Testimony of

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Thank you, Mr. Chairman and Members of the Subcommittee, for this opportunity to speak to you on this very important matter.

I am J. Brent Walker, executive director of the Baptist Joint Committee on Public Affairs (BJC). I am an ordained Baptist minister and a lawyer. From 1995-2003 I served as an adjunct professor of law at Georgetown University Law Center, where I taught an advanced seminar in church-state law. I am now an adjunct professor at the Baptist Theological Seminary at Richmond. I speak today, however, only on behalf of the BJC.

The BJC serves fourteen Baptist bodies, focusing on public policy issues concerning religious liberty and its constitutional corollary, the separation of church and state. For sixty-eight years in our nation's capital, the BJC has pursued a well-balanced, sensibly centrist approach to church-state issues. We take seriously both religion clauses in the First Amendment as essential guarantors of God-given religious liberty. It is, indeed, our "first freedom."

II. General Principles

The first sixteen words of the First Amendment to the Bill of Rights provide, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The wise architects of our republic fashioned these twin pillars - No Establishment and Free Exercise - and placed them first in the Bill of Rights to protect what many of them believed to be a God-given right - religious freedom.

The Establishment Clause is designed to keep government from promoting, endorsing or helping religion. The Free Exercise Clause is intended to prevent government from discouraging, burdening or hurting religion. The two, taken together, call for what Chief Justice Warren Burger called a "benevolent neutrality" on the part of government. The religion clauses require government to accommodate religion without advancing it, protect religion without promoting it, lift burdens on the exercise of religion without extending religion an impermissible benefit. These twin pillars buttress the wall of separation that is critical to ensuring our religious liberty. The best thing government can do for religion is to leave it alone.

The separation of church and state is relatively modern and distinctively American. True, it enjoys some biblical warrant. The notion that our relationship to God should be voluntary supports it; Jesus' admonition to "render to Caesar the things that are Caesar's and unto God the things that are God's" foreshadows it; the early church's refusal to seek help from Herod or scheckels from Caesar models it.

Nevertheless, throughout most of the history of Western civilization there was, little, if any, affection for the separation of church and state. But the painful lessons of history teach that when government takes sides in religion - for or against - someone's religious liberty is denied and everyone's is threatened.

Our nation's founders had a decidedly different vision. The Constitution never mentions Christianity. It speaks of religion only once in Article VI, and then to ban a religious test for public office. With the adoption of the religion clauses in the First Amendment two years later, our founders made it clear that the state must not take sides in matters of religion and one's status in the civil community would not depend on a willingness to espouse any religious confession. Our founders understood existentially that government and religion are both better off when neither tries to do the job of the other. When the state and the church are tied together, the church tends to use civil power to enforce its brand of religion and the state palms off the name of God to support its stripe of politics. But when the two are separated, religion tends to flourish, and the state is required to respect religious diversity. Far from encouraging hostility to religion, it has been indispensable in ensuring the greatest measure of religious liberty the world had ever seen.

The constitutional requirement of keeping church and state separate, however, does not call for the divorcement of religion from politics. The metaphorical wall of separation does not block metaphysical assumptions from playing a role in public life. Religious people have as much right as anyone else to vend their beliefs in the marketplace of ideas and (with some limits) to allow their religious ethics to influence public policy by preaching, teaching, organizing politically and even running for office. Far from being prohibited, as a Baptist Christian, I would say it is required. This is consistent with Jesus' call in the Sermon on the Mount to be "salt" and "light."

So, church-state separation and religious liberty are not opposing ideas engaged in a philosophical tug-of-war. Instead, separation is the means by which we ensure that liberty for everyone. The doctrine has never meant that church and state should be sealed off from each other with the state tending to important public affairs and the church shunted to the backwaters of private religion. Nor does it mean that religious people, when motivated to do so by their religious convictions, cannot speak out on public policy issues along with the rest of the political community. Religious people are not second-class citizens.

Thus, the BJC has always been committed to two goals: (1) the institutional and functional separation of church and state as an essential constitutional hedge protecting our religious freedom; and (2) the right of people of faith to express their religion freely and to engage in the political process the same as everyone else. While at first glance these goals may appear contradictory, in reality they are not. We affirm both a robust role of religion in public life and the institutional and functional separation of church and state. Indeed, the latter protects the former.

Religious expression pervades American culture, the media and our politics. Anyone who has traveled abroad can see and feel the difference. We have come a long way since 1976 when Jimmy Carter announced he was a "born again" Christian and the Washington press corps - and most of the country for that matter - responded with befuddled amusement. They really did not know what he was talking about and were stunned that he spoke so freely and publicly about his faith.

Today, religious themes saturate the candidates' speeches and the public square generally. Religion animates most of the divisive current issues - from same-sex marriage, to abortion, to faith-based initiatives, to governmental posting the Ten Commandments, to the Pledge of Allegiance. "Larry King Live," "Crossfire," "Hardball," the "O'Reilly Factor," the "Today Show," "Real Time," and the evening news - they cannot seem to stop talking about religion.

Yes, we have come a long way over the past quarter century - as speaking of God seems now to be a mandatory (not just a permissible) part of our political rhetoric. And our willingness as a culture to talk openly about religion belies any claim that we have a naked public square.

Religious speech in public places by government leaders, the media and private citizens abounds - bumper stickers, billboards, John 3:16 end zone signs, post-game prayer huddles, cover stories on national news magazines, and religious programming on television and radio. And clearly the Mel Gibson movie, "The Passion of the Christ," has taken this to a new level.

No, we do not and should not have a naked public square. Religious speech in public places by private citizens is commonplace; candidates for office routinely voice religious themes and language; and even public officials revel in various forms of civil religion with near impunity. In fact, far from a naked public square, it is actually dressed to the nines.

The following are helpful guidelines as we seek to honor the separation of church and state, while affirming the relevance of religious values to public life:

We must:

? Defend the right of individuals and organizations to speak, debate and advocate with their religious voices in the public square.

? Stand firm by the principle that government action without a secular purpose or with a primary effect that advances or inhibits religion violates the separation of church and state.

Similarly, we should:

? Discourage efforts to make a candidate's religious affiliation or nonaffiliation a campaign issue.

? Discourage the invoking of divine authority on behalf of candidates, policies and platforms and the characterizing of opponents as sinful or ungodly.

III. Examples of Application

Three contemporary issues provide good illustrations about how these general privileges play out in American life.

A. Religion in the Public Schools

A variety of church-state disputes commonly arise in the context of our public schools in ways that require a balancing of both no establishment and free exercise principles. The general rule is clear: the public schools must refrain from sponsoring religious exercises or otherwise promoting religion; but they should, and sometimes must, accommodate the free exercise rights of students. Voluntary, student-initiated prayer, for example, ordinarily should be permitted, but school-sponsored prayer must not be allowed. Public schools may teach about religion in history, social studies, comparative religion, and Bible-as-literature courses. But school officials should not teach religion in ways that would proselytize or promote a religious point of view.

The most recent Supreme Court case involving religion in the public schools addresses the more difficult issue of student religious speech in the context of pervasive state sponsorship. Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000). This case involved student-delivered prayers at football games in Texas. The Court, in a 6-3 vote, struck down the practice as unconstitutional. The Court reasoned that the student prayer was so shrouded in government sponsorship that it amounted to a state endorsement of religion. The school district adopted a pro-prayer policy; it conducted and supervised the election of the student to give the prayer; the prayer was delivered in the midst of a school-sponsored event (i.e. football game); and the school provided the microphone over which the prayer was to be broadcast. Finally, the Court reasoned that granting the student body the power to elect a speaker to pray is problematic. The very practice of voting whether to have a prayer before football games, and who the "pray-er" would

be, inevitably favors the majority religion in a given school district.
The focus of much of the current debate and developing case law is directed toward defining the proper contours of student-initiated religious expression. "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," issued by the United States Department of Education in 2003, addresses the issue in the context of school assemblies, athletic events and graduation. It provides that where students are selected on neutral criteria and retain "primary control" over what they say, that expression will not be attributed to the school, and, therefore, cannot be restricted because of its religious content. The guidelines go on to suggest that, to avoid misunderstandings, school officials may make "appropriate disclaimers" to clarify that the speech is that of the student and not the schools'. The guidelines supplement a more comprehensive set of guidelines issued by the United States Department of Education (www.ed.gov) in 1995 by the Clinton administration.
The bottom line, common sense approach requires that we seek to balance the no establishment principle (i.e., no government-sponsored religion) with the free exercise principle (i.e., accommodating the rights of students to exercise their religion without interfering with the right of other students not to participate).

B. Ten Commandments

The posting of the Ten Commandments demonstrates how religious expression by politicians and government officials can turn into a violation of the Establishment Clause. While religious expression by public officials is ordinarily permitted, there are constitutional limits.
The Alabama Ten Commandments case is illustrative of a governmental official expressing his own religious views in a way that clearly crossed constitutional boundaries and the federal courts were correct in so holding. Sitting as the highest judicial officer in the state of Alabama, Chief Justice Roy Moore (1) singled out one favored religious tradition, (2) chose the preferred Scripture passage, and (3) displayed it in a way that created nothing less than a religious shrine. While so doing, he made theological judgments throughout. Which Commandments? The ones found in Deuteronomy 5 or Exodus 20? Is it an English Old Testament version or the Hebrew Bible or maybe the Septuigent in Greek? If English, is it a Catholic or Protestant one? If Protestant, which translation - King James, New International Version or the Revised Standard Version? These are fundamentally religious decisions that government officials are uniquely ill-suited to make. How strange it is to create a graven image out of a document in which God says we are not supposed to have any graven images!
But, it is critical to acknowledge the difference between government speech endorsing religion, which the Establishment Clause prohibits, and private religious speech, which the Constitution protects, to paraphrase Justice Sandra Day O'Connor. Board v. Mergens, 496 U.S. 226 (1990). Religious speech by private citizens, even in public places, is not forbidden; it is protected and commonly practiced.
There are unlimited ways in which the Ten Commandments can be expressed in public without the help of government. For example:
1. They can be posted in front of every church and synagogue in the land at the edge of the property in full public view.
2. The Ten Commandments can be displayed even on public property if that property is dedicated as a free-speech forum.
3. One can hold up a sign "Exodus 20" or "Deuteronomy 5," instead of "John 3:16," in the end

zones of televised football games.
4. Taking a lesson from the prophet Jeremiah, we can write the commandments on our "hearts" instead of on stone, thereby providing a living witness to the principles embodied in those teachings, in a way that truly makes a difference.
In sum, the question is not whether the Ten Commandments embody the right teachings; the question rather is who is the right teacher - American politicians, public officials and judicial officers - or parents, religious leaders and families? The answer is the latter; they do not need the help of the former. As a Baptist minister, I can think of little better than for everyone to read and obey the Ten Commandments; as a constitutional lawyer, I can think of little worse than for governmental officials to tell us to do it.
Finally, even public officials are not prohibited from considering the Ten Commandments in the proper context. For example:
1. Schools may teach about the Ten Commandments in a Bible-as-literature course.
2. Schools may instruct students in the ethical precepts embodied in the last five commandments in a proper character education program.
3. The commandments can be depicted as an integral part of an historical/educational exhibit such as on the frieze in the U.S. Supreme Court courtroom.

C. Pledge of Allegiance

The case presently pending before the Supreme Court, in Elk Grove v. Newdow (No. 02-1624), illustrates a practice that may be constitutional, but represents a form of civil religion that vitiates vital religion. In my opinion, teacher-led recitation of the Pledge of Allegiance does not violate the Establishment Clause for several reasons.
First, the Pledge of Allegiance is not a religious exercise. It is a secular pledge, which, when taken as a whole, is intended to inspire patriotism. It does not have the purpose or primary effect of advancing religion. At most, it is an acknowledgment of this nation's religious roots.
Second, this reference to America's religious character does not play favorites. A pledge to "one nation, under Jesus," or "under Buddha" would be difficult to defend. True, the word "God" implies a certain monotheism, and the phrase "under God" is not a perfectly nuanced reflection of America's religious pluralism. But it is hard to come up with a more inclusive phrase than this one.
Third, students cannot be compelled to recite the Pledge - with or without the words "under God." The Supreme Court ruled eleven years before "under God" was added to the pledge in 1954 that students have the right to refuse to pledge allegiance to the flag. West Virginia v. Barnette, 319 U.S. 624 (1943). Students who object to reciting the Pledge cannot be compelled to say it or disciplined for not participating.
That said, what is legal and constitutional is not always helpful or wise. One wonders if including the words "under God" in the Pledge has done religion any favors. Civil religion in its various configurations has long been a pervasive part of American political culture. In its more benign forms, civil religion serves as a unifying, cultural balm that reminds us of our religious roots as a nation. But it can easily and often morph into an idolatry of nationalism or, at the very least, result in the trivialization of religion.
Simply stated, civil religion is not the same as heartfelt, vital religion. Ceremonial religion is not life-altering, world-changing religion. "Ceremonial deism," as it is sometimes called, is a pale substitute for authentic faith. Indeed, one of the traditional arguments in favor of the

constitutionality of this and other forms of ceremonial deism is that, through long use and rote repetition, the words have lost any religious import they might have had. In short, what is commonplace becomes mundane.
The vitality of religion in America is thus diminished - not enhanced - when people of faith conflate our penultimate allegiance to Caesar with out ultimate allegiance to God.

IV. Conclusion

We must catch the vision of our nation's founders - religious freedom for all, unaided and unhindered by government, and make it a reality in our day. We must commit ourselves to protecting religious expression in public places - even sometimes from the mouths of public officials - without allowing government officially to promote religion or to pick and choose among religions.
Two founders succinctly expressed this aspiration. Daniel Carroll, a Catholic from Maryland, captured the pith of the free exercise principle when he said, "The rights of conscience are of particular delicacy and will little bear the gentlest touch of government's hand." On the other side of the Potomac, Virginia Baptist John Leland expressed the rationale for the no establishment principle when he exclaimed, "The fondness of magistrates to foster Christianity has done it more harm than all the persecutions ever did."
The stirring words of Carroll and Leland call for government neutrality in religion and highlight the importance of protecting the rights of conscience of every human being. They reflect the bookends for a well-balanced view of a free church in a free state.