AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE, INC.

To: **SLI Supporters**
From: **A. Eric Johnston**
Date: **July, 2000**
Re: **Comments and Analysis on *Santa Fe School District v. Doe***

INTRODUCTION

When the 5th Circuit Court of Appeals decided the *Jones* case in 1992, this began an effort to protect student-initiated rights for religious expression in public schools. From 1961 until then, the establishment clause had been used to remove virtually all *indicia* of religion from public schools. In the 1980s we began to realize that an effort to re-establish the equality of the free exercise of religion clause would be necessary if there was to be any religious presence in public schools. It was obvious and realistic that students' rights should be respected and if the school did not participate in what the student said at a forum, i.e. a place where student speech is permitted, the speech should be permitted, even though religious. The *Santa Fe* decision dealt a significant set back to that effort.

ANALYSIS OF THE CASE

On June 19, 2000, six members of the U.S. Supreme Court (Justice Stevens, with concurring Justices Kennedy, O'Connor, Souter, Ginsburg, and Breyer) ruled that a pre-sporting event (football) student invocation/message violated the establishment clause. It relied on the *Lemon* (1971) and *Weisman* (1992) cases. Rather than view the student speech under the First Amendment protected freedoms of speech and religion, the court chose to apply the establishment clause.

Since the *Lemon* case became law in 1971, there has been a progressive imbalance between the free exercise and establishment clauses of the First Amendment with establishment clause jurisprudence taking a significant priority. In other words, courts tend to view all public religious questions as establishment clause issues with very little consideration of individual free exercise and speech rights.

In the *Santa Fe* case, the district (trial) court used a free exercise test called a "forum analysis" to rule the policy was constitutional. A forum analysis tests a law or activity from the free speech and free exercise of religion clauses. Religious free speech is protected when a government opens a public place for some type of comment. The Santa Fe policy was to permit student comment, without school direction, on matters pertinent to the beginning of a sporting event. However, the Supreme Court determined this was not a public forum, but an attempt by the school district to impose a majority form of religious belief on an unprotected minority.

To accomplish this, the court resurrected the *Lemon* test which is the most subjective and restrictive of judicial religious tests. It also applied the test with a "facial" analysis, the broadest form of analysis. In other words, the policy is assumed on its face to be unconstitutional and the court need not consider there may be another legal and constitutional actual application of the policy.

The policy at issue provided that (1) students would vote to determine whether there would be a pre-game speaker and if so, (2) who the speaker would be. There was no requirement that there be a speaker or what the speaker would say, except that if there was anything said, it must be related to the event and be "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."

This policy had been developed over an approximate four year period based on orders of the district court. The *Jones* (1992) decision offered some guidance along with later cases. The school district argued it was trying to comply with the law and not promote a policy of prayer. Yet, the Supreme Court without evidence, except its own predisposition, determined the improper motive and purpose of the school district to be a perpetuation of school prayer.

Justice Rehnquist, along with Justices Scalia and Thomas, dissented saying that the policy should have been given an opportunity to go into effect. Any court challenge would then be on the basis of "as applied", thereby having given the students a chance and to see whether there would in fact be prayer or other type of speech, or a mixture of speech. So long as the student made the choice, it does not matter if it is a prayer or something else. Because the majority would not permit that development, the Chief Justice said that its opinion "bristles with hostility to all things religious in public."

The majority termed the prospective student's speech as "government speech" and not "private speech". This was based on its predisposition to find an improper purpose and because it took place at a public school.

The majority's final concern was whether someone might view the policy as being an endorsement of religion. With its predisposition on the legislative history of the policy, the court automatically assumes an observer would believe the school district was endorsing religion. However, such a concern is easily obviated by a notice in the "event program" that any student comments are private speech by the students and in no way are endorsed or authorized by the school.

CONCLUSION

With this "hostility" the current makeup of the Supreme Court suggests there will be continued dominance of the establishment clause which will overshadow individual rights. In the *Tinker* case (1965) the Supreme Court recognized that students do not leave their rights at the schoolhouse door. However, if those are religious rights, they apparently do.

When school districts, like the one in Santa Fe, by the direction of a lower federal court, make continuous serious attempts to cooperate with the law and develop policies which recognize students' rights without state control or directions, yet are cast aside by a hostile predisposed court, there is little future for those individual rights. This raises significant concern for the ultimate disposition of religious comments by the valedictorian at graduation. There should be distinctions between a pre-game invocation and the valedictorian's right to make religious comments. Whether that is true, may ultimately depend on a change of court membership. That truly raises the significance of the 2000 Presidential elections.