CRS Report for Congress
Received through the CRS Web

School Prayer: The Congressional Response, 1962 - 1998

Updated December 1, 1998

(name redacted)
Legislative Attorney
American Law Division

ABSTRACT

Since 1962 school prayer has been one of the most volatile issues in American politics. As a result, Congress has repeatedly been embroiled in debates on measures ranging from constitutional amendments to appropriations riders to restore or protect devotional exercises in the schools; and it has enacted four proposals into law. This report gives an overview of the measures considered and enacted and a Congress-by-Congress review of legislative action on the subject.

School Prayer: The CongressionalResponse, 1962 - 1998

Summary

For at least a century and a half the issue of school prayer has periodically convulsed the body politic. But only in recent times — since 1962 when the Supreme Court in *Engel v. Vitale* held government sponsorship of devotional activities in the public schools to be unconstitutional — has Congress become persistently involved.

Since that decision Congress has considered a variety of measures to promote or permit devotional activities in the public schools: (1) **Constitutional amendments** — Numerous proposals have been introduced in every Congress since *Engel* to overturn or limit the Court's decisions by amending the Constitution, and numerous hearings have been held. The House has voted on a constitutional amendment twice (in 1971 and 1998), the Senate four times (in 1966, 1970, and twice in 1984). But only in the Senate vote in 1970 did such a proposal garner the two-thirds majority necessary for adoption, and that vote was perceived less as a vote on school prayer than as a vote to kill the measure to which the school prayer proposal was attached — the Equal Rights Amendment. (2) **Limitations on federal court jurisdiction** — Proposals were introduced in every Congress from the 93d through the 103d to strip the federal courts of jurisdiction over the school prayer issue. The Senate voted in favor of such a measure the first time it came up for a vote in 1979; but in 1982, 1985, and 1988 it rejected the proposal by increasingly wide margins. (3) **Equal access proposals** — Following the Supreme Court's 1981 decision in *Widmar v. Vincent* holding student-initiated religious groups to be entitled to meet on the same basis as other student-initiated groups at public colleges and universities, Congress in 1984 enacted the "Equal Access Act" extending the principle to student-initiated religious groups at the public secondary school level. (4) **Appropriations riders** — Since fiscal 1981 Congress has added a prophylactic rider (the Walker amendment) to the annual appropriations bills for the Department of Education barring funds from being used "to prevent the implementation of programs of voluntary prayer and meditation in the public schools." (5) **Cutoff of funds** — Since 1984 both the House and the Senate have voted on various amendments to cut off federal education funds from state and local educational agencies that prevent individuals from participating in voluntary prayer. In 1994 Congress enacted the Kassebaum amendment and converted several school prayer amendments to the "Goals 2000: Educate America Act" into a mandate to state and local educational agencies similar to the Walker amendment. (6) **Sense-of-the-Congress resolutions** — Measures to express Congress' views on what devotional activities remain permissible in the public schools under the Court's rulings have frequently been offered as alternatives to constitutional amendments. The Senate has rejected two such proposals (in 1966) and approved one (in 1994), but none have become law.

This report provides a Congress-by-Congress review of legislative action on the school prayer issue from 1962 through 1998.

Contents

School Prayer: The Congressional Response, 1962 - 1998

Introduction

The Supreme Court's decisions in *Engel v. Vitale*[1] in 1962 and *Abington School District v. Schempp*[2] in 1963 holding government sponsorship of prayer and Bible reading in the public schools to be unconstitutional loosed a firestorm of opposition which continues to reverberate through the body politic. Within three days of the Court's ruling in *Engel*, more than fifty constitutional amendments to override or otherwise limit that decision had been introduced in Congress; and during the 88th Congress, after *Abington*, one hundred sixty were offered. Two decades later in the 98th Congress, the issue precipitated five sets of hearings in the House and Senate, an extended Senate debate on a Presidential proposal to amend the Constitution, four committee reports, and the enactment of two statutes relevant to the issue. Three and a half decades after *Engel* the issue was still a central part of an ambitious effort in the 105th Congress to alter the Supreme Court's church-state jurisprudence by means of a constitutional amendment.

During these three and a half decades Congress has considered several types of legislation in response to the Court's school prayer decisions:

(1) Constitutional amendments. Every Congress since *Engel* has witnessed the introduction of numerous proposals to overturn or limit the Court's decisions and their judicial progeny by amending the Constitution. The proposals have taken a variety of forms and have been the subject of numerous hearings (*see* Appendix I). The Senate has voted four times on such measures (in 1966, 1970, and twice in 1984) and the House twice (in 1971 and 1998). But only in the Senate vote in 1970 did a constitutional amendment garner the two-thirds majority necessary for adoption, and that vote was perceived less as a vote on school prayer than as a vote to kill the measure to which the school prayer amendment was attached — the Equal Rights Amendment. In the 104th and 105th Congresses debate about a constitutional amendment on the subject broadened to include the question of whether other aspects of the Court's church-state jurisprudence should also be addressed, and in the 105th Congress the House voted on such a broad-based proposal (H.J.Res. 78). The vote fell substantially short of the two-thirds majority necessary for adoption, however.

(2) Limitations on federal court jurisdiction. In every Congress from the 93d through the 103d proposals were introduced to strip the federal courts of all jurisdiction over cases involving the school prayer issue. Several hearings were held

---

[1] 370 U.S. 421 (1962).

[2] 374 U.S. 203 (1963).

on the proposals, and the Senate voted in favor of such a measure in 1979. Subsequently, however, the Senate rejected such proposals by increasingly wide margins in 1982, 1985, and 1988.

(3) Equal access proposals. In 1981 in *Widmar v. Vincent*[3] the Supreme Court held that student-initiated religious groups in public universities have a constitutional right to meet in school facilities on the same basis as other student-initiated groups. That decision gave rise to Congressional proposals to ensure student-initiated religious groups at the high school level the same extracurricular rights and privileges as non-religious student groups. Several hearings were held on the subject, and in 1984 Congress enacted into law the "Equal Access Act"[4] (for the text, *see* Appendix II).

(4) Appropriations riders. Beginning in 1980 efforts were made to attach riders to the appropriations acts for the Department of Education barring the use of funds "to prevent the implementation of programs of voluntary prayer and meditation in the public schools." Neither the House nor the Senate has ever taken a recorded vote on the matter, but the rider (known as the Walker amendment) has been included in all of the measures funding the Department of Education since fiscal 1981. Efforts to attach the same rider to the appropriations bills for the Department of Justice for fiscal years 1982, 1983, and 1984 and to a supplemental appropriations bill for fiscal 1982 failed and have not been renewed, despite favorable recorded votes in both the House and the Senate on the first measure.

(5) Funds cutoff proposals. Since 1984 both the House and the Senate have voted periodically on amendments to cut off federal education funds from any state or local educational agency that prevents individuals from participating in voluntary prayer. Such proposals have been approved twice in both the House (in 1989 and 1994) and the Senate (both in 1994), and rejected once in each body (in 1984 in the House, in 1994 in the Senate.) A limited version of a funds cutoff proposal — the Kassebaum amendment — was enacted into law in 1994 as part of the "Improving America's Schools Act of 1994"[5] (for text, *see* Appendix II). In addition, Congress modified two Senate-passed funds cutoff proposals to the "Goals 2000: Educate America Act" in 1994 to bar funds under the Act from being used by state or local educational agencies "to adopt policies that prevent voluntary prayer and meditation in public schools."[6]

(6) Sense-of-the-Congress resolutions. A number of resolutions have been introduced since *Engel* that would express Congress' view on what devotional activities in the public schools remain permissible under the Court's decisions. The resolutions have sometimes been perceived as an alternative to a constitutional amendment, but they have not won extensive support. The Senate rejected two such proposals in 1966 while adopting one in 1994, but the latter proposal was deleted in conference.

---

[3] 454 U.S. 263 (1981).

[4] P.L. 98-377, Title VIII (Aug. 11, 1984); 98 Stat. 1302-04; 20 U.S.C. 4071 et seq.

[5] P.L. 103-382, Title XIV, § 14510 (Oct. 20, 1994); 108 Stat. 3518; 20 U.S.C. 8900.

[6] P.L. 103-227, Title X, § 1011 (March 31, 1994); 108 Stat. 265; 20 U.S.C. 6061.

(7) Miscellaneous. In 1979 the House voted to amend the bill creating the Department of Education to provide that one of its purposes would be "to permit in all public schools ... a daily opportunity for prayer or meditation ...," but the amendment was deleted in conference. In 1984 the House voted for an amendment providing generally that "[n]o State or local educational agency shall deny individuals ... the opportunity to participate in moments of silent prayer," but the amendment was again deleted in conference. In 1994 the House defeated a proposal barring funds in an education bill from being used by state and local educational agencies to "adopt policies to prevent voluntary prayer and meditation." In 1992 the Senate rejected a resolution urging the Supreme Court to overturn *Engel* and *Abington*.

Thus, the political furor over the school prayer issue during the past thirty-six years has not precipitated the adoption of a constitutional amendment or the elimination of federal court jurisdiction over the issue. But it has led to the enactment of the following four statutory measures:

> (1) a requirement that public secondary schools which receive federal financial assistance afford student-initiated religious, philosophical, and political groups the same opportunity to meet during the school day as is afforded other student-initiated extracurricular groups (the Equal Access Act);
>
> (2) a prophylactic rider to the appropriations acts for the Department of Education, added since fiscal 1981, providing that none of the funds "may be used to prevent the implementation of programs of voluntary prayer and meditation in the public schools";
>
> (3) an amendment to the "Goals 2000: Educate America Act" barring state and local education agencies from using funds under the Act "to adopt policies that prevent voluntary prayer and meditation in public schools"; and
>
> (4) an amendment to the "Improving America's Schools Act of 1994" cutting off federal education funds to any state or local education agency that refuses to abide by a court decision holding it in violation of the constitutional right of a student with respect to prayer in the public schools (the Kassebaum amendment).

This report provides a Congress-by-Congress summary of legislative actions relevant to the issue of the conduct of devotional activities in the public schools from 1962 through 1998, *i.e.*, from the 87th Congress through the 105th Congress.[7]

---

[7] For a detailed summary of the Supreme Court's decisions concerning religious activities in the public schools and a comprehensive narrative overview of the legal standards that govern the conduct of religious activities in the public schools, *see* CRS Report No. 93-680, *Prayer and Religion in the Public Schools: What Is, and Is Not, Constitutionally Permitted*, by (name redacted).

Congress-by-Congress Summary

87th Congress (1961-62)

On June 25, 1962, the Supreme Court handed down its decision in *Engel v. Vitale, supra*, holding the daily recitation in the New York public schools of a prayer composed by the state Board of Regents unconstitutional as a violation of the establishment of religion clause of the First Amendment. Within three days more than fifty constitutional amendments had been introduced in Congress to overturn the decision, and by the time the 87th Congress adjourned less than four months later, a total of fifty-seven constitutional amendments had been introduced. The Senate Judiciary Committee held two days of hearings on the matter,[8] but no further action was taken.

88th Congress (1963-64)

On June 17, 1963, public opinion on the issue was further aroused by the Supreme Court's decision in *Abington School District v. Schempp, supra*. That decision held unconstitutional government sponsorship of daily readings from the Bible and unison recital of the Lord's Prayer in the public schools. The resulting public furor led to the introduction of one hundred sixty constitutional amendments in the House and the Senate to overturn *Engel* and *Abington*. Rep. Emmanuel Celler (D.-N.Y.), the chairman of the House Judiciary Committee, strongly opposed the amendments and initially chose not to convene any hearings on the matter. But record amounts of constituent mail and a growing number of signatures on a discharge petition on the Becker amendment (H.J.Res. 9)[9] led him to organize and hold 18 days of hearings in April - June, 1964.

---

[8] *Prayers in Public Schools and Other Matters: Hearings Before the Senate Committee on the Judiciary*, 87th Congress, 2d Session (1962).

[9] H.J.Res. 9 had been introduced by Rep. Becker (R.-N.Y.) at the opening of the 88th Congress. But efforts to forge a consensus with other Members subsequently led him to introduce H.J.Res. 693 as well, and it was agreed that if the discharge petition succeeded, that language would be substituted for H.J.Res. 9. H.J.Res. 693 provided as follows:

> Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.
>
> Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.
>
> Nothing in this Article shall constitute an establishment of religion.

The discharge petition on H.J.Res. 9 ultimately garnered 167 of the 218 signatures necessary to take the legislation away from the Judiciary Committee.

During those hearings many established religious groups — the National Council of Churches, the Synagogue Council of America, the United Presbyterian Church, the Baptist Joint Committee on Public Affairs, the Methodist Church, the Episcopal Church, the Union of American Hebrew Congregations, the Seventh Day Adventists, *etc*. — came out in support of the Supreme Court's decisions and in opposition to proposals that would tamper with the First Amendment in order to overturn them. Other groups — the Catholic Archdiocese of New York City, the Committee for the Preservation of Prayer and Bible Reading in Public Schools, Project Prayer, the Constitutional Prayer Foundation, the National Association of Evangelicals, Project America, the American Legion, *etc*. — testified in favor of a constitutional amendment. But the net effect of the hearings seemed to be to dissipate the public fervor for immediate action, and no other legislative activity on the matter occurred in the 88th Congress.

89th Congress (1965-66)

The number of constitutional amendments introduced to overturn the Court's decisions declined to 55 in the 89th Congress, but the issue came to a vote in the Senate for the first time. On March 22, 1966, Senator Dirksen (R.-Ill.) proposed a constitutional amendment on prayer (S.J.Res. 148) and announced his intention to bring the measure to a vote sometime during the session. The operative section 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.

A subcommittee of the Senate Judiciary Committee held six days of hearings on the proposal,[10] but took no further action. On September 19, 1966, therefore, Sen. Dirksen proposed his constitutional amendment as a substitute for a minor pending bill designating October 31 of each year as National UNICEF Day. Senator Bayh (D.-Ind.) in turn proposed as a substitute for the Dirksen proposal a sense-of-the-Congress resolution simply affirming that the Supreme Court's decisions continue to permit moments of "silent, voluntary 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.[11]

Two weeks later the issue surfaced again in the Senate. Sen. Hartke (D.-Ind.) proposed an amendment to a pending education bill providing as follows:

---

[10] *School Prayer: Hearings on S.J.Res. 148 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 89th Congress, 2d Session (1966).

[11] For the debate and vote on the Dirksen and Bayh proposals, see 112 CONG. REC. 23063-23084, 23122-23147, 23155-23163, 23202-23207, 23531-23556 (1966).

> It is the sense of the Congress that (1) notwithstanding the recent Supreme Court decisions relating to the reading of the Bible and the offering of prayer in the public schools, any public school system if it so chooses may provide time during the school day for prayerful meditation if no public official prescribes or recites the prayer which is offered; and (2) providing public school time for prayerful meditation in no way violates the Constitution because each individual participating therein would be permitted to pray as he chooses, but that such practice is consonant with the free exercise of religion protected by the First Amendment to the Constitution.

After brief debate in which the proposal was criticized by both opponents and supporters of the Supreme Court's decisions, the amendment was tabled by voice vote.[12]

90th Congress (1967-68)

In this Congress 56 constitutional amendments and 3 sense-of-the-Congress resolutions were proposed, but no further legislative action occurred.

91st Congress (1969-70)

In the 91st Congress the number of constitutional amendments proposed surged to 96, and in 1970 a floor amendment and debate on prayer surfaced unexpectedly in connection with the Senate's consideration of the proposed Equal Rights Amendment (ERA). On October 13, 1970, 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.[13] This vote was widely perceived, however, as a vote not solely 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, neither the ERA nor the amendments added to it went any further in that Congress.

92nd Congress (1971-72)

The number of constitutional amendments proposed on the school prayer issue dropped to 41 in the 92nd Congress, but the issue came to a vote in the House for the first time in 1971. The focus of House action was H.J.Res. 191 sponsored by Rep. Wylie (R.-Ohio), an amendment identical to the Baker Amendment that had been

---

[12] For the debate on the Hartke Amendment, see 112 CONG. REC. 25485-25488 (Oct. 6, 1966).

[13] For the debate and vote on the Baker amendment, see 116 CONG. REC. 36478-36505 (Oct. 13, 1970).

attached to the ERA in 1970 (*see* previous section). Because the House Judiciary Committee refused to report any of the proposed measures 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.[14] 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 September 21, 1971, obtained the requisite 218 signatures to take the Wylie Amendment from the Judiciary Committee and bring it to the floor of the House for a vote.

House rules, however, prevented the debate and vote from occurring until November 8, 1971,[15] 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 religious activity. Thus, as amended, the Wylie proposal provided as follows:

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

Notwithstanding these changes, however, the House vote on final passage fell twenty-eight votes short of the necessary two-thirds majority of the 402 members voting, 240-162.[16]

93rd-95th Congresses (1973-1978)

During these three Congresses the number of constitutional amendments introduced gradually declined, from 42 in the 93rd to 35 in the 94th to 29 in the 95th. In 1973 a Senate subcommittee held brief additional hearings on the school prayer issue,[17] and in 1974 Sen. Helms (R.-N. Car.) first introduced his bill to remove all

---

[14] A discharge petition 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 by signing a petition to that effect in the well of the House.

[15] 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.

[16] For the debate and vote on the Wylie amendment, see 117 CONG REC. 39886-39958 (Nov. 8, 1971).

[17] *Hearings on School Prayer Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee*, 93rd Congress, lst Session (1973) (unpublished).

jurisdiction over the issue from the federal courts.[18] But no further Congressional action on the issue occurred until late in the decade.

96th Congress (1979-80)

In contrast to the quietude of the previous three Congresses on the issue, a spate of floor amendments on the school prayer issue emerged in the 96th Congress. None involved a constitutional amendment. Instead, the focus shifted to Sen. Helms' proposal to limit the jurisdiction of the federal courts and to limitations on the new Department of Education, one of which was enacted into law.

Federal court jurisdiction. The Senate acted first. On April 5, 1979, Sen. Helms offered his proposal to deny the federal courts all jurisdiction over the issue as an amendment to S. 210, a bill to create a Cabinet-level Department of Education. His amendment provided as follows:

> Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any state statute, ordinance, rule, regulation, or any part thereof, or arising out of an Act interpreting, applying, or enforcing a state statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings.
> ....
> Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under Section 1259 of this Title.[19]

After brief debate the Senate, in votes that appeared to catch the proponents of S. 210 by surprise, rejected a motion to table the Helms amendment, 43-43, and adopted the proposal, 47-37.[20] After some parliamentary maneuvering and a more extensive debate, however, the Senate on April 9 deleted the amendment from the Department of Education bill, 53-40,[21] and added it instead to a less major bill concerning the Supreme Court's jurisdiction (S. 450) by a vote of 51-40.[22]

Subsequently in the House, S. 450 became the subject of a discharge petition campaign and of extensive hearings by a subcommittee of the House Judiciary Committee.[23] But the bill died at the end of the 96th Congress without coming up for a vote either in subcommittee or committee or on the House floor.

---

[18] Sen. Helms' bill was introduced as S. 3981, 93rd Congress, 2d Session (1974).

[19] See 125 CONG. REC. 7577 (April 5, 1979).

[20] *Id.* at 7577-7581 (April 5, 1979).

[21] *Id.* at 7649-7657 (April 9, 1979).

[22] *Id.* at 7631-7644 (April 9, 1979).

[23] *Prayer in Public Schools and Buildings — Federal Court Jurisdiction: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 96th Congress, 2d Session (1980).

Department of Education. The House did vote on two other proposals during the 96th Congress, however. On June 11, 1979, the House added, by a vote of 255-122, an amendment to its version of the bill to create a Department of Education (H.R. 2444) stating one of the Department's purposes to be

> to permit in all public schools providing an elementary or secondary education a daily opportunity for prayer or meditation, participation in which would be on a voluntary basis.

As originally proposed by Rep. Walker (R.-Pa.), the amendment stated the Department's purpose to be "to promote ... a daily opportunity for prayer or meditation ...." But prior to adopting the amendment, the House accepted by voice vote an amendment by Rep. Erdahl (R.-Minn.) changing the word "promote" to "permit". The Walker amendment was deleted in conference, however, and thus was not part of the Department of Education bill as enacted into law.[24]

Appropriations rider. The second amendment **was** enacted into law and subsequently has been added to every Department of Education appropriations bill. On August 27, 1980, Rep. Walker proposed on the House floor the following amendment to the fiscal 1981 appropriations bill for the Department of Education (H.R. 7998):

> No funds appropriated under this Act may be used to prevent the implementation of programs of voluntary prayer and meditation in the public schools.

Rep. Walker stated during debate that the Department of Education had previously taken no action in this regard and that there were no funds in the bill for that purpose for fiscal 1981. But he termed the amendment necessary as "a preventive measure" to assure that the Department could not initiate any such action. After brief debate, the House adopted the measure by voice vote.[25] The Senate did not act on the Department's appropriation bill prior to adjournment, but Congress included in the continuing resolution it adopted to fund the Department and other agencies whose appropriations had not been enacted for fiscal 1981 the following similar provision, applicable not only to the Department of Education but also to the Departments of Labor and of Health and Human Services[26]:

> Notwithstanding any other provision of this joint resolution except Section 102, none of the funds made available by this joint resolution for programs and activities for which appropriations would be available in H.R. 7998, entitled the Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1981, as passed the House of Representatives on August 27, 1980, shall be used to prevent the implementation of programs of voluntary prayer and meditation in the public schools.

---

[24] For the debate and vote on Rep. Walker's proposal, *see* 125 CONG. REC. 14226-14233 (June 11, 1979).

[25] 126 CONG. REC. 23499-23500 (Aug. 27, 1980).

[26] P.L. 96-536, § 108 (Jan. 3, 1981); 94 Stat. 3170.

As enacted, the continuing resolution, including this provision, was effective not for the entire fiscal year but only until June 5, 1981.

97th Congress (1981-82)

The pace of activity on the school prayer issue increased further in the 97th Congress, with President Reagan proposing a constitutional amendment, the Senate having an extensive debate on Sen. Helms' court jurisdiction bill, and Rep. Walker attempting to extend the rider attached to the Department of Education appropriation to the appropriation for the Department of Justice. Again, however, the only measures enacted were prophylactic riders to the two appropriations acts for the Department of Education.

President Reagan's constitutional amendment. In the most significant development, President Reagan became the first President to propose a constitutional amendment on school prayer since the *Engel* and *Abington* decisions. On May 17, 1982, he recommended to the 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.[27]

The Senate Judiciary Committee held hearings on the President's proposal,[28] but no further action ensued.

Federal court jurisdiction. The Senate did have an extensive debate on Sen. Helms' proposal to limit the jurisdiction of the federal courts over school prayer. Introduced since 1974 as an alternative to the cumbersome process of amending the Constitution on this issue and adopted by the Senate in the previous Congress, the proposal, together with similar initiatives on abortion and busing, became the focal point of political debate on the prayer issue in the 97th Congress.

In 1981 subcommittees in both the Senate and the House held hearings on the proposals to limit federal court jurisdiction over prayer, abortion, and busing[29] but took no further action. On August 18, 1982, Sen. Helms offered his amendment to eliminate the original jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court over cases concerning "voluntary prayers in public

---

[27] The proposed language was introduced as S.J.Res. 199 by Senators Thurmond and Hatch and as H.J.Res. 493 by Representatives Kindness, Lott, and Beard. See 128 CONG. REC. 10371 (May 18, 1982) and 11780 (May 25, 1982), respectively.

[28] *Proposed Constitutional Amendment To Permit Voluntary Prayer: Hearings on S.J.Res. 199 Before the Senate Committee on the Judiciary,* 97th Congress, 2d Session (1982).

[29] *Constitutional Restraints Upon the Judiciary: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Congress, 1st Session (1981).
Statutory Limitations on Federal Jurisdiction: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Congress, 1st Session (1981) (unpublished).

schools and public buildings" to a pending debt-limit increase bill (H.J.Res. 520),[30] along with another amendment to restrict abortion. Senators Weicker (R.-Conn.) and Baucus (D.-Mont.), in turn, offered amendments to Sen. Helms' proposals[31] and together with Sen. Packwood (R.-Ore.) engaged periodically over the following five weeks in "extended debate" on the prayer and abortion issues.

During the course of that debate the Senate refused, 38-59, to table the Weicker-Baucus amendments[32]; refused as well to table the Helms prayer proposal, 47-53[33]; and refused on seven occasions to invoke cloture and bring further debate on the amendments to a close.[34] Finally, Sen. Helms moved to recommit the debt ceiling bill to committee with instructions to report back a clean bill with his prayer

---

[30] 128 CONG. REC. 21835 (Aug. 18, 1982). Sen. Helms' prayer amendment, titled the "Voluntary School Prayer Act of 1982," provided as follows:

> Notwithstanding the provisions of Sections 1253, 1254, and 1257 of this chapter, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any state statute, ordinance, rule, regulation, or any part thereof, or arising out of any act interpreting, applying, or enforcing a state statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings.
>
> Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under Section 1259 of this Title.

[31] 128 CONG. REC. 21840 (Aug. 18, 1982). Sen. Weicker's amendment provided as follows:

> Nothing in this Act shall be interpreted to limit in any manner the Department of Justice in enforcing the Constitution of the United States nor shall anything in this Act be interpreted to modify or diminish the authority of the courts of the United States to enforce fully the Constitution of the United States.

Sen. Baucus' amendment provided as follows:

> It is the sense of the Congress that the federal courts must remain open to litigants whose claims arise out of the federal Constitution. Furthermore, it is emphatically the province and duty of the judicial department to say what the law is and Article 5 of the Constitution specifically provides a mechanism to respond to the Constitutional decisions of the Supreme Court.

[32] 128 CONG. REC. 21840-41 (Aug. 18, 1982).

[33] 128 CONG. REC. 24585 (Sept. 22, 1982).

[34] The first three cloture votes were to end debate on Sen. Helms' abortion amendment; the last four were to end debate on his proposal concerning Federal court jurisdiction over prayer cases. The votes all fell short of the 60 votes required for cloture, and were, in order, as follows: 41-47, 45-35, 50-44, 50-39, 53-47, 54-46, and 53-45. See 128 CONG. REC. 23092 (Sept. 9, 1982), 23255 (Sept. 13, 1982), 23617 (Sept. 15, 1982), 24169 (Sept. 20, 1982), 24471 (Sept. 21, 1982), 24583 (Sept. 22, 1982), and 24776 (Sept. 23, 1982), respectively.

amendment included, but the Senate tabled the motion, 51-48,[35] and adopted instead a motion to recommit with instructions to report the bill back unencumbered by any amendments, 79-16.[36] Thus, Sen. Helms' initiative to eliminate federal court jurisdiction over prayer was defeated.

Department of Education appropriations riders. The 97th Congress did re-enact Rep. Walker's appropriations riders on school prayer, however, although again without taking any recorded votes on the matter. Initially, it continued in effect the limitation enacted by the 96th Congress on the appropriations for the Departments of Labor, Health and Human Services, and Education through the rest of fiscal 1981[37] and the first part of fiscal 1982.[38] For the rest of fiscal 1982[39] and for fiscal 1983,[40] however, Congress reverted to the original language that Rep. Walker had proposed in the previous Congress and limited its applicability to the Department of Education. The limitation provided as follows:

> No funds appropriated under the Act may be used to prevent the implementation of programs of voluntary prayer and meditation in the public schools.

Department of Justice appropriations riders. Rep. Walker also offered this language as a limitation on the appropriations for the Department of Justice for fiscal 1982 and for fiscal 1983, but his proposal was not enacted. Again, as in the original debate regarding the limitation when offered to the Department of Education appropriation, Rep. Walker stated that the Department of Justice had previously

---

[35] 128 CONG. REC. 24777 (Sept. 23, 1982).

[36] *Id.* at 24792.

[37] P.L. 97-12, Title IV, § 401 (June 5, 1981); 95 Stat. 95.

[38] Congress funded those departments for the first part of fiscal 1982 by two continuing resolutions. P.L. 97-51, § 101 (Oct. 1, 1981); 95 Stat. 958 provided funds through Nov. 20, 1981, subject to the conditions contained in the Departments' 1981 appropriation. P.L. 97-85 (Nov. 23, 1981); 95 Stat. 1098 simply extended the effective date of that continuing resolution to Dec. 15, 1981.

[39] The third continuing resolution for fiscal 1982 (P.L. 97-92, § 101 (Dec. 15, 1981); 95 Stat. 1183) provided funding authority through March 31, 1982, and incorporated by reference the language that had been included in the Department of Education appropriations bill for fiscal 1982 (H.R. 4560) as it had been reported to, and adopted by, the House (see H. Rept. No. 97-251 and 127 CONG. REC. 23406 (Oct. 6, 1981), respectively) and as reported to the Senate (S. Rept. No. 97-268). The fourth continuing resolution for fiscal 1982 (P.L. 97-161 (March 31, 1982); 96 Stat. 22) simply extended the third one through the remainder of fiscal 1982.

[40] The first continuing resolution for fiscal 1983 provided funding authority through Dec. 17, 1982, and incorporated the Walker language by reference to the third continuing resolution of the previous fiscal year. P.L. 97-276, § 101(b) (Oct. 1, 1982); 96 Stat. 1187. After the Walker language had been included in the regular appropriations bill for the Department of Education (H.R. 7205) as reported by the House Appropriations Committee (H. Rept. No. 97-894), as adopted by the House (128 CONG. REC. 28184 (Dec. 1, 1982)), and as reported by the Senate Appropriations Committee (S. Rept. No. 97-680), it was also included as part of the "Department of Education Appropriation Act, 1983" enacted as part of the continuing resolution funding various government agencies through the rest of fiscal 1983. P.L. 97-377, § 101(e) (Dec. 21, 1982); 96 Stat. 1901.

engaged in no activity to prevent the implementation of programs of voluntary prayer and meditation and that it did not contemplate engaging in such activity. But he said the limitation was necessary to remove the "chilling effect" the mere possibility of such action by the Justice Department was having on school districts that might initiate such programs. After brief debate, the House, after first appearing to reject the proposed limitation on a voice vote, adopted it as part of the Department of Justice's fiscal 1982 appropriation on a recorded vote of 333-54.[41] In the Senate, however, the limitation was deleted by the Senate Appropriations Committee,[42] restored by vote of the full Senate (70-12) on a motion by Sen. Hollings (D.-S. Car.),[43] and then subjected to repeated amendment and the threat of "extended debate" on the Senate floor.[44] As a consequence, the Department's appropriation bill for fiscal 1982 was never enacted, and the Department was funded for fiscal 1982 by means of a continuing resolution that did not include the Walker amendment.[45]

When the Department's regular appropriation bill for fiscal 1983 came to the House floor on December 9, 1982, the House again added the Walker Amendment to it, this time by voice vote.[46] But the Senate did not act on that bill, and once again the Department was funded by a continuing resolution that did not include the Walker amendment.[47]

Other appropriations riders. Finally, Rep. Walker proposed similar language as an amendment to the regular supplemental appropriations bill for fiscal 1982

---

[41] 127 CONG. REC. 6051 (Sept. 9, 1981).

[42] *See* H.R. 4169 as reported on Oct. 30, 1981 (S. Rept. No. 97-265).

[43] 127 CONG. REC. 27490 (Nov. 16, 1981). The vote was on a motion to table the Committee's deletion of the limitation.

[44] See 127 CONG. REC. 27490-97 (Nov. 16, 1981); 27705-06 (Nov. 17, 1981); and 27895-96 (Nov. 18, 1981). The Senate debate proceeded as follows: Sen. Weicker (R.-Conn.) proposed to amend the limitation so that it would bar the use of funds only to "prevent implementation of constitutional programs of voluntary prayer and meditation in the public schools." That amendment was tabled, 51-34. Similarly, a motion to reconsider that vote was tabled, 54-36. The following day the Senate voted 93-0 to accept an amendment by Sen. Weicker adding to the limitation the words "except that nothing in this Act shall be interpreted as the establishment of religion or prohibiting the free exercise thereof." Sen. Helms (D.-N. Car.) then proposed adding the words "provided further, that nothing in this provision shall be interpreted in derogation of the limitation on expenditures stated herein," and on November 18 the Senate adopted the Helms proviso, 58-38. Subsequently, a cloture motion was introduced on the bill, but it failed to get the 60 votes necessary (the vote was 59-35) and the bill was then dropped. See 127 CONG. REC. 30904 (Dec. 11, 1981).

[45] P.L. 97-92, § 101 (h) (Dec. 18, 1981); 95 Stat. 1190.

[46] 128 CONG. REC. 29678 (Dec. 9, 1982). The Department was funded for the first part of fiscal 1983 (until Dec. 17, 1982) by a continuing resolution. P.L. 97-276 (Oct. 1, 1982). But because the Walker language had not been included in the Department's regular appropriations bill as reported by either the House Appropriations Committee (H. Rept. 97-721 (Aug. 10, 1982)) or the Senate Appropriations Committee (S. Rept. 97-584 (Sept. 27, 1982)), it was not incorporated by reference in that continuing resolution.

[47] P.L. 97-377, § 101 (Dec. 21, 1982); 96 Stat. 1871.

(H.R. 6863). After very brief debate, however, the House rejected the amendment by voice vote.[48]

98th Congress (1983-84)

The debate about the conduct of devotional activities in the public schools intensified even further during the 98th Congress. In the most significant action Congress enacted into law an equal access requirement designed to allow student-initiated religious groups to hold meetings in public secondary schools during extracurricular time. In addition, it continued to include the Walker limitation in the appropriations acts for the Department of Education. But the Senate, after an extended debate, rejected a modified version of President Reagan's proposed constitutional amendment on school prayer, and the House rejected an amendment to a pending education bill to deny federal funds to public schools which prevent individuals from participating in prayer. The House, instead, added to the bill a requirement that the schools permit individuals to participate in silent prayer, but that requirement was deleted from the bill in conference and thus was not enacted into law.

Constitutional amendments. The Senate Judiciary Committee held hearings on proposed constitutional amendments on the subject in 1983,[49] and in early 1984 it became the first Congressional committee to report a constitutional amendment on the school prayer issue. But the Committee was divided on the issue, and as a result it reported **two** constitutional amendments — S.J.Res. 73 and S.J.Res. 212, both without recommendation.[50] S.J.Res. 73 was a modified version of President Reagan's initiative on the matter and provided for organized vocal prayer in the public schools and other public institutions, 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. Neither the United States nor any state shall compose the words of any prayer to be said in public schools.[51]

S.J.Res. 212, in turn, was an initiative of Sen. Hatch (R.-Utah) and concerned silent prayer and equal access, as follows:

---

[48] 128 CONG. REC. 18639-41 (July 29, 1982).

[49] *Voluntary School Prayer Constitutional Amendment: Hearings on S.J.Res. 73 and S.J.Res. 212 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 98th Congress, 1st Session (1983).

[50] S. Rept. No. 98-347 (Jan. 24, 1984), reporting S.J.Res. 212, and S. Rept. No. 98-348 (Jan. 24, 1984), reporting S.J.Res. 73. The Committee also reported a third proposal to provide statutory protection to student religious groups in public elementary and secondary schools. See *infra*, at 17.

[51] President Reagan's proposal had included only the first two sentences. *See Constitutional Amendment Concerning Prayer: Message from the President of the United States*, H.R. Doc. No. 26, 98th Cong., 1st Sess. (1983).

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

On March 2, 1984, S.J.Res. 73 was made the pending business in the Senate,[52] and for the next two and a half weeks that body engaged in an extensive debate on the issue.[53] During the course of the debate several alternatives to the President's proposal were proffered by various Senators.[54] But no consensus developed behind any of the alternatives, and in the end the Senate took up-or-down votes on only two proposals. On March 15 the Senate tabled a substitute proposal offered by Sen. Dixon (D.-Ill.) concerning silent prayer and equal access, 81-15.[55] And on March 20 a majority of the Senate voted in favor of S.J.Res. 73, 56-44,[56] but that vote was eleven votes short of the two-thirds majority necessary for the measure to be adopted.

Equal access. A consensus did develop in both the House and the Senate around the equal access concept, however. In 1981 the Supreme Court in *Widmar v. Vincent, supra,* had held accommodation of student-initiated religious groups at the public university level to be constitutionally mandated by the free speech clause of the First Amendment. But both before and after this decision, several state and federal appellate courts had held it to be **un**constitutional for public **secondary**

---

[52] 130 CONG. REC. 4288 (March 2, 1984).

[53] See 130 CONG. REC. 4318-4345 (March 5, 1984); 4578-4592 (March 6, 1984); 4737-4770 and 4747-4759 (March 7, 1984); 4886-4900 (March 8, 1984); 5152-5157 (March 12, 1984); 5264-5322 (March 13, 1984); 5418-5450 (March 14, 1984); 5712-5714 and 5723-5734 (March 15, 1984); 5833-5839 (March 19, 1984); and 5895-5922 (March 20, 1984). Supporters in the House engaged in an all-night "prayer vigil" in support of the amendment. See 130 CONG. REC. 4465-4523 (March 5, 1984).

[54] *See, e.g.,* the proposals offered by Senators Baker (R.-Tenn.) And Gorton (R.-Wash.), respectively, at 130 CONG. REC. 4609 (March 6, 1984) and 4897 (March 8, 1984).

[55] 130 CONG. REC. 5733 (March 15, 1984). Sen. Dixon's proposal was worded as follows:

> SECTION 1. Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or silent reflection in public schools. No person shall be required by the United States or by any state to participate in such prayer or reflection. Neither the United States nor any state shall compose any prayer or encourage any particular form of prayer or reflection.
>
> SECTION 2. The authorization by the United States or any state of equal access to the use of public facilities by student voluntary religious groups shall not constitute an establishment of religion.
>
> 130 CONG. REC. S2458 (daily ed. March 8, 1984).

[56] 130 CONG. REC. 5619 (March 20, 1984).

schools to accommodate meetings of student-initiated religious groups on school property during the school day.[57]

Congressional interest in this situation was first evidenced by a bill introduced by Sen. Hatfield (R.-Ore.) late in the 97th Congress to provide statutory protection to student-initiated religious groups in public secondary schools.[58] In the 98th Congress interest in the issue surged, as eleven equal access measures were introduced[59] and four sets of hearings on the issue were held in both the House and the Senate.[60] In early 1984 committees in both the Senate and the House favorably reported equal access measures for floor action.[61] When the committee-reported bill in the House (H.R. 5345) was brought up on May 15, it received a substantial majority, 270-151.[62] But H.R. 5345 was not adopted at that time, because the measure had been brought up under a procedure (suspension of the rules) requiring a two-thirds majority for adoption, and the vote fell 11 votes short of that margin.

The measure that became law originated in the Senate as a floor amendment to a House-passed education bill (H.R. 1310). Proffered by Senators Denton (R.-Ala.) and Hatfield (R.-Ore.), the measure provided that public secondary schools which receive federal financial assistance and which permit one or more noncurriculum-related student groups to meet on school premises during noninstructional time may not deny a similar opportunity to meet to any student-initiated group due to the religious, political, philosophical, or other content of the speech to be exercised at such meetings. After the measure was modified during the Senate debate to make

---

[57] Johnson v. Huntington Beach Union High School District, 137 Cal. Rptr. 43, 68 Cal. App. 3d 1, *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 (1978); Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert. den*. 454 U.S. 1123 (1981); Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982), *cert. den*. 459 U.S. 1155 (1983). A similar decision by the United States Court of Appeals for the Third Circuit was rendered just the day before the final House vote on the equal access legislation. See Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir., 1984), *vacated for want of jurisdiction*, 475 U.S. 534 (1986).

[58] S. 2928, 97th Congress, 2d Session (Sept. 17, 1982).

[59] *See* H.R. 2732, H.R. 4172, H.R. 4996, H.R. 5345, H.R. 5439, S. 425, S. 815, S. 1059, and three Senate floor amendments — 130 CONG. REC. 9321 (April 12, 1984); 15053 (June 6, 1984); and 19400 (June 27, 1984).

[60] *Equal Access: A First Amendment Question: Hearings Before the Senate Committee on the Judiciary*, 98th Congress, 1st Session (April 28 and August 3, (1983).

Hearings on the Equal Access Act (H.R. 2732) Before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Congress, 1st Session (June 16 and October 18-20, 1983).

Religious Speech Protection Act (H.R. 4996): Hearing Before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Congress, 2d Session (March 28, 1984).

Hearing on the Secondary School Equality of Access Act (H.R. 5439) Before the Subcommittee on Constitutional Rights of the House Judiciary Committee, 98th Congress, 2d Session (April 26, 1984)(unpublished).

[61] *See* S. Rept. No. 98-357 (Feb. 22, 1984) and H. Rept. No. 98-710 (April 26, 1984).

[62] 130 CONG. REC. 12214-40, 12263-64 (May 15, 1984).

clear that it in no way impinged on the disciplinary authority of school officials, the Senate adopted it, 88-11.[63]

The House vote on the measure came only after considerable parliamentary maneuvering. When H.R. 1310 as amended came back to the House, Rep. Perkins (D.-Ky.) moved that conferees on the bill be appointed. But Speaker O'Neill announced that he had already referred the equal access portion of the bill to both the Judiciary Committee and the Education and Labor Committee for their consideration until August 6.[64] Rep. Perkins chose not to wait for that date to arrive, however. On July 25 he moved that the House suspend the rules, discharge the two committees from further consideration of the Senate amendment, and concur in that amendment. After one hour of debate, the House did so, 337-77.[65] Subsequently, the House concurred in the rest of H.R. 1310 as amended by the Senate and sent the bill to the President, who signed it into law on August 11, 1984.[66] (*See* Appendix II for the text of the Equal Access Act.)

Appropriations riders. In addition to enacting the "Equal Access Act,"[67] the 98th Congress continued to include language barring the use of funds to "prevent the implementation of programs of voluntary prayer and meditation in the public schools" in the acts appropriating funds for the Department of Education for fiscal 1984[68] and for fiscal 1985,[69] although not without controversy. However, when

---

[63] For the Senate debate and vote, see 130 CONG. REC. 19211-19252 (June 27, 1984).

[64] 130 CONG. REC. 19770 (June 28, 1984).

[65] *Id.* at 20932-20951 (July 25, 1984).

[66] P.L. 98-377, Title VIII (Aug. 11, 1984); 98 Stat. 1302-04; 20 U.S.C. 4071 *et seq*.

[67] Although the measure did not specifically concern school prayer, it might be noted that Congress also included in P.L. 98-377 a new magnet schools desegregation authorization that contained the following provision concerning secular humanism:

> Grants under this title may not be used for ... courses of instruction the substance of which is secular humanism.
> P.L. 98-377, Title VII, § 709 (Aug. 11, 1984); 98 Stat. 1302; 20 U.S.C. 4059.

This provision was part of a Senate floor amendment sponsored by Sen. Hatch (R-Utah) and others to add a magnet schools authorization to a pending education bill (H.R. 1310) but was not specifically debated by the Senate prior to the adoption of that amendment on June 6, 1984. 130 CONG. REC. 15027-36 (June 6, 1984). In the House the amendment was only briefly discussed before that body concurred in the Senate amendments on July 25, 1984. *Id.* at 20952, 20956 (July 25, 1984). Nonetheless, the provision became law when President Reagan signed the bill on August 11, 1984.

[68] This language was initially incorporated by reference in the continuing resolution funding various government agencies for the first part of fiscal 1984. P.L. 98-107, § 101(a)(1)(Oct. 1, 1983); 97 Stat. 733. On the Department's regular appropriation bill, the limitation was included in the bill as reported by the House Appropriations Committee (H. Rept. 98-357 (Sept. 16, 1983)), and as adopted by the House (129 CONG. REC. 25425 (Sept. 22, 1983)); but it was stricken by the Senate Appropriations Committee (S. Rept. No. 98-247 (Sept. 28, 1983)) and was not included in the bill as adopted by the Senate (129 CONG. REC. 27021 (Oct. 4, 1983)). The language was restored by the conference

(continued...)

similar language was proposed in the House as an amendment to the fiscal 1984 appropriations for the Department of Justice, the amendment was ruled out of order, and that ruling was sustained on a voice vote.[70]

Funds cutoff proposal. Finally, on July 26, 1984, the House also rejected a floor amendment sponsored by Rep. Coats (R.-Ind.) to cut off federal aid to any state or local education agency which had "a policy of denying or which effectively prevents participation in prayer in public schools by individuals on a voluntary basis," 194-215. In its place the House, first by voice vote and then by recorded

---

[68](...continued)
committee, however, (H. Conf. Rept. No. 98-442 (Oct. 19, 1983)), and thus was part of the Department's fiscal 1984 appropriation as finally enacted into law. P.L. 98-139, Title III, § 307 (Oct. 31, 1983); 97 Stat. 895.

[69] This language was initially incorporated by reference in a series of continuing resolutions funding the Department of Education and various other agencies and departments for fiscal 1985. See P.L. 98-441, § 101(a) (Oct. 3, 1984), 98 Stat. 1699; P.L. 98-453 (Oct. 5, 1984), 98 Stat. 1731; P.L. 98-455 (Oct. 6, 1984), 98 Stat. 1747; P.L. 98-461 (Oct. 10, 1984); 98 Stat. 1814; and P.L. 98-473, 101(a)(Oct. 12, 1984), 98 Stat. 1837. On the Department's regular appropriations bill (H.R. 6028), the language was included in the bill as reported by the House Appropriations Committee (H. Rept. No. 98-911 (July 26, 1984)) and as adopted by the House (130 CONG. REC. 21872-73 (Aug. 1, 1984)); but it was stricken by the Senate Appropriations Committee (S. Rept. No. 98-544 (June 29, 1984)). Sen. Helms (R-N. Car.) offered the Walker language as a floor amendment, but the Senate accepted the amendment by voice vote only after Sen. Helms modified it to read as follows: "None of the funds appropriated under this Act shall be used to prevent individual voluntary prayer and meditation in the public schools." 130 CONG. REC. 26681, 26684-88 (Sept. 25, 1984). After the House conferees refused to accept the Senate's modification (H. Rept. No. 98-1132 (Oct. 3, 1984), at 35), the House insisted on its version of the language and the Senate acceded. See 130 CONG. REC. 31404, 31304 (Oct. 10, 1984). Thus, the Walker language was again included in the Department's appropriation act for fiscal 1985 as signed into law on November 8, 1984. P.L. 98-619, § 307 (Nov. 8, 1984); 98 Stat. 3329.

[70] 129 CONG. REC. 24624-25, 24646-47 (Sept. 19, 1983).

votes of 378-29 and 356-50,[71] substituted the following language proposed by Rep. Gunderson (R.-Wisc.):

> No State or local educational agency shall deny individuals in public schools the opportunity to participate in moments of silent prayer. Neither the United States nor any State or local educational agency shall require any person to participate in prayer or influence the form or content of any prayer in such public schools.

This amendment was deleted in conference, however,[72] and thus was not part of the bill as enacted into law.[73]

99th Congress (1985-86)

On June 4, 1985, the Supreme Court in *Wallace v. Jaffree*[74] held unconstitutional an Alabama statute providing for a daily moment of silence in the public schools "for meditation or voluntary prayer." Nonetheless, Congressional action on the school prayer issue slowed considerably in the 99th Congress. During the first session a subcommittee of the Senate Judiciary Committee held hearings on a proposed constitutional amendment to overturn *Wallace*,[75] and the Committee favorably reported S.J.Res. 2, as follows:

---

[71] This series of votes resulted from the complex parliamentary situation that developed on the House floor during consideration of Rep. Coats' amendment. Rep. Coats' amendment was a first-degree amendment to the pending education bill (H.R. 11) and provided as follows:

> No funds shall be made available under any applicable program to any State or local educational agency which has a policy of denying or which effectively prevents participation in prayer in public schools by individuals on a voluntary basis. Neither the United States nor any State nor any local educational agency shall require any person to participate in prayer or influence the form or content of any prayer in such public schools.
> 130 CONG. REC. 21231 (July 26, 1984).

Rep. Gunderson proposed to change the first sentence of this amendment to the language noted in the text. When the House accepted the Gunderson amendment by voice vote, Rep. Walker (R.-Pa.) proposed another second-degree amendment which, in slightly modified form, incorporated the original language of the Coats amendment. The House rejected that amendment, 194-215. But Rep. Hunter (R.-Cal.) had proposed an identical amendment as a substitute for the Coats amendment. Before a vote could occur on that substitute, however, Rep. Gunderson again offered his language as an amendment to the Hunter substitute. As a result, the House in rapid order voted to accept the Gunderson amendment to the Hunter substitute, 378-29; substituted the amended Hunter amendment for the original Coats amendment, as amended by voice vote; and finally adopted the substitute amendment, 356-50. *See* 130 CONG. REC. 21231-21256 (July 26, 1984).

[72] H. Rept. No. 98-1128 (Oct. 2, 1984), at 53.

[73] P.L. 98-473 (Oct. 12, 1984); 98 Stat. 1837.

[74] 472 U.S. 38 (1985).

[75] *Constitutional Amendment Relating to School Prayer: Hearing on S.J.Res. 2 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary,* 99th Congress, lst Session (1985).

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of silent prayer or reflection.[76]

But no floor debate or vote occurred on the proposal in either the first or second session. Also during the first session, the Senate on September 10, 1985, engaged in a desultory debate on Sen. Helms' proposal to limit the jurisdiction of the federal courts over the school prayer issue (S. 47), but decisively rejected the proposal, 62-36.[77]

Congress did, however, continue to enact the Walker rider to the appropriations acts for the Department of Education. Although no votes or debates occurred on the proposal, the matter was not entirely free from controversy. In the first session the rider was included in the version of the fiscal 1986 appropriations bill for the Department (H.R. 3424) as reported to,[78] and adopted by, the House[79]; but it was **not** included in the version reported to,[80] and adopted by, the Senate.[81] The rider was restored in the House-Senate conference, however, and H.R. 3424 was enacted into law.[82]

The same pattern developed during the second session on the Department's fiscal 1987 appropriations bill (H.R. 5233). The Walker rider was included in the version reported to,[83] and adopted by, the House[84]; but it was again deleted in the version reported to,[85] and adopted by, the Senate.[86] As in 1985, the rider was restored by the House-Senate conference committee,[87] and the conference agreement

---

[76] S. Rept. No. 99-165, 99th Congress, 1st Session (Oct. 29, 1985).

[77] 131 CONG. REC.. 23210 (Sept. 10, 1985). For the full debate, *see* 131 CONG. REC. 23174-23210 (Sept. 10, 1985).

[78] H.Rept. No. 99-289, 99th Congress, lst Session (Sept. 26, 1985).

[79] 131 CONG. REC. 25710 (Oct. 2, 1985).

[80] S. Rept. No. 99-151, 99th Congress, 1st Session (Oct. 4, 1985).

[81] 131 CONG. REC. 28391 (Oct. 22, 1985).

[82] P.L. 99-178, § 306 (Dec. 12, 1985). Prior to enactment of the appropriations bill, the Department had been funded by means of several continuing resolutions which incorporated by reference the terms and conditions, including the Walker rider, of the fiscal 1985 appropriation for the Department. See P.L. 99-103, § 101 (b)(1) (Sept. 30, 1985); P.L. 99-154 (Nov. 14, l985); and P.L. 99-179 (Dec. 13, 1985).

[83] H. Rept. No. 99-711, 99th Cong., 2d Sess. (July 24, 1986).

[84] 132 CONG. REC. 18302-03 (July 31, 1986).

[85] S. Rept. No. 99-408, 99th Cong., 2d Sess. (Aug. 15, 1986).

[86] 132 CONG. REC. 22582 (Sept. 10, 1986).

[87] H. Conf. Rept. No. 99-960, 99th Cong., 2d Sess. (Oct. 2, 1986).

was enacted into law by reference in the continuing resolution by which much of the government was funded for fiscal 1987.[88]

100th Congress (1987-88)

Congressional action on school prayer declined further in the 100th Congress. During the second session Sen. Helms again offered his proposal to eliminate the jurisdiction of the federal courts over the issue, this time as an amendment to the pending "Fair Housing Amendments Act" (H.R. 1158). Again, after brief debate the Senate on August 1, 1988, rejected the proposal, 71-20.[89]

The only other action on the issue, again with neither debate nor vote, was the continued inclusion of the Walker rider on the appropriations acts for the Department of Education. This time there was no controversy over the rider. For fiscal 1988 the rider was included in the Department's appropriations bill (H.R. 3058) from its initial approval by the House Appropriations Committee through its adoption by the Senate,[90] and was eventually included in the massive continuing resolution by which the Department and other federal agencies were funded for fiscal 1988.[91] For fiscal 1989 the rider was included in the Department's appropriation bill (H.R. 4783) from its inception through final enactment into law.[92]

101st Congress (1989-90)

Action on school prayer continued to be slight in the 101st Congress. Congress did continue to include the Walker amendment in the Department of Education

---

[88] P.L. 99-500, § 101(i) (Oct. 18, 1986); 100 Stat. 1783-287. Prior to the enactment of this continuing resolution, the Department had been funded for the first few days of fiscal 1987 by a series of continuing resolutions which maintained the Walker rider. See P.L. 99-434, § 101(a) (Oct. 1, 1986), 100 Stat. 1076; P.L. 99-464, § 101(e) (Oct. 9, 1986), 100 Stat. 1187; P.L. 99-465 (Oct. 11, 1986), 100 Stat. 1189; and P.L. 99-491 (Oct. 16, 1986), 100 Stat. 1239.

[89] 134 CONG. REC. 19728-48 (Aug. 1, l988).

[90] H.R. 3058 was reported with the Walker rider included by the House Appropriations Committee on July 30, 1987 (H. Rept. No. 100-257), adopted by the House on August 5, 1987 (133 CONG. REC. 22519-20), reported by the Senate Appropriations Committee on October 1, l987 (S. Rept. No. 100-189), and adopted by the Senate on October 14, 1987 (133 CONG. REC. 27805).

[91] Prior to the enactment of the Department's appropriation bill as part of the final continuing resolution (P.L. 100-202, § 101(h) [Dec. 22, 1987]; 101 Stat. 1329-283), funding for the Department had been provided by a series of continuing resolutions, all of which continued the Walker rider in effect. See P.L. 100-120, § 101(a)(1) (Sept. 30, 1987), 101 Stat. 789; P.L. 100-162 (Nov. 10, 1987), 101 Stat. 903; P.L. 100-193 (Dec. 16, 1987), 101 Stat. 1310; and P.L. 100-197 (Dec. 20, 1987), 101 Stat. 1314.

[92] H.R. 4783 was reported with the Walker rider included by the House Appropriations Committee on June 10, 1988 (H. Rept. No. 100-689), passed by the House on June 15, 1988 (134 CONG. REC. 14468), reported by the Senate Appropriations Committee on June 23, 1988 (S. Rept. No. 100-399), adopted in the Senate on July 27, 1988 (134 CONG. REC. 19059), reconciled in a conference committee (H. Conf. Rept. No. 100-880), and signed into law as P.L. 100-436 on September 20, 1988.

appropriations acts for fiscal years 1990 and 1991, again without controversy or debate.[93] In addition, the House adopted, by a vote of 269-135, a funds cutoff amendment by Rep. Dannemeyer to the "Applied Technology Education Amendments of 1989" (H.R. 7) providing as follows:

> No funds shall be made available under any applicable program in this Act to any state or local educational agency which has a policy of denying or which effectively prevents participation in prayer in public schools by individuals on a voluntary basis.[94]

The provision was not included in the Senate version of the bill, however, and it was dropped in conference.[95]

102d Congress (1991-92)

In the 102d Congress action on school prayer continued to be minimal. Sen. Helms proposed a sense-of-the-Senate amendment to a pending education bill (S. 2) that would have urged the Supreme Court to reverse its holdings in *Engel* and *Abington*, as follows:

> It is the sense of the Senate that when the Supreme Court considers the case of *Weisman v. Lee*, it should use that opportunity to reverse the Supreme Court's earlier holdings in the *Engel v. Vitale* and the *Abington School District v. Schempp* cases so that voluntary prayer, Bible reading, or religious meetings will be permitted in public schools or public buildings to the extent that student participation in such activities is not required by school authorities.

---

[93] For fiscal 1990 the Walker amendment was included in the Department's appropriation bill as reported by the House Appropriations Committee (H. Rept. 101-354 (Nov. 14, 1989)), as adopted by the House (135 CONG. REC. 28996 (Nov. 15, 1989)), as adopted by the Senate (135 CONG. REC. 29343 (Nov. 16, 1989), and as signed into law (P.L. 101-166, Title III, § 306 (Nov. 21, 1989); 103 Stat. 1179, 1185), after a previous version had been vetoed by President Bush for unrelated reasons (H.R. 2990, vetoed on Oct. 21, 1989). For the first month and a half of the fiscal year the Department had been funded through a series of continuing resolutions that incorporated the Walker amendment by reference. See P.L. 101-100, § 101 (Sept. 29, 1989), 103 Stat. 638; P.L. 101-130 (Oct. 26, 1989), 103 Stat. 775; and P.L. 101-154 (Nov. 15, 1989), 103 Stat. 934.

For fiscal 1991 the Walker amendment was again included in the Department's appropriation bill as reported by the House Appropriations Committee (H. Rept. 101-591 (July 12, 1990)), as adopted by the House (136 CONG. REC. 18314 (July 19, 1990)), as reported by the Senate Appropriations Committee (S. Rept. 101-516 (Oct. 10, 1990), as adopted by the Senate (136 CONG. REC. 28874 (Oct. 12, 1990)), and as enacted into law (P.L. 101-517, Title III, § 305 (Nov. 5, 1990), 104 Stat. 2210, 2216). For the first month of the fiscal year the Department was funded by a series of continuing resolutions that incorporated the Walker amendment by reference. See P.L. 101-403, § 101 (Oct. 1, 1990), 104 Stat. 867; P.L. 101-412 (Oct. 9, 1990), 104 Stat. 894; P.L. 101-444 (Oct. 19, 1990), 104 Stat. 1030; P.L. 101-461 (Oct. 25, 1990), 104 Stat. 1075; and P.L. 101-407 (Oct. 28, 1990), 104 Stat. 1086.

[94] 135 CONG. REC. 8679-83 (May 9, 1989).

[95] *See* H. Conf. Rept. 101-660, 101st Cong., 2d Sess. (Aug. 2, 1990).

After brief debate, the Senate rejected the amendment, 38-55[96]; and subsequently, the Court in *Lee v. Weisman*[97] reaffirmed *Engel* and *Abington* by holding a public high school's sponsorship of an invocation and benediction by a rabbi at its graduation ceremony to be unconstitutional. In addition, the Walker amendment continued to be included in the Department of Education appropriations acts for fiscal 1992 and fiscal 1993, without controversy or debate.[98]

103d Congress (1993-94)

The pace of activity on school prayer increased considerably in the 103d Congress, and two measures were enacted into law. The central focus of legislative debate and action was a funds cutoff amendment first proposed by Sen. Helms to the "Goals 2000: Educate America Act" (S. 1150, H.R. 1804) and later debated again as an amendment to the bill reauthorizing the Elementary and Secondary Education Act (H.R. 6). But the amendment was not enacted as part of either bill. Instead, in the Goals 2000 legislation Congress enacted a measure forbidding funds from being used by state and local educational agencies "to adopt policies that prevent voluntary prayer and meditation in public schools." In the ESEA reauthorization it enacted an alternative and more limited funds cutoff provision (the Kassebaum amendment). The 103d Congress also continued to include the Walker amendment in the appropriations measures for the Department of Education.

Goals 2000. On February 3, 1994, Sen. Helms proposed the following amendment to the "Goals 2000: Educate America Act" (S. 1150):

> No funds made available through the Department of Education under this Act, or any other Act, shall be available to any state or local educational agency which has a policy of denying or which effectively prevents participation in, constitutionally protected prayer in public schools by individuals on a voluntary basis. Neither the United States nor any state nor any local educational agency

---

[96] 138 CONG. REC. S 234-255 (daily ed. Jan. 23, 1992).

[97] 505 U.S. 577 (1992).

[98] For fiscal 1992 the Department was initially funded through a series of continuing resolutions that incorporated the Walker amendment by reference. See P.L. 102-109, § 101 (Sept. 30, 1991), 105 Stat. 551; P.L. 102-145, § 101 (Oct. 28, 1991), 105 Stat. 968; P.L. 102-163 (Nov. 15, 1991), 105 Stat. 1048. In the Department's regular appropriations bill the Walker amendment was included in the versions adopted by the House and the Senate (137 CONG. REC. H 10925 and S 17782 (daily ed. Nov. 22, 1991) and enacted into law (P.L. 102-170, Title III, § 305 (Nov. 16, 1991), 105 Stat. 1128, 1136), after a previous version had been vetoed by President Bush for unrelated reasons (H.R. 2707, vetoed on Nov. 19, 1991). For fiscal 1993 the Department was initially funded by means of a continuing resolution that incorporated the Walker amendment by reference. See P.L. 102-376, § 101 (Oct. 1, 1992); 106 Stat. 1311. The Walker amendment was then included at every stage of Congress' consideration of the Department's regular appropriations bill. See H. Rept. 102-708 (July 23, 1992), 138 CONG. REC. H 6753 (daily ed. July 28, 1992)(House passage), S. Rept. 102-397 (Sept. 10, 1992), 138 CONG. REC. S 13982 (Sept. 18, 1992)(Senate passage), and P.L. 102-394, Title III, § 305 (Oct. 6, 1992), 106 Stat. 1813, 1820.

> shall require any person to participate in prayer or influence the form or content of any constitutionally protected prayer in such public schools.[99]

The words "constitutionally protected" were not in the amendment as initially proposed by Sen. Helms but were added by him after an extended colloquy with Sen. Packwood (R.-Ore.). With the addition of those words, the Senate adopted the amendment after brief debate, 75-22.[100]

But the Senate also adopted two other amendments to the Goals 2000 legislation having to do with school prayer. Both were proffered as alternatives or correctives to the Helms amendment. The first was a sense-of-the-Senate resolution concerning silent meditation offered by Sen. Danforth (R.-Mo.):

> It is the sense of the Senate that local educational agencies should encourage a brief period of daily silence for students for the purpose of contemplating their aspirations; for considering what they hope and plan to accomplish that day; for considering how their own actions of that day will affect themselves and others around them, including their schoolmates, friends and families; for drawing strength from whatever personal, moral or religious beliefs or positive values they hold; and or such other introspection and reflection as will help them develop and prepare them for achieving the goals of this bill.[101]

The Senate adopted the Danforth amendment, 78-8.[102] The second amendment was offered by Sen. Levin (D.-Mich.) and provided as follows:

> Notwithstanding any other provision of this Act, no funds made available through the Department of Education under this Act, or any other Act, shall be denied to any State or local educational agency because it has adopted a constitutional policy relative to prayer in public school.[103]

That amendment the Senate also adopted, by voice vote.[104]

The House did not have any provisions relating to school prayer in its version of the Goals 2000 legislation. But prior to the conference on the bill, Rep. Duncan (R.-Tenn.) offered a motion to instruct the House conferees to accept the Helms amendment. After Rep. Ford (D.-Mich.), the floor manager of the bill, stated he accepted the motion, the House adopted it, 367-55.[105]

Nonetheless, none of the three amendments that had been adopted by the Senate appeared in the final version of the Goals 2000 legislation. Instead, the conferees reported a single provision modeled on the Walker amendment, as follows:

---

[99] 140 CONG. REC. S 727 (daily ed. Feb. 3, 1994).

[100] *Id.* at S 756.

[101] *Id*. at S 736.

[102] *Id.* at S 841 (daily ed. Feb. 4, 1994).

[103] *Id.* at S 910.

[104] *Id.* at S 1118 (daily ed. Feb. 8, 1994).

[105] *Id.* at H 648-50 (daily ed. Feb. 23, 1994).

> No funds authorized to be appropriated under this Act may be used by any State or local educational agency to adopt policies that prevent voluntary prayer and meditation in public schools.[106]

This compromise led to vigorous protests in both the House and the Senate, but the protests proved unavailing. In the House Rep. Duncan proposed a motion to recommit the bill to conference with instructions to the House conferees to accept the Helms amendment, but the motion was defeated, 195-232.[107] In the Senate Sen. Helms led a filibuster against the conference report, but the Senate invoked cloture, 62-23, and adopted the report, 63-22.[108] Thus, the compromise language became law.[109]

ESEA reauthorization. A similar debate occurred on the bill to reauthorize the Elementary and Secondary Education Act, the "Improving America's Schools Act of 1994" (H.R. 6), but this time the House took the initiative. On March 21, 1994, Rep. Sam Johnson (R.-Tex.) proposed an amendment essentially identical to the Helms amendment.[110] Rep. Williams (D.-Mont.) proposed substituting language similar to the compromise in the conference report on the Goals 2000 legislation[111];

---

[106] H. Conf. Rept. 103-446, Title X, § 1011 (March 21, 1994). The conference report explained the provision as follows:

> Students do not shed their right to religious liberty at the schoolhouse gate, just as they do not lose other constitutional rights. In addition, private reflection is valuable in permitting children to draw strength from their personal values and beliefs so that they are prepared to learn and grow. Children would do well to take time each day to consider what they hope to accomplish and how their actions will affect themselves and others around them.
>
> This section promotes these important values by providing that funds made available under this Act may not be used to adopt policies designed to prevent students from engaging in constitutionally protected prayer or silent reflection. The conferees do not intend that this section confer new legal rights. Instead, the section respects our long tradition of local control over educational decisions, while ensuring that funds made available under this Act are not spent preventing the exercise of cherished constitutional rights.

Id. at 204.

[107] 140 CONG. REC. 6091-92 (March 23, 1994).

[108] *Id*. at 6982-89 (March 25, 1994).

[109] P.L. 103-227, Title X, § 1011 (March 31, 1994); 108 Stat. 265; 20 U.S.C. 6061.

[110] 140 CONG. REC. H 1740 (daily ed. March 21, 1994). The only change from the Helms amendment was the addition of the prefatory words "(n)notwithstanding any provision of law."

[111] *Id.* at H 1741. Rep. Williams' amendment provided as follows:

> No funds authorized to be appropriated under this Act may be used by any State or local education agency to adopt policies to prevent voluntary prayer and meditation.

but his substitute was defeated, 171-239,[112] and the Johnson amendment was adopted, 345-64.[113]

When the Senate version of the reauthorization bill came up for consideration, Sen. Helms offered his amendment again,[114] and Sen. Kassebaum (R.-Kan.) offered a more limited alternative that would cut off federal education funds only if a court found that a school agency had violated a student's constitutional rights with respect to school prayer and then willfully refused to abide by the court's order, as follows:

> Any State or local education agency that is adjudged by a Federal court of competent jurisdiction to have willfully violated a Federal court order mandating that such local educational agency remedy a violation of the constitutional right of any student with respect to prayer in public schools, in addition to any other judicial remedies, shall be ineligible to receive Federal funds until such time as the local educational agency complies with such order. Funds that are withheld under this section shall not be reimbursed for the period during which the local educational agency was in willful noncompliance.[115]

The Senate rejected the Helms amendment, 47-53, and then adopted the Kassebaum amendment, 93-7.[116]

Once again, a motion to instruct the House conferees to insist on the House provision with respect to school prayer was offered, this time by Rep. Gunderson (R.-Wis.). And once again, after Rep. Ford stated he accepted the motion, the House adopted it, 369-55.[117] But the conference committee adopted the Kassebaum amendment with only slight change instead[118]; and, as had been true on the Goals 2000 bill, this led to both a motion to recommit in the House and a filibuster in the Senate. The House rejected the motion to recommit, 184-215,[119] and the Senate invoked cloture, 75-24.[120] Thus, the Kassebaum amendment was enacted into law.[121]

---

[112] *Id.* at H 1749-50.

[113] *Id.* at H 1750-51.

[114] 140 CONG. REC. 18207 (July 27, 1994).

[115] *Id.* at 18204.

[116] *Id.* at 18229-30.

[117] *Id.* at H 9249-53 (daily ed. Sept. 20, 1994).

[118] H. Conf. Rept. 103-761, Title XIV, § 14510 (Sept. 28, 1994), reprinted at 140 CONG. REC. H 1009 *et seq*. (daily ed. Sept. 28, 1994). The conferees modified the Kassebaum amendment by inserting the words "under this Act" after "Federal funds."

[119] 140 CONG. REC. H10407 (daily ed. Sept. 30, 1994).

[120] *Id*. at S 14154 (daily ed. Oct. 5, 1994).

[121] P.L. 103-382, Title XIV, § 14510 (Oct. 20, 1994); 108 Stat. 3518; 20 U.S.C. 8900.

Appropriations riders. The 103d Congress continued to include the Walker amendment as a condition on the appropriations for the Department of Education for fiscal 1994 and fiscal 1995, without controversy or debate.[122]

104th Congress (1995-96)

The Republican ascendancy in the 104th Congress promised to give renewed vigor to the school prayer issue. But a split among the proponents of a constitutional amendment on the issue prevented any legislation other than the Walker amendment from moving forward. Nonetheless, political activity on the subject was intense, as committees in the House and Senate held three sets of hearings, various Members and interest groups sought to broaden the debate to include other church-state issues, and President Clinton entered the fray with a significant initiative.

Constitutional amendments. School prayer had not been part of the "Contract with America" on which the House Republicans had based much of their 1994 campaign effort. But soon after the election gave the Republicans control of both the House and the Senate for the first time in more than 40 years, Speaker-to-be Newt Gingrich (R.-Ga.) promised that the House would vote on a constitutional amendment on school prayer no later than July 4, 1995; and he charged Rep. Istook (R.-Ok.) with taking the lead on the matter. But the content of such an amendment quickly proved problematic, as proponents both within and without the Congress vigorously disagreed over what the amendment needed to address. Some wanted the amendment to focus primarily on overturning the Supreme Court's jurisprudence regarding public aid to religious institutions, while others wanted it primarily to address recognition of the nation's religious heritage, including school prayer. Hearings were held in both the House and the Senate on the general subject of religious liberty,[123] but no consensus on a possible amendment emerged.

In the meantime, the Clinton Administration took steps to pre-empt the debate by clarifying the legal status of religion in the public schools. In April, 1995,

---

[122] For fiscal 1994 the Department was initially funded by means of a continuing resolution that incorporated the Walker amendment by reference. See P.L. 103-88, § 101 (Sept. 30, 1993); 107 Stat. 977. On the Department's regular appropriations bill, the Walker amendment was included at every stage of the bill's passage through Congress, without controversy. See H. Rept. 103-156 (June 24, 1993); 139 CONG. REC. H 4334 (daily ed. June 30, 1993)(House passage); S. Rept. 103-143 (Sept. 15, 1993); 139 CONG. REC. S 12671 (Sept. 19, 1993); and P.L. 103-112, Title III, § 304 (Oct. 21, 1993), 107 Stat. 1100, 1108.

For fiscal 1995, for the first time in over a decade, the Department's regular appropriations bill was enacted prior to the beginning of the fiscal year. The Walker amendment was included at every stage of the bill's passage. See H. Rept. 103-553 (June 21, 1994); 140 CONG. REC. H 5339 (daily ed. June 29, 1990) (House passage); S. Rept. 103-318 (July 20, 1994); 140 CONG. REC. S 11080 (daily ed. August 10, 1994) (Senate passage); and P.L. 103-333, Title III, § 304 (Sept. 30, 1994).

[123] *See Religious Liberty and the Bill of Rights: Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong., 1st Sess. (1995) and *The State of Religious Liberty in America: Hearings Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. (1995).

Secretary of Education Riley joined with three dozen groups from across the political spectrum in a declaration on "Religion in the Public Schools: A Joint Statement of Current Law." In July, 1995, President Clinton made an address on the subject and directed that the Secretary send a version of that document to every school district in the country. In August, 1995, Secretary Riley did so.[124]

Eventually, proponents of a constitutional amendment introduced competing proposals. In November, 1995, Rep. Hyde (R.-Ill.) introduced H.J.Res. 121 (the "Religious Equality Amendment"),[125] and Rep. Istook introduced H.J.Res. 127 (the "Religious Liberties Amendment"). Both proposals differed significantly from earlier initiatives on the matter. H.J.Res. 121 sought to add a general nondiscrimination standard with respect to religion to the Constitution[126] and as such seemed to address the issue of public aid to religious institutions more than school prayer. H.J.Res. 127 also contained a nondiscrimination requirement but, in addition, specifically addressed student-sponsored prayer as well as the subject of governmental "acknowledgments" of the nation's religious heritage.[127]

Efforts to forge a consensus amendment continued throughout the 104th Congress. Late in the second session House Majority Leader Armey introduced H.J.Res. 184 as a possible compromise,[128] and that proposal was the general focus of a hearing before a House subcommittee.[129] In the last month a statutory proposal

---

[124] The text of the guidelines, as revised in 1998, can be found on the Department's web site — www.ed.gov.

[125] Sen. Hatch (R.-Utah) subsequently introduced Rep. Hyde's proposal in the Senate as S.J.Res. 45.

[126] H.J.Res. 121/S.J.Res. 45 provided as follows:

> Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.

[127] H.J.Res. 127 provided as follows:

> To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.

[128] H.J.Res. 184 provided as follows:

> In order to secure the right of the people to acknowledge and serve God according to the dictates of conscience, neither the United States nor any State shall deny any person equal access to a benefit, or otherwise discriminate against any person, on account of religious belief, expression, or exercise. This amendment does not authorize government to coerce or inhibit religious belief, expression, or exercise.

[129] *Legislation To Further Protect Religious Freedom: Hearing Before the* (continued...)

by Rep. Hoke drew some attention.[130] But none of the proposals moved out of committee or became the subject of debate and vote on the House or Senate floors.[131]

Federal court jurisdiction. For the first time since the 93d Congress, no proposals were introduced to eliminate federal court jurisdiction over the issue of devotional activities in the public schools.

Appropriations riders. The 104th Congress continued to include the Walker amendment as a condition on the appropriations for the Department of Education for fiscal 1996 and fiscal 1997, without controversy or debate.[132]

105th Congress (1997-98)

In the 105th Congress the consensus that had eluded proponents of a constitutional amendment in the 104th Congress was achieved; and an energetic effort was made to enact H.J.Res. 78, a broad-based proposal concerning not only school prayer but other aspects of the law of church and state. The House Judiciary Committee became the first House committee to report a constitutional amendment

---

[129](...continued)
Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess. (1996) (unprinted).

[130] H.R. 4129 and H.R. 4130, both introduced by Rep. Hoke, authorized a Justice Department hotline and civil suits by students to enforce the following rights designated in the bill:

> Students in public schools —
>
> (1) have the same right to engage in individual or group prayer and religious discussions in or connected with school as they do to engage in other comparable activity;
>
> (2) may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions;
>
> (3) have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities; and
>
> (4) may display or otherwise communicate religious messages, including on items of clothing, to the same extent they are permitted to display or communicate other messages.

[131] A number of other proposals had also been introduced in the House and the Senate (*see*, *e.g.*, House Joint Resolutions 10, 16, 19, 67, 94, 161, and 186; Senate Joint Resolutions 6, 7, 24, and 33; H.R. 2034 and H.R. 2669; and S. 27 and S. 319) and two of the measures (S.J.Res. 7 and H.R. 27) had been placed directly on the Senate calendar. But no action occurred on them.

[132] For fiscal 1996 the Department was funded by a series of continuing resolutions which incorporated the Walker amendment by reference. See P.L. 104-31 (Sept. 30, 1995), 109 Stat. 278; P.L. 104-54 (Nov. 19, 1995), 109 Stat. 540; P.L. 104-56 (Nov. 20, 1995), 109 Stat. 548; P.L. 104-94 (Jan. 6, 1996), 110 Stat. 25; and P.L. 104-99 (Jan. 26, 1996); 110 Stat. 26. For fiscal 1997 the Walker amendment was explicitly included in the Department's appropriation bill which was enacted as part of an omnibus appropriations measure. See P.L. 104-208, Title III, § 303 (Sept. 30, 1996).

relating to school prayer, and the House voted on the matter for the first time since 1971. But the vote fell far short of the two-thirds majority necessary for the proposal's adoption. Congress did, however, continue to enact the Walker amendment as part of the appropriations measures for the Department of Education.

Constitutional amendment. On May 8, 1997, Rep. Istook introduced H.J.Res. 78. The proposal blended together the elements that had been the subject of controversy among proponents in the previous Congress and provided as follows:

> To secure the people's right to acknowledge God according to the dictates of conscience: The people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed. The Government shall not require any person to join in prayer or other religious activity, initiate or designate school prayers, discriminate against religion, or deny equal access to a benefit on account of religion.

A subcommittee of the House Judiciary Committee held a hearing on the proposal on July 22, 1997,[133] and reported a modified version to the full committee on a party-line vote of 8-4 on October 28, 1997. The full committee reported the measure to the House on May 19, 1998, without further change, again on a party-line vote of 16-11.[134]

As modified, H.J.Res. 78 provided as follows:

> To secure the people's right to acknowledge God according to the dictates of conscience: Neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed. Neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion.

In both the subcommittee and full committee Democrats had proposed various amendments to the proposal, including ones to delete the parts concerning access to benefits and recognition of religious heritage, to add a civil rights proviso, to substitute "freedom of religion" for "acknowledge God," and to substitute the current language of the First Amendment. But all were defeated, largely on party-line votes.

The week prior to the consideration of H.J.Res. 78 on the House floor on June 4, 1998, President Clinton reissued a slightly revised version of the guidelines on religious expression in the public schools that had been sent to all of the nation's school districts in 1995 and devoted a radio address to the matter.[135] During floor consideration, only two amendments were proposed. Rep. Bishop (D.-Ga.) first

---

[133] *Hearing on Proposing an Amendment to the Constitution of the United States Restoring Religious Freedom Before the Subcommittee on the Constitution of the House Judiciary Committee*, 105th Cong., 1st Sess. (July 22, 1997) (unprinted).

[134] H.Rept.No. 105-543, 105th Cong., 2d Sess. (May 19, 1998).

[135] The text of the President's radio message can be found on the White House web site — www.whitehouse.gov — and the text of the revised guidelines can be found at the Department of Education's web site — www.ed.gov.

offered an amendment to substitute "freedom of religion" for "acknowledge God" in the preamble of H.J.Res. 78. That was rejected, 419-6.[136] His second amendment addressed the funding part of the initiative and proposed to substitute the words "or otherwise compel or discriminate against religion" for the language "discriminate against religion, or deny equal access to a benefit on account of religion." That amendment was also rejected, 399-23.[137] On the final vote on passage of H.J.Res. 78, the House voted in favor, 223-203[138]; but that vote fell 61 votes short of the two-thirds majority necessary for adoption.[139]

Appropriations riders. Both the House and the Senate continued to include the Walker amendment barring the use of Department of Education funds "to prevent the implementation of programs of voluntary prayer and meditation in the public schools." The condition was attached to the Department's appropriation for both fiscal 1998 and fiscal 1999, without controversy.[140]

Cutoff of funds. Sen. Helms (R.-N.Car.) introduced two bills — S. 41 and S. 185 — to bar the Department of Education from funding "any State or local educational agency that has a policy of denying, or that effectively prevents participation in, constitutional prayer in public schools by individuals on a voluntary basis." The first bill was placed directly on the Senate calendar without referral to committee, but no further action was taken on either bill.

---

[136] *Id.* at H4108-09.

[137] *Id.* at H4109-10.

[138] *Id.* at H4111.

[139] The debate on H.J.Res. 78 can be found at 144 CONG. REC. H4069-H4112 (daily ed. June 4, 1998).

[140] For fiscal 1998 both the House and the Senate included the Walker amendment in their versions of the appropriations bill for the Department of Education (H.R. 2264, S. 1061), and the condition was included in the version enacted into law. *See* P.L. 105-78 (Nov. 13, 1997). For fiscal 1999 the same pattern prevailed. Both the House and the Senate included the condition in their versions of the Department's appropriation bill for fiscal 1999 (H.R. 4274, S. 2440), and the condition was included in the Department's appropriation enacted as part of an omnibus bill at the end of the session. *See* P.L. 105-177 (Oct. 21, 1998).

Appendix I

Congressional Hearings Related to School Prayer

Constitutional Amendments

Senate

Prayers in Public Schools and Other Matters: Hearings before the Senate Committee on the Judiciary, 87th Congress, 2d Session (1962).

School Prayer: Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Congress, 2d Session (1966).

Hearings on School Prayer Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 93rd Congress, 1st Session (1973) (unpublished).

Proposed Constitutional Amendment To Permit Voluntary Prayer: Hearings Before the Senate Committee on the Judiciary, 97th Congress, 2d Session (1982).

Voluntary School Prayer Constitutional Amendment: Hearings on S.J.Res. 73 and S.J.Res. 212 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Congress, 1st Session (1983).

Constitutional Amendment Relating to School Prayer: Hearing on S.J.Res. 2 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 99th Congress, 1st Session (1985).

The State of Religious Liberty in America: Hearings Before the Senate Committee on the Judiciary, 104th Congress, 1st Session (1995).

House

School Prayers: Hearings Before the Committee on the Judiciary of the House of Representatives, 88th Congress, 2d Session, Vol. I-III (1964).

Religious Liberty and the Bill of Rights: Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Congress, 1st Session (1995).

Legislation To Further Protect Religious Freedom: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Congress, 2d Session (1996) (unprinted).

Hearing on H.J.Res. 78 "Proposing an Amendment to the Constitution of the U.S. Restoring Religious Freedom" Before the Subcommittee on the Constitution of the House Judiciary Committee, 105th Cong., 1st Sess. (1997) (unprinted).

Limitations on Federal Court Jurisdiction

Senate

Constitutional Restraints Upon the Judiciary: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Congress, 1st Session (1981).

House

Prayers in Public Schools and Buildings—Federal Court Jurisdiction: Hearings on S. 450 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Congress, 2d Session (1980).

Statutory Limitations on Federal Jurisdiction: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Congress, 1st Session (1981) (unprinted).

Equal Access Proposals

Senate

Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Committee on the Judiciary, 98th Congress, 1st Session (1983).

House

Hearings on the Equal Access Act (H.R. 2732) Before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Congress, 1st Session (1983).

Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Congress 2d Session (1984).

Hearing on the Secondary School Equality of Access Act (H.R. 5439) Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 98th Congress, 2d Session (April 26, 1984).

Appendix II

Statutes Relating to School Prayer

(1) Condition Attached to the Department of Education Appropriations Act (the Walker Amendment) Since Fiscal 1981

No funds appropriated under this Act may be used to prevent the implementation of programs of voluntary prayer and meditation in the public schools.

(2) Equal Access Act (P.L. 98-377, Title VIII (Aug. 11, 1984); 98 Stat. 1302-04; 20 U.S.C. 4071 *et seq*.)

Short Title

SEC. 801. This Title may be cited as "The Equal Access Act."

Denial of Equal Access Prohibited

SEC. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does no materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof —

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Definitions

SEC. 803. As used in this title —

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Severability

SEC. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

Construction

SEC. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

(3) Goals 2000: Educate America Act (P.L. 103-227, Title X, § 1011 (March 31, 1994); 108 Stat. 265; 20 U.S.C. 6061):

No funds authorized to be appropriated under this Act may be used by any State or local educational agency to adopt policies that prevent voluntary prayer and meditation in public schools.

(4) Improving America's Schools Act of 1994 (The Kassebaum Amendment) (P.L. 103-382, Title XIV, § 14510 (October 20, 1994); 108 Stat. 3518; 20 U.S.C. 8900:

> Any State or local educational agency that is adjudged by a Federal court of competent jurisdiction to have willfully violated a Federal court order mandating that such local educational agency remedy a violation of the constitutional right of any student with respect to prayer in public schools, in addition to any other judicial remedies, shall be ineligible to receive Federal funds under this Act until such time as the local educational agency complies with such order. Funds that are withheld under this section shall not be reimbursed for the period during which the local educational agency was in willful noncompliance