SOUTHEAST LAW INSTITUTE™

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Dear SLI Supporter:

Most of us have been so absorbed with the political campaigns, we have had little time for other issues. In the legal/political sphere, elections always take precedence because the persons who are elected to office will be the policymakers and, ultimately, the authors and arbiters of our law.

As a result of some of these policies, recent U.S. Supreme Court decisions have made some favorable law, but there have been some discouraging opinions from other courts. In the months ahead, we will examine some of these opinions. The U.S. Supreme Court opinions conclude:

* School vouchers are constitutional. This permits states to pass laws for parents to obtain either a voucher or a tax credit, which they may use to send their child to a non-public school, including a religious school, if that is their choice. This particularly helps children who are in failing public school districts and low income families.

* Judges have First Amendment free exercise of speech rights to debate campaign issues. Alabamians are familiar with some of the problems Alabama Supreme Court Justices faced in the last campaign. Judges are entitled to participate in public debates and the public is entitled to know their positions.

* Public schools may give random drug tests to students.

Perhaps, one of the most significant cases decided was the recent Ninth Circuit Court of Appeals ruling in the case of *Newdow v. U.S. Congress, et al*. That appeals court has declared our national Pledge of Allegiance unconstitutional because of its inclusion of the words "under God". I have often wondered when the Pledge would be attacked. I assumed it would happen some day, but felt most scholarly lawyers, regardless of persuasion, would have recognized the lack of a constitutional issue and the necessity of having a strong historic Pledge of Allegiance. Well, on June 26, we learned that, at least, the western part of the country does not care for our Pledge of Allegiance. This month's educational update examines that opinion.

Summer is always a slow time. Many of us are on vacation and we have other interests. The election year and some of these court cases perks us up a bit. Regardless of all that we are doing, SLI is at work and continues to need your assistance. As we have often said, please do not forget our financial needs during the summer months. Please make as generous a contribution as possible. We are very grateful for your support.

Yours Very Truly,

A. Eric Johnston

AEJ/sh

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

To: **SLI Supporters**
From: **A. Eric Johnston**
Date: **July 2002**
Re: **Federal Court Proclaims "Pledge of Allegiance" Unconstitutional!**

On June 26, 2002, the United States Court of Appeals for the Ninth Circuit (which covers California, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii, and Guam) ruled the Pledge of Allegiance for the United States is unconstitutional because it includes the words "under God". The court deemed this to be an "establishment of religion". There has never been a direct ruling on this issue, although there is informal discussion ("dicta") in cases that the Pledge is constitutional. However, the Ninth Circuit was given the opportunity and during one of the most precarious times in the history of the United States, it has decided to attack one of the most important foundations upon which our country rests.

History

The Pledge of Allegiance was first written in 1892. In 1924, the words were changed to add that the Pledge to the flag was "of the United States of America". In 1954, the words "under God" were added after the words "one nation". It reads:

> *"I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all".*

Newdow v. U.S. Congress

Michael Newdow filed a lawsuit on behalf of his public school daughter against the Congress, California and others stating as an atheist she should not be required to pledge allegiance to a nation under God. A three-judge panel of the Federal Ninth Circuit agreed saying even though students are not required to recite the Pledge it shows an endorsement of religion; it "aims to inculcate in students a respect for the ideals set forth in the Pledge"; the Pledge is an attempt to employ the machinery of the state to enforce a religious orthodoxy; the mere fact that a pupil is required to listen every day to the statement "one nation, under God" has a coercive effect; and the sole purpose of the 1954 act was to advance religion - all of which makes it unconstitutional. One of the three judges dissented and pointed out earlier opinions by federal courts which are contrary to this extraordinary ruling. The other two judges even recognized those earlier opinions, yet persisted in their belief that the Pledge is a danger to America.

Explanation of the Court's Error

The most important legal concept to be understood deals with the nature of the Pledge of Allegiance. Although no U.S. Supreme Court case has been decided concerning the Pledge with it including the words "under God", the 1943 case of *West Virginia State Board of Education v. Barnette*, held that Jehovah Witness students in public schools could not be required to recite the Pledge because it would violate their First Amendment rights. While that decision was limited to "political" ideas, its essence was that although the students who objected would not be forced to say the Pledge, the students who wished to say the Pledge could. Under the *Newdow* ruling, no one would be able to say the Pledge.

Additionally, though the Supreme Court has not ruled directly on the issue, it has recognized in dicta that "one nation under God" in the Pledge of Allegiance is constitutional. See *County of Allegheny v. ACLU* (1989). Similarly, the national motto, "In God We Trust" was held by this same Ninth Circuit Court to be constitutional in *Aronow v. U.S.* (1970).

The Pledge of Allegiance seeks to establish in a concise statement what it means to be an American. America stands for a certain and absolute set of values and principles. The ruling of the Ninth Circuit Court simply refuses to recognize, among other things, the religious foundation and history of America. It refuses to recognize the *Barnette* concept that you are not required to recite the Pledge, but you are free to recite it. If we are required to

follow this court's reasoning, our religious free rights are violated because we will not be free to recite the Pledge and acknowledge a "nation under God". The dissenting judge succinctly stated the reality of this case:

> "In God We Trust" or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity."

Conclusion

The onward march of groups who hate the real values of America have brought the Ninth Circuit Court to the logical conclusion. The Pledge of Allegiance is probably the single most significant statement of what America is. For that reason, this decision cannot be ignored, either by the polity or the U.S. Supreme Court.

The Justice Department has already asked the entire e*n banc* Ninth Circuit Court (15+ judges) to review the decision, which has been temporarily stayed. If the e*n banc* Court reverses the decision, the case will be over. If it affirms the decision, SLI believes the U.S. Supreme Court will review it. When that happens, we believe the U.S. Supreme Court will say exactly what it meant in *Barnette* and in *Allegheny* and find our Pledge of Allegiance is constitutional.

Federal decisions are difficult to understand. In reading this one, we see a shallow reasoned and thinly veiled attempt to strike at the freedom of the public square in America. The idea that a simple proclamation of belief in America somehow establishes or requires persons to subscribe to or establish a religion or dogma is simply beyond normal reasonable comprehension.