



REPORT FROM THE CAPITAL

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NewsMakers

◆ Darlene Summers, a Muslim U.S. soldier, faces a court-martial for refusing to stop wearing the traditional black scarf covering the head and neck while on duty. The Army maintains the scarf impairs Summers' safety and says she can wear the scarf during off-duty hours, but not when performing military duties.

◆ Supreme Court Justice Clarence Thomas, a lapsed Roman Catholic for the last 25 years, has returned to the Catholic Church. Three members of the high court are Catholic, two are Jewish and four are Protestant.

◆ Pir Afzar Qadir, leader of a right-wing Muslim organization in Pakistan, has declared the nation's prime minister, Benazir Bhutto, and her cabinet "non-Muslims" for deciding to abolish the death penalty for women. Qadir also said the officials should be killed if they do not rescind the decision, according to Religion News Service.

◆ Lane County Circuit Judge Jack Billings denied the Roman Catholic Church's request to destroy a recording made during a murder suspect's confessional with a priest. District Attorney Doug Harclerod has apologized for the recording but wants it preserved to prove that evidence he introduces was not tainted by the incident. Δ

Courts send mixed signals about validity of RFRA

A 1993 religious liberty law that was widely embraced by religious groups, Congress and President Clinton is finding some of the nation's courts a bit less neighborly.

That is not to suggest that the Religious Freedom Restoration Act will not survive court challenges. In fact, most courts that have ruled on its constitutionality, including two federal appeals courts, have agreed that it passes muster.

Out of 10 decisions, only three courts have ruled against RFRA, and one of those was promptly reversed by a federal appeals court.

The most recent ruling against RFRA was handed down by federal district Judge Frederic N. Smalkin in a dispute between Cumberland, Md., officials and Sts. Peter and Paul Roman Catholic Church. The church, which wants to raze a 19th century monastery and chapel that the city wants preserved, cited both RFRA and constitutional grounds for its case. Smalkin dismissed the church's RFRA claim after finding the law unconstitutional but allowed the remainder of the church's complaint to go forward.

RFRA was enacted after the Supreme Court ruled in 1990 that government no longer needed a compelling reason to justify generally applicable laws that interfere with religious practice. Backers say RFRA merely created a statutory requirement that government avoid placing "substantial" burdens on religious practice without a "compelling" reason.

Judge Smalkin said the "intent and effect" of RFRA is to require courts to decide all free exercise cases under the compelling interest test. By requiring the

courts to decide free exercise cases under a legal standard that the Supreme Court has expressly rejected, "Congress has usurped the Supreme Court's authority to determine the scope and meaning of the

First Amendment and has violated the separation of powers," he said.

Church-state attorneys who helped unite U.S. religious groups behind RFRA disagree with Smalkin's conclusions.

Steven T. McFarland, director of the Christian Legal Society's Center for Law and Religious Freedom, said the court "went astray" when it held that RFRA usurps a court's interpretation of the Constitution. "On the contrary," he said. "The Congress, in RFRA, has simply adopted a standard of review for religious claims that the court has decided is not triggered by the First Amendment. And the Congress is free to do that."

J. Brent Walker, general counsel of the Baptist Joint Committee, said that through RFRA, "Congress is not trying to tell the courts how to interpret the Constitution. It is simply creating a statutory right where the Supreme Court refused to find a constitutional right." He said that while the Constitution prevents Congress from reducing constitutional rights, "it can give greater rights."

Smalkin noted that most courts that have addressed the question have found RFRA to be constitutional. In issuing a procedural order making it possible for an immediate appeal of his RFRA ruling to the 4th U.S. Circuit Court of Appeals, he noted "there is substantial ground for difference of opinion" on the question of RFRA's constitutionality. Δ



1936-1996

Six Decades
of Securing
Religious Liberty



In mid-1969, the U.S. Supreme Court agreed to hear the case of *Walz v. Tax Commission of the City of New York*. Frederick Walz, a New York City property owner, complained that the property tax exemption for religious organizations forced him to make involuntary payment to church groups and, in effect, confiscated his property without due process of law in violation of the U.S. Constitution.

The Baptist Joint Committee filed a friend-of-the-court brief arguing that exempting religious property from taxation is not prohibited by the Constitution but required by religious liberty. On May 4, 1970, the Supreme Court upheld the tax exemption for property used for religious purposes. The court's 7-1 ruling held that tax exemption required only minimal involvement of the state with the church, while the power to tax would produce excessive entanglement. The court maintained that its position was neither sponsorship of nor hostility toward religion, but neutrality, albeit a benevolent neutrality. Δ

Church fires in South draw action from officials

President Clinton met with Southern governors at the White House recently to discuss the region's recent church fires.

At least 35 fires have struck African-American churches over the past 18 months, creating memories of similar acts during the civil rights movement.

Clinton said he did not think, based on the evidence he has seen, a conspiracy exists. But he said that "a lot of these instances are racially motivated, and they tend to play off on one another." He said federal officials have investigated 61 fires or acts of desecration at black churches. Of those, 53 were in the Southeast.

Recently, a group of 38 pastors joined the National Council of Churches of Christ in Washington to talk to federal officials about the government's response to the fires.

The church leaders said at a press conference that there is a linkage between the fires, if not a formal conspiracy, and demanded that investigations be directed toward white supremacist groups.

Reggie White, National Football League star and associate pastor of one of the burned churches, joined the group and called on professional football teams to adopt a burned church to help rebuild. He also appealed to the "Bill Cosbys, Oprah Winfreys, ... Michael Jordans and Emmitt Smiths" of the world.

"Our communities are being terrorized and we have to do something about it," White said to fellow black leaders. "If we don't take care of it now, our children are going to adopt these attitudes, and when they grow up they're going to destroy America."

The Department of Housing and Urban Development (HUD) is creating a package to guarantee loans from private institutions to rebuild "community institutions damaged or destroyed by acts of arson or terrorism."

A HUD official said the package will need congressional approval and HUD is attempting to structure legislation so that it "will be consistent with the constitutional provisions" for the separation of church and state.

A Baptist church-state attorney discussed the government's involvement in providing resources to rebuild the churches at a June 20 hearing held by the Congressional Black Caucus. J. Brent

Walker, general counsel for the Baptist Joint Committee, said government's role "should be secondary and supportive."

Walker endorsed the idea of HUD guaranteeing loans for the churches but said that tax dollars "cannot be used to assist 'pervasively sectarian' religious institutions — which churches clearly are — even for an ostensibly secular purpose like providing funds for brick and mortar."

Congress has also taken action on the issue. The U.S. House of Representatives approved legislation June 18 that would make it easier for federal prosecutors to assert jurisdiction in cases in which religious property has been damaged. The bill, approved 422-0, gives federal jurisdiction in cases when the offense is motivated by the race, color or ethnicity of individuals associated with that property.

The measure allows victims who suffer death or injury from such acts to be eligible for compensation. The bill also would reduce from \$10,000 to zero, the dollar amount of damage necessary to trigger federal intervention.

Bill to protect religious communication introduced

Legislation to prevent prosecutors from using "privileged religious communication" against defendants — as was recently attempted in a tape-recorded confession in Oregon — has been introduced in Congress by Rep. Peter King, R-N.Y.

"The Oregon incident made it clear to us that certain things had to be spelled out more clearly," a King spokesman said.

The Oregon incident involved the Lane County district attorney, who taped a confession made to a Roman Catholic priest by a suspect charged with burglary and theft in a case that also involved the shooting deaths of three teen-agers. An outcry from church officials later prompted the district attorney to relinquish the tape.

The "Religious Communications Sanctity Act" would provide for a penalty of up to five years in prison and a \$250,000 fine for government officials who "surreptitiously" listen to any communication that is privileged, because of its religious character.

The bill would also call for the immediate destruction of any such recording or transcripts of the recording.

Church-State Intersection

J. Brent Walker

General Counsel



We talk a lot about ecumenism. Now we have the opportunity to put our money where our mouths are. Persons of faith are ral-

lying to rebuild the churches recently burned. The National Council of Churches is raising money for reconstruction. The Baptist Joint Committee along with the American Baptist Churches in the U.S.A. and the Cooperative Baptist Fellowship are giving too. The National Association of Evangelicals and the National Black Evangelical Association have also started a rebuilding fund. The Quakers, Mennonites and others are involved as well. And it is not just Christians who are helping. The BJC got a call earlier this week from Soka-Gakkai International-USA, a Buddhist organization, asking how it can help. Additionally, Habitat for Humanity will be diving headlong into church rebuilding. This is exactly what people of faith should be doing — cooperating, pooling resources to help those who have suffered from hate and intolerance.

How should government address church burning? The government's primary emphasis should be on prevention of additional destruction and enforcement of criminal penalties. Although government has a role in facilitating the funding of reconstruction, it should only be secondary and supportive. There is much that government can do that acknowledges the private sector's primary role and that does not violate the separation of church and state.

I would think it appropriate to allow victim churches to seek aid from the Crime Victims Fund. This involves no tax dollars, but will be funded through fines from convicted offenders, penalty assessments, proceeds of forfeited appearance bond and other money paid from other non-public sources. Second, it

is quite proper for HUD to guarantee loans by private lending institutions. Of course, these avenues of relief should not be directed solely to churches, but should be available to all similarly situated organizations that suffer property damage because of their race, color, ethnicity or religious affiliation.

There are limits, however, to what the government can do. The First Amendment's Establishment Clause prohibits outright grants to religious organizations. Supreme Court jurisprudence is very clear. Taxpayer money cannot be used to assist "pervasively sectarian" religious institutions even for an ostensibly secular purpose like providing funds for brick and mortar.

Some argue that grants should be given to churches that provide "essential services of a governmental nature." I am not sure what "essential services of a governmental nature" means, but I suspect it has to do with church schools, community centers, homeless shelters, soup kitchens and the like. Funding activities that operate out of a building that is also used for religious purposes is very problematic. It is unacceptably entangling for the government to decide what activity is sacred and what is secular, what percentage of the building is used for one over the other, and what is a governmental service versus what is a religious one.

The proper avenues for governmental involvement — victims fund and guaranteed loans — taken together with a generous outpouring of money from the religious community, will be more than sufficient to rebuild the churches.

Although church burning is appalling, it is especially important to listen to our heads and stand on constitutional principles when tragic events tug at our heart strings to do otherwise. It is important for us to do good, but we must never do good at the expense of constitutional principles which have stood for over 200 years to ensure religious liberty. Δ

Quoting

Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools ... Keep the church and state forever separate.

President Ulysses S. Grant

The separation of church and state is extremely important to any of us who holds to the traditions of our nation ... To change these traditions ... would be harmful to our whole attitude of tolerance in the religious area. If we look at situations which have arisen in the past in Europe and other world areas, I think we will see the reason why it is wise to hold to our early traditions.

Eleanor Roosevelt

Separation means separation, not something else. Jefferson's metaphor in describing the relationship between church and state speaks of a 'wall of separation,' not a fine line easily overstepped.

Justice Felix Frankfurter

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

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Myths About Public School Prayer

John M. Swomley, *Americans for Religious Liberty, Silver Spring, Md., 1996, 58 pp.*



Has the United States Supreme Court outlawed school prayer? Did the ban on school sponsored prayer cause a national moral decline and a corresponding increase in crime? John M. Swomley addresses these and other questions in *Myths About Public School Prayer*.

Swomley provides a concise analysis of common assumptions about religion in public education. The recurring nature of the debate over school prayer is fueled, Swomley says, by the misconceptions of religious groups who view public schools as a "fertile field for evangelism" or a potential harbor for religious nationalism. Swomley challenges the notions that organized school prayer is harmless and that it contributes to positive character building of America's youth.

This book refutes the myth that, before the early 1960s, American schools had always had school prayer. Most public schools "either never had school prayer or only occasionally resorted to devotional services." The author also notes that many have misunderstood the Supreme Court's school prayer decisions. We are reminded that public schools are not required to be religion-free zones. Students may pray silently at any time or pray aloud in informal settings such as cafeterias or hallways as long as other students are not compelled to listen or participate. The Equal Access Act affords religious groups the same rights to meet on school property as non-religious

Book Review

groups. The only prayers the Supreme Court has forbidden are those organized and sponsored by public schools.

Confronting the popular belief that Christians are being persecuted in America, Swomley notes that while public schools are not permitted to engage in religious exercises, they are also not permitted to engage in anti-religious activity. Schools must display a "conscious neutrality" toward religion and cannot serve as the "hotbed of secular humanism" some school-prayer advocates fear. Appropriately, the same legal remedies that are available to those who object to religious instruction are available to those complaining of anti-religious teaching.

According to Swomley, state-sponsored prayer in public schools is an exercise of political power by the majority at the expense of religious minorities. He argues persuasively that religion involves deeply personal beliefs and that no single prayer could ever be acceptable in our diverse society. Religious expression is an individual right that we all possess, "not a matter to be settled by majority vote."

As an extra bonus, a number of articles and other materials on public school prayer are appended to Swomley's essay. Included among these are two consensus statements to which the BJC contributed greatly: "Religion in the Public Schools: A Joint Statement of Current Law," and "A Shared Vision: Religious Liberty in the 21st Century." This is a nice "one-stop-shopping" resource for information on prayer in public schools. Anyone who desires to contribute to the public debate on this topic in an informed manner would be well-advised to read this book.

—R. Matthew Newell
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