RESPONSE TO ALLIANCE DEFENSE FUND LETTER, MARCH 31, 2010

Submitted by the Freedom From Religion Foundation, April 27, 2010

The Alliance Defense Fund's letter to Mayors was mailed ***before*** *FFRF won its challenge of the National Day of Prayer in district court on April 15, 2010. The ADF, representing the National Day of Prayer Task Force, briefed the court with the same arguments it presented to Mayors. These arguments were unpersuasive to the court. See the decision, Freedom From Religion Foundation v. Obama,* No. 08-588, 2010 WL 1499451 (W.D. Wis. 2010), *which addresses and rejects ADF claims in detail.*

I National Day of Prayer Law Based on Revisionist Myth

The Senate Report to the National Day of Prayer law (Public Law 82-324), enacted in 1952, erroneously claimed that "when the delegates to the Constitutional Convention encountered difficulties in writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions." As Judge Barbara Crabb noted in her careful decision, this claim is untrue. The U.S. founders did not pray during the Constitutional Convention when they adopted our secular Constitution, which shows their intent to keep religious ritual out of government.

II Constitution Has Secular, Not Religious, Foundation

Our nation is founded on a secular and entirely godless Constitution. Its only references to religion are exclusionary, such as that there shall be no religious test for public office (U.S. Const. art. VI). The Establishment Clause of the First Amendment — "Congress shall make no law respecting an establishment of religion" — erects a "wall of separation between church and state," a descriptive metaphor by Thomas Jefferson which is a bedrock principle in decisions by the U.S. Supreme Court. The guarantees of the Bill of Rights, including the First Amendment, of course, have long been incorporated to apply to state as well as federal citizens. *See Everson v. Board of Education,* 330 U.S. 1 (1947).

III National Day of Prayer Proclamations Not an Unbroken Tradition

The district court in *FFRF v. Obama* notes: "No tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular date. It was not until 1952 that Congress established a legislatively mandated National Day of Prayer; it was not until 1988 that Congress made the National Day of Prayer a fixed, annual event. Defendants identify no other instance in which Congress has endorsed a particular religious practice in a statute." 2010 WL1499451, at *24. The district court distinguished between the National Day of Prayer and Thanksgiving proclamations in three significant ways. ADF relies repeatedly on one National Day of Thanksgiving Proclamation by Pres. George Washington in 1789. Yet Washington also warned: "Religious controversies are always more productive of more acrimony & irreconcilable hatreds than those which spring from any other cause." (Letter to Edw. Newenham, 1792).

James Madison, primary architect of the U.S. Constitution, eventually concluded that national days of prayer were unconstitutional (Detached Memoranda, 1817). Thomas Jefferson always strenuously opposed them. In explaining why he refused to issue prayer proclamations, President Thomas Jefferson wrote to the Rev. Samuel Miller in 1808: "I consider the government of the U.S. as interdicted by the constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises... But it is only proposed that I should recommend, not prescribe, a day of fasting and praying. That is, I should indirectly assume to the United States an authority over religious exercises, which the constitution has directly precluded them from . . . Every one must act according to the dictates of his own reason and mine tells me that civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents." What Jefferson could not do as President, certainly mayors may not do.

IV Justice Douglas Quote Misused

ADF quoted Justice Douglas, saying, "We are a religious people whose institutions presuppose a Supreme Being..." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). In context, and as Justice Douglas later explained in his dissent in *McGowan v. Maryland,* 366 U.S. 420, 563 (1961), this is a reference to his view

that our constitutional law and our common law were founded on the belief that God gave Americans certain unalienable rights. Given the context, he was not espousing a declaration that our government is one that supports belief in God. Justice Douglas further explained,

> "[I]f a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, first, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others...
> ***The First Amendment commands government to have no interest in theology or ritual;*** it admonishes government to be interested in allowing religious freedom to flourish — whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral." *Id.* at 563-564. (emphasis added)

IV Establishment Clause Law Does Not Approve Mayoral Prayer Proclamations

Establishment Clause case law supports the proposition that mayoral sponsorship of a day of prayer is constitutionally problematic. ADF told mayors, "You can be confident that your participation in and acknowledgment of the National Day of Prayer are constitutionally protected activities." That is not true. It is true that mayors, as individuals and not in their official capacity, have the rights of free exercise of religion and free speech. However, actions by government officials in their official capacity are not protected, and their actions that favor religion have been found to violate the Establishment Clause. As Judge Crabb noted in the district ruling, the Supreme Court has continually required government neutrality toward religion. *See e.g., McCreary County*, 545 U.S. at 875-76 ("[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); *Board of Education of Kiryas Joel Village Sch. Dis. v. Grumet*, 512 U.S. 687, 703 (1994)("government should not prefer one religion to another, or religion to irreligion."); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590-91 (1989)("government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)(government "may not...promote one religion or religious theory against another or even against the militant opposite.)

VI *Marsh v. Chambers* Does Not Support Mayoral National Day of Prayer Activities

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court ruled that a legislative practice confined to a nonsectarian, non-denominational prayer, led by an officiant who had not been selected based upon any impermissible religious motive, and which was addressed to the body of legislators present and no one else, was permissible. *See Marsh*, 463 U.S. 783. The Supreme Court later noted in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 n. 52 (1989):

> It is worth noting that just because *Marsh* sustained the validity of legislative prayer, ***it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional.*** Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. (emphasis added)

Legislative prayer is distinct from official prayer proclamations. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

FFRF and its attorneys would be pleased to provide you with further resources. A pdf version of *FFRF v. Obama* is available online at: *http://ffrf.org/news/releases/judge-rules-in-favor-of-ffrf-in-suit-against-national-day-of-prayer/.*