Written Statement of the Honorable Roy S. Moore

House Committee on the Judiciary, Subcommittee on Courts, the Internet, and Intellectual Property

Hearing on the Constitution Restoration Act of 2004 (H.R. 3799)

September 13, 2004

I am here today to discuss how the federal courts have strayed from the Constitution on an issue that I believe strikes at the core of who we are a nation: the acknowledgment of God. For over fifty years, the federal courts have steadily eroded our first freedom, the freedom of conscience, and have attempted to replace the Godly foundation upon which this country was built with a foundation that espouses the philosophy of secular humanism, demanding people's ultimate allegiance to the state rather than to God. Couched in the innocuous language of "neutrality toward religion," the federal courts deceive those unfamiliar with our history into believing that the First Amendment's prohibition against "establishment[s] of religion" requires the complete removal of God from the public square. Nothing could be further from the truth, yet our courts continue unchecked ordering the cessation of any act or mention by a public official acknowledging God, spurred on by a coterie of anti-religious zealots led by the ACLU. Indeed, just this past June the entire country took a collective breath while the fate of the phrase "under God" in our Pledge of Allegiance depended upon the opinions of eight justices who seriously considered whether those words violate the First Amendment. This should not be! We dodged that bullet, but only on a technicality, and it is quite possible that the next time[1] we will not be so fortunate and the Court will do what its current precedent (as distinguished from the law) demands by declaring the Pledge unconstitutional.[2] We are at a point where Alexander Hamilton's now infamous statement labeling the federal courts as "the least dangerous" branch of government[3] is

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[1] Michael Newdow, the plaintiff in the case challenging the Pledge, has already indicated that the issue is "just going to go right back" to the Supreme Court because he has been in contact with numerous people who have expressed a willingness to be plaintiffs" in a future challenge. Television interview by Heidi Collins with Michael Newdow (June 14, 2004), *available at* http://www.cnn.com/2004/LAW/06/14/newdow/.

[2] *See Elk Grove Unified School Dist. v . Newdow*, 124 S. Ct. 2301 (2004) (Thomas, J., concurring) (explaining that an honest application of the Supreme Court's "coercion" test analysis dictated the result reached by the Ninth Circuit Court of Appeals when it declared the Pledge to be unconstitutional).

[3] THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds. 2001). Hamilton made this observation because, as he pointed out, "the judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id*.

viewed as laughable and naive in today's lawsuit-happy age in which a person who feels offended can erase over two hundred years of history simply by appealing to what is rapidly becoming "the despotic branch."

But this is America, and we are not without recourse against the federal courts' efforts to ensure that this country turns from God. If Congress would exercise the power it has under Article III of the United States Constitution, the unlawful usurpation of jurisdiction by the federal courts would cease and no longer would they run roughshod over the will of the American people. I implore you to act! But in order to gain a proper perspective of how far we have strayed from the Constitution, let us examine a few legal and historical facts.

I. The Acknowledgment of God

A) God and Religion

In the case of *Glassroth v. Moore*,[4] I refused to remove a monument of the Ten Commandments or stop the acknowledgment of God even though an unlawful order from a federal district judge commanded me to do so. Because of that refusal, the monument was removed to a locked closet and I was removed from office. The federal district court that ruled the monument to be a violation of the Establishment Clause of the First Amendment concluded that I had "placed a slightly over two-and-a-half ton granite monument—engraved with the Ten Commandments and other references to God—in the Alabama Judicial Build **with the specific purpose and effect . . . of acknowledging the Judeo-Christian God** as the moral foundation of our laws." *Glassroth v. Moore*.[5] As if to leave no doubt as to why the district court felt the monument was unconstitutional, the court ended its opinion with an even more explicit explanation of the "wrong" I had committed:

> "If all Chief Justice Moore had done were to emphasize the Ten Commandments' historical and educational importance (for the evidence shows that they have been one of the sources of our secular laws) or their importance as a model code for good citizenship (for we all want our children to honor their parents, not to kill, not to steal, and so forth), this court would have a much different case before it. But the Chief Justice did not limit himself to this; he went far, far beyond. He installed a two-and-a-half ton monument in the most prominent place in a government building . . . **with the specific purpose and effect of establishing a permanent recognition of the 'sovereignty of God,'** the Judeo-Christian God, over all citizens of this country, regardless of each taxpaying citizen's individual personal beliefs or lack thereof. To this, the Establishment Clause says no."

Id. at 1318 (emphasis added).

Unfortunately, the Founders' grand design and the modern reality in the courts have become two vastly different things.

[4] 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

[5] 229 F. Supp. 2d 1290, 1293 (M.D. Ala. 2002) (emphasis added).

Despite the district court's stern conclusion, the Establishment Clause says no such thing. In fact, with respect to this issue the First Amendment simply provides that "Congress shall make no law respecting an establishment of religion."[6] Putting aside for purposes of this hearing the obvious fact that the monument I put on public display in no way shape or form resembles a "law," and foregoing any discussion of the plain truth that the monument does not constitute an "establishment" under any generally understood definition of that term, the point that must be emphasized is that the monument does **not** represent "religion." As the term "religion" was understood at the time the Bill of Rights was adopted, it did not constitute the general acknowledgment of God. A religion, as understood by the founding generation, dictates both the duties we owe to our Creator and the manner in which we discharge, or carry out, those duties. This definition of the word "religion" was used in the Virginia Declaration of Rights of 1776,[7] James Madison's *Memorial and Remonstrance Against Religious Assessments* of 1785,[8] and the North Carolina (1788), Rhode Island (1790), and Virginia (1788) Ratifying Conventions' proposed amendments to the United States Constitution. Under this widely accepted definition, a "religion" dictates not only **that** a person is to worship God, but also **how** he or she is to do so. In contrast, an acknowledgment of God recognizes God's existence, place, and influence in our society.[9]

B) Historical Precedents

There have been acknowledgments of God throughout our history that, until the modern Supreme Court decided otherwise, were never considered to be government establishments of religion. In fact, our Nation was founded upon a document that explicitly acknowledges God: the Declaration of Independence. The Declaration intones that "all men" are "endowed by their Creator with certain unalienable Rights," that we were entitled to independence based on "the Laws of Nature and Nature's God," and it invokes "a firm Reliance on the Protection of Divine Providence" for the act of declaring independence.

Benjamin Franklin, during a particularly contentious debate in the Constitutional Convention of 1787, "beg[ged] leave to move that, henceforth, prayers imploring the assistance of heaven, and its blessing on our deliberations, be held in this assembly every morning before we proceed to business, and that one or more of the Clergy of the City be requested to officiate in that service."[10] While Franklin's request was voted down due to the pressing business in the Convention (the delegates believed they would have to find and pay a church pastor to perform the prayer), his proposal was a direct precursor to

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[6] U.S. Const., amend. I.

[7] Virginia Const, Art. I, § 16 (1776).

[8] J. Madison, *Memorial and Remonstrance Against Religious Assessments*, (June 20, 1785) in 5 *The Founders Constitution* 82 (P. Kurland & R. Lerner eds. 1987).

[9] Remarks made by President Bush concerning the Ninth Circuit Court of Appeals' ruling regarding the Pledge of Allegiance indicate that he, like those of the founding generation, understands this distinction: "Declaration of God in the Pledge of Allegiance doesn't violate rights. As a matter of fact, it's a confirmation of the fact that we receive our rights from God, as proclaimed in our Declaration of Independence." Jimmy Moore, *Pledge Protection Act Blocked by House Judiciary Committee Chairman*, TALON NEWS, Sept. 17, 2003, *available at* http://mensnewsdaily.com/ archive/newswire/nw03/ talonnews/0903/091703-pledge.htm.

[10] AMERICA'S GOD AND COUNTRY, 249 (William J. Federer ed. 1996).

action taken by the First Congress, which nine days after it convened with a quorum, on April 9, 1789, appointed two chaplains of different denominations to serve in the House and Senate respectively, paying them a salary of $500 each for their services.[11]

Immediately following the approval of the Bill of Rights (including the First Amendment) by Congress on September 25, 1789, Congress passed a resolution requesting that the President of the United States "recommend to the people of the United States a day of public thanksgiving and prayer."[12] President Washington heartily agreed with the Congressional recommendation and declared:

> "**Whereas it is the duty of all nations to acknowledge the providence of Almighty God**, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor. . . . Now, therefore, I do appoint Thursday, the 26th day of November 1789 . . . that we may all unite to render unto Him our sincere and humble thanks for His kind care and protection."[13]

Most of the Presidents of the United States have followed Washington's example by calling upon the American people to pause for national thanksgiving and prayer in times of crisis. Starting with Abraham Lincoln in November 1863, Presidents for the next 75 years annually declared a day of national thanksgiving until Congress permanently established a national holiday of thanksgiving in 1941.

Since the passage of the Judiciary Act of 1789, federal judicial officers have been required to take an oath of office swearing to support the United States Constitution that concludes with the phrase, "So help me God." That requirement remains unchanged to this day.[14]

Due to an outpouring of pleas from people across the country during the Civil War, then Secretary of the Treasury Salmon P. Chase by letter instructed James Pollack, Director of the U.S. Mint at Philadelphia, on November 20, 1861, to prepare a motto incorporating God to be placed on U.S. coins.

> "Dear Sir: No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins.
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> "You will cause a device to be prepared without unnecessary delay with a motto expressing in the fewest and tersest words possible **this national recognition**."[15]

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[11] *See* David S. Barton, "Franklin's Appeal for Prayer at the Constitutional Convention," *at* http://www.wallbuilders.com/resources/search/detail.php?ResourceID=19.

[12] 1 ANNALS OF CONG. 949-50 (Joseph Gales ed., 1789).

[13] 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 131-32 (W. W. Abbot et al, eds., 1987) (emphasis added).

[14] *See* 28 U.S.C. § 453.

[15] *Fact Sheets: Currency & Coins—History of "In God WE Trust*," United States Department of the Treasury, *at* http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.html (emphasis added).

After various suggestions were considered, "In God We Trust" was selected as the message and Congress enacted legislation on April 22, 1864 authorizing the mint to place the motto on one and two-cent coins.[16] The motto has appeared on all U.S. coins since 1938 and on all currency since 1964.[17]

On June 14, 1954, Congress added the words "Under God" to the Pledge of Allegiance, which is codified at 4 U.S.C. § 4. The House Report that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."[18] President Eisenhower, in commenting on this addition to the Pledge, stated that by adding the words "Under God" "we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war."[19]

In short, public acknowledgments of God are replete throughout our history and in no way violate the constitutional prohibition on establishments of religion because they do not dictate the duties which we owe to our Creator or the manner in which we are to carry out those duties. A display of the Ten Commandments, for instance, does not dictate a person's form of worship or articles of faith. Thus, acknowledgments of God do not coerce belief or behavior, whereas, a particular religion, such as Protestantism, Catholicism, or Judaism, requires a person to believe certain tenets and act or refrain from acting in certain ways. The monument of the Ten Commandments that I placed in the rotunda of the Alabama Judicial Building was simply one more example of our country's substantial tradition of acknowledging God.

C) Straying from the Path

Despite this tradition, the United States Supreme Court—and lower federal courts following its lead—pay no attention to the words of the First Amendment and instead have concocted an elaborate array of tests from which these federal courts pick and choose in determining whether a particular public reference to God is unconstitutional. The original test, known as the *Lemon* test because it was introduced in *Lemon v. Kurtzman*,[20] is a three-prong test that is supposed to articulate the Supreme Court's definitive standard for whether a government action violates the Establishment Clause. However, the *Lemon* test has been criticized so often[21] that members of the Court have

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[16] *Id*.
[17] *Id*.
[18] H. R. Rep. No. 1693, 83d Cong., 2d Sess., p. 2 (1954).
[19] AMERICA'S GOD AND COUNTRY, 226 (William J. Federer ed. 1996).
[20] 403 U.S. 602 (1971)
[21] Probably the best criticism of *Lemon* remains the stinging prose from the pen of Justice Scalia, in his dissent *in Lamb's Chapel v. Center Moriches Union Free School Dist*., 508 U.S. 384, 398, 399 (1993):

> "As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it

felt free to try their hands at coming up with their own legal tests, much the way a cook experiments with a recipe. These newer tests, such as the "Endorsement" test invented in 1984[22] and the "Coercion" test invented in 1992,[23] purport to ensure that government remains "neutral" toward religion. However, far from achieving this theoretical neutrality,[24] in practice these tests encourage and often demand hostility toward religion, especially the Christian religion.[25] They do so by punishing the very religion that is interwoven into America's historical fabric: if a particular display or act can be perceived by a "reasonable observer" as "endorsing" a religion or if it can be said to "coerce" a non-believer—where "coercion" somehow means that the non-believer simply feels

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> to return to the tomb at will. . . . For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."

[22] *See Lynch v. Donnelly*, 465 U.S. 668 (1984).
[23] *See Lee v. Weisman*, 505 U.S. 577 (1992).
[24] If post-modern thought has taught us anything, it should be that for humans it is simply impossible to achieve true neutrality because we are all affected by a myriad of influences that inform our thoughts. Only God, who has always existed and is unaffected by human whims and faults, is truly impartial. Yet this inconvenient philosophical fact does not daunt the United States Supreme Court, which has placed itself in the role of ultimate and final arbiter of all the important issues of the day. In essence, the Supreme Court has installed itself as God on earth by pretending to be the impartial arbiter of right and wrong and the source on high from which the law is handed down to the rest of us. As my personal experience demonstrates, allegiance to their "law" must be unwavering unless you are prepared to suffer severe consequences, in my case the loss of the position to which I was elected as the highest judicial officer in the State of Alabama. Obviously, from the federal courts' perspective, my position was not high enough to permit me to question their wisdom, even though I took the same oath as they do to support the Constitution of the United States "so help me God."

The inability to be completely impartial does not, of course, mean that humans are incapable of making rational decisions, it just means that we must be careful to recognize how our prejudices—which may be good or bad—influence our decisions, and that our decisions stand a much better chance of being correct if they are based on God's law and will because He is the foundation that never wavers, the only One who is truly impartial. Our inherent prejudices mean that we must take care not to set ourselves or anyone else up as somehow immune from ordinary human faults in reason, but this is exactly what we have done with the Supreme Court. As renowned Judge Richard Posner of the Seventh Circuit Court of Appeals has observed:

> "There is a tendency to lionize the Supreme Court justices. They are sometimes depicted as intellectual, even moral, giants (in some versions, as avatars of the Old Testament prophets), to be entirely disinterested, to 'do their own work' (as Louis Brandeis once said), and to produce a judicial product that reflects deep scholarship and mature, even agonized deliberation. In *Casey v. Planned Parenthood*, three of the justices sought to place the Court in tutelary relation to a submissive population whose 'very belief in themselves' as 'people who aspire' to live according to the rule of law' is 'not readily separable from their understanding of the Court.'"

Richard A. Posner, *The People's Court*, THE NEW REPUBLIC, July 19, 2004, *available at* http://www.tnr.com/doc.mhtml?pt=DXiDIQtR6xTqTkBSvzhYJH==. Posner rightly labels such inflated self-importance as "nauseat[ing]," but we give the Court no reason to think otherwise so long as it is not challenged by the People and reigned in by the other branches of government.
[25] *See, e.g., Supreme Court Hostility Toward Religion in the Public Square: Hearings before the Senate Subcomm. on the Constitution, Civil Rights, and Property Rights*, 104th Cong. (2004) (statement of Vincent Phillip Muñoz) [Hereinafter *Hearing*].

offended by the display or act—then the federal courts declare the display or act to be unconstitutional. Obviously, because so many of this country's laws and traditions have been directly influenced by Christianity, the "reasonable observer" will see the Christian religion everywhere and non-believers may feel offended by this pervasive influence. The result is the removal of anything from the public square that shows even the slightest hint of stemming from Christianity, including all acknowledgments of God despite the fact that they do not constitute "religion." In sum, as American Enterprise Institute Fellow Vincent Phillip Muñoz has aptly put it:

> "The Constitution's text prohibits laws respecting an establishment of religion or prohibiting the free exercise thereof. It says nothing about government 'endorsement of religion.' Justice O'Conner effectively has replaced the text and original meaning of the First Amendment with her own words and ideas. Justice Kennedy's 'psychological coercion' test is also far off the mark. The Founders understood religious 'coercion' to mean being fined, imprisoned, or deprived of a civil right on account of one's religion. Coercion to them did not include feeling uncomfortable when other people mention God."
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> "The modern Court has lost sight of the fact that the framers of the First Amendment meant to protect religious freedom, not to banish religion from the public square. The free exercise of religion is the primary end of the First Amendment; 'no-establishment' is a means toward achieving that end."[26]

Not only have the federal courts strayed far from the text of the Constitution that is supposed to be their guide, but their approach has resulted in making a mess of the law on the issue in question. One would think that having the federal courts as the sole arbiter of constitutional meaning and having the Supreme Court as the final arbiter of constitutional questions—as principally and historically incorrect as that is—would at least provide consistency and stability to constitutional decision-making. Sadly, again nothing could be further from the truth, particularly in cases allegedly implicating the principle of separation of church and state. In my case, the method of decision-making used by the Eleventh Circuit Court of Appeals was typical of federal courts in these cases: "Establishment Clause challenges," the Court asserted, "are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts."[27] This means that little certainty exists as to which displays or actions will pass constitutional muster according to the federal courts and which will fail.[28] Indeed, as one federal district court expressed recently in deciding that a public display of the Bible is unconstitutional, while the *Lemon* test is supposed to be the standard for Establishment Clause violations, "[u]nfortunately, it is difficult to find coherent guidance from the

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[26] *Id.*

[27] *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003).

[28] The Third Circuit Court of Appeals has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997).

Supreme Court's later opinions applying the *Lemon v. Kurtzman* analysis."[29] "Coherent guidance," the one thing that ought to be expected from a Court that declares itself "supreme" in all things related to the Constitution, is the one thing it has failed to provide in Establishment Clause jurisprudence.

There is one point in these cases, however, on which the federal courts are quite clear, and the point is demonstrated by a contrast between my case and another recent case involving a Ten Commandments monument. While the Eleventh Circuit affirmed the decision that the granite monument of the Ten Commandments that I placed in the Alabama Judicial Building was unconstitutional, just last year the Fifth Circuit in *Van Orden v. Perry*,[30] ruled that a granite monument of the Ten Commandments erected on the grounds of the Texas State Capitol was constitutionally permissible. The primary difference that ostensibly made the Texas monument permissible but the Alabama one impermissible was that the Texas monument was one of a number of monuments erected on the capitol grounds, while the Alabama monument was what the courts label a "stand-alone" Ten Commandments monument. While this may seem to be a distinction without a difference—both monuments display the Ten Commandments—the distinction makes all the difference in the world to the federal courts. If a display of the Ten Commandments is surrounded by historical documents, if it is included as just one of many displays on public property, if special attention is not drawn to God's law, then the federal courts generally will extend the imprimatur of constitutionality on the given display. However, if, like the Alabama monument, the Ten Commandments are displayed more prominently or stand alone, and therefore draw attention to the God who wrote those commandments rather than relegating the Ten Commandments to a mere historical influence on our laws that carry no current relevance, the federal courts cannot countenance it and will order the removal of the display. In other words, the one clear rule in Establishment Clause cases is that if the display or action in question acknowledges God, it will be declared unconstitutional, but if the display or action relegates God to a footnote in history, then it will be tolerated.[31] Thus, the one thing that should without question be constitutional because it does not constitute "religion" under the First Amendment—the acknowledgment of God—is the one thing that the federal courts and especially the Supreme Court will not allow.

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[29] *Staley v. Harris County*, __ F Supp. 2d __, __(S.D. Tex. Aug. 10, 2004). That district court is far from being alone in expressing this sentiment. The Fifth Circuit Court of Appeals has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000); the Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999); the Tenth Circuit admitted that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 561 (10th Cir. 1997).

[30] 351 F. 3d 173 (5th Cir. 2003).

[31] My case unequivocally demonstrates this fact, as sometime after the monument of the Ten Commandments was removed from the rotunda of the Alabama Judicial Building, the remaining eight justices of the Alabama Supreme Court placed in the same rotunda a display containing the Ten Commandments together with several other historical documents such as Magna Charta, the Code of Justinian, the Mayflower Compact, and, ironically enough, the United States Constitution. Neither the federal district court nor the plaintiffs who sued to have the monument removed complained about the subsequent display. The only explanation for why this second display would not "offend" sensibilities is that it does not acknowledge God.

This conclusion is simply absurd. The First Amendment was never intended to exclude acknowledgments of God. As the Senate Judiciary Committee observed during a time when some were questioning the constitutionality of the Congressional chaplaincy:

> "[The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy."[32]

Unless action is taken by Congress, "atheistical apathy" or worse is exactly where we are headed courtesy of the federal judiciary.

II. The Way Back: The CRA

A) Restricting Jurisdiction

Obviously, given the current landscape in which federal judges feel no compunction about removing God from the public square regardless of the will of the People or what the Constitution dictates, action must be taken to curb the overreaching of those judges. A convenient and constitutional solution can be found in the proposed Constitution Restoration Act of 2004 (CRA), H.R. 3799,[33] which this subcommittee has convened to discuss today. Simply put, the major thrust of the CRA is to employ Congress's Article III, § 2 power to restrict the jurisdiction of the federal courts, preventing them from hearing "any matter" that concerns a federal or state official's "acknowledgment of God as the sovereign source of law, liberty, or government."[34] Enactment of the CRA would mean that the federal courts could no longer hear legal challenges to such things as public displays of the Ten Commandments, our national motto "In God We Trust," "One Nation Under God," invocations of prayer at public functions by public officials, and the like.

Some have questioned whether Congress has the authority under Article III, § 2 to limit the jurisdiction of the federal courts on issues such as the CRA proposes. The pertinent constitutional language provides:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. **In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make**.[35]

This passage plainly provides that in all cases in which the Supreme Court does not have original jurisdiction Congress is free to limit or deprive altogether the Supreme Court's

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[32] *The Reports of the Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53*, The Senate Judiciary Committee, January 19, 1853 (Washington: Robert Armstrong, 1853).
[33] The Senate counterpart is S. 2323.
[34] H.R. 3799, 108th Cong. (2004).
[35] U.S. Const., Art. III, § 2, para. 2 (emphasis added).

jurisdiction over those cases. **Establishment Clause cases are not among those over which the Supreme Court has original jurisdiction**. Because the lower federal courts are creatures of statute according to the Constitution,[36] the result is that Congress possesses the authority to deprive both the Supreme Court and lower federal courts of cases implicating the public acknowledgment of God.

That the Constitution grants Congress plenary power to regulate the jurisdiction of the federal courts is, by far, the view accepted by most constitutional law scholars.[37] While a handful of scholars have taken issue with this reading of the Constitution,[38] these alternative views have been widely criticized as illogical and policy-driven rather than being faithful to the constitutional text.[39] Moreover, the Supreme Court has approved congressional regulation of the federal courts' jurisdiction based on the Constitution's text since at least 1799, and Congress has employed this power recently in a number of legislative enactments, including as recently as last year.[40] Certainly a large number of those in Congress, and at least 13 members of this subcommittee, believe that it possesses this power as they have recently supported bills calling for removing the federal courts' jurisdiction in the areas of marriage[41] and the Pledge of Allegiance.[42] Thus, there can be no doubt of Congress's power to regulate the jurisdiction of the federal courts in the fashion proposed by the CRA.

Not only is preventing the federal courts from hearing cases concerning the public acknowledgment of God authorized under the Constitution, it is also the principled thing to do. As I have already explained, there have been numerous examples of acknowledgements of God throughout the history of our nation that, until the modern Supreme Court took them under consideration, were never considered to be violations of the First Amendment. No one's right to worship (or not worship) God according to the dictates of his conscience is infringed through public acknowledgments of God.[43] No one is forced to believe in God because of the words in the Pledge; no one is forced to become a Christian or a Jew because the Ten Commandments are displayed in a government building; no member of this body is forced to join in when the chaplain of

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[36] *See* U.S. Const., Art. I, § 8, cl. 9; Art. III, § 1.

[37] Appendix A: "Select Bibliography on the Constitutional Restoration Act" (hereinafter "Appendix A"), part I-A.

[38] *See* "Appendix A," part I-B.

[39] *See* "Appendix A," part I-C.

[40] *See* Appendix B: "A Brief History of Congressional Regulation of the Federal Courts' Jurisdiction" (hereinafter "Appendix B"). Some of the information in Appendix B may be found in William E. Dannemeyer, *Article III, Section 2*, THE WASHINGTON TIMES, Oct. 7, 2003, *available at* http://www.washtimes.com/op-ed/20031006-085845-5892r.htm.

[41] The Marriage Protection Act of 2004 (H.R. 3313), which prohibits federal courts from hearing certain types of marriage cases as well as any challenge to the Defense of Marriage Act of 1996 (DOMA), passed the House of Representatives by a vote of 233 to 194 this year. The MPA has 48 co-sponsors, including three members of this subcommittee: Representatives J. Randy Forbes, William Jenkins, and Mike Pence. Subcommittee members Mark Green, Melissa Hart, and Rick Boucher also voted for the MPA.

[42] The Pledge Protection Act (H.R. 2028) proposes to deprive the federal courts of jurisdiction over cases challenging the phrase "Under God" in the Pledge of Allegiance. The PPA has 224 co-sponsors, including ten members of this subcommittee: Representatives Spencer Bachus, John Carter, J. Randy Forbes, Elton Gallegly, Bob Goodlatte, Henry Hyde, William Jenkins, Ric Keller, Mike Pence, and Lamar Smith.

[43] *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, (June 20, 1785) in 5 *The Founders Constitution* 82 (P. Kurland & R. Lerner eds. 1987).

the House of Representatives, Rev. Daniel P. Coughlin, offers a prayer before a legislative session of Congress. Public acknowledgments of God profess God's role in the past and present development of our country, recognizing the first principle upon which this nation was founded: liberty under law, God's law. They do not violate the conscience of any individual and thus removal of jurisdiction from the federal courts to decide cases concerning such acknowledgments renders no legal harm to any individual. Moreover, cases concerning actual violations of the Establishment Clause may still be heard in the federal courts and cases involving the acknowledgment of God may still be reviewed in the state court systems, so the CRA does not foreclose an individual's right to legal redress of an actual harm.

Even though the action proposed in the CRA is constitutional and principled, some still question whether it is necessary. To answer, one need only look to the number of actual and threatened lawsuits occurring each year concerning "religious" displays and practices in the public square. This past year alone we have seen challenges to the Pledge,[44] the decisions of the City of Redlands and of Los Angeles County in California to remove depictions of crosses from their seals because of the threat of a lawsuit from the ACLU, the filing of a lawsuit to remove the display of a Bible in front of a courthouse,[45] a principal whose job is in jeopardy for speaking out about God,[46] and, of course, several more cases involving displays of the Ten Commandments.[47] There can be no doubt that as long as the federal courts continue to entertain complaints from "special interest litigators who are professionally hostile toward religion"[48] such as the ACLU and Americans United for Separation of Church and State, the right to publicly acknowledge God will continue to be in jeopardy.

B) The Supreme Law of the Land

Article VI of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law

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[44] *Elk Grove Unified School Dist. v . Newdow*, 124 S. Ct. 2301 (2004).

[45] *See Staley v. Harris County*, __ F Supp. 2d __, __(S.D. Tex. Aug. 10, 2004).

[46] Boca Raton, Florida principal Geoff McKee is taking heat for speaking about God in at least three staff meetings and for attempting to start a Bible study at school. *See* Lois K. Solomon, *Boca principal under fire for making references to God*, THE SUN-SENTINEL, August 25, 2004, available at http://www.sun-sentinel.com/news/local/palmbeach/sfl-pmckee25aug25,0,236086,print.story?coll=sfla-news-palm.

[47] For example, there is a movement in Boise, Idaho to return a Ten Commandments monument the city recently removed from its public park. *See* Brad Hem, *Boise mayor says no to election on monument: Coalition moves forward with petition, says it might sue for public vote*, THE IDAHO STATESMAN, June 23, 2004, *available at* http://www.idahostatesman.com/apps/pbcs.dll/article?AID=/20040623/NEWS01/406230331. City officials in Everett, Washington are fighting against Americans United for Separation of Church and State to keep a Ten Commandments monument on city property. In a sign of the times, officials turned down an offer of free legal representation from a Christian organization because they did not want the defense to appear to be too religious. *See* David Olson, *Everett turns down help with monument fight*, THE HERALD, June 11, 2004, *available at* http://www.heraldnet.com/stories/04/06/11/loc_monument001.cfm. The borough of Hanover, Pennsylvania is also fighting Americans United to keep a Ten Commandments monument located in its public park. *See* Julie Sheldon, *Group helping to keep memorial: Hanover association gives $1,000 for fight to keep Ten Commandments monument*, EVENING SUN, June 10, 2004, available at http://www/eveningsun.com/cda/article/print/0,1674,140%7E9956%7E2204951,00.html.

[48] Muñoz, *Hearing*, *supra* note 25.

of the Land,"[49] and it requires that all "judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution."[50] Thus, the Constitution is the governing law and federal judges are required to rule in accordance with it because it is from the Constitution that federal judges derive their authority. Unfortunately, federal judges, even some of those on the United States Supreme Court, appear to be forgetting that oath as they have increasingly begun to look to international law—rather than the text of the Constitution—for guidance in their decision-making. This trend began in *Atkins v. Virginia*[51] in which the Court struck down state laws applying the death penalty to convicted murderers who are mentally retarded, and the trend continued in *Grutter v. Bollinger*[52] in which the Court concluded that student body diversity is a compelling state interest that can justify using race as a factor in university admissions without violating the Equal Protection Clause of the Fourteenth Amendment.

However, the reality that the Court is starting to substitute rulings of international law in place of the authority of the U.S. Constitution is best demonstrated in *Lawrence v. Texas*[53] in which the Court struck down state laws criminalizing homosexual sodomy. Over fifteen years before *Lawrence*, the Supreme Court declared in *Bowers v. Hardwick*[54] that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.[55] In *Lawrence*, the Court boldly proclaimed that "[homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage in [sodomy] without intervention of the government."[56] In overruling *Bowers*, the Court stated:

> "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[57]

Thus, the United States Supreme Court relied in part on foreign law to declare several states' laws unconstitutional even though in 1986 it declared that such laws did not violate the Constitution.

Such reliance on foreign law for constitutional decision-making directly contradicts Article VI's declaration that the Constitution is the supreme law of the land and it is a manifest breach of the judicial oath of office. So, as a secondary but related

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[49] U.S. CONST., Art. VI, para. 2.
[50] U.S. CONST., Art. VI, para. 3.
[51] 536 U.S. 304 (2002).
[52] 539 U.S. 306 (2003).
[53] 539 U.S. 558 (2003).
[54] 478 U.S. 186 (1986).
[55] *Id*. at 190-94.
[56] *Lawrence*, __ U.S. at __.
[57] *Id*. at __ (citation omitted).

measure, the CRA prohibits federal courts from relying upon any source of foreign law other than the common law of England in interpreting the United States Constitution. Violation of this provision by a federal judge is an impeachable offense. The problems attendant with applying international law in our judicial decisions range from those of legitimacy to the failure to take cultural differences into account,[58] but the specter of using foreign law to warp our fundamental principles, such as religious freedom, makes passing of the CRA all the more imperative. One need only look at France, where earlier this year all religious articles and symbols were banned in its state schools, to see the dangers attendant with following international precedents. France, like several of its European counterparts, is already a highly secularized society devoid of almost any references to God or even religion in general. We also appear headed down such a path, but reliance upon foreign law as authority for constitutional decisions would only serve to speed up that journey toward destruction. Thus, in a very real way this provision of the CRA also helps protect the right to publicly acknowledge God that holds such a vital place in this nation's history and continued survival.

III. Conclusion

I have attempted here to provide an adequate explanation of why the CRA is constitutionally permissible, practically viable, and socially vital for the protection of our right to publicly acknowledge God. The CRA would cover not only the issue of the Pledge, but also so many other issues that are dealt with by the federal judiciary under the guise of Establishment Clause jurisprudence. The members of this committee should be inspired to support this important piece of legislation and I hope you all will endeavor to convince your fellow Congressmen to do likewise. The bottom line is that CRA will halt the federal courts' distortion of the law of the Constitution in this area. The courts have been given ample opportunities to answer the call for returning to the objective standard of the Constitution as the rule of law for religious expressions in the public square. They have failed and in so doing have shirked their responsibility as expositors of the law. It is therefore up to **Congress** to make use of **its** responsibility as the law-making branch. I urge the Congress to answer the call to this responsibility on behalf of the People so that the fundamental right to publicly acknowledge God may be pulled back from the precipice of extinction it has been pushed to by the federal judiciary.

[58] Some scholarly critiques of the use of international law by the American judiciary are listed in *Appendix A*, part IV.

APPENDIX A: Select Bibliography on the Constitution Restoration Act

I. Congressional Regulation of the Federal Courts: The "traditional view" is that Congress has plenary authority to regulate and even abolish all jurisdiction of the lower federal courts and it has near plenary authority to restrict the jurisdiction of the United States Supreme Court.

A. The traditional view is explained and advocated in several pieces, including:

1. William J. Quirk, *The Fourth Choice: Ending the Reign of Activist Judges*, Chronicles, June 2004, *available at* http://www.chroniclesmagazine.org/Chronicles/June2004/0604Quirk.html.

2. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984).

3. James McClellan, *Congressional Retraction of Federal Court Jurisdiction*, 27 Vill. L. Rev. XX (1982); McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* 511-516 (3d ed. 2000).

4. Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 Vill. L. Rev. 959 (1982); Rice, *Withdrawing Jurisdiction from the Federal Courts*, 7 Harv. J. L. & PP. 13 (1984).

5. Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and Spirit of the Exceptions Clause*, 24 Wm. & Mary L. Rev. 385 (1983).

6. Julian Valasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. L. Rev. 677 (1997).

7. William Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229 (1973).

B. The traditional view has been challenged by a group of scholars who wish to ensure the dominance of the Supreme Court in American law:

1. Akil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985).

2. Lawrence Gene Sager, *Constitutional Limitations on Congress's Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

3. Mark Strasser, *Taking Exception to Traditional Exceptions Clause Jurisprudence: On Congress's Power to Limit the Court's Jurisdiction*, 2001 Utah L. Rev. 125 (2001).

4. Lawrence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981).

C. However, these critiques have been strongly refuted by newer traditionalists:

1. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Penn. L. Rev. 569 (1990).

2. Martin Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. Pa. L. Rev. 1633 (1990); Redish, *Constitutional Limitations on Congressional Power to Control Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U. L. Rev. 143 (1982).

II. Whether federal court opinions are the equivalent of law: That the opinions of courts are the law is, in essence the view taken by the U.S. Supreme Court in *Cooper v. Aaron*, 358 U.S. 1 (1958). However, some scholars have pointed out the fallacies of such a view.

A. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001). Several articles discuss the fact that the other branches have interpretive responsibilities concerning the Constitution. Kramer is among the more noted of such scholars and argues that historically the Constitution was seen as a popular document that was meant to be interpreted by more than one branch. Kramer contends that the Supreme Court needs to be the final authority on constitutional issues, but thinks we have gone too far in proclaiming the Court the only authority on such issues.

B. Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 Const. Comm. 205 (2003) (presenting a more refined version of Kramer's argument).

C. Gary Lawson, *Interpretive Equality as a Structural Imperative (or "Pucker Up and Settle This!"*), 20 Const. Comm. 379 (2004). Lawson argues for the view traditionally known as "departmentalism," which advocates equal interpretive powers for each of the three branches of government concerning the Constitution. Lawson also provides reasons why it is not necessarily logical that the Supreme Court should be the final authority on the Constitution.

D. Sanford Levinson, *Perspectives on the Authoritativeness of Supreme Court Decisions: Could Meese Be Right This Time?*, 61 Tul. L. Rev. 1071 (1987)

(supporting Meese's then-controversial claim from *The Law of the Constitution*); Levinson, *Constitutional Faith* 27-52 (1988).

E. Edwin Meese III, *The Law of the Constitution*, 61 Tulane L. Rev. 979 (1987). This is the touchstone piece on this subject, wherein Meese reminded people that the only binding authority the Supreme Court possesses is on the parties to the particular case on which it rules. Unfortunately, Meese later tempered his view after receiving a mountain of criticism not unlike what Chief Justice Moore has endured, conceding that judicial decisions are "the law of the land," among other things. Edwin Meese III, *The Tulane Speech: What I Meant*, Wash. Post, Nov. 13, 1986, at A21.

F. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 Geo. L. J. 373 (1994); Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993). Paulsen also argues for a form of departmentalism, *i.e.*, that each branch of the federal government has co-equal power to interpret the Constitution independently, with no requirement of giving deference to another branch's interpretation. Specifically, he states that if the Supreme Court renders a decision with which the President disagrees on constitutional grounds, the President is at liberty to refuse to enforce the judgment.

G. Charles Warren, *The Supreme Court in United States History* 470-71 (1923).

IV. **The Use of Foreign Sources of Law**. Citations to foreign law as authority in American judicial opinions has been sparse and is of relatively new vintage. The Supreme Court began to make use of it in *Atkins v. Virginia*, 536 U.S. 304 (2002), a case in which the Court struck down laws applying the death penalty to convicted murderers who are mentally retarded, and in *Lawrence v. Texas*, 539 U.S. 558 (2003), the case which struck down state criminal laws prohibiting homosexual sodomy.

A. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57 (2004) (listing a myriad of reasons why it is principally and practically wrong to use foreign law for judicial decision-making).

B. Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003): This is the most famous current work on the subject, in which Judge Bork makes such observations as: "International law is not law but politics. For that reason, it is dangerous to give the name 'law', which summons up respect to political struggles that are essentially lawless."

C. Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L. J. 193 (2003) (Advocating cautious restraint in the use of foreign law because of the Supreme Court's role in our

system of government. While he does not suggest that foreign law should never be resorted to, he believes it should not be used with any frequency).

V. Literature on Impeachment and What Constitutes and Impeachable Offense:

A. Raoul Berger, *Impeachment: Constitutional Problems* (1973) (explaining that "high crimes and misdemeanors" is a term of art exclusive to impeachment that has a long history and has no relation to ordinary criminal law, nor does it require that an indictment could lie for the particular offense).

B. *The Federalist Papers* No. 65, at 330-31 (Gary Wills ed. 1982): Alexander Hamilton argued that impeachable offenses are "those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated Political, as they relate chiefly to injuries done immediately to the society itself." A judge's refusal to follow a duly enacted statute could certainly fall into this category. Any doubt on the subject is erased by *Federalist 81*, p. 411, in which Hamilton states:

> "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been on many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the senate a court for the trial of impeachments." (Emphasis added).

C. Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 Regent U. L. Rev. 111

(1998) (explaining the history and meaning of the impeachment clause and why it is okay to remove judges for extra-constitutional decisions).

D. Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 Tex. L. Rev. 1 (1989). Gerhardt argues that impeachment is a political proceeding and thus Congress can decide what is an impeachable offense within certain limits of our system. Gerhardt does not believe that the "good behavior" clause provides a second means for removal (pp. 70-71). However, he also seems to think that impeachment of judges cannot be for "conduct central to the performance of a judge's constitutional obligations." P. 69.

E. Michael Gerhardt, *The Federal Impeachment Process: A Constitutional and Political Analysis* (2000): Here Gerhardt gives a more extensive argument along the lines that impeachment can be for both criminal and non-criminal offenses. He also states that the "good behavior" Clause was not intended to allow judges to be impeached "on the basis of a looser standard than the president or other impeachable officials, but rather that they may be impeached on a basis that takes into account their special duties or functions. Thus, a federal judge might be impeached for a particularly controversial law review article or speech, because these actions undermine confidence in the neutrality and impugn the integrity of the judicial process." Pp. 106-07. This passage seems to indicate that perhaps Gerhardt does believe that a judge could be impeached for misapplying the law, but it is unclear.

F. *Senate Documents: Cases of Impeachment* 1798-1904, vol. 32 (1912) (athorough collection of primary source material from impeachments which takes no position on what constitutes an impeachable offense).

G. Alexander J. Simpson, Jr., *A Treatise on Federal Impeachments* 30-60 (1916) (convincingly argues that impeachment includes more than just criminal offenses and does not include any opinion or evidence suggesting that the impeachment provision in the CRA is improper).

H. Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 Geo. L.J. 2193 (1998) (states that impeachable offenses clearly include more than just criminal offenses (pp. 2218-2219), and that what constitutes an impeachable offense is a non-justiciable matter (pp. 2222-2225)).

I. Emily Van Tassel & Paul Finkelman, *Impeachable Offenses: A Documentary History from 1787 to the Present* (1999): This is mostly a compilation of primary source material on impeachments that have occurred throughout the country's history. As such, the book does not reach any conclusions *per se* about what is an impeachable offense. It does point out that no judge has been removed for an improper interpretation of law.

APPENDIX B: A Brief History of Congressional Regulation of the Federal Courts' Jurisdiction

Court Cases

1. 1799 – *Turner v. Bank of North America*, 4 U.S. 8 (1799): Lower federal courts are courts of limited jurisdiction and it is presumed that such courts are without jurisdiction unless there is an enactment stating otherwise.

2. 1845 – *Cary v. Curtis*, 44 U.S. 236 (1845): A statute made final the decision of the Secretary of the Treasury in a tax case. A party argued that the statute represented an unconstitutional limitation on the judicial power of the courts. The Supreme Court rejected that argument, stating the following:

> [T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.

   Cary, 44 U.S. at 245 (footnotes omitted).

3. 1850 – *Sheldon v. Sill*, 49 U.S. 44 (1850): A question arose as to Congress's authority to limit the jurisdiction of the lower federal courts. The Supreme Court stated:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result,--either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.
>
> The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.
>
> Such has been the doctrine held by this court since its first establishment.

Sheldon, 49 U.S. at 448-49 (footnotes omitted).

4. 1938 – *Lauf v. EG Shinner & Co*., 303 U.S. 323 (1938): Again dealing with the congressional power to limit lower federal court jurisdiction, this time in relation to issuing injunctions in labor disputes under the Norris-La Guardia Act of 1932, the Court reiterated: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." *Lauf*, 303 U.S. at 330.

5. 1943 – *Lockerty v. Phillips*, 319 U.S. 182 (1943): In this case the Supreme Court affirmed that Congress also has the power to restrict jurisdiction on a certain subject to a particular lower court and only that court, stating:

> By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the

> authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.

Lockerty, 319 U.S. at 187.

Examples from the 107th Congress of Legislation Limiting Federal Court Jurisdiction

1. 21st Century Department of Justice Appropriations Authorization Act (PL 107-273, § 201(a)).

2. Approval of World War II Memorial Site and Design (PL 107-011, § 3).

3. Aviation and Transportation Security Act (PL 107-071, § 117).

4. Intelligence Authorization Act for Fiscal Year 2003 (PL 306, § 502).

5. Public Health Security and BioTerrorism Preparedness and Response Act of 2002 (PL 107-188, § 102).

6. Small Business Liability Relief and Brownfields Revitalization Act (PL 107-118, § 102).

7. Terrorism Risk Insurance Act of 2002 (PL 107-297, § 102).

8. Trade Act of 2002 (PL 107-210, § 5101).

9. USA Patriot Act (PL-056).

10. 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States (PL 107-206, § 706):

    - Tom Daschle (D-S.D.) had an amendment added to this legislation protecting the Black Hills Forest by prohibiting the federal courts from handling challenges to timber-thinning to control forest fires in the forest. The Amendment provided, in part: "Due to the extraordinary circumstances present here, actions authorized by this section shall proceed immediately . . . Any actions authorized by this section shall not be subject to judicial review by any court of the United States."

Other Past Key Examples of Congressional Limitation on the Federal Courts' Jurisdiction

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Stripped federal courts of jurisdiction over Immigration and Naturalization Service (INS) decisions on whether and to whom to grant asylum. The act effectively permitted the INS to deny an individual asylum without the decision being reviewable by the federal courts.

2. The Prison Litigation Reform Act of 1996 (PLRA): Restricted remedies that a judge can provide in civil litigation concerning prison conditions.

3. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): Limited the number of habeas corpus petitions that a state prisoner is allowed to file in federal court.