr. BERMAN. Thank you. The gentleman did not constrain—confine this resolution to just dealing with this specific decision, and I understand why. Because he is not trying to get into second guessing each decision of the Court. He is trying to establish a broader principle of strict interpretation, and that is a fundamental principle, and therefore I am sure that the majority side can appreciate that in this particular case we have seen a line of decisions which have immunized citizens of their States from exercising their Federal rights where Congress clearly intended to cover the States from actions by the States, and I would hope that they would show the consistency of their position and they're serious about the language of paragraph 7 of this resolution by adopting this amendment.

Chairman SENSENBRENNER. Gentleman from Ohio.

Mr. CHABOT. Thank you, Mr. Chairman. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. CHABOT. Thank you. If I could address a question to the gentleman from California. The gentleman's amendment is a very interesting amendment. I would agree with the gentleman in part and oppose to the gentlemen's amendment, be opposed in part. Would the gentleman consider amending his amendment or modifying it to the degree that we do include all Federal judges, which I would agree with the gentleman would be an improvement. Right now this is limited to just circuit court judges. I would agree to expand that to Federal judges.

On the other hand, I would object to the additional language which I find unnecessary. The text of the existing resolution says: "The President should nominate and the Senate should confirm Federal Circuit Court Judges"—we would agree to including all Federal judges—"who interpret the Constitution consistent with the Constitution's text." To me that's simpler, more understandable and less limited than it would be if we should specifically point out other parts of the Constitution as the gentleman suggests.

So just to reiterate, would the gentleman agree to modifying his amendment to include Federal judges, in other words, the first two lines of your amendment, but striking the second two lines, which limits the parts of the Constitution that we're referring to? I'll yield to the gentleman.

Mr. BERMAN. I thank the gentleman for yielding, and if he would permit me, before I answer that question, to understand fully what he's talking about, to ask him two questions. The first would be: do you disagree with anything that I've said, that the general principle of strict interpretation of the Constitution is inconsistent with the decisions that I mentioned, that keep citizens of the States from suing their own States based on Federal statutes and denying jurisdiction, not only to Federal courts but even in the most—the last of the cases, just State courts, to litigate those Federal questions?

Mr. CHABOT. Reclaiming my time, the issue before us today is the *Newdow* case and the Pledge of Allegiance, and that's how we got to this point where we're at today. I wed agree with the gentleman—I'm not going to say I agree with everything or disagree with everything the gentleman said because it was 5 minutes, plus 3 minutes, plus 1 minute, which was 9 minutes I believe, and I agree with much of what the gentleman said, but I don't think we need to get into all those side issues. At this point our goal here is to protect the rights of children and others in this country to pledge allegiance to the flag, which the Ninth Circuit has at this point declared unconstitutional, and that's over 9 million kids that are going to be unable in schools to pledge allegiance to the flag, which seems absurd, but that's what the ruling has been thus far.

What we're trying to do at this point is to, as part of this amendment, is to encourage the President to nominate and the Senate to confirm judges who strictly—strike strictly—interpret the Constitution consistent with the Constitution's text. The additional items that the gentleman has included in his amendment, from our point of view are unnecessary and just complicate the matter further.

And I'd yield to the gentleman if he has anything to say.

Mr. BERMAN. I appreciate the gentleman yielding. This resolution isn't just limited to the Pledge of Allegiance. The gentleman's point is basically——

Mr. CHABOT. Reclaiming my time, that's how we got here and that's the principal issue, but I would yield back.

Mr. BERMAN. The gentleman chose to include paragraph 7. The gentleman is saying, whatever you think about the Pledge, whatever you think about that decision, the major error of the Ninth Circuit decision was that they not apply the First Amendment of the Constitution by its text, and they veered away from a literal interpretation of the text of the First Amendment, and its free exercise and establishment clauses. That's why you include paragraph 7. And I'm just trying to understand, is there a general principle here, because if there is, if we don't want to get into my addition to the "be it resolved" clause, would the gentleman accept simply including a "whereas" clause that makes reference to the Eleventh Amendment as well being an amendment for which the text should be strictly adhered to.

Mr. CHABOT. Reclaiming my time, and we've got very little amount of time here, we're not agreeable at this time to any additional verbiage. We are agreeable to expanding this to include all Federal judges, not just circuit court judges. And if the gentleman is agreeable to that, we could draft an amendment, or you can modify it as such.

Mr. BERMAN. Well, I—no, I would not——

Chairman SENSENBRENNER. Let the Chair make a constructive suggestion. It seems to me there are two individual propositions. If either gentleman wants to demand a division of the question, we can vote on the first two lines of the Berman Amendment first and the second two lines second, and perhaps accomplish, allowing everybody to vote the way they wanted to.

Mr. CHABOT. I would move to divide it.

Mr. BERMAN. Mr. Chairman, point of order. I'm curious on how one can divide my amendment. Is this in a parliamentary sense truly a divisible question?

Chairman SENSENBRENNER. The Chair believe it is.

Mr. BERMAN. I guess that's just about enough, isn't it? [Laughter.]

Mr. BERMAN. Is that a strict interpretation of——

Chairman SENSENBRENNER. The time of the gentleman has expired. The question is on——

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Ohio's time has expired.

The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes, and the question currently is on the first two lines of the Berman Amendment.

Mr. WATT. I don't have any comment on the first two lines of the Berman Amendment. I think it's ridiculous to divide the question because it's all one sentence, and I think the Chairman is abusing the Chairman's rights by dividing the question.

Chairman SENSENBRENNER. Okay. Then the Chair will withdraw the division of the question and the question now is on the Berman Amendment as introduced.

Mr. WATT. I move to strike the last word. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I won't take 5 minutes. I think this exercise is so ridiculous that I can't even bear the thought of taking 5 minutes to debate it. If I read this correctly the First Amendment of the Constitution says that we should make no laws, no laws inconsistent with freedom of speech. That would be absolutely ridiculous. That would be the strict adherence to the actual text of the First Amendment, so we're making a mockery of the Constitution that has worked for our country for years and years and years, and just in the name of making some political point here, which to me is just—doesn't even warrant the dignity of this Committee.

I yield back.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose the gentleman from New York seek recognition?

Mr. NADLER. Move to strike the last word.

Chairman SENSENBRENNER. Gentleman's recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, I must confess, I'm not sure how I should vote on Mr. Berman's amendment, because the fact of the matter is, the courts always interpret the Constitution in a way that the courts think, or claim they think at any rate, it's consistent with the Constitution's text. So I don't know what this amendment does. Now, the question is what does "consistent" mean? Judges interpret that in different ways. Some think it means the literal meaning of the words. Justice Scalia thinks it means whatever Madison thought it meant in 1788, what the original framers thought it meant in 1788, if you can divine that somehow. Others think it means what a broad reading would mean given current conditions, but whatever it means, those are interpretations of what "consistent with the Constitution's text" means.

Now, it's true that the current majority of the Supreme Court has egregiously offended the meaning of Article XI by going backwards on it. Article XI says—Eleventh Amendment—well, the Eleventh Article's amendment to the Constitution.

The Eleventh Amendment says that the judicial power of the United States shall not extend to suits by citizens of one State against another. Very clear. The current court has interpreted it to mean, well, it also shouldn't extend to suits by citizens of a State against the same State. Quite different from what the plain text seems to indicate. The current Supreme Court has also invented the doctrine that this amendment also brings the entire legal structure of sovereign immunity into the States, and that the States accede to the power of the King of England, because apparently when we rebelled against England, sovereignty was not vested, taken away from the King and given to the people. It was given to the States rather than the people, which is a novel theory. But based on that theory, they brought sovereign immunity into the Eleventh

Amendment and said that therefore people can't sue their own States to enforce Federal laws.

But I'm not sure what this amendment means, and I certainly wouldn't want to give it to the tender mercies of the current members of the Supreme Court. I think that the Supreme Court has made it very difficult by their varying interpretations, and frankly, the current majority of the Supreme Court is strictly textuous when they want to be and anti-textuous when they don't want to be. For example, any Justices adhering to a textuous interpretation of the Constitution would have thought that the Supreme Court had no business getting involved with Florida State Law in the case of *Gore* v. *Bush*, but they were overriding reasons of politics to deviate from the normal constitutional views of the Supreme Court majority there.

So I think that whether we have this language or not doesn't take away from the danger that the Supreme Court poses to the Constitution.

I yield back.

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. DELAHUNT. And I will not take my 5 minutes. But I would ask the proponent of the resolution if there is a—if he has considered, along with others, the filing of an amicus? I yield to the gentleman.

Mr. CHABOT. No.

Mr. DELAHUNT. Could the gentleman distinguish the rationale between the decision issued by the Ninth as opposed to that issued by the Seventh Circuit?

Mr. CHABOT. Would the gentleman yield?

Mr. DELAHUNT. I do.

Mr. CHABOT. I think the Seventh was right and the Ninth was wrong.

Mr. DELAHUNT. Well, I understand that, but if you could just distinguish the rationale to amplify the logic of it, the premise of the rationale.

Mr. CHABOT. Will the gentleman yield?

Mr. DELAHUNT. Yes.

Mr. CHABOT. The Ninth Circuit in this case basically indicated that the Pledge of Allegiance is unconstitutional, that it violates the establishment clause of the United States Constitution, which I think is clearly in error. The Seventh Circuit, in a different case, came to a very different conclusion, and I think that the Seventh Circuit is much more consistent with prevailing law, with the Supreme Court's rulings over the years with respect to the establishment clause, and I just think it's pretty clear that the Ninth in this particular instance is out of whack not only with the sentiment of the American people, but existing precedent over many years, both——

Mr. DELAHUNT. Right. Well, reclaiming my time. I mean oftentimes the Supreme Court is inconsistent with the sentiment of the American people, but clearly it's their constitutional duty to inter-

pret the Constitution, so we're not talking about sentiment. We're talking about the Constitution. We crafted a Constitution, I would suggest, to avoid the popular mood of the moment.

Having said that, I'll yield the time I have remaining to——

Ms. LOFGREN. Would the gentleman yield?

Mr. DELAHUNT. To the lady from California.

Ms. LOFGREN. I think—thank you for yielding—that the issue raised by Mr. Berman is a sound and scholarly one, that I understand I could support the amendment. But I'd like to go to the underlying bill, which is a complete utter waste of our time. I actually disagree with the Ninth Circuit. I think their decision is wrong. It will be appealed. I think ultimately it will be overturned.

The bill before us has nothing to do with that. I mean we have a lot of work to do, and passing this bill—the House has already expressed its opposition to the Ninth Circuit decision. Why we are spending time, when we have so many other things to do, on this preposterous exercise of grandstanding is beyond me. And I yield back.

Mr. DELAHUNT. Reclaiming my time, I would yield to the gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman, Mr. Delahunt.

And I just want to point out that fundamentally that seventh paragraph in the eyes of the majority is nonsense. They put it in, but they don't mean it. They're not serious about it. And I don't mean this in any personal sense, but in a general political sense, there's a tremendous hypocrisy here. This isn't about strict interpretation versus activism. This is a total result oriented line of thinking that says when we like the decision and it's done in the name of strict construction, we're for it. And when we want a decision that requires activism and a search for nonconstitutional doctrines that compel it, then it's fine. And the majority's unwillingness to accept this language, evinces I think a broader sense than just we want to keep the focus on the Pledge.

Over in the U.S. Senate now there's a debate about a Federal judge. Paragraph 7 here says, "Whereas the decision"—I'm sorry. The seventh clause says, "The President should nominate and the Senate should confirm Federal Circuit Judges who interpret the Constitution consistent with the Constitution's text." The necessary conclusion one draws from that language is that they should not confirm judges who do not interpret the text strictly. In other words, judicial philosophy is a very relevant consideration to the confirmation of Federal judges. But when they talk about the hold up in the Senate on this judgeship, they say, you shouldn't be judging about whether it's judicial philosophy. It's whether he's competent to be a judge. You don't mean that. You don't mean strict interpretation. It's a total result-oriented philosophy. When I like the decision, I'm for it. When I don't like the decision, I'm——

Chairman SENSENBRENNER. Time of the gentleman from Massachusetts has expired.

Mr. BERMAN. Mr. Chairman, I'd like to withdraw the amendment.

Chairman SENSENBRENNER. The amendment is withdrawn. Are there further amendments?

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. Mr. Chairman, that was in error. Thank you very much.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from Virginia?

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. Gentleman's recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I come from a State that has a long tradition in supporting religious freedom. In fact, it was Thomas Jefferson of Virginia who wrote the Virginia State for Religious Freedom which precedes the First Amendment to our Constitution.

So as we send our troops overseas to fight for freedoms, let us remember the good work of those who wrote the First Amendment to the Constitution. Today's exercise is totally gratuitous because nothing we do here will change the underlying law. This is because we're dealing with constitutional issues that cannot be altered by resolution. If the Judicial Branch ultimately finds the pledge to be constitutional, then nothing needs to be done. On the other hand, if the courts ultimately find it to be unconstitutional, no law that we pass will change that.

Whether or not you agree with the decision, the fact is that the majority opinion is well reasoned. The appellate court applied all three different tests that have been applied in the last 50 years in evaluating establishment clause cases, and found the constitutional violation based on all three tests. One test was whether the phrase "under God" in the Pledge constitutes an endorsement of religion. The majority opinion says that it was an endorsement of one view of religion, monotheism, and therefore was an unconstitutional endorsement. Another test was whether the individuals were coerced into being exposed to the religious message. And again, the majority opinion concluded that the Pledge was unconstitutional because young children, who are compelled by law to attend school, quote, "may not be placed in the dilemma of either participating in a religious ceremony or protesting." Finally, the Court applied the lemon test, part of which holds that a law violates the establishment clause if it has no secular purpose or no non-religious purpose. For example, cases involving the moment of silence in public schools, some of those laws have been upheld if the law allows silent prayer as one of many activities which can be done in silence. But courts have stricken laws in which a moment of silent prayer is added to existing moments of silence because that law has no secular purpose. The court concluded that the 1954 law, which added "under God" to the existing Pledge, had no secular purpose and therefore was unconstitutional.

I also believe, Mr. Chairman, that a good argument can be made in support of the dissent. The operative language in the dissent was, and I quote, "Legal word abstractions and ruminations aside, when all is said and done, the danger that 'under God' in our Pledge will tend to bring about a theocracy or suppress someone's belief is so minuscule as to be de minimis. The danger that that phrase represents to our First Amendment's freedoms is picayune at best," unquote.

Unfortunately, our actions today may cause the courts to review the sentiments behind this because if the courts look at the importance that we apparently affix to "under God," these terms will—these actions will diminish the argument that the phrase has de minimis meaning, and our actions today will actually increase the constitutional vulnerability of the use of the phrase in the pledge.

Now, while a Federal Court of Appeals in California recently rejected calls to rehear the case, the fact remains that this issue is still alive and well in the courts, and every hearing we hold chips away at the de minimis meaning argument.

Furthermore, Mr. Chairman, the court may review the legislation, this legislation under the lemon test, and find that today's exercise has no secular purpose, and therefore helps interested constitutional attack. Those attacks will gain validity because of our attacks today.

Mr. Chairman, let me close with a quote from an editorial that appeared in the Christian Century, a nondenominational Protestant weekly which a good friend was so kind to send to me. It reads, and I quote: "To the extent 'under God' has real religious meaning, then it is unconstitutional. The phrase is constitutional to the extent that it is religiously innocuous. Given that choice, I side with the Ninth Circuit."

Mr. Chairman, I would hope that we would not pass this resolution and get on to more important work.

I yield back the balance of my time.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. Strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, I wish to speak in opposition to this resolution. When we considered a very similar resolution on the floor of the House, what was it, last year, most of the newspaper columnists, most of the speakers on the floor of the House said something that I profoundly disagreed with. They said that this was a shocking and surprising decision and would almost certainly be overturned when the Court heard it en banc.

If you read the decision, however, as Mr. Scott pointed out, it's well reasoned legally, and more to the point, it is absolutely mandated, in my opinion, by the school prayer jurisprudence of the last 40 years of the Supreme Court. And the only way you can get around that is by saying that "under God" is de minimis, which is an insult to religion. God is not de minimis. I hope that this Committee will not vote for this resolution, in effect endorsing their opinion of the Court that God is de minims. God is not minor, and a declaration of a belief in God is not unimportant. And if it is important and you coerce students into doing it, and it is coercion, as the Court pointed out, the entire jurisdiction of the school prayer area in the Supreme Court in the last 40 years says it's unconstitutional.

Now, having said that, you have a conflict of courts between the Ninth and the Seventh. Why not let—the Supreme Court will have to decide this. I predict they will uphold the Ninth Circuit. They

will say that the Ninth Circuit was correct. But why not let that go forward and see? It will go forward in any event. Why should Congress come out—well, I know why. It's political grandstanding. But putting that aside, Congress has no business telling the courts that they're right or wrong.

Another reason for opposing this resolution is it is simply a violation of the separation of powers. It's simply wrong, of the spirit. I mean we can say anything we like, but we shouldn't go telling courts they're wrong. If we think the court did something that we don't appreciate, draft a bill to change the law, or draft an amendment to change the Constitution if it's a constitutional issue. That's our job. We write the laws. We can initiate an amendment to the Constitution. But if you're not prepared to do that, a resolution that simply says the courts are wrong in how they interpret the Constitution, it's none of our business to say that. As individuals, but not as the House of Congress.

So I believe on several grounds, one, the court was right. I think the Supreme Court's going to sustain that. Time will tell. But it's not our business to change that unless we want to wait for the Supreme Court to decide, and if we don't like that, you can try to amend the Constitution, which I wouldn't suggest in any event, but that's the proper procedure. This is simply political grandstanding, and it's dangerous political grandstanding, and I challenge anyone to go home and say the Ninth Circuit is wrong because the phrase "under God" is meaningless and unimportant. It's not meaningless. It is not unimportant. I have no problem reciting the Pledge, but we shouldn't—we shouldn't coerce schoolchildren into doing it, for those few who may disagree, who may come from Buddhist households or Hindu households or atheist households. They're Americans too. They have equal religious liberty with all the rest of us. I yield back.

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. Mr. Chairman, thank you for your kindness. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman's recognized for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, I'm going to take a slightly different perspective than a number of my colleagues. Hopefully, I will be in line with constitutional commentary and arguments, and I will make the point that when Members write legislation, jurisdiction is, if you will, directed. I imagine that we are looking at this legislative initiative because it deals with the Constitution and deals with the judicial opinion, and so it is appropriately referred to the Judiciary Committee.

I say that because I hope that the resolution that I am drafting and one that I've already drafted, that indicates that Congress should be the entity under the Constitution, to be the vehicle to declare war will be considered by this Committee expeditiously. So I'm not going to argue the point about the question of H. Res. being before us, because I hope that there will be a fair treatment of all Members' resolutions dealing with the Constitution, and I believe that this House and this Congress has abdicated its responsibility

with the allowing of a potential preemptive unilateral strike, and I believe that a constitutional review should take place of that.

As it relates to H. Res. 132 I also have a view that will cause me to vote present on this, on these accounts. One is that I believe that the First Amendment—and since we are here speaking about judicial opinions, we all can just give our opinion—as an amendment that allows a freedom of expression, freedom of religion, freedom of speech. I believe the Pledge of Allegiance is an expression of speech. I also believe that it is a voluntary expression of speech, and so I have to read this legislation to ensure that there is no compulsion on the part of anyone in the United States, any elementary, any middle school, any high school, public school student being forced to say the Pledge of Allegiance. If that is the case then I think this is a benign resolution except for its gratuitous comments about judicial appointments, which is causing me to oppose the resolution as it presently is written, because I'm not sure what my colleagues on the other side are trying to say. Are they trying to suggest there's a litmus test for the kinds of judges that are to be appointed? And I think that is wrong. That has no place in this gratuitous resolution.

But as far as the Pledge of Allegiance is concerned, I think that it is a voluntary expression. The "under God" is a voluntary expression. If you do not want to say it, do not say it. It may be a little uncomfortable for you. I think maybe if you're in elementary school, the parents should be notified or the parents should notify the school. The child should not be isolated. We should not categorize any children who do not want to say it, but the Pledge of Allegiance is voluntary.

So from a personal perspective I disagree with the Ninth Circuit, and from a personal perspective I think the First Amendment protects us in saying "under God." But my personal perspective is probably totally irrelevant.

This Committee, this Chairman and this Committee has chosen to accept this resolution, and I have no argument with that in terms of being presented to this body. But I will say to my colleagues, be fair to those of us who believe that we are proceeding with an unconstitutional war because we have not actually declared war by way of as vote of this Congress, and that you will accept resolutions that we have that says that under Article II, Section 8, the Congress is the only body to declare war. And I guess as we proceed with this resolution, I hope that the First Amendment does protect any of us who desire to pledge allegiance to the flag and allow the words "under God" to be part of our pledge, and as we do so, I would think that we would characterize this as a voluntary statement of our loyalty to the United States of America, respect for the democracy and the Constitution, and this resolution would have been better off if it had had one statement, which is, "We believe in the pledge of allegiance to the flag. Here it is, and we support it." But obviously that was not the intention. I hope that as it goes to the floor it will be presented in a way that many of us who agree that the First Amendment protects saying "under God" because it is voluntary, will be able to vote for this when it finally arrives at the floor of the House.

With that, Mr. Chairman, I yield back, and I look forward to us reviewing the resolutions that I'll be presenting on the war and the

unconstitutionality of the present posture of the United States in preemptive unilateral strike without a constitutional declaration of war. I yield back.

Chairman SENSENBRENNER. Are there amendments?

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I won't take 5 minutes. I just wanted to say publicly what I just leaned over and said to my colleague, Mr. Scott. I endorse his statement fully, his wonderful intellectual statement of what I had to say emotionally. I just don't have the patience to say it when people politically grandstand, but I have great admiration for the manner and content of the way he deals with this. I yield back.

Mr. DELAHUNT. If I——

Mr. WATT. I yield to the gentleman from——

Mr. DELAHUNT. I just wanted to note that I do believe that Congress has the right that I think it has exercised in the past in terms of expressing its opinion about the Constitution, and I would—clearly, this body in our system is not the ultimate arbiter of the interpretation of the Constitution, but I think the gentlelady from Texas makes an excellent point. If the motion itself, if the resolution itself was restricted to an expression about a particular decision, I think there would be a different comfort level, if you will, in terms of many of us that serve on this Committee as far as a vote is concerned.

But with the additional language that is in the amendment, I daresay that her reference to a litmus test or to that language, undermining, if you will, the reality and the basic constitutional premise that we have an independent judiciary is absolutely on the market. And maybe the gentleman who proposed the resolution should review the resolution based on her comments. And I yield back.

Mr. WATT. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. Are there amendments? If not, a reporting quorum is present. The question is on agreeing to the motion to favorably report House Resolution 132. Those in favor will say aye.

Opposed, no.

The ayes appear to have it.

Mr. CHABOT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Ohio.

Mr. CHABOT. Ask for recorded vote.

Chairman SENSENBRENNER. Recorded vote is requested. Those in favor of reporting H. Res. 132 favorably, will, as your names are called, answer aye, those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
[No response.]
The CLERK. Mr. Chabot?
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye. Mr. Jenkins?
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye. Mr. Cannon?
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye. Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye. Mr. Forbes.
[No response.]
The CLERK. Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Carter?
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye. Mrs. Blackburn?
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Present.
The CLERK. Mr. Berman, present. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. Present.
The CLERK. Mr. Watt, present. Ms. Lofgren?
Ms. LOFGREN. Present.
The CLERK. Ms. Lofgren, present. Ms. Jackson Lee?
Ms. JACKSON LEE. Present.
The CLERK. Ms. Jackson Lee, present. Ms. Waters?
Ms. WATERS. Present.
The CLERK. Ms. Waters, present. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?

Mr. DELAHUNT. Present.

The CLERK. Mr. Delahunt, present. Mr. Wexler?

Mr. WEXLER. Aye.

The CLERK. Mr. Wexler, aye. Ms. Baldwin?

[No response.]

The CLERK. Mr. Weiner?

Mr. WEINER. Aye.

The CLERK. Mr. Weiner, aye. Mr. Schiff?

Mr. SCHIFF. Aye.

The CLERK. Mr. Schiff, aye. Ms. Sánchez?

Ms. SÁNCHEZ. Present.

The CLERK. Ms. Sánchez, present. Mr. Chairman?

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Members in the chamber, wish to cast or change their votes? Gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Chairman SENSENBRENNER. The gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye.

Chairman SENSENBRENNER. Gentleman from Virginia, Mr. Forbes?

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye.

Chairman SENSENBRENNER. Other Members who wish to cast or change their vote? The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. No.

The CLERK. Mr. Meehan, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? Mr. Meehan again.

Mr. MEEHAN. Can I change my vote to aye or present? [Laughter.]

Chairman SENSENBRENNER. Remember, three strikes and you're out. [Laughter.]

Mr. MEEHAN. Present, please.

The CLERK. Mr. Meehan, present.

Chairman SENSENBRENNER. Further Members who wish to cast or change their votes?

If not, the clerk will report.

Mr. MEEHAN. Can I take my staffer off the payroll? [Laughter.]

Mr. DELAHUNT. Leave me alone, Marty.

Chairman SENSENBRENNER. And that can be done outside the Committee room. The clerk will report.

The CLERK. Mr. Chairman, there are 22 ayes, 2 nays, and 8 present.

Chairman SENSENBRENNER. And the motion to report the resolution favorably is agreed to. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days as provided by the House rules in which to submit additional dissenting supplemental or minority views.

MINORITY VIEWS

Minority Views to H. Res. 132, a resolution to reaffirm the reference to one Nation under G-d in the Pledge of Allegiance

H. Res. 132 is a response to the 9th Circuit's decision in *Newdow* v. *U.S. Congress I*[1] and *Newdow* v. *U.S. Congress II*.[2] In these rulings, the 9th Circuit held that daily voluntary[3] recitation of the pledge violated the Establishment Clause of the Constitution.[4] Both the House of Representatives and the Senate passed resolutions in the 107th Congress immediately after the Court handed down its decision in *Newdow I*. H. Res. 459 passed by a vote of 416–3, and S. Res. 292 passed by a vote of 99–0.[5] The current resolution is in response to *Newdow II*, recently released on February 28, which reaffirms the first holding and denies all petitions for rehearing on the issue.

Although the 9th Circuit has held that the Pledge violates the Establishment Clause, the only other Circuit to have considered the question, the 7th Circuit, has upheld the language of the Pledge, including the 1954 amendment.[6] Although the proposed legislation cites Supreme Court *dicta* on the subject of the Pledge and the national motto, the Court has never squarely considered the question of the constitutionality of the voluntary recitation of the Pledge in schools.

We voted for the resolution at Committee because we believe the Ninth Circuit Court of Appeals ruling runs counter to the spirit and precedent surrounding the First Amendment. As Members with great respect and reverence for our pledge of allegiance, we don't believe its recitation substantively infringes on freedom of religion.

H. Res. 132 should not be interpreted as a means of discrediting the judiciary. When Members of Congress argue, as they did last

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[1] 292 F.3d 597 (9th Cir. 2002). http://www.ca9.uscourts.gov/ca9/newopinions.nsf/FE05EEE79C2A97B688256BE3007FEE32/$file/0 016423.pdf?openelement

[2] No. 00–16423 (9th Cir., February 28, 2003)

[3] Mandatory recitation of the Pledge was struck down by the Supreme Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[4] The Court wrote, "[t]he Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Newdow I* at 9124. The 9th Circuit, relying on the Supreme Court's voluntary school prayer jurisprudence stated, "the phrase 'one nation under G-d' in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge, codified in Federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of G-d. A profession that we are a nation 'under G-d' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no g-d,' because none of these professions can be neutral with respect to religion." *Id.* at 9123.

[5] H. Res. 459, 107th Cong., 148 Cong. Rec. H4125–4136 (June 27, 2002); S. Res. 292, 107th Cong., 148 Cong. Rec. S6105–6106 (June 26, 2002).

[6] *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992).

Congress, that a decision was written by "radical secularists[7]" and others make assertions concerning the judiciary creating a "G-dless state[8]" little room is left for fair and reasoned debate. However, it should be noted that other judicial rulings have been much more objectionable and destructive to the ideals of our Constitution; for example, the Supreme Court ruling in *Bush* v. *Gore* in which Five Republican political appointees contorted the equal protection clause to stop the counting of votes.[9] Although the Majority now decries judicial activism, there was no resolution on the floor in condemnation of that.

In addition, last June, the Supreme Court ruled in *Zelman* v. *Simmons-Harris* that taxpayer funds can be used in voucher programs to support parochial schools.[10] This ruling has been called the worst church-state ruling in 50 years. The Supreme Court also upheld random drug testing of high school students who participate in extracurricular activities in *Board of Education* v. *Earls*, including those students who are not suspected of any wrongdoing.[11] Its hard to imagine an opinion that is more objectionable from a privacy standpoint. But again, we doubt we will see a congressional referenda on those decisions any time soon.

We also take great issue with our friends who came to the House Floor claiming that *Newdow* is a shocking sign of some fundamental defect in the judiciary. Unlike *Bush* v. *Gore*, this decision can be appealed, where it will likely be overturned. This is but one step in the judicial process, a process that usually and ultimately gets it right. Just as *Plessy* v. *Ferguson*[12] (upholding separate but equal) was eventually overturned by *Brown* v. *Board of Education*[13], and *Penry* v. *Lynaugh*[14] (permitting execution of the mentally retarded) was overridden by *Atkins* v. *Virginia*[15], we have seen that the courts have often lost their way only to find it again

We are also concerned about new language inserted in this Congress' resolution that states "the President should nominate and the Senate should confirm Federal circuit court judges who interpret the Constitution consistent with the Constitution's text." In one sense, this new language is a truism—obviously the Constitution needs to be read consistent with its text. That is what judges do. We hope this is not read as some sort of a litmus test that sitting judges and other potential nominees had better tailor their constitutional views to a particular or a narrow view of the Constitution.

Lost in our debate on H. Res. 132 is the value of our judicial system, the crown jewel of our democracy. If there is any single idea in the Constitution that has separated our experiment in democracy from all other nations, it is the concept of an independent judiciary.

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[7] Remarks of Mr. Pence, Cong. Rec. H4074, 107th Congress, June 27, 2002.
[8] Remarks of Mr. Pickering, Cong. Rec. H4129, 107th Congress, June 27, 2002.
[9] *Bush* v. *Gore*, 531 U.S. 98 (2000).
[10] *Zelman* v. *Simmons-Harris*, No. 00–1751(2002).
[11] *Board of Education of Independent School District No. 92 of Pottawatomie County et. al.* v. *Earls et al.*, No. 01–332 (2002).
[12] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).
[13] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
[14] *Penry* v. *Lynaugh*, 492 U.S. 302 (1989).
[15] *Atkins* v. *Virginia*, No. 00–8452 (2002).

The Founding fathers, in their great wisdom, created a system of checks and balances. Independent judges with lifetime tenure were given the tremendous responsibility of interpreting the constitution. It is no surprise that over the years, it is the judiciary, more than any other branch of our government, that has served as the protector of our precious civil rights and civil liberties over the years. We agree with Alexander Hamilton that the "independence of the judges" enables them to stand against the "ill humors" of passing political majorities.[16]

The fact that the Ninth circuit appears to have gone astray does nothing to diminish our respect for our Judiciary.

JOHN CONYERS, JR.

[16] The Federalist No. 78 at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)

ADDITIONAL VIEWS

Judges should not be immune from criticism. Indeed, healthy debate on the merits of judicial decisions is an essential element of our system of justice. But there is a difference between legitimate criticism and pressure tactics that pose a threat to judicial independence.

Like all Americans, Members of Congress are free to criticize judicial decisions with which we disagree. In fact, I joined most of my colleagues in voting for a resolution during the last Congress (H. Res. 459) that expressed disapproval of this very decision and urged that it be overruled.

But I voted "present" on this current resolution because it goes further in a way that I believe would set an unwise and dangerous precedent. It is one thing to urge the Judicial Branch to use the normal process of appellate review to correct an erroneous decision. It is quite another thing to imply that judges who issue unpopular decisions in particular cases are unfit for office.

Unfortunately, that is what the present resolution does. It not only expresses disapproval of the court's reasoning in *Newdow*, but states that "the President should nominate and the Senate should confirm Federal circuit court judges who interpret the Constitution consistent with the Constitution's text."

By linking future nominations to a particular ruling with which the proponents disagree, the resolution sends a not-so-subtle message to sitting judges and other potential nominees that they had better tailor their constitutional views to those of the congressional majority if they wish to be confirmed.

The framers recognized that an independent Judicial Branch is an essential guarantor of freedom in a democracy. For this reason, Article III of the Constitution provides that judges shall continue in office during good behavior, and that their compensation shall not be diminished during their continuance in office. For the same reason, those who profess fidelity to the Constitution must take great care not to chip away at the independence of the judiciary on which our liberty depends.

WILLIAM D. DELAHUNT.
HOWARD L. BERMAN.

ADDITIONAL VIEWS

I come from a State that has a long tradition in supporting religious freedom. In fact, it was Thomas Jefferson of Virginia who wrote the Virginia Statute for Religious Freedom which precedes the first amendment of the Constitution.

H. Res 132 is totally gratuitous, as it will do nothing to change the underlying law. This is because we are dealing with constitutional issues that cannot be altered by resolution. If the Judicial branch ultimately finds the Pledge or the national motto to be constitutional, then nothing needs to be done. If, on the other hand, the courts ultimately find it to be unconstitutional, no law that we pass will change that.

Although I tend to agree with the dissent in the *Newdow* vs *U.S. Congress*, 292 F. 3d 597(9th Cir. 2002), case regarding the Pledge of Allegiance, I believe the reasoning of the majority opinion in that case was sound. In that case, the Supreme Court applied three different tests that have been applied for the last 50 years in evaluating the establishment clause cases. One test was whether the phrase "under God" in the Pledge constitutes an endorsement of religion. The majority opinion says it was an endorsement of one view of religion, monotheism, and, therefore, was an unconstitutional endorsement.

Another test was whether the individuals were coerced into being exposed to the religious message, and the majority opinion concluded that the Pledge was unconstitutional because young children "may not be placed in the dilemma of either participating in a religious ceremony or protesting."

Finally, the court applied the Lemon test, part of which holds that a law violates the establishment clause if it has no secular or nonreligious purpose. For example, cases involving a moment of silence in public schools, some of those laws have been upheld if the law allows silent prayer as one of the many activities that can be done in silence. But courts have stricken laws in which a moment of silent prayer is added to existing moments of silence because that law has no secular purpose. The court concluded that the 1954 law which added "under God" to the existing Pledge had no secular purpose and, therefore, was unconstitutional.

I indicated that I tended to agree with the dissent in the *Newdow* case. The operative language in the dissent which persuaded me was the following:

> "Legal world abstractions and ruminations aside, when all is said and done, the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress someone's belief is so minuscule as to be de minimis. The danger that phrase represents to our first amendment's freedoms is picayune at best."

Unfortunately, our actions in enacting H. Res. 132 may cause the courts to review the sentiments behind "one Nation under God" or "In God We Trust" because if the courts look at the importance that we apparently affix to "one Nation under God" or "In God We Trust," then it diminishes the argument that the phrase has de minimis meaning and increases the constitutional vulnerability of the use of that phrase in the Pledge. While, a Federal appeals court in California recently rejected calls to rehear the controversial ruling that struck down recitation of the Pledge of Allegiance in public schools due to its religious content, the fact remains that this issue is alive and well and every hearing chips away at the de minimis meaning argument.

Furthermore, the court may look at the legislation under the *Lemon* test and find that this exercise has no secular purpose and is, therefore, unconstitutional. The phrase "In God We Trust", the national motto, appears to be vulnerable to the same constitutional attack as the phrase "under God" in the Pledge. Those attacks gain validity because of our actions on H. Res 132.

A quote from an editorial that appeared in the Christian Century, a non-denominational Protestant weekly, Puts this matter in perspective:

> "To the extent 'under God' has real religious meaning, then it is unconstitutional. The phrase is constitutional to the extent that it is religiously innocuous. Given that choice, I side with the Ninth Circuit - the government should not link religion and patriotism"

ROBERT C. SCOTT.

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