

# RELIGIOUS LIBERTIES

## MOMENT OF SILENCE DEBATE

Honorable Walter Dellinger, *O'Melveny & Myers* and former Solicitor General of the United States

Honorable William Pryor, *Alabama Attorney General*

Ms. Margot Adler(*moderator*)

Transcript of broadcast on National Public Radio's "Justice Talking" program.

**MARGOT ADLER:** Is a moment of silence school prayer in disguise or simply an opportunity for quiet reflection? I'm Margot Adler and we'll debate this issue in this edition of NPR's Justice Talking. I'm joined by Walter Dellinger, former Solicitor General in the Clinton Administration and Bill Pryor, Attorney General of Alabama.

Walter Dellinger is a partner at the Washington, D.C. law firm of O'Melveny & Myers. A professor of law at Duke University. Mr. Dellinger was head of the Office of Legal Counsel in the Clinton Justice Department. As Solicitor General, he argued a record 9 cases before the Supreme Court, including several dealing with the religion clauses of the First Amendment.

Alabama Attorney General Bill Pryor is a national leader in litigation involving federalism. He recently won several major Supreme Court cases, including *University of Alabama vs. Garrett* and *Alexander vs. Sandoval* which limited the reach of federal civil rights statutes. The Wall Street Journal has called Bill Pryor the intellectual leader of the Alabama Republicans.

Thank you both for joining us here at Justice Talking. Our debate begins with opening statements, first we'll hear from Attorney General Pryor.

**BILL PRYOR:** The First Amendment provides Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. We have strayed far, too far, from the original understanding of the First Amendment when we would debate whether a mere moment of silence, with an expressed allowance of prayer at the beginning of each day in public schools somehow violates the First Amendment. Indeed, a moment of silence is a neutral accommodation of religion that violates neither the First Amendment nor the decisions of the Supreme Court interpreting that amendment. The framers of the First Amendment did not harbor any hostility toward prayer, even public or government sponsored prayer. The First Congress, promptly after its ratification of the First Amendment, called upon President George Washington to proclaim a national day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God. Both Houses of Congress also instituted the practice of opening each day's legislative session with a prayer delivered by a chaplain who was employed and paid by the government. The Supreme Court itself begins its sessions, each day, with the prayer God Save the United States and This Honorable Court. The Court, however, has laid down more stringent rules for religious expression in public schools. The Court, understandably, frowns upon any attempts by the government to coerce a child, who is required by law to attend school, to observe a particular prayer or religious exercise that may violate the freedom of conscience or contradicts the beliefs of that student. But, a moment of silence is not coercive. It does not create peer pressure. It neither encourages nor discourages religion. It is neutral. This is not a hard question. There is nothing dangerous about a classroom of silent children.

**MARGOT ADLER:** That was Bill Pryor. Now an opening statement from Professor Dellinger.

**WALTER DELLINGER:** I need to first express the view of those who are not represented on this panel because I fully agree with Attorney General Pryor that moments of silence are not unconstitutional. I think the particular Virginia law, which mentions prayer is, for reasons I will tell you. But, not only do I believe that moments of silence that are neutral and undesignated are constitutional. I believe that very fervently and have expressed that view since the 1970's. I also believe that student religious groups have an equal right to use of the school facilities with all other student clubs and that religious speech is fully entitled to be protected. There are many who disagree with that and they are well-meaning but I believe in all of those views. I also believe that the mere fact that legislators enact a moment of silence in the hope that children will use it to pray does not come close to invalidating. There's nothing constitutionally offensive about the mere existence of prayer in the public schools or anywhere else. The constitutional evil to be avoided is government encouragement or inducement to pray or not to pray. As long as a prayer results from the private choice of individual citizens, the Constitution is not violated. This statute, and one where a legislature passes a moment of silence for meditation or prayer or any other silent activity, rather than simply a moment of silence for any activity of the students choosing. It crosses a line that seems trivial but is not and it ought to be at the heart of where people, who believe in the principles of the Federalist Society, belong and that is it crosses this very simple line. I try to explain it to my students in the simplest possible fashion. This is not rocket science. Private prayer, good. Government prayer, bad. The hard cases are always deciding whether it is the government or the individual that is deciding about prayer. Here, the seemingly trivial fact, and I understand that it seems to be trivial, of the addition of the word prayer in the statute that crosses the line of constitutionality precisely because it is unnecessary to the goal of creating a formal opportunity for reflection which students who choose to do so can choose to pray. That purpose is wholly accomplished by a statute or policy that simply provides that a moment of silence be set aside. If a simple moment of silence is created, parents, priests, rabbis and ministers can, if they wish, suggest to their children or parishioners that they use the moment of silence for prayer. But, providing in the state's code of laws that prayer is a designated activity, takes the state itself across a thin line and into the improper business of the official endorsement of religious exercise. There is no good role

for government in organizing, promoting, encouraging or discouraging any groups of Americans to pray or not to pray.

**MARGOT ADLER:** That was Walter Dellinger. Bill Pryor, students have the freedom to pray on the school bus. They have the freedom to pray around the flag, around the flagpole at school, they can say grace before lunch, they can meet with their Bible Club after school at the end of the day, why do they need a state sanctioned minute in the classroom?

**BILL PRYOR:** Well, the Virginia legislature found that there was more than a reason to accommodate religious belief and religious exercise at work here. In response to the Columbine incident of school violence with which we're all familiar, the Virginia legislature felt and the sponsors of the moment of silence bill in Virginia felt that each student could use a moment of quiet reflection as a management tool for the school to prepare the children of that school to collect their thoughts and realize the seriousness of the work and the day ahead, that's a valid secular purpose but also the Virginia legislature also wanted to make sure though that it, in no way, suggested that there was going to be discrimination against believers and, for those children who chose to exercise their right to pray during that moment of silence, they could certainly do so.

**MARGOT ADLER:** Professor Dellinger, it's only 60 seconds, aren't you making a mountain out of a molehill?

**WALTER DELLINGER:** I'm not concerned about what goes on in the 60 seconds. I think if students choose to use 60 seconds to pray, they're fully within their constitutional rights and I would zealously defend that. I think the constitutional problem occurs way far away from that school classroom. It occurs in the halls of government where government officials choose to pass a law that tells people that the government officially sanctioned view is that prayer is the preferred activity, singled out just prayer and meditation or any other activity. I think what that is and I know that, you know, some laws are truly terrible and yet not unconstitutional. This may be reverse. A law that's not bad at all but is constitutional because it crosses a narrow line. In a country in which religion has been a matter of individual conscience and private citizens acting as individuals and in groups, any step that takes you across the line into the collectivization of religion, even if it's a trivial collectivization, by having the government formally put in its code of laws that this is what you're supposed to do at that time, to me crosses a narrow line and that's where I, if you'll pardon the expression, get off the school bus.

**MARGOT ADLER:** Attorney General Pryor, would you be concerned if the moment that we're talking about was 5 minutes. If it was 5 separate moments throughout the day, if you can argue for 60 seconds, what about 60 minutes?

**BILL PRYOR:** Well, as Walter said a moment ago, just because a law is constitutional doesn't mean that it's wise. I would say that it might be unwise to have a 60 minutes of moment of silence law but it would be constitutional. I don't think the principle would be any different.

**WALTER DELLINGER:** And, Margot, let me add on that very point, though, again, there are those who would disagree from the left, I'm not troubled by an hour. If there's a wide range of activities permitted, that is to say, talk about the hour is to talk about a school setting aside an hour for student initiated clubs or organizations and if there are a group of students who wish to spend the entire hour on school premises engaging in a hour long not simply silent prayer but vocal, spoken group prayer, as long as it is truly a product of individual private choice, I would defend that. Now, I know, for the purposes of your debate, it would be good to have another view out there and just let me say that there are 4 justices on the Supreme Court who, I believe, would disagree with General Pryor and myself, Justice Stevens, Justice Souter, Justice Ginsburg and, in most but not instances, Justice Breyer believe that, when prayer occurs on public property, even if it's a product of private choice, where if religious activity occurs, it is constitutionally suspect. I don't agree with that as long as their is private choice. On the other hand, I mean, if I may digress for just a moment, I think this is an area in which there's a miracle of collective decision making. The court has gotten every religion case in the last decade right even though 7 out of the 9 justices are wrong, and I think very fundamentally wrong, about one half of the equation so that the, you know, the government prayer bad, private prayer good dichotomy is one in which I celebrate the wonderful opinion of Justice Thomas, joined by Justice Scalia and Justice Rehnquist last term, upholding the right of student religious groups to meet on even elementary school campuses. It's a wonderful vindication of that right. Where they get it wrong, however, and I think that the dissenters...I don't understand why the dissenters don't agree that allowing an equal voice for religion is just fine in a world in which there are government subsidies out there, you should not discriminate against those who would use those subsidies for religious purpose. Where they get it wrong, to just (indistinguishable), it seems to me is when they allow the government itself to say, where there's a football game, we're going to have a minute, it's going to be for prayer or one other thing, then the government itself intrudes in that process and I think there, we're missing the critical distinction between government prayer and private prayer.

**MARGOT ADLER:** Bill Pryor, what are schools or legislators trying to accomplish in that one minute? If a student dozes off, if they do a crossword puzzle, their homework, if they doodle, if a girl puts on makeup, would that defeat the state's purpose?

**BILL PRYOR:** No, not necessarily, you know, we had study hall when I was in school, I guess that was our hour moment of silence and we didn't always study and it...but it, nevertheless, served my purpose most of the time to study and it did not necessarily defeat the school's purpose that one member of the class might put on some makeup. Just because students don't take advantage of that moment to the state's end does not mean that the state's end still has not been served when most do.

**MARGOT ADLER:** Mr. Dellinger, what happens if, during this moment of silence, a student prays out loud? You can think of many different religions where, in fact, praying out loud is appropriate and considered part of their religious practice. Would it violate the Free Exercise Clause to punish him for praying?

**WALTER DELLINGER:** Well, I think it is...you've identified one of the policy issues about a moment of silence. I don't think...I think it is perfectly fine for the school to enforce a neutral rule if the moment has not been designated by the government as being either for or against prayer. I'd firmly find for the government to enforce a moment of silence, you may not speak out against the war in Kosovo and you may not speak out about religion or math or football or anything else during that moment of silence. Each person can use it as he or she sees fit. It is the case and those who oppose, unlike me, that give them a voice who would oppose a moment of silence believe that it is not even neutral among religions for precisely that reason that it favors those for whom prayer is a private and quiet activity and disfavors those for whom it is important to have it be a group and collegial activity involving spoken prayers.

**BILL PRYOR:** But the government here did not say that it favored prayer, it only said that this law would not disfavor prayer. The statute itself said, each people may, in the exercise of his or her individual choice meditate, pray or engage in any other silent activity and that's why it was upheld by the Federal Court of Appeals.

**MARGOT ADLER:** So you don't think, for example, that the Virginia statute favors one form of prayer over another because, for example, Orthodox Jews might want to daven and Muslims might want to kneel and face Mecca and do stuff that might not be considered...might be considered disruptive in some schools in fact.

**BILL PRYOR:** Well, as we both agree, this is a neutral rule. All it requires of students is silence. It's an accommodation of religion to say the government does not disfavor prayer in the exercise of that individual choice to remain silent. The government...the Supreme Court has upheld accommodations of religion in a variety of circumstances. The military draft law which exempts members of the clergy is constitutional. The court has upheld a public school program that allows release time for students to attend religious classes off school premises. There are a variety of those kinds of accommodations and that's all this is.

**MARGOT ADLER:** Do you think school districts have the right to fire teachers who refuse to comply with a silent moment in a classroom? How about you, Walter, you can start.

**WALTER DELLINGER:** Gee, that's a tough one. I think the school certainly can...if the policy, unlike the Virginia policy is truly a neutral moment of silence, certainly the school and not the teacher gets to make those kinds of decisions. Attorney General Pryor is the Attorney General, whether one would have a...who had a religious conscientious objection to participating in a moment of silence would have a free exercise right not to be punished because of that, it's...I think a difficult question. I can't give an answer. Actually I would...want...the Attorney General is the chief law enforcement officer of his state, what would you advise if asked by a teacher...a school whether they could discharge a teacher that refused to provide for the moment of silence, if his or her reason was one of conscience.

**BILL PRYOR:** Well, I certainly would not advocate that a teacher has a right to disobey a law passed by the legislature and I would, generally, take the view that if a teacher refuses to comply with a state law, that is, refuses to allow the students to have their moment of silence, that that would be grounds for firing.

**MARGOT ADLER:** Since September 11th, more and more schools are requiring that students recite the Pledge of Allegiance which ends with the phrase, one nation under God, indivisible with liberty and justice for all. Isn't the Pledge a form of prayer? It doesn't end with amen but it's a kind of prayer, it mentions God, Mr. Dellinger, what do you think?

**WALTER DELLINGER:** You know, I think, Margot, that all principles have their point of diminishing returns and the principle about the government nonendorsement of prayer runs out for me before you get to In God We Trust on the coins or the mention in the Pledge of Allegiance, that's not a prayer.

To say that we are one nation under God is an acknowledgment of a supreme being and the Supreme Court itself has said, with Justice Douglas of all writing that our nation's institutions presuppose the existence of a supreme being but it's not a prayer. It's not like God save the United States and this honorable court, a request for God to save the court. That is a prayer. And it needs...and the court needs it.

**MARGOT ADLER:** Attorney General Pryor, if teacher-led prayer in public schools were legal, would you want it?

**BILL PRYOR:** That is a tough question. I'm a Roman Catholic, I was raised on the Gulf Coast of Alabama, I attended Catholic schools, my parents were Catholic school teachers and I can imagine that if I were a teacher in North Alabama and I tried to lead the Hail Mary, that there may be some Southern Baptists who would object.

And, for that reason, I'm not upset by the balance that has been struck and that balance is that the government doesn't sponsor prayer but it does fully protect, under the First Amendment, the rights of students totally on their own initiative to express their religious beliefs and pray.

**WALTER DELLINGER:** May I address that?

**MARGOT ADLER:** Oh, absolutely.

**WALTER DELLINGER:** Because I don't find that a difficult question at all. Hugo Black, that great Baptist from the State of Alabama,

wrote in the school prayer case which involved, remember a group of government bureaucrats called the Board of Regents, sitting in a room and composing the prayer, the exact words of a prayer to be recited in unison by groups of school children throughout New York at the beginning of every school day, Hugo Black said it is no business of the government to compose prayers to be recited by any group of citizens as part of a religious program carried out by governmental officials. And we have to remember that schools are governmental officials. I, too, grew up in the Catholic Church and every Thursday, for many, many years I had an ache in the pit of my stomach, still remembering how painful Thursday's were because on Thursday's the Protestant Bible came to my public school and when she came, I would dread her arrival because the teacher would say, when she swept in laden with Kool Aid and cookies and coloring...Bible coloring books, my parish priest would advise my mother, it would be an occasion of sin for me to learn the doctrines of the Protestant faith and so, the teacher would...and my mother, therefore, refused to consent to my remaining, a good Irish Catholic that she was and the teacher would say, Victor and Walter will now leave the room and I envied Victor K. Berg, the only Jew in the class for his seat next to the door because he got to sneak out quickly, I had to walk the gauntlet, wondering what was wrong with a kid who couldn't stay in the room to color pictures of Jesus and have cookies. And, it was an extraordinarily painful experience. We had to go shelf books for an hour and maybe that's why I've been unusually sensitive to these issues. Now, I realize years later, it gave me a sense of what it's like to be an outsider to the dominant culture which you don't usually get growing up southern, white and male but every Thursday for an hour I had a glimpse of that and I think the person who really stood...helped stand...stem the tide for a constitutional amendment to put organized government prayer back in the school was Senator Hatch. And I think he understood the plight of (indistinguishable) who had adherence to the Church of Jesus Christ of the Latter Day Saints who are in public schools outside of Utah throughout the country. What it's like to be made to be a religious stranger in your own public school. Again, I think there's no good role for government as long as speech and prayer is private, it's fine but not where government itself makes the decision and the...you know, the strong case where government officials compose the prayer but it also is the last unconstitutional step when the government says this moment is designated as being for prayer.

**BILL PRYOR:** The reason that it is a more difficult question is because the First Amendment is not the discomfort amendment. Part of the price of our liberty, the ACLU and others have taught us is that we sometimes might hear something that offends us and that's why the question is more difficult. I, again, don't have a problem where the court has struck the balance and that is that the government should not be in the business of sponsoring the prayer and...but, the students' right to pray on their own initiative should be fully protected.

**WALTER DELLINGER:** I'd (indistinguishable) that there's not a discomfort amendment and, therefore, if the valedictorian chosen on neutral grounds, is the person with the highest academic average, if you're in a school where the valedictorian really gets to express his or her views and the previous valedictorian condemned the war in Viet Nam, then that gives valedictorian, I think, to speak about how the role of God or a particular religious doctrine meant her life or even offer a prayer because it's an individual who has not been chosen by the government for religious purposes who is doing this. Across the narrow line is another person who is offering a prayer who's been asked to give a benediction but their government officials have decided that this is going to be prayer and the person is invited to speak, conditioned upon the government's requirement, that what they do is pray. They may cause the same degree of discomfort or, on the positive side, the same degree of religion but one is governmental and one is not and that's why I think we have to keep our eye on that very, very fine line.

**MARGOT ADLER:** You're listening to Justice Talking. Our debate on a moment of silence continues in just a moment.

**MARGOT ADLER:** Welcome back to NPR's Justice Talking, I'm Margot Adler. We're joined by two people who have different views about whether Virginia's moment of silence law promotes prayer or just promotes peace in the classroom. My guests are former US Solicitor General Walter Dellinger and Bill Pryor the Attorney General of Alabama. Now, I've had a lot of chance to ask questions, I'm wondering if any of you have questions for each other.

**WALTER DELLINGER:** I had one for General Pryor. Since we're in so much agreement, I want to focus on, and this is supposed to be a debating series, one area where we disagree and that is whether the addition of the word prayer to what we otherwise would agree is a constitutional moment of silence, invalidates it. I think General Pryor's argument, and the best argument I've heard for the notion that having the legislature itself designate prayer is not itself an invalidation, is this and that is that it doesn't actually constitute a state official imprimatur or endorsement of prayer, it's just stating a fact. It's just stating that one of the things you can do with the moment is pray, which is obviously true. Any student can and some no doubt will pray no matter what the statute says so, what is the harm of adding the word prayer if it's merely informational. Here's my question. Suppose a state legislature, I presume it wouldn't be Alabama, set aside a moment at the beginning of each school day for meditation or erotic fantasy.

Now, I think some citizens would be upset and it would seem to me that the response would sound disingenuous to say, oh, the government is not endorsing erotic fantasy, we put it in the statute just to acknowledge the fact that students can and no doubt, some young ones no doubt will do exactly that with their time. How persuasive would it be to people who would be concerned, as I think you and I would about the adoption of such a statute, how persuaded would we be by the argument that the state's being completely neutral. It just happens to mention erotic fantasy and provides information. That is my question.

**BILL PRYOR:** I'm confident I would have a much better chance of having the ACLU on my side if the statute provided a moment of silence for erotic fantasy.

**WALTER DELLINGER:** I think you're exactly right about that.

**MARGOT ADLER:** Is that the end of your answer.

**BILL PRYOR:** Yes it is.

**WALTER DELLINGER:** And an excellent answer it is.

**MARGOT ADLER:** You didn't really answer his question.

**BILL PRYOR:** Well, in fact, if the statute so provided and included the language in the Virginia statute, the catchall, what I would call the catchall language or any other silent activity of the student's choice, then I would think yes, again, to make your point, Walter, that bad laws are not always unconstitutional laws and I would think that would be a constitutional law.

**WALTER DELLINGER:** Well, I think the difference is, the only point I want to make is it does strike me as an official encouragement and that while it's not unconstitutional for the state to either encourage or discourage erotic fantasy, they may do either one, I think that religion is an area where we think it's no business of government to get into either encouragement or discouragement. My point is that when the legislature singles one of these out, it's not being neutral but it...

**BILL PRYOR:** That's not right. The First Amendment does more than that and what this Virginia law is doing is what the First Amendment itself does and the First Amendment not only says that there shall not be an establishment of a religion nor shall there be any law prohibiting the free exercise thereof. We have long had, for centuries, had, in this nation, laws that expressly protect religious expression that expressly note that religious expression is not disfavored, that it is protected and that is all this law does.

**WALTER DELLINGER:** Well, you see, I strongly agree with that, I just don't think that's all that this law does and, in fact, the argument that the law accommodates religion is met with the answer that a statute that provides for a moment of silence for each student to use as he or she sees fit, also fully accommodates the desire of some families, parents, rabbis, parishioners that the time be used to pray, that's why it is something that's any business of the government to go and add the word prayer. Now, an earlier Supreme Court case was a slightly easier example for my side of this debate because in the earlier case of Wallis against Jaffee, there already was a statute that provided a moment of silence. They passed a new law just to add the word for prayer so that everybody could officially vote that that was the collective governmental wisdom, that's where I think the line was crossed.

**MARGOT ADLER:** Now, Attorney General Pryor, do you have a question for Walter?

**BILL PRYOR:** Well, Walter, I heard you say the rule today that I've heard you say before, government prayer bad, private prayer good. What I cannot understand is why you do not follow your own rule here, where neither the government nor a religious majority has sponsored a prayer but any prayer that does occur with the expressed allowance of silent prayer has to be purely private?

**WALTER DELLINGER:** Well, I think this is the hardest and the closest case but it does seem to me that it is precisely because the government itself has no need, it's the gratuity of the government deciding for or against whether to put prayer in that constitutes the endorsement. Again, it's not the student praying that is unconstitutional nor even the creation of the occasion, it's the government's official imprimatur. I think that's stronger, for example, in the case like the Texas football case which, I think, will excite a number of our listeners and audiences since football and prayer were joined at the hip and on southern Friday nights in much of this country. It was defended they having a prayer right before the football game as being a choice of the students, a one minute open forum, but students don't get up and debate the war in the Middle East during this moment before the football game and was designated for prayer or meditation or some other sportsmanship message. It wasn't an open forum. You couldn't say winning is not the most important thing, winning is the only thing or let's cream the other team, you could only either pray or talk about one other thing closely related to it by the government's own order and, it seems to me, that that really does cross the line into the collectivization and the governmentalization of prayer and that those on the court who believe in private religious expression ought to be and are surprisingly not equally fervent that the government ought not be telling people what religious views they ought and ought not be expressing.

**BILL PRYOR:** There's a problem with that and the problem is that the view of those four dissenters, Walter, has so infected, not just the law and just not misunderstanding among lawyers and judges about what the First Amendment requires, it has infected public school classrooms and there was evidence in the legislative record in Virginia, including our mutual friend, Jay Secula, who testified before the Virginia legislature, that many teachers and principals believe that the decisions of the Supreme Court, the separation of church and state, somehow banishes any expression of religion from the public school and when the Virginia legislature reacts, just as Congress did in passing the Equal Access Law and in other examples, when the Virginia legislature reacts to that and makes it clear, no, that's not the case, it's not unconstitutional.

**MARGOT ADLER:** What about that?

**WALTER DELLINGER:** I believe it's unnecessary for the state to put in its code prayer, though I fully agree with Attorney General Pryor that a number of school officials, particularly in the '70's...it was almost, if you'll pardon the expression, an unholy alliance between a lot of secular school officials who believed that, because public premises were involved, there could be no religion and who actively discriminated against religious clubs and religious expression, joined with people who wanted a constitutional amendment that would lead to the government collectivization of prayer, all of them said and told everybody that prayer and God have been expelled from the public

schools. I think that was never the law but I do agree it was a problem. What we did when I headed the Office of Legal Counsel, was to send school guidelines to every single school superintendent in the United States of America and we made it clear, both sides of this principle, that where you allow voluntary clubs and activities, the Fellowship of Christian Athletes is equally entitled to meet, where students can read book reports of the students choosing to other people, if they can choose a book about religion, if they can write a biography of a great person, they can choose to write it about Jesus, where the valedictorian can choose her subject, she can speak about religion. Where a university funds student publications, it can not in any way discriminate against religious publications. Where you can hand out literature on the campus of...in a general way, students are allowed to that, you hand religious literature, we made this all clear but we also made clear that it's not for the government itself to say that's what these activities are for.

**MARGOT ADLER:** This is NPR's Justice Talking. I'm Margot Adler. Thirty states have laws that mandate or authorize a moment of silence at the beginning of the school day, are these laws a call to prayer? Do they serve a legitimate secular purpose. If you're just joining us, we're having a debate at the Federalist Society Conference in Washington, D.C. And now I'd like to go into the audience at that conference and take some of your questions and comments. First, let me find my mike, see if it works, it does. Start right here.

**MAN:** My question is for General Dellinger. If I recall from constitutional law, the endorsement test has to do with whether an ordinary person, a member of the general public, would understand from the state action, that the state has effectively endorsed religion. If I recall from first year tort law as well, the question of what a reasonable person would do under the circumstances, say in an ordinary negligence case, is a factual question that is usually not settled by a court but which is instead assigned to the jury so, my question for you General Dellinger is, how can we confidently say, how could a court confidently say that the presence of the word prayer in a statute by itself would lead a reasonable person to believe that the state was endorsing prayer, is that not more properly a factual question that should go to a jury?

**WALTER DELLINGER:** Mr. Sales (indistinguishable) was one of the last people I had a chance to teach, Ken Starr was one of the earliest I had a chance to teach and it's an excellent question and I do think that under a view of the law that what matters is whether people perceive there to be an endorsement that you might have difficulty establishing that the placing of the word prayer in the statute met that factual test, I really agree with that. I think, however, that I don't agree...I agree with you about what the law said, I don't agree that the law is right and I think it's wrong both ways. People will tell you that putting a...there were 3 or 4 dissenters that thought that Ohio couldn't, on a first come, first served basis, allow the placing of a Christian cross in the Capitol Square because people might wrongly assume that the government was endorsing it. It wasn't, you know, the next week there could have been a pro life or a pro choice or pro democratic display but...therefore, I think it matters what the government actually does. What the government had done in Capitol Square is truly create a neutral forum and where they've done that, even if some citizens misapprehend it as being an endorsement, I wouldn't strike it down. On the other hand, even if students, pupils would not see it as an endorsement. I think it's invalid. The state legislature has all told us that this is what the moment is for so, I think you're right about the existing law. I've got a little bit of trouble but I think the law is wrong, both ways on that. That the mere fact that...a lot of people say that if you allow the Fellowship of Christian Athletes to meet on the public school campus, some might think you're endorsing. Well, that's too bad. They have a right of equal access notwithstanding that misapprehension in my view. You correctly state what's in the law, however.

**MARGOT ADLER:** Let's take another question.

**WOMAN:** My question is also for General Dellinger. You mentioned back in the point about whether the legislature might have included this because there is widespread misunderstanding as to what students' rights in school actually are, the '70's but in just 2 or 3 years ago, Emily Zardickie was prevented from starting a Fellowship of Christian Athletes club in her Florida high school. Last month a girl was suspended for wearing a shirt that mentioned God in a pro life context to school. A kid was told not to wear a Star of David because it violated the gang symbols policy that the school had and that was only a year or 2 ago. This...I see examples of this constantly because I cover it in my job. It's obvious to me that many, many schools, despite the fact that they've received the federal government guidelines about religious expression in public school, have no idea really what those rules are that isn't it conceivable that perhaps putting this in as one option, not the preferred option, just an option stated, is helping to get across, again, to people who seem to have trouble understanding these principles, what the law actual is.

**WALTER DELLINGER:** It seems to me that...I think your point is very well taken and that in every one of those examples that student was exercising his or her constitutionally protected rights and wrongly being barred from doing so. I don't think that the state's...and I believe it's fine to give legal guidance and policy guidance that it's wrong for school officials to suppress those religious activities. I don't think the statutory code is where we usually put legal advise and that's why...I know it's a debate over...I think we cross the line when you make it part of the code of Alabama law that this is a moment for prayer, because then, I think, you're starting down the road of government collective endorsement of religion.

**BILL PRYOR:** This is an instance, Walter, where the legislature wanted to change the law, take a moment of silence law that was discretionary in Virginia and make it mandatory, put a provision in that would require the attorney general of Virginia to defend the law and made it clear that this problem that really does exist out there, should not be read by the school administrators who have to now administer this new mandatory moment of silence. Let's take the words of the president you served, Bill Clinton, who said, in 1995, some students in America have been prohibited from reading the Bible, silently in study hall. Some students have been prevented even from saying grace before lunch. Some school officials and teachers and parents believe that the Constitution prevents any religious expression at all in public schools, that is wrong. It's a rare occasion when I find myself in agreement with Bill Clinton, but he was right and this is a problem that

continues to persist. I think the guidelines that the department sent out were good guidelines but, guess what, we still have this problem in Alabama and my office, with the superintendent of education in my state has had to issue the same kinds of guidelines to continue to get out the word. What's wrong with the legislature? They are the lawmakers making it clear when they changed the law that everyone remember this is what the First Amendment requires.

**WALTER DELLINGER:** Well, I do agree with that. I wrote those words in fact....

And I still agree with them and I don't think it's wrong for the government to convey that information. I know you're going to think this is a very precious line that I'm drawing. I'm not even sure that preambulatory language or statements by the legislators would be a problem for a neutral moment of silence. I think it's unnecessary for the government to say in the law itself as being set aside for prayer.

**MARGOT ADLER:** Bill Pryor, I'm wondering...you've given a lot of examples and the audience has given a lot of examples of people who felt that they couldn't exercise religion freely in the context of school, what about the other side of that? Where do you think abuses could be possible in coercive, in other words, where do you think there could be coercive prayer in the moment of silence? Do you think there's a point where the line could be crossed? How would you determine if the moment of silence was abused? Where there be a certain case where it could be in your opinion?

**BILL PRYOR:** Well, if the moment of silence, this law in Virginia, were followed to the letter, I don't believe that it could be coercive. Now, if you were to take an example from my state, a tragic example of a couple of years ago, where at the beginning of a school day, a teacher forced an Orthodox Jewish child to bow his or her head, you know, that, I think, is not just complying with a moment of silence, that is the kind of coercion that is not only a disgrace, it is unconstitutional but if this law, as it's written in Virginia, which requires a 60 second moment of silence for...and each child has his or her individual choice, fully protected to do whatever they want during that moment of silence so long as it is silent, I don't believe that can be coercive.

**MARGOT ADLER:** Let's take another question from the audience. Let's...I should...

**MAN:** I'd like to ask General Dellinger...

**MARGOT ADLER:** Let's get a few for Pryor by the way.

**WALTER DELLINGER:** He's right so people don't need to ask him questions.

**BILL PRYOR:** It's always nice to be the home team.

**MAN:** I just don't understand exactly where you're drawing the line. You said quite a few times that if prayer is mentioned in the statute, even with this...or other purpose, it's no good. What if prayer were mentioned among 5 other things or if it were mentioned with 10 other silent activities, 100, where would you draw the line and how could constitutionally make any difference whether prayer is mentioned with a general clause or whether there is other specifics with it. How can that possibly make a constitutional difference?

**WALTER DELLINGER:** That's a fair question and I think when you take the basic principle that private prayer is good and government prayer is bad, the marginal cases are always going to be where you think the government itself is...become the active agent responsible for the prayer, okay. Now, if government has an open forum and prayer is one of many possibilities, the choice then of one among many by the individual speaker is not a governmental choice. So, there is a point at which I would convert over and it's not ever going to be a bright line but if you tell people that you're going to create a public forum and they could either speak about prayer or broccoli. I don't think you can say it's a government, it's an individual private choice. They chose prayer, they chose not to speak about broccoli and that's getting very close to the Texas football case, for example, where they elect a student speaker who can give a very narrowly circumscribed message in which a religious invocation is one choice and there's one other little choice but there's not much else. The government, it seems to me, has inappropriately entered the arena of deciding what we should do and there are abuses. We've talk...you were very right about the abuse we talked about but there are abuses...when you have a school that has a spoken prayer where everybody has to stand and recite and you don't have to attend that but you give up your right to go to the high school football game when collectively people are making some people feel as if they are religious strangers in their own public schools by governmental action and not just by private choice then I think that too is something we should be concerned about.

**MAN:** Yeah, this question is for Mr. Pryor. Notwithstanding current Supreme Court jurisprudence in the First Amendment and this is an establishment case, hadn't we misunderstood the Establishment Clause. Wasn't the Establishment Clause intended to prevent an institutional national church, wasn't it more directed towards that kind of thing rather than the problem of state endorsement or even more problematic, the requirement for secular purpose because your example of this prayer clause, you explained it as some kind of secular purpose which is really problematic if we're going to talk about prayer at all.

**BILL PRYOR:** Right.

**MAN:** And that would be my question.

**BILL PRYOR:** I agree with you that we have, in many ways, not only misunderstood the Establishment Clause which had not only the narrow purpose of prohibiting an established state church but really the narrow purpose of an established federal church because when the First Amendment was enacted, of course, there were state that had established churches but, I think that not only have one, and sometimes not been honest about the history of the Establishment Clause. I think that, in some of these contexts, there's a legitimate First Amendment question if we assume that the First Amendment, of course, applies to the states which now, thanks to the 14th Amendment, passed after the Civil War, we do. I think the real question is a free exercise question and a free speech question. In the example that I gave of the Orthodox Jewish student in Alabama being forced by a teacher to bow a head, to me that's not so much a question of an establishment of religion, that's a question of the free exercise of religion or the freedom of speech and that, I think, is where we can draw the line a lot in a lot more fair and tolerant way.

**MAN:** I have a question for both generals on the platform. And I take off on General Dellinger's talk about perception. How do you reconcile and have you reconciled with the average person's belief that the law is consistent. The discussion you're having on what is a much more gray area, with the fact that people always see instruments of our government actually having prayer, God, in their institutions, including our presidents saying God Bless America, Congress opening up with prayers by religious people and even the Supreme Court having at its doorway the Ten Commandments.

**WALTER DELLINGER:** I'm not sure that I can make consistent the approval of legislative chaplains. I'm dubious that that is valid for the reason you can't distinguish it. I do think that when presidents speak about their religious views, even invoking the God that the president worships, that government officials have also a private side that can't be completely broken off from their government life so, I'm much more comfortable with a president speaking of the wellsprings of his own beliefs and we want to hear from a president personally and other government leaders and they shouldn't have to censor out their religious beliefs, then I am comfortable with having the legislature pass something in the statute books. I know that's a fine distinction because the president is always a government...always... (indistinguishable) a government official is those who have been in OLC will, in the audience, will attest but presidents could sometimes must speak their own views as well, even when they're addressing the nation in a governmental capacity.

**BILL PRYOR:** I think the question was a good one and the question was, how can we reconcile what are still prevailing government sponsorships of prayer, not only public prayer but government sponsored prayer that still occur in institutions of government including the Supreme Court, including legislative chaplains, including the Montgomery, Alabama City Council or County Commission, which begins a meeting with a prayer, how do we reconcile it with these decisions particularly in the area of public schools and it's not an easy reconciliation. Now, the fact of the matter is that the founders did not view an acknowledgment of God or prayer as a violation of the First Amendment. Now, granted, we didn't have widespread public schools and what the court has said in this area, of course, is that children are different, they're impressionable. That we are sending an almost dangerous message to them with a government sponsorship of prayer. You know, that's why I said earlier in this debate, I find that question about the teacher-led prayer more difficult than Walter does because kids hear all kinds of things with which they don't agree and one of the things they learn as citizens of this country is that they have freedom of conscience, they have the right to their own beliefs but that doesn't mean that they're going to always agree with what they hear. And, our institutions still do recognize that there can be acknowledgments of God and that our institutions have always presupposed the existence of God, that we derive our rights from God, not from government, that was the critical difference in the founding of America.

**MARGOT ADLER:** Bill, given what you said, what do you think about the posting of the Ten Commandments in public schools because, of course, some people would argue that, for some religions, certainly Hindus and others, several of those commandments go against their belief.

**BILL PRYOR:** Well, the Supreme Court of the United States ruled, in 1980 in a case from Kentucky, Stone versus Graham, that you cannot have a permanent posting of the Ten Commandments in a public school classroom so, as a lawyer, I would say it's a settled question...

**MARGOT ADLER:** But, personally.

**BILL PRYOR:** ...now if you ask...personally I think it's pretty hard and disingenuous to defend the court's decision, again, unless you're recognizing that children are this special group of citizens who have to be kept away from the dangerous messages of religion. You have a hard time reconciling this with the notion that the court that handed down that decision, it's a 5 to 4 decision, itself has multiple depictions of the Ten Commandments in its own courtroom and it's not just one, folks. There are many depictions of the Decalogue in the Supreme Court of the United States. It's carved on the doors to the courtroom, there's a tablet 6 feet tall directly above where the Chief Justice sits, there are little brass medallions all along the railings with depictions of tablets with the Roman numerals 1 through 10 and there on the right-hand wall, at the top of the wall, is a frieze of ancient lawgivers with Moses, 6 feet tall, holding tablets with Hebrew letters, I wonder what it is.

**MARGOT ADLER:** Let's go back in the audience and take some more questions and comments unless, of course, Walter has something to say.

**WALTER DELLINGER:** I'm not ever going to run for Attorney General of Alabama to get to Bill Pryor. You know, part...while...part of the problem is that we don't think of the school teacher as the government, do we. You know, I think if this debate were about whether the government could post a religious message chosen by the government in every IRS office and direct IRS agents to tell everybody that



came in to be audited, that the IRS agent could say, I'm going to lead us in prayer.

**MARGOT ADLER:** They're going to feel they need it at that point.

**WALTER DELLINGER:** We would be horrified that the government was doing it. Ordinary people, realistic people see the public school teacher Ms. you know, Jones that they remember from the 4th grade, don't see her as an IRS agent. It takes years of careful training in constitutional scholarship to realize it is a matter of law, the IRS agent, you know, the director of the Internal Revenue Service and the school teacher are both the government and that's why I think it is sometimes hard for people to understand, you know, why we think that "government officials should not be making the religious decision.

**BILL PRYOR:** But there's a reason, there is a critical difference here and there's a commonsense reason why we see a difference in the school and it's not the teacher, Walter, it's not just to focus on the teacher, the problem is, when we send, as parents, our children to school, we expect more than we do from an audit with an IRS agent. We expect our children to be instilled with values that will make them good citizens and millions of Americans think that job is not performed adequately when religion or religious values are excluded and that's why it's more difficult.

**MARGOT ADLER:** But they can send their kids to Sunday school or Saturday school.

**BILL PRYOR:** They certainly can but the problem with that is that a child who has to be educated and reared every day doesn't just need that message one day out of seven.

**MARGOT ADLER:** Let's go on to another question.

**WALTER DELLINGER:** Well, let me follow-up on that. The other side of that coin is that the parents who have a constitutional right to arrange for the religious upbringing of their children have the right to insist that the state, through the public school, not teach a religion that's contrary to theirs and that's the other side of the coin that you just articulated and perhaps you can respond to that.

**BILL PRYOR:** Well, that's the reason I am not, even though I think the question is more difficult than Walter would allow. I'm not troubled where the court has drawn the line and, I agree with you, the real question in these cases is not about establishment, the real question is about free exercise, freedom of conscience and free speech, just as you stated it.

**MAN:** The State of New York just adopted a measure setting aside a public school classroom for Muslim students to use during the season of Ramadan to pray, I'm wondering, Walter, if you think that is a permissible accommodation of their free exercise rights or whether it's an impermissible establishment of religion. Actually, I'd like for both of you to respond.

**WALTER DELLINGER:** I think that's an interesting question and I think that the answer would be if the school makes lots of efforts to accommodate individual decisions that there be prayer or similar activities then I would be comfortable with it where it's truly a matter that students are doing. If you otherwise facilitate people being able to exercise their religion by, you know, by doing it. If other groups with similar needs could do so then I think one could defend that. If you move just beyond silence into these other prayer activities that Bill Pryor thinks are a close case, I represented a number of religious groups in the Texas football prayer case, the American Jewish Congress and a number of other organizations, and one of the points that that amicus brief made is that government involvement in religion is bad for religion from the wellsprings a view pointed you've often expressed, the...you know, what happens is, when you have government prayer, what follows with it is the government censorship guidelines. Back in Lee versus Weis when they would have an officially designated prayer at graduation, they wouldn't stop there, they would then say, but you must not utter the word Jesus, you must not give a sectarian prayer, the prayer has to be reviewed by some government official, that is inevitably what happens. You either get government sponsorship or something that really makes people religious strangers in their school or you get government officials censoring prayer. I don't see it as any good role for government in determining the content or whether there should be prayer and the First Amendment saves us from that by both prohibiting all forms of official prayer while both preserving and protecting all forms of truly private prayer.

**BILL PRYOR:** I'm heartened to hear that New York, which has been, you know...my state, Alabama, is the source of most Establishment Clause cases. New York has to be the primary venue for cases involving free exercise violations and it was just this last term of the Supreme Court, again, in the Good News Club case, where New York was, once again, slapped down by the Supreme Court because they wouldn't let a Bible club on school premises after school hours. I'm heartened to hear that they're making that kind of allowance for Muslim students during Ramadan. That, to me, is a good sign for New York.

**MARGOT ADLER:** Let's take another question.

**MAN:** This is, I guess, primarily directed to General Dellinger. Even if you accept the notion that a moment of silence is not government coercion and even you accept, going further than that, that being subjected to prayer in public events, Congress and In God We Trust on a coin is not coercion, I fail to see how you cannot consider it to be coercive to require an atheist, such as myself to say the Pledge of Allegiance clause which says, one nation under God. I'm an American citizen just like everybody who has religious beliefs and I understood your earlier comments of you...were dismissing, out of hand, the notion of any effective constitutional challenge to laws which require the Pledge of Allegiance. If I misunderstood you, please clarify.

**WALTER DELLINGER:** Let me, yeah, let me be quite precise. I believe that a school may organize students to say the Pledge of Allegiance but I do not believe that any person can be coerced to say the Pledge with or without the word God in it. I mean, the Supreme Court said that and I strongly believe and I don't think we would want to be, you know, a lot of people are worried about what would happen if Elian Gonzalez went back and were organized to recite messages chosen by the government, I think we don't ever want anybody required to recite a speech organized by the government, that that really is across a very big road. Understand there's some people will be uncomfortable that others are reciting and they are not but that, to me, does not make it, at that level, unconstitutional but certainly nobody should be coerced into saying that or making any other pledge, in my view.

**BILL PRYOR:** I agree.

**MARGOT ADLER:** Last question. General Pryor, could Congress pass a law tying federal funding for schools to an exercise of moment of silence in the classroom? Would it be constitutional?

**BILL PRYOR:** This is federal education funding. I don't think...

**MARGOT ADLER:** Federal education funding.

**BILL PRYOR:** ...that would violate the First Amendment but I'm running through the federalism challenges to this...this spending clause statute which is my new hobby, spending clause.

**MARGOT ADLER:** That's why we asked you this at the Federalist Society.

**BILL PRYOR:** You know, if the federal funding is for education and particularly has some relation to ensuring that there are going to be reasonable accommodation in schools for release time programs or extracurricular activities like Bible clubs, there's a close relationship there, I wouldn't have a problem with tying that to a moment of silence but I, at least as a matter of policy, if not law, I'd object to these extraneous strings that have nothing to do with the funding purpose that come down from Congress upon the states.

**MARGOT ADLER:** Any thoughts?

**WALTER DELLINGER:** I believe it's constitutional. This was constitutional when Congress tied federal funds to schools providing equal access to religious groups on the same basis as all other groups. If the law itself passes, constitutional muster, I believe a neutral moment of silence would, Congress can say, we want that and we want...and I very strongly believe in the equal access principle that Congress did adopt as part of a national mandate. I'm less uncomfortable about national mandates, however, than many people in this room.

**MARGOT ADLER:** We're just about out of time. It's time to give our debaters a last chance to make some final brief remarks. First, Attorney General Bill Pryor.

**BILL PRYOR:** Well, I return to my last sentence in my opening statement. There is nothing dangerous about a classroom of silent children. In fact, many parents in the United States would find it a refreshing sight and so, I think, would many teachers and...with our tradition of not only respect for religion but also a healthy hostility toward government sponsorship of religion. I think that the Commonwealth of Virginia struck the right balance. It is...this is, after all, the home of Thomas Jefferson where the first guarantee of religious freedom was enacted and, I think, they have followed in his tradition.

**WALTER DELLINGER:** I believe...

**MARGOT ADLER:** Wait. And now, a closing statement from Professor Walter Dellinger.

**WALTER DELLINGER:** Well, I believe that Attorney General Pryor and I agree on about 99% of the issues in this area and I think there's a growing consensus along the area that distinguishes between government religion and private religion which, I think, is quite encouraging. I think, when I first got into this issue in the late '70's, there were many people that felt that if there was a public premise involved, you had to exclude religion all together even if many other voices and many other views were free to be heard. On the hand, there were those far more who were willing to have government self-composed prayer and collectivize us into reciting the government's own prayer words. In other words, there were two camps. Prayer is always good and if we need government muscle to make you do it, we'll get it and those, on the other hand, who saw prayer as always bad and we want to discourage it wherever we can, even if it's a product of private choice. I think we've come much, much closer together. There's been a wonderful consensus that the line ought to be, whether it's government or private prayer, not where it occurs, that there's equal access to funding for religious speech as well as all other speeches. It's a little bit troubling still, in my view, that I think 3 Justices on the court have it wrong one way and 4 Justices have it wrong the other way. That is, the courts further apart than the country is on this, though the results are always right. Thank you.

**MARGOT ADLER:** Former Solicitor General Walter Dellinger and Alabama Attorney General Bill Pryor, thank you both and thanks to Dean Router and Leonard Leo of the Federalist Society for their assistance with this program. We close this edition of Justice Talking with this thought from Henry David Thoreau: "Silence is the universal refuge, the sequel to all dull discourses and all foolish acts...where no indignity can assail, no personality can disturb us."