> The case of navies with insulated crews may be less within the scope of these reflections. But it is not entirely so. The chance of a devout officer, might be of as much worth to religion, as the service of an ordinary chaplain. But we are always to keep in mind that it is safer to trust the consequences of a right principle, than reasonings in support of a bad one.[10]

The usual religious right response Madison's arguments against tax-supported chaplains in the *Detached Memoranda* is to point out that he was on the 1789 committee mentioned by J.M. O'Neill. This is one of the many lies about James Madison created by implying that he agreed with every decision of every legislative body or committee that he ever sat on – simply because he was there. In order to use this committee as evidence that Madison supported tax-supported chaplains in 1789, however, his presence alone isn't enough. The purpose of the committee also has to be misrepresented.

> **According to David Barton, in his book *Original Intent*: "...in 1789, Madison served on the Congressional committee which authorized, approved, and selected paid Congressional chaplains."**

This committee had nothing to do with deciding whether or not Congress would have chaplains. That precedent had been set by the Continental Congress and was not going to change. This committee had nothing to do with selecting the chaplains either.

At the request of the Senate in April 1789, a joint committee was appointed to write a set of rules for conferences between the two houses of Congress. One of the House members elected to this committee was, of course, James Madison. Because the Senate and the House were going to be sharing chaplains, this same joint committee was also charged with the task of coming up with rules regulating their appointment. This was the committee's only involvement with chaplains.

The following, from *Debates and Proceedings of Congress,* April 9, 1789, is Barton's source for his claim that the committee, and James

10. Elizabeth Fleet, "Madison's 'Detached Memoranda,'" *William and Mary Quarterly,* 3rd Series, Vol. 3, No. 4, October 1946, 559-560.

Madison, by virtue of being appointed to the committee, *"authorized, approved, and selected"* chaplains.

> The Speaker laid before the House a letter from Oliver Elsworth, Esq. a member of the Senate, stating the appointment of a committee of that House to confer with a committee to be appointed on the part of this House, in preparing a system of rules to govern the two Houses in cases of conference, and to regulate the appointment of Chaplains.
>
> Whereupon, Messrs. Boudinot, Sherman, Tucker, Madison, and Bland, were elected by ballot for that purpose.[11]

Madison never approved of tax-supported chaplains. His opinion in 1789, as well as when he wrote the *Detached Memoranda,* was that if members of Congress wanted to hire chaplains, they should do so with their own money. He also objected to the official election of chaplains by Congress, which he considered to be a government endorsement of the majority religion of that body.

In 1822, Madison wrote a letter to Edward Livingston, a member of the Louisiana legislature. Livingston was one of three legal scholars commissioned to revise the laws of the state of Louisiana, which, up until that time, had been a confusing mixture of the Napoleonic Code, civil law written by the legislature, and a smattering of common law that had made its way there from other states. Livingston sent Madison a copy of a pamphlet he had written on the plan for the revisal. After complimenting Livingston on the manner in which he proposed to keep religion out of Louisiana's new law code, Madison went on to express the same opinions on chaplains and thanksgiving proclamations found in the *Detached Memoranda.* In this same letter, he also explicitly stated that he had not approved of tax-supported chaplains in 1789.

> I observe with particular pleasure the view you have taken on the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace. This has always been a favorite principle with me;

11. *The Debates and Proceedings of the Congress of the United States of America*, vol. 1, 1st Cong., 1st Sess., (Washington D.C.: Gales & Seaton, 1834), 109.

> and it was not with my approbation, that the deviation from it took place in Congress, when they appointed chaplains, to be paid from the National Treasury. It would have been a much better proof to their constituents of their pious feeling if the members had contributed for the purpose, a pittance from their own pockets. As the precedent is not likely to be rescinded, the best that can now be done may be to apply to the Constitution the maxim of the law, *de minimis non curat.*[12]

In a statement similar to the last sentence of this paragraph from his letter to Livingston, Madison wrote the following in the *Detached Memoranda.* In that document, as in the letter, it appeared immediately after his opinion on tax-supported chaplains.

> Rather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism de minimis non curat lex [the law does not concern itself with trifles]: or to class it "cum maculis quas aut incuria fudit, aut humana parum cavit natura [faults proceeding either from negligence or from the imperfection of our nature]."[13]

Madison had good reason to be concerned about tax-supported chaplains being considered a legitimate precedent. The existence of these chaplains had already become a favorite argument among the religious right of his day. The arguments used by today's religious right to justify Ten Commandments monuments in courthouses and "under God" in the Pledge of Allegiance are not new. They began appearing during the 1810s and 1820s in the battles over issues such as Sunday mail delivery. What Madison undoubtedly found most alarming, however, was that things like chaplains in Congress were being claimed as precedents not only by religious organizations, but by members of Congress. One of the first instances of this occurred in 1811, when

12. James Madison to Edward Livingston, July 10, 1822, *Letters and Other Writings of James Madison,* vol. 3, (New York: R. Worthington, 1884), 274.

13. Elizabeth Fleet, "Madison's 'Detached Memoranda,'" *William and Mary Quarterly,* 3rd Series, Vol. 3, No. 4, October 1946, 559.

Madison vetoed *An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia.*

Madison's reasons for this veto, which are found later in this chapter, were accepted by the majority of the House. Many of the representatives of 1811 had just never given much thought to the First Amendment's establishment clause before this, and hadn't realized that the bill violated it. One even made a comment often heard today – that he had always thought the amendment meant only that a national religion couldn't be established. The majority of the House, after reading Madison's veto message, decided that he understood the First Amendment better than they did, and wanted to drop the bill. Some, however, wanted to take another vote and try to override the veto. This minority included Laban Wheaton, a representative from Massachusetts, who presented an argument as melodramatic as any heard from today's religious right, warning that the failure of this bill would lead to religion being banned altogether in the entire District of Columbia. One thing Wheaton used to justify the bill, of course, was the appointment of tax-supported chaplains by the first Congress.

> Mr. W. said he did not consider the bill any infringement of the Constitution. If it was, both branches of the Legislature, since the commencement of the government, had been guilty of such infringement. It could not be said, indeed, that they had been guilty of doing much about religion; but they had at every session appointed Chaplains, to be of different denominations, to interchange weekly between the Houses. Now, if a bill for regulating the funds of a religious society could be an infringement of the Constitution, the two Houses had so far infringed it by electing, paying or contracting with their Chaplains. For so far it established two different denominations of religion. Mr. W. deemed this question of very great consequence. Were the people of this District never to have any religion? Was it to be entirely excluded from these ten miles square?[14]

Laban Wheaton was apparently unable to convince the majority of the House that religion was in danger, or that the existence of chap-

14. *The Debates and Proceedings of the Congress of the United States of America,* vol. 22, 11th Cong., 3rd Sess., (Washington D.C.: Gales & Seaton, 1853), 984.

lains justified further violations of the First Amendment. When another vote was taken on the bill, it failed 74-29.[15]

Remarkably, what Madison called a *"step beyond the landmarks of power"* that should not have *"the effect of a legitimate precedent"* has appeared in the opinions of a number of Supreme Court justices, one even invoking Madison's name and implying that he voted in favor of paying chaplains.

> **According to Justice Reed, in his dissenting opinion, McCollum v. Board of Education, 1948: "The practices of the federal government offer many examples of this kind of 'aid' by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days."**
>
> **According to Justice Burger, delivering the opinion of the court, Lynch v. Donnelly, 1984: "In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate." and "It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers."**
>
> **Justice Burger, in his dissenting opinion, Wallace v. Jaffree, 1985: "Some who trouble to read the opinions in these cases will find it ironic - perhaps even bizarre - that on the very day we heard arguments in**

15. *The Debates and Proceedings of the Congress of the United States of America,* vol. 22, 11th Cong., 3rd Sess., (Washington D.C.: Gales & Seaton, 1853), 997.

> **the cases, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official chaplains and paid from the Treasury of the United States."**

Justice Burger, in his footnote to a misleading description of the 1789 committee in *Marsh v. Chambers,* 1983, not only implied that Madison's appointment to that committee somehow indicated his approval of chaplains, but that he approved of paying them with public money by voting for the bill authorizing their payment. In order to give this impression, Burger made it sound as if Madison voted for an individual bill whose sole purpose was authorizing the payment of chaplains. There was no such bill. Chaplains were just among the many employees listed in *An Act for allowing compensation to the members of the Senate and House of Representatives of the United States, and to the officers of both Houses,*[16] which, of course, Madison did vote for.

> **According to Justice Burger's footnote: "It bears note that James Madison, one of the principal advocates of religious freedom in the Colonies and a drafter of the Establishment Clause,...was one of those appointed to undertake this task by the House of Representatives...and voted for the bill authorizing payment of the chaplains."**

> **Justice Scalia, in his dissenting opinion, Lee v. Weisman, 1992, referred to Marsh v. Chambers: "As we detailed in Marsh, congressional sessions have opened with a chaplain's prayer ever since the First Congress."**

16. Richard Peters, ed., *The Public Statutes at Large of the United States of America,* vol. 1, (Boston: Charles C. Little and James Brown, 1845), 71.