

Historical Commission, SBC

Nashville, Tennessee



# REPORT FROM THE CAPITAL

Volume 51, No. 3

February 6, 1996

## NewsMakers

◆ **President Bill Clinton** recently designated Jan. 16 as Religious Freedom Day. His proclamation noted that more than 200 years ago on that date, Virginia's General Assembly approved a bill introduced by Thomas Jefferson that created the first legal protection for religious freedom. Jefferson called religious liberty one of the "natural rights of mankind." The bill was later used as a model for the First Amendment to the Constitution. Clinton urged Americans to reaffirm their devotion to religious freedom and tolerance.

◆ **Edward F. Meier** is a spring semester intern at the Baptist Joint Committee. He will work with the agency's legal and legislative staff, as well as provide administrative support. Meier is a sophomore at George Washington University, studying international affairs. He spent 12 years in Nigeria, where his parents were medical missionaries.

◆ The House of Representatives voted Jan. 23 to award evangelist **Billy Graham** and his wife, **Ruth Graham**, a Congressional Gold Medal. Lawmakers said Graham's messages have been heard by more than 100 million people in person and over 2 billion through television. He has also served as a spiritual adviser and confidant to 10 presidents.

## Appeals court upholds religious freedom law

In the most significant ruling to date on the constitutionality of the Religious Freedom Restoration Act, a federal appeals court has reversed a lower court's invalidation of the 1993 law.

A three-judge panel of the 5th U.S. Circuit Court of Appeals ruled unanimously Jan. 23 that Congress acted within its authority in passing RFRA. The panel rejected a district court's finding that RFRA intrudes on the role of the judicial branch.

RFRA restored a long-standing legal test that required government to show a "compelling" reason to restrict religious practice. Religious groups asked Congress to reinstate the test after the U.S. Supreme Court ruled in 1990 that government no longer needed a compelling reason to justify broadly applied laws and policies that burdened religious practice.

Under RFRA, government cannot substantially burden religious practice unless it uses the least restrictive means available to advance a compelling purpose.

In the 5th Circuit case, Boerne, Texas, officials had challenged RFRA's constitutionality in a dispute over a Roman Catholic parish's plans to raze part of a 72-year old church building the city wanted preserved. Church officials argued the city's landmark preservation law violated the parish's rights under RFRA.

District Judge Lucius Bunton of San Antonio sided with the city, invalidating RFRA because it infringed on the authority of the courts "to say what the law is."

The appeals court disagreed. It said the Constitution authorizes Congress to enact

laws that protect constitutional rights if such laws do not conflict with other provisions of the Constitution.

The appeals court agreed with the Justice Department's argument that RFRA simply provided legislative protection

for a constitutional right "over and above" that provided by the high court's interpretation of the First Amendment. The department intervened to defend the constitutionality of RFRA.

"In short, the judiciary's duty is to say what the law is, but that duty is not exclusive," the appeals court said. "The district court's holding that RFRA usurps the judiciary's power ... to interpret the Constitution is incorrect."

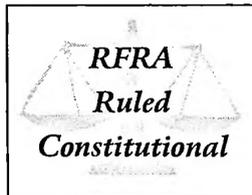
Several religious groups, including the Baptist Joint Committee, filed a friend-of-the-court brief asking the federal appeals court to uphold the constitutionality of RFRA.

Melissa Rogers, associate general counsel at the BJC, said the decision confirms the position of RFRA's drafters that "Congress has the power to enact laws to enhance the protection for constitutional values when the Supreme Court has declined to do so.

"We are extremely gratified that the highest court yet to speak to the issue has upheld RFRA's constitutionality."

The decision is effective throughout the 5th Circuit, which includes Louisiana, Mississippi and Texas.

"It should also send a strong signal to other courts that RFRA is good law," Rogers said. Δ



## Religious liberty argument fails in wrongful death case

The U.S. Supreme Court declined Jan. 22 to consider whether a \$1.5 million wrongful death judgment against four Christian Scientists violated their First Amendment right to free exercise of religion.

The Christian Scientists were sued by the father of an 11-year-old Minnesota boy whose diabetes was treated with spiritual healing methods rather than medical care.

Ian Lundman died less than three days after first complaining of stomach pain. His mother, Kathy McKown, relied on the Christian Science teaching that prayer is the most effective treatment for illness and reliance on conventional medicine interferes with spiritual healing.

After Ian's death, his mother and stepfather, William McKown, were indicted for manslaughter, but the indictments were dismissed because of a Minnesota law that specifically allows parents to rely exclusively on "spiritual treatment."

Ian's father, Douglas Lundman, then filed a wrongful death suit against the McKowns, the First Church of Christ, Scientist, a Christian Scientist nurse and a practitioner. A trial court awarded Lundman \$9 million in punitive damages from the church and \$1.5 million in compensatory damages from all defendants.

An appeals court later reversed the judgment against the church, while upholding the monetary award against the four individuals. The high court's refusal to review the case let both of those actions stand.

Also left standing was the appeals court's ruling that church practitioners or clergy can be held liable for malpractice based on alleged negligence or unreasonable performance of a religious function.

That issue prompted several religious organizations, including the Baptist Joint Committee, to ask the high court to accept the case solely to determine whether clergy can be deemed liable for malpractice in the performance of religious duties.

In a friend-of-the-court brief, the religious groups argued that Minnesota stands alone in permitting claims of "religious malpractice, which requires civil courts to interpret church doctrine to determine if an adherent violated tenets of his own religion."

The First Amendment bars civil courts

from interpreting religious doctrine, the brief states.

*"Clergy malpractice has reared its ugly head again. We had hoped the court would take the case to repudiate that doctrine once and for all.*

*"Secular courts are uniquely ill-suited to pass on the reasonableness and efficacy of religion or to second-guess the clergy on spiritual matters."*

— J. Brent Walker  
BJC General Counsel

## Former Congresswoman Barbara Jordan dies

Former U.S. Rep. Barbara Jordan, D-Texas, died Jan. 17 of pneumonia and complications of leukemia. She had suffered from multiple sclerosis for several years.

In 1966, Jordan became the first African-American woman ever elected to the Texas Senate. She was elected to the U.S. House of Representatives in 1972 and served there until 1978. As a member of the House Judiciary Committee, she voted to impeach then-President Richard M. Nixon after giving a moving speech in which she expressed "complete" faith in the Constitution.

Jordan, a Baptist, spoke at the Baptist Joint Committee's 50th Anniversary celebration where she said the wall of separation between church and state has never been a solid one. "It is penetrable," she said. "It should be penetrable."

She addressed three Democratic National Conventions. On the opening night of the 1976 convention, she said, "I, Barbara Jordan, am a keynote speaker, and notwithstanding the past, my presence here before you is one additional bit of evidence that the American dream need not forever be deferred."

*"It was not just her voice. Everyone remarked on Barbara Jordan's remarkable rhetoric, her divine eloquence, her moving locution.*

*I worked with her for 30 years. Her profound stewardship of opportunity, her passion for helping people and her innate hopefulness tilled the soil from which sprang her public persuasiveness.*

*She did her homework, understood history, intentionally and consistently confronted evil. We search in vain for her likes today. We shall miss her."*

— James M. Dunn  
BJC Executive Director

1936-1996

Six Decades  
of Securing  
Religious Liberty



In 1867, President Andrew Johnson ordered the American Ministry to the Vatican closed. According to a paper by Rufus Weaver, a BJC founder, ambassadors to the Vatican were allowed to hold religious services in the embassies in 1866, but all other Protestant worship was forbidden in the city of Rome, which prompted Johnson's action. In 1939, President Franklin D. Roosevelt reopened the debate when he announced the appointment of Myron C. Taylor as personal envoy to the Vatican. The Joint Conference Committee (forerunner of the BJC) protested that "any recognition, implied or otherwise, of the political status of any ecclesiastical organization constitutes, in our judgment, an assault upon (church-state separation)." Roosevelt told religious leaders he did not view the appointment as establishing formal ties but as an attempt to maintain world peace. Baptists disagreed, but Roosevelt proceeded over their protest. Δ

# Church-State Intersection

*J. Brent Walker*

General Counsel



**G**ood news on the religious liberty front is hard to come by these days. But, good news we got on January 23 when a federal appeals

court upheld the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA). The case is *Flores v. City of Boerne*.

RFRA was passed to restore a high level of protection for the exercise of religion — shielding it from governmental regulation in all but a few situations where government has a compelling interest. Its constitutionality has been questioned by states and local governments at nearly every turn. (The Justice Department has filed briefs arguing for its constitutionality.) Most federal district courts that have considered the issue have ruled that the act is constitutional, but a federal judge in Texas struck down the act in a superficially reasoned, almost flippant opinion. On appeal, a three-judge panel of the 5th U.S. Circuit Court of Appeals in New Orleans unanimously reversed that decision and declared RFRA constitutional. The appeals court's trenchantly reasoned opinion addressed the four grounds commonly raised to support an argument that the act is unconstitutional.

1. Congress lacks authority to require state and local government to comply with RFRA. Wrong, the appellate court said. The Fourteenth Amendment applies the First Amendment, including the Free Exercise Clause, to the states. Section 5 of the Fourteenth Amendment gives Congress the power to enforce that amendment by appropriate legislation. Citing civil rights legislation and cases as precedent, the court upheld Congress' power to enforce the free exercise values embodied in RFRA.

2. Congress has violated the separation of powers by second-guessing the courts' right to interpret the Constitution

and to decide if and when religious exemptions are appropriate. Not so, the 5th Circuit ruled. Both the courts and the Congress have a role to play here. While Congress cannot cut back on rights embodied in the Constitution, there is nothing wrong with Congress extending greater rights than the courts have interpreted the Bill of Rights to provide. The courts will still exercise their judicial power to decide the proper outcome of cases brought under RFRA.

3. RFRA violates the First Amendment's Establishment Clause. No way, retorted the appellate court. RFRA itself provides that "nothing in this chapter shall be construed to affect, interpret, or in any way address [the Establishment Clause]." By definition, RFRA permits accommodation of religion "up to the limit permitted by the Establishment Clause but no further." Moreover, the court ruled that RFRA "no more advances religion than other legislatively mandated accommodation of the exercise of religion," which the courts have historically upheld as permissible under the First Amendment.

4. RFRA violates the Tenth Amendment. Wrong again, the court wrote. Congress did not rely on its Commerce Clause power that the Supreme Court cut back on last year in *U.S. v. Lopez*, a case dealing with the Gun Free School Zone Act. Rather, as mentioned above, Section 5 of the Fourteenth Amendment is the constitutional basis for Congress' exercise of power. The court concluded that "on its face, RFRA does not intrude upon states' sovereignty any more than the myriad of federal statutes that pre-empt state regulation."

So, it's time to celebrate a victory. As long as federal circuit courts continue to uphold the law, there is little risk that the Supreme Court will try to decide the issue. Although the high court would likely uphold RFRA's constitutionality, it would be nice not to have to run the risk that it might not. Δ

## Liberty & Law

**R**FFRA is also, in a sense, an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts — that is, strict scrutiny versus a form of intermediate scrutiny. This view includes an image of congressional second-guessing of the courts. But that sense is false. Congress by RFRA is demanding ad hoc review of laws of general applicability that substantially burden the free exercise of religion. ... Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. Δ

— 5th U.S. Circuit Court of Appeals.  
*Flores v. Boerne, Texas*  
Jan. 23, 1996

**Baptist Joint  
Committee  
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/churches.

**REPORT FROM THE CAPITAL**

**James M. Dunn**  
*Executive Director*  
**Larry Chesser**  
*Editor*  
**Kenny Byrd**  
*Associate Editor*  
**J. Brent Walker**  
*Book Reviews*

REPORT (ISSN-0346-0661) is published 24 times each year by the Baptist Joint Committee. Single subscriptions, \$10 per year. Bulk subscriptions available.

# Book Review

## The Godless Constitution: The Case Against Religious Correctness

Isaac Kramnick and R. Laurence Moore,  
W.W. Norton & Co., New York, 1996, 177pp.



The heated controversy between the advocates of religious correctness and the proponents of the godless Constitution has existed since the nation's founding, say authors Isaac Kramnick and R. Laurence Moore. Objections raised by the religious right are not novel. Unlike those who have previously attacked the wall of separation, however, groups like the Christian Coalition refuse to recognize that the Constitution's writers intentionally provided for freedom of conscience. The authors assert that our nation's founders and their political tradition are being flagrantly misrepresented by the political agenda of the religious right. *The Godless Constitution* soundly refutes that misrepresentation.

They note that the designers of the Constitution did not look to the state to "inculcate morality," but instead limited government to the civil responsibilities of protecting life and liberty. This is best seen in Thomas Jefferson's classic statement: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say There are twenty gods, or no God. It neither breaks my leg, nor picks my pocket." Roger Williams and John Locke also served as key figures by providing proponents of religious liberty with their winning arguments.

The founders did not want a godless

America, explain Kramnick and Moore, but a godless Constitution that placed religious responsibilities on the conscience of the individual and the church. This benefits both religion and the state in that "the business of God is too important to be sullied by bipartisan religious practices," Moore said in a recent broadcast interview. The founders demonstrated confidence in religion, the authors argue. The founders intended "to let religion do what it did best, to preserve the civil morality necessary to democracy, without laying upon it the burdens of being tied to the fortunes of this or that political faction." While the religious right decries the increasing power of the state, it contradicts these claims with attempts to give the government power over the church. If successful, this will only attach bureaucratic strings to the freedom of conscience.

Interestingly, Baptists have had a strong role in defining the religious and political attitudes from colonial times to the present. An entire chapter is devoted to explaining the contributions of Baptists in protecting and preserving religious freedom. This helps explain the vital role Baptists often play in today's religious liberty debates.

*The Godless Constitution* is recommended reading for persons seeking an accurate understanding of the history of our Constitution, particularly in light of claims made by the religious right. It warns against extreme views from both the right and left. The founders provided for a "God-full" country governed by a "godless Constitution." Δ

— Malissa Bennett  
*B/JC Intern*



200 Maryland Ave. N.E.  
Washington, D.C. 20002  
202-544-4226  
Fax: 202-544-2094  
CompuServe: 70420.54  
Internet:  
Baptist\_Joint\_Committee.  
part1 @ Ecunet.org

3452  
DR. LYNN E. MAY JR.  
HISTORICAL COMMISSION  
127 NINTH AVE..N  
NASHVILLE TN 37234

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