100th convention at Caesar's Resort and Casino in Atlantic City, NJ.

The skilled craftsmen and women of the building trades have formed the backbone of New Jersey's labor movement for more than two centuries. It was the building trades, in particular the carpenters at the Hibernia Iron Works in 1774, who were the first to band together and strike for better working conditions. It was the building trades unions who consistently provided for the city and county trade federations that formed in the mid-19th century, for New Jersey's Knights of Labor assemblies, and especially for the New Jersey State Federation of Labor that grew into New Jersey's AFL–CIO.

The New Jersey Building and Construction Trades Council and its unions led the fight for the 8-hour day, better and safer working conditions, strong pension and health benefits, and a living wage.

The NJBCTC and its unions built the modern State of New Jersey, from the New Jersey Turnpike and the Garden State Parkway, to Newark Airport and the Meadowlands. They built the high-rise casinos that light up Atlantic City's skyline, the new skyscrapers rising up on Jersey City's Gold Coast, the hospitals in which we care for our sick, and the schools in which we educate our children.

Mr. Speaker, the men and women of the New Jersey Building and Construction Trades Council and its unions deserve our gratitude, and I would like to offer my congratulations to President William Mullen and his vice presidents, representing each of the construction trades. I also invite my colleagues to join me in recognizing their predecessors who built the NJBCTC into what it is today, and to the tens of thousands of building trades craft unionists of generations past and present, who have built strong unions and a strong New Jersey.

CRS LETTER ADMITTING ITS ERRONEOUS STATEMENT IN A MEMO ISSUED DURING DEBATE ON H.R. 3313, THE MARRIAGE PROTECTION ACT

HON. F. JAMES SENSENBRENNER, JR.

OF WISCONSIN

IN THE HOUSE OF REPRESENTATIVES

Monday, September 13, 2004

Mr. SENSENBRENNER. Mr. Speaker, on July 22, 2004, the House debated and passed H.R. 3313, the Marriage Protection Act, a bill that would prevent Federal courts from striking down the protection we granted to States in the Defense of Marriage Act. That protection allows states to refuse to recognize same-sex marriage licenses issued in other States if they so choose.

In the midst of floor debate on H.R. 3313, the Congressional Research Service issued a memorandum to the minority staff of the House Judiciary Committee, which stated: ''We are not aware of any precedent for a law that would deny the inferior Federal courts original jurisdiction or the Supreme Court of appellate jurisdiction to review the constitutionality of a law of Congress.'' Those on the other side of the aisle made much of this statement, and the statement was widely reported in the press.

I would like to set the record straight. The statement that Congress has never passed a law that would deny Federal courts jurisdiction to hear a constitutional claim is false, and the most cursory review of American history shows that. The very first Judiciary Act of 1789 denied the inferior Federal courts original jurisdiction and the Supreme Court appellate jurisdiction to review the constitutionality of literally thousands of Federal statutes under a jurisdictional regime that governed for roughly a century.

The Judiciary Committee majority staff pointed out these precedents to the Congressional Research Service in a letter sent on August 4, 2004, asking CRS if its position continued to be that ''there is not 'any precedent for a law that would deny the inferior federal courts original jurisdiction or the Supreme Court of appellate jurisdiction to review the constitutionality of a law of Congress.' ''

On August 16, the Congressional Research Service responded in a letter that states: ''*our earlier memorandum was incorrect.*'' (Emphasis added). Let me repeat that. CRS admitted that: ''our earlier memorandum was incorrect.'' CRS goes on to note that it recognizes ''the fact that as written and construed [the Judiciary Act of 1789] did operate to preclude any federal court from deciding the validity of a federal statute from 1789 to 1875.''

I would like to submit for the RECORD, in addition to my statement, the original erroneous memorandum sent by the Congressional Research Service, the letter to CRS from the majority staff of the committee requesting a clarification of CRS's views, and the response from CRS admitting its error.

So let the record be clear. H.R. 3313, the Marriage Protection Act, has ample precedent in American history, and the Congressional Research Service agrees.

CONGRESSIONAL RESEARCH SERVICE

MEMORANDUM

To: House Committee on the Judiciary, Attention: Perry Apelbaum.

From: Johnny H. Killian, Senior Specialist, American Constitutional Law, American Law Division.

Subject: Precedent for Congressional Bill.

This memorandum is in response to your query, respecting H.R. 3313, now pending before the House of Representatives, as to whether there is any precedent for enacted legislation that would deny judicial review in any federal court of the constitutionality of a law that Congress has enacted, whether a law containing the jurisdictional provision or an earlier, separate law. We are not aware of any precedent for a law that would deny the inferior federal courts original jurisdiction or the Supreme Court of appellate jurisdiction to review the constitutionality of a law of Congress.

[Letter sent to the Congressional Research Service from the Committee on the Judiciary]

AUGUST 4, 2004.

Mr. JOHNNY KILLIAN,
Madison Building, Library of Congress, Washington, DC.

DEAR JOHNNY: In an undated Memorandum from yourself to Perry Apelbaum, the minority chief counsel of the House Judiciary Committee, you stated ''We are not aware of any precedent for a law that would deny the inferior federal courts original jurisdiction or the Supreme Court of appellate jurisdiction to review the constitutionality of a law of Congress.'' This Memorandum was made known to us in the midst of House floor debate on H.R. 3313, the Marriage Protection Act, on July 22, 2004.

In the Judiciary Act of 1789, (Footnote Text: Judiciary Act of 1789, 1 Stat. 85 (1789)) Congress provided no general federal question jurisdiction in the federal courts below the Supreme Court. (Footnote Text: See Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 33 (stating that in the Judiciary Act of 1789, ''Congress provided no general federal question jurisdiction in the lower federal courts'')). The federal circuit courts were vested with jurisdiction according to the nature of the parties rather than the nature of the dispute. The Judiciary Act of 1789 provided ''the circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum . . . of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.'' (Footnote Text: Judiciary Act of 1789, 1 Stat. 73, §11 (1789))

Further, and of relevance here, Section 25 of the Judiciary Act of 1789 restricted the Supreme Court's appellate jurisdiction over state court decisions to cases where the validity of a treaty, statute, or authority of the United States was drawn into question and the state court's decision was against their validity (Footnote Text: Judiciary Act of 1789, 1 Stat. 73, §25 (1789)) or where a state court construed a United States constitution, treaty, statute, or commission and decided against a title, right, privilege, or exemption under any of them. (Footnote Text: Judiciary Act of 1789, 1 Stat. 73, §25 (1789))

Consequently, under the Judiciary Act of 1789, if the highest state courts upheld a federal law as constitutional and decided in favor of a right under such federal statute (and there was no coincidental federal diversity jurisdiction), no appeal claiming such federal law was unconstitutional was allowed to any federal court, including the Supreme Court. The Judiciary Act of 1789, therefore, denied the inferior federal courts original jurisdiction and the Supreme Court appellate jurisdiction to review the constitutionality of literally thousands of laws of Congress in the many and various circumstances meeting the criteria just mentioned.

Congress did not grant a more general federal question authority to the lower federal courts until after the Civil War, (Footnote Text: See Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875)) and Congress did not grant the Supreme Court the authority to review state court rulings upholding a claim of federal right until 1914. (Footnote Text: See Judiciary Act of 1914, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (1914)) Until 1914, then, a situation existed in which the constitutionality of literally thousands of federal laws could not be reviewed in either the inferior federal courts, or the Supreme Court, or both.

We are not aware of any doubt about these facts among scholars of federal court jurisdiction.

The Judiciary Act of 1789, of course, went far beyond what H.R. 3313 would do regarding federal court jurisdiction. While the Judiciary Act of 1789 precluded all federal court review of constitutional issues when state courts upheld any law of Congress (expressing a policy distinctly in favor of the validity of federal law), H.R. 3313 simply provides that challenges brought against one section of the Defense of Marriage Act, codified at 28 U.S.C. §1738C, (Footnote Text: 28 U.S.C. §1738C states ''No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of

the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.'') be brought in federal court, and in no way favors any particular outcome.

Therefore, I am writing to ask you whether you continue to believe the statement that there is not ''any precedent for a law that would deny the inferior federal courts original jurisdiction or the Supreme Court of appellate jurisdiction to review the constitutionality of a law of Congress'' is correct.

We would appreciate your answer as soon as possible, but no later than August 16, 2004.

Sincerely,

PHIL KIKO,
Chief of Staff/General Counsel.

[Letter in response to the letter dated August 4, 2004 from the Congressional Research Service to the Committee on the Judiciary]

CONGRESSIONAL RESEARCH SERVICE,
August 16, 2004

MEMORANDUM

To: House Committee on the Judiciary, Attention: Philip C. Kiko.

From: Johnny H. Killian, Senior Specialist, American Constitutional Law, American Law Division.

Subject: Congressional Control of Jurisdiction of Federal Courts.

This memorandum responds to your request that we reassess an earlier memorandum of ours that was prepared for Congress in light of construction of an early congressional enactment.

In brief, during consideration of H.R. 3313, the Marriage Protection Act, in the House of Representatives, we were asked whether we were aware of any precedent for the provisions of the bill that would deny all federal courts, the Supreme Court under its appellate jurisdiction and the inferior courts under their original jurisdiction, of authority to review any questions pertaining to the interpretation of, or the validity under the Constitution of, 28 U.S.C. §1738C. That statute provides that no State, or other relevant jurisdiction, is required to give full faith and credit to any public act, record, or judicial proceeding that recognizes marriage between two persons of the same sex. We responded, first orally and then by a brief memorandum, that we were not aware of any precedent for a law that would deny to all federal courts the power to review the constitutionality of a law of Congress.

You have called our attention to provisions of the Judiciary Act of 1789, 1 Stat. 85, specifically §§11, 25, which you contend contradict our memorandum and do deny all federal courts jurisdiction to review the constitutionality of acts of Congress. We do acknowledge that the cited provisions of the first Judiciary Act do in some respects prevent federal judicial review of the constitutionality of some acts of Congress, with, however, some qualifications that we set out below. Nonetheless, there were, indeed, some circumstances under which federal court jurisdiction was denied or not provided, so that our memorandum was not entirely accurate.

Our response requires some analysis. As you point out and as it is the consensus of the scholarly community, the first Judiciary Act did not confer on the federal courts, both the inferior federal courts and the Supreme Court, all the jurisdiction that might have been conferred under Article III of the Constitution. (Footnote Text: See R. Fallon, D. Melzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed., 1996), 29–33; W. Casto, The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction, 26 B.C. L. Rev. 1101, 1116–17(1985)). Thus, §11 of the Judiciary Act generally conferred diversity jurisdiction, with some limits, on the inferior federal courts, and a few other grants, but it did not confer federal question jurisdiction, that is, jurisdiction arising under the Constitution, laws, and treaties of the United States. So, absent the ability of litigants to obtain original jurisdiction in the inferior federal courts under some other head of jurisdiction, the constitutionality of federal statutes could not be attacked in those inferior federal courts. Some few instances of federal question jurisdiction appeared in the historical record, but it was not until 1875 when Congress conferred general federal question jurisdiction on the inferior federal courts, subject to a jurisdictional amount limitation. 18 Stat. 470.

However, such actions could be brought in the state courts, and the Supreme Court had limited appellate jurisdiction to review the state court decisions. This presents the focal point of the issue before us. Congress did not confer complete appellate jurisdiction over such questions decided by state courts. There were three categories of jurisdiction (Footnote Text: Casto, cited in fn. 1, 1118–20). That is, the Supreme Court enjoyed appellate jurisdiction:

1. Where the validity of a treaty, statute, or authority of the United States is drawn into question and the state court's decision is against their validity.

2. Where the validity of a state statute or authority is challenged on the basis of federal law and the state court's decision is in favor of their validity.

3. Where a state court construes a United States constitution, treaty, statute, or commission and decides against a title, privilege, or exemption under any of them.

Thus, the Supreme Court's appellate jurisdiction in these cases depended upon the particular results reached by the state courts. The first grant clearly recognized the federal interest in having one national, uniform resolution of the question of the validity of a federal law or a treaty, so that if a state court decision invalidated either under the U.S. Constitution the Supreme Court could review it. Only if the state court upheld the federal law or treaty did the Supreme Court lack jurisdiction. Obviously, Congress had in mind the federal interest involved in this situation, but it is nonetheless true that one challenging the validity of a federal law could not take that challenge to the Supreme Court if he lost in the state court.

Similarly, if a litigant challenged a state law as being invalid under a federal law and the state court upheld the validity of the state law, the litigant could appeal to the U.S. Supreme Court and obtain an answer. But if a litigant was defending in state court a claim under a state law, including a contention the federal law was invalid, and that court held the state law invalid under federal law, the litigant could not appeal that decision to the U.S. Supreme Court. So the way that §25 was worded did have the effect, at least in some instances, of insulating a federal law from a federal constitutional attack (Footnote Text: The law, incidentally, was not changed until 1914, 38 Stat. 790, as a result of the decision in Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), invalidating a regulatory measure under a Lochner-like application of the Fourteenth Amendment's due process clause. One may wonder how often this kind of thing happened if the law was not changed for 85 years).

Now, one can imagine that federal laws were not forever protected from constitutional challenge, that a challenge might only often be postponed. Just consider, the instance might arise in which a state court invalidated a state law as in conflict with a federal law, and the losing party in the state court could not appeal that decision. But in a Nation of many States, thirteen when the Judiciary Act was passed in 1789, as compared to some 40 or so by 1875, when the inferior federal courts were invested with federal question jurisdiction, how many times is it likely that in only one State a federal law of general applicability that could be interpreted as invalidating a state law would be challenged. No principle of res judicata or collateral estoppel would prevent a challenge to such state laws being brought in many States and surely state courts would be divided. Eventually, the issue would come to the U.S. Supreme Court.

That the effect of §25 might only infrequently result in the constitutionality of a federal statute being insulated from review does not alter the fact that as written and construed the section did operate to preclude any federal court from deciding the validity of a federal statute from 1789 to 1875. Accordingly, our earlier memorandum was incorrect.

EXPRESSING SENSE OF THE HOUSE ON ANNIVERSARY OF TERRORIST ATTACKS LAUNCHED AGAINST UNITED STATES ON SEPTEMBER 11, 2001

SPEECH OF

HON. ANNA G. ESHOO

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, September 9, 2004

Ms. ESHOO. Mr. Speaker, I rise today to commemorate and observe the solemn anniversary of the unspeakable attacks of September 11, 2001, and in particular to express my deepest sympathies to the families of two American heroes, Naomi Solomon who died in the World Trade Center and Andy Garcia who lost his life aboard Flight 93.

Few events in U.S. history have been so jarring to our collective security and so unifying. The sorrow we all felt that day was surpassed only by our commitment to do everything possible to ensure that never again would we be so vulnerable and so unprepared.

Today, on the third anniversary of that fate-filled day, we must reconnect ourselves to the task of actually doing what has not yet been completed to make America safe.

While we've made progress, we cannot rest. Whether on land, sea, or air, critical security gaps continue to exist 3 years after the attacks of September 11. We have before us concrete steps, recommended by the 9/11 Commission, to address our vulnerabilities and to strengthen our defenses. Congress must reform the intelligence community by doing the following:

Create a strong National Intelligence Director;

Improve Congressional oversight;

Ensure an integrated terrorist watch list;

Strengthen the FBI's ability to collect and analyze domestic intelligence;

Create an integrated strategic plan for aviation and transportation security;

Improve airline passenger and baggage screening;

Improve coordination between FAA and military authorities;

Provide for the increased assignment of radio spectrum for safety purposes; and