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PROCLAIM LIBERTY

REPORT from the CAPITAL

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NEWS MAKERS

President Clinton recently announced his intention to nominate **Gilbert F. Casellas**, general counsel to the Air Force, as chairman of the Equal Employment Opportunity Commission. The EEOC has the responsibility to enforce Title VII of the Civil Rights Act and other federal laws that prohibit employment discrimination. Casellas is the former president of the Hispanic National Bar Association.

James M. Dunn, executive director of the Baptist Joint Committee, led June 22 a breakout session for a conference sponsored by the U.S. Department of Housing and Urban Development. The conference, the first of its nature, explored building a partnership among HUD and churches, synagogues and mosques that would help restore community to cities across the nation. Dunn led discussions on how religious institutions can work with HUD. Henry Cisneros, secretary of Housing and Urban Development, said the department needs congregations to affect change because many societal problems are matters of the spirit.

John Shattuck, Ashton Carter and **Charles Meissner**, Clinton administration officials, have been nominated to serve on the Commission on Security and Cooperation in Europe (commonly referred to as the Helsinki Commission), which monitors global human rights conditions. Shattuck is assistant secretary of state for democracy, human rights and labor; Carter is assistant secretary of defense for nuclear security and counter proliferation; Meissner is assistant secretary of commerce for international economic policy. Among other human rights issues, the Helsinki Commission monitors religious liberty concerns. Δ

Treat religion differently, Walker urges lawmakers

The First Amendment sometimes requires that government treat religion differently, a Baptist church-state attorney told 18 members of Congress attending a June 21 Constitutional Forum.

Because of the First Amendment's religion guarantees, "government should accommodate religion without advancing it," said J. Brent Walker, general counsel at the Baptist Joint Committee.

"In a word, government should turn religion loose — leave it alone — so that people of faith may practice their religion as they see fit, not as government sees fit."

Walker and Mark Tushnet, associate dean at Georgetown University Law Center, addressed the question of when government can interfere with religion.

Organized by Reps. David Skaggs, D-Colo., and James Leach, R-Iowa, the forum meets on a near monthly basis to discuss constitutional issues with specialists.

"Most Americans agree that government should be neutral toward religion," Walker said, but controversies arise in the church-state field over defining neutrality.

A formal view of neutrality, he said, requires that religion be treated the same as other areas. It cannot be singled out for special burdens or privileges.

Walker cited as an example of this view the Supreme Court's 1990 ruling that generally applicable laws that burden religion do not have to be justified by a compelling reason.

In contrast, Walker said, a substantive view of neutrality sometimes requires that religion be treated differently and be exempted from broadly applied laws.

"Churches that oppose the ordination of women should be exempt from the gender provisions of Title VII (of the Civil Rights Act) and Jews should be allowed to hire rabbis, not Baptist preachers, to lead their synagogues." Δ

Walker and Skaggs listen to a question at a Constitutional Forum.

Church-state specialists voice concerns to officials

Proponents of the Religious Freedom Restoration Act met June 22 with high-level Clinton administration officials to pursue a strategy for applying the 1993 law's enhanced protections for religious practice.

The Justice Department sparked an outcry from religious groups after it told a federal appeals court in April that a Minnesota church should not be allowed to keep tithes contributed by a couple headed for bankruptcy.

The appeals court is reviewing a district court decision ordering Crystal Evangelical Free Church to turn over $13,450 donated by Bruce and Nancy Young during the 12 months before they filed bankruptcy.

Particularly troubling to religious groups was the administration argument that recovering the funds from the church does not violate RFRA, which requires government to show a compelling reason before it can burden religion. By arguing that creditors could recover money given to a church while bankruptcy laws shield money spent on gambling, liquor or pricey vacations, the administration position minimized the effectiveness of RFRA, the religious groups said.

Steve McFarland, director of the Christian Legal Society's Center for Law and Religious Freedom, said White House officials asked him to bring together a group of church-state specialists to "help the Justice Department put together a long-range policy for application of RFRA."

McFarland's organization led a coalition of religious groups siding with the church in the bankruptcy case.

Attending the meeting were three prominent law school professors who helped craft RFRA — Douglas Laycock of the University of Texas School of Law; Michael McConnell of the University of Chicago School of Law; and Edward Gaffney Jr., dean of Valparaiso School of Law.

Also attending were McFarland and two Baptist church-state attorneys, J. Brent Walker of the Baptist Joint Committee and Michael Whitehead of the Southern Baptist Christian Life Commission.

Among those representing the administration in the meeting — capped by an unscheduled visit from President Clinton and White House Counsel Lloyd Cutler — were Walter Dellinger, assistant attorney general; Joel Klein, deputy counsel to the president; and William C. Bryson, acting associate attorney general.

McFarland said the meeting opened "some important lines of communication between those of us who labored to pass the act (RFRA) and those who are employing it."

Walker said the meeting was set up to discuss the administration's involvement in the bankruptcy case and to urge the administration to "develop a policy of rigorous enforcement of the law (RFRA), even if it cuts across entrenched bureaucratic interests."

Walker said administration officials "did not agree to change their position" in that case, but they "at least listened intently and left open the possibility that they might reconsider."

Both McFarland and Walker said the Justice Department's position in the bankruptcy case is unreconcilable with Clinton's support of RFRA voiced when he signed the measure Nov. 16.

Clinton's support for RFRA was also recently underscored in letters to Southern Baptist officials as that denomination weighed a position on the Equal Employment Opportunity Commission's proposed guidelines on religious harassment in the workplace.

"That the president of the United States took time to meet with us on these issues speaks volumes about where his heart is on religious liberty issues. Now the administration needs to convert it into tangible policy," Walker said. Δ

High court invalidates residential sign ban

A Missouri city's near-total ban on residential signs went too far in restricting free speech, a unanimous U.S. Supreme Court ruled June 13.

The high court upheld lower court decisions striking down a sign ordinance enacted by an affluent St. Louis suburb seeking to preserve property values and avoid the visual blight caused by a proliferation of signs.

The Ladue City Council barred residential signs except those providing residence identification, "for sale" notices and safety hazard warnings. The ordinance also permitted businesses, churches and non-profit groups to display signs not allowed at residences.

The ordinance was challenged by resident Margaret P. Gilleo, who sought to display a small sign stating "For Peace in the Gulf" from her second-story window.

"Although church signs were exempted, the ordinance banned an important medium for religious speech and religiously informed political speech by individuals.

"The state's interest in eliminating visual clutter is simply insufficient to justify cutting off the right to speak from one's own home."

—J. Brent Walker

POWER

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content. It did mine. Thus, I'm leery.

But back to the power question. If Baptists are no longer an oppressed minority, victims of others' intolerance, how shall we use the political power we've acquired?

I vote for religious tolerance. We use it to protect the religious tolerance for which we've fought.

To paraphrase one of Ravenworth's patron saints, Alan Neely:

> Years ago, Baptists endowed this nation with a great bank account: religious tolerance. Today, new religious groups seek the same tolerance early Baptists didn't have. They seek to write checks on the account we endowed. As Muslims, Buddhists, B'hai's, Sikhs and other religious groups are increasing in America, will their growth provoke our anxiety? Will we attempt to impose on them the very thing forced on us — a sanctioned style of religious expression? May it never be.

Let us pray in our churches for our graduates. God knows they need it.

And let us pray for ourselves that we be wise as serpents and harmless as doves. Power is seductive. When it comes to the ethics of power, few are wise, fewer are harmless. Power is an addictive substance, sold at inflated prices. So let us beware. Pimping power has never suited Baptists well. Δ

Neutrality vs. neutrality

J. BRENT WALKER
General Counsel

Most everyone believes that government should be "neutral" toward religion, but there are at least two ways of shooting for neutrality.

There is "formal neutrality." This view sees religious liberty simply as an "equality" right. Religion will not be singled out for discriminatory treatment or targeted for special burdens. This view of neutrality is held by Justice Antonin Scalia and a slim majority on the Supreme Court, as expressed in *Employment Division v. Smith* (the so-called Native American Peyote case).

Another view is called "substantive neutrality." It sees free exercise not in terms of facial equality, but as a "substantive liberty." This kind of neutrality sometimes requires religion to be treated differently and given exemptions from governmental regulation. Churches that oppose the ordination of women should be exempt from the gender provisions of Title VII, and Jews should be allowed to hire rabbis, not Baptist preachers, to serve their synagogues.

The courts must exempt religion from substantial governmental burdens unless a compelling state interest can be shown. On the political side, legislators should exempt religion when either the Constitution or good public policy demands it, so long as it does not run afoul of the Establishment Clause.

This is the traditional view of the Supreme Court — at least from *Sherbert v. Verner* (1963) up to *Employment Division v. Smith* (1990), the view of the Baptist Joint Committee and the view that is embodied in the Religious Freedom Restoration Act of 1993 (RFRA).

The idea of religious liberty as a substantive liberty, not an equality right, is the proper way to view the operation of the Free Exercise Clause. Here's why:

1. The language of the First Amendment itself requires it. Religion is specifically mentioned and protected as a fundamental liberty in the panoply of preferred rights. It is not phrased in terms of equal treatment.

2. History reports that religious exemptions were practiced and regarded as desirable during the late 18th century. Although the record is not uniform, language in the free exercise provisions of state constitutions parallels the concept of compelling state interest. And, legislative exemptions for such things like oath-taking and military conscription, show that exemptions were thought to be beneficial, if not constitutionally mandated.

3. Even if exemptions were foreign to the Framers' thinking, the world has changed dramatically in the last two centuries. The modern welfare state has the power to molest religion in ways that were unimagined by Jefferson and Madison, and the pervasive pluralism of our contemporary religious landscape calls all the more for increased sensitivity by government in the form of religious accommodation.

4. The idea of formal neutrality sets up a constitutional redundancy. Equality is already available under the Equal Protection Clause of the 14th Amendment. This view effectively guts the Free Exercise Clause of any meaning in its own right.

5. Formal neutrality imports a certain statism and majoritarianism into an essentially anti-statist, countermajoritarian Bill of Rights. Indeed, Justice Scalia recognized as much when he wrote:

"It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."

6. Substantive neutrality simply works better to protect religious liberty. It is true that during the high water years of free exercise the record of success was not all that good. But under a weaker standard it would have been even worse. Indeed, a comparison of the cases decided between *Smith* and RFRA's passage with those after RFRA prove the point.

7. Finally, formal neutrality results in inconsistencies on the Establishment Clause side of the First Amendment. Just as religion sometimes needs to be treated differently under the Free Exercise Clause to achieve true neutrality, so too must it be treated differently under the Establishment Clause. A strict view of formal neutrality when applied to the Establishment Clause would water down that clause as much as it does the Free Exercise Clause.

So when you hear someone talk about government "neutrality," be sure you understand which kind they are talking about. Only one fully protects religious liberty. Δ

GUEST VIEWS

JAMES LAMKIN

Power, particularly political power, can be a dangerous thing. Trouble thrives on either end of the continuum. On one hand, powerlessness creates victims. On the other, absolute power creates oppressors.

No wonder Baptists never have fared well with power — with or without it. When Baptists had no political power, our ethics emerged from the victim's posture. Anabaptists and early colonial Baptists were victimized by the intolerance of others. But victims can cry out. And cry out we did. The lament for religious freedom was heard. Wails became words. And words became law. And law granted liberty.

But over time, Baptists have moved up the continuum. Baptists no longer stand among the powerless. We no longer sit in the victim's chair with bruised ribs and bloody noses. We've got influence. We've got power. And the ethics of power demand careful application.

Every year, there's an identified issue as the litmus test for real (American) Christianity. A test of power. This year, it's prayer at public school graduations. The Christian Coalition and other groups "empowered" the issue. They've said public prayer should be allowed. They've said the graduates should decide; and if they so choose, let one of them pray.

However, on that issue, I vote no. I'm not for prayer at public school graduations. My reasoning is confessional.

I've prayed at public school graduations. More than once. Furthermore, I've even preached public school graduation "sermons." Thus, this No is the vote of a convert. A slow convert.

In retrospect, I meant well. But I'll admit that what I did on those occasions was neither prayer nor sermon. It was a cross (pardon the pun) between an Army recruitment slogan and a Robert Frost poem. A generic gospel that implored graduates to "be all that you can be" and "take the road less traveled by." But neither made all the difference.

Whatever else prayer is, it is a trust event. Ravensworth Baptist Church members allow me to offer a pastoral prayer during congregational worship because they trust me. I can rage at injustice. I can sigh for righteousness. I can name our sins. Ask for our healing — because reverence and common understanding weave us together in prayer. Even when we disagree, we still trust.

How many graduation ceremonies have you been to lately that resembled reverence and common understanding? Without both, public prayer becomes irrelevant, token or simply communal eavesdropping.

Prayer goes public only by invitation. Somebody gives permission. And invitation and permission can influence

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