TESTIMONY OF MR. WARREN W. EISENBERG, DIRECTOR
INTERNATIONAL COUNCIL OF B'NAI B'RITH

BEFORE THE SENATE JUDICIARY COMMITTEE
MONDAY, JUNE 27, 1983

PRAYER IN PUBLIC SCHOOLS

My name is Warren Eisenberg and I am Director of the International Council of B'nai B'rith. As many of you may know, B'nai B'rith is the oldest and largest Jewish organization in the world. Founded 140 years ago by twelve Jewish immigrants living in the bubbling center of New York's melting pot, B'nai B'rith has been dedicated to philanthropy, social service, protection of the victims of persecution and, of course, to Jewish culture. Our philosophy is based on a fervent belief in democratic pluralism and a vigorous defense of the rights of minorities. As Jews, we are well aware of what happens when these rights are violated. And it is on this point that I would like to base my testimony on the school prayer issue.

There are three interrelated school prayer proposals that I intend to address. The first is SJ Resolution 73 -- the amendment supported by President Reagan -- which would legalize organized voluntary prayer in the public schools. The second is the section of the amendment offered by Senator Hatch which would legalize individual or group silent prayer. And the third is the section of Senator Hatch's proposed amendment that allows equal access to public school facilities.

We at B'nai B'rith are gravely concerned over the consequences of SJ Resolution 73, the organized voluntary prayer amendment. We feel that it strikes at the very heart of our Constitution and our democratic, pluralistic society. Let us assume that his bill becomes law. Who will decide on the content of the prayer? Will it be the local rabbi or preacher, the school principal, or even the governor? Does any one of them have the right and authority to give expression to every child's most personal beliefs? And is it possible to develop a prayer that will not offend a particular religious minority?

At B'nai B'rith we fear that this proposed amendment will have the effect of violating the rights of religious minorities. And this is a serious violation in light of the fact that our nation was founded to protect the various minorities that fled from tyranny in Europe. We do understand the sincere motive behind this proposed amendment. But in the name of attempting to inculcate morality through prayer, don't we run the risk of establishing, in the schools, a form of secular religion? And wouldn't this be in direct contradiction to the Establishment clause of the First Amendment? As an organization dedicated to Jewish culture, B'nai B'rith obviously affirms the role of religion in American society. But we are confident that religion and prayer have a home in institutions other than the public schools.

There is one final point concerning the organized voluntary prayer amendment. And that has to do with the children who choose not to participate in the prayer. Indeed, voluntary prayer has the potential of making children of religious minorities involuntary outsiders. And it can also have the effect of forcing these schoolchildren to doubt their own, different, beliefs.

Such children do not, simply, need such pressures, especially when they are condoned by the state.

As for Senator Hatch's amendment, we find silent prayer no less threatening to our pluralistic society than we do organized voluntary prayer. This silent prayer amendment is an attempt to get around the obvious problems with SJ Resolution 83, but the distinctions are spurious. It is important to preface my remarks on silent prayer by noting that as a Jewish organization, B'nai B'rith obviously believes in the efficacy of prayer. But to believe that prayer is effective is not the same as wanting it in the public schools. For, we recognize that not all Americans are religious; not all believe that prayer of any sort will have an effect on our nation's or children's morality. So by legalizing silent prayer, we again run the risk of violating the rights of religious minorities by establishing, implicitly, a secular religion. It is not, indeed, the state's role to legitimize any form of worship or to impose it on its citizens. Silent prayer, then, stands in fundamental contradiction to the Establishment clause and to the principles of religious freedom.

Furthermore, children who choose not to participate in the moment of silence face the same social ostracism as those who would not recite the organized prayer under SJ Resolution 73. Any form of prayer in the schools could force a non-believer, who has every right not to believe, to question whether his or her principles are correct. In each case, legalized prayer would separate, rather than unify, our schoolchildren, and would constitute an unnecessary intrusion by the state into a child's most private beliefs.

There is another problem with the silent prayer amendment. Silent prayer assumes that schoolchildren would express, without guidance or structure, their reverence for a Deity. But if there are no directions or guidelines given, how do we know what the students are thinking? With their foot in the door, supporters of organized prayer might then attempt to make sure that they know what children are thinking by once again introducing an organized prayer amendment.

Finally, we at B'nai B'rith are concerned with the Equal Access provision of Senator Hatch's proposed amendment. It is generally recognized that any group that wishes to use school facilities must be approved and advised by school authorities. Under the Equal Access provision, the same would apply to religious groups, which means that the state implicitly accepts such groups as having a legitimate place in the schools. Again, this violates the Establishment clause. But is also creates a situation where the school would condone a club that would not allow minorities to join because of religious belief. Certainly, this would foster exclusion, not unity. It would reinforce bias and discrimination. It would do exactly the opposite of what our nation is dedicated to, which is the inclusion and acceptance of all our citizens.

To summarize, we at B'nai B'rith support religious expression, but we do not see the school as the proper place for it. Imposing prayer on schoolchildren can only have the effect of giving the state stamp of approval to the potential exclusion of religious minorities. Isn't it better that we continue to center religious activities in the church, synagogue, home and family, without any government intrusion? Haven't these institutions worked well enough for the past 200 years?

fde School Prayer

S T A T E M E N T

of

RITA SALBERG

At a Hearing on Prayer in the Schools

before the

SENATE COMMITTEE ON THE JUDICIARY

on behalf of

B'NAI B'RITH WOMEN

JUNE 1983

B'nai B'rith Women
1640 Rhode Island Avenue, N.W.
Washington, D.C. 20036

GOOD AFTERNOON, SENATOR. MY NAME IS RITA SALBERG. I AM THE CHAIRMAN OF PUBLIC AFFAIRS FOR B'NAI B'RITH WOMEN AND A MEMBER OF THE EXECUTIVE BOARD OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH.

I AM HERE THIS MORNING ON BEHALF OF THE 120,000 MEMBERS OF B'NAI B'RITH WOMEN TO TELL YOU OF OUR PROFOUND DISTRESS OVER THE PROPOSED BILL TO AMEND THE CONSTITUTION TO ALLOW PRAYER IN THE SCHOOLS. WE BELIEVE IT TO BE BAD GOVERNMENT POLICY, BAD RELIGIOUS PRACTICE, AND BAD EDUCATIONAL PROGRAMMING.

IT IS OUR FIRM BELIEF THAT THE PROTECTIONS OF DEMOCRACY CAN ONLY BE MAINTAINED BY A CLEAR AND STRICT SEPARATION OF CHURCH AND STATE, A SEPARATION WE BELIEVE IS VIOLATED BY THE PROPOSED PRAYER BILL. AS A JEWISH ORGANIZATION WE ARE PARTICULARLY MINDFUL OF THE STRONG HISTORICAL TENDENCY OF GOVERNMENT AND RELIGIONS TO INTERMIX -- AND WITH DISASTEROUS CONSEQUENCES FOR MINORITIES.

THE GENIUS OF THE BILL OF RIGHTS IS THAT IT SERVES TO LIMIT THE RIGHTS OF THE MAJORITY IN PARTICULAR INSTANCES, THEREBY GRANTING PROTECTIONS TO MINORITIES. AS OUR COUNTRY BECOMES EVER MORE ETHNICALLY AND RELIGIOUSLY DIVERSE, SUCH PROTECTIONS ASSUME AN EVEN GREATER IMPORTANCE.

IT SEEMS TO ME THAT THE PROPOSED LEGISLATION IS PARTICULARLY VULNERABLE TO

CRITICISM FROM A RELIGIOUS STANDPOINT. IF A PRAYER COULD BE DEVISED THAT IS ACCEPTABLE TO ALL -- AND I'M THINKING NOW OF THE RECENT INFLUX INTO OUR COUNTRY OF PEOPLE FROM SOUTHEAST ASIA, MANY OF WHOM HAVE A HERITAGE APART FROM THE JUDEO-CHRISTIAN ONE -- THAT PRAYER WOULD NECESSARILY BE SO HOMOGENEOUS AS TO BE MEANINGLESS. WE WHO SHARE RELIGIOUS BELIEF -- HOWEVER DIFFERENT THE FORM -- KNOW THAT TRUE PRAYER CANNOT BE STOPPED BY ANY COURT, JUST AS TRUE PRAYING CANNOT BE MANDATED BY FEDERAL OR STATE LAW.

IN FACT, THERE IS A STRONG ARGUMENT TO BE MADE THAT MECHANICAL RECITATION OF PRAYER IN A PUBLIC SCHOOL -- ESPECIALLY A PRAYER COMPOSED BY GOVERNMENT OFFICIALS WITH A NEED TO MAKE THAT PRAYER HAVE A WIDE ACCEPTABILITY -- SUCH A PRAYER DEGRADES THE RELIGIOUS EXPERIENCE THAT IS TRUE PRAYER. IF THE AIM OF A PRAYER IN THE SCHOOLS IS TO INCULCATE IN CHILDREN ETHICAL AND MORAL STANDARDS, THAT CAN BE DONE -- AND SHOULD BE DONE -- OUTSIDE THE CONTEXT OF PRAYER. TO MY MIND, THERE IS SURELY A PLACE FOR PRAYER IN CHILDREN'S LIVES -- AND THAT PLACE IS IN THE HOME, IN THE CHURCH, SYNAGOGUE, MOSQUE, IN MANY PLACES -- BUT NOT OUR PUBLIC SCHOOLS.

I WAS A TEACHER IN THE NEW YORK CITY SCHOOLS FOR FIFTEEN YEARS. THE PURPOSE OF THE PUBLIC SCHOOL SYSTEM WAS, IT ALWAYS SEEMED TO ME, BEST STATED BY THE LATE JUSTICE DOUGLAS. HE DESCRIBED A PUBLIC SCHOOL AS A PLACE, QUOTE TO TRAIN AMERICAN CITIZENS IN AN ATMOSPHERE FREE OF PAROCHIAL, DIVISIVE, OR SEPARATIST INFLUENCES OF ANY SORT -- AN ATMOSPHERE IN WHICH CHILDREN MAY

ASSIMILATE A HERITAGE COMMON TO ALL AMERICAN GROUPS AND RELIGIONS. END QUOTE.

I WOULD BE THE LAST TO SAY OUR SCHOOLS ARE FREE OF DIVISIVENESS OR THAT THEY ARE HAVENS FROM STRIFE AND CONFLICT. THEY SURELY ARE NOT. CHILDREN FROM AN EARLY AGE ARE AWARE OF RACIAL AND RELIGIOUS DIFFERENCES AND CONFLICTS -- AT LEAST THAT HAS BEEN MY EXPERIENCE -- BUT THE ROLE OF THE PUBLIC SCHOOL SYSTEM IS NOT TO EXACERBATE THOSE DIFFERENCES. RATHER, SCHOOLS ARE THE PLACES TO EMPHASIZE OUR COMMONALITY, OUR ONENESS. IN OUR RICHLY PLURALISTIC COUNTRY, THAT ONENESS IS NOT TO BE FOUND IN A RELIGIOUS BELIEF OR IN A PRAYER.

GOOD EDUCATIONAL POLICY ALSO CALLS FOR US TO LOOK AT OUR DIFFERENCES BUT TO LOOK AT THEM IN A CONSTRUCTIVE WAY. FROM THE EXPERIENCE OF JEWISH PEOPLE I HAVE SPOKEN WITH OVER THE YEARS, OUR DIFFERENCES ARE NOT ADDRESSED POSITIVELY THROUGH PRAYING IN SCHOOL. IN FACT, QUITE THE CONTRARY. I KNOW PEOPLE WHO SUFFERED IN VARYING DEGREES, FROM WHAT WAS ONCE THE COMMON PRACTICE OF PRAYING IN SCHOOLS. MOST STINGING WAS THE EXPERIENCE OF ONE FRIEND, THE ONLY JEWISH CHILD IN HER CLASS, WHO HAD THE MISFORTUNE TO HAVE AS A TEACHER A WOMAN WHO CALLED ON HER REGULARLY TO READ FROM THE NEW TESTAMENT THE PASSAGE ON THE "PERFIDIOUS JEW." (THE ADJECTIVE WAS REMOVED FROM THE NEW TESTAMENT DURING VATICAN II.) FOR HER, AND FOR OTHERS I KNOW, PRAYER IN THE SCHOOLS WAS FAR FROM A POSITIVE EXPERIENCE. IT WAS NOT EVEN A BENIGN EXPERIENCE. IT WAS HURTFUL AND DESTRUCTIVE, ALTHOUGH THE INTENT OF THE

PRACTICE WAS QUITE THE OPPOSITE. TO THOSE WHO ARGUE, WHAT HARM CAN PRAYER IN THE SCHOOLS DO TO CHILDREN?, I SAY IT CAN DO HARM.

AS MEMBERS OF ONE OF THE LARGEST RELIGIOUS MINORITY GROUPS IN THE COUNTRY, B'NAI B'RITH WOMEN URGES YOU NOT TO PROCEED WITH LEGISLATION THAT WILL PUT PRAYER BACK INTO OUR SCHOOLS.

bill School Prayer

WU INFOMASTER

CBN CHPK

019908I194 1710EST
04 DLY VIRGINIA BEACH VA 7/13/83
PMS SENATOR ORRIN HATCH - RPT DLY
135 RUSSELL SENATE OFFICE BLDG.
WASHINGTON, DC 20510

DEAR SENATOR HATCH:

I ATTEMPTED TO CONTACT YOU BY TELEPHONE TODAY AND THE TREMENDOUS PRESSURE OF YOUR SCHEDULE PREVENTED OUR DISCUSSION.

I DEEPLY WANT TO THANK YOU FOR THE WORK YOU ARE DOING IN BEHALF OF MORAL CAUSES IN THE NATION, BUT I FEEL THAT WHAT IS BEING LABELED "THE HATCH AMENDMENT", DEALING WITH SILENT MEDITATION IN SCHOOLS, IS A SERIOUS MISTAKE WHICH ALL OF THE EVANGELICAL LEADERS IN AMERICA WILL BE FORCED TO OPPOSE IF IT DOES GET THROUGH THE JUDICIARY COMMITTEE.

BELOW IS A COPY OF THE TELEGRAM ON THE MATTER WHICH WARRENTS YOUR URGENT ATTENTION.

A MEETING OF KEY RELIGIOUS LEADERS WAS HELD AT MY OFFICE LAST FRIDAY. INCLUDED IN THE GROUP WAS DR, JAMES DRAPER, PRESIDENT OF THE SOUTHERN BAPTIST ASSOCIATION, AMERICA'S LARGEST PROTESTENT DENOMINATION; A REPRESENTATIVE OF NATIONAL BAPTISTS; AND THE GENERAL SECRETARY OF THE NATIONAL RELIGIOUS BROADCASTERS. WE ARE UNANIMOUS IN OUR OPPOSITION TO WHAT HAS BEEN TERMED "THE HATCH AMENDMENT" WHICH IS BEING OFFERED AS A SUBSTITUTE TO THE PRESIDENT'S AMENDMENT ON PRAYER.

THE REASON IS AS FOLLOWS:

(1) THIS AMENDMENT WILL ESTABLISH TRANSCENDENTAL MEDITATION AND SIMILAR HINDU ORIENTED MYSTICISM AS THE CONSTITUTIONAL MANDATED RELIGION OF AMERICA.

(2) THE AMENDMENT WOULD PROHIBIT CONGRESSIONAL AND PRESIDENTIAL PROCLAMATIONS DEALING WITH PRAYER AND BIBLE READING SUCH AS OUR COUNTRY HAS KNOWN FROM ITS FOUNDING.

(3) THE HATCH AMENDMENT DOES NOT ADDRESS THE PROBLEMS RAISED BY THE RECENT LUBBOCK TEXAS CASE OR THE GUILDERLAND, NY CASE FORBIDDING VOLUNTARY PRAYER AND BIBLE STUDY BY STUDENTS.

ALL OF US FEEL THAT THERE IS NOW BROAD SUPPORT FOR THE PRESIDENT'S REVISED AMENDMENT WHICH WOULD PERMIT PRAYER IN SCHOOLS, BUT WOULD PROHIBIT THE FEDERAL GOVERNMENT OR STATE GOVERNMENT OR THEIR AGENCIES FROM COMPOSING PRAYERS TO BE READ IN SCHOOL.

THE RESTORATION OF PRAYER IN SCHOOLS IS FAVORED BY 75% OF THE PEOPLE IN THE UNITED STATES.

A CONSTITUTIONAL AMENDMENT WILL TAKE MAXIMUM EFFORT OF RELIGIOUS LEADERS IN CONCERT FOR SEVERAL YEARS. NONE OF US IS PREPARED TO GIVE ANY ENERGY TO WORK FOR A PROPOSED AMENDMENT THAT GIVES STUDENTS ONLY *THE RIGHT* TO MEDITATE SILENTLY IN SCHOOL. THEY HAVE THIS RIGHT NOW. I PERSONALLY URGE YOUR SUPPORT OF THE REVISED CONSTITUTIONAL AMENDMENT THAT IS BEING PROPOSED BY PRESIDENT REAGAN WHICH IS UNDER CONSIDERATION BY THE SENATE JUDICIARY COMMITTEE TOMORROW.

PLEASE ACCEPT MY CORDIAL PERSONAL REGARDS.

PAT ROBERTSON
PRESIDENT
THE CHRISTIAN BROADCASTING NETWORK
VIRGINIA BEACH, VA

ACCEPTED

WU INFOMASTER

CBN CHPK

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01 DLY VIRGINIA BEACH VA 7/13/83
PMS SENATOR DENNIS DECONCINI RPT DLY
326 DIRKSEN SENATE OFFICE BLDG
WASHINGTON, DC 20510

DEAR SENATOR DECONCINI:

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PAT ROBERTSON, PRESIDENT
THE CHRISTIAN BROADCASTING NETWORK
VIRGINIA, BEACH, VA

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02 DLY VIRGINIA BEACH VA 7/13/83
PMS SENATOR HOWELL HEFLIN - RPT DLY
357 DIRKSEN SENATE OFFICE BLDG
WASHINGTON, DC 20510

DEAR SENATOR HEFLIN:

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PAT ROBERTSON, PRESIDENT
THE CHRISTIAN BROADCASTING NETWORK
VIRGINIA, BEACH, VA

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WU INFOMASTER

CBN CHPK

019153I194 1631EST
03 DLY VIRGINIA BEACH, VA 7/13/83
PMS SENATOR ROBERT C. BYRD - RPT DLY
311 HART SENATE OFFICE BLDG.
WASHINGTON, DC 20510

DEAR SENATOR BYRD:

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PAT ROBERTSON, PRESIDENT
THE CHRISTIAN BROADCASTING NETWORK
VIRGINIA, BEACH, VA

ACCEPTED
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TEXT OF

PRESIDENT REAGAN'S

REVISED VOLUNTARY PRAYER AMENDMENT

ARTICLE

"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 the United States or by any State to participate in prayer. Nor shall the United States or any State compose the words of any prayer to be said in public schools."

July 12, 1983

AMERICAN ASSOCIATION
OF SCHOOL ADMINISTRATORS

TESTIMONY OFFERED TO THE SENATE SUBCOMMITTEE ON SCHOOL PRAYER

by

Ira J. Singer
Superintendent of Schools
Herricks Public Schools
New Hyde Park, New York

on behalf of

American Association of School Administrators

6/27/83

(703) 528-0700
1801 North Moore Street • Arlington, Virginia 22209

Mr. Chairman. Committee Members. I am here today representing the American Association of School Administrators, the professional association of local school superintendents and other school administrators.

It is my honor and privilege to address Senators of the Congress of the United States and discuss the proposed constitutional amendments on school prayer.

To come directly to the point, AASA opposes both Joint Resolution 73 and the alternative proposed by the Constitution Subcommittee of this Committee for silent meditation and equal access to school facilities. More specifically AASA opposes putting such matters in the constitution where they become law for all citizens throughout the nation.

The AASA Committee on Federal Policy and Legislation opposes Senate JT Resolution 73 because we believe it to be contrary to the principles upon which this country was founded.

In school we teach the history of our nation through the beliefs and views of our Founding Fathers, views which were not consonant with the substance or intent of Resolution 73 or the subcommittee alternative.

For example, Thomas Jefferson was a staunch advocate of civil rights and, in the 1st Amendment, fought for the protection of the rights of everyman <u>from</u> religion not <u>for</u> religion. He was terribly concerned about the government recog-

nizing a one and only righteous way to heaven. He abhorred such talk. He was " . . . sworn against tyranny of the minds of man." That famous quote was uttered about the tyranny of religion, not patriotism, as it is so often taught in our schools. To zealous Calvinists who denounced him as an atheist, Jefferson charged that " . . . the effect of religous coercion would be to make one-half the world fools and the other half hypocrites."

In Orlando last March, President Reagan stated, "When our Founding Fathers passed the 1st Amendment they sought to protect churches from government interference . . . " To the contrary, the 1st Amendment, was written to protect the individual citizen, not the church, from religious coercion of any form. This was Jefferson's theme.

In commenting upon religious freedom in the Virginia Acts, Jefferson wrote that "diversity is the law of nature." He attacked those who would force religious dogma on others charging them with an " . . . impious presumption to assume domain over the freedom of others depriving them of their liberty." He stated that " . . . our civil rights have no dependence upon our religious beliefs . . ."; and that " . . . no man shall be compelled to frequent or support any religious ministry whatsoever." Jefferson was a highly moral man who held that the opinions of atheists should have equal value to those who professed religious beliefs. For these and other statements, he was denounced by the Colonist clergy in New England as an atheist. Jefferson's retort was that " . . . no mind beyond mediocrity bothered to improve itself in New England."

In fact, revisionist interpretations have gone so far as to lead one federal district judge to proclaim that, in the Engel vs Vitale Case, the Supreme Court " . . . erred in its reading of history . . ." and that the constitutional wall of separation between church and state is a " . . .myth." A state senator, in praising this judge's opinion, held that the framers of the constitution ". . . did not believe in the separation of church and state . . . " and one nationally prominent clergyman has said that school prayer was " . . . in the intent and mind of the 1st Amendment framers." What would Jefferson say to that?

These may be fond wishes, but they are not facts. In 1785-86, Madison and Jefferson, in obtaining the Virginia Bill for Religious Liberty " . . .opposed all religious establishments by law on gounds of principle." When in 1784, the religious conservatives of Virginia tried to revive the idea of multiple church establishment in a tax bill designed to support "Teachers of the Christian Religion", James Madison was the chief opponent, arguing with all his being that an assessment on all citizens to pay teachers of religion was clearly tantamount to " . . . an establishment of religion" and therefore indefensible.

My testimony here is particularly fitting since I am the Superintendent of Schools of the Herricks Public Schools in New Hyde Park, New York, the site of the landmark Engel vs Vitale School Prayer Decision by the Supreme Court in 1962. That prayer was voluntary and non-demoninational to be recited as part of opening day exercises. It was composed by state officials and authorized and recommended by the State Board of Regents. The Supreme Court found it to be unconstitutional.

Liberally quoting from the teachings and writings of our Founding Fathers, Justice Black, writing the majority opinion, stated, "The inclusion of a classroom prayer composed by state officials in a daily program for public schools violates the prohibition of the First Amendment, operative against the states by virtue of the Fourteenth Amendment, against the making of a law 'respecting an establishment of religion,' even though the prayer is denominationally neutral and its observance on the part of the students is voluntary." Justice Black also stated, "... neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary, served to free it from the limitations of the Establishment Clause."

Aside from the court's opinion, the practical implications of a constitutional amendment requiring voluntary prayer in the classroom are nightmarish. How is a child excused from class if that child does not wish to participate in this voluntary activity? Conformity is a powerful force among children of all ages. In some places, a child would have to be truly heroic to ask to leave the room. And the teacher who does not believe in this practice must now police it. Will his or her attitude become more powerful than the compulsion to pray or be excused? How will teacher-parent relations be affected when they are in disagreement over the product and the process of the proposed amendment? The prospects of disruption, litigation, non-compliance and ridicule are, to say the least, disquieting.

Since 1962, the Court ruling on voluntary prayer has withstood the test of time through a variety of assualts and circumventions. Black did not err in his reading

of history but testified for our Founding Fathers in restating the Jeffersonian principle of a wall of separation.

Besides, Resolution 73 fails to recognize the contemporary reality of the American school house where Christians, Jews, Muslims, Hindus, Taoists, and other children of disparate religions, as well as those who profess no religious affiliation, coexist in the same classroom. Collective or unison prayer, voluntary or otherwise, would trample on the beliefs of many students and result in an atmosphere of stress and dissension.

As for the formal adoption of a period of silent prayer, AASA is opposed to a constitutional mandate for such practice. The courts, for the most part, have found the period of silent prayer or meditation to be in violation of the Establishment Clause of the 1st Amendment. It is true that individual school districts can be found where such practice is tolerated. However, in Alabama, periods of silent prayers were recently overturned. In New Mexico, a federal judge ruled in February that a New Mexico law allowing a minute of silence in the schools is a violation of the Establishment Clause. In his decision, the judge wrote ". . . The illness lies in the public perception of the moment of silence as a devotional exercise. If the public perceives the state to have approved a daily devotional exercise in public school classes, the effect of such action is the advancement of religion."

In Massachusetts, the legislature was told by its state supreme court that silent meditations as opposed to prayer would not change the unconstitutionality of the act since the law contemplates that, at least in some instances, prayers

would be orally recited. The court stated that when prayers are to be heard in the classrooms of the public schools of the commonwealth, " . . . it is more than a strain to argue that religion is not being advanced in the sense of the Constitution." In other words, during the moment of silence, individuals will pray aloud and make religious gestures. The teacher must either allow such actions or stop them -- an untenable and inappropriate responsibility either way.

Finally, AASA opposes a constitutional amendment requiring public schools to grant equal access to school facilities to religious groups throughout the nation.

This is a comparatively new effort to merge church and school. In Bristol, Virginia, bible study classes are held in the school house immediately before and immediately after classes. Students volunteer for the classes. Those who do not are required to go elsewhere in the building during these classes. Court action on this program is pending.

Recently the Supreme Court declined to hear a case involving the right of the Lubbock, Texas schools to hold voluntary prayer meetings in school facilities before or after school hours. Earlier, the U.S. Court of Appeals had ruled against the practice as a violation of the 1st and 14th Amendments. Specifically the Court ruled against a Board of Education policy which permitted students to gather at the school before or after school hours to meet for any " . . . educational, moral, religious, or ethical purposes . . . " so long as the meetings were voluntary. The Court of Appeals found the directive a constitutional violation since it specifically related to "religion in the schools."

The courts appear to be rejecting the concept as constitutionally unacceptable, not out of hostility, but rather a true concern over our heading down a new road of religious establishment.

Aside from the opinion of the court, the AASA recognizes that various school districts throughout the country have, at their own risk, entered into contractual arrangements with religious groups for the temporary use of school facilities, usually for emergency purposes. A constitutional amendment would complicate such voluntary decisions and require all school boards, whether they wished to or not, to grant access to all groups in a way that would surely interfere with school activities. For example, church related activities, following immediately upon student dismissal, would be perceived as an integral part of the school's extra and co-curricular programs. While attendance would be voluntary, it would be apparent to all students in the school that certain religious activity was authorized and, fairly judged or not, established by the Board of Education.

Schools could easily become magnets for all religious groups seeking a new home or additional space. Schools could easily become school-churches. Equipment, materials, and supplies would be in jeopardy and the smooth flow of instruction from day to day would be disrupted. Given the random nature of the groups who would demand access, security would have to be increased and screening would become a full time job.

In effect, the attention, energy, and time of students, teachers, and school administrators could easily be diverted from their primary mission of public education, impeded by such distractions as multiple religious groups competing for the use of public school houses.

In summary, the AASA feels that prayer is a very personal experience and religion an individual matter. Mixing education and religion in the public schools of our diverse society is not wise. Nor is it sound practice to employ the Constitution as a handy remedy to appease those who have been frustrated by court decisions. The Constitution, after all, is the foundation of our national wisdom. The balance of powers provide recourse through the courts to those who feel that their rights have been violated by legislative acts. The interplay of the judicial and legislative branches of government has protected the civil rights of American citizens and sustained this nation's integrity as a democratic society through more than a century of history. That process should be preserved and the proposed constitutional amendments rejected.

STATEMENT

OF

THE HONORABLE EDWARD C. SCHMULTS

DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

ON

PROPOSED CONSTITUTIONAL AMENDMENTS
RELATING TO SCHOOL PRAYER

Before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

June 27, 1983

Mr. Chairman and Members of the Committee:

I am pleased to appear again today on behalf of the Administration to discuss proposals to amend the Constitution to restore the opportunity to engage in prayer in our public schools and institutions.

In April, I appeared before the Subcommittee on the Constitution to support Senate Joint Resolution 73, an amendment proposed by the Administration and introduced in the Senate by Senators Thurmond, Hatch, Chiles, Abdnor, Nickles and Helms. That resolution embodies the President's proposed amendment to the Constitution, which reads as follows:

> "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 the United States or by any State to participate in prayer."

As I stated at that time, the President strongly supports S.J. Res. 73, and I again urge the Committee to give this proposed amendment its support. In our view, this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions.

More recently, a different type of school prayer amendment has been considered by this Committee and reported out by the Subcommittee on the Constitution. This new proposed amendment is much more limited in scope, as it relates only to silent meditation in public schools and to the use of school

facilities by voluntary student religious groups. The language of the new proposal is as follows:

> Sec. 1. Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation in any public school. Neither the United States nor any State shall require any person to participate in prayer or meditation, nor shall they encourage any particular form of prayer or meditation.
>
> Sec. 2. Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups.

I would like to briefly summarize the President's proposed amendment before addressing the new proposal before the Committee.

I.

The President has proposed an amendment to the Constitution 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, Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963), which held that it is an impermissible "establishment of religion" in violation of the First Amendment for a state to foster group prayer or Bible readings by students in public schools. In the years following Engel v. Vitale and Abington School District v. Schempp, the courts have increasingly restricted the states from incorporating religious observances into the daily schedule of students in public schools. These cases have forbidden voluntary prayers in the classroom

setting. 1/ More recent decisions have forbidden periods of silent prayer, 2/ and voluntary meetings for "educational, religious, moral, or ethical purposes." 3/ Even the venerable tradition of having chaplains open legislative sessions with a prayer -- a tradition going back before the First Congress and widely followed in the states -- is now under serious attack in the courts. 4/

Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words, "restore the simple freedom of our citizens to offer prayer in

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1 Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982) (voluntary prayer at start of class for students with parental permission); Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965) (grace before meals).

2 See, e.g., Jaffree v. Wallace, No. 83-7046 (11th Cir. May 12, 1983); Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982).

3 Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1042-48 (5th Cir. 1982), cert. denied, 103 S. Ct. 800 (1983); see also Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981); Brandon v. Board of Education, 635 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

4 One federal court of appeals has already ruled that it is unconstitutional for a state legislature to have a chaplain to open its sessions with a prayer, Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), cert. granted, 103 S. Ct. 292 (1982) (No. 82-23), and a similar challenge to chaplains in Congress is now pending. Murray v. Buchanan, 674 F.2d 14 (D.C. Cir. 1982), vacated for rehearing en banc, No. 81-1301 (D.C. Cir.).

our public schools and institutions." We believe that the Administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the Establishment Clause. The Establishment Clause should not be read to prohibit governmental references to or affirmations of belief in God. 5/

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). The free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools. 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. Moreover, some of the courts' Establishment Clause cases have appeared to overshadow the First Amendment right of students to free exercise of religion.

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5 In discussing the scope of the Establishment and Free Exercise Clauses, Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General of the United States, stated: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." Griswold, Absolute is in the Dark--A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

Finally, the President proposed his amendment to allow 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.

Accordingly, the President's proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before Engel v. Vitale and Abington School District v. Schempp were decided, i.e., when prayers such as the Regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

II.

In contrast to the President's proposed amendment, S.J. Res. 73, the other constitutional amendment approved by the Subcommittee on the Constitution is much more limited in scope. It would address only two narrow aspects of the current controversy over school prayer, silent meditation and voluntary prayer meetings. In all other respects, it would leave the Establishment Clause jurisprudence developed by the Supreme Court and the

other federal courts untouched. Moreover, it would amend the Constitution with respect to these subjects even though the Supreme Court has not yet had the opportunity to determine whether these activities are in fact prohibited under current interpretations of the Establishment Clause.

Just as the President's amendment would not create new affirmative constitutional rights with respect to school prayer, the new amendment is apparently not intended to create new rights for students. Both sections of the new proposal merely provide that the Constitution shall not be construed to affect the conduct described in its provisions.

With respect to periods of silent prayer or meditation, it appears that some 18 states have enacted laws or ordinances providing for or requiring such observances of silence. 6/ In litigation challenging these laws, two have been held unconstitutional as an establishment of religion, one has been held as constitutional, and one is the subject of a pending court challenge. 7/ However, the Supreme Court has never been presented with this question, and therefore the constitutionality

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6 See Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U. L. Rev. 364, 372 n.44 (1983).

7 Courts in Tennessee and New Mexico have ruled against silent prayer or meditation. See cases cited in note 2, supra. The district court in Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) (three-judge court), upheld a Massachusetts law requiring that "a period of silence not to exceed one minute in duration shall be observed for meditation or prayer . . . " at the start of class. A similar New Jersey law is under challenge in May v. Cooperman, No. 83-89 (D.N.J.).

of the practice of silent prayer or meditation has not been finally determined under the existing construction of the Establishment Clause.

With respect to the use of school facilities by voluntary student groups for prayer meetings, the state of the law at present is even more favorable. Although several lower court decisions have ruled against the validity of such practices, 8/ other cases, including a recent decision of the Supreme Court, suggest that a policy of non-discrimination or equal access of student religious groups to school facilities on the same basis as other student groups does not violate the Constitution and indeed may be constitutionally mandated in certain circumstances.

The Supreme Court case, Widmar v. Vincent, 454 U.S. 263 (1981), arose in the context of a state university which had a policy of permitting all student groups to meet in its facilities but which nevertheless sought to exclude religious student groups. The Court held that the university could not constitutionally exclude the student religious groups. Having created an open forum for student groups, the university could not then enforce a content-based discrimination against certain groups on the basis of the religious content of their speech.

Although the Widmar decision was in the university setting, the constitutional principles of that case may well be applicable in other contexts as well. To the extent that a high

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8 See cases cited in note 3, supra.

school has a policy of promoting extracurricular activities by students in a context that may be said to reflect an open forum, Widmar may be read to forbid content-based discrimination against religious speech in that context as well. Indeed, a recent district court decision in Pennsylvania has applied the Widmar principle to hold unconstitutional a high school's refusal to grant equal access to a religious group to hold meetings during an extracurricular student activity period. 9/ Thus, although there undoubtedly will be further litigation over the constitutionality of this practice below the college level, there are several encouraging signs that the equal access principle is not unconstitutional under present constitutional doctrines.

Moreover, I note that several bills have been introduced in the Senate which are intended to extend the Widmar principle to the high school or the elementary level and to provide a statutory basis of authority for the requirement of non-discrimination. 10/ The Secretary of Education in his earlier testimony has endorsed the general purpose of these bills, and the President has voiced support as well. We believe that this is an appropriate subject for legislation to ensure equal access to school meeting facilities by student religious groups.

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9 Bender v. Williamsport Area School District, No. 82-0692 (M.D. Pa. May 12, 1983).

10 These bills are S. 425 and S. 1059, introduced by Senator Denton, and S. 815, introduced by Senator Hatfield and cosponsored by a number of other Senators.

Thus, the proposed new amendment would establish a new constitutional rule with respect to questions that have not yet been finally determined to be unconstitutional, and which might well be held valid under current Supreme Court precedents. Legislation and the results of litigation over the current meaning of the Establishment Clause may accomplish essentially the result as the proposed new constitutional amendment. For these reasons, the arduous task of a constitutional amendment with respect to equal access and silent meditation would seem to be premature.

At the same time, the new amendment would have no effect at all on the large number of school prayer issues that the courts have decided. The Supreme Court's decisions in Engel v. Vitale and Abington School District v. Schempp would be unaffected. Any prayers conducted in the classroom context, even if voluntary and with parental consent, would still be forbidden. 11/ Individual prayers such as grace before meals would still be suspect if said aloud, and prayers in the context of student assemblies or graduation ceremonies would also not be within the terms of the amendment. In short, the new amendment would fail to address a number of the principle concerns that led the President initially to propose his amendment. 12/

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11 See Karen B. v. Treen, supra.

12 The new proposed amendment also is limited only to public schools, and would therefore not reach the question of public prayer in other public institutions as does S.J. Res. 73.

Finally, I note briefly my concern over the breadth of the second sentence of the first section of the new amendment. On its face, this sentence, which would prohibit the United States or any State from requiring participation in meditation or from encouraging any particular form of prayer or meditation, would seem to apply broadly as a prohibition on actions by the federal or state authorities, even beyond the subject of silent prayer or meditation. This sentence should be given careful consideration to determine if it is even necessary in light of the nature of silent meditation, and to ensure that it would not be applicable to circumstances not intended by its authors.

III.

Like the authors of the new proposed amendment on school prayer, the Administration believes that the courts have unreasonably restricted the rights of our citizens to pray in public schools and institutions. Our common goal is to restore the opportunity for students to engage in prayer in our public schools. We, however, seek to achieve this objective through an amendment that confronts the problem directly by addressing the Supreme Court's rulings in Engel v. Vitale and Abington School District v. Schempp. The Administration's proposed amendment would restore the opportunity for public prayer, whether spoken or silent, in public schools and other institutions, and would ensure that decisions regarding prayer would be made by states and localities rather than by the federal judiciary. This amendment would overturn the exclusion of religion from public

institutions under current judicial interpretations of the Establishment Clause.

Notwithstanding the formidable obstacles to the enactment of any constitutional amendment, and some of the objections raised with respect to the President's proposed amendment, we believe that the approach and result of S.J. Res. 73 are the correct ones and would result in the adoption of a proper new interpretation of the Constitution with respect to school prayer.

We recognize that the new proposed amendment would resolve any remaining constitutional questions regarding silent meditation and voluntary student religious groups. However, it is at the same time an incomplete remedy. It would affect only two specific areas of the broader questions relating the public prayer, and would leave essentially undisturbed the Supreme Court's pronouncements in this field. Moreover, it would constitutionalize two of the specific questions which the Supreme Court has not yet had the opportunity to evaluate under current constitutional standards.

For these reasons, we adhere to the President's initial proposal, and urge prompt action on S.J. Res. 73, so that the process of state ratification can begin. 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 who founded this nation understood the importance of recognizing the source of our blessings. It is

time that we restore the ability of our schoolchildren to do so as well.

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

discusses original proposal by Pres. Reagan

PREPARED STATEMENT OF WALTER E. DELLINGER

Before the Subcommittee on the Constitution of the Judiciary Committee of the United States Senate, May 2, 1983.

My name is Walter Dellinger and I am Professor of Law at Duke University. I appreciate having been invited by the Committee to testify today on the constitutional amendment proposed by President Reagan on May 17, 1982, and now being considered by this Committee.

This amendment (which will apply to every public institution and not merely to schools) would effectively repeal a portion of the First Amendment. Promoted by its sponsors as an amendment which would merely "permit children to pray in schools," its potential impact would be considerably different: it would empower government officials to compose officially approved devotional exercises and to require that these exercises be conducted regularly in public institutions.

The language of the amendment itself is deceptively simple. As proposed by the President, it reads in full:

> 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 THE UNITED STATES OR BY ANY STATE TO PARTICIPATE IN PRAYER.

The text of the amendment does not immediately alert us to the spectre of state and federal officials determining what official theology should be imposed on state or nation. This is because the amendment avoids stating on its face <u>who</u> is empowered to determine the content of the religious exercises to be performed in public institutions. Once that question is asked, however, the answer is clear: whatever officials would, in the absence of the First Amendment, otherwise have authority to control the institutions in question.

STATEMENT OF NORMAN DORSEN
PRESIDENT, AMERICAN CIVIL LIBERTIES UNION

ON

PROPOSED CONSTITUTIONAL AMENDMENTS CONCERNING RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

June 27, 1983

Mr. Chairman and Members of the Committee:

The American Civil Liberties Union appreciates the opportunity to present its views on the issue of prayer in the public schools. There are two proposed constitutional amendments pending before the Committee which would permit religious exercises in public schools. Both would fundamentally alter the structure of the First Amendment and its careful balance between the protection of free exercise of religion and the separation of church and state. In so doing, they would radically transform the relationship between government and religion. No longer would the government be neutral towards religion. Rather, it would become the sponsor of religion and the instrument of particular denominations and forms of religious activity. The ACLU supports the historic principle upon which our nation was founded that the free exercise of religion can flourish only if religion is completely free from government. That is the bedrock principle of the First Amendment, and that principle would be destroyed if either of the pending amendments were to be passed by the Congress and ratified by the states.

This nation has a rich religious heritage that reflects our pluralistic society. It has developed and flourished under a constitutional system that recognizes that religion is a private matter and that the rights of all persons to exercise freely their religious beliefs are best protected when the government is prohibited from engaging in, interfering

with, or sponsoring religious activities.

The principle of the separation of government from religion was not invented or recently developed by the Supreme Court. It was written into the First Amendment by the framers of the Constitution. James Madison's famous Memorial and Remonstrance on Religious Freedom reflected the view of the framers that "there is not a shadow of right in the general government to intermeddle with religion...This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it."

The principle of separation of government from religion has been deeply embedded in American life for two centuries. The Supreme Court has applied this principle to the wide variety of factual situations that have been presented to it. In this century, for example, the Court held that government cannot interfere with religion by requiring compulsory attendance at public schools in contravention of religious beliefs. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Forty years ago, the Court held that the government may not require public school students to salute the flag in contravention of their religious beliefs. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Two decades ago, in the school prayer decisions, the Court merely continued the application of the principle that government can neither sponsor nor impede the free exercise of religion. In reaching its decisions the Court conducted an inquiry into whether the challenged practices "tend to promote

that type of interdependence between religion and state which the first amendment was designed to prevent." Engel v. Vitale, 370 U.S. 421 (1962). In other words, the school prayer decisions were part of the natural evolutionary process of the American principle of seperation of church and state as applied to contemporary life. With the influx of immigration and the enormous religious and cultural diversity of twentieth century America, the protection of religious freedom through the separation of church and state became more important than ever.

When viewed in historical context, it becomes clear that the results of the 1962 and 1963 Supreme Court decisions cannot be reversed without fundamentally upsetting the structure of religious freedom embodied in the First Amendment. Both of the proposed constitutional amendments, by permitting the government to promote and sponsor formal religious activity, go far beyond reversing the result in specific cases. Ultimately, they would amend the First Amendment itself by turning the government into the instrument of powerful religious groups at the expense of religious minorities and those who profess no religion.

S.J. Res 73, sponsored by Senator Thurmond, would permit the state to sponsor formal group prayer periods. Senator Hatch's version, S.J. Res ___, would permit the same, albeit the prayers would be "silent". But silent or oral, officially sponsored prayer periods are precisely what transforms the government into an instrument of religion. The resulting loss

of religious freedom would be incalculable, as would the perversion of the civic function of public schools.

Students who prefer not to pray or meditate silently along with their classmates would be forced either to excuse themselves from the activity or to participate in a religious exercise contrary to their beliefs. In other words, students would have to choose between publicly "announcing" their minority religious preferences by non-participation, or participating in religious activities that they do not believe in. Either alternative would unfairly burden children with differing beliefs, and would almost surely have a substandial impact upon their ability to perform in other school activities.

Furthermore, some of the students who choose not to participate in school prayers or who worship in ways different from the majority very likely will be subjected to pressure, stigma and scorn by their classmates. This likelihood makes a mockery of the "voluntary" nature of the proposed school prayer. It is, of course, absurd to suggest that young or impressionable students, particularly those in elementary schools, will be able to exercise freedom of choice in religious matters.

Instituting prayer in public schools also will burden teachers with the responsibility of explaining the differences among religions, a task for which they lack the capability and training. This in turn may have an adverse effect on hiring decisions by focusing inquiries on the manner in which a potential teacher intends to lead the class in prayer. In addition, children will be prone to

compare the way their teachers lead a meditation compared to their ministers.

In short, the confusion that would inevitably result from the practical and administrative ramifications of public school prayer would compound the overwhelming damage that would be done to the principles of the First Amendment.

Sponsors of the amendment have suggested that these consequences must be balanced against the harm caused to those denied the "right" to pray in school. Nothing in the First Amendment prohibits a student, individually, from praying. On the other hand, the free exercise clause does not mean and has never meant that students have a "right" to obtain government sponsorship of group prayer periods in school. If it does, then any religious majority would be able to force the government to sponsor its beliefs to the detriment of religious minorities. This view is completely at odds with the lessons of history of a country founded by religious minorities fleeing majority persecution and it is a severe distortion of the free exercise principle. As the Supreme Court has said, "While the free exercise clause clearly prohibits the use of state action to deny rights of free exercise to anyone, it has never meant that a majority could use the machinery of the state to practice its beliefs." Engle v. Vitale, 370 U.S. at .

Finally, I would like to comment briefly on Section 2 of the Hatch Amendment which provides for access to public school

facilities by voluntary student organizations. Under current interpretations of the First Amendment, religious groups may have access to public school facilities if the government policy is one that is neutral and nondiscriminatory in both its terms and implementation, so long as the activities are wholly unrelated to the school, do not take place during the school day and are not supported in any way by public funds. If the forum is truly open to all members of the public, not only students, and the circumstances of the use do not suggest government involvement or sponsorship, then the Establishment Clause may not be offended by such religious activity.

However, if the school policy is neutral only in appearance--if religious uses are accorded special preference; or if the school promotes or encourages the religious use, or permits it to take place in conjunction with the school day or other school activities; or if some religious or speech uses are denied or discouraged--then a policy permitting religious use of public school facilities would be constitutionally objectionable. Significantly in every instance in which the courts have examined so-called neutral extracurricular use policies in schools, they have been rejected precisely because the courts found that they were adopted for the purpose, and had the effect, or advancing sectarian ends. See, e.g., Lubbock Civil Liberties Union v. Lubbock Indep. School District, 669 F.2d 1038 (5th Cir. 1983), cert. denied _____U.S._____ (1983) (striking down school board policy which resulted in school sponsored prayer and Bible reading); Brandon v. Board of Education

of Guildeland, 635 F.2d 971 (2nd Cir. 1980), cert. denied, 454 U.S. 1123 1981) denial by school principal of special permission for student religious group to meet in school building did not violate First Amendment. See generally Widmer v. Vincent, 454 U.S. 263 (1981).

Section 2 of the Hatch amendment would permit access to public schools by religious groups under circumstances where the school would officially sponsor religious activities. For this reason it suffers from the same flaws as Section 1; namely, it would abridge the fundamental principle embodied in the First Amendment that the free exercise of religion can only be guranteed so long as the government does not become its sponsor.

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MICHAEL J. MALBIN

AMERICAN ENTERPRISE INSTITUTE
WASHINGTON, D. C.

TESTIMONY BEFORE THE
COMMITTEE ON THE JUDICIARY
JUNE 27, 1983

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR ASKING ME TO TESTIFY AS AN EXPERT WITNESS ON THE SCHOOL PRAYER AMENDMENT. WHAT I SAY WILL BE BASED ON MY OWN RESEARCH INTO THE HISTORICAL RECORD. I AM NOT HERE TO REPRESENT ANYONE, AND AEI TAKES NO ORGANIZATIONAL POSITIONS ON ISSUES OF PUBLIC POLICY.

LET ME COME RIGHT TO THE POINT. YOU HAVE TWO AMENDMENTS BEFORE YOU: THE PRESIDENT'S AND THE SILENT PRAYER OR MEDITATION AMENDMENT. I BELIEVE THE SUPREME COURT SINCE 1947 AND THE LOWER

CAN MEET THE SERIOUS AND LEGITIMATE CONCERNS--NOT ALL OF THE CONCERNS, BUT THE SERIOUS AND LEGITIMATE ONES--OF THOSE WHO WANT PRAYER, WITHOUT RAISING ANY OF THE SERIOUS AND LEGITIMATE CONCERNS OF THOSE WHO ARE ON THE OTHER SIDE.

LET ME NOW TURN TO A MORE DETAILED CONSIDERATION OF THE ISSUES. I SHALL DO SO IN FIVE PARTS. THE FIRST WILL BE AN OUTLINE OF THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT. THE SECOND WILL DESCRIBE WHAT IS WRONG WITH CURRENT COURT DOCTRINE AND WITH THE SEPARATIONIST ARGUMENTS AGAINST SILENT PRAYER. THE THIRD WILL DESCRIBE THE PROBLEMS WITH THE PRESIDENT'S AMENDMENT FROM THE PERSPECTIVE OF 1789. FOURTH WILL BE A RESPONSE TO THOSE CONSERVATIVES WHO SAY THAT A SILENT PRAYER AMENDMENT WOULD BE BOTH RELIGIOUSLY AND POLITICALLY MEANINGLESS. AND FIFTH WILL BE A RESPONSE TO THOSE WHO SAY THAT A SILENT PRAYER AMENDMENT IS NOT NECESSARY OR APPROPRIATE UNTIL THE SUPREME COURT RULES ON THE ISSUE.

I. THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT

MR. CHAIRMAN, I KNOW YOU HAVE ASKED ME TO COME HERE PRIMARILY BECAUSE OF MY PUBLISHED WORK ON THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT'S TWO RELIGION CLAUSES. I HAVE ALREADY DESCRIBED THAT RESEARCH IN SEN. HATCH'S SUBCOMMITTEE HEARINGS, WHERE SOME OF MY PUBLICATIONS WERE INSERTED IN THE RECORD. I SHALL NOT TAKE YOUR TIME, THEREFORE, REVIEWING A LOT OF OLD GROUND. INSTEAD, I SHALL SUMMARIZE THE MAIN POINTS THAT SEEM PERTINENT TO THE IMMEDIATE ISSUE.

To resolve this difference, we have to look at the principles the members of the First Congress intended to convey in the ten cryptic words of the establishment clause. Fortunately, we have a lot better evidence than out-of-context statements by Jefferson and Madison for doing that, namely, the Annals of Congress. I review those debates in detail in my published work. Here as I said, I will give a brief summary of my conclusions.

Madison thought the Bill of Rights was not necessary given his views on enumerated powers and his views on the necessary and proper clause. The best protection, he thought, against a national religious establishment, or against all forms of majority tyranny, was an extended republic that was friendly to and fostered a multiplicity of sects, opinions, and interests.

Nevertheless, to respond to concerns raised during ratification, he agreed to sponsor a set of amendments in the First Congress. One of his original proposals reads, "No religion shall be established by law." It was interpreted by Madison in his opening remarks to mean, "that Congress should not establish a religion." Please note that Madison said Congress should not establish a religion, not that Congress should not establish religion as such.

But Madison's interpretation did not match his own original language. This led members of Congress to express two different kinds of concerns. One, to quote Benjamin Huntington, was "that

BUT THE LANGUAGE DID NOT PROHIBIT LAWS THAT MIGHT TEND TO ASSIST RELIGION AS SUCH. THE FIRST CONGRESS DID NOT EXPECT THE BILL OF RIGHTS TO BE INCONSISTENT WITH THE NORTHWEST ORDINANCE OF 1787, WHICH THE SAME CONGRESS REENACTED IN 1789. ONE KEY CLAUSE IN THE ORDINANCE READ AS FOLLOWS: "RELIGION, MORALITY, AND KNOWLEDGE BEING NECESSARY TO GOOD GOVERNMENT AND THE HAPPINESS OF MANKIND, SCHOOLS AND THE MEANS OF LEARNING SHOULD FOREVER BE ENCOURAGED."

THIS CLAUSE CLEARLY IMPLIED THAT SCHOOLS, WHICH WERE TO BE BUILT ON FEDERAL LANDS WITH FEDERAL ASSISTANCE, WERE EXPECTED TO PROMOTE RELIGION AS WELL AS MORALITY. IN FACT, MOST SCHOOLS AT THIS TIME WERE CHURCH RUN, SECTARIAN SCHOOLS. HOWEVER, THE AID WAS OPEN TO ANY SECT THAT APPLIED.

IN SUMMARIZING THE HISTORY, I SHOULD LIKE TO EMPHASIZE THE BROAD AREA OF AGREEMENT BETWEEN MADISON AND OTHERS IN THE FIRST CONGRESS; THEY ALL WANTED RELIGION TO FLOURISH, BUT THEY ALL WANTED A SECULAR GOVERNMENT. THEY ALL THOUGHT A MULTIPLICITY OF SECTS WOULD HELP PREVENT DOMINATION BY ANY ONE SECT AND THUS HELP AVOID THE RELIGIOUS DIVISIVENESS AND RELIGIOUS WARFARE WITH WHICH THEY WERE ALL SO FAMILIAR FROM RECENT ENGLISH HISTORY. WE SHOULD NOT LOSE SIGHT OF THE IMPORTANCE OF THIS CONCERN ABOUT DIVISIVENESS TO THE FRAMERS AS WE SEEK TO CORRECT RECENT MISINTERPRETATIONS OF THEIR INTENT.

FRAMERS FOR THEIR RULE OF LAW. THE COURT IN 1947 SAID THAT NEITHER CONGRESS NOR A STATE MAY DO ANYTHING TO AID OR PREFER ONE RELIGION OVER ANOTHER, OR AID OR PREFER RELIGION AS SUCH, EVEN IN A NON-DISCRIMINATORY WAY. THE COURT THUS CHANGED THE LAW IN TWO WAYS: FIRST BY PROHIBITING NONDISCRIMINATORY AID TO RELIGION AND, SECOND, BY APPLYING THE ESTABLISHMENT CLAUSE TO THE STATES AND THUS CONTRADICTING ONE PART OF THE ORIGINAL INTENTION, WHICH WAS TO PREVENT CONGRESS FROM HARMING THE EXISTING STATE RELIGIOUS ESTABLISHMENTS. ON THE NATION-STATE ISSUE, IF ANYONE WANTS TO ARGUE THAT THE FOURTEENTH AMENDMENT CHANGED THINGS, THAT PERSON HAS TO COPE WITH THE AWKWARD FACT THAT MANY OF THE ORIGINAL SUPPORTERS OF THE FOURTEENTH AMENDMENT ALSO SUPPORTED THE UNSUCCESSFUL BLAINE AMENDMENT, WHICH WOULD HAVE PROHIBITED STATES FROM MAKING LAWS RESPECTING AN ESTABLISHMENT OF RELIGION. IN THE 1960S AND 1970S, THE COURT SHIFTED AWAY FROM ITS STERILE "NO-AID" RULE TO ONE THAT WAS ONLY SLIGHTLY BETTER, BUT THAT STILL REQUIRED AN OFFICIAL STATE POLICY OF NEUTRALITY BETWEEN RELIGION AND IRRELIGION AND STILL PROHIBITED NONDISCRIMINATORY AID.

THE CURRENT SEPARATIONIST CRITICS OF THE SILENT PRAYER AMENDMENT RELY ON THE SUPREME COURT "NO-AID" AND "NEUTRALITY" RULES, WITH THEIR FALSE HISTORICAL PRETENSIONS, TO SAY THAT A SILENT PRAYER OR MEDITATION AMENDMENT SHOULD BE PROHIBITED. "ENFORCED CLASSROOM SILENCE," SAID THE NEW YORK TIMES IN A JUNE 19 EDITORIAL, IS "HARDLY LES

I FIND IT STRANGE THAT SOME OF THE SAME GROUPS THAT OPPOSE PERIODS FOR SILENT PRAYER OR MEDITATION, SUPPORT KINDERGARTEN CLASSES ON NUCLEAR WAR AND JUNIOR HIGH SCHOOL CLASSES ON CONTRACEPTION. WHEN CHALLENGED, THESE GROUPS SAY THEY ARE NOT ADVOCATING UNILATERAL DISARMAMENT OR TEENAGE SEX. NO STUDENT WILL BE COERCED OR PRESSURED, THEY SAY; THEY JUST WANT TO GIVE YOUNGSTERS A CHANCE TO MAKE AN INFORMED CHOICE. PRECISELY SO. I DON'T OPPOSE SEX EDUCATION AND I BELIEVE IN INFORMED CHOICE. NOTHING MORE IS INVOLVED HERE.

III. The President's Amendment

I TURN NOW TO THE PRESIDENT'S AMENDMENT, WHICH WOULD PERMIT VOCAL, GROUP, VOLUNTARY PRAYER IN THE CLASSROOM. MY PROBLEM WITH THIS AMENDMENT IS THAT THERE IS NO SUCH THING AS A NONDISCRIMINATORY VOCAL PRAYER. EVEN A NONDESCRIPT PRAYER THANKING GOD FOR THE FOOD WE EAT ENVOKES A BEING NOT AT ALL CONSISTENT WITH THE SUPREME POWERS ACCEPTED BY THOSE AMERICANS WHO HAPPEN TO BE BUDDHISTS, OR HINDUS OR MEMBERS OF ONE OF THE OTHER LARGE EASTERN RELIGIONS, OR EVEN MANY CONTEMPORARY UNITARIANS.

WHAT SORT OF PRAYER MIGHT BE OFFERED UNDER THE PRESIDENT'S AMENDMENT? IT SEEMS TO ME THAT THERE ARE ONLY THREE POSSIBILITIES: ONE WRITTEN BY THE STATE, ONE CHOSEN BY THE STATE FROM SECTARIAN LITURGY, OR ONE OFFERED VOLUNTARILY BY A STUDENT. EACH HAS A PROBLEM. A STATE-AUTHORIZED PRAYER, SUCH AS IN Engel v. Vitale

THE PROBLEM OF PEER PRESSURE AND RIDICULE GETS AT THE HEART OF WHAT IS WRONG WITH THE PRESIDENT'S AMENDMENT. THE PURPOSE OF THE FIRST AMENDMENT WAS TO SUPPORT AN ENVIRONMENT IN WHICH RELIGION WAS HONORED, BUT IN WHICH THE PASSIONS THAT PRODUCE CIVIL STRIFE WERE DAMPED DOWN. THE PRESIDENT'S AMENDMENT WOULD HONOR RELIGION, BUT IT WOULD ALSO ENFLAME RELIGIOUS PASSIONS IN EVERY SCHOOL DISTRICT IN THE COUNTRY. I DO NOT KNOW OF MANY LOCAL COMMUNITIES THAT DO NOT HAVE AT LEAST TWO CHURCHES. THE DOCTRINAL DIFFERENCES BETWEEN THE TWO CHURCHES MAY LOOK SMALL TO OUTSIDERS, BUT THEY GENERALLY ARE TAKEN VERY SERIOUSLY BY CHURCH MEMBERS. WHAT WHAT THE AMENDMENT WOULD DO, THEREFORE, IS GUARANTEE A POLITICAL FIGHT AMONG CHURCHES IN EVERY CITY, TOWN AND HAMLET ACROSS THE LAND.

I THINK THE PUBLIC KNOWS THIS. THE SUPPORTERS OF THE PRESIDENT'S AMENDMENT LIKE TO CITE PUBLIC OPINION POLLS THAT SHOW 75-80 PERCENT OF THE PUBLIC FAVORING A RESTORATION OF PRAYER IN THE PUBLIC SCHOOLS. BUT WHEN THE QUESTIONS ARE PHRASED MORE SPECIFICALLY TO INCLUDE WORDS LIKE "ORGANIZED GROUP PRAYERS," OR "ORGANIZED VOCAL PRAYER," THE SUPPORT DROPS TO THE LOW TO MID-60S. THAT IS STILL A MAJORITY, BUT NOT THE OVERWHELMING CONSENSUS NORMALLY ASSOCIATED WITH TWO-THIRDS VOTES IN THE HOUSE AND SENATE AND RATIFICATION BY THREE-QUARTERS OF THE STATES. I THINK THE 10-15 PERCENT WHO SHIFT WITH THE QUESTION'S WORDING ARE TRYING TO TELL US SOMETHING THAT IS WORTH HEARING.

BUT WHAT ABOUT THOSE STUDENTS WHO DO NOT KNOW HOW TO PRAY ON THEIR OWN? ONE QUICK ANSWER IS THAT IT IS NOT THE SCHOOL'S JOB TO TEACH THEM. MORE IMPORTANTLY, THOSE STUDENTS WILL HAVE A CHANCE FOR MORE MEANINGFUL RELIGIOUS LEADERSHIP WITH SILENT THAN WITH PUBLIC, VOCAL PRAYER. THERE WOULD BE NOTHING WRONG UNDER THIS AMENDMENT, AS I UNDERSTAND IT, WITH SUNDAY SCHOOLS ADVISING STUDENTS ON THEIR DAILY PRAYERS FOR THE COMING WEEK, ~~OR EVEN GIVING SUCH CHILDREN CARDS WITH SUGGESTED PRAYERS~~. THERE IS NO WAY THE CLERGY COULD PLAY ANYTHING APPROACHING SUCH A ROLE WITH A VOCALIZED PRAYER.

FINALLY, WHAT ABOUT THOSE WHO SAY, AS SOME EVANGELICALS HAVE SAID TO ME, THAT THEY HAVE A RELIGIOUS OBLIGATION TO PROCLAIM THE NAME OF CHRIST ALOUD? TO THEM I SAY FINE, BUT NOT IN A CLASSROOM. VOCAL AND SILENT PRAYER, IN MOST FAITHS, SERVE DIFFERENT RELIGIOUS PURPOSES. SILENT PRAYER IS PERSONAL; VOCAL PRAYER IS COMMUNAL. THE SCHOOL, HOWEVER, IS NOT A RELIGIOUS COMMUNITY. IN ITS COMMUNAL ROLE, THE SCHOOL SHOULD STAND FOR THE PROPOSITION THAT PRAYER OR MEDITATION HAVE A LEGITIMATE ROLE WITHIN THE POLITICAL COMMUNITY; IT SHOULD <u>NOT</u> TRY, HOWEVER, TO CREATE OR SUPPORT A SINGLE RELIGIOUS COMMUNITY ON ITS OWN. THAT IS WHAT RELIGIOUS ORGANIZATIONS ARE FOR. AS A POLITICAL COMMUNITY, WE MUST BE OPEN TO THOSE WHO DISAGREE ON MATTERS OF FAITH. THAT IS A BEDROCK PRINCIPLE OF OUR CONSTITUTIONAL REGIME.

ON THEM BY LOCAL CIVIL LIBERTIES ORGANIZATIONS. AS LONG AS THIS SITUATION EXISTS, PEOPLE WHO WANT SOME KIND OF SILENT PRAYER OR MEDITATION EXERCISE ARE BEING DENIED AN OPPORTUNITY THAT THEY SHOULD HAVE. IT IS PERFECTLY APPROPRIATE FOR THIS BODY TO AFFIRM A RIGHT WHOSE EXERCISE IS BEING CHILLED IN PART BY THE COURTS. AT THE SAME TIME, IT IS APPROPRIATE FOR THIS BODY TO DECLARE LOUDLY THAT ONE CAN HONOR AND RESERVE A PLACE FOR RELIGION IN PUBLIC LIFE, WITHOUT ESTABLISHING IT. YES, YOU COULD WAIT FOR THE UNPREDICTABLE SUPREME COURT, BUT YOU MIGHT HAVE TO WAIT FOR A LIFETIME.

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

200 MARYLAND AVENUE, N.E., WASHINGTON, D. C. 20002-5797 · 202/544-4226

JAMES M. DUNN
EXECUTIVE DIRECTOR

TESTIMONY OF THE
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

on

The Proposed Constitutional Amendment dealing with a Minute of Silence and Equal Access in the Public Schools

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

June 27, 1983

I am John W. Baker, General Counsel for the Baptist Joint Committee on Public Affairs.

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: The American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have a current membership of nearly 30 million.

Through a concerted witness in public affairs, the Baptist Joint Committee seeks to give corporate and visible expression to the voluntariness of religious faith, the free exercise of

religion, the interdependence of religious liberty with all human rights, and the relevance of Christian concerns to the life of the nation. Because of the congregational autonomy of individual Baptist churches, we do not purport to speak for all Baptists.

On June 16, 1983 the Southern Baptist Convention, meeting in Pittsburgh, Pennsylvania, adopted a resolution which, after praising the First Amendment provisions preventing an establishment of religion and guaranteeing the free exercise of religion, concluded: "Be it finally RESOLVED, That we call upon Baptists to express their confidence in the United States Constitution, and particularly the First Amendment, as adequate and sufficient guarantees to protect these freedoms." One day later, on June 17, 1983, The American Baptist Churches in the U.S.A., meeting in Cleveland, Ohio, adopted a resolution on religious liberty which in part stated: "We also reaffirm the principle of Separation of Church and State as a legal guarantee and a source of support for religious liberty."

These attitudes about the First Amendment guarantees are typical of most Baptists and it is from this starting point that the Baptist Joint Committee will present its testimony today.

1. We strongly object to any attempt to amend the First Amendment. Because the First Amendment has been extensively litigated during the past 40 years, there is some understanding of its scope and meaning. There is an orderliness and a regularity about it which has allowed both church and state to know generally the proper relationship between the two. Both the church and the state have profited by knowing the metes and

bounds of their relationship. Religious liberty has been adequately and sufficiently protected by the First Amendment as it is today.

We object to any effort to tamper with or alter the First Amendment. It is ironical that such a very personal, private and exclusively religious part of an individual's life -- prayer -- should be the subject matter of the only serious congressional attempts to modify the religion clauses of the First Amendment. The Supreme Court did not -- and, in fact, could not -- eliminate truly voluntary prayer from the public schools or anywhere else. Neither a prayer amendment which, in effect, provides for government-prescribed, so-called "voluntary" prayers nor a required or permitted period of silence is necessary for truly voluntary prayer to take place. The First Amendment, as it is, is an adequate and sufficient guarantor of all truly voluntary religious activity.

2. **Amending the Constitution should be the last resort rather than a first resort.** The Constitution has stood as a fundamental law for nearly two centuries. It has stood the test of time with relatively few amendments beyond the Bill of Rights. To assume that every perceived wrong or suspect application of our fundamental law must be corrected by an amendment to the Constitution is to be untrue to our heritage as Americans. Only after <u>all</u> other methods for the redress of grievances have been exhausted should any consideration be given to adding new ideas and new and untested and uninterpreted words to the Constitution.

3. Neither the judicial nor the legislative processes have run their full course on the issues of a period of silence or equal access. The Constitution as it is today embodies ideas and concepts which are not antagonistic toward either of the concepts this proposed amendment addresses. If the judicial processes as well as the ordinary legislative processes are allowed to run their course, the need which some Senators see for a constitutional amendment may well be removed.

For example, there are conflicting decisions in the Federal District Courts about the constitutionality of a period of silence for prayer or meditation in public schools. A three-judge panel upheld a Massachusetts law which provided for a period of silence. Gaines v. Anderson, 421 F.Supp. 337 (D.Mass. 1976). Similar laws have been struck down recently. See, Beck v. McElrath, ____ F.Supp. ____(M.D.Tenn. 1982) and Duffy v.Las Cruces Public Schools, 557 F.Supp. 1013 (D.N.M. 1983). Another "period of silence" case is now pending in the Federal District Court in New Jersey. It is just a matter of time until this issue reaches the Supreme Court and a final determination can be reached on the merits of the case and on the meaning of the First Amendment.

Also, only last month a Federal District Court in Pennsylvania handed down a decision in a "clean" case supporting the right of a voluntary student religious group to equal access to the use of school facilities when a limited public forum had been created. Bender, et al. v. Williamsport Area School District, et al., ____ F.Supp. ____(M.D.Pa. 1983). Notice of

appeal has been filed.

Courts are uniquely competent to differentiate fact patterns and to render case-by-case decisions in complicated and emotion-laden cases. It is the better part of wisdom to give the courts a full opportunity to decide cases such as these rather than to rush to change the basic rules before the courts are able to sort out the problems. It has only been a comparatively short time since the Supreme Court handed down its prayer and Bible reading decisions. At the outside it should take only two years for the cases mentioned above to reach the Court. This nation will be better served by patient waiting on the Court than by an amendment to the Constitution which will require many additional years of litigation to clarify its meaning and delineate its impact.

A legislative body in its lawmaking function is uniquely competent to act on social issues. Since every word added to the Constitution alters the fundamental law of the land, an amendment must be terse; but a legislative act states its purpose, defines terms used, and qualifies its meanings so that the intent of Congress usually is clear. The "equal access" portion of this proposed amendment is a classic example of the danger of using a few words to achieve a specific end. If the amendment is adopted, the first time a totally undesirable student group demands access the school administrator -- who must allow <u>equal</u> access to <u>all</u> voluntary student groups -- will have to opt for <u>no</u> access to <u>any</u> group. Moreover, an amendment may have far-reaching effects, many of which are unforeseeable; legislation

does not suffer as greatly from this defect and is much more easily changed when a mistake has been made.

The Congress has not yet exhausted its legislative options. Senator Hatfield's proposal on equal access, S. 815, has not been given a hearing. It merits hearings and we would find its provisions much less threatening to religious liberty than this proposed amendment. S. 815 is more narrowly drafted and contains more qualifying words than does this proposed amendment, and thus it is less likely to force drastic decisions by school administrators or engender unforeseen judicial interpretation. In any event, we would much prefer an attempt at a legislative solution to the problem of religion in the public school classroom to any change in the First Amendment.

Thus we end where we began. We unalterably oppose any tampering with the First Amendment. That Amendment indeed has proven to be "adequate and sufficient" to protect religious liberty in the past and it is our contention that, if it is left alone, it will continue to be "adequate and sufficient" for the years to come.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH, UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, HEARINGS ON PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYER, JUNE 28, 1983.

MR. CHAIRMAN, THIS MARKS THE SEVENTH DAY OF HEARINGS BY THE SENATE COMMITTEE ON THE JUDICIARY OVER THE PAST YEAR ON THE SUBJECT OF PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYER. TODAY'S HEARING FOLLOWS A DECISION BY THE SUBCOMMITTEE ON THE CONSTITUTION TO REPORT TO THE FULL COMMITTEE TWO PROPOSED AMENDMENTS ON THIS MATTER-- S.J.RES. 73, PROPOSED BY THE ADMINISTRATION, AND S.J.RES. ___, A NEW PROPOSAL EMERGING FROM THE SUBCOMMITTEE.

I WOULD LIKE TO FOCUS BRIEFLY UPON THIS LATTER PROPOSAL, SPONSORED BY CHAIRMAN THURMOND, SENATOR GRASSLEY, AND MYSELF. WHAT THIS PROPOSAL WOULD DO IS TO ALLOW STATES AND LOCALITIES TO PERMIT INDIVIDUAL OR GROUP SILENT PRAYER OR MEDITATION AT OUTSET OF THE PUBLIC SCHOOL-DAY. IN ADDITION, IT WOULD CLARIFY THAT THERE IS NO CONSTITUTIONAL IMPEDIMENT TO LOCAL SCHOOL DISTRICTS ALLOWING VOLUNTARY, EXTRA-CURRICULAR STUDENT ORGANIZATIONS OF A RELIGIOUS CHARACTER FROM USING PUBLIC SCHOOL FACILITIES ON THE SAME BASIS AS SIMILAR ORGANIZATIONS OF A NON-RELIGIOUS CHARACTER. THIS RELATES TO THE SO-CALLED 'EQUAL ACCESS' ISSUE.

BECAUSE S.J.RES. ___ REPRESENTS AN EFFORT TO ACHIEVE A CONSENSUS APPROACH ON AN EXTREMELY DIFFICULT ISSUE, IT HAS BEEN THE SUBJECT OF CRITICISM BY A NUMBER OF SINCERE INDIVIDUALS AND ORGANIZATIONS ON BOTH ENDS OF THE POLITICAL SPECTRUM BECAUSE WHO WOULD PREFER DIFFERENT APPROACHES. I RESPECT THEIR JUDGEMENT, BUT WOULD LIKE NEVERTHELESS TO OFFER

A NUMBER OF COMMENTS ABOUT THEIR CRITICISMS.

TO THOSE OF A MORE LIBERAL PERSUASION WHO ARE CRITICAL OF THE PROPOSED ALTERNATIVE AMENDMENT, LET ME EMPHASIZE SEVERAL IMPORTANT POINTS:

FIRST, THE AMENDMENT WOULD ONLY PERMIT INDIVIDUAL OR GROUP SILENT PRAYER OR MEDITATION. IT WOULD NOT PERMIT THE EXPRESSION OF DENOMINATIONAL PRAYER, OR OF ANY OTHER ORAL OR VOCAL PRAYER.

SECOND, THE AMENDMENT WOULD NOT ESTABLISH ANY CONSTITUTIONAL RIGHT IN ANY INDIVIDUAL TO REQUIRE PRAYER IN THE SCHOOLS. IT WOULD SIMPLY LEAVE THIS DECISION WITH THE STATE AND LOCAL COMMUNITY. NO STATE OR LOCAL COMMUNITY WOULD BE COMPELLED TO ALLOW PRAYER.

THIRD, THE PROPOSED AMENDMENT WOULD NOT REQUIRE ANY INDIVIDUAL TO PARTICIPATE IN SILENT PRAYER OR MEDITATION. REASONABLE ACCOMODATIONS WOULD HAVE TO BE MADE FOR INDIVIDUALS WHO CHOSE, FOR WHATEVER REASON, NOT TO PARTICIPATE IN SILENT PRAYER.

FOURTH, THE PROPOSED AMENDMENT WOULD PROHIBIT ANY FORM OF OVERT OR SUBTLE ENCOURAGEMENT OF ANY PARTICULAR FORM OF PRAYER. NEITHER THE STATE NOR THE LOCAL COMMUNITY NOR THE CLASSROOM TEACHER COULD, IN ANY WAY, ENCOURAGE THE SILENT EXPRESSION OF ANY FORM OF PRAYER.

FIFTH, THERE WOULD BE ABSOLUTELY NO ROLE UNDER THIS AMENDMENT FOR THE STATE OR ANY OTHER PUBLIC AUTHORITY TO DRAFT ANY PRAYER, COMPOSE ANY PRAYER, OR SELECT ANY PRAYER FOR STUDENTS. BECAUSE ONLY SILENT EXPRESSIONS OF PRAYER WOULD BE PERMISSIBLE, THE STATE WOULD HAVE NO RESPONSIBILITIES IN THIS REGARD.

FINALLY, PRESSURES UPON THE MINORITY-RELIGION STUDENT WOULD BE ABSOLUTELY MINIMIZED BY THE PROPOSED AMENDMENT. BECAUSE IT RELATES TO SILENT PRAYER, EACH STUDENT WOULD BE ABLE TO UTTER) utter? THOSE THOUGHTS MOST MEANINGFUL. ALTHOUGH THEY WOULD BE FREE TO EXCUSE THEMSELVES FROM EVEN THE SILENT PERIOD, THERE WOULD BE VIRTUALLY NO NEED FOR ANY MINORITY-RELIGION STUDENT TO HAVE TO EXCUSE HIMSELF FROM A CLASSROOM IN A CONSPICUOUS MANNER OR TO EMBARRASS HIMSELF AMONG HIS OR HER PEERS IN ANY WAY.

IN SHORT, MR. CHAIRMAN, THE PROPOSED ALTERNATIVE AMENDMENT FULLY RESPECTS THE VALUES OF RELIGIOUS TOLERANCE THAT UNDERLIE OUR CONSTITUTION, AS WELL AS ITS DIRECTION AGAINST FOSTERING UNNECESSARY ENTANGLEMENT BETWEEN CHURCH AND STATE.

TO THOSE OF A MORE CONSERVATIVE PERSUASION WHO HAVE BEEN CRITICAL OF THE PROPOSED AMENDMENT, LET ME EMPHASIZE SEVERAL ADDITIONAL POINTS:

FIRST, SIMPLY BECAUSE A PRAYER IS SILENT RATHER THAN VOCAL, DOES NOT MEAN THAT IT IS A WEAK PRAYER. INDEED, I AM CONCERNED THAT ANY STATE-APPROVED PRAYER, ONCE IT HAS GONE THROUGH THE NECESSARY COMMITTEES AND LEGISLATIVE BODIES, IS LIKELY TO BE SO WEAK THAT IT IS MEANINGLESS TO VIRTUALLY ALL INDIVIDUAL STUDENTS. THE VALUE OF SILENT PRAYER IS THAT EACH CHILD CAN PRAYER, IN AS INTENSE A MANNER AS HE OR SHE DESIRES, TO THOSE PERSONAL VALUES WHICH ARE MOST IMPORTANT. EVERY CHILD CAN BE ACCOMODATED, WITH THE MOST ROBUST EXPRESSIONS OF PERSONAL DEVOTION.

SECOND, I WOULD ARGUE THAT IT WOULD BE A GREAT ACHIEVE-MENT FOR THIS COUNTRY IF WE WERE ABLE TO REAFFIRM THROUGH THE

PROPOSED AMENDMENT THAT THE HISTORIC UNDERSTANDING OF THE 'ESTABLISHMENT' CLAUSE HAS IDENTIFIED A PROPER, SUPPORTIVE ROLE BETWEEN THE STATE AND EXPRESSIONS OF RELIGIOUS VALUE. THE PROPOSED AMENDMENT WOULD END THE REGIME BY WHICH THERE IS A LITTLE-DISGUISED STATE OF OFFICIAL ANTAGONISM BETWEEN CHURCH AND STATE.

THIRD, I WOULD ARGUE THAT IT WOULD BE A GREAT ACHIEVEMENT FOR THIS COUNTRY TO REAFFIRM THAT A STUDENT'S EDUCATION OUGHT PROPERLY TO CONSIST OF THE DEVELOPMENT OF SPIRITUAL CHARACTER. THIS WOULD REVERSE THE DECADES-LONG TREND BY WHICH PUBLIC SCHOOLS ARROGATE TO THEMSELVES MORE AND MORE TEACHING AND SOCIAL FUNCTIONS, WHILE DOING LESS AND LESS TO INCULCATE SOME SENSE OF PERSONAL REFLECTION AND INTROSPECTION.

FINALLY, I BELIEVE THAT THE 'EQUAL ACCESS' PROVISIONS OF THE PENDING AMENDMENT WOULD ALSO SERVE TO CLARIFY THAT THERE ARE TWO RELIGION CLAUSES IN THE FIRST AMENDMENT-- THE 'ESTABLISHMENT' CLAUSE AND THE 'FREE EXERCISE' CLAUSE. SECTION 2 OF THE PROPOSED AMENDMENT WOULD STRONGLY EMPHASIZE THAT THE CONSTITUTION PROTECTS RELIGIOUS SPEECH IN THE SAME MANNER THAT IT PROTECTS OTHER FORMS OF 'FREE SPEECH'.

MR. CHAIRMAN, I BELIEVE THAT THE PROPOSED SUBCOMMITTEE AMENDMENT WOULD ESTABLISH A PUBLIC POLICY ENDORSED BY A SUBSTANTIAL MAJORITY OF THE AMERICAN PEOPLE OF ALL POLITICAL PERSUASIONS AND WALKS-OF-LIFE. IT IS CONSISTENT WITH THE CONSTITUTIONAL VALUES THAT HAVE BEEN AT THE FOUNDATION OF THIS COUNTRY SINCE ITS INCEPTION. I WOULD RESPECTFULLY ASK MY FRIENDS ON BOTH SIDES OF THE POLITICAL SPECTRUM TO RECONSIDER THEIR OBJECTIONS, LOOK CAREFULLY AT ALTERNATIVE SOLUTIONS, AND JOIN IN SUPPORT OF THE PROPOSED AMENDMENT.

THE WHITE HOUSE
WASHINGTON

Ethnic Press Briefing

Linas has 60 on list of Briefing

Gerston from 15 translators

for Presidential

Have Doug Riggs

contact Linas

THE WHITE HOUSE
WASHINGTON

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Dick Fox – Rep – Jewish

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W I T N E S S L I S T

Hearing Regarding

S C H O O L P R A Y E R
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Before

THE SENATE JUDICIARY COMMITTEE

June 27, 1983
9:30 A.M., SD-226

THE HONORABLE EDWARD SCHMULTS
Deputy Attorney General
of the United States

THE HONORABLE MARK O. HATFIELD
United States Senator
State of Oregon

PANEL I

PROFESSOR ROBERT CORD

PROFESSOR WALTER DELLINGER

PANEL II

PROFESSOR MICHAEL MALBIN

PROFESSOR PAUL BENDER

PANEL III

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

LUTHERAN COUNCIL, U.S.A.

NATIONAL COUNCIL OF CHURCHES

AMERICAN JEWISH CONGRESS

PANEL IV

THE MORAL MAJORITY

THE FREEDOM COUNCIL

CHRISTIAN VOICE

CENTER FOR JUDICIAL STUDIES

PANEL V

AMERICAN CIVIL LIBERTIES UNION

AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE

PEOPLE FOR THE AMERICAN WAY

PANEL VI

THE UNITED METHODIST CHURCH

EPISCOPAL CHURCH

UNION OF AMERICAN HEBREW CONGREGATIONS

PANEL VII

AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

NATIONAL ASSOCIATION OF
STATE BOARDS OF EDUCATION

NATIONAL EDUCATION ASSOCIATION

AMERICAN FAMILY SEMINAR

B'NAI B'RITH WOMEN

CHRISTIAN LEGAL SOCIETY

NATIONAL COUNCIL OF JEWISH WOMEN

ANTI-DEFAMATION LEAGUE

AMERICAN JEWISH COMMITTEE

SEVENTH DAY ADVENTISTS

AMERICANS FOR DEMOCRATIC ACTION

(Parvin/AB)
July 19, 1983
5:00 p.m.

PRESIDENTIAL REMARKS: BRIEFING FOR CENTRAL AMERICA
OUTREACH GROUP
JULY 19, 1983

Welcome to the White House. I wish the occasion for your visit today was a more enjoyable one, but we all know you're here for a serious purpose. This audience understands the dangers of a violent minority seeking to impose its will by terrorism. In the Middle East, the PLO is committed to the destruction of Israel and the democracy it represents. In Central America, communist guerrillas seek the destruction of El Salvador and its budding democracy.

But more than a similarity of terrorist methods links events in the Middle East with those in Central America. The common element is the Palestine Liberation Organization. For make no mistake, just as the PLO deals in terrorism and subversion in the Middle East, it is also an active ally of communist revolutionaries throughout Central America.

The strong tie between the PLO and Nicaragua's Sandinista government is particularly revealing. Sandinista soldiers fought beside their PLO comrades in the Middle East as early as 1970 and many have been trained by the PLO. In 1978 the two groups issued a joint declaration of war against Israel. The PLO has provided the Sandinistas with material, advisors and training in terror. They espouse the same principles and the same hate. As one Sandinista spokesman has said, "There is a long standing blood unity between us and the Palestinians."

~~we have once again~~ The results of this self proclaimed "blood unity" between the ~~We know the Sandinistas seek to intimidate all religions;~~ Sandinistas and the PLO are evident for all the world to see and are ~~again~~ evil echoes ~~not simply the Jewish. Catholic and Protestant clerics have been~~ of history: ~~persecuted and expelled for speaking out against the crimes of~~ -- virtually the entire Jewish community in Nicaragua has been frightened into exile. ~~the revolution. During his visit to Nicaragua, the Pope's sermon~~ -- Their synagogue, which had its doors torched by Sandinistas supporters in 1978 ~~and mass were interrupted by organized Sandinista groups chanting~~ while services were in progress, has since been confiscated and turned ~~pro-revolutionary slogans. Last August, the Catholic Church's~~ into offices for a sandinista organization. ~~official radio spokesman was marched naked through the streets in an orchestrated attempt to embarrass the church.~~

~~As soon as~~ The Sandinistas and their PLO brethren ~~were~~ have widened their scope and now direct their ~~established in Managua, the same~~ brotherhood of terror ~~was~~ toward the struggling democracy in ~~directed toward~~ El Salvador. And when the world fully understands the intentions and consequences of communist rule in Central America, I believe it will appreciate U.S. efforts there. Our goal is nothing less than to protect human liberty, ~~and~~ dignity, and ensure the rights of persecuted minorities.

The United States stands for religious freedom; in fact, that is why our Pilgrim forefathers first set foot here. Our belief in religious freedom is one more reason we must give assistance to those in Central America who are fighting totalitarian, anti-religious forces.

So I hope when you leave here today you will discuss what you've heard with others. Please share with them the truth -- that communism in Central America means not only the loss of political freedom, but religious freedom as well. You have a vital message to deliver -- one that concerns free men and women everywhere and one that must be told. Now, I believe you have some questions.