

June 11, 2008

Scott D. English, Chief of Staff
Office of the Governor
Post Office Box 12267
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Dear Mr. English:

You request an opinion regarding the constitutionality of H.3159, R-370 which is, as you describe it, “a bill adopted by the General Assembly ... allowing local bodies to display certain historical documents” By way of background, you state the following:

[b]ased on amendments made to this bill, we have received conflicting requests from the bill’s original sponsors as to how the Governor should act on this legislation. ...

The bill specifically authorizes local governments, including school boards, to post the “Foundations of American Law and Government” display in a visible, public location in the public buildings of this State and its political subdivisions. The display includes 13 documents that, according to the bill, “have played a significant role in the foundation of our system of law and government.”

We are seeking your advice as to whether this legislation is constitutional. Please consider any and all constitutional issues, including Establishment Clause issues that may arise if H.3159 were to become law.

In light of our duty to return this bill to the General Assembly by Wednesday, June 11th, I would appreciate your prompt consideration of this opinion request.

It is our opinion that a court would most likely find this legislation constitutionally valid.

Law / Analysis

H.3159's purpose, as set forth in the legislation’s Title, is to “provide that historical documents and educational and information material regarding the history and background of

American law may be used in approved displays, monuments, plaques, or similar fixtures in state or local public areas, buildings or places.” Pursuant to Section 1, the General Assembly finds that

- (1) there is a need to educate and inform the public about the history and background of American law;
- (2) the public buildings of this State and its political subdivisions are ideal forums to display educational and informational material regarding the history and background of American law; and
- (3) a basic knowledge of American constitutional history is important to the formation of civic virtue in our society.

Section 2(B) sets forth the documents which “[t]he Foundations of American Law and Government” display must include. These are:

- (1) The Ten Commandments;
- (2) The Magna Carta;
- (3) The Mayflower Compact, 1620;
- (4) The Declaration of Independence;
- (5) “The Star-Spangled Banner’ by Francis Scott Key;
- (6) The Bill of Rights of the United States Constitution;
- (7) The Preamble to the South Carolina Constitution;
- (8) The Nineteenth Amendment to the United States Constitution;
- (9) The national motto ‘In God We Trust’;
- (10) The image of Lady Justice;
- (11) The Lord’s Prayer;
- (12) The Emancipation Proclamation, 1863;
- (13) Martin Luther King, Jr.’s ‘I Have a Dream’ speech.

Pursuant to Subsection 2(C), the General Assembly further provides that

[p]ublic displays of the Foundations of American Law and Government display shall contain the text of the documents listed in items (1) through (13) of subsection (B) together with the context for acknowledging formative, historically significant documents in America’s heritage contained in subsection (D). Because the purpose of the display is not to advance religion, the General Assembly expresses no preference as to which version of the Ten Commandments is displayed.

Subsection 2(D) further states that the documents required to be placed in the Foundations of American Law and Government display have “played a significant role in the foundation of our

system of law and government” In parts 2(D)(1) through (13) of the legislation, is contained a description of each of the documents required to be placed in the display; the General Assembly has sought in these provisions to identify the historical significance of each document in terms of the role it has played in law and government in the United States.

In addition, part 2(I) provides for the creation of an advisory committee to make recommendations to the General Assembly and the Department of Archives and History “regarding the public representations of the Foundations of American Law and Government” Such recommendations include “other documents to be added to the list for the display.”

Turning now to an analysis of the legislation’s constitutionality, the critical question is whether the Act is in conflict with the Establishment Clause of the First Amendment of the United States Constitution, which prohibits any law “respecting an establishment of religion.” In previous opinions, this Office has recognized that governmental authorization to display the Ten Commandments or some other religious symbol is not necessarily constitutionally invalid, as an establishment of religion, depending upon the context and the governmental purpose involved. An opinion, dated January 25, 2002, addressed the constitutionality of legislation under the First Amendment which would designate September 17 of each year – the anniversary of the ratification of the United States Constitution – as “Respect for Law Day,” thereby requiring all public and private schools permanently to establish a display which included the Ten Commandments, the Magna Carta, the Declaration of Independence and the United States Constitution.

In this opinion, we concluded, based upon an earlier opinion, dated August 10, 1998, that such a display was constitutional under the Establishment Clause. We noted that historical documents, such as the Declaration of Independence and Magna Carta, also refer to God but “have an important historical and legal purpose wholly apart from any religious connotations which they may possess.” Thus, in our view,

[t]he issue ... is whether the Ten Commandments also serves an independent historical and legal purpose wholly apart from the Biblical context. Together, does this group of documents possess a nonreligious purpose? We believe it does. As we recognized in the August 10, 1998 opinion, there is a growing body of authority which demonstrates that the “Ten Commandments traditionally were used to teach the moral restraint that undergirds obedience to law.” (citing Kuntz, “The Ten Commandments on School Room Walls ...,” 9 U.Fla.L.J. and Pub Policy, 1, 2 (Fall, 1997). Indeed, Circuit Judge John T. Noonan of the Ninth Circuit Court of Appeals has, as a legal historian, concluded that the Ten Commandments “have been the most influential law code in history.” John T. Noonan, Jr., *The Believer and the Powers That Are: Cases, History and Other Data Bearing on the Relations of Religion and Government*, 4 (1987).

Thus, we were of the opinion “that the proposed legislation is wholly in accord with both the federal and state Constitutions and does not infringe upon the Establishment Clause of the First Amendment.” As we also recognized in the August 10, 1998 opinion, “[w]here the Ten Commandments are part of a legitimate, larger purpose or theme to teach students about law, history, or culture ... such would be constitutional.”

Since the 1998 and 2002 opinions were issued, the United States Supreme Court has decided two cases involving display of the Ten Commandments in different contexts, in *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County v. ACLU*, 545 U.S. 844 (2005). Viewed together, these decisions reinforce the constitutional validity of H.3159.

Van Orden upheld, by a 5-4 majority, a Texas display on the State Capitol grounds. The monument in question consisted of the text of the Ten Commandments, as well as many smaller symbols such as the Star of David and Greek letters representing Christ. This monument which had been donated by the Fraternal Order of the Eagles, had stood for about forty years without legal challenge. The plurality opinion distinguished its earlier decision, *Stone v. Graham*, 449 U.S. 39 (1980), by noting that the Texas display, which contained seventeen other monuments and twenty-one historical markers, was, unlike *Stone* which had involved “an improper and plainly religious purpose”¹ The Texas display, concluded the *Van Orden* Court, involved a “far more passive use of ... [the] texts [of the Ten Commandments]” In *Van Orden*, Texas used the Ten Commandments not to promote religion, but to exhibit “the several strands in the State’s political and legal history.” 545 U.S. at 691.

Justice Breyer, in his concurring opinion in *Van Orden*, agreed that the Texas monument did not violate the Establishment Clause. He observed that “[w]hile the Court’s prior tests provide useful guideposts, ... no exact formula can dictate a resolution to such fact-intensive cases.” 545 U.S. at 700. In order to determine whether the message conveyed by the display is religious or secular, the Court must, he noted, “consider the context of the display.” *Id.* at 701.

According to Justice Breyer, such context must be determined by factors such as the circumstances surrounding the display’s placement on state grounds, the display’s physical setting

¹ In *Stone*, the Supreme Court by *per curiam* opinion, invalidated a Kentucky statute requiring the posting of a copy of the Ten Commandments on the walls of each public school classroom. The Court concluded that “[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.” *Id.* at 41. In the Court’s view, simply posting the text of the Commandments on the classroom walls “serves no ... education function.” Nor was it, in the Supreme Court’s view, an instance where the text of the Commandments was being “used in appropriate study of history, civilization, ethics, comparative religion or the like.” *Id.* at 42.

and the amount of time the display has stood without challenge. In his opinion, the facts demonstrated that the Eagles had sought to highlight the role of the Ten Commandments in shaping civic morality and in curbing juvenile delinquency. These facts thus suggested an ethics-based secular motive in the display, rather than a religious-centered one. His assessment was thus that the monument's setting provided "a context of history and moral ideals." *Id.* at 702. The State had intended the display's "moral message – an illustrative message reflecting historical 'ideals' of Texans – to predominate." *Id.*

McCreary v. ACLU, supra also involved a display which included the Ten Commandments, but was, in the Court's opinion, a different case with a dissimilar context than *Van Orden*. On the same day that *Van Orden* was decided, the Court ruled by a 5-4 majority that the Kentucky display violated the Establishment Clause. A Ninth Circuit decision, *Card v. City of Everett*, 520 F.3d 1009, 1017 (9th Cir. 2008) summarizes the Supreme Court's decision in *McCreary* as follows:

[i]n *McCreary*, the Court invalidated displays of the Ten Commandments in two Kentucky courthouses. 545 U.S. at 858, 125 S.Ct. 2722. The displays were at first "large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus." *Id.* at 851, 125 S.Ct. 2722. In the course of the litigation, the counties altered the displays twice, each time adding to them arguably greater secular or historical content. *Id.* at 853-56, 125 S.Ct. 2722. The majority applied the *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)] test, focusing heavily on the question of the counties' purpose. *Id.* at 862, 125 S.Ct. 2722 ("[A]n understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts."). The Court explained that [t]he point is simply that the original text [of the Ten Commandments] viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable." *Id.* at 809, 125 S.Ct. 2722. For this reason, the first display failed under the secular purpose prong of *Lemon*, as it must. See *Stone* [*v. Graham*,] 449 U.S. at 39-43, 101 S.Ct. 192. In examining and invalidating the two subsequent versions, the Court rejected the county's claim that they evinced a secular purpose, because purpose must be evaluated as if by "one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S. at 866, 125 S.Ct. 2722; see also *id.* at 874, 125 S.Ct. 2722 ["(A)n implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense."). There can be little doubt after *McCreary* not only that *Lemon* is still alive but that the secular purpose inquiry has been fortified. See *id.* at 900-03, 125 S.Ct. 2722 (Scalia, J., dissenting).

Based upon our reading of *McCreary*, together with *Van Orden*, particularly Justice Breyer's concurring opinion therein, it appears clear that any display involving the Ten Commandments or some other religious symbol must thus have a secular purpose in order to be valid. In other words, the display cannot have a "religious object." *McCreary*, 545 U.S., id. at 809; *Stone, supra*. But where the facts demonstrate "an ethics-based secular motive in the display, rather than a religious centered one ...," the courts will likely deem the display to be constitutional.

H.3159, it seems to us, meets this test. The legislative findings, expressed in Section 1 of the Act, make clear that the purpose of the legislation, in authorizing "The Foundations of American Law and Government" displays is to provide a "basic knowledge of American constitutional history" as part of "the formation of civic virtue in our society."

That the legislation's overarching purpose is "ethics-based," rather than motivated to promote religion, is also demonstrated by other provisions of the Act. Subsection 2(C) states that "[b]ecause the purpose of the display is not to advance religion, the General Assembly expresses no preference as to which version of the Ten Commandments is displayed." *Compare, McCreary*, 545 U.S. at 851 (use of King James version of Ten Commandments, found in Exodus, suggests religious-based purpose). In addition, subsection (D)(1) provides a further expression by the General Assembly of its purpose in including the Ten Commandments as part of the Foundations of American Law and Government. Such subsection states:

[t]he Ten Commandments have profoundly influenced the formation of western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness'. The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

In short, we believe that the Legislature's purpose in including the Ten Commandments in the display, authorized by H.3159, is secular rather than religious.

One other aspect of the legislation deserves attention. Subsection 2(B)(11) requires that the display include a copy of "The Lord's Prayer." Subsection 2(D)(11) provides as follows the General Assembly's purpose in including the Lord's Prayer in the display:

[t]he Lord's Prayer, used to teach people how best to seek their daily needs, is a model of philosophy and inspiration for legal and moral systems throughout the ages. In the colonies, James Oglethorpe brought debtors to freedom in our neighboring state of Georgia in remembrance of 'forgiving our debts as we forgive our debtors'.

The United States Supreme Court declared unconstitutional, in *School District of Abington Township v. Schempp*, 374 U.S. 803 (1963), the policy of a school board, requiring the daily reading of the Bible or recitation of the Lord's Prayer, as violative of the Establishment Clause. In this context, the Court rejected any argument that these practices possessed a "secular purpose ... [, such as] the promotion of moral values" Instead, the Court found that the practices had a "religious character." 374 U.S. at 224.

However, the context of H.3159 is markedly different from that of *Schempp*. The Lord's Prayer, like the Ten Commandments, is included in the display as part of a much broader purpose – to instill respect for law and to promote civic virtue. Like the Ten Commandments, the Lord's Prayer has been viewed by one scholar, a Judge of the International Court of Justice, the Hague, as possessing this independent purpose:

[i]n short, reciting the Prayer is a commitment to the principles it contains; and each time the Prayer is repeated, there is a renewal of that pledge. In lawyer's language, one cannot blow hot and cold, affirming in words what one repudiates in action. The Prayer is a supreme recognition that heavenly duty is to be performed on earthly soil.

Viewed this way, The Lord's Prayer contains a large number of basic principles underlying law and human rights which, if practiced, offer us a way out of the paths of violence and self-centeredness which threaten to lead humanity to self-destruction through another century of violence.

Weeramantry, "On Earth As It is In Heaven: A Vision of World Order For the 21st Century, 2 *Tulsa J. Comp. and Intl. Law*, 169, 172 (Spring, 1995). Thus, in our opinion, the Lord's Prayer is here being utilized by the General Assembly as part of the display for a secular, rather than a religious purpose – the promotion of a sense of history and respect for law. This is the same secular purpose as the Star of David, the Greek letters representing Christ and Ten Commandments served in *Van Orden*. See also, *Lynch v Donnelly*, 465 U.S. 668 (1984) [nativity scene used as part of an overall holiday display to symbolize the Christmas holiday is constitutional]; *Marsh v. Chambers*, 463 U.S. 783 (1983) [practice of using prayer to open sessions of legislature serves the purpose of providing guidance and a sense of solemnity to legislators and is constitutional].

Conclusion

It is our opinion that a court would likely conclude that H.3159 is constitutionally valid. While the Ten Commandments and the Lord's Prayer would, in other circumstances, be deemed overtly sectarian, we believe that in the context of a display which has as its overarching purpose the teaching of history and civic virtue, the inclusion of these documents would pass constitutional muster. As the Supreme Court held in *Van Orden* and *McCreary* – the recent Ten Commandments cases – the constitutional test is whether the display has a secular purpose or is, instead, religiously-

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centered. To our mind, this legislation, authorizing a display which includes numerous, universally recognized and important historical documents, such as the Declaration of Independence, the Magna Carta, the Bill of Rights as well as many others, has the clearly secular purpose of providing “a basic knowledge of American constitutional history [which] is important to the formation of civic virtue in our society.” Moreover, both the Ten Commandments, as well as the Lord’s Prayer, have an established place in the teaching of American constitutional history and civic virtue. In addition to the role of these two documents as sectarian symbols, they also, like the other documents assembled in the display, well serve the function of teaching history, morality, ethics, integrity and virtue. Accordingly, it is our opinion that a court would conclude the Legislature may constitutionally include the Ten Commandments and the Lord’s Prayer as part of the historical display contemplated by the legislation.

Yours very truly,

Henry McMaster

HM/an