



**Summary of District Judge Barbara Crabb’s Opinion in the National Day of Prayer Case, *Freedom From Religion Found., Inc. v. Obama***

On April 15, 2010, Judge Barbara Crabb of the United States District Court for the Western District of Wisconsin held that 36 U.S.C. § 119, the federal statute that requires the President to proclaim the first Thursday in May as a National Day of Prayer, violates the Establishment Clause of the First Amendment.<sup>1</sup> The case will likely be appealed to the United States Court of Appeals for the Seventh Circuit, where briefs would be due in the fall of 2010.

In *Freedom From Religion Found., Inc. v. Obama*, Case No. 08-cv-588 (W.D. Wis. Apr. 15, 2010), the Freedom From Religion Foundation (FFRF) alleged that the National Day of Prayer statute, and all presidential prayer proclamations that have been issued in the past, violate the Establishment Clause.<sup>2</sup> The statute declares:

The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.<sup>3</sup>

The American Center for Law and Justice filed an *amicus curiae* brief on behalf of itself and 31 members of the United States Congress, arguing that the statute was consistent with the Establishment Clause. The brief highlighted the long history of official prayer proclamations dating to the founding of the nation and argued that the statute and the prayer proclamations were constitutionally sound.

Judge Crabb held in March 2010 that FFRF had standing to challenge the constitutionality of the National Day of Prayer statute, but lacked standing to challenge the issuance of prayer proclamations by the President or other public officials.<sup>4</sup> With respect to the National Day of Prayer statute, Judge Crabb declared on April 15, 2010 that it “goes beyond mere ‘acknowledgment’ of religion because its sole purpose is to encourage all citizens to engage in prayer, an inherently religious exercise that serves no secular function in this context.”<sup>5</sup> She added, “recognizing the importance of prayer to many people does not mean that

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<sup>1</sup> The First Amendment states, in relevant part, that “Congress shall make no law respecting an establishment of religion . . . .”

<sup>2</sup> Slip op. at 51.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4.

the government may enact a statute in support of it, any more than the government may encourage citizens to fast during the month of Ramadan, attend a synagogue, purify themselves in a sweat lodge or practice rune magic.”<sup>6</sup>

### *Legislative History*

Judge Crabb’s opinion recounts the legislative history of 36 U.S.C. § 119, which was enacted in 1952 after Billy Graham called for a National Day of Prayer while preaching in Washington, D.C.<sup>7</sup> Judge Crabb cited statements of various legislators who supported a bill to create a National Day of Prayer to promote voluntary prayer in the United States and to fight the atheistic roots of communism in the midst of the Korean War.<sup>8</sup> The 1952 version of the statute did not set a specific day for each year’s National Day of Prayer but simply directed the President to designate one each year.<sup>9</sup>

In 1988, organizers of private National Day of Prayer events around the country asked Congress to amend the statute to designate a specific timeframe for the National Day of Prayer to occur each year to provide more certainty in event planning.<sup>10</sup> Various members of Congress endorsed this objective and reiterated that the National Day of Prayer was a call to Americans to return to prayer and acknowledge God’s authority.<sup>11</sup> On May 5, 1988, Congress enacted the current version of the statute which requires the President to designate the National Day of Prayer as the first Thursday in May each year.<sup>12</sup>

In 1989, a Christian private organization called the National Day of Prayer Task Force was created for the purpose of organizing National Day of Prayer events and encouraging Americans to participate in them.<sup>13</sup> On several occasions, the organization’s chairperson has been invited to speak at White House prayer services held on the National Day of Prayer.<sup>14</sup> The organization sponsors thousands of Judeo-Christian themed prayer events each year and requires its coordinators, volunteers, and speakers to share those beliefs in order to participate.<sup>15</sup>

### *Establishment Clause Tests*

Judge Crabb began her analysis of the statute by stating, “[a]s world history and current events around the globe show all too clearly, few topics inspire stronger opinions and emotions than religion.”<sup>16</sup> After dismissing the argument that the Establishment Clause does not apply to the President,<sup>17</sup> she observed that the Supreme Court has stated repeatedly that the government cannot “prefer one religion to another, or religion to irreligion.”<sup>18</sup> She noted that the *Lemon* test

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<sup>6</sup> *Id.* at 4-5.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 6-7.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 13-15.

<sup>18</sup> *Id.* at 16 (quoting *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994)).

was still the controlling standard in most Establishment Clause cases, as refined by the endorsement test cases.<sup>19</sup> She concluded that the relevant question in this case was whether a reasonable observer would conclude that the National Day of Prayer statute has a primarily religious purpose, or has the primary effect of impermissibly endorsing religion in general or one religious sect in particular.<sup>20</sup>

Judge Crabb stated that “religious expression by the government that is inspirational and comforting to a believer may seem exclusionary or even threatening to someone who does not share those beliefs.”<sup>21</sup> Justice O’Connor, the architect of the endorsement test, has explained that “government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.”<sup>22</sup> Judge Crabb then concluded, “[i]f the endorsement test is controlling, there can be little doubt that § 119 violates the establishment clause.”<sup>23</sup>

### ***Primary Effect of the Statute***

Regarding the statute’s primary effect, Judge Crabb observed that “Defendants do not deny that prayer is an inherently religious exercise,” and noted that “[t]he statute itself defines prayer as a method of ‘turn[ing] to God.’”<sup>24</sup> She added, “the very nature of having a statute involving a ‘national day’ in recognition of a particular act connotes endorsement and encouragement. . . . A reasonable observer of the statute or a proclamation designating the National Day of Prayer would conclude that the federal government is encouraging her to pray.”<sup>25</sup> Judge Crabb then cited cases invalidating government-sponsored prayer practices and stated that their reasoning applied to the National Day of Prayer statute.<sup>26</sup> She added that discrimination between various religious sects is not the only way that the government can violate the Establishment Clause.<sup>27</sup>

### ***Primary Purpose of the Statute***

Judge Crabb noted that statutes that promote religion in some respect—such as statutes recognizing Christmas and Good Friday as holidays—may be constitutionally permissible if they have a primarily secular purpose.<sup>28</sup> She concluded, however, that the statute’s purpose in this case “does not diminish the message of endorsement in the statute.”<sup>29</sup> She reviewed the legislative history of the statute, including Billy Graham’s call for its creation in 1952, and concluded that “the purpose of the National Day of Prayer was to encourage all citizens to engage in prayer, and in particular the Judeo-Christian view of prayer.”<sup>30</sup> Judge Crabb also

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<sup>19</sup> *Id.* at 17 (citations omitted).

<sup>20</sup> *See id.* at 17-18, 21.

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *Id.* at 20 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring)).

<sup>23</sup> *Id.* at 22.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 23.

<sup>26</sup> *Id.* at 24 (citations omitted).

<sup>27</sup> *Id.* at 25-26.

<sup>28</sup> *Id.* at 27-28 (citations omitted).

<sup>29</sup> *Id.* at 29.

<sup>30</sup> *Id.* at 30.

concluded that the 1988 amendment was problematic because its purpose was to support the communication of the religious message of religious organizations.<sup>31</sup>

### ***Acknowledgement and Accommodation of Religion***

Judge Crabb stated that, although “the line between [permissible] ‘acknowledgment’ and [impermissible] ‘endorsement’ is a fine one,” “Establishment clause values would be significantly eroded if the government could promote any longstanding religious practice of the majority under the guise of ‘acknowledgment.’”<sup>32</sup> She concluded that the statute’s purpose was not to acknowledge the role of religion in American life but rather to call for religious action on the part of citizens.<sup>33</sup> In addition, the statute was not designed to accommodate the free exercise rights of citizens by lifting government-imposed burdens upon religion.<sup>34</sup>

### ***Limitations Upon Lemon and the Endorsement Test***

Judge Crabb rejected several possible grounds for limiting the application of the *Lemon* test or the endorsement test to the statute. She acknowledged that many of the leading Establishment Clause cases involved young students in public schools, where the Establishment Clause has a unique application, but concluded that coercion was not required to find an Establishment Clause violation, and the endorsement test was not limited to cases involving children.<sup>35</sup>

In addition, Judge Crabb rejected an analogy to *Marsh v. Chambers*, 463 U.S. 783 (1983), a case in which the Supreme Court upheld the longstanding practice of opening legislative sessions with prayer as an example of permissible “ceremonial deism.”<sup>36</sup> She stated that “Defendants and *amici* rely heavily on *Marsh*, arguing that, if legislative prayer is an acceptable practice under the establishment clause, the National Day of Prayer statute must be constitutional as well. . . . [A]nswering questions under the establishment clause requires more than simply comparing practices in different cases at a high level of generality.”<sup>37</sup>

Judge Crabb said that cases discussing permissible examples of ceremonial deism—such as the printing of “In God We Trust” on coins, the inclusion of “one nation under God” in the Pledge of Allegiance, and the opening of court sessions with “God save the United States and this honorable court”—do not suggest that government action does not need to have a primarily secular purpose.<sup>38</sup> She distinguished these examples by concluding that the National Day of Prayer statute “does not use prayer to further a secular purpose; it endorses prayer for its own sake.”<sup>39</sup> She stated that encouraging citizens to pray was different in key respects than opening legislative sessions with prayer.<sup>40</sup>

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<sup>31</sup> *Id.* at 32.

<sup>32</sup> *Id.* at 33.

<sup>33</sup> *Id.* at 34.

<sup>34</sup> *Id.* at 35-36.

<sup>35</sup> *Id.* at 38-41.

<sup>36</sup> *Id.* at 42-50.

<sup>37</sup> *Id.* at 43.

<sup>38</sup> *Id.* at 44-45.

<sup>39</sup> *Id.* at 46.

<sup>40</sup> *Id.*

Moreover, Judge Crabb observed that the fact that a practice has a long tradition does not guarantee that it is consistent with the Establishment Clause.<sup>41</sup> She stated that the history of a practice is relevant but not necessarily determinative of its constitutionality.<sup>42</sup> She concluded that, “unlike legislative prayer or the Pledge of Allegiance, the National Day of Prayer serves no purpose but to encourage a religious exercise, making it difficult for a reasonable observer to see the statute as anything other than a religious endorsement.”<sup>43</sup>

In noting that the challenge to individual presidential thanksgiving proclamations had been dismissed on standing grounds, Judge Crabb declared that they were distinguishable from the statute itself for several reasons.<sup>44</sup> She stated that thanksgiving declarations “serve an obvious secular purpose of giving thanks” and are attributable mainly to the individual Presidents who gave them rather than the federal government as a whole.<sup>45</sup> In addition, Presidential thanksgiving proclamations are not without controversy, as some of the nation’s early Presidents declined to issue them due to their views of the Establishment Clause.<sup>46</sup>

Judge Crabb also stated that the National Day of Prayer statute has sparked numerous controversies along religious lines, citing multiple examples of complaints raised concerning specific National Day of Prayer events led by private organizers.<sup>47</sup> She said that the government was partly to blame for these controversies due to its close working relationship with the National Day of Prayer Task Force.<sup>48</sup> In addition, Judge Crabb found the discussion of the National Day of Prayer in previous cases to be unhelpful.<sup>49</sup>

### ***Conclusion***

Near the end of her opinion, Judge Crabb stated that “[t]he same law that prohibits the government from declaring a National Day of Prayer also prohibits it from declaring a National Day of Blasphemy.”<sup>50</sup> She granted the plaintiffs’ motion for summary judgment, declared that the statute is unconstitutional, and issued an injunction preventing the government from enforcing the statute (which would take effect after any appeal of the decision is concluded).

The government will need to file its notice of appeal in June 2010 with the United States Court of Appeals for the Seventh Circuit, with briefs due for the parties and *amici* in the fall of 2010 barring any time extensions. The ACLJ will file an *amici curiae* brief with the court of appeals on behalf of itself and members of Congress.

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<sup>41</sup> *Id.* at 47-49.

<sup>42</sup> *Id.* at 50.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 51.

<sup>45</sup> *Id.* at 51-52.

<sup>46</sup> *Id.* at 52-53.

<sup>47</sup> *Id.* at 57-59.

<sup>48</sup> *Id.* at 60.

<sup>49</sup> *Id.* at 61-63.

<sup>50</sup> *Id.* at 64.