

## **N.D.A.G. Letter to Clayburgh (Jan. 30, 1991)**

January 30, 1991

Representative Richard S. Clayburgh  
House of Representatives  
State Capitol  
Bismarck, ND 58505

Dear Representative Clayburgh:

Thank you for your January 28, 1991, letter requesting my opinion on the constitutionality of prohibiting sales of alcohol on Good Friday. While I cannot give a definitive answer to your question, the prohibition against sale of alcohol on Good Friday is probably a violation of the establishment clause of the first amendment to the United States Constitution. That clause prohibits states from making laws that establish or support religions or religious purposes.

The United States Supreme Court has established a three prong test for determining whether a state's statute is permissible under the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not foster 'an excessive government entanglement with religion.'" Stone v. Graham, 449 U.S. 39, 40 (1980) (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971)). A failure to pass muster under any of the three prongs of this test causes the statute to be struck down under the establishment clause of the first amendment. Stone v. Graham, 449 U.S. at 40-41.

To date, only one state supreme court has specifically addressed the question of whether banning the sale of alcohol on Good Friday violated the United States Constitution. In Griswold Inn, Inc. v. State of Connecticut, 441 A.2d 16 (Conn. 1981) the Connecticut State Supreme Court declared Connecticut's statute prohibiting the sale of alcoholic beverages on Good Friday unconstitutional. In that case, the court found that the statute did not pass muster under any of the three prongs of the test established by the Supreme Court.

Under the Supreme Court test, the first prong is whether the statute has a "secular legislative purpose." A look at the legislative history of North Dakota Century Code section 5-02-05 leaves no doubt that the legislative reason for prohibiting alcohol sales on Good Friday was based on religious rather than secular grounds. In 1967 an amendment was proposed to House Bill No. 683 which would add Thanksgiving as a day on which the sale of alcohol would be prohibited. That amendment was defeated because "[i]t was decided that this was not considered a religious day and should not be included with Good Friday . . ." Hearing on H.B. 683 before the House Committee on Finance and Taxation, 40th N.D. Leg. (January 31, 1967). In 1973, when N.D.C.C. § 5-02-05 was amended to add

Thanksgiving Day, the basis for adding it was that Thanksgiving Day was a religious holiday from the Puritan's point of view. Hearing on H.B. 1151 before the House Committee on the Judiciary, 43rd N.D. Leg. (January 29, 1973) (Statement of Representative Lundene). In 1985 a bill was introduced before the House of Representatives which would amend N.D.C.C. § 5-02-05 to allow for the sale of alcohol on Good Friday and Memorial Day. The bill was passed only after it was amended to allow alcohol sales on Memorial Day but still prohibit them on Good Friday. Hearing on H.B. 1428 before the House Committee on Industry, Business and Labor, 49th N.D. Leg. (January 29, 1985).

The legislative history of North Dakota's prohibition of alcohol sales on Good Friday does not demonstrate a secular purpose. Thus, the statute does not appear to pass muster under first prong of the test established by the United States Supreme Court. Consequently, a court would likely find it is unconstitutional under the establishment clause of the first amendment to the United States Constitution.

I hope this discussion is helpful. I am also attaching a copy of the Griswold Inn case for your review.

Sincerely,

Nicholas J. Spaeth

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