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LEGAL ANALYSIS OF PRESIDENT REAGAN'S PROPOSED CONSTITUTIONAL AMENDMENT ON SCHOOL PRAYER

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EXECUTIVE SUMMARY

Since the Supreme Court held state-sponsored prayer and Bible-reading in the public schools to violate the First Amendment in Engel v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963), literally hundreds of constitutional amendments have been proposed in Congress to overturn those decisions. On May 17, 1982, President Reagan sent to Congress his recommended amendment--the first time a President has made such a proposal on the matter. His proposal provides 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.

This report notes that the Supreme Court has interpreted the First Amendment to bar the government from using, or permitting others to use, the public schools as instruments of inculcating religious faith or belief, but that it has found some accommodations with religion to be permissible and even, in the college context, compelled. The report further notes that on issues not yet adjudicated by the Supreme Court, the state and lower federal courts have uniformly held the First Amendment to permit government to sponsor periods for silent meditation and to accommodate baccalaureate services and commencement prayers in connection with graduation exercises, but have also uniformly held unconstitutional government accommodation of student-initiated prayer groups in public secondary schools. In addition, the report notes that outside of the public school context, the Supreme Court has found constitutional government involvement with religion in prisons and, by implication, in the military, and that state and lower federal courts have uniformly held constitutional the use of prayer to open meetings of legislative bodies. In other contexts, however, governmental involvement with prayer or affirmations of belief have been held unconstitutional.

In this legal context the report finds that the language of the President's proposal would not change those existing interpretations of the First Amendment which either have not specifically involved prayer or have upheld government involvement with prayer in a particular context. The report further finds that because the proposal speaks only in terms of "individual or group prayer" and not of government sponsorship or other involvement, its effect on those interpretations of the First Amendment which have held government involvement with prayer in the public schools unconstitutional to be uncertain. In addition, the report finds that even if the element of government involvement with prayer is read into the proposal (as seems its intent), it remains unclear whether the proposal would legitimize all, or only some, of the various forms of government involvement with prayer in the public schools that have heretofore been struck down. The report further finds that the same uncertainty attends the question of the proposal's effect on government involvement with prayer in public institutions other than the schools. Finally, the report notes that the second sentence of the proposal would not change existing interpretations of the First Amendment but would assure that the first sentence would not be interpreted to legitimize governmental coercion of religious affirmation.

The report also includes a reprise of past Congressional action on proposed constitutional amendments relating to school prayer, noting that majorities in both the House and Senate have in different Congresses voted for such proposals but that the necessary two-thirds majority was obtained only once and then apparently as part of a strategy to defeat a proposed "Equal Rights Amendment" by encumbering it with extraneous amendments.

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INTRODUCTION

On May 17, 1982, President Reagan recommended to Congress that the following language be added as an amendment to the Constitution:

> 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. 1/

In a message accompanying the proposal, the President said that the purpose of the proposal was "to restore the simple freedom of our citizens to offer prayer in our public schools and institutions":

> The amendment I propose will remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools. 128 Cong. Rec. S5334 (May 17, 1982).

In addition, the President stated that his proposal would not compel anyone to engage in prayer but would "allow communities to determine for themselves whether prayer should be permitted in their public schools and...allow individuals to decide for themselves whether they wish to participate in prayer." 2/

This report sets forth the legal context of the President's

1/ Subsequently, the proposed language was introduced as S. J. Res. 199 by Senators Thurmond and Hatch and H.J. Res. 493 by Representatives Kindness, Lott, and Beard. See 128 Cong. Rec. S5428 (May 18, 1982) (daily edition) and H2852 (May 25, 1982)(daily edition), respectively.

2/ The full text of the President's message is printed as an Appendix to this report.

proposal, analyzes the legal scope and effect of the proposed language, and briefly sketches past Congressional action on proposed constitutional amendments relating to school prayer.

LEGAL CONTEXT

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." As worded, the establishment and free exercise clauses are applicable only to the federal government, but in the 1940's the Supreme Court held them to be part of the meaning of the due process clause of the Fourteenth Amendment and thus to apply to the states as well.[3/] Since that time the Court has on seven occasions addressed the meaning of these clauses with respect to the constitutionality of government involvement with religious activities in the public schools and on one occasion regarding religious activities in prisons. State and lower federal courts have further elaborated on their meaning in other situations relevant to the President's proposal. The following subsections detail this legal context.

(1) Supreme Court Decisions Concerning Religious Activities in the Public Schools: Not all of the Court's decisions in this area directly concern the subject of President Reagan's proposal, that is, prayer in public schools and institutions. But cumulatively they provide the basic interpretation of the religion clauses of the First Amendment which, in part, the President's proposal appears intended to reverse.

3/ Cantwell v. Connecticut, 310 U.S. 296 (1940)(free exercise); Everson v. Board of Education, 330 U.S. 1 (1947)(establishment).

Five of the Court's seven decisions have held government sponsorship or sanction of particular religious activities in the public schools to violate the establishment of religion clause. In McCollum v. Board of Education[4/] the Court held unconstitutional, 8-1, a "shared time" program in which local schools permitted private teachers to come into the schools to give religious instruction to consenting students during the school day. The Court stated:

> The...facts...show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects....This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment.... 333 U.S. at 209-210.

Subsequently, in Engel v. Vitale[5/] and the companion cases of Abington School District v. Schempp and Murray v. Curlett[6/] the Court held unconstitutional, by 6-1 and 8-1 majorities, respectively, state sponsorship of such devotional activities as prayer and Bible reading in the public schools, notwithstanding provisions for the excusal of students who did not wish to take part. In Engel the school invited students and teachers to join in daily recital of a prayer composed by the New York State Board of Regents, while in Abington and Murray selections from the Bible were read

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4/ 333 U.S. 203 (1948).

5/ 370 U.S. 421 (1962).

6/ 374 U.S. 203 (1963).

and students and teachers were invited to join in unison recital of the Lord's Prayer. The state's sponsorship of these activities, the Court held, violated "the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion."[7/] Writing for the Court in Engel, Justice Black stated:

> ...the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. 370 U.S. at 425.

And in Abington Justice Clark, writing for the Court, interpreted the First Amendment to impose a "wholesome neutrality" on government with respect to religion which bars it from placing its "official support...behind the tenets of one or all orthodoxies" as well as from interfering with "the right of every person to freely choose his own course with reference thereto."[8/]

In Epperson v. Arkansas[9/] the Court unanimously struck down a state statute which imposed civil and criminal penalties on a public school teacher who gave instruction on the theory of evolution. The Court found that the sole purpose of the statute was to "blot out a particular theory (of creation) because of its supposed conflict with the Biblical account, literally read":

> No suggestion has been made that Arkansas law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. 393 U.S. at 107-108.

7/ Id., at 225.

8/ Id., at 222.

9/ 393 U.S. 97 (1968).

Stating that "the First Amendment does not permit the State to require that teaching and learning be tailored to the principles or prohibitions of any religious sect or dogma,"[10/] the Court struck down the statute.

More recently, in Stone v. Graham[11/] the Court held unconstitutional, 5-4, a state statute which required that a copy of the Ten Commandments, purchased with private contributions, be posted on the wall of each public classroom in the state. The Court found the "pre-eminent purpose" of the posting requirement to be "plainly religious in nature," notwithstanding contrary declarations by the legislature. As a consequence, the Court held that the "mere posting of the copies under the auspices of the legislature provides the 'official support of the State...Government' that the Establishment Clause prohibits."[12/]

On the other hand, the Court has held government involvement with religious activities in the public schools in two instances not to violate the First Amendment. In Zorach v. Clauson[13/] the Court, in a 6-3 decision, upheld as constitutional a local "released time" program in which public school children whose parents so requested were permitted to leave the schoolgrounds during the school day to receive religious instruction from private teachers in nearby private facilities. Differentiating the program from the "shared time" program struck down in McCollum, supra, the Court stated:

10/ Id., at 106.

11/ 449 U.S. 39 (1980).

12/ Id., at 42.

13/ 343 U.S. 306 (1952).

> In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. 343 U.S. at 315.

The First Amendment, Justice Douglas wrote for the Court, requires a "complete and unequivocal" separation of church and state, but it does not require that "the government show a callous indifference to religious groups"[14/]:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person....But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here. 343 U.S. at 313-14.

Most recently, the Court in Widmar v. Vincent[15/] held, 8-1, that a public university which routinely permits student groups to use campus facilities may not bar such groups from using the facilities for religious worship and discussion. Such content-based discrimination, the Court stated, violated the students' right of free speech under the First and Fourteenth Amendment. The university argued that conformance with the separation of church and state mandated by the establishment clause constituted a compelling public interest sufficient to override the students' interests, but the Court refused to agree that a policy

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14/ Id., at 314.

15/ 102 S. Ct. 269 (1981).

of accommodation would either place the imprimatur of university sponsorship on the religious activities or single out religious groups for any special benefits. The Court concluded:

> Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards. 102 S. Ct. at 278.

In sum, the Court has interpreted the religion clauses of the First Amendment to impose on government a "wholesome neutrality"[16/] with respect to religion in the public schools. The Court has made clear that not all government action relating to religion in the public schools is constitutionally forbidden. It has upheld the constitutional permissibility of "released time" programs. It has held in the college context, that student groups are constitutionally entitled to use campus facilities for religious purposes to the same extent as for other purposes. In dicta it has affirmed the constitutionality of the public schools offering courses about religion[17/] and providing opportunities for students to take part in ceremonial or patriotic exercises which may incidentally involve a profession of faith but are not essentially devotional.[18/]

But the Court has also made clear that the First Amendment bars government from using the public schools as an instrument of inculcating

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16/ Abington, supra, at 222.

17/ Stone v. Graham, supra, at 42.

18/ Engel, supra, at 421, ftnt. 21.

religious faith or belief. It has held that government may not itself sponsor devotional activities as a regular part of the school day, nor tailor the curriculum to the principles or prohibitions of any particular religious sect or dogma. It has further held that the First Amendment bars the government from permitting private interests to use the school premises for religious instruction during the school day.

"...(T)he command of the First Amendment," the Court has said, "(is) that the Government maintain strict neutrality, neither aiding nor opposing religion."[19/]

(2) State and Lower Federal Court Decisions on Other School Prayer Situations: In addition to enforcing the Supreme Court's rulings in fact situations similar or identical to those above, the state and lower federal courts have interpreted the establishment and free exercise clauses in several situations involving prayer in the public schools not yet adjudicated by the Court. Among those state and lower federal court adjudications, the following three areas appear directly pertinent to President Reagan's proposal:

(a) Silent meditation: Justice Brennan, in a concurring opinion in Abington, opined that there was no constitutional objection to the public schools observing "a moment of reverent silence" at the beginning of each school day,[20/] and the New Hampshire Supreme Court has on two occasions advised the state legislature that statutes prescribing a period for silent meditation at the beginning of each

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19/ Abington, supra, at 225.

20/ Abington, supra, at 280-81 (Brennan, J., concurring).

school day would be constitutional.[21] But the matter has been formally adjudicated in only a single case.

In Gaines v. Anderson[22] a three-judge federal district court upheld the constitutionality of a state statute prescribing a period of silence "for meditation or prayer" at the beginning of each school day. The court found the prescription of a moment of silence to serve such permissible secular and non-religious purposes as stilling the tumult of the playground and inculcating self-discipline and respect for authority. The court further found meditation to be "not necessarily a religious exercise" and held that the addition of the phrase "or prayer" to the statute did no more than reflect a "legislative sensitivity to the First Amendment's mandate to take a neutral position that neither encourages nor discourages prayer."[23] Thus, the court found no constitutional objection to the statute.[24]

(b) Baccalaureate services and commencement prayers: Similarly, state and lower federal courts have found no constitutional objection to the holding of sectarian baccalaureate services or to the inclusion of invocations and benedictions in commencement ceremonies relating to

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21/ Opinion of the Justices, 108 N.H. 97, 228 A. 2d 161 (1967) and Opinion of the Justices, 113 N.H. 297, 307 A. 2d 558 (1973).

22/ 421 F. Supp. 337 (D. Mass. 1976).

23/ Id., at 343.

24/ It might be noted that 21 states have now adopted statutes requiring or permitting moments of silent meditation. See CRS, "State Statutes Relating To Prayer and Bible Reading in the Public Schools At the Time Of, and Subsequent To, Engel and Abington" (April 1, 1982).

graduation from public schools.[25] The courts have uniformly held government's involvement with religion in these circumstances to be so attenuated as to be de minimis. As one court has stated:

> There is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases. There is no element of calculated indoctrination...The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated. There is no state financial outlay and the Court cannot visualize the organs of state government becoming infected by a divisive religious battle for control of this brief and transient exercise. Grossberg v. Deusebio, 380 F. Supp. 285, 289 (E.D. Va. 1974).

(c) Student-initiated prayer groups: In contrast to the foregoing, the state and lower federal courts that have addressed the issue have uniformly concurred that the use of public elementary and secondary school facilities at student initiative for religious purposes is unconstitutional. In two of the cases the courts have found school officials rather than students to be the initiating force behind the devotional meetings and thus have found the cases controlled by Engel and Abington.[26] In two others the courts have found the students to be the initiators of the religious activity but have found the mode of the activity to be so intertwined with the school

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25/ Wood v. Mt. Lebanon Township School District, 342 F. Supp. 1293 W.D. Pa. 1972); Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (E.D. Ark. 1973); Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Chamberlin v. Dade County Board of Public Instruction, 143 So. 2d 21 (Fla. 1962), vacated and remanded 377 U.S. 402 (1963), previous opinion reinstated 160 So. 2d 97 (Fla.), reversed in part, dismissed in part 377 U.S. 402 (1964), on remand 171 So. 2d 535 (Fla. 1965).

26/ State Board of Education v. Board of Education, Netcong, New Jersey, 108 N.J. Sup. 586, 262 A. 2d 21, aff'd 57 N.J. 172, 270 A. 2d 412 (1970), cert. den. 401 U.S. 1013 (1971); Commissioner of Education v. School Committee of Leyden, 358 Mass. 776, 267 N.E. 2d 226, (cert. den. 404 U.S. 849 (1971).

program as to connote state sponsorship.[27] But in three cases state and federal appellate courts have found the students to be the initiators of group devotional meetings yet nonetheless have held the imprimatur of state sponsorship given the activities by the "institutionally coercive" setting of the public schools, the subsidies involved in the groups' use of school facilities, and/or the involvement of school officials in supervising the activities to bring the activites within the proscriptions of the establishment clause.[28] These courts have also uniformly held students' claims based on the free exercise, free speech, and equal protection clauses to be unavailing against these establishment clause considerations. As the United States Court of Appeals for the Second Circuit stated in the most recent case:

> Two significant factors...defeat the claims. First, a high school is not a "public forum" where religious views can be freely aired....Equally compelling, the students in this case propose to conduct prayer meetings in the high school, not merely discussions about religious matters. When the explicit Establishment Clause proscription against prayer in the public schools is considered..., the protections of political and religious speech...are inapposite.... In short, these two vital distinctions indicate that the students' free speech and associational rights, cognizable in a "public forum," are severely circumscribed by the Establishment Clause in the

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27/ Goodwin v. Cross County School District No. 7, supra (use of public address system by student council for prayer and Bible reading each school day); Collins v. Chandler Unified School District, 664 F. 2d 759 (9th Cir.), cert. den. 102 S. Ct. 322 (1981)(opening of school assemblies with prayer by student selected by student council).

28/ Johnson v. Huntington Beach Union High School District, 137 Cal. Rptr. 43, 68 Cal. App. 3d 1 (Ct. App.), cert. den. 434 U.S. 877 (1977); Trietley v. Board of Education of the City of Buffalo, 65 A. D. 2d 1, 409 N.Y.S. 2d 912 (App. Div. 1978); Brandon v. Board of Education of the Guilderland Central School District, 635 F. 2d 971 (2d Cir. 1980), cert. den. 102 S. Ct. 970 (1981).

> public school setting. Because of the symbolic effect that prayer in the schools would produce, we find that Establishment Clause considerations must prevail in this context. Brandon v. Guilderland Central School District, supra, at 980.

Perhaps significantly, the Supreme Court denied certiorari in this case soon after it issued its contrary ruling in the public college context in Widmar v. Vincent, supra.

In sum, then, state and lower federal court decisions have applied the religion clauses of the First Amendment in three contexts involving school prayer seemingly relevant to President Reagan's proposal but not yet definitively adjudicated by the Supreme Court. These courts have uniformly found no constitutional objection to government prescription of a moment of silence at the beginning of each school day or to baccalaureate services and commencement prayers offered in connection with graduation exercises. But they have found unconstitutional the use of secondary school facilities during the school day by student prayer and Bible study groups. While these rulings cannot be considered the final or definitive interpretations of the First Amendment in these contexts,[29/] the unanimity of the courts that have addressed the issues provides, at the least, firm guidance on that interpretation.

(3) Court Decisions Involving Prayer in Public Institutions Other Than Schools: Because President Reagan's proposal concerns not only prayer in public schools but also prayer in "other public institutions," the legal context also includes interpretations of the First Amendment in public institutions other than schools. It is a well-established principle, for instance, that government is permitted

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29/ Cooper v. Aaron, 358 U.S. 1 (1958).

and, perhaps, even obligated to make provision for religious exercises when individuals, as the result of government action, have been deprived or removed from their usual outlets for religious expression. This principle finds its most obvious application in the contexts of prisons and military service.[30/] As Justice Brennan summarized the principle in Abington:

> ...(S)uch provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice..., government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be.
> ....
> ...(H)ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.... Abington School District v. Schempp, supra, at 297-299 (Brennan, J., concurring).

In addition, state and lower federal courts have uniformly upheld the constitutionality of opening the meetings of state and local legislative bodies with religious invocations.[31/] (This uniformity does not extend to the question of the constitutionality of paying a

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30/ Cruz v. Beto, 405 U.S. 319 (1972)(state prison held constitutionally obligated to provide opportunities for religious expression by Buddhist inmate); Rudd v. Ray, 248 N.W. 2d 125 (Iowa 1976)(provision of chaplains and chapels at public expense in state prison held constitutional); Theriault v. Silber, 547 F. 2d 1279 (5th Cir. 1977)(employment of chaplains in federal prisons held constitutional).

31/ Marsa v. Wernik, 86 N.J. 232, 430 A. 2d 888 (1981); Chambers v. Marsh, 504 F. Supp. 585 (D. Neb. 1980); Voswinkel v. City of Charlotte, 495 F. Supp. 588 (W.D. N. Car. 1980); Bogen v. Doty, 598 F. 2d 1110 (8th Cir. 1979); Lincoln v. Page, 109 N.H. 30, 241 A. 2d 799 (1960).

salary to legislative chaplains, however.[32] The courts have been wary in this conclusion, terming the matter a potential "quagmire."[33] But they, nonetheless, have held the purpose and primary effect of such invocations to be to set a tone of solemnity for the legislative proceedings and, on the facts before them, not to excessively entangle government with religion.

In other contexts not specifically involving public institutions but having some bearing, the First Amendment has been held to bar the government from disseminating written prayers or requiring individuals to serve as bearers of its ideological messages. In Wooley v. Maynard[34] the Court held that a state cannot, consistent with the free exercise clause, compel an individual to use license plates bearing an ideological message that violates the individual's religious beliefs. Similarly, in Hall v. Bradshaw[35] a federal appellate court held unconstitutional a state's inclusion of a "motorist's prayer" on state maps published and distributed at public expense.

In sum, then, outside of the public school context, the religion clauses of the First Amendment have been uniformly interpreted by the courts to permit government involvement with prayer in such public institutions as prisons, the military, and legislative bodies, but to bar government sponsorship of prayers on state literature or license plates.

32/ Compare Chambers v. Marsh, supra (payments to state legislative chaplain and printing of chaplain's prayers at public expense held unconstitutional) with Colo v. Treasurer, 378 Mass. 550, 392 N.E. 2d 1195 (1979)(state legislative chaplain's salary held constitutional).

33/ Bogen v. Doty, supra, at 1114.

34/ 430 U.S. 705 (1977).

35/ 630 F. 2d 1018 (4th Cir. 1980), cert. den. 450 U.S. 965 (1981).

LEGAL EFFECT OF PRESIDENT'S PROPOSAL

As a constitutional amendment, of course, the President's proposal is not subject to any constitutional objection or question. The sole legal question is how the proposal, if adopted, would change existing interpretations of the Constitution and, more particularly, of the First Amendment.

(1) Effect on Interpretations of First Amendment Which Have Not Involved Prayer: At the outset, it should be noted that the President's proposal concerns only "individual or group prayer in public schools or other public buildings." Thus, it would appear to have no effect on other matters concerning government and religion that have been addressed in the decisions noted above. It would not appear, for instance to reverse the Court's decision in McCollum v. Board of Education, supra in which the Court held the establishment clause to bar the public schools from letting private teachers give religious instruction to consenting students during the school day on the school premises. It would appear to have no effect on the teaching of evolution in the public schools (Epperson v. Arkansas, supra). It would appear not to affect the Court's decision in Stone v. Graham, supra, in which the Court held unconstitutional a state statute directing that wall plaques containing the Ten Commandments be hung on every schoolroom wall. Finally, and perhaps most important, it would appear not to affect that part of the Court's decision in Abington School District v. Schempp, and Murray v. Curlett, supra,

in which the Court held the establishment clause to proscribe state sponsorship of devotional Bible reading in the public schools. The proposal focuses exclusively on "individual or group prayer."

(2) Effect on Interpretations of First Amendment In Which Government Involvement With Prayer Has Been Upheld: Moreover, because the proposed amendment is stated in the negative--"Nothing in this Constitution shall be construed to prohibit..."--it also would appear to have no effect on those present interpretations of the First Amendment in which government accommodation of individual or group prayer has been found not to be prohibited. Thus, it would not alter the Supreme Court's decision in Zorach v. Clauson, supra, in which the Court held constitutional government accommodation of private religious exercises off the public elementary and secondary school grounds during the school day, nor the Court's decision in Widmar v. Vincent, supra, in which the Court held that public college students have a constitutional right to use campus facilities for group prayer to the same extent as they may use the facilities for non-religious purposes. Nor would the proposed language appear to affect the so-far uniform decisions of the state and lower federal courts which have held the First Amendment not to prohibit state prescription of periods of silence in the public schools or the holding of sectarian baccalaureate services and the inclusion of prayers in commencement ceremonies as part of high school graduation exercises. Nor would the proposed language appear to alter those decisions which have affirmed the constitutionality of government involvement with prayer in the contexts of prisons, the military, and legislative bodies.

The President's proposal, in other words, would not alter existing interpretations of the First Amendment which either have not involved individual or group prayer or which have held government involvement with prayer to be permitted rather than prohibited. Its sole effect in this regard would be to reinforce those interpretations in which government involvement with prayer has been held to be permitted.

(3) Effect on Interpretations of First Amendment Which Have Held Government Involvement With Prayer in Public Schools To Be Unconstitutional: The primary substantive effect of the proposal was stated by President Reagan in his accompanying message to be to "remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools." However, it is not entirely certain that the language of the proposal is sufficient to accomplish this result. Each of the judicial decisions which have involved prayer in the public schools has framed the constitutional question not in terms of the permissibility of the activity itself but in terms of the permissibility of government's sponsorship of, or involvement with, that activity. That is, in Engel the Court interpreted the establishment clause to mean not that prayer is unconstitutional but that "in this country it is no part of the business of government to compose official prayer..."(emphasis added).[36/] In Abington the Court emphasized that "the concept of neutrality" inherent in the First Amendment "does not permit a State to require a religious exercise even with the consent of the majority...." (emphasis added).[37/] In Brandon a federal appellate court identified

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36/ Engel, supra, at 425.

37/ Abington, supra, at 225.

the constitutional infirmity to be not the student-initiated group prayer activity itself but the "appearance...that the state has placed its imprimatur on a particular religious creed...." (emphasis added).[38/] Yet the President's proposal speaks not in terms of government involvement with prayer in the public schools but in terms of the activity itself, that is, "individual or group prayer." Thus, the language of the proposal, if read literally, leaves some doubt that it reaches and reverses those judicial interpretations of the First Amendment which have held unconstitutional government sponsorship of, or other involvement with, prayer in the public schools.

An interpretation that the proposal does not reach and reverse such interpretations, of course, would seem inconsistent with its stated intent. The President in his accompanying statement made clear his intent to "remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools" (though he did so without mentioning or citing the Supreme Court decision(s) that he would change). Senator Thurmond, in introducing the proposal as S. J. Res. 199, cited Engel as altering the original meaning of the establishment clause and described the proposal as intended to "reinstate() the original intent of the Founding Fathers and permit() individual and group prayer in public schools or other Government-owned institutions...."[39/] Moreover, the second sentence of the proposal--"No person shall be required by the United States or by any State to participate in prayer"--seems to

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38/ Brandon v. Board of Education of Guilderland School District, supra, at 978.

39/ 128 Cong. Rec. S5428 (May 18, 1982)(daily ed.).

imply that some government role is contemplated by the first sentence of the proposal.

The point simply is that without resort to such ancillary sources regarding the intent of the proposal (and to additional legislative history that may be developed in the future as the proposal is considered), the language of the first sentence of the proposal leaves some ambiguity as to its effective scope. (In this connection it might also be noted that it is not unknown for legislative enactments to be judicially interpreted in one manner notwithstanding strong indications to the contrary in the enactments' legislative histories.[40/])

Nonetheless, if the proposal were construed, as seems likely, to legitimize government sponsorship of prayer in the public schools and other public buildings, some ambiguity still remains. As can be seen in the decisions cited in the foregoing section, government involvement with prayer in the public schools has come in a variety of forms. In Engel a government body itself composed a prayer and recommended its recital by teachers and students.[41/] In Abington and Murray governmental bodies provided for the unison recital of the Lord's Prayer. In Brandon and Huntington Beach the proposed student prayer groups apparently involved only students, but in Trietley the program was initiated by a local minister and provided for the participation of a teacher as well as students. Other cases show

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40/ E.g., N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1980); United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

41/ The prayer composed by the New York Board of Regents was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

other forms: In the recent case of Karen B. v. Treen[42] teachers were authorized to ask whether any student wished to offer a prayer and, if no student volunteered, to offer their own prayers. In Collins v. Chandler Unified School District, supra, the student council, with the approval of school officials, selected students to open student assemblies with prayer. Another case involved daily opening assemblies in which, at school board direction, a student read the chaplain's "remarks" from the Congressional Record.[43] Given this variety in past forms of government involvement with prayer in the public schools--forms which have been held unconstitutional under the establishment clause, the question arises whether the President's proposal would legitimize all, or only some, of these forms of involvement and, if only some, which ones. Again, the future legislative history of the proposal may clarify this matter.

(4) Effect on Government Involvement With Prayer in "Other Public Institutions": As worded, the President's proposal concerns individual and group prayer not only in the public schools but also in "other public institutions," without limitation. Thus, its potential substantive scope appears considerably broader than just school prayer.

42/ 653 F. 2d 897 (5th Cir. 1981), aff'd mem. 102 S. Ct. 1267 (1982).

43/ State Board of Education v. Board of Education of Netcong, New Jersey, 108 N.J. Sup. 586, 262 A. 2d 21, aff'd 57 N.J. 172, 270 A. 2d 412 (1970), cert. den. 401 U.S. 1013 (1971).

Again, however, the nature of its effect on the legal status of prayer in public institutions other than the schools appears to depend on whether, and the extent to which, a concept of government sponsorship is read into the proposal. If no concept of government sponsorship is read into its language, it would appear not to alter existing law in this regard. If a narrow concept of government sponsorship is read into it, the proposal might do no more than reinforce those existing interpretations of the First Amendment which have upheld some government involvement with prayer in prisons, the military, and legislative assemblies. If, on the other hand, an expansive concept of government sponsorship is read into the proposal, it might legitimate government sponsorship of prayer opportunities for public employees on the job, for visitors to museums, or for applicants for public assistance.

If, as the statements of the President and the proposal's Senate sponsor indicate, the proposal is intended to legitimate some government involvement with prayer in the public schools, the same logically would seem true regarding government involvement with prayer in other public institutions. But at this point in its legislative consideration, the proposal appears ambiguous on the intended scope of this involvement.

(5) Effect of Second Sentence of Proposal: Finally, it might be noted that the second sentence of the President's proposal--"No person shall be required by the United States or by any State to participate in prayer"--appears not to change existing law. Present interpretations of the First Amendment hold that the government has no power to compel any person to declare a religious belief or to participate in exercises

involving affirmations contrary to individual belief.[44/] The effect of the second sentence, thus, appears to be to make clear that the first sentence does not alter this principle.

PAST CONGRESSIONAL ACTION ON PROPOSED CONSTITUTIONAL AMENDMENTS

Since the Supreme Court's decisions in 1962 and 1963 in Engel and Abington, every Congress has witnessed the introduction of numerous proposals to amend the Constitution with respect to this issue.[45/] The Senate has voted twice on such proposals, the House once.

In 1966 Sen. Dirksen (R-Ill.) offered a constitutional amendment on prayer as a substitute for a pending joint resolution to designate October 31 of each year as "National UNICEF Day." The operative part of his amendment provided as follows:

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

Sen. Bayh (D-Ind.) in turn proposed as a substitute for the Dirksen proposal a sense of the Congress resolution interpreting the Supreme Court's decisions as continuing to permit moments of "silent, voluntary

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44/ Torcaso v. Watkins, 367 U.S. 488 (1961); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977).

45/ Within three days of the Engel ruling, more than fity proposed constitutional amendments had been introduced, and by the end of the 88th Congress, after Abington, more than one hundred fifty had been offered. In the present Congress, in addition to the President's proposals, ten other constitutional amendments relating to prayer have been introduced--House Joint Resolutions 24, 30, 69, 123, 126, 132, 135, 164, 170, and 311.

prayer or meditation" in the schools. After extensive debate, the Senate rejected the Bayh substitute, 33-52, and then approved substituting the text of the Dirksen proposal for the pending joint resolution, 51-36. On the crucial vote on final passage, however, the Senate voted only 49-37 in favor, nine votes short of the necessary two-thirds majority.[46/]

In 1970 a prayer amendment surfaced unexpectedly in connection with the Senate's debate on the proposed Equal Rights Amendment. Sen. Baker (R-Tenn.) proposed as an amendment to the pending ERA the following:

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

After brief debate the Senate added this amendment to the ERA by a vote of 50-20.[47/] This vote was widely perceived, however, as a vote not on the merits of the prayer issue but as part of a strategy to so encumber the ERA with extraneous matters that its supporters would let it die. When the Senate also added an amendment to the ERA exempting women from the draft, this strategy was successful. Thus, both the ERA and the amendments added to it went no further in that Congress.

The controversy over government-sponsored prayer in the public schools did not result in a House vote until 1971. The bill that became the focus of House action in that year was H.J. Res. 191, sponsored by Rep. Wylie (R-Ohio),

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46/ See 112 Cong. Rec. 23063-23084, 23122-23147, 23155-23163, 23202-23207, and 23531-23556 (1966).

47/ For the debate and vote on the prayer amendment, see 116 Cong. Rec. S36478-S36505 (Oct. 13, 1970).

which was identical to the Baker amendment noted above. Because the House Judiciary Committee refused to report any of the proposed bills on the prayer issue that were referred to it, the supporters of the Wylie amendment resorted to the little-used tactic of a discharge petition, which permits a majority of the House (218 members) to discharge a committee from consideration of a bill if the bill has been pending before it for 30 days or more. After an extensive lobbying and grass-roots campaign by such groups as the Prayer Campaign Committee, the Back to God movement, and the National Association of Evangelicals, the discharge petition on Sept. 21, 1971, obtained the requisite 218 signatures to bring the Wylie amendment directly to the floor of the House for a vote.

Because House rules prevented an immediate vote on the issue, however,[48/] the debate and vote did not occur until November 8, giving both proponents and opponents of the Wylie bill time to mount intensive lobbying and grass-roots campaigns. On November 8 the House easily adopted the petition to discharge the Judiciary Committee from further consideration of H.J. Res. 191, 242-157. After lengthy debate the House then adopted by voice vote an amendment offered by Rep. Buchanan (D-Ala.) substituting the word "voluntary" for "nondenominational" and adding "meditation" as a permissible activity--an amendment that its sponsors thought would answer the primary arguments against the resolution and would eliminate the danger that a State might prescribe

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48/ The rules required that a discharge petition, once the requisite number of signatures had been obtained, had to wait seven days before being brought before the House, and then could be considered only on the second or fourth Monday of the month. Coupled with the House's holiday observance schedule, these requirements meant that the bill could not be considered before November 8.