

REPORT FROM THE CAPITAL

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS



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SENATE REVIEW OF LIBERTIES

A standing subcommittee of the Senate Judiciary Committee has announced hearings on the Bill of Rights. This Subcommittee on Constitutional Rights consists of Senators Thomas C. Hennings, Jr. of Missouri, chairman, Joseph C. O'Mahoney of Wyoming, and William Langer of North Dakota. It has tentatively scheduled hearings on the first clause of the First Amendment, dealing with religious liberty, for October 3rd.

What are these hearings on religious liberty going to be? What is the significance? What are they getting at? Who is going to testify? Such are the questions that have been coming for some time, and such are the questions that we have been seeking to answer. Unfortunately, there are no clear answers, only a wide assortment of interests. The time, however, has apparently come to find out from the Congressmen who voted the funds what we can expect. Numerous widely divergent possibilities are in view as to outcomes.

The first impression received was that there would be no significant outcomes on this part of the hearings. The contention was that the significance of the project lies in areas of other civil liberties -- freedom of speech, press, assembly -- the freedoms that are said to be endangered by the security program.

This viewpoint was supported by the remarks made by Senator Hennings when the appropriation (Senate Resolution 8.94) was under consideration, on May 11, 1955:

"I can best express the general purview of what the subcommittee intends to do by following the notes I have undertaken to make on the subject.

"We are asking for only \$50,000. We have a very small staff. We are starting very late in the year. The subcommittee is to deal with a general examination of the Bill of Rights and proposed legislation affecting it, to determine the appropriateness of its present-day application, with particular attention to matters concerned with due process,

freedom of speech, freedom of the press, and freedom from unreasonable search and seizure, as well as the functions of administrative agencies whose responsibilities particularly affect such rights."

This is the view which still prevailed at a recent meeting of the Americans for Traditional Liberties organization, as late as August 21. As reported in the New York Times August 22, 1955, they commended the hearings, saying that the move "holds promise of a return to the political and social sobriety so much needed by our country today." They urged "a sober and adequate review of recent security measures" and the introduction of "appropriate legislation to correct the erosions made upon our liberties." The signers, including a number of eminent names, were obviously thinking of the security issues reviewed in our June Report from the Capital.

By August 14th, however, the project had taken on a new significance. On that date the subcommittee released the questionnaire which is to be used in bringing together testimony on the first clause of the First Amendment. The body of this instrument is contained in questions as follows (to be answered Yes or No except where indicated):

1. (Identification of witness)
2. (a) Do you regard the phrase "make no law respecting an establishment of religion" as a prohibition against any direct or indirect government aid to churches or religious sects?
 - (b) Or do you regard the language as banning preferential treatment of any particular church or religious sect while permitting government aid to religion generally or to the various churches and sects on a non-discriminatory basis?
3. Do you believe the free exercise of religion protects atheists in propagating a disbelief in religion?
4. Do you consider that the U. S. Supreme Court is correct in interpreting the religion clause in conjunction with the Fourteenth Amendment as constituting a prohibition against acts by state and local governments as well as against acts by the Federal Government?
5. Have you observed any significant instances in recent years of a denial of the rights expressed in the religion clause?

If your answer is Yes, kindly enumerate the instances
6. (a) If your answer to Question 5 is Yes, do you consider such instances as you cite as routine problems in the course of life in a democracy which can be handled satisfactorily by the courts?

6. (b) Or do you consider them as evidence of a tendency to permit erosion of the rights expressed in the religion clause?
7. If you have checked 6 (b), do you think that the tendency could be corrected or eliminated by some Congressional action?

If your answer is Yes, please indicate as specifically as you can the nature of the Congressional action you have in mind:

8. Speaking generally and considering the deep emotional nature of religious beliefs, do you feel that the present state of affairs in the United States with respect to the rights expressed in the religion clause is:

Excellent Good Fair Poor

It is difficult to see how this instrument follows from the minimum anticipations mentioned above. Questions 2 and 4 are direct invitations to challenge the Supreme Court's rulings, by which the Court holds that the disestablishment clause of the First Amendment does not permit the use of public funds to aid religious bodies. This is significant. The hearings on religious liberty have now become so significant that they will call forth an evaluation of the Supreme Court's constitutional decisions. There is nothing routine here.

Between these two momentous questions is No. 3, equally interesting, for it asks the person who believes in religious liberty to face up to the realization that this could mean freedom for the atheist to advocate his position. In the current international atmosphere, freedom of conscience for the atheist is undoubtedly the severest test that can possibly be applied to American confidence in religious freedom. Why this extreme test is selected with all of its obvious possibilities for confusion, embarrassment, or intimidation, has not been explained.

It will be noted, too, that question 4 deals with the problem of federal-state constitutional relations. Is the Supreme Court correct in viewing the Federal Constitution as being the supreme law of the land, binding on state and local governments as well as on the national? If the First Amendment does not permit the use of federal funds for churches, perhaps some cities or states would use tax money for that purpose if permitted to do so by the Supreme Court. Is that then, to be a precedent in constitutional law?

Let me say at this point that I have found the special staff very fair and legitimately concerned that this shall not become a sectarian fracas. However, I fear that something has slipped somewhere in the preparations.

Another viewpoint on the significance of the hearings was stated in the national Catholic weekly review, America, in the issue dated August 27, 1955:

"To appreciate the propriety and implications of this novel inquiry it is enough to recall a couple of salient features of our constitutional system. The first is that Congress has not only the right but the duty to examine into the way religious rights are protected under our Constitution as interpreted by our courts. It has probably been too shy about this in the past, sitting back and waiting for the Supreme Court to decide what is and is not legal.

"The fact of the matter is that if Congress were to pass legislation in 'aid of religion' after carefully convincing itself that such legislation was in conformity with our Constitution, this sober judgment of the Congress would weigh heavily in favor of the legislation in the eyes of the Supreme Court. Since the three branches of the Federal Government are coordinate, the court is bound to respect, though it has power to overrule, the judgment of Congress about the constitutionality of measures it passes.

"Secondly, the Supreme Court in the *Everson* and *McCullum* decisions of 1947-48 created unutterable confusion about what kind of 'aid to religion' was allowable under the Constitution. It improvised a revolutionary doctrinaire interpretation of what 'an establishment of religion' (such as Amendment I forbids) really means. (See The State and Religious Education, America Press booklet, pp. 6-8 for an analysis of what was unprecedented in the *Everson-McCollum* doctrine.) The high tribunal has notably receded from its highly subjective insistence on absolute separation of Church and State. Nevertheless, nobody, including Congress, today knows what kinds of 'aid to religion' by the Federal or State governments might be construed as legal or illegal.

"Congress can help to dispel this confusion. It can, if necessary, even propose a clarifying amendment to Amendment I, though this should not be necessary. The very least that it can do is to give qualified representatives of the people a chance to explain in what ways the pro-secularist interpretation of Church-State relations positively infringes on the religious rights of American citizens by denying them the 'equal protection of the laws.' We hope Congress sees this inquiry through."

Apprehension about this questionnaire and the objectives of the hearings also found expression in a Washington Post editorial on August 20, 1955, saying, in part:

"Lon Hocker, chief hearings counsel for the subcommittee, says that the questionnaire is designed to give people a chance to express themselves on these controversial points in writing and thus limit the duration of the public hearings. We surmise that the questionnaire is likely to have precisely the opposite effect. Once these inflammable issues are opened to discussion before a public body, every group and faction

may be expected to demand a hearing. The main purpose of the inquiry is likely to be obscured by a futile debate on a highly complex issue of constitutional law.

"We cannot help wondering if the subcommittee has really deliberated on this aspect of its survey. The questions it is asking are not wholly beyond the range of congressional interest; the subcommittee, we are reminded, could be sounding out public sentiment for some change in the religious-liberty clause. But the subcommittee has not indicated that it has any such purpose, and if it should have any such objective in mind it would meet with the most emphatic kind of resistance. If the subcommittee has no intention of tampering with the traditional separation of church and state in this country--a tradition that has served well for 165 years --then it better take another hard look where its inquiry is leading.

"In its present form the questionnaire invites criticism of the Supreme Court's decisions on the vital subject of church-state relationships. Decisions of the Court are not, of course, above criticism, but no other branch of the Government should put itself in the position of challenging the Court unless it is prepared to support a change in the Constitution or the laws. No good could possibly come from merely airing sectarian controversies over the separating of church and state. Certainly this is not proper function of a congressional committee in a country where the Government is forbidden to intervene in religious affairs."

Many are wondering where we are going.

At present it is also difficult to say who will be heard by the subcommittee. As yet there is no indication that religious groups or organizations as such will be heard. The plan seems to be to get completed questionnaires from "interested" parties and then the subcommittee will digest and screen material for the record, and select the witnesses who are to be called in personally. What will be the basis of selection?

The emphasis has been on getting people who are known authorities in constitutional law--people who have written widely in the field. The questionnaire asks the participant to state what he has written on the subject of church-state relations. Here again the scientific quality of the investigation breaks down for a selective factor is knowingly or unknowingly introduced. People who agree with the current positions of the Supreme Court and with the long American tradition have not exerted themselves to gain printed space to express such approval, while a vocal minority who have persistently challenged the Court have been much in print. Are these now to be given primary consideration?

In this connection it should also be noted that the problem might narrow in terms of competence to a judicial consideration. While the appropriation was being discussed, Senator Allen J. Ellender of Louis-

iana asked, "Do we not have laws on the statute books, as well as the Constitution itself, to protect the rights of our people?" and when Senator Hennings replied "Yes", Senator Ellender remarked, "The Bill of Rights has endured for more than 100 years. It exists for the protection of the rights of our people. If anyone's rights have been violated, it strikes me that the individual can be protected by recourse to the courts. Merely holding hearings will not cure any evils that may exist."

We have learned to look to Congress as our policy making body, not as our Judiciary. Does it not follow, then, that the subcommittee would be more germane to its task if it called on people who know the minds of the American public on the subject of religious liberty? Such an investigation of the lay people would undoubtedly reveal a deep faith in, and appreciation for, the First Amendment and our American traditions.

A problem of procedure can also be seen on the horizon. As planned the hearings will proceed through the Bill of Rights, amendment by amendment, and clause by clause. This will normally divorce discussions of freedom of speech, of press, of assembly, etc., from the considerations of freedom of religion. Perhaps such divorce is necessary, but it will sadly reduce the clarity of the picture, for freedom of religion is relatively meaningless unless it stands in the midst of the other civil liberties, such as assembly, speech, and press. If witnesses are desirous of expressing themselves on several points of interest, they may find themselves making periodic trips to Washington for some months.

Baptists have always been interested in religious liberty, both as personal "soul liberty", and as institutional freedom and independence for the church. In the past as in the present we have sought these freedoms for all peoples of the world, at high cost to ourselves. There is no doubt but that the American people are overwhelmingly in favor of our American system by which the church advances on the basis of commitment and stewardship of the participants rather than by use of tax money. Baptists of all fellowships will be happy to cooperate in any moves that facilitate this freedom.

We stand firmly with Senator Hennings who stated it well on the floor of the Senate, "The Committee does not intend to row with muffled oars toward concealed objectives." I am sure that Senator Hennings is also aware of the danger of attempting to mount the proverbial horse and then to ride off in all directions.