July 21, 2004

Dear Representative:

Tomorrow you will vote on what is probably one of the most dangerous pieces of legislation to come before you during your tenure – H.R. 3313. Do not be fooled into thinking that the "real act" happened last week in the Senate, when the Senate failed to pass a provision to amend our federal Constitution. Your vote on H.R. 3313 will be of equal constitutional import.

In *Morrison v. Olson*, in 1998, the Supreme Court ruled that Congress could place a restriction on the President's power to remove an Independent Counsel. Congress has passed a law prohibiting the President from removing Independent Counsels except for "good cause."

Justice Scalia dissented in the strongest of terms. Here is what he said:

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish--so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

H.R. 3313 comes as a wolf as well. This bill is about power – the *abuse* of power as intended by the Framers in creating the separation of powers system of our democracy.

When legislators rail that "unelected judges" are finding legislative acts unconstitutional, they are attacking the very structure of our democracy. The *essence* of the job of judges in our system of separation of powers is to decide whether certain legislative acts are unconstitutional. Judges are *supposed* to be protected from the influence of elections *precisely* so that they can be the bulwarks against the denial of constitutional rights to minorities. That is the point of our federal Constitution providing that judges be appointed and be given life tenure.

For Congress now, in H.R. 3313, to directly intrude into the arena of the judicial branch, and to remove the very *power* of the judicial branch to do what it is supposed to do, is the ultimate height of an attack against our separation of powers system. And our separation of powers system is what keeps us safe in our democracy.

That is why Congress has *never* passed a bill stripping the Supreme Court of jurisdiction to hear a constitutional challenge *since 1868*. Here's how Professor Barry Friedman from NYU Law School described that case in a letter to Congress:

> "In 1868, fearing that the Supreme Court might invalidate military Reconstruction of the South before the 14th Amendment could be ratified, Congress stripped the Court of jurisdiction to hear a habeas corpus appeal in a case, *Ex Parte McCardle*, that raised the question. To this day, scholars debate whether the Court acceded to Congress' wishes because it feared congressional reprisal or because it believed the action legitimate."

There is a good reason why Congress has never, since 1868, passed another law stripping the Supreme Court of jurisdiction to hear a constitutional challenge. And this is the case despite the fact that efforts have been made in the most contentious of issues – desegregation, abortion, the composition of the armed forces, to name but a few.

Tomorrow's vote on H.R. 3313 may be one of the most important votes you cast in your tenure as a Representative of the House. I urge you to remember Justice Scalia's opening paragraph in his dissent in *Morrison v. Olson* when you do so:

> It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:
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> > "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The judges have their job to do and the Congress has its job to do. Part of Congress' job is not to take away the powers of another co-equal branch.

By the way, it would be a particularly poor idea to vote for H.R. 3313 on the basis that it is unconstitutional (which it is) and therefore that courts will "fix" Congress' mistake. Over the last twenty years in which I have worked as an advocate and a scholar in legislation, I have seen the Supreme Court cut back significantly on Congress' power to legislate under the Constitution. While there are many reasons for this, I believe one component has been that Congress has sometimes been willing to pass bills that it knows are unconstitutional. That

tends to reduce the stature of Congress in the eyes of the courts, including the Supreme Court, and thus leads to a weakening of respect for Congress.

Sincerely,

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