NEWSLETTER OF THE BAPTIST JOINT COMMITTEE

PROCLAIM LIBERTY

REPORT from the CAPITAL

Volume 49, Number 7 April 5, 1994

NEWS MAKERS

James M. Dunn, executive director of the Baptist Joint Committee, told students at the Baptist Theological Seminary in Richmond, Va., that their commitment as an institution to be "distinctly Baptist" is a "tall order." Addressing the topic, "Being baptist," Dunn said, "We suffer from semi-Baptists today who would make creeds for us of what they believe and think we should. ... The only creed for Baptists is: 'Ain't nobody going to tell me what to believe.' The absence of a creed, however, does not mean that we have no confession of faith. We say with the early church: Jesus Christ is Lord."

President Bill Clinton, a Southern Baptist, believes in Jesus Christ, but not in using the office of the presidency to force his beliefs on others, he recently told ABC News. Clinton told ABC News religion correspondent Peggy Wehmeyer, in interviews aired March 22 and 23, that he's comfortable using language referring to Christ as Savior but not with using his political position to say, "You must do that, you must believe that, you must be governed by these laws."

Gerald Torres, counsel to the U.S. attorney general, recently told a Senate panel that the administration supports the Native American Free Exercise of Religion Act (S. 1021) that would provide federal protection for Native American religious sites and practices. Noting the administration has concerns about some of the bill's provisions, Torres said, "I would like to note the administration's support for the concepts animating this bill. ... NAFERA is a welcome and long overdue measure." The Baptist Joint Committee supports the legislation. Δ

Silent on Lemon

High court hears church-state arguments

If the high court is about to change its stance requiring governmental neutrality toward religion, the justices weren't tipping their hands March 30 as they heard arguments in the only significant church-state case this term.

At issue in *Board v. Grumet* is whether the New York legislature violated the Establishment Clause by creating a separate public school district for handicapped children living in a community of Hasidic Jews. A larger question before the court was whether it would abandon its long-held but much-criticized *Lemon* test for assuring church-state separation.

Lemon requires governmental actions to have a secular purpose, neither advance nor inhibit religion and avoid excessive entanglement between religion and government.

But surprisingly, the *Lemon* standard was barely mentioned during arguments, leading to speculation.

J. Brent Walker, general counsel of the Baptist Joint Committee, said, "The utter absence of questions about *Lemon* is probably a good sign, but not necessarily. It may mean they have already made up their minds.

"My best guess is we have at least five, maybe six votes to uphold Lemon's essential core."

Walker said the justices' silence on *Lemon* didn't stem from disinterest in the case itself.

"I don't remember the last argument when the court was more active. Every justice, except for Justice (Clarence) Thomas, asked a lot of questions. They are obviously intrigued by this case."

The one-hour argument was devoted to the facts and application of First Amendment law.

The New York legislature created the special district encompassing the all-Hasidic village of Kiryas Joel to resolve a conflict over providing special education services to disabled students.

Hasidic Jews, who practice an insular lifestyle, found the Monroe-Woodbury Central School District's special education services in public schools unsatisfactory.

The state supreme court said creating the district violated *Lemon*'s second prong because the special services were available to disabled Hasidic students in the pre-existing public schools.

Nathan Lewin, representing the school board, said that the district did not unconstitutionally advance religion because the state created the entity as a secular solution to a local problem.

Justice Sandra Day O'Connor said that she was troubled by Lewin's suggestion that a narrow law that does not extend to all New Yorkers is neutral.

Jay Worona, representing Louis Grumet, said the statute clearly violates the Establishment Clause because it sets up "political constituents defined along religious lines."

Justice Antonin Scalia said that the district was created to solve a cultural problem, rather than a religious one.

Unwilling to predict the outcome on the merits of the case, the BJC's Walker said he hopes justices will not overturn or water-down the requirement that government remain neutral in matters of religion.

"Government is uniquely ill-suited to get into the religion business. And, religion has flourished in this country precisely because it is has been freed from government regulation and support," he said. Δ

Senate breaks filibuster by school prayer advocate

Despite a filibuster by a school prayer proponent, the U.S. Senate approved March 26 a major education bill. The Goals 2000: Educate America Act (S. 1150, H.R. 1804) would establish national education standards and would provide grants for educational reform.

Sen. Jesse Helms, R-N.C., led the filibuster effort, because the House-Senate conference committee adopted a Democratic alternative to his school prayer amendment.

The Senate had approved the Helms' amendment that would deny federal funds to school districts that prevent participation in constitutionally protected prayer in public schools.

The U.S. House of Representatives earlier had approved a similar bill without any school prayer amendments.

The conference replaced Helms' amendment with a less-stringent one offered by Rep. Pat Williams, D-Mont. Williams' proposal would bar funds from being used to prevent voluntary student prayer, but would not mandate an across-the-board fund cutoff.

Helms' attempt to have his amendment put back in the bill failed, and the measure was approved 63 to 22.

"Students' right to pray is already constitutionally protected. So there was no need for any prayer amendment. Prayer legislation is more about politics and C-SPAN than prayer.

"But we are much happier with the Williams' provision. The harsh fund-cutoff provision in the Helms' amendment would have induced school officials to permit unconstitutional, state-sponsored prayer rather than risk losing a lot of federal money. Williams (provision) will make less mischief."

— J. Brent Walker

Court rejects appeals in 1st Amendment cases

The U.S. Supreme Court refused March 21 to review an Ohio court's decision that a conviction for inciting violence cannot be based on constitutionally protected speech, including burning the American flag.

Left standing was the Ohio Supreme Court's reversal of Cheryl Lessin's conviction for inciting violence in connection with a 1990 protest of U.S. Persian Gulf policy.

Speaking on behalf of the Revolutionary Communist Party, she criticized the U.S policy of sending troops to the Persian Gulf and burned an American flag during the protest.

Ohio's top court threw out her conviction, saying the trial court failed to instruct the jury that "flag burning in the absence of a call to violence is protected speech" and that jurors could not "consider the fact that Lessin burned the flag in determining whether she incited violence."

When criminal charges arise from conduct protected by the Constitution as well as from unprotected conduct, jurors must be told that a conviction cannot be based on constitutionally protected acts, the court said.

With the conviction reversed, Lessin's case was remanded to the trial court for proceedings consistent with the Ohio Supreme Court's opinion.

In another March 22 action, the nation's high court refused to hear Nevada Attorney General Frankie Sue Del Papa's request to apply a reduced level of protection for a prisoner's religious practice.

Nevada officials wanted the high court to require lower courts to apply its holding in *Oregon v. Smith* in prisoner's rights cases. In its 1990 *Smith* ruling, the Supreme Court made it easier for states to justify generally applicable laws that burden religious practice.

In the case at issue, an Orthodox Jewish prisoner filed suit against Nevada prison officials alleging infringements of his religious rights because officials failed to provide him with a kosher diet, clothes made from a single fiber, the services of a rabbi and a guarantee he would not be transported on the Sabbath.

A federal appeals court sided with Nevada officials on all issues except the kosher dietary requirements. The appeals court returned the case to the trial court to determine issues such as whether alternative means of religious practice were available to the prisoner, the impact of accommodating the prisoner's dietary needs on guards, other prisoners and prison resource allocation, and the absence of ready alternatives to the prison's dietary policies.

"The issue is all but moot now. The Religious Freedom Restoration Act (signed into law Nov. 16, 1993) provides a level of protection for everyone, including prisoners, that exceeds the standard that the lower court applied in this case."

— J. Brent Walker

House approves major lobby reform legislation

The U.S. House of Representatives approved March 24 major lobby reform legislation that could affect the prophetic and pastoral ministries of local churches and religious organizations. But a Baptist church-state specialist working closely with lawmakers hopes that won't be the case.

J. Brent Walker, general counsel of the Baptist Joint Committee, said religious organizations have sought an exemption to the Lobby Disclosure Act (H.R. 823, S. 349) for churches. The Baptist Joint Committee, meeting in October 1993, approved a resolution calling for an exemption in the bill.

The bill, approved overwhelmingly in both chambers, would revamp lobbying laws to increase disclosure requirements and tighten loopholes on activities designed to influence government. A major provision of the bill would establish an office of lobbying registration and public disclosure, requiring anyone who lobbies to register and file reports with that office.

As introduced, the language defining a lobbyist was overbroad, presenting a risk that churches might have to report activities simply because they speak on public issues, Walker said.

Walker has worked with the two chief sponsors to clarify this issue.

Most of that language was added to the House version and a committee report accompanying the Senate bill. The House statutory language and Senate report essentially say that lawmakers have no intention for the bill to cover religious organizations.

"We got about 90 percent of what we wanted," Walker said. "The House bill contains most of the language we suggested to make clear that religious organizations should not have to ask Caesar permission to exercise our prophetic ministry.

"Now we need to hold the line and try to clean up loose ends in the conference committee."

LIBERTY in HISTORY

The crisis came in 1784-1786. Patrick Henry ... carried in the House of Burgesses a resolution declaring: "The people of this Commonwealth ought to pay a moderate tax for the support of ... some Christian church or denomination." The opposition rallied its forces. In a debate between Henry and James Madison, the latter carried off the honors. The bill was postponed, and this allowed the liberal leaders to wage a campaign of education. In 1786 the measure finally was buried, and at the same time Thomas Jefferson's famous bill for religious freedom was passed — a bill declaring that the government must not interfere in church affairs or matters of conscience or impose any disabilities for religious opinion. This epochal measure became the cornerstone of religious freedom in many states. Allan Nevins and Henry Steele Commager, *A Pocket History of the United States*, pp. 94-95 (9th Rev. Ed., 1992). • **(JBW)**

VIEWS OF THE WALL

Arguments ignore *Lemon*

J. BRENT WALKER
General Counsel

The U.S. Supreme Court heard oral argument March 30 in *Board v. Grumet*, the only significant church-state case of this term. The case involves the constitutionality of a public school district whose boundaries coincide with the Village of Kiryas Joel where only Satmar Hasidic Jews reside. The legislature gave the Satmars a full panoply of political power to run the school district, but it presently is being used only to deliver remedial services to handicapped children. These services already were available through the predecessor school district, but the Satmars objected to sending their children to those schools.

The case has a more significant undercurrent. The court is being asked to modify or overturn the *Lemon* test that it has used for more than 20 years to help decide Establishment Clause cases. The Baptist Joint Committee urged the court not to depart from *Lemon* and its requirement that government remain neutral in matters of religion.

I had hoped to report to you on the courtroom give and take about the *Lemon* test. But, surprise! It was not even discussed. The entire hour argument was devoted to background facts and the application of First Amendment jurisprudence to the Kiryas Joel school district.

I suppose this is a good sign. If those justices who have criticized *Lemon* (i.e., Rehnquist, Scalia, Thomas, Kennedy) thought they had enough votes to kill it, they probably would have spent more time asking questions and talking about it at oral argument. But, I don't think they have the votes. Even if Justice Kennedy stays with the others (not by any means a certainty), they still need a fifth vote. Although Justice Byron White probably would have voted that way, he is now retired; his successor, Justice Ruth Bader Ginsburg, is probably more friendly to *Lemon's* principle of governmental neutrality.

Another reason why *Lemon* may survive attack is that those who are most likely to vote to uphold the school district (i.e. Rehnquist, Thomas and Scalia), probably could do it even under *Lemon*. They see the school district not as an advancement of religion, but as a reasonable accommodation to social and cultural peculiarities of the community. On the other hand, those most likely to strike down the school district (Blackmon and Stevens), also can do so without regard to *Lemon*. They might argue, as we did in our brief, that investing a religious sect with governmental power amounts to an actual merger of church and state. That is blatantly unconstitutional, even without applying the *Lemon* test.

Nevertheless, we cannot be assured of success. Even though *Lemon* was not discussed, it is still an issue raised by two petitioners and numerous groups filing friend-of-the-court briefs. The lack of discussion at oral argument about the test could suggest, not a lack of interest by the justices, but that they already may have made up their minds.

The principle of neutrality embodied in *Lemon* must survive. Government should not become involved in religion. The separation of church and state is good for government: government is uniquely ill-suited to get into the religion business. It is also good for religion: religion has flourished in this country precisely because it has been freed from governmental regulation and support. Yes, government should accommodate religion by lifting burdens on religious practice. It should not be permitted to actively benefit religion in a way that establishes religion or departs from a posture of neutrality.

The best thing government can do for religion is simply to leave it alone. We hope the justices agree. Δ

GUEST VIEWS

MICHAEL J. CLINGENPEEL

Legislative proposals to institute programs of "voluntary," student-initiated prayer in public schools are cropping up across the country. I am opposed to this type of legislation.

Not because I value prayer too lightly.

Not because I believe our public school students could not use the practice.

I am opposed because:

• Prayer legislation is unnecessary. Prayer has never been outlawed in public schools. Any student who chooses to utter a sincere prayer can do so any time he or she wishes. The human conscience has never been held captive by the state, nor can it be.

• Our Baptist mothers and fathers fought any attempt of the state to administer private religious practices. It escapes me why people who argue that public schools have messed up our children's education want to see public schools in charge of our children's religion. Let me choose whom I want to teach my child about talking to God.

• So-called student-initiated prayers are rarely so. More often they are parental-induced attempts to return to an idealized world. The '50s may look good now, but they also brought us the John Birch Society, Joseph McCarthy, the Ku Klux Klan and Baptist churches riddled with overt racial prejudice. We had prayers in schools during those days.

• A pluralistic society must protect the rights of the minority against the majority, not vice-versa. Because majority rule is often heavy-handed, our federal Constitution protects minorities. I have lived elsewhere in the United States where Baptists and Christians are minorities, and the prospects of student-initiated prayers in those places was not pleasant for a Baptist Christian.

Prayers on the lips of zealous, majoritarian ideologues can be used to bludgeon sincere believers. A religious bully is no less a bully.

• Most prayers in the "public square" are innocuous, flaccid imitations of the real thing, often uttered for a human, not divine, audience. That goes for prayers in state legislatures and the U.S. Congress.

• Granting to one student the right to utter audible prayers violates another student's right not to listen. School prayer legislation addresses the right to pray, but ignores the right not to listen.

Most people disagree with me. Public opinion polls prove it. Lawmakers everywhere are passing this type of legislation. But that doesn't make it right, nor constitutional, nor Baptist. Δ

Michael J. Clingenpeel, editor of the **Religious Herald**, *newsjournal of the Baptist General Association of Virginia, recently testified against school prayer proposals later approved by state lawmakers.*

REPORT from the CAPITAL

James M. Dunn
Executive Director
Larry Chesser
Editor
Pam Parry
Associate Editor
J. Brent Walker
Book Reviews

REPORT (ISSN-0346-0661) is published 24 times each year by the Baptist Joint Committee.

Established in 1936

Baptist Joint Committee on Public Affairs
200 Maryland Avenue, N.E., Washington, D.C. 20002
202-544-4226

Supporting bodies: Alliance of Baptists • American Baptist Churches in the U.S.A. • Baptist General Conference • Cooperative Baptist Fellowship • National Baptist Convention of America • National Baptist Convention U.S.A. Inc. • National Missionary Baptist Convention • North American Baptist Conference • Progressive National Baptist Convention Inc. • Religious Liberty Council • Seventh Day Baptist General Conference • Southern Baptist state conventions and churches.

Baptist Joint Committee
200 Maryland Avenue, N.E.
Washington, D.C. 20002

Non-profit Org.
U.S. Postage
PAID
Riverdale, MD
Permit No. 5061

06100 MAYL7J K 000
DR. LYNN E. MAY JR.
HISTORICAL COMMISSION
127 NINTH AVE.,N
NASHVILLE, TN 37234