SOUTHEAST LAW INSTITUTE™

1200 Corporate Drive, Suite 107
Highway 280 - Meadow Brook Corporate Park
Birmingham, Alabama 35242

Telephone: (205) 408-8893
Facsimile: (205) 408-8894
E-mail:AEJ@SoutheastlawInstitute.org
www.southeastlawinstitute.org

January 2005

Dear Friends and Supporters,

We had an extraordinarily busy end of the year, winding up some issues and preparing for some in the new year. We were able to favorably resolve most matters and included in these we:

- Responded to several telephone calls for assistance on public school denials of the religious meaning of Christmas.
- Assisted a student who was attempting to transfer from a homeschool to a public school which would not accept her credits.
- Consulted with Ft. Payne lawyers on the contest of a wet/dry election, but the judge unfortunately dismissed their case.
- Assisted lawyers in northwest Alabama to resolve an issue of the right of a Christian school student to participate in athletics after transferring from a public school.

A week before Christmas I appeared on Senator Hank Erwin's television show to discuss our religious rights at Christmas. We are always available to provide education on important issues. A major part of SLI's mission is to educate. Education does more than anything in life to resolve problems. We are always grateful for the opportunity to serve in this way.

Another issue for which we have been providing legal analysis involves Amendment 2, which lost in the general election, but would have removed certain racist language concerning education. Though there seems to be almost universal denial in the media, the true situation is that racism was being used as a cover to establish a "constitutional right" to a public education in Alabama. This month's Educational Update is a clear explanation of the issue, which was published in *The Birmingham News* on December 19, 2004. We hope the legislature will remove the racist language, while permitting open debate on the issue of education.

We have also been busy drafting legislation for the upcoming 2005 Regular Session of the Alabama Legislature. We will give you a more complete report on the content of these bills in upcoming newletters. They include a constitutional amendment to prohibit same-sex marriage and civil unions, a Laci and Conner Peterson-type fetal homicide bill, and a companion bill for civil damages for the death of an unborn child.

We are grateful for your support last year. Please remember us as the new year begins. Keep in mind that during the legislative session (February-May), it will be necessary for me to frequently be out of my office to testify and provide legal assistance on a number of legal issues. I will not be receiving pay for that work, yet office, travel and related expenses will go on. Please support us in this very important work.

With best wishes for the new year, I am,

Yours very truly,

A. Eric Johnston, General Counsel

AEJ/ppm

A CHRISTMAS MEMO
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **January 2005**
From: **A. Eric Johnston**
Re: **Reflections on Another Christmas, Er . . . I Mean . . . , Holiday Past**

For over twenty years we have been working on protecting the rights of public school children to enjoy the religious aspects of Christmas. During the 1990s, there was a significant amount of litigation on the issue, including Alabama. You may recall the DeKalb County prayer case. The ultimate decision by the Eleventh Circuit Court of Appeals agreed with SLI's initial position taken on behalf of Governor James, that the free exercise of religion clause permits children to express religion at public schools, including Christmas.

Guidelines have been provided by both the federal and Alabama state governments. The federal "No Child Left Behind Act" and Bill Pryor's Attorney General's Opinion clearly explain free exercise rights. Nevertheless, each year, we have telephone calls from concerned parents that their children are not permitted to tell the true Christmas story, pass out Christmas cards referring to the virgin birth, or express some religious sentiment. This year was no exception. We had a few calls, provided information, and to our knowledge, all problems were satisfactorily resolved. We appreciate that most schools respect students' rights.

In addition to public schools, public squares have also been scrutinized. You may recall the U.S. Supreme Court case which permitted a nativity scene to be erected by a city, so long as there were other aspects of Christmas present. This is pejoratively called the "plastic reindeer test." In other words, the baby Jesus could be present as long as there were also plastic reindeer. Although this test may sound strange, it is really not too far removed from an appropriate appreciation for Christmas in all its aspects.

This past Christmas, we noticed for the first time an effort in the private sector to remove the Christian aspects of Christmas, *viz*., Macy's required employees to express "Happy Holidays" and not "Merry Christmas" and the Summit shopping area in Birmingham had no Christian symbols. Christmas trees were even removed from stores and open areas and this would certainly lead you to believe that mangers were a no-no. It was not long ago that the only debate was whether Christmas trees were historically "Christian" or "heathen." Oh, for simpler times.

This year Christmas finally became politically incorrect. Many public schools did not let up on their efforts to sanitize (Santa-tize) Christmas, but for the first time, we saw major developments in virtually every area of American life to abandon our traditional cultural appreciation for Christmas. The fact is, America seemed to be celebrating every new and every secular aspect of Christmas, but the traditional and Christian religious aspect. There was a plastic reindeer, but no baby Jesus; there was a menorah, but no star; there was a zawadi, but no wise men; there was a Nutcracker, but no kernel of truth.

It is true we are a country of immigrants and not a homogenous society. Nevertheless, the first Americans were of a Judeo-Christian heritage from Western Europe, although they were diverse in their doctrine. They brought with them many customs, most of which were integrated into the cultural traditional American Christmas as we know it. It was not too very long ago that we enjoyed all of the traditions of Christmas. It was not wrong to expect Santa Claus, because you still knew and, if you wished, celebrated the real "reason for the season." Non-Christians were not forced to believe in the virgin birth, but it was accepted as part of the American tradition. One was not afraid to say "Happy Holidays", and be mistaken for trying to avoid saying "Merry Christmas." It was all part of the same thing.

The American population has changed with significantly more presence of other religions and traditions from parts of the world other than Western Europe. We should all respect these religious beliefs and customs. These Americans are entitled to celebrate and enjoy them under the freedoms granted by the United States Constitution.

At the same time, America is great because of those constitutionally guaranteed freedoms. Accordingly, we cannot abandon our traditions for the sake of being radically pluralistic. Pluralism will lead to tribalism. We become a nation of separate tribes with no common bond. America has created its own nationalistic spirit, though being a country of immigrants with divergent views, by coming together under the banner of constitutional freedoms. What is happening in America today is a disintegration of that nationalism into an outwardly secular society devoid of our real tradition and history. The "politically correct" approach to American life today is to avoid doing something you fear will offend another person. Respect for another person is found in appreciation for his values and not the forsaking of your own values.

What we have just observed at Christmas is not a singular event, but a indication of something wrong. It is a multifaceted and complex problem, which must be approached in many different venues. It is a spiritual matter, as well as, a temporal matter. We do not have all the answers and there is certainly a great more reflection necessary to come up with those answers. For the time being, we need to do what we each can to respect one another, but at the same time preserve and respect what we have. We may be in the public sector or we may be in the private sector; wherever, we have an obligation to protect America's traditions, while respecting the individual beliefs of others. During the year let us think about how to approach Christmas next year. While we are thinking about that, let us put those thoughts into action now.

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **January 2005**
From: **A. Eric Johnston**
Re: **Failure of Amendment 2 Not a Mere Racism Issue[1]**

Amendment 2 has failed. It is true Amendment 2 was about racism. It is also true it was about the right to a public education. However, the issue is more complex than it appears. Amendment 2 was an effort to remove racist language from Amendment 111 to the Alabama Constitution. However, the effort was hijacked by those with another motive. Rather than simply remove racist language, the bill re-opened the issue of public education rights.

Amendment 2 would have removed the unconstitutional racist language that requires separate schools for "white and colored children" and references to the poll tax. It also would have removed language that there is no right to education at public expense. While these issues may have been linked in the segregationist years, they are unrelated today. The proposal harkens back not to the days of racism, but to the expensive and protracted litigation concerning the "equity funding" of Alabama public schools. A brief primer on the history is helpful.

Article XIV, Section 256, Alabama Constitution, provides for an education system, including separate schools for "white and colored children". In 1956, Amendment 111 was an effort to skirt the integration issue, but it precluded a "right" to a public education.

The "equity funding lawsuit" was filed in 1993. Judge Gene Reese held Section 256 provides for a constitutional right to education and Amendment 111 is unconstitutional. He directed the Alabama Legislature to fund changes in education which would have cost, according to the *Birmingham News*, 1.7 billion dollars. Judge Reese's reasoning had nothing to do with racism. In 1997 the Alabama Supreme Court permitted Reese to proceed with a plan of taxation. But, in 2002 the Alabama Supreme Court applied the "separation of powers doctrine" holding nothing authorized this "judicial intrusion into legislative matters." Racism was not an issue in either case.

To correct Reese's attempted usurpation, in 1996, Amendment 582 was added to the Alabama Constitution which says no state court order disbursing state funds would be binding until approved by a simple majority of the legislature. In support of Amendment 2, lawyers were been quick to opine this 1996 amendment will avoid any separation of powers issue. All of this legal wrangling raises the question of why be defensive when this proposed amendment can be fixed and voted on without any damage to the state, which is already struggling with taxes and costs of education. Simply have two bills, one to remove racism and one to address education.

As to the merits of Amendment 2, if it had passed, education would have become a constitutional right in Alabama. The obligation for funding would still remain with the legislature. However, plaintiffs would be given the very tool used by Judge Reese to require that funding take place regardless of the will of the legislature. Representative Ken Guin admits he put the extra language in Amendment 2 in order to do what Reese could not do in 1993. The mere fact the restrictive language is removed would be enough for Judge Reese to again find the right exists. At a minimum, we will have judicially directed increased taxes, but perhaps worse, we could have a constitutional crisis.

Whether to expand education rights or support new taxes depends on the will of the people through their duly elected representatives. The will of the people would not have been done if Amendment 2 had passed as a mere racism removal remedy having nothing to do with education. Racism was not the issue, it was the vehicle. The issues were control of education, taxes and judicial activism. If we want education as a constitutional right, why not vote on it honestly? The issue has not been debated either in the legislature or by the people. Why permit certain members of the legislature to conspire through subterfuge crying racism? Deciding education needs must be done by the legislature not the courts. All we need to do is simply hold the legislature accountable.

Clearly, Amendment 111 was passed during segregationist years. That parts of it should be removed is without question. That other parts serve a legitimate purpose must not be lost in racist rhetoric. In 1993, Judge Reese did not concern himself with racist ghosts; he declared the limitation on education rights unconstitutional for other reasons. After Amendment 2 lost, apologists condemned the "political right" as racists; that the focus on education was a "red herring." It is the apologists who are the fishermen. Alabama is not a racist state, except to those who use racism as a tool. At the same time these racist fishermen were casting their aspersions, the media was positively reporting the prominence of Alabama at the North American International Auto Show in Detroit.

Alabama has exceptional potential which it is now beginning to see. For commentators to almost unanimously accuse Alabamians as racists is invidious discrimination against Alabama. I see racism used time and again in legislative processes to obscure improper action. We must clear the mist of racism from our thinking and see issues for what they really are. Alabamians are intelligent people. In spite of constant editorializing, Alabamians understood the real issues in Amendment 2 and voted accordingly. Those who used racism as the vehicle are now tasting the sourest of grapes, which I understand taste a lot like red herrings.

[1] Printed in *The Birmingham News*, December 19, 2004.