



U.S. Department of Justice
Office of Legal Counsel

CWRWT:lr

Office of the
Deputy Assistant Attorney General

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MEMORANDUM FOR FRED F. FIELDING
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Re: School Prayer Amendments

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This responds to your request for comments on certain alternative versions of a constitutional amendment regarding school prayer. We have reviewed three such proposals -- the Baker Amendment, S.J. Res 218, 1/ a modified Baker amendment, 2/ and a modified Dirksen amendment. 3/ We discuss below the relationship of these proposals to certain concerns of the Administration. In view of the time constraints involved, our discussion is necessarily preliminary.

1. A "right" to pray in public buildings: The Baker amendment speaks of "the right of persons" to pray in public buildings. There are two objections to this language. First, the Free Exercise Clause already protects the right of persons, lawfully assembled, to participate in prayer, subject to the restrictions of the Establishment Clause under certain

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 expenditures of public funds, to participate in voluntary prayer."

2/ "Nothing contained in this Constitution shall prohibit persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, from participating in prayer. No authority administering such a building shall require any person to participate in prayer. Neither the United States nor any State shall compose the words of any prayer to be said in public schools."

3/ "Nothing contained in this Constitution shall prohibit the authority administering any educational institution or school system supported in whole or in part through the expenditure of public funds from providing for or permitting prayer. No such authority shall require any person to participate in prayer. Nothing contained in this article shall authorize any such authority to compose the words of any prayer."

circumstances. The Department of Justice has noted, in analyses of earlier bills and amendments, that a court could read this language as merely a reaffirmation of a "right" that already exists, especially because the first sentence of the Baker amendment is in the negative and can thus be read as not creating a new, affirmative right. The risk would be, therefore, that the amendment would be read as having limited effect on existing constitutional decisions and accomplishing few of the Administration's objectives.

Second, assuming that the Baker amendment is read to create a new affirmative right of persons to pray in public buildings, the courts may impose concomitant obligations on the States to permit prayer on the demand of individuals and groups, subject only to reasonable restrictions on time, place and manner. Such a right goes far beyond the Free Exercise Clause, particularly as it has been interpreted by the courts. The Baker amendment could be construed as creating a constitutional right of persons to require that states and local school boards in fact institute school prayer programs. Creating this new constitutional right would create a fertile new area for litigation -- for example, seeking to determine whether an individual may assert his right under a host of varying circumstances, such as during the State prescribed prayer period or during school assemblies or as often as is required by his religion. In addition, if the teacher wishes to lead the class in one prayer and a student wishes to exercise his right to pray at the same time, who would prevail?

The deletion of the word "right," as provided in the modified Baker amendment, see supra note 2, would eliminate these concerns. Similarly, the President's amendment, 4/ as well as the modified Dirksen amendment, are aimed not at creating such a right, but at eliminating the effect of past Supreme Court decisions prohibiting the States and local school districts from choosing to provide for prayer in their respective schools.

2. Public buildings covered: The Supreme Court's recent decision in Marsh v. Chambers, 103 S.Ct. 3330 (1983),

4/ "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. Neither the United States nor any State shall compose the words of any prayer to be said in public schools."

has led some to suggest that the Administration need not seek an amendment that applies to buildings other than public schools. While Marsh is a strong affirmation of the right of legislatures to hire chaplains, we do not believe that the Administration should assume Marsh's holding will be applied to other public buildings. The Marsh Court relied heavily on an unbroken historical practice of prayer in legislatures by chaplains paid by the state. It is not clear what precedential value Marsh will be given by the Court beyond legislative chaplains, or other practices that enjoy a similar unbroken line of historical practice. ^{5/} In addition, as the Administration's proposal already includes "other public institutions," support of more limited language, such as that contained in the modified Dirksen amendment, might be read as a retreat and as a decision to abide by present limitations imposed by the courts under the Establishment Clause with regard to other public buildings.

3. Voluntary Prayer: The Supreme Court has essentially held that state-sponsored prayer in schools cannot be "voluntary" -- i.e., that the ability of students to remain silent or to absent themselves "furnishes no defense to a claim of unconstitutionality under the Establishment Clause." Abington School District v. Schempp, 374 U.S. 203, 225 (1963) (citing Engel v. Vitale, 370 U.S. 421 (1962)). The Court considered the public school setting to involve "implied coercion." The use of the word "voluntary" in the Baker amendment may permit the courts to read the Abington and Engel analysis into the new amendment, thereby defeating the Administration's aim of providing for reinstatement of traditional school-sponsored classroom prayer. ^{6/}

The President's proposal does not utilize the term "voluntary," but rather states that "[n]o person shall be required by the United States or by any State to participate in prayer." This wording, given a strong legislative history, would permit prayer in the public schools so long as there is involved no actual coercion of the students to participate.

4. State-led prayer: The President's amendment is designed to permit States, through teachers and others, to

^{5/} See Anderson v. Laird, 466 F.2d 283 (D.C. Cir.) cert. denied, 409 U.S. 1076 (1972).

^{6/} The modified Baker amendment, supra note 2, by deleting the word "voluntary," avoids this problem.

lead or initiate student prayer. The focus of the President's amendment, though, as well as that of the Baker amendment and the modified Baker amendment, is upon persons and groups being able to pray in public buildings.

There is some risk that a court wishing to limit the effect of the President's amendment, once it is passed, could read the first sentence to authorize only individual or group generated prayer, such as student groups meeting on school property, see Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 103 S.Ct. 800 (1983), or students saying grace in the cafeteria at lunchtime, see Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965). In order to avoid this result, strong legislative history should be created to make clear that the first sentence is intended to have a broad meaning -- i.e., that no prohibition of any kind, including on State direction and involvement, is placed on individual or group prayer in public buildings by the Establishment Clause or the remainder of the Constitution. In addition, the legislative history would need to emphasize that the second sentence is intended to preclude only actual coercion and to negate past court decisions involving implied coercion in the school setting.

In this regard, the language of the modified Dirksen amendment, supra note 3, focuses more directly on the role of the state in prayer activity in public buildings. It states that nothing in the Constitution prevents the State from "providing for or permitting prayer." The risk of this more specific language is that it could provide the courts with the opportunity to construe the words "providing for or permitting" to be restrictive rather than expansive. Legislative history, therefore, would need to be created clearly delineating what "providing for or permitting" includes. Any question that "providing for or permitting" is to be read narrowly, so as merely to allow the State to provide a time and place for student-generated prayer, rather than to allow the State to initiate and lead prayer, as well as to prescribe the form and content of the prayer to be used, should be eliminated.

5. State-composed prayer: We understand that there are some who oppose any amendment that would permit the State to compose the actual words of a prayer to be said in the public schools. They apparently fear that such a state-drafted prayer would be so bland and watered down as to be devoid of any meaning or value spiritually.

A sentence has been added to the President's proposal which speaks to this issue. 7/ It is designed to prohibit the United States or any State from composing the words of the prayer itself, a practice the Court held to be unconstitutional in Engel (Board of Regents drafted prayer to be used in New York public schools), but to permit states to select which prayer from among traditional religious sources will be used, e.g., the Lord's Prayer, Biblical passages, etc., a practice the Court held in Abington to be unconstitutional also (school district provided an acceptable list of prayers, which included the Lord's Prayer and ten biblical verses). Thus, the amendment is designed to leave intact the Court's decision in Engel, while reversing the Court's decision in Abington. 8/

The Baker amendment does not explicitly address this issue. The modified form of the Baker amendment includes the language of the President's amendment on this point, as does the modified Dirksen amendment.

We hope that the foregoing discussion will be helpful to you in assessing alternative courses of action in seeking passage of a constitutional amendment once again permitting prayer in the public schools. We will be happy to provide a more thorough analysis of any of these alternatives at your request, or to provide any other assistance you may need.

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Office of Legal Counsel

7/ "Neither the United States nor any State shall compose the words of any prayer to be said in public schools."

8/ It is crucial that the legislative history make clear that the amendment is not intended to overturn Engel but is intended to permit the State to accept suggested prayers from non-State sources and to direct that particular prayers be used. Unless this interpretation is established, the courts may read the amendment narrowly to remove State involvement in prescribing the prayer to be used. In addition, the legislative history should establish a clearly definable line between what the State is permitted to do and what it is prohibited from doing with regard to the selection of prayers.

Attention will also need to be given in the legislative history to whether the word "State" includes all subdivisions and agents thereof.