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U.S. Department of Justice

Office of Legal Policy

May 14, 1982

TO: James A. Baker III
Fred F. Fielding
Edwin L. Harper
Craig L. Fuller
Michael M. Uhlmann
Gary Bauer

FROM: Jonathan C. Rose
Assistant Attorney General

Attached is a copy of the school prayer package which the Deputy Attorney General forwarded to Ed Meese this afternoon. He asked me to make sure you had a copy.

Attachment

School Prayer

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 14, 1982

MEMORANDUM

TO: Edwin Meese, III
Counsellor to the President

FROM: Edward C. Schmults
Deputy Attorney General

SUBJECT: Constitutional Amendment on School Prayer

Pursuant to the President's directive to us, we have undertaken an analysis of various possible versions of a Constitutional Amendment to permit prayer in the public schools. Attached at Tab 1 is a discussion by the Office of Legal Counsel of three alternative formulations of an amendment. This paper provides a useful discussion of a number of the questions and ambiguities presented by almost any formulation of a school prayer amendment.

You will recall that you and the Attorney General agreed to one version of a possible amendment last week. After considerable review here we have been unable to develop a formulation which seems to us superior in any respect. In an effort to assist you the Office of Legal Policy has produced a background analysis and memorandum in support of the language upon which you and the Attorney General agreed. That package is attached at Tab 2.

Attachments

Office of the
Assistant Attorney ~~General~~

Washington, D.C. 20530

13 MAY 1982

MEMORANDUM FOR EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL

Proposed Constitutional Amendment to Permit Prayer in the Public Schools

This responds to your request that we study the issue of a draft constitutional amendment permitting prayer 1/ in the public schools, and make a recommendation to you. The essential function of this amendment would be to overrule the Supreme Court's holdings in School District of Abington Township v. Schempp, 374 U.S. 203 (1963) (Abington) and Engel v. Vitale, 370 U.S. 421 (1962) (Engel). 2/ The following guidelines were provided.

1. Prayer would be permitted in the public schools.
2. Anyone should be able to draft the prayer -- the state, the local school board, a teacher, student or parent.
3. The prayer session would be voluntary. No one could be compelled to participate.
4. The prayer would not have to be nondenominational -- it could reflect local religious attitudes. Again, however, every effort would be made to protect individual freedom of conscience.

1/ The term "prayer" would embrace at least the following: traditional or original, denominational or nondenominational, religious recitations religious meditation and moments of silent reflection and Bible recitation.

2/ The decision to propose such an amendment is based on a desire to reinforce this country's long history of recognizing the existence of a deity to whom humility and thanksgiving are due. This history may be traced back to the Mayflower Compact of 1620, and includes references to God in the Declaration of Independence, 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) and witnesses; proclamations and Inaugural Addresses made by the several Presidents, and the recognition of Thanksgiving Day as a time set aside to express gratitude to a supreme

(Footnote Continued)

After reviewing various proposals and responses to them that have been made in the past, 3/ we offer three alternatives

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(Footnote Continued)
being. See generally School Prayer: Hearings on S.J. Res. 148 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 174 (1966) (1966 Hearings) (Appendix C, Brief of Respondents in Engel). Moreover, forty-nine of the fifty states have constitutions that refer to dependency on God. Id. at 154-64. See also 112 Cong. Rec. 23146 (1966) (statement of Sen. Simpson).

At the time Engel was decided, thirteen states required Bible reading in the schools, five permitted it by statute, seven permitted it under the common law, and one expressly prohibited exclusion of the Bible. Note, 31 Geo. Wash. L. Rev. 497, 503 n.54 (1963); Comment, 20 Ark. L. Rev. & B.A.J. 320, 322 (1967). See Doremus v. Board of Educ., 75 A.2d 880 (N.J. 1950), app. dismissed, 342 U.S. 429 (1952). Cases in which prayer or Bible reading were approved are collected at Annot., 45 A.L.R.2d 742 (1956). Of the seven state courts that had held Bible reading to be prohibited under their constitutions, three permitted "nonsectarian" religious exercises. Comment, supra, at 322. However, eleven States had disapproved of Bible reading, and five of prayer in the public schools. La Morte & Dorminey, Compliance with the Schempp Decision: A Decade Later, 3 J.L. & Educ. 399, 400-01 (1974) (La Morte).

3/ See Prayers in the Public Schools and Other Matters: Hearings on S.J. Res. 205, 206, 207, S. Con. Res. 81, S. Res. 356 Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. (1963); School Prayers: Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools Before the House Comm. on the Judiciary, Pts. 1-3, 88th Cong., 2d Sess. (1964) (1964 Hearings); 1966 Hearings, supra. See also Prayer in Public Schools and Buildings -- Federal Court Jurisdiction: Hearings on S. 450 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. (1980); G. Gunther, Cases and Material on Constitutional Law 1560 n.3 (9th ed. 1980).

as potential solutions to the problem. 4/

The text of the alternatives which we believe to be worthy of consideration are set forth in part III of this memorandum. We first summarize current law in the area and the various constitutional amendments that have been proposed to change it. Next, the effect of our proposed amendments on current law is evaluated. Finally, we discuss a number of issues left unresolved by our proposals, and suggest additional language that might be included to address those issues.

I. CASE LAW

The establishment of religion in pre-Revolutionary America took several forms, differing from colony to colony as to which church was established, 5/ and what form the establishment

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4/ Each would begin with the following words:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:
>
> Article ."

5/ In North Carolina, for example, it was the Church of England while in Massachusetts it was the Congregationalist Church. C. Antieau, A. Downey & E. Roberts, Freedom from Federal Establishment: Formation and Early History of the First Amendment Religious Clauses 4 (1964) (Antieau). Multiple establishment -- where more than one Protestant Church received state support -- eventually existed after the Revolution in nine of the thirteen colonies. Id. at 49 ff. See also Note, Religion and the Public Schools, 20 Vand. L. Rev. 1078, 1079 & n.1 (1967).

took. 5/ After the Revolution, many states moved towards disestablishment, but the movement was not uniform. 6/ The persecutions and harassment suffered by religious dissenters before the Revolution 7/ created an atmosphere in which hostility to the established churches, whose power rested with the state, fed the hostility to the royal government. 8/ The burdens placed on those who were not members of the

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5/ There were several ways in which the establishment of a church might be manifested. It might be the only one officially recognized and protected by the sovereign; its members alone might be eligible to vote, to hold public office, and to practice a profession; it might have the power to compel religious orthodoxy under penalty of fine and imprisonment or expel dissenters from the commonwealth; it could be financed by taxes upon all members of the community; it might be the only church which could freely hold public worship and evangelize, or it might be the only church which could validly perform sacraments like marriage and burial. Since schools were largely under church auspices, a monopoly of the education system undermined the dissenters' ability to promote their own ministry. Antieau, supra n.4, at 11.

6/ Id. at 30-38.

7/ For example, the Moravians were not allowed to send missionaries to the Indians; Quakers were in one instance flogged for refusing baptism; and children in Virginia were illegitimate unless their parents had been married in the Church of England. Id. The greatest sources of friction, however, was State support of the established churches paid for by taxes levied on all the people. In Virginia, Presbyterians made one of the first moves after the Revolution to end this practice, when they remonstrated that they were being taxed to support the Church of England whose members were a minority of the population. Id. at 32. Jefferson's "Act For Establishing Religious Freedom," drafted in 1777 but not passed until 1785, stated, "That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." 12 Hening's Statutes at Large of Va. 84, 85 (1823).

8/ "The effect of such practices in the minds of the colonists was to make religious dissent burdensome and humiliating; it placed a premium on ecclesiastical conformity. In short, it was religious persecution." Antieau, supra n.4, at 29.

established church aroused a widespread desire to remove everything that burdened men's freedom of conscience in religious matters. Out of this struggle came the First Amendment. 9/

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.

While a number of early Supreme Court decisions deal with the permissibility under the Free Exercise Clause of government regulations limiting freedom to engage in certain religious practices, 10/ there was no significant

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9/ Determining the true intent of the Framers relative to the First Amendment is an attractive historical exercise, see McGowan v. Maryland, 336 U.S. 420, 444-45 (1961); Antieau, supra at n.4, but it can never be completely convincing. The absence in the colonies of any substantial numbers of Catholics or Jews, the amendment's wholly federal application until the incorporation doctrine developed, and the lack of notes from most members of the First Congress renders any determination somewhat suspect. It seems safe to say, though, that "[a]lthough it has been suggested [by Justice Story] that the congressional objective was merely to prevent the establishment of a national church, the overwhelming weight of authority ascribes a much broader scope to the amendment." Note, Religion and the Public Schools, 20 Vand. L. Rev. 1078, 1079 (1967) (footnotes omitted).

10/ See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1879). Cf. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (challenges to compulsory flag salute by Jehovah's Witnesses).

exploration of Establishment Clause principles until 1947. 11/ In Everson v. Bd. of Educ., 330 U.S. 1 (1947), the Court upheld a state program which reimbursed parents for the cost of their children's transportion to nonpublic schools. The Court found that providing free bus transportation to children, regardless of the school they attended, was no more than the provision of a general governmental service to all children of the State. However, the Court warned:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go or to remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for Church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Id. at 15-16.

These principles were eventually applied in Engel, 12/ which involved the daily reading of the following prayer, drafted by the New York State Board of Regents:

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

370 U.S. at 422. The Court concluded "that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause." Id. at 424. The Court went on to hold:

11/ But see Bradfield v. Roberts, 175 U.S. 291 (1899) (Federal grant to religiously affiliated hospital upheld); Quick Bear v. Leupp, 210 U.S. 50 (1908) (Indian tribal money held in trust by Government could be used to pay tuition at parochial school).

12/ See also McCollum v. Board of Educ., 333 U.S. 203 (1948) (release time program on school grounds violates Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (release time program off school grounds permissible under Establishment Clause).

"Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause. . . . The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct Governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."

Id. at 430. In essence, the teaching of Engel was:

"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 that Bible readings held at the beginning of each public school day violated the Establishment Clause. The first of two companion cases decided in Abington involved a Pennsylvania statute which provided for the reading of "at least ten verses from the Holy Bible . . . without comment, at the opening of each public school on each school day." 374 U.S. at 205. Children could be excused from the Bible reading upon written consent of their parents or guardians. The companion case in Abington challenged a similar rule promulgated for the public schools of Baltimore, Maryland, requiring daily "reading, without comment, of a chapter of the Holy Bible and/or the use of the Lord's Prayer." Id. at 211.

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. As in Engel, only Justice Stewart dissented from the Court's holding in Abington.

Abington is the Supreme Court's most recent full statement on prayer or Bible reading in the public schools. 13/ 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).'"

Stone v. Graham, 449 U.S. 39, 40 (1980); see also Tilton v. Richardson, 403 U.S. 672, 684-89 (1971). This standard prohibits the conduct of any form of organized prayer in the Nation's public schools.

Following these standards, the lower courts have held all mandatory forms of religious expression unconstitutional. 14/ See, e.g., Meltzer v. Board of Public Instruction, 577 F.2d 311 (5th Cir. 1978), cert. denied., 439 U.S. 1089 (1979) (required Bible reading); Alabama Civil Liberties Union v. Wallace, 456 F.2d 1069 (5th Cir. 1972) (same); Anderson v. Laird, 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972) (mandatory chapel attendance at federal military academies). Additionally, optional or voluntary prayers held at the request of students, or before or after school, have been held to violate the Establishment Clause. See Lubbock Civil Liberties Union v. Lubbock

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13/ There is only one case after Abington where plenary treatment was given this issue by the Court. See Chamberlain v. Dade County Bd. of Public Instruction, 377 U.S. 402 (1964) (per curiam) (Florida statute requiring devotional Bible readings and prayer unconstitutional).

14/ See Merel, The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment, 45 U. Chi. L. Rev. 805, 808 (1978).

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). The fact that the recited prayer is nondenominational or makes no reference to God has been held immaterial. See, e.g., Mangold v. Albert Gallatin Area School District, 438 F.2d 1194 (3d Cir. 1971) (nondenominational Bible reading and prayer); DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968) (compulsory recitation of "thank you" prayer). 15/

15/ In other cases relating to the general subject of public prayer or school-sponsored religion, the results have been less uniform. Compare Widmar v. Vincent, 102 S. Ct. 269 (1981) (state university may not, consistent with First Amendment guarantee of free speech, exclude student religious groups from utilizing university facilities for prayer, where those facilities are generally open for use by student groups); Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979) (prayer by unpaid clergyman preceding county board meetings upheld); Theriault v. Silber, 547 F.2d 1279 (5th Cir.), cert. denied, 434 U.S. 871 (1977) (employment of chaplains in federal prisons by United States upheld); and Florey v. Sioux Falls School Dist., 464 F. Supp. 911 (D.S.D. 1979), aff'd, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980) (singing of Christmas carols upheld) with Stone v. Graham, 449 U.S. 39 (1980) (statute requiring posting of Ten Commandments on classroom walls unconstitutional); Epperson v. Arkansas, 393 U.S. 97 (1968) (statute prohibiting teaching of evolution unconstitutional); and Gilfillan v. Philadelphia, 637 F.2d 924 (3d Cir. 1980), cert. denied, 451 U.S. 987 (1981) (extraordinary expenditures incurred to assist Pope's visit violated Establishment Clause); cf. O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (permit authorizing Mass by Pope on Mall in Washington, D.C. upheld).

II. PAST AND PENDING PROPOSALS

Dissatisfaction with Engel and its progeny has led to three major attempts to amend the Constitution to provide, inter alia, for prayer in the public schools: in 1964 (Becker Amendment), 16/ 1966 (Dirksen Amendment), 17/ and 1971 (Wylie Amendment). 18/ All three 19/ were opposed for one or more of the following reasons: that permitting prayer would lead to an establishment of religion, 20/ that prayer is too personal

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16/ Rep. Becker's amendment, H.J. Res. 693, 88th Cong., 2d Sess. (1963), reprinted in the Appendix (App.), at 1, was strongly opposed by Rep. Celler, Chairman of the House Judiciary Committee. Nevertheless, under the threat of a discharge petition, hearings were scheduled and voluminous testimony was received. See 1964 Hearings, supra n.3. However, no further action was taken.

17/ Sen. Dirksen's amendment, S.J. Res. 148, 89th Cong., 2d Sess. (1966), App. 2, was opposed by Sen. Bayh, Chairman of the Senate Judiciary Committee, and Sen. Ervin. 117 Cong. Rec. 23122-147 (1966). Sen. Bayh conducted full hearings, id. at 16416; see 1966 Hearings, supra n.2. Sen. Dirksen brought the matter to a vote on the floor by convincing the Senate to substitute his amendment for the text of another bill under consideration. Id. at 23554. The final tally, however, did not achieve the two-thirds vote necessary for a constitutional amendment. Id. at 23556.

18/ Rep. Wylie's amendment, H.J. Res. 191, 92d Cong., 1st Sess. (1971), App. 3, was successfully brought out of the House Judiciary Committee on a discharge petition. 117 Cong. Rec. 39889 (1971). After extensive debates, id. at 39885-958, the amendment received a majority, but did not garner the two-thirds vote necessary. Rep. Wylie provided a set of Q and A's for his amendment. See 117 Cong. Rec. 38694-95 (1971).

19/ Although the Becker, Dirksen and Wylie amendments have been the major efforts, scores of amendments have been introduced annually since Engel. See, e.g., 20 Cong. Q. 398, 400 (1964) (160 proposed amendments in the 88th Congress).

20/ See, e.g., 112 Cong. Rec. 23204 (1966).

and serious a matter to be placed in the hands of the state, 21/ that a relationship with God must be denominational and any attempt to draft a nondenominational prayer trivializes prayer, 22/ that it would be divisive, 23/ and that it would inject the courts into the determination of which prayers were permissible.

In addition to these earlier efforts, a variety of resolutions pending in the current Congress propose voluntary prayer amendments. 24/ The proposed congressional amendments take several different forms.

H.J. Res. 30, 132, and 164 provide in § 1 that "[n]othing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution or place." Section 2 of these proposals provides that "[n]othing in the Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States." Section 3 states that "[n]othing in this article shall constitute an establishment of religion." These proposals, which are modeled after the Becker amendment, see App. 1, are similar to prior proposals which provide that "nothing in the Constitution" is to be construed to prohibit prayer. However, unlike some prior drafts, they also make express reference to "Biblical Scriptures," and add a provision designed to assure that references to God in various circumstances shall be permissible under the Constitution.

21/ Id.

22/ 117 Cong. Rec. 38693 (1971).

23/ Id. at 39900-957 passim.

24/ See App. 4-7 for their texts.

H.R. Res. 69 and 135 provide that "[n]othing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in voluntary prayer." These proposals are modeled on the Wylie amendment, see App. 3, and again adopt the "[n]othing in this Constitution shall" form. However, the language of these resolutions would create a new constitutional right to participate in voluntary prayer in any public building. This right to pray is limited to circumstances where the participants are "lawfully assembled," but no other express limitations appear, e.g., limitations designed to protect the interests of nonparticipants or to permit schools to restrict the amount of time students assembled in classrooms may devote to prayer so that secular education is not unduly interrupted.

H.R. Res. 123 and 170 provide that nothing in the Constitution "shall be construed to forbid prayer in public places" or institutions "including schools," or to forbid "religious instruction" in public places or institutions including schools "if such instruction is provided under private auspices, whether or not religious." Section 2 of these proposals creates a constitutional "right of the people to participate in prayer or religious instruction" which "shall never be infringed" by the States or the United States. This language goes beyond prior proposals in permitting religious instruction as well as prayer, and in creating a federal constitutional right to participate in prayer or religious instruction without any express limitations. "Religious instruction" under private auspices seems clearly to cover activities not covered by the term "prayer." Significantly, the proposed new right to participate in prayer and religious instruction would probably be broadly interpreted and stringently protected by the courts because of the novel language "shall never be infringed." The sort of time, place and manner restrictions that have been developed under the First Amendment might well not be permissible.

H.J. Res. 126 provides that nothing in the Constitution "shall be construed to forbid prayer in public places or in institutions of the several States or of the United States, including schools." Section 2 of the amendment would create a "right of the people to participate in prayer" which "shall never be infringed" by the States or the United States.

H.J. Res. 126 differs from prior proposals in not expressly providing that prayer must be voluntary. It also creates a new constitutional right to participate in prayer, which (like the right created by § 2 of H.R. Res. 123 and 170) has no express limitations. As with H.R. Res. 123 and 170, the novel language "shall never be infringed" suggests that the new right is to be broadly interpreted and vigorously enforced by the courts. 25/

Substantive treatments of the voluntary prayer issue are also pending in the 97th Congress in S. 1577, the "Voluntary Prayer and Religious Meditation Act of 1981," and Title IV of S. 1378, the "Family Protection Act." These provisions, which are essentially identical, would create in individuals a federal statutory right "to participate in the free exercise of voluntary prayer or religious meditation in any public building." They also provide that neither the United States nor any State "shall abridge the right of free exercise of voluntary prayer or religious meditation in any public building." The Department of Justice gave its views on Title IV of the Family Protection Act in a letter from Assistant Attorney General Robert A. McConnell to the Office of Management and Budget (April 8, 1982).

25/ In addition to proposals seeking to amend the Constitution, there are a number of other bills pending in the present Congress which relate to voluntary school prayer. Almost all this proposed legislation seeks to strip the federal courts of jurisdiction to consider cases in which the constitutionality of measures relating to voluntary prayer is challenged. See, e.g., S. 481, S. 1742, H.R. 72, H.R. 326, H.R. 408, H.R. 865, H.R. 989, H.R. 1335, H.R. 2347, and H.R. 4756. For example, S. 1742 would withdraw jurisdiction from the Supreme Court to consider "any case arising out of any State statute, ordinance, rule [or] regulation . . . which relates to voluntary prayers in public schools or public buildings." The Attorney General addressed both the constitutional and policy implications of such "court-stripping" legislation in his letter of May 6, 1982 to Sen. Strom Thurmond. Since they approach the voluntary school prayer issue in a manner quite distinct from the proposed amendment, we will not discuss those bills here.

III. ALTERNATIVE PROPOSALS AND COMMENTARY

Option A

Section 1: Nothing in this Constitution shall prohibit any person from engaging in prayer in any public school.

Section 2: No person shall be obliged by the United States or by any State to engage in prayer, or to support any religion except as incidental under Section 1 of this Amendment.

The specific intention of this Amendment is to overrule Engel and Abingdon, insofar as those cases prevent voluntary, organized prayer in the public schools. The term "engaging in prayer" forms the operative core of this proposal. "Engaging in prayer" would include preparing for, attending, participating in, and leading prayer.26/

Section 1 is drafted to permit state and local authorities and school personnel to exercise wide discretion in matters of prayer. It does not create any new federal right to pray, as do some proposals currently pending in Congress, but would instead permit schools to allow "any person," including non-school personnel, to engage in prayer on school premises. Officials would have full discretion to regulate or prohibit prayer exercises when, for example, they threaten to become excessive, divisive or disruptive.

Section 2 of the Amendment is designed to address a strongly felt objection to most voluntary prayer amendments: that children will be pressured, if not actually required, to participate in some state-authorized prayer activity. The phrase "obliged . . . to engage in prayer" seeks to guarantee that participation in religious activity is fully voluntary. This protection safeguards a vital principle underlying the religion clauses of the First Amendment. Because dangers of coercion inhere even in so-called "voluntary" school sponsored exercises, Section 2 protects children from all coercive influences, including those which fall short of formal requirements of participation. If a school's prayer exercise results in any overt or covert pressure upon the child, Section 2 guarantees

26/ The term "prayer" is defined supra n.1.

him a right to withdraw from that exercise.27/

The final clause of Section 2 seeks to provide explicit guidance concerning the relationship between the prayer amendment and the Establishment Clause. Reconciling these two constitutional provisions may well be the most vexing problem to confront the courts after passage of a prayer amendment. Section 2 of this option affirms that no person may be required to support -- financially or otherwise -- any religious exercise,28/ except those which are "incidental" to the permissive authority vested under Section 1 in the public schools. The term "incidental" embraces, for example, the teacher's time and the necessary texts and physical facilities used in the authorized prayer exercise. It would not include construction of special religious facilities, or the provision of religious artifacts such as religious signs, symbols, apparel or implements. In essence, the Amendment seeks to restrict application of the Supreme Court's traditional three-part Establishment Clause test 29/ only in the context of public school prayer; Establishment Clause jurisprudence outside the public school prayer context would be left undisturbed.

27/ "As long ago as 1890, state appellate court judges recognized the fact that a nonparticipant in a religious exercise 'loses caste with his fellows.'" Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 345 (1963) (Choper), quoting State v. District Board, 76 Wisc. 177, 200, 44 N.W. 967, 975 (1890). See also Wilkerson v. City of Rome, 152 Ga. 762, 786, 110 S.E. 895, 906 (1922) (dissenting opinion); People ex rel. Ring v. Board of Educ., 245 Ill. 334, 351, 92 N.E. 251, 256 (1910); Knowlton v. Baumhover, 182 Iowa 691, 699-700, 166 N.W. 202, 205 (1918); Herold v. Parish Bd. of School Directors, 136 La. 1034, 1050, 68 So. 116, 121 (1915); Kaplan v. Independent School Dist., 171 Minn. 142, 155-56, 214 N.W. 18, 23 (1927) (dissenting opinion). Choper notes that "one state court observed that it was well-known that public schools conduct religious exercises 'and that, with rare exceptions, those attending them yield cheerful obedience thereto, regardless of their personal views on the subject of religion." Choper, supra, at 345 n.99, quoting North v. Board of Trustees, 137 Ill. 296, 304, 27 N.E. 54, 56 (1891).

23/ This represents settled Establishment Clause doctrine. See supra at 3-10.

29/ See supra at 8.

The basic advantages of this option are: (1) it does not establish any new right to pray; (2) its language is directed specifically at the problem of constitutional prohibitions against prayer activity in public schools; and (3) it provides explicit guidance concerning potentially severe conflicts which may arise between any prayer amendment and the Establishment Clause. The main disadvantages of this option are: (1) the term "incidental" is capable of generating considerable uncertainty; (2) the term "obliged" is also subject to a variety of constructions; and (3) the same ambiguity may be said to attach to the term "support any religion."

Option B

> Nothing in this Constitution shall prohibit public schools from providing students with a reasonable opportunity to engage in prayer or religious meditation; provided, that no one shall be obliged to attend or participate in, nor shall anyone be unreasonably burdened by such prayer or religious meditation.

The advantage of adopting this form for the amendment is that it narrowly overrules the Engel and Abington decisions without creating serious problems for the courts when they must attempt to reconcile the new amendment with related areas of First Amendment case law. Its effects are confined to prayer in the public schools, which is the primary concern of the proponents of a voluntary prayer amendment, and outside that area it will leave First Amendment case law undisturbed. Since the amendment says only that the federal Constitution does not prohibit voluntary prayer, the States and local governments which currently prohibit school prayer may continue to do so. Moreover, by confining its coverage to school prayer or religious meditation, the amendment will make it possible to avoid the difficult questions of construction which would attend an amendment which also permitted prayer in all public buildings and public places, or which attempted to permit things other than prayer. This proposal also avoids expressly authorizing such things as reading from "Biblical Scriptures," which are texts of only some particular religions, and includes the language "religious meditation" to accommodate adherents of religions which do not pray in the Christian, Jewish or Moslem sense.

The use of the language "reasonable opportunity to engage in" should allow state and local authorities a good deal of flexibility in deciding how to accommodate the interests of everyone affected by permitting voluntary school prayer. That language recognizes that at some point an opportunity for prayer may be excessive and threaten to transform a secular public education into a religious education. This language provides the courts with a familiar (if imprecise) standard under which to intervene in such circumstances.

Also important, this proposal, like some prior drafts, does not create a new federal right to pray, as do some of the pending proposals in Congress. It is very difficult to

see how such a new right to pray would fit in with existing related First Amendment doctrine, and hard to predict how the courts would resolve the questions that would inevitably arise when one person's right to pray came into conflict with legitimate interests of other people (including their right to pray).

The second clause of the amendment attempts to meet the most strongly felt objections of those who have opposed a voluntary prayer amendment: that children will be pressured into participation in some denominational or state-composed prayer not only by the direct edicts of school authorities, but also by the peer pressure that can be fostered by the way a voluntary school prayer program is administered. 30/ This clause seeks to minimize the potential for such indirect coercion in addition to forbidding schools to require participation. The "unreasonably burden" language seeks to recognize the obvious point that permitting voluntary prayer will necessarily impose some burden on nonparticipants, and that while some burden must therefore be permissible, it should not be unreasonable. This gives school authorities some flexibility, and the courts a familiar, if again imprecise, standard under which to operate when the burdens imposed on, e.g., other students' interest in obtaining a secular education without disruption or in praying according to their own faith, become excessive.

In addition to the basic objections which may be made to any prayer amendment, there are several points that should be made about Option B. The language "reasonable opportunity" leaves a great deal to the courts. To the extent the courts are unsympathetic to this attempt to carve out an exception to the Establishment Clause, they can narrowly limit what is reasonable. Of course, legislative history can be made, but because there will be disagreements over what should be permitted, that legislative history is likely to be unclear. The second clause may also present problems. If students may not be required to attend, what will the schools do with them? It will create a serious problem for schools which want some classes to start out with a prayer. Also, the language "unreasonably burden" leaves room for the courts either to interpret the amendment's protection very narrowly, or, as opponents fear, permits the courts to allow a wide range of "reasonable burdens." It might also be argued that "reasonable" and "unreasonably" are terms which should not be used in the Constitution. While the Fourth Amendment uses the standard "unreasonable searches and seizures," and the Eight Amendment speaks of "excessive" bail and fines, elsewhere in the Bill of Rights the courts have worked out accommodations of conflicting interests without such terms.

30/ See supra n.27.

Option C

> Prayer in the public schools shall be governed by state law. Freedom of conscience shall not be infringed in the conduct of such prayer.

The essential function of this proposed amendment is, as noted above, to overrule the holdings in Abington and Engel. Coupled with this is a desire to return the issue to local control, where it was handled for most of our nation's history. To that end, Option C would simply return the issue to the states, which may, as they did in the past, resolve the issue by statute, constitution or some form of local option.

The second sentence has been phrased in terms of "freedom of conscience" because the voluntary nature of religious participation was one of the most important concerns underlying the original drafting of the First Amendment. The return of prayer to state control will raise concerns about how to insure that children are protected from pressure to conform -- whether intentional or accidental. Rather than trying to detail what the state may not require -- for example, attendance, participation or support -- a process that will inevitably be attacked as leaving out something of concern, this option sets forth a broad principle that clearly encompasses the core value that proponents of this amendment wish to protect -- the freedom of every individual to pray or not to pray, as his religious beliefs indicate. Since its ratification, the Establishment Clause of the First Amendment in its development in the courts has been a major source of protection against compelled behavior. Use of the words "freedom of conscience" will reaffirm the continued strength of that analysis and will also acknowledge, to the extent the Establishment Clause is modified, the right not to participate in action compelled by the State when it infringes on religious belief, a right that has always been a part of the Free Exercise Clause. See Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Thus, while local laws will reflect the desires of the community, children will be assured of being able to resist attempts that threaten their religious ideals, no matter what the source of the threat or how it is couched.

Respect for state law is significant because of the fact that some states have constitutions or statutes that forbid school prayer. California, for example, has a provision stating that no "sectarian or denominational doctrine shall be taught, or instruction thereon be permitted, directly or indirectly" in any public school. Cal. Const. art. 9, §8. This has been part of the California Constitution since at least 1875. See People v. Board of Educ., 55 C. 331, 5 P.C.L.J. 622 (1880). See also 25 Ca. Op. Att'y Gen. 316 (1955); La Morte, supra n.1, at 403-07. This Administration may not wish to impose its position with respect to prayer on the states -- rather, it may wish to recognize the heterogeneous nature of communities by respecting essentially local decisionmaking. Thus, the issue of whether and under what conditions prayer will be conducted in the public schools will be left to the traditional interplay of pluralistic forces at the local level.

This proposal avoids the language used in most prior proposals to the effect that "[n]othing in this Constitution shall be construed to prohibit ..." for three reasons. First, the Supreme Court has construed the Constitution in Abington and Engel. What is really desired is to amend that construction by changing the Constitution. This may be better accomplished through the straightforward establishment of new, permissive authority rather than by means of a negative and loosely worded attempt to undo Abington and Engel. Second, the Supreme Court relied only on the Establishment Clause of the First Amendment in its holdings, and the proposed amendment should be drafted as narrowly as possible and not imply that there may be some other place in the Constitution that also prohibits school prayer. Third, given the delicacy of the tension between the Establishment Clause and the Free Exercise Clause, and the courts' longstanding struggle to explain the parameters of the Establishment Clause, this proposal would be less likely to cast doubt on the continued validity of the outstanding cases in this area except for those dealing with school prayer.

Nor does this proposal use the word "voluntary" to define the prayer. Some cases have questioned whether school prayer can be truly voluntary because of subtle peer pressure. 31/ In order to minimize challenges to action taken under the amendment, it is not advisable to include both a test of voluntariness and respect for freedom of conscience. The latter subsumes the former, and will adequately insure that participation is voluntary.

31/ See also Choper, supra n.27, at 343-50.

This proposed amendment should answer many of the arguments traditionally raised against proposed prayer amendments. First, it would arguably be less divisive. Anyone -- parent, teacher or school board -- may draft a prayer. The prayer may be either silent or spoken, and could include within it meditation or other silent communion. 32/ The proposal permits school boards sufficient flexibility to reflect the interests of its students even in a heterogeneous district -- by, for example, rotating prayers or providing equal time or separate assemblies for different religions.

Second, by permitting the use of denominational prayer, it defuses the arguments over nondenominational prayer. Nondenominational prayer has been attacked as producing a hollow verse that offends because it trivializes the notion of true prayer. In addition, attempting to draft such prayers can itself be extremely divisive and still not produce a prayer that is satisfactory to most people. 33/ The draft

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32/ Some religions, such as the Quakers and the Church of Christ, "do not believe in ceremonial prayers formulated by one person to be repeated in unison by others." 117 Cong. Rec. 39907 (1971) (statement of Rep. Hathaway).

33/ For example, the prayer in the Engel decision is often cited as a model nondenominational prayer. As noted earlier, it reads: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." However, when the Board of Regents suggested it to the New York schools,

> "[t]he announcement aroused a storm of controversy. The proposal was opposed by the leading Protestant weekly, The Christian Century, which deemed the practice ineffectual, and the prayer 'likely to deteriorate quickly into an empty formality with little, if any, spirtual significance.' The leaders of the Lutheran Church of Our Redeemer in Peekskill, New York, charged that Christ's name had 'deliberately been omitted to mollify non-Christian elements' and that the prayer 'therefore is a denial of Christ and His prescription for a proper prayer. As such it is not a prayer but an abomination and a blasphemy.'

(Footnote Continued)

amendment avoids this problem by recognizing the legitimate place of denominational prayer in the public schools and reflecting local religious beliefs, while at the same time protecting the rights of those belonging to a religious minority.

Third, the prayer will not coerce children into complying. The Supreme Court was not the first court to be concerned that prayer in the public schools, even when denominated

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(Footnote Continued)

> Opposition, but of course for different reasons, was also voiced by all the major Jewish organizations, including the American Jewish Congress, the Synagogue Council of America and the New York Board of Rabbis, as well as such non-sectarian organizations as the American Civil Liberties Union, the New York Teachers Guild, the United Parents Association and the Citizens Union."

Pfeffer, Court, Constitution and Prayer, 16 Rutgers L. Rev. 735, 736-37 (1962). It was estimated that no more than ten percent of New York's school boards adopted the prayer. Id. at 737. See also Note, 37 Tulane L. Rev. 124, 128-29.

> "Decisions holding Bible reading in public schools to be permitted may tacitly rest on the theory that the 'United States has a religious bias, and that religious bias is toward some vague, undenominational Protestantism.'"

"voluntary," might exert a coercive influence on small children. 34/ This amendment, while insuring that the schools are able to conduct prayers, also protects the children by making sure that their freedom of conscience is not infringed. Thus, if a prayer does unavoidably result in pressure on the child, he or his parents will be assured that his right to withdraw from that pressure is guaranteed.

Option C is, however, open to a number of objections. First, it provides little guidance regarding the extent to which "state law" will remain subject to federal constitutional principles. For example, the degree to which the First Amendment's Free Speech, Free Exercise, and Establishment clauses will limit state action under this proposal is unresolved; the same can be said of the equal protection provision of the Fourteenth Amendment.

Second, this option is unique in its potential implications regarding the federal system. The Ninth and Tenth Amendments make explicit the Founders' intention that the federal goverment is one of limited, delegated powers, and that all remaining power rests with the states or the people. This option, however, provides an affirmative grant of power to the states -- a novel insertion into our Constitution, although arguably consistent with the Framers' intention to leave as much power with the states as possible.

Finally, the term "freedom of conscience," while resonant with the historical intent of the Framers and generally understood by them as a term of art, does not possess any fixed meaning today. There are, therefore, potentially troublesome issues of interpretation and limitation with the phrase.

34/ See supra n.27.

IV. ISSUES NOT ADDRESSED BY THESE ALTERNATIVES

The draft amendment does not provide a solution to all possible objections. Some of these are noted below, and where possible, we have included either a response or possible language that could be added on to the draft amendment.

1. Establishment of religion: As noted above, one of the objectives of the amendment is to permit local school boards to adopt prayers that reflect the predominant beliefs of their constituency. This will undoubtedly generate debate and disagreement.

First, critics will protest that this exception to the Establishment Clause strikes at the most fundamental basis of the First Amendment: the neutrality of government in matters of religion and conscience. 35/ Second, disputes over the degree to which the Establishment Clause is limited by this amendment will likely lead to voluminous litigation--an intrusion by the courts into the area of school prayer which backers of this amendment hoped to end. 36/ For example, traditional Establishment Clause analysis currently prevents public schools from using their resources to assist religious teaching or promote religious doctrine. 37/ Yet obviously

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35/ See e.g., McGowan v. Maryland, 366 U.S. 420, 564 (1961); Antieau, supra n.4, at 132-33.

36/ For example, a brief summary of the state court litigation arising after Abington can be found in La Morte, supra n.2. Compliance by the states and local school boards was neither immediate nor complete.

37/ See e.g., McCollum v. Board of Educ., 333 U.S. 203 (1948) ("release time" program which turned public school classrooms over to religious instructors); Engel, 370 U.S. at 439 (Douglas, J., concurring) ("The point for decision is whether the Government can constitutionally finance a religious exercise. Our system . . . is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes."); Meek v. Pittenger, 421 U.S. 349 (1975) ("auxiliary services" provided by public school personnel to students in parochial schools); supra at 3-9. See generally Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) ("for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").

this amendment would permit the use of public school facilities, supplies and teachers' time to teach, explain, and recite prayers. Arguments will surely arise over what else might be funded. Prayer books, Bibles, rosary beads, yarmulkas, and incense, because they are arguably necessary to prayer, are only some of the possibilities. 38/

Third, critics will argue that permitting local governmental involvement in religion will deny the children belonging to minority religions an equal opportunity to voice their prayers unless special provision is made for them. Failure to insure that each group has a chance to have its prayer said will create an incentive to challenge particular prayers. But including some kind of equal protection language may create such practical problems that local school boards will be dissuaded from adopting any prayer.

Finally, the increasing pluralism in this country will raise presently unforeseen questions -- for example, whether some practice is a form of prayer. See Malnak v. Mahesh, 440 F. Supp. 1284 (D. N.J. 1977), aff'd, 592 F. 2d 197 (3d Cir. 1979); Note, Transcendental Meditation and the Meaning of the Establishment Clause, 62 Minn. L. Rev. 887 (1978).

To the extent that you desire to address these concerns, you might consider one of the following phrases as an addition to the draft amendment.

1. "No state authority implementing this amendment shall give preference to one religion or group of religions."

2. "No state implementing this amendment shall deprive any person of a reasonable opportunity to offer or conduct his own prayer."

3. "This amendment shall be implemented with due regard for the equal protection rights of all persons."

38/ Prior to Engel, Gideon Bibles were distributed in about 43% of the schools questioned in one survey. Comment, 20 Ark. L. Rev. & B.A.J. 320, 323 (1967); 1964 Hearings, pt. 3, at 2413. The practice has been held unconstitutional, Brown v. Orange County Board of Public Instruction, 128 So. 2d 181 (Fla. Dist. Ct. App. 1960), aff'd, 155 So. 2d 371 (1963); Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953), cert. denied, 348 U.S. 816 (1954). The version of the Bible to be distributed has been, and will be a great source of controversy. See Choper, supra n.27, at 373-75 (1963).

2. Other religious observances: The draft amendments are limited to prayer. No provision is made for other forms of religious observance, such as posting the Ten Commandments, see Stone v. Graham, 449 U.S. 39 (1980), or having Christmas decorations, a nativity scene, star-topped Christmas tree or Channukah candles in public schools. This was done for two reasons. First, the single unifying desire of proponents of these amendments in the past has been to permit prayer in the public schools. Limiting the amendment's scope increases the chances of consensus, i.e., it decreases the number of possibly objectionable consequences that opponents will be able to seize on. Second, it is very difficult to limit a phrase such as "other religious observances," "other religious displays," "traditional religious symbols" or "other expressions of religious belief." It is not evident that displays of crucifixes or even conduct Mass or other religious ceremonies or rituals would not be covered as well. To the extent that this amendment is read to provide a right to pray, it may not be desirable to include an additional right to other expressions of religious beliefs while in school. The courts have recognized a wide variety of conduct as expressive of sincere religious beliefs, 39/ and will no doubt expand their rulings as the number of religions in this country continues to multiply. 40/ Arguments about what should be included will not only raise troubling questions when the amendment is being debated but will also provide another fertile source of litigation once the amendment is passed. 41/

39/ See Int'l Society of Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981) (solicitation of funds); Goldman v. Secretary of Defense, 530 F. Supp. 12 (D.D.C. 1981) (wearing a yarmulke while on military duty); Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974) (Native American hairstyle), aff'd 522 F.2d 357 (8th Cir. 1975); State v. Whittingham, 504 P.2d 950 (Ariz. 1973), cert. denied, 417 U.S. 946 (1974) (use of peyote); People v. Woody, 394 P.2d 813 (Ca. 1964) (same).

40/ There are at least 80 different religions that have more than 50,000 members each.

41/ A recent news story, for example, described a potential challenge to the practice of Seattle, Wash. area schools arranging for appearances by football players who combined speeches on the sport with appeals to accept Jesus. N.Y. Times, May 5, 1982, at B15, col. 2.

If it is desired, however, to include more than prayer within the scope of this amendment, the phrase "other expression of religious belief" would be added after the word "prayer" in the amendment's first sentence. The breadth of this phrase, and others like it, will magnify the Establishment Clause problems discussed above and, on balance, we recommend against it as creating many more problems than it would resolve.

3. Other public institutions: The draft amendment does not cover any other public building, such as state office buildings, museums, or prisons. One reason is similar to that articulated above -- most supporters of this amendment are interested in prayer in the public schools. Concern over prayer in other buildings is not central, and the draft is intended to attract as broad a base of support as possible. Prayer is already permitted in public buildings, such as auditoriums, and school grounds, see Widmar v. Vincent, 102 S. Ct. 269 (1981), and religious rights are respected even in prisons. 42/

The only reason for including public buildings would appear to be to insure that chaplains hired by legislatures are constitutionally permissible. To the extent, however, that there is objection to hiring chaplains for state or federal legislatures, and debate over the propriety as well the constitutionality of this practice, the base of support for the amendment will be undermined. See Chambers v. Marsh, Nos. 81-1077, 81-1088 (8th Cir. Apr. 14, 1982) (chaplain for Nebraska state legislature violates Establishment Clause); Murray v. Buchanan, No. 81-1301 (D.C. Cir. Mar. 9, 1982); Voswinkel v. City of Charlotte, 495 F. Supp. 588 (W.D.N.C. 1980) (police chaplain); but see Colo v. Treasurer & Receiver General, 392 N.E.2d 1195 (Mass. 1979) (approved legislative chaplains; same religion for 20 years), 43/ If it is desired,

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42/ Despite Justice Douglas' language in Engel condemning prayers at the opening of court sessions, 370 U.S. at 441 (concurring opinion), we are not aware that any court has in fact held the practice to be unconstitutional.

43/ The funding of the Nebraska state chaplain, which was successfully attacked in Chambers, supra, is very similar to the present funding of the Congress' chaplains. See 2 U.S.C. §§ 61d, 84-2 (Supp. IV 1980). The Senate also pays for a secretary for the Chaplain and a postage allowance, 2 U.S.C. § 61d-1,-2, and both chaplains apparently receive free copies of the Congressional Record. 44 U.S.C. §906. The Senate Chaplain receives regular cost-of-living increases along with the other Senate employees. See e.g., 2 U.S.C. §60a-1 note (Supp. IV 1980).

however, to include more than the public schools, we recommend that the phrase "or other public building" be inserted where appropriate.

A second reason for not attempting to include public buildings is that even the inclusion of the phrase "or building" might not be sufficient to guarantee the constitutionality of such paid chaplains. Whether the draft amendment should cover use of public funds for anything much beyond incidental matters such as reproduction of a selected prayer is unclear. An amendment aimed at permitting voluntary prayer in public places, a noncompulsory practice, is closer to cases approving voluntary prayers offered in public meetings, see Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979); Lincoln v. Page, 241 A.2d 799 (N.H. 1968), than to the fully compensated program presently in existence for Congress, and successfully challenged in the state context in Chambers. Language that would clearly cover funding of chaplains would of necessity also cover other items deemed necessary or conducive to prayer, including, perhaps, chaplains for public schools. We urge that such language not be included. It could trigger struggles among religions, with each seeking to have its own prayers said in public -- a struggle that would raise the specter of pre-Revolutionary internecine quarrels over money for particular churches. See Gilfillan v. City of Philadelphia, 637 F.2d 924 (3rd Cir. 1980), cert denied, 451 U.S. 987 (1981) (special platform for Pope John Paul II disallowed).

4. Implementation difficulties: Our proposals do not attempt to resolve the inevitably knotty problems which will confront local and state authorities seeking to implement the prayer provision. Such problems include: how to draft prayers, and who to consult in doing so; how to treat students and teachers who decline to participate in prayer; how to publish and distribute prayers; how to accommodate requests by religious leaders to lead prayers in school; how to decide when praying will be permitted; and whether, when and how religious holidays will be recognized in prayers.

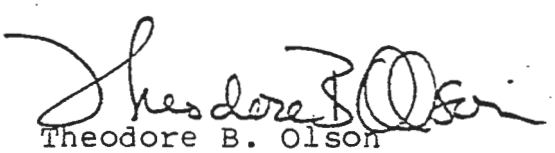
5. Federal military academies and other federal "schools": Our proposed amendments do not discuss any potential application to federal military academies and other federally-operated "schools" sponsored, for example, by the Departments of State, Agriculture, and others. Yet these institutions would appear to qualify as "public schools." Since it is likely that our proposal, as drafted, would permit the government to compose official prayers to be recited in all federally operated schools, implementation difficulties similar to those enumerated above might arise on the federal level.

V. Conclusion

Unfortunately, every proposal in this field has its disadvantages and will certainly inspire objections and debate. It is impossible to replicate with a constitutional amendment the pre-Engel days, because while voluntary school prayers had not been held to violate the federal constitution, there was a general understanding that there were constitutional limits to governmental participation in public school religious observance. The proposed amendment, whichever form is adopted, will make it clear that some substantial governmental involvement is permissible and the limits will have to be tested and refined anew in the courts.

On balance, we have a mild preference for Option B although there is a great deal to be said for Option C. Choosing any of the various alternatives will be difficult, however, and we suggest that an oral discussion within the Department of Justice with a few of the individuals who have been involved in the research and analysis of the advantages and disadvantages of each option may be a useful part of the decision-making process.

We will of course be glad to consult with you on any issue raised by this memorandum.



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APPENDIX

Becker Amendment

"Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution or place.

Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

Nothing in this Article shall constitute an establishment of religion."

20 Cong. Q. 401 (1964).

Dirksen Amendment

"Nothing contained in this Constitution shall prohibit the authority administering any school, school system, educational institution or other public building supported in whole or in part through the expenditure of public funds from providing for or permitting the voluntary participation by students or others in prayer. Nothing contained in this article shall authorize any such authority to prescribe the form or content of any prayer."

112 Cong. Rec. 6477 (1966).

Wylie Amendment

> "Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in voluntary prayer or meditation."

27 Cong. Q. 624 (1971). The original text, which called for nondenominational rather than voluntary prayer, can be found at 117 Cong. Rec. 38694-95 (1971).

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

"ARTICLE --

"SECTION 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

"SECTION 2. Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

"SECTION 3. Nothing in this article shall constitute an establishment of religion.

"SECTION 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE --

"SECTION 1. Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in voluntary prayer

"SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by Congress."

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

"ARTICLE --

"SECTION 1. Nothing in this Constitution shall be construed to forbid prayer in public places or in institutions of the several States or of the United States or its territories or the District of Columbia; including schools; or to forbid religious instruction in public places or in institutions of the several States or of the United States or its territories or the District of Columbia, including schools, if such instruction is provided under private auspices, whether or not religious.

"SECTION 2. The right of the people to participate in prayer or religious instruction shall never be infringed by the several States or the United States or its territories or the District of Columbia."

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint reolution:

"ARTICLE --

"SECTION 1. Nothing in this Constitution shall be construed to forbid prayer in public places or in institutions of the several States or of the United States, including schools.

"SECTION 2. The right of the people to participate in prayer shall never be infringed by the several States or the United States."

OTHER SUGGESTED AMENDMENTS

1. Nothing in this Constitution shall be construed to prohibit public schools from setting aside a brief period during which children may individually or in groups pray or meditate or engage in other compatible activity.

2. Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by any State or the United States to participate in such prayer.

3. Prayer in the public schools shall not constitute an establishment of religion; provided, that freedom of conscience shall not be infringed thereby.

4. No State or the United States shall deny students the right to a reasonable opportunity to engage in prayer in public schools. No person shall be obliged to attend or participate in such prayer, nor shall any person be unreasonably burdened by such prayer.

5. Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or public buildings; provided, that freedom of conscience shall not be infringed thereby.

6. Nothing in this Constitution shall prohibit prayer or religious displays in public schools or other public institutions or public buildings; provided, that no person shall be required to attend or participate in or be unreasonably burdened (or discriminated against) by such prayer or display.

7. That portion of the Establishment Clause of the first article of the amendment to the Constitution of the United States that prohibits the conduct of prayer in the public schools is hereby repealed.

8. The right of any person to offer or conduct prayer in the public schools shall not be denied or abridged on account of the Establishment Clause of the first article of amendment to the Constitution of the United States.