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Opinion No. 05-063

Constitutionality of Senate Joint Resolution 105 and House Joint Resolution 122

QUESTION

Do the provisions of Senate Joint Resolution 105 or House Joint Resolution 122 violate the First Amendment as interpreted by *Engel v. Vitale* or any other constitutional provisions?

OPINION

No.

ANALYSIS

Senate Joint Resolution ("SJR") 105 designates May 5, 2005, as "Tennessee Day of Prayer" to coincide with the "National Day of Prayer" and urges "all Tennesseans to observe 'Tennessee Day of Prayer' in accordance with their respective faiths." House Joint Resolution ("HJR") 122 designates May 15, 2005, as a "Day of Special Prayer for Widows" and "ask[s] that all Tennesseans pause to remember and empathize with the plight of our bereaved sisters." You have asked whether the provisions of these resolutions violate the First Amendment as interpreted by the United States Supreme Court in *Engel v. Vitale*, or any other provision of the Constitution.

Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), is a case involving the Establishment Clause of the First Amendment to the United States Constitution. In that case, the Board of Education of a local school district in New York had directed the district's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each day:

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

This daily procedure had been adopted on the recommendation of the State Board of Regents, which had composed the prayer, recommended it, and published it as part of their "Statement on Moral and Spiritual Training in the Schools." The parents of several students brought suit challenging both the state law authorizing the school district to direct the use of prayer in public schools and the district's regulation ordering the recitation of the prayer, on the grounds that they violated the Establishment Clause of the First Amendment. The United States Supreme Court held that New York's program

of daily classroom invocation of God's blessings, as prescribed in prayer promulgated by its Board of Regents, was a "religious activity," and use of the public school system to encourage recitation of such prayer was a practice wholly inconsistent with the Establishment Clause, even though the prayer was non-denominational, and students were not required to participate over their or their parents' objections. 370 U.S. at 424-425.

The Establishment Clause simply states that "Congress shall make no law respecting an establishment of religion." The United States Supreme Court has explained that the purpose of this Clause, as well as the Free Exercise Clause of the First Amendment, is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). At the same time, that Court has recognized that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id*. As such, the Supreme Court has consistently held that not every law that makes a reference to prayer has the effect of encouraging or advancing religion. *See Lynch v. Donelly*, 465 U.S. 668, 104 S.Ct. 1355, 70 L.Ed.2d 604 (1984); *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed.2d (1952); *Allen v. Consolidated City of Jacksonville, Fla.*, 719 F.Supp. 1532 (M.D.Fla. 1989).

The Court has further noted that there is an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. For example, in the early colonial period, a day of thanksgiving was celebrated as a religious holiday to give thanks for the bounties of nature as gifts from God. *Id*. at 675. Subsequently, the day after the First Amendment was proposed, Congress urged President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God." *See* A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964). At the same time, Congress also enacted legislation providing for paid chaplains for the House and Senate. *See Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

There are countless other illustrations of the "Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Lynch*, 465 U.S. at 677. For example, executive orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving national holidays in religious terms. Our national motto — "In God We Trust" — is statutorily prescribed and mandated for our currency. *See* 36 U.S.C. § 186 & 31 U.S.C. § 324. Further, the invocation of "God save the United States and this Honorable Court" occurs at all sessions of the United States Supreme Court, and the chambers of that Court are decorated with a "notable and permanent — not seasonal — symbol of religion: Moses with Ten Commandments." *Id*. Additionally, Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals," 36 U.S.C. § 169h, and such proclamations have repeatedly been issued. *See, e.g.*, Proclamation No. 5017, 48 Fed.Reg. 4261 (1983); Proclamation No. 4795, 45 Fed.Reg. 62,969 (1980); Proclamation No. 4379, 40 Fed.Reg. 25,429 (1975); Proclamation No. 4087, 36 Fed.Reg. 19,961 (1971); Proclamation No. 3812, 32 Fed.Reg. 14,015 (1967); Proclamation No. 3501, 27 Fed.Reg. 10,147 (1962).

In looking at SJR 105 and HJR 122, we do not believe that either of these resolutions violates the Establishment Clause of the First Amendment for two reasons. First, the Establishment Clause, which is made applicable to the states by the Fourteenth Amendment, states that "Congress shall make no ***law*** respecting an establishment of religion." (Emphasis added). A "law is commonly defined as:

> A binding custom or practice of a community: a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision or usage) made, recognized or enforced by the controlling authority.

Webster's Third New International Dictionary (unabridged). The Supreme Court has stated that fundamental to the existence of a law is the obligation it creates and the sanction it imposes. It is a matter of compulsion and does not take the nature of a plea, suggestion, or request. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909) and *United States Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34, 50 S.Ct. 165, 74 L.Ed.683 (1929).

In this instance, neither resolution requires or compels any kind of action concerning religion. Nor does either resolution impose any penalties or sanctions of any kind. Rather, the resolutions simply urge or request "all Tennesseans to observe 'Tennessee Day of Prayer' in accordance with their respective faiths" and to "pause to remember and empathize with the plight of our bereaved sisters." As such, these resolutions are not "laws" and do not present the type of governmental action that encroaches upon the prohibitions of the Establishment Clause. *See Zwerling v. Reagan*, 576 F.Supp. 1373 (C.D.Ca. 1983) (presidential proclamation declaring 1983 as the year of the Bible did not violate the Establishment Clause).

Furthermore, even if SJR 105 and HJR 122 could be considered "laws" for purposes of the Establishment Clause, we still do not think they violate that clause under the analysis utilized by the Supreme Court in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). Under the *Marsh* analysis, historical circumstances contemporaneous with the passage of the Establishment Clause by the First Congress may insulate a practice from attack under that clause. *Id*. at 786-95, 103 S.Ct. at 3333-38. In *Marsh*, the Supreme Court approved the practice of the Nebraska legislature paying a chaplain to open its sessions, basing its approval on the decision in the First Congress to pay a chaplain to offer daily prayers in the Congress, the practice thereafter, and the support of the First Amendment's framers and ratifying states. *Id*.; s*ee also Lynch*, 465 U.S. at 674.

The parallels with SJR 105 and HJR 122 are strikingly similar. As noted, *supra*, a resolution requesting the President set aside a day of Thanksgiving and prayer was passed the day after the First Amendment was proposed. Since then, Congress has continually requested, and the President has issued, proclamations designating days of prayer on general and specific topics. Moreover, James Madison, a drafter of the Establishment Clause whose views on religion have been given

considerable weight by the Supreme Court, *see Marsh*, 463 U.S. at 788, n. 8, 103 S.Ct. at 3334, n. 8, issued day of prayer proclamations during his term as President. *See* Drakeman, *Religion and the Republic: Madison and the First Amendment*, in James Madison on Religious Liberty 240-41 (R. Allen ed. 1985).

Thus, the practice of issuing resolutions or proclamations designating days of prayer appears to be "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786, 103 S.Ct. at 3333. Accordingly, under the Supreme Court's analysis in *Marsh*, we do not believe that either SJR 105 designating May 5, 2005, as "Tennessee Day of Prayer," or HJR 122 designating May 15, 2005, as "Day of Special Prayer for Widows," violates the Establishment Clause of the First Amendment. *See Allen v. Consolidated City of Jacksonville, Fla.*, 719 F.Supp. 1532 (M.D.Fla. 1989).

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