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Doc No	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	MEMO	BLACKWELL TO ELIZABETH DOLE RE PROPOSED TESTIMONY ON SCHOOL PRAYER AMENDMENT	2	8/11/1982	B6

Freedom of Information Act - [5 U.S.C. 552(b)]

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1 MEMO

2 8/11/1982 B6

BLACKWELL TO ELIZABETH DOLE RE
PROPOSED TESTIMONY ON SCHOOL PRAYER
AMENDMENT

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WHITE HOUSE STAFFING MEMORANDUM

DATE: 8/11/82 ACTION/CONCURRENCE/COMMENT DUE BY: 8/12/82

SUBJECT: STATEMENT BY ASSISTANT ATTORNEY GENERAL THEODORE OLSON RE
SCHOOL PRAYER AMENDMENT

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	GERGEN	☒	☐
MEESE	☐	☒	HARPER	☒	☐
BAKER	☐	☒	JAMES	☐	☐
DEAVER	☐	☒	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY	☒	☐
CLARK	☐	☐	ROLLINS	☒	☐
DARMAN	☐ P	☒ SS	WILLIAMSON	☒	☐
DOLE	☒	☐	WEIDENBAUM	☐	☐
DUBERSTEIN	☒	☐	BRADY/SPEAKES	☐	☒
FIELDING	☒	☐	ROGERS	☐	☐
FULLER	☒	☐	_____	☐	☐

Remarks:

Please provide any edits/comments by c.o.b. tomorrow, August 12th.

Thank you.

Richard G. Darman
Assistant to the President
(x2702)

Response:



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 10, 1982

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Richard G. Darman

SUBJECT: Justice proposed testimony for August 18, 1982,
on S.J.Res. 199/The School Prayer Amendment

N.B. Please advise us as to who will coordinate White
House comments on this issue.

The Office of Management and Budget requests the views of
your agency on the above subject before advising on its
relationship to the program of the President, in accordance
with OMB Circular A-19.

A response to this request for your views is needed
no later than COB Thursday, August 12, 1982
(Justice has asked for clearance by NOON, Friday, August 13, 1982.)

Questions should be referred to William A. Maxwell
(395-3890) or to Michael W. McConnell (395-4850),
the legislative analyst in this office.

William A. Maxwell
William A. Maxwell for
Assistant Director for
Legislative Reference

Enclosures

cc: M. Uhlmann

D. Gerson

STATEMENT

OF

THEODORE B. OLSON

ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL COUNSEL

ON

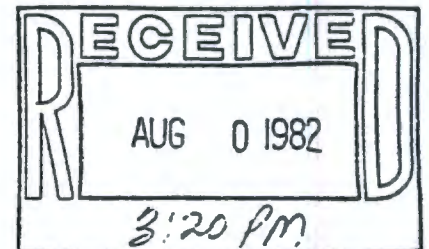
S.J. RES. 199, THE SCHOOL PRAYER AMENDMENT

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

August 18, 1982



Mr. Chairman and Members of the Committee:

I am pleased to appear today on behalf of the Administration to discuss Senate Joint Resolution 199, a resolution proposed by the Administration and introduced in the Senate by Chairman Thurmond of this Committee and one of his respected colleagues, Senator Hatch. This resolution proposes an amendment to the Constitution to restore the right to engage in prayer in our public schools and institutions. My remarks will be divided into three parts: first, why the amendment is needed and how it will achieve its end; second, why it is a sound solution to a contentious problem; and third, how it overcomes the objections traditionally raised by opponents of school prayer.

I.

The Administration has proposed this amendment in order to permit, once again, voluntary prayer in public schools and other public institutions. It is intended to reverse the effect of two decisions of the Supreme Court, School District of Abington Township v. Schempp, 374 U.S. 203 (1963) (Abington) and Engel v. Vitale, 370 U.S. 421 (1962) (Engel).

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two clauses, known as the

Religion Clauses, prohibit government "establishment of religion" (the Establishment Clause) and guarantee to citizens the right to the "free exercise" of their individual religious preferences (the Free Exercise Clause). The relationship between these two clauses is a delicate one -- the ultimate objective being individual liberty of religious conscience. 1/

Until the middle decades of this century the Supreme Court had issued only a few opinions analyzing the Establishment Clause of the First Amendment. In 1962, the Court decided Engel, which involved the daily reading in some New York schools of a nondenominational prayer. The Court held that "by using its public school system to encourage recitation of the . . . prayer [drafted by the State] New York has adopted a practice wholly inconsistent with the Establishment Clause." 370 U.S. at 424. The prayer reading was held to be unconstitutional even though nondenominational and voluntary. The Court ruled that:

1/ Protection from government intrusion upon religious liberty was sought by the Founding Fathers because of their perception "that cruel persecutions were the inevitable result of government established religions." Everson v. Board of Education, 330 U.S. 1, 12 (1947).

"The constitutional prohibition against laws respecting an establishment of religion must at least mean in this country it is no part of the business of Government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."

Id. at 425.

The Engel doctrine was reaffirmed and expanded one year later in Abington, where the Court held, in two companion cases, that Bible readings held at the beginning of each public school day violated the Establishment Clause. 374 U.S. 203. Reviewing past cases interpreting the Establishment Clause, the Court noted that it had "rejected unequivocally the contention that the Establishment Clause forbids only Governmental preference of one religion over another." Id. at 216. Thus, the key test was not whether any particular religion was established. Rather,

"The test may be stated as follows: what are the purpose and effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand

the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

374 U.S. at 222.

Abington is the Supreme Court's most recent full statement on prayer or Bible reading in the public schools. In other contexts, however, the Supreme Court has elaborated upon the standard governing Establishment Clause questions.

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not foster "an excessive government entanglement with religion," Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted)."

Following these mandates, the lower courts have held all mandatory forms of religious expression in the public schools unconstitutional. Some courts have also struck down optional

prayers held at the request of the students, as well as prayers scheduled for before or after school. 2/

As a result of these rulings, therefore, institutionalized, voluntary prayer in the public schools has been held to be inconsistent with the prohibitions of the First Amendment. The President has proposed this amendment as the most straightforward solution to this situation.

II.

There are important reasons why the proposed amendment should be supported by this Committee. First, we believe that this amendment will reflect and reinforce this country's long history of recognizing the existence of a deity to whom humility and thanksgiving are due. For over 150 years, prayers or Bible readings were a familiar part of the school day for American children, and were viewed as an appropriate expression of humility and gratitude for the blessings which had been bestowed upon this nation and its peoples.

2/ See, e.g., Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982) (voluntary activities of religious nature); Hall v. Board of School Commissioners, 656 F.2d 999 (5th Cir. 1981) (students conducting devotional readings); Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd, 102 S. Ct. 1267 (1982) (statute permits prayer at request of students); Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981) (voluntary prayers at school assembly requested by students); Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981) (permission for student group to engage in communal prayer meetings on school premises would violate the Establishment Clause).

Our country's most important public documents and occasions have traditionally been marked by a recognition of our dependence on a supreme being. For example, references to God can be found in the Mayflower Compact of 1620, the Declaration of Independence, the Pledge of Allegiance, and the National Anthem; on the Liberty Bell, the American Seal, our legal tender, monuments such as the Tomb of the Unknown Soldier, and the Washington, Lincoln and Jefferson Memorials; and in the oath of office taken by federal employees (including the President, all federal judges and members of Congress) and witnesses in judicial and legislative proceedings. American institutions have continued to reflect these religious beliefs as evidenced by the employment of chaplains in the legislatures and the armed forces, the proclamations and Inaugural Addresses made by several Presidents, and the public recognition of Thanksgiving Day as a time set aside to express gratitude to a supreme being. Forty-nine of the fifty states have constitutions that refer to dependency on God. ^{3/} As the Supreme Court has stated, "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

This amendment is sensitive to and protective of the rights of those who disagree. This is a nation which was

^{3/} The exception is West Virginia.

created by diverse peoples with differing religious convictions and which has grown richer each year as different ethnic groups, and new religions, both imported and home grown, have become a part of our heritage. The heterogeneous character of our religious observances, and the respect for differing opinions that it has engendered, are among our true national treasures. The proposed amendment will, while giving voice to the desires of the majority, scrupulously protect the rights of those in the minority. Freedom of conscience, freedom of association and the rights of liberty and individual freedom form the core the First Amendment, and they will not be weakened by this proposal. On the contrary, the second sentence of the amendment stands as a clear prohibition against compulsory participation in school prayer, or any effort at compulsion, and will enable every person to remain completely free of any constraint on his or her conscience, no matter who attempts to impose it.

The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools. Dissatisfaction with the Supreme Court's ruling has led to twenty years of angry dissent by our citizens. Each year, scores of proposed amendments are introduced, and major efforts to pass an amendment were mounted in 1964, 1966 and 1971. The Founding

Fathers provided a mechanism to permit changes in the Constitution -- certainly not to reflect every transient desire, but to allow for changes sought by a great majority of the people over a period of many years. The demand for the opportunity for prayer in the public schools has proved to be lasting, not transitory. We believe that it is appropriate for the people to be given the opportunity to restore a practice which existed throughout three-fourths of our national history.

III.

The proposed amendment contains two guarantees: first, it mandates that the Establishment Clause no longer be read to preclude prayer in public schools or other public institutions. Second, it mandates that the government cannot require any person to participate in such prayer.

The first sentence of the amendment would remove any constitutional bar to individual or group prayer in public institutions. It is important to note that this amendment is meant to affect the Supreme Court's Establishment Clause analysis only in the context of prayer in public institutions;

outside that context this jurisprudence would be left undisturbed. It does not address state constitutions that may also bar prayer, or local decisions not to have prayer in the public schools. It does not create a "right" to pray in public institutions. It does not affect other forms of religious observance in public facilities. It is only intended to modify the federal Constitution to remove any federal bar to prayer.

The first sentence is designed to permit the states -- whether on a state or local level -- to authorize voluntary, organized prayer. A school committee could authorize a variety of options: a single prayer such as that drafted by the New York Board of Regents and struck down in Engel, a selection of prayers, the drafting of prayers by the individual schools, teachers, or students, or a period of silent prayer or meditation. The restraints on the composition of the prayer or its place in the school day would be governed by state law, not the federal Constitution.

The amendment will not create a new, affirmative constitutional right to pray. The right to pray is found now in the First Amendment's guarantees of the free exercise of religion and freedom of speech, and this proposed amendment

would not alter past construction of either the Free Exercise or the Free Speech Clause. The present right to pray would remain subject to reasonable time, place and manner restrictions.

The first sentence will also permit such prayers in public institutions other than schools. This will, for example, remove any doubt that public prayers are permissible in opening sessions of courts and the legislatures, both state and federal.

The second clause will insure that the values treasured by our Founding Fathers, such as freedom of association and freedom of conscience, will continue to be strictly protected. The clause guarantees individuals the right not to participate in prayer in public institutions. Any child or parent who chooses not to be involved is completely free to refrain from participating. The same would hold true for any teacher or other public official. The rights of dissenters, atheists or religious minorities to be free of state mandated religion will not be infringed under this amendment. Any effort to compel participation in the prayers will be unconstitutional.

There are four major objections that have been traditionally raised regarding prior proposed constitutional amendments in this area. Since they will no doubt be heard again, it seems appropriate to address them at this point.

First, opponents argue that prayer is too personal a matter to be placed in the hands of the State. The proposed amendment does not undercut the personal nature of prayer. There is no requirement that there be a monolithic State prayer nor is there a bar to anyone who wishes to propose a prayer. There is no compulsion on individuals to join in the public prayer if they do not wish to do so. Those who wish to pray communally may do so; those who do not may abstain with a guarantee of their right to do so. The decision about how personal and private to make one's religious devotions is left completely to the individual.

Second, critics argue that prayer will become trivialized because a prayer satisfactory to everyone -- such as a nondenominational prayer -- is so diluted that it reflects no one's true religious beliefs. In addition, it is said that attempting to draft such prayers can itself be extremely divisive and still not produce a prayer that is satisfactory to most people. The proposed amendment does not require that a prayer be nondenominational or satisfactory to every religious group in the area. It may well be that the prayer selected will reflect the particular religion that predominates in a community. Those who find the prayer objectionable will be guaranteed the right to refrain from participation.

Third, it is said that this amendment will be divisive, as religious partisans struggle to have their prayer represented in the public schools. The proposed amendment removes the federal bar to prayer in the public schools and institutions and places the decision both whether to permit such prayer and what its content will be in the hands of the States or local communities. If a community does not wish to authorize such prayer, there is nothing in the proposed amendment requiring it to do so. If it is felt that the introduction of prayer will be divisive, State or local governments will be able to reject it. This is a decision, however, that we believe should be made at the local level. We do not believe that discussion of the issue will prove unmanageable. There is little evidence that prayer in the public schools was a truly divisive factor prior to Engel and Abington or that religious diversity was not respected and even encouraged during those years. For over a century, local areas -- even those with diverse populations -- were able to draft suitable prayers with little recorded difficulty. Opponents who have raised this spectre have relied on emotional appeals and have presented little evidence to support their claims.

Certainly the question of whether and what kind of prayer to permit may generate debate in some communities.

We do not believe, however, that such discussions are unhealthy. Surely a country that has witnessed over 200 years of often strenuous debate and that has used that process to fashion some of our greatest achievements -- our fight for independence, the creation of the Constitution, the abolition of slavery and the determined accomodation of minority rights -- is used to debate and dissent. Few measures are unanimously adopted in a free and pluralistic society, but that is a price we willingly and happily pay for a republican form of government. But our desire to debate issues, encompassing as it does our tolerance for dissent, and the constitutional protections granted to dissenters, should not be used to frighten citizens away from exercising their authority to effect changes that reflect the will of the majority, while protecting the rights of the minority.

Finally, critics argue that the amendment will inevitably lead to the establishment of religion. The argument made is that a religion that is particularly strong in an area will insure adoption of "its" prayer, so that inevitably the particular religion becomes established in the classroom. While this argument is superficially attractive, it is in fact disingenuous. Again, these critics ignore the experience this country has had with school prayer. For almost two centuries, prayers were said in schools and

public institutions without leading to the establishment of any religion. In fact, our history is one of the continuing disestablishment of those religions that, even after the Revolution, remained as official state churches. This amendment does not establish any religion or authorize funding for any accessory to school prayer, such as prayer books or Bibles. The amendment does nothing more than remove the bar that presently exists in the federal Constitution to local option on school prayer. How local areas implement their option will be the subject of local discussion, subject to local sentiments. The fears raised by opponents of this amendment are the fears of those opposed to any prayer in public institutions. While we understand that position and believe that it is generally motivated by good intentions, we disagree with it and believe that decisions in this area are matters that properly belong and are best addressed at the local level.

CONCLUSION

We began our national history with an unforgettable Declaration that governments were instituted in order to secure to the people those inalienable rights including life, liberty and the pursuit of happiness with which people were "endowed by their Creator." Those rugged and inspired individuals of all

faiths who created the government which established and protects our right to pursue the faith of our conscience understood the importance of recognizing the source of our blessings. It is time that we restore the right of our children to do so as well.

Mr. Chairman, I shall be glad to answer any questions you or members of the Committee might have.

ANALYSIS

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I.

THE RELIGIOUS HERITAGE OF THE NATION

From the birth of the United States, public prayer and the acknowledgment of a Supreme Being have been a foundation of American life. Government officials have continually invoked the name of God, asked His blessings upon our nation, and encouraged our people to do the same. One of the most striking examples of this invocation of God's blessing and assistance is found in the Declaration of Independence, which proclaims it "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . ." The new nation was established, the authors of the Declaration said, "appealing to the Supreme Judge of the world for the rectitude of our intentions" and "with a firm reliance on the Protection of Divine Providence. . . ."

Similarly, the First Congress, which drafted the language of the First Amendment, not only retained a chaplain to offer public prayers, but, the day after proposing the First Amendment, called on President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many

Coins have borne the legend "In God We Trust" since 1865, 31 U.S.C. § 324a, 5/ and this was made the national motto in 1956. 36 U.S.C. § 186. In 1952, Congress directed the President to proclaim a National Day of Prayer. 36 U.S.C. § 169h. In 1954, Congress added the words "under God" to the Pledge of Allegiance to acknowledge this heritage. 36 U.S.C. § 172. The House Judiciary Committee explained:

This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs. 6/

Many patriotic songs similarly acknowledge dependence upon God and invoke His blessings. One stanza from the National Anthem, 36 U.S.C. § 170, includes the phrases "Praise the Pow'r that hath made and preserved us a nation" and "And this be our motto, 'In God is our Trust.'" 7/ The fourth stanza of "America" reads:

5/ Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting).

6/ H.R. Rep. No. 1693, 83d Cong., 2d Sess. (1954).

7/ Engel v. Vitale, 370 U.S. at 449 (Stewart, J., dissenting).

II. TRADITION OF PRAYER IN THE PUBLIC SCHOOLS

In keeping with the nation's heritage of public prayer, there has been a long tradition of including some form of prayer in the public schools ever since their inception. 11/ As early as 1789, for example, the Boston school committee required schoolmasters "daily to commence the duties of their office by prayer and reading a portion of the Sacred Scriptures." 12/ A commission supporting the establishment of a public school system in New York in 1812 reported that "Morality and religion are the foundation of all that is truly great and good, and are consequently of primary importance." 13/ There was a considerable effort in the 19th century to avoid the use of "sectarian books and sectarian instruction." 14/ For example, the Massachusetts Board of Education headed by Horace Mann removed sectarian instruction from the schools but also prescribed a program of "daily Bible readings, devotional

11/ See generally, L. Pfeffer, Church, State, and Freedom, 394-99 (1953); Beale, A History of Freedom of Teaching in American Schools 95 (1941); Note, supra note 8, at 1083-84.

12/ Hartford, Moral Values in Public Education: Lessons from the Kentucky Experience 31 (1958).

13/ 2 State of New York, Messages from the Governors (C. Lincoln ed.) 550-51.

14/ 2 Stokes, supra note 2, at 57, quoted in Brief of Intervenor-Respondents at 25, Engel v. Vitale, 370 U.S. 421 (1962).

prepared by the New York State Board of Regents (the Regents' prayer) read:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

The Regents, in their brief to the Supreme Court as amicus curiae, noted that the exact words "Almighty God" were contained in 34 state constitutions, that every state constitution acknowledged dependence on God in some form, and that an acknowledgment or invocation of "blessings" was contained in 29 state constitutions. 18/ Thus, the recitation of the Regents' prayer in New York schools closely mirrored other official statements reflecting the nation's religious heritage.

III. THE RELIGION CLAUSES OF THE FIRST AMENDMENT AND PUBLIC PRAYER

The First Amendment to the Constitution, which was proposed by the First Congress in 1789, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " In a 1947 decision, the Supreme Court construed the Establishment Clause to be applicable to the states through the due process clause of the Fourteenth Amendment. 19/

In concluding that the First Amendment forbids prayer in public schools, many courts and commentators have

18/ Brief at 15-16.

19/ Everson v. Board of Education, 330 U.S. 1 (1947).
See also Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause).

religious exercises should not be totally excluded from public education, belie the absolute effect which some have sought to give these words. 24/

The Supreme Court, in holding prayer in public schools to be unconstitutional, embraced an absolutist interpretation of the First Amendment based on its reading of the historical context in which the Amendment was passed. 25/ The Court in Engel v. Vitale, 370 U.S. at 428-29 n.11, relies on the interpretation of history contained in Everson v. Board of Education, 330 U.S. at 11-13 (opinion of the Court), and 33-42 (Rutledge, J., dissenting). Justice Rutledge said:

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. . . . In the documents of the times, particularly of Madison, . . . is to be found irrefutable confirmation of the Amendment's sweeping content. . . . [Madison's] Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion." . . . [I]t behooves us in the dimming distance of time not to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise. 330 U.S. at 33-34, 37-38.

24/ See Griswold, supra note 23, at 174; R. Healey, Jefferson on Religion in Public Education 256 (1962).

25/ 370 U.S. at 425-30.

religion altogether." 28/ Another thought that it should read "no religious doctrine shall be established by law." 29/ Another agreed

that the words might be taken in such latitude as to be extremely hurtful to the cause of religion He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all. 30/

Madison explained his position by saying that

he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience

Mr. Madison thought if the word 'national' was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent. 31/

These passages from the congressional debates prove two points. First, the concern the Congress wished to address by the amendment was the fear that the federal government might establish a national church, use its influence to prefer certain sects over others, or require

28/ Id.

29/ Id. at 730.

30/ Id. at 730-31.

31/ Id.

not be precluded from aiding religion, it is more likely that the final language was intended to prevent Congress from passing a law interfering with the existing state laws on the establishment of religion. 36/

Prior to its decisions of the 1960's, the Supreme Court had recognized that the Establishment Clause was not intended to result in absolute separation:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly. 37/

As stated by Justice Stewart, "as a matter of history and as a matter of the imperatives of our free society, . . . religion and government must necessarily interact in countless ways." 38/

36/ Malbin, Religion and Politics 15-17 (1978); Berns, supra note 4, at 8-9; Sky, The Establishment Clause, the Congress and the Schools: An Historical Perspective, 52 Va. L. Rev. 1395, 1418-19 (1966). Thus, as Justice Stewart has noted, "it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." Abington School District v. Schempp, 374 U.S. at 310 (Stewart, J., dissenting).

37/ Zorach v. Clauson, 343 U.S. 306, 312 (1952). The Court went on to suggest that prayers in legislative halls, thanksgiving proclamations, and "all other references to the Almighty that run through our laws, our public rituals, [and] our ceremonies" do not "flout . . . the First Amendment." Id. at 312-13.

38/ Abington School District v. Schempp, 374 U.S. at 309 (Stewart, J., dissenting).

clear that students were not required to participate in the prayer, the Court appeared to adopt a theory of implied coercion:

When the power, prestige and financial support of the government is placed behind a particular religious belief, the coercive pressure upon religious minorities to conform to the officially approved religion is plain. Id. at 431.

One year later, in Abington School District v. Schempp, 374 U.S. 203 (1963), the Court struck down a Pennsylvania law requiring that public schools begin each day with readings, without comment, from the Bible. Emphasizing the "complete and unequivocal" separation between church and state in its previous constructions of the First Amendment, 41/ the Court concluded that the purpose and primary effect of Pennsylvania's law was the advancement of religion in violation of the Establishment Clause. 374 U.S. at 222-26.

In construing the Establishment Clause to require strict "neutrality" of the state toward religion, the Court has forbidden the government from placing any support "behind the tenets of one or of all orthodoxies." Id. at 222. The Court also reaffirmed the rule that

Neither [the states nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid

41/ 374 U.S. at 219-20, quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952). See also Everson v. Board of Education, 330 U.S. at 18.

another case, the recitation of a similar verse before meals, but without any reference to God, was held to be a prayer in violation of the Establishment Clause. 44/

More recently, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a one-minute prayer or meditation at the start of the school day. 45/ The lower court found that the practice of permitting student and teacher prayers in the public schools was inconsistent with the "absolute governmental neutrality" demanded by the Supreme Court's interpretation of the First Amendment. 653 F.2d at 901. The Supreme Court has also held that a state statute requiring the posting of the Ten Commandments on classroom walls in public schools was unconstitutional. Stone v. Graham, 449 U.S. 39 (1980).

The principles established in Engel v. Vitale and Abington School District v. Schempp have been extended recently to bar the accommodation or even toleration of students' desire to pray on school property even outside regular class hours. In one case, a court held that a

44/ DeSpain v. DeKalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

45/ Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982). Accord, Kent v. Commissioner of Education, 402 N.E.2d 1340 (Mass. 1980).

from the Bible by school authorities, as in Engel v. Vitale and Abington School District v. Schempp. 49/

Finally, with respect to prayer in public buildings other than schools, the Court of Appeals for the District of Columbia Circuit has ruled that atheists have standing to challenge the practice of the Senate and House of Representatives retaining Chaplains to open their sessions with a prayer, although the court has not yet decided whether the practice is unconstitutional. Murray v. Buchanan, No. 81-1301 (D.C. Cir. Mar. 9, 1982). Another court has ruled unconstitutional a state legislature's practice of retaining any particular chaplain to open legislative sessions with prayer. 50/

49/ Id. at 761; Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d at 1042-48; Brandon v. Board of Education, 635 F.2d at 978-79. The recent Supreme Court decision in Widmar v. Vincent, 102 S. Ct. 269 (1981), does not retreat from these principles. In that case, the Court held that a state university may not, consistent with the First Amendment's guarantee of free speech, exclude a student religious group from utilizing university facilities for meetings where those facilities were generally open for use by student groups. As the court pointed out, the question at issue in Widmar "is not whether the creation of a religious forum would violate the Establishment Clause." Id. at 276. Instead, given that the university opened its facilities to general student use, "the question is whether it can now exclude groups because of the content of their speech." Id. In this context, the Court did not believe that the primary effect of the open facilities policy would be to advance religion. Id.

50/ Chambers v. Marsh, No. 81-1077 (8th Cir. Apr. 14, 1982). But see Zorach v. Clauson, 343 U.S. at 312-13 (suggesting that "[p]rayers in our legislative halls" do not "flout[] the First Amendment").

Moreover, the courts have extended the principles of Engel v. Vitale and Abington School District v. Schempp to proscribe not only government-sponsored prayer, but also voluntary prayer initiated by students. By prohibiting students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours, the courts' concern with the Establishment Clause has overshadowed the First Amendment right of students to free exercise of religion. As Justice Stewart has stated, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." 54/ Although it can be argued that those parents could send their children to private or parochial schools, the Supreme Court has stated that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." 55/

The unintended but inevitable result of current judicial interpretations of the Establishment Clause is not state neutrality but a complete exclusion of religion which, as Justice Stewart noted, is, in effect, state discouragement of religion:

54/ Abington School District v. Schempp, 374 U.S. at 312 (Stewart J., dissenting).

55/ Id. at 312-13, quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

decisions of essentially local concern to be made by states and localities rather than the federal judiciary. For over 170 years, school prayer issues were resolved at the state and local levels by the residents of the affected communities. Their choices regarding school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

Finally, and most importantly, this amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. 58/ Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of self-reflection and meditation. 59/ Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society. A prayer such as the one struck down in Engel v. Vitale, for instance, was promoted by the New York State Regents to encourage children to take

58/ Polls have shown that public approval of voluntary school prayer ranges from 69 to 85 percent of the population. See New York Times, May 7, 1982, p. B 40. Such clear public sentiment in favor of school prayer supports the need for this constitutional amendment.

59/ For example, the brief Bible readings in Abington School District v. Schempp were designed to serve such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions, and the teaching of literature." Id., 374 U.S. at 223.

state-composed prayers, and Abington School District v. Schempp, which forbade readings from the Bible. The proposed amendment would, therefore, make clear that the Establishment Clause of the First Amendment could no longer be construed to prohibit the government's encouragement or facilitation of individual or group prayer in public schools, and that students should be allowed to participate in such prayer with the support of school authorities.

The language of the proposed amendment would also foreclose an argument that the Free Exercise Clause of the First Amendment could be construed to forbid group prayer. Thus, the amendment rejects the "implied coercion" theory advanced in Engel v. Vitale, 370 U.S. at 431, which presumes that any group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion, and that therefore no prayer is constitutionally permissible. ^{61/} However, as discussed below, the proposed amendment expressly protects the right of objecting students not to participate in prayer. This provision is sufficient to protect the rights of those who do not wish to participate without denying to all others who desire to pray an opportunity to do so.

^{61/} See also Abington School District v. Schempp, 374 U.S. at 288 (Brennan, J., concurring).

conflict with deeply held religious beliefs." 62/ The proposed amendment would not, by its terms, alter past constructions of the Free Exercise Clause or the Free Speech Clause as a source of a right to prayer. Of course, to the extent that a right of prayer could be based on the Free Exercise Clause or the Free Speech Clause, the right would remain subject to reasonable state restrictions governing the time, place, and manner of its expression. 63/

C. Type of Prayer

If school authorities choose to lead a group prayer, the selection of the particular prayer -- subject of course to the right of those not wishing to participate not to do so -- would be left to the judgment of local communities, based on a consideration of such factors as

62/ See Brandon v. Board of Education, 635 F.2d at 977-80; Stein v. Oshinsky, 348 F.2d at 999-1002; Hunt v. Board of Education, 321 F. Supp. 1263 (S.D. W.Va. 1971); Kent v. Commissioner of Education, supra.

63/ See, e.g., Stein v. Oshinsky, 224 F. Supp. 757, 760 (E.D.N.Y. 1963) ("The rights of [students] to say voluntary prayer must be subject to such reasonable rules and regulations as may be prescribed by the school authorities"), rev'd on other grounds, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965). Cf. Heffron v. International Society for Krishna Consciousness, 101 S. Ct. 2559 (1981) (restriction on distribution of religious literature upheld); Grayned v. City of Rockford, 408 U.S. 104 (1972) (restriction on demonstration near school upheld). Thus, school officials would be able to schedule periods of prayer in a manner so as not to cause disruptions during the school day; similarly, a judge or legislative committee could limit prayer to the opening of a day's session, not during the middle of a jury argument or a hearing.

Moreover, a limitation to "nondenominational prayer" would not only preclude arguably sectarian prayer that may be promoted by the state but also would prevent individuals or groups, acting on their own and with no encouragement from the state, from participating in sectarian prayer in public places. The amendment is intended to enable the state to allow voluntary, privately-initiated prayer in public places, such as saying grace before meals or attending an informal prayer meeting before or after school. ^{67/} It would clearly be inappropriate to constitutionally limit such privately-initiated prayer to "nondenominational" expression.

The determination of the appropriate type of prayer is a decision which should properly be made by state and local authorities. That was indeed the practice throughout most of this nation's history. In fact, the long history of prayer in public schools has produced a considerable body of state court decisions, decided before Engel v. Vitale and Abington School District v. Schempp, which clarify the scope of permissible prayers under state law. Because the proposed amendment merely would remove the bar of the Establishment Clause as construed by the Supreme Court, state laws which prohibit or restrict sectarian

^{67/} Cf. Stein v. Oshinsky, 348 F.2d 971 (grace before meals); Brandon v. Board of Education, 635 F.2d 999 (prayer meeting before school).

Bible, 70/ or could be suggested by school authorities in light of local circumstances. Examples of such prayers composed or selected by school officials are the Regents' prayer in Engel v. Vitale, and the fourth verse from "America," which was recited by New York City school-children. 71/

D. Applicability of the Proposed Amendment

The amendment by its terms would apply to prayer in "public schools or other public institutions." The intent of this language is to make the remedial provisions of this amendment coextensive with the reach of the First Amendment's Establishment Clause as construed by the Supreme Court. The prohibitions of the Establishment Clause do not forbid prayer in private schools or institutions, and so the present amendment need not address the issue.

Although most controversies relating to public prayer arise in the context of public schools, the proposed amendment is drafted to apply to prayer in other public institutions, including prayers in legislatures. 72/ In

70/ In Abington School District v. Schempp, 374 U.S. at 207, 211, the school authorities permitted the use of different versions of the Bible.

71/ See note 8 supra.

72/ One court has ruled unconstitutional a state legislature's practice of retaining a chaplain to offer prayers, and a similar challenge to chaplains in Congress is pending. See text at 19 supra.

who desire to participate, subject only to the express right of those who do not wish to participate not to do so.

The guarantee against required participation in prayer parallels and reaffirms the protection already afforded by the Free Exercise Clause of the First Amendment. 73/ It is intended to be analogous to the Supreme Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), which held that students cannot be compelled to recite the Pledge of Allegiance. 74/ Thus, the second sentence of the proposed amendment assures that students and others will never have to make a forced choice between their religious beliefs and participation in a state-sponsored prayer. Indeed, the second sentence of the proposed amendment provides greater protection than the Free Exercise Clause, because a person desiring not to participate in prayer need not show a

73/ See McDaniel v. Paty, 435 U.S. 618 (1978) (state statute barring ministers from service in state legislature violates right to free exercise of religion); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compulsory school attendance law violates free exercise rights of Amish parents); Sherbert v. Verner, 374 U.S. 398 (1963) (conditioning unemployment benefits on acceptance of Saturday work violates free exercise rights of a Seventh-Day Adventist).

74/ See also Torcaso v. Watkins, 367 U.S. 488 (1961) (state law requiring affirmation of belief in God as a condition to public employment violates free exercise rights).



White House Office of Policy Information

ISSUE UPDATE

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On May 17, 1982 the President sent to Congress a proposed amendment to the Constitution which would restore the freedom of our citizens to pray in public schools. This paper, prepared by the White House Office of Policy Information, explains the fundamental policy considerations behind the proposal.

Constitutional Amendment to Restore School Prayer

The President's goal

The President wants to restore Americans' right to participate in voluntary school prayer, a right which is now prohibited by Supreme Court interpretations of the U.S. Constitution. He believes that individuals should be allowed to decide for themselves whether to join in such prayers.

As the President has stated, "The First Amendment was written not to protect the people and their laws from religious values but to protect those values from government tyranny."

Judicial rulings restricting prayer,

The Supreme Court did not see it this way. Its 1962 and 1963 rulings have prohibited prayer in our nation's public schools for nearly two decades on the premise that allowing such prayer violates the Constitutional separation between Church and State.

In writing the Constitution, the Founding Fathers were anxious to ensure that freedom of religion would be guaranteed, thus avoiding the religious persecution that had led a large number of American colonists to leave their European homelands. At the same time they sought to prevent the establishment of a "State religion" -- as existed in many European countries during the 1700s -- which could compel non-adherents to worship or contribute to a religion not of their own choosing.

For a century and three-quarters, the American judicial system maintained this careful balance between "freedom to worship" and "freedom from (compulsory) worship." However,

Numerous examples demonstrate the religious nature of the American people. Our Declaration of Independence states that "all men...are endowed by their Creator with certain unalienable rights..." Our national pledge of allegiance proclaims us as "one nation, under God." Our coins are inscribed with the words "In God We Trust." In fact, even the Supreme Court, in an earlier day, observed that "We are a religious people whose institutions presuppose a Supreme Being."

Prayer also remains an integral part of many government functions and institutions. Sessions of Congress and many of the State legislatures open with prayer. Each of the branches of the U.S. military retains chaplains, and maintains chapels and hymnbooks for use by servicemen and women. The President, as well as governors and mayors of many of our States and cities, preside over annual prayer breakfasts. The President-elect takes the oath of office with his hand upon the Bible. The standard form for oaths for sworn testimony in U.S. courts contains the phrase "so help me God." And each new session of the Supreme Court opens with the declaration "God save the United States and this honorable Court."

By banning school prayer, the government is thus not only inconsistent with American religious heritage and practices, but is actually promoting a new orthodoxy contrary to the nation's history by tilting in favor of an "official line" that voluntary expression of religious belief is somehow unacceptable and illegal. The government thereby places school prayer on the same level as drinking, smoking or using illicit drugs on public school grounds -- all forbidden activities.

In the end, however, the historical case for the school prayer amendment transcends even these religious issues, for prayer is but one of many forms of public expression. In singling out public school prayer for prohibition, the Court rulings of 1962 and 1963 departed from America's tradition of making no distinctions on the basis of the content of its citizens' speech. Moreover, the ban on school prayer is a glaring contradiction in a society which allows freedom of expression in political and philosophical discussion in public schools, but not in its religious forms.

Why we need an amendment

Under these circumstances, a constitutional amendment is needed to reaffirm America's heritage of allowing those who wish to worship to be able to do so, while simultaneously preserving the freedom of those who do not wish to pray. In contrast to the current ban on voluntary school prayer, which relegates the right to pray to the status of a "second-class freedom," not to be countenanced

The amendment would also prevent the establishment of a uniform national rule on the conduct of voluntary prayer. It would instead allow State and local authorities to decide the appropriate manner in which school prayer should be conducted.

The second sentence of the proposed amendment assures that no one need make any expression of religious beliefs which he or she does not hold, and that no person would be required, by any State or the Federal government, to participate in prayer. The right not to pray is thus protected as well.

At the same time, the presence of one or more students who do not wish to participate in prayer would no longer deny the remainder of the students the right to pray. The freedom to pray -- even in public places -- is one of America's most essential and revered liberties. Where there is no constitutionally overriding harm from the exercise of this particular freedom -- as there clearly is not in this case -- the freedom to pray must not be categorically forbidden.

Concerns about the amendment

Opponents to a constitutional amendment allowing voluntary school prayer often claim that voluntary prayer is available to students at any time during the school day. But these critics fail to recognize that many of the world's great religions consider prayer at times a communal activity. To exercise their religion fully, many persons believe they should join in prayer. Opposing this right is itself a form of intolerance, relegating children to surreptitious private expressions of faith instead of accomodating their legitimate religious interest in joining together in prayer.

What these critics are really saying is that voluntary school prayer must be hidden and in silence. But this right to prayer, which American school children now have, is similar to the freedom Soviet school children have: They can pray as long as they are not caught at it. Surely public expressions of prayer should have more legitimacy in the United States than that which exists in an officially atheistic and totalitarian country.

Opponents also claim that the amendment will impose "government-sponsored prayers," but past experience has shown that this claim is unwarranted. Local school authorities are far more likely to allow one or more of the following expressions of prayer: Permitting a brief period of silent prayer at the start of the school day; permitting students to say their prayers before lunch; or allowing students to organize prayer groups which could meet at school before or after classes or during recess.

Conclusion

In the President's May 17 letter to Congress introducing the school prayer amendment, the President said: "The amendment will allow...individuals to decide for themselves whether they wish to participate in prayer."

Thus, the fundamental issue is whether or not a free people, under their Constitution, will be entitled to exercise the freedom to express their religious faith in the form of prayer. This long cherished liberty -- so deeply imbedded in the history and traditions of the United States -- is one which the President is committed to restoring.

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