course of action the issuing officials have taken. Thus we conclude that Formal Opinion 1952—No. 15 is not here applicable.

In view of the foregoing, we have reached the conclusion that the pending litigation which questions the constitutionality of Chapter 45 of the Laws of 1961 will not affect the validity or payment of the bonds authorized pursuant to Chapter 46 of the Laws of 1961. We advise you, therefore, that the issuing officials may lawfully provide for and cause the issuance and delivery of the bonds in question.

Very truly yours,

ARTHUR J. SILLS
Attorney General

By: ALAN B. HANDLER
Deputy Attorney General

JUNE 26, 1963

DR. F. W. RAUBINGER
Commissioner of Education
225 West State Street
Trenton 25, New Jersey

FORMAL OPINION 1963—No. 2

DEAR DR. RAUBINGER:

You have asked our opinion as to whether the Supreme Court's decision in *School District of Abington Township* v. *Schempp* and *Murray* v. *Curlett*, Nos. 142 and 119 (Supreme Court June 17, 1963) affects the New Jersey statutes relating to the reading of five verses of the Old Testament and the recitation of the Lord's Prayer at the opening of each school day (R.S. 18:14-77 and 78).

The United States Supreme Court in the above decision held unconstitutional a Pennsylvania statute and a Rule adopted by the Board of School Commissioners of Baltimore City, Maryland, pursuant to Maryland law, which required readings from the Holy Bible in the public schools. The Pennsylvania law stated as follows:

> "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

The Baltimore Rule was similar.

> "Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. . . . Any child shall be excused from participating in the opening exercises upon written request of his parent or guardian."

It was the decision of the Supreme Court that these statutes violated the First and Fourteenth Amendments of the United States Constitution. The issue is whether the holding and rationale of this decision applies to the following New Jersey statutes.

R.S. 18:14-77:

> "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day . . ."

R.S. 18:14-78:

> "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Although not stated in express terms it has always been the practice in all school districts of this State to excuse those children who did not wish to participate in these practices.

It is our opinion that the *Abington* case renders these statutes unconstitutional and prohibits the practices authorized thereunder.

Although the laws challenged in the Supreme Court were somewhat distinguishable from the New Jersey statutes in that the New Testament was included in the former yet expressly excluded in the latter, we think the decision is broad enough to erase this distinction. There is no question but that the decision prohibits the use of the Lord's Prayer as a compulsory religious ceremony in the public schools. The thrust of the majority opinion is that the Government must maintain a position of neutrality in religious matters. The test which the Court set down by which legislation is measured against the Establishment Clause of the First Amendment is "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." That the reading of the Bible and the recitation of the Lord's Prayer fulfills neither of these requirements necessarily follows from the proscription of the First Amendment as delineated and interpreted by the Supreme Court. The Court's rationale does not depend upon the number of verses to be read, the choice of Testament permitted, the version of the Bible utilized, or the voluntary character of the ceremony, but rather that these ceremonies when presented in the context of a secular program of education "are religious exercises, required by the states in violation of the commandment of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion."

In 1950 the Supreme Court of New Jersey found that the Old Testament, because of its antiquity, its content, and its wide acceptance, was not a sectarian book when read without comment. *Doremus* v. *Board of Education of Hawthorne*, 5 N.J. 435 (1950), appeal dismissed, 342 U.S. 429 (1952). This precedent is no longer binding. Justice Brennan makes this clear in his concurring opinion in the *Abington* case:

> "The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history. To vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the

> student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided."

The neutrality mandated by the high Court's interpretation of the First Amendment is violated by the required use of the Bible, which is unalterably, "an instrument of religion" in the public schools. It might also be noted that the case of *Engel* v. *Vitale*, 370 U.S. 421 is authority for the principle that nonsectarian religious practices, as well as sectarian practices, violate the Establishment Clause.

It is, therefore, our opinion that the provisions of R.S. 18:14–77 and 78 are unconstitutional by virtue of the decision in *Abington* v. *Schempp*, and that the practice authorized thereunder should no longer be enforced, required or continued under the auspices of the State Department of Education.

Sincerely yours,

ARTHUR J. SILLS
Attorney General

JULY 19, 1963

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1963—No. 3

DEAR MR. KERVICK:

You have requested our opinion as to whether the Consul General of the General Consulate of Switzerland in Philadelphia, Pennsylvania is entitled to an exemption from or refund of the tax imposed upon the sale of motor fuels pursuant to N.J.S.A. 54:39–1 et seq. We conclude below that consular personnel are not entitled to the claimed exemption or refund.

This tax is imposed upon "distributors" of motor fuels. N.J.S.A. 54:39–27 states:

> "*Every distributor* shall * * * render a report to the commissioner * * * stating the number of gallons of fuel sold or used in this State by him * * *. A tax of $0.05 per gallon on each gallon so reported shall be paid by *each distributor*, * * *. If *any distributor* shall fail, neglect or refuse to file the report within the time prescribed by this section, the commissioner shall note such failure, neglect or refusal upon his records, and shall estimate the sales, distribution and use of said *distributor*, assessing the tax thereon, adding to said tax a penalty of 20% thereof for failure, neglect or refusal to report, and such estimate shall be prima facie evidence of the true amount of tax due to the commissioner from *such distributor* * * *." (Emphasis added)

A "distributor" is defined by the statute to mean and include every person who imports into the State motor fuels for use, distribution, storage or sale in the State. N.J.S.A. 54:39–3.

The Consul General does not claim an exemption by virtue of the statute itself. There are certain enumerated exemptions from the motor fuels tax specified by the