Legislative opportunities: Religion and congress

by Oliver Thomas in the Jan 20, 1999 issue

At no time is the legislative process more frustrating than during the congressional "silly season," the last six months of the legislative cycle when members are up for election. Scads of bills are introduced for no other reason than to be able to tell the folks back home, "Look what I tried to do." Some of the most popular measures are the "votes for God," as members sometimes refer to them off the record. Prayer amendments are perennial favorites. So are the many schemes to funnel tax dollars to private and parochial schools. Modern iterations include efforts to defund the National Endowment for the Arts and to ban laws protecting gays and lesbians from discrimination.

This year's list included the "Religious Liberty Amendment"; the work of Representative Ernest Istook (R., Okla.), it actually would have reduced the rights of minorities by allowing local school boards and city councils to decide which religious traditions, if any, they wanted to "recognize" (that is, promote). It's sobering to note that although the amendment failed to garner the necessary two-thirds for passage, a majority of House members supported it.

Then there was the interest in imposing unilateral sanctions on nations that engage in religious persecution. Fortunately, cooler heads prevailed, and the terms of the International Religious Freedom Act provide a range of diplomatic responses from which the president may choose. The act also mandates more thorough investigation and reporting of religious persecution, as well as increased training for U.S. government personnel. Most important, perhaps, is the provision that requires the president to work toward a multilateral response to persecution. As was demonstrated in the case of South Africa, enlisting the support of the world community is critical to the success of any human rights campaign.

So election-year politics sometimes produce good things. The Religious Liberty and Charitable Donations Protection Act is another example. This new statute will protect

churches from having to cough up past tithes given and received in good faith from parishioners who later go bankrupt. Until this year, charitable contributions were considered fraudulent conveyances by the Bankruptcy Code, because in its view nothing of value was received in exchange for the gift.

But, alas, the Congress missed an opportunity to protect religious freedom via the Religious Liberty Protection Act. The bill was introduced to salvage the remnants of free exercise left from the Supreme Court's 1990 decision *Employment Division v. Smith*. In *Smith*, a thin five-member majority held that in most cases the government no longer needed to demonstrate a "compelling" interest before restricting religious exercise. Although Congress tried to restore the compelling-interest test in 1993 with passage of the Religious Freedom Restoration Act, a majority of the justices decided in June that Congress had overstepped its bounds in trying to impose on state and local governments the requirement to accommodate religion.

RLPA was the answer. Supported by some 60 national organizations ranging from the Southern Baptist Convention to People for the American Way, RLPA imposed the duty to accommodate religion on any government agency that receives federal funding (such as prisons and schools). It also provided protection to religious activities that involve interstate commerce (such as seminaries, publishing houses and mission boards). Finally, the bill gave limited relief to churches if and when they encounter land-use problems with zoning boards, historic districts and the like. Overall, it was a modest, calibrated attempt to restore the balancing test used widely by the courts prior to 1990.

Why did it fail? By publicizing a handful of bizarre claims by Satanists and other offbeat religionists, some state attorneys general convinced lawmakers that the compelling-interest test would wreak havoc on the prison system. It is easier and cheaper, of course, simply to deny religious rights to prison inmates, but should all suffer because of the frivolous claims of a few? Texas Attorney General Dan Morales pointed out that, in fact, less than one-half of 1 percent of the total prison litigation involved religion, and that RFRA had not been a burden on the states. The U.S. Department of Justice, which overseas the nation's largest prison system, revealed that it had tried only 75 RFRA cases over the years and that it had never lost one! Despite such reassurances and a massive lobbying campaign by Chuck Colson's Justice Fellowship, rumor and allegation cast enough of a cloud over RLPA to frighten many conservatives away.

Some on the far right succeeded in stripping away the bill's protections for ministries that involve interstate commerce. Despite years of congressional action based upon the commerce clause, these conservatives allowed a philosophical concern over the expansion of congressional power to override their constituents' need for *somebody* --even if it's Congress--to restore their religious rights.

The bizarre process came full circle when the venerable American Civil Liberties Union dropped its support for fear that religious conservatives might try to use the bill as a shield against nondiscrimination laws designed to protect gays and lesbians. Never mind that no court has ever countenanced such a claim and that courts tend to err on the other side, finding that even the "right" of an unmarried couple to cohabit trumps the religious scruples of a conscientious landlord.

At a recent gathering in Washington, however, attorneys for many of the nation's largest religious groups concluded that it would be more fruitful to focus on state efforts to protect religious exercise. Even that will be difficult. Though religious liberty is popular in the abstract, support wanes for specific practices. That is precisely why the compelling-interest test is so important. Every American should be entitled to practice his or her religion unless the government can demonstrate a very good reason--such as health or safety--why he or she should not. If it takes 50 state legislatures to do the job the Supreme Court or the Congress should have done, so be it.