

Statement of

The Honorable John Cornyn

United States Senator
Texas
June 8, 2004

OPENING STATEMENT OF SEN. JOHN CORNYN

The U.S. Supreme Court will soon decide whether the First Amendment forbids school teachers across America from leading students in the voluntarily recitation of the Pledge of Allegiance, simply because the Pledge affirms what we all know to be true - that our nation was founded "under God." [Elk Grove Unified School Dist. v. Newdow (2004).]

The Senate has unanimously and repeatedly condemned the Ninth Circuit's contrary ruling striking down the Pledge. A majority of the members of this subcommittee filed the first amicus brief in the U.S. Supreme Court defending the Pledge on the merits. And the vast majority of Americans agree with the Senate - rather than with the Ninth Circuit and the ACLU - on the constitutionality of the Pledge.

But however the Court ultimately rules, the Pledge case reminds us of a broader, systemic problem caused by the Court's previous rulings: an unjustifiable hostility to religious expression in public squares across America. And just as there is bipartisan agreement on the constitutionality of the Pledge of Allegiance, so should there be bipartisan agreement that government should never be hostile to expressions of faith.

Accordingly, our hearing today is entitled "Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square." Our witnesses will examine issues of government discrimination against religious expression generally - including both discrimination against religious versus non-religious expression in government speech, as well as discrimination against purely private expressions of faith.

THE FIRST AMENDMENT HAS BEEN BADLY MISUNDERSTOOD

It's difficult to think of a provision of the Constitution that has been as badly misunderstood and misapplied as the First Amendment in this respect - or with worse consequences for our coarsened culture and discourse.

The First Amendment contains two important provisions with respect to religious liberty. It protects the "free exercise" of religion against government interference or intrusion. And it also provides that Congress shall make no law "respecting an establishment of religion."

The Founders included the Establishment Clause, because they wanted to forbid government from taking any action either to establish an official state church, or to favor a particular religious denomination in any other way.

Notably, nothing in these provisions requires government to be hostile to religion overall. The Constitution nowhere requires government to expel expressions of faith from the public square. Nor does the Establishment Clause forbid government from acknowledging, indeed celebrating, the important role that faith has historically played in the lives of the American people - dating back to the Founders themselves.

This week, the nation mourns the passing of a great man, President Ronald Reagan. I think he spoke for the American people when he said in 1983, and I quote: "When our Founding Fathers passed the First Amendment, they sought to protect churches from government interference. They never intended to construct a wall of hostility between government and the concept of religious belief itself."

REFERENCES TO FAITH PERMEATE OUR GOVERNMENT

After all, references to faith permeate our nation's history. References to faith can be found across our nation's most important institutions of government, in our fundamental legal documents, and on our cherished cultural treasures. Our currency is emblazoned with the phrase "In God We Trust." The public buildings of all three branches of government - including the U.S. Supreme Court - are decorated with numerous references to God. The Declaration of Independence acknowledges the Founders' "firm reliance on the protection of Divine Providence." It talks about "nature's God" and our "Creator," while the Constitution refers to "our Lord."

An act of Congress authorized President Washington to issue the nation's first Thanksgiving Proclamation. Moreover, that Proclamation specifically referenced the "duty of all Nations to acknowledge the Providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor." And on the very day that Congress proposed the First Amendment, it also approved the Northwest Ordinance, which explicitly directed to U.S. territorial governments that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

So there is ample precedent and strong tradition to support government speech that acknowledges, accommodates, and indeed celebrates the importance of faith in the lives of the American people.

Moreover, the First Amendment specifically protects private religious expression in the public square, by guaranteeing both the free exercise of religion and freedom of speech against government interference. As Justice Scalia has aptly written, "a priest has as much liberty to proselytize as a patriot" - a principle that holds in the public square the same as on private property.

JUDICIAL HOSTILITY TO RELIGIOUS EXPRESSION

Despite these clear constitutional commands, however, activist courts, led by the U.S. Supreme Court, have demonstrated a clear and unmistakable - if inconsistent and unstable - hostility towards religious expression in the public square.

In a case I argued before the Supreme Court as attorney general of Texas, the Court held - and I quote - that a high school's "policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." [Santa Fe Indep. Sch. Dist. v. Doe (2000).] Moreover, just this year, the Court upheld overt religious discrimination in the state of Washington, when it allowed the state to provide college scholarships even though they exclude all theology majors from the program. [Locke v. Davey, (2004).]

The hostility towards religion is as inconsistent as it is unjustified. In the Fifth Circuit, which governs my home state of Texas, students may initiate and lead non-sectarian prayer at graduation ceremonies - but not before football games. [Doe v. Santa Fe Independent School Dist. (5th Cir. 1999).] As Chief Justice Rehnquist famously noted in 1985, "a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. . . . A science book is permissible, a science kit is not. . . . A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip." [Wallace v. Jaffree (1985).]

Given this troubling and incoherent jurisprudence, it is no surprise that local governments have far too often demonstrated similar hostility to religious expression as a result. Whether out of ideological motivation, ignorance of the law, or simple fear of litigation, local governments across the nation have repeatedly attempted to banish faith from the public square.

HOSTILITY TO RELIGIOUS EXPRESSION IN PRACTICE

Today, we will hear the personal stories of citizens who have experienced government hostility to religious expression first hand.

In one case, a public school in Muskogee, Oklahoma ordered Nashala Hearn, a 12 year-old Muslim student, not to wear her hijab, or headscarf, and suspended her when she refused to comply, in accordance with the dictates of her faith. It was not until the current Justice Department - which has taken special and admirable steps to champion religious freedom as a basic civil right - intervened on Nashala's behalf, that the school finally backed down and settled the case out of court just last month.

In the small town of Balch Springs, in my home state of Texas, a city-owned senior center barred a group of senior citizens from privately engaging in prayer and singing religious hymns. It took the involvement of public interest lawyers from the Liberty Legal Institute and, once again, the support of the Justice Department for the city to back down.

The examples are countless. Children across America are being barred from sharing candy canes with classmates. Teachers are being reprimanded for circulating the President's Proclamation of a Day of National Prayer through their school e-mail accounts. Schools are specifically targeting religious groups and excluding them from their campuses.

The situation has become so extreme that even patriotic and other nonreligious references to faith have been attacked. It is simply patriotic to recite the Pledge of Allegiance, yet the Ninth Circuit believes it is unconstitutional in public schools. The Los Angeles County seal is under attack by the ACLU because it includes a depiction of a cross - a cross that simply reflects "the historical importance of the Catholic missions" in California.

This pervasive hostility to faith is wrong, and it is without constitutional basis.

BIPARTISANSHIP

I hope that today's hearing will accomplish two things. First, we must reaffirm our bipartisan commitment to religious freedom and liberty in the public square. And second, we must recognize that unfortunate and unjustified hostility to religious expression is pervasive, and it must be stopped.

The restoration of religious liberty and celebration envisioned by the Founders should be a bipartisan effort. The judicial attack on the Pledge of Allegiance has been unanimously condemned by the United States Senate. And both the Clinton and Bush Administrations have issued Department of Education guidelines forbidding discrimination against religion by public schools, consistent with a Congressional mandate in the No Child Left Behind Act.

I began my remarks by quoting President Ronald Reagan. I would like to close with words from President Clinton, who stated in 1995, and I quote:

"Americans feel that instead of celebrating their love for God in public, they're being forced to hide their faith behind closed doors. That's wrong. Americans should never have to hide their faith. But some Americans have been denied the right to express their religion and that has to stop. That has happened and it has to stop."

I agree. Americans should never have to hide their faith. They have the constitutional right to exercise their faith openly - not just at home, but in the public square as well.