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## PUBLIC OFFICIALS State of Georgia Division of Archives and History: Authorize the Display of Certain Historical Documents as Part of the Foundation of American Law and Government; Provide a Context for Historical Documents; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

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## PUBLIC OFFICIALS

***State of Georgia Division of Archives and History: Authorize the Display of Certain Historical Documents as Part of the Foundation of American Law and Government; Provide a Context for Historical Documents; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes***

CODE SECTIONS:	O.C.G.A. 45-13-51 (new)
BILL NUMBER:	HB 941
ACT NUMBER:	532
GEORGIA LAWS:	2006 Ga. Laws 258
SUMMARY:	The Act authorizes local municipalities and political subdivisions to post documents considered to be relative to the foundations of American law and government. The authorized documents include the Mayflower Compact, the Ten Commandments as extracted from Exodus Chapter 20, the Declaration of Independence, the Magna Carta, "The Star Spangled Banner" by Francis Scott Key, the national motto, the Preamble to the Georgia Constitution, the Bill of Rights of the United States Constitution, and the description on the image of Lady Justice. The Foundations of American Law and Government display is to include these nine documents together with a context for acknowledging historically significant documents in America's heritage.
EFFECTIVE DATE:	July 1, 2006

### History

Georgia is among many states struggling to find a constitutionally appropriate way to display the Ten Commandments in public locations, such as judicial facilities, legislative facilities, and educational facilities. Recent Supreme Court case law has not provided a bright-line rule against the public display of the Ten Commandments.<sup>1</sup> Instead, the Court has focused on the context in which religious documents or images are displayed, finding otherwise unacceptable religious displays to be constitutional when governmental entities place such displays in the appropriate, e.g., historical or secular, context.<sup>2</sup> This was the guiding principle of the original drafters of the predecessor of Georgia House Bill 941: to provide historical context to surround the display of the Ten Commandments so as to pass constitutional muster.<sup>3</sup>

The most recent decisions by the U.S. Supreme Court involving the display of the Ten Commandments came down simultaneously on June 27, 2005.<sup>4</sup> Douglas Laycock, a professor of constitutional law at the University of Texas, boldly summed up these cases: “The road map is keep your mouth shut about the religious purpose, talk about secular and historical things, and you can probably get away with [publicly displaying religious documents or images].”<sup>5</sup> Particularly relevant is the decision in *McCreary County v. ACLU of Kentucky*, in which the Court threw out the historical displays because the authors of the supporting legislation had a clearly religious purpose.<sup>6</sup> This decision was issued after the initial drafting of HB 941, changing the case law between the time the bill was drafted and the time it came to

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1. See Press Release, Southeastern Legal Foundation, Ten Commandments Public Display Legislation: U.S. Rep. Lynn Westmoreland and SLF Speak Out, Feb. 2, 2006, available at <http://southeasternlegal.org/default.aspx?page=1&release=386>.

2. See, e.g., *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

3. See Telephone Interview with Todd Young, Policy Director for the Southeastern Legal Foundation (March 29, 2006) [hereinafter Young Interview].

4. *McCreary*, 125 S. Ct. 2722; *Van Orden*, 125 S. Ct. 2854.

5. See Charles Lane, *Court Split Over Commandments*, WASH. POST, Jun. 28, 2005, at A1.

6. *McCreary*, 125 S. Ct. at 2738-39.

the House floor.<sup>7</sup> Because of the recent Supreme Court decisions on the display of the Ten Commandments, Professor Lynn Hogue, who assisted in the initial drafting of what is now HB 941, now believes that the bill, as introduced and as enacted, is unconstitutional.<sup>8</sup>

HB 941 was born in 2003, drafted with the help of constitutional experts from the Southeastern Legal Foundation, and originally introduced during the 2003 General Assembly by now U.S. Representative Lynn Westmoreland.<sup>9</sup> Co-sponsors of the bill included then Speaker of the House Terry Coleman and House Republican leadership Rep. Glenn Richardson and Rep. Jerry Keen.<sup>10</sup> The bill was tabled in a House Judiciary Committee in 2003.<sup>11</sup> Now, in 2006, with a more conservative Georgia legislature in place, HB 941 was raised once again, sponsored by, among others, Representatives Benton and England from Barrow County.<sup>12</sup>

Barrow County is especially significant to the Ten Commandments dispute, because it was one of the latest legal battlegrounds in Georgia over the Ten Commandments.<sup>13</sup> The ACLU filed suit on September 16, 2003, after Barrow County officials hung a Ten Commandments display in the breezeway of the courthouse in Winder, Georgia.<sup>14</sup> The suit was brought on behalf of plaintiff John Doe, who desired to remain unknown to avoid community criticism.<sup>15</sup> On July 18, 2005, the court signed a consent order providing for the removal of the Ten Commandments display,

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7. See Denis O'Hayer, *11 Alive News: Commandments Fight Has New Wrinkle* (NBC television broadcast Feb. 6, 2006), transcript available at [http://www.11alive.com/news/news\\_article.aspx?storyid=75748](http://www.11alive.com/news/news_article.aspx?storyid=75748) [hereinafter O'Hayer].

8. See *id.*; *Lawmakers 2006* (GPTV broadcast, Feb. 6, 2006) [hereinafter *Lawmakers*]; Letter from Lynn Hogue, Professor of Law, Georgia State University College of Law to Glenn Richardson, Speaker of the House, Georgia Legislature (Feb. 2, 2006); Telephone Interview with Lynn Hogue, Professor of Law, Georgia State University College of Law (Apr. 19, 2006) [hereinafter Hogue Interview].

9. See Southeastern Legal Foundation, *supra* note 1; Young Interview, *supra* note 3.

10. Young Interview, *supra* note 3.

11. See Young Interview, *supra* note 3.

12. HB 941, as introduced, 2006 Ga. Gen. Assem.

13. See Bill Rankin, *Counties Try to Decipher Commandments Rulings; Barrow Hopes to Stay Course; Henry Watches*, ATLANTA J.-CONST., Jun. 28, 2005, at A4; Audio Recording of House Proceedings, Feb. 1, 2006 (remarks by Rep. Terry Lamar England), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_47120020,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_47120020,00.html) [hereinafter House Audio].

14. See House Audio, *supra* note 13.

15. See Plaintiff's Verified Complaint, *Doe v. Barrow County*, 03-CV-0156-CV-WCO (N.D. Ga. 2004) at 4; ACLU, *Georgia County Agrees to Remove Ten Commandments Display from Courthouse*, July 19, 2005, <http://www.aclu.org/religion/tencomm/20163prs20050719.html>; House Audio, *supra* note 13.

preventing the placement of substantially similar future displays, protecting the plaintiff's anonymous status after the resolution, and awarding the ACLU \$150,000 in fees and expenses.<sup>16</sup> After losing such a bitter battle over the Ten Commandments display, it is not surprising to find that Representatives Benton and England, both representing Barrow County, were interested in sponsoring and reviving HB 941 in 2006.<sup>17</sup>

### *Bill Tracking of HB 941*

#### *Consideration and Passage by the House*

Representatives Benton, England, Bearden, Mosley, and Maddox of the 31st, 108th, 68th, 178th, and 172nd, respectively, sponsored HB 941.<sup>18</sup> The bill was pre-filed in the House on November 15, 2005.<sup>19</sup> On January 9, 2006, the House first read HB 941 and the Speaker of the House, Glen Richardson, assigned it to the House Special Rules Committee.<sup>20</sup> Without any changes, the House Special Rules Committee favorably reported the bill to the House floor on January 24, 2006.<sup>21</sup> One of the primary issues raised on the House floor with respect to HB 941 was a general dismay with the fact that the only way the Ten Commandments could be displayed was by devaluing the religious meaning of the sacred text.<sup>22</sup> In addition, there was concern as to the availability of state funds for the defense of municipalities against an almost certain legal challenge to the display of the Ten Commandments.<sup>23</sup> Nevertheless, by a vote of 140 to 26, the House passed HB 941 as filed on February 1, 2006.<sup>24</sup>

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16. See Judgment and Order, *Doe v. Barrow County*, 03-CV-0156-CV-WCO (N.D. Ga. 2004) at 1, 3, available at <http://www.acluga.org/briefs/10.commandments.barrow/order.pdf>.

17. See *Morning Edition, Georgia May Display Ten Commandments in Courthouses* (National Public Radio broadcast Feb. 15, 2006).

18. See HB 941, as introduced, 2006 Ga. Gen. Assem.

19. See State of Georgia Final Composite Status Sheet, HB 941, Nov. 15 2005 (Mar. 30, 2006).

20. See State of Georgia Final Composite Status Sheet, HB 941, Jan. 9, 2006 (Mar. 30, 2006).

21. See State of Georgia Final Composite Status Sheet, HB 941, Jan. 24, 2006 (Mar. 30, 2006).

22. See House Audio, *supra* note 13 (remarks by Rep. Bobby Franklin).

23. See House Audio, *supra* note 13 (remarks by Rep. Hugley and Rep. Millar).

24. Georgia House of Representatives Voting Record, HB 941 (Feb. 1, 2006); State of Georgia Final Composite Status Sheet, HB 941, Feb. 1, 2006 (Mar. 30, 2006).

### *Consideration and Passage by the Senate*

The Senate read the bill for the first time on February 2, 2006 and assigned it to the Senate Rules Committee.<sup>25</sup> The sponsors of the bill, in making every attempt to pass legislation that the Court will not later overturn, introduced a substitute bill to the Senate Rules Committee.<sup>26</sup> The substitute bill, among other things, broadened the list of historical documents to be displayed alongside the Ten Commandments.<sup>27</sup> The reasoning behind this substitute was that the inclusion of more historical documents would mean that less attention would be drawn to any one particular document.<sup>28</sup> Further, the substitute bill removed the requirement for the Attorney General to defend and bear the cost of defending the local municipalities against any legal proceeding relative to the display of the documents.<sup>29</sup> The drafters of the substitute thought that the presence of this provision, by assuring payment of the costs of future legal proceedings, almost invited a lawsuit, and thus, they removed the provision.<sup>30</sup> Moreover, the substitute removed any reference to religious heritage and the specific requirement that the Ten Commandments displayed be those given in the King James Version of the Bible.<sup>31</sup> Finally, the substitute removed the provision providing that the Secretary of State will supply the local municipalities with the state-approved display.<sup>32</sup>

On the Senate floor, Senator Ralph Hudgens, submitted that “[n]o one knows if [HB 941] is constitutional.”<sup>33</sup> Instead, the Senator relied on the advice of legislative counsel Betsy Howerton, stating that the

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25. See State of Georgia Final Composite Status Sheet, HB 941, Feb. 2, 2006 (Mar. 30, 2006).

26. See Telephone Interview with Rep. Tommy Benton Interview, House Dist. No. 31 (Apr. 18, 2006) [hereinafter Benton Interview].

27. Compare HB 941, as introduced, 2006 Ga. Gen. Assem., with HB 941 (SCS), 2006 Ga. Gen. Assem.

28. See Benton Interview, *supra* note 26.

29. Compare HB 941, as introduced, 2006 Ga. Gen. Assem. with HB 941 (SCS), 2006 Ga. Gen. Assem.

30. See Benton Interview, *supra* note 26.

31. Compare HB 941, as introduced, 2006 Ga. Gen. Assem. with HB 941 (SCS), 2006 Ga. Gen. Assem.

32. Compare HB 941, as introduced, 2006 Ga. Gen. Assem. with HB 941 (SCS), 2006 Ga. Gen. Assem.

33. Audio Recording of Senate Proceedings, Mar. 28, 2006 (remarks by Sen. Ralph Hudgens), [http://www.georgia.gov/00/article/0,2086,4802\\_6107103\\_47120055,00.html](http://www.georgia.gov/00/article/0,2086,4802_6107103_47120055,00.html) [hereinafter Senate Audio].

substitute bill “presents possibly the strongest language that can be proposed at this point.”<sup>34</sup> No further discussion was conducted on the Senate floor.<sup>35</sup> And so, without debate, the Senate adopted the Senate Committee substitute on March 30, 2006, by a vote of 43 to 4.<sup>36</sup>

### *Consideration by the Conference Committee*

The Senate Committee substitute for HB 941 was sent to the House as a structured bill.<sup>37</sup> Thus, because Representative Tom Bordeaux objected to the substitute when it came back to the House for consideration, a Conference Committee was appointed on March 30, 2006.<sup>38</sup>

Because members of the House actually drafted the Senate Committee substitute, the Conference Committee made no changes to the bill.<sup>39</sup> On March 30, 2006, by a vote of 138 to 4, the House adopted the Conference Committee report.<sup>40</sup> Similarly, the Senate, on the same day, unanimously adopted the Conference Committee report.<sup>41</sup> Governor Purdue signed the bill into law on April 20, 2006.<sup>42</sup>

### *The Act*

The Act adds Code section 45-13-51, authorizing each municipality and political subdivision to post the Foundations of American Law and Government display in a visible, public location in the judicial facilities of such municipality or political subdivision.<sup>43</sup>

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34. *See id.*

35. *See id.*

36. Georgia Senate Voting Record, HB 98 (Mar. 28, 2006); State of Georgia Final Composite Status Sheet, HB 941, Mar. 28, 2006 (Mar. 30, 2006).

37. *See* Benton Interview, *supra* note 26 (indicating amendments cannot be made to structured bills and only one objection is necessary to compel the appointment of a Conference Committee).

38. *Id.*; State of Georgia Final Composite Status Sheet, HB 941, Mar. 30, 2006 (Mar. 30, 2006).

39. *See* Benton Interview, *supra* note 26.

40. Georgia House Voting Record, HB 941 (Mar. 30, 2006); State of Georgia Final Composite Status Sheet, HB 941, Mar. 30, 2006 (Mar. 30, 2006).

41. Georgia Senate Voting Record, HB 941 (Mar. 30, 2006); State of Georgia Final Composite Status Sheet, HB 941, Mar. 30, 2006 (Mar. 30, 2006).

42. *See* State of Georgia Final Composite Status Sheet, HB 941, Apr. 20, 2006 (Mar. 30, 2006).

43. O.C.G.A. § 45-13-51 (Supp. 2006).

*Analysis*

This Act may face constitutional difficulty on several grounds and almost certainly will face a constitutional challenge from the ACLU of Georgia.<sup>44</sup> From the beginning of the legislative process, the ACLU has indicated that it thinks HB 941 violates the First Amendment proscription against government-established religion.<sup>45</sup> The ACLU still objects to the Act, despite the amendments to the language of the bill.<sup>46</sup>

HB 941 will most likely undergo the closest, and perhaps the most damaging, judicial scrutiny as it pertains to the intent of the legislature in posting the array of historical documents.<sup>47</sup> This concern stems from the recent U.S. Supreme Court decision in *McCreary County v. ACLU of Kentucky*, where the Court held displays of the Ten Commandments to be unconstitutional, brushing aside the Kentucky law's authors' stated secular intent and instead finding that the authors had a clearly religious purpose.<sup>48</sup> Professor Lynn Hogue, an original drafter of HB 941, fears that, if this bill is challenged, the Court will see through the Georgia legislature's stated secular intent.<sup>49</sup> Professor Hogue stated that "[t]he inclusion of documents like the Mayflower Compact and so forth, now becomes just basically window dressing for what is essentially a religious effort."<sup>50</sup> Professor Hogue believes that, in view of *McCreary*, it is now nearly impossible to draft legislation having the ultimate goal of posting the Ten Commandments because such intent is already religious in nature.<sup>51</sup>

Despite Professor Hogue's change in opinion, the Southeastern Legal Foundation (SLF) still maintains that HB 941, as originally

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44. See Nancy Badertscher, *Legislature 2006: Ten Commandments Law Predicted; House Speaker Says OK Is Likely*, ATLANTA J.-CONST., Jan. 28, 2006, at E3 [hereinafter Badertscher, *Legislature 2006*]; Nancy Badertscher, *Thou Shalt Be Allowed to Post These Documents*, ATLANTA J.-CONST., Feb. 2, 2006, at F6 [hereinafter Badertscher, *Thou Shalt*].

45. See Badertscher, *Legislature 2006*, *supra* note 44.

46. See Electronic Mail Interview with Maggie Garrett, Attorney, American Civil Liberties Union of Georgia (Apr. 6, 2006) [hereinafter Garrett Interview].

47. See Hogue Interview, *supra* note 8.

48. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2738-39 (2005).

49. See O'Hayer, *supra* note 7; *Lawmakers*, *supra* note 8; Hogue Interview, *supra* note 8.

50. See O'Hayer, *supra* note 7.

51. See Hogue Interview, *supra* note 8.



introduced, and as enacted, is constitutional.<sup>52</sup> SLF maintains that Georgia legislators, unlike those in Kentucky in the *McCreary* case, have, from the beginning of the legislation drafting process, had in mind a secular-historical purpose in the proposed state-sanctioned document display.<sup>53</sup> Moreover, proponents of the bill believe that the changes made in the substitute bill only strengthen its constitutional validity.<sup>54</sup> However, this position may be belied by comments made by House Representatives, such as Rep. Vance Smith, Jr., during the House floor debate.<sup>55</sup> For instance, Representative Smith stated that the historical context approach of House Bill 941 was a clever legal device aimed at accomplishing the goal of publicly posting the Ten Commandments.<sup>56</sup> Rep. Smith stated that this historical/secular approach presented “the strongest legal case” the Georgia legislators had “at doing what most in [the] body want[ed] to do.”<sup>57</sup>

Aside from the primary issues with regard to legislative intent, Professor Hogue also voiced concern with respect to the removal of the requirement that the Ten Commandments displayed be those given in the King James Version of the Bible.<sup>58</sup> In his letter to Speaker Glenn Richardson, Professor Hogue indicated that the legislature’s choice in the original bill as to which version of the Ten Commandments would be posted was “inherently sectarian.”<sup>59</sup> The drafters of the substitute bill, perhaps in response to this concern, thus removed the requirement that the Ten Commandments displayed be extracted from the King James version of the Bible.<sup>60</sup> However, Professor Hogue contends that this excision does not adequately address the issue.<sup>61</sup> Even though the Act itself no longer specifies which version of the Ten Commandments is to be posted, it leaves the decision of which version to post open to the discretion of each

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52. See Young Interview, *supra* note 3.

53. See *id.*

54. See *id.*; Senate Audio, *supra* note 33 (remarks by Sen. Ralph Hudgens).

55. See House Audio, *supra* note 13 (remarks by Rep. Vance Smith, Jr.).

56. *Id.*

57. See *id.*

58. See Hogue Interview, *supra* note 8.

59. Letter from Lynn Hogue, Professor of Law, Georgia State University School of Law to Glenn Richardson, Speaker of the House, Georgia Legislature (February 2, 2006).

60. Compare HB 941, as introduced, 2006 Ga. Gen. Assem. with HB 941 (SCS), 2006 Ga. Gen. Assem.

61. See Hogue Interview, *supra* note 8.

local municipality.<sup>62</sup> And so, Professor Hogue explained that, for each display posted, the municipality makes an inherently sectarian choice when it chooses which version is to be posted in their courthouse.<sup>63</sup>

Finally, constitutional issues aside, critics of the Act have taken issue with the practical, i.e., financial repercussions of the Act.<sup>64</sup> Maggie Garrett pointed out that the bill, as originally drafted, required the State to take on every Ten Commandments lawsuit in the state, which would be an incredibly costly financial burden on the taxpayer.<sup>65</sup> However, Professor Hogue indicated that this provision was written into the original bill with the hope that the Attorney General would defend against only one Ten Commandments case and that the ruling in that case would have a state-wide effect, thus, providing “footprints” for local governments to follow.<sup>66</sup> As such, in Professor Hogue’s view, the original provision was considered to be the most cost effective way to deal with the litigation that will almost certainly involve this Act.<sup>67</sup> However, both Professor Hogue and Maggie Garrett agree that the removal of this provision does not create a favorable financial outlook, because it merely shifts the burden from the state taxpayers to the local governments that will inevitably face lawsuits in the future.<sup>68</sup> However, as noted above, the drafters of the substitute bill posit that the presence of a provision assuring defense and the state’s assumption of the costs of defense, merely invites lawsuits.<sup>69</sup>

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62. *See id.*

63. *See id.*

64. *See id.*; Garrett Interview, *supra* note 46.

65. *See* Garrett Interview, *supra* note 46.

66. *See* Hogue Interview, *supra* note 8.

67. *See id.*

68. *See id.*; Garrett Interview, *supra* note 46.

69. *See* Benton Interview, *supra* note 26.

