

PAST DUE BILL

Religious Freedom Restoration Act Finally Becomes Law

by Rob Boston

Successfully concluding an arduous three-year legislative drive, President Bill Clinton made the Religious Freedom Restoration Act (RFRA) the law of the land at a bill-signing ceremony on the White House lawn last month.

Before signing the bill, Clinton made brief remarks to a crowd of representatives from 68 religious and public policy groups (including Americans United) that had backed the measure, which is designed to restore religious freedom rights placed in jeopardy by a 1990 Supreme Court decision.

Squinting in the bright sun of an unusually warm November day, Clinton said passage of the RFRA was "clearly called for" and noted that since the high court's 1990 ruling in the *Employment Division v. Smith* case, federal and state courts have decided more than 50 religious freedom cases against religious groups. "This act," he observed, "will help to reverse that trend."

Remarked Clinton, "Our founders cared a lot about religion.... They well understood what could happen to this country, how religion and government could be perverted were not some space provided—a space of freedom between government and people of faith."

Clinton's pen stroke the morning of Nov. 16 marked the end of a three-year long effort launched by a broadly based coalition of religious and public policy groups to secure passage of the RFRA. More than five dozen groups, including Americans United, ultimately participated in the effort.

Their success came through a rare instance of cooperation among groups that normally do not see eye to eye on church-state issues. Organizations from the separationist and anti-separationists camps, liberal, conservative and apolitical, joined forces to push for the RFRA.

The incentive was strong. Most religious leaders and civil liberties advocates intensely disliked the *Smith* ruling. In that case, which dealt with the right of Native Americans to use peyote in religious ceremonies, a slim high court majority voted to change the rules governing religious free exercise.

Prior to *Smith*, the government could not restrict religious freedom without first showing a "compelling state interest" and then proving that its actions were the "least restrictive means" of furthering the government's goals. *Smith* wiped out both of those standards, holding instead that all "neutral and generally applicable" laws are constitutional, even if their practical effect was to obliterate religious practices.

In the wake of *Smith*, religious claimants began losing free exercise cases immediately. The situation got so bad that some state courts interpreted their own constitutions as offering more religious freedom protection than the U.S. Constitution.

Unable to persuade the Supreme Court to reconsider the *Smith* ruling, concerned organizations formed the Coalition for the Free Exercise of Religion, an umbrella group, to press for the RFRA.

The legislation's early champion was former House member Stephen Solarz of New York. Solarz introduced the measure two years in a row, but lost his seat in 1992 after redistricting. Fortunately, the measure had a large number of cosponsors and was reintroduced in 1993 by Rep. Christopher Cox (R-Calif.) and Rep. Charles E. Schumer (D-N.Y.). In the Senate, the measure was cosponsored by Edward Kennedy (D-Mass.) and Utah Republican Orrin G. Hatch.

Despite such bipartisan support, the RFRA faced obstacles from day one. Since RFRA was conceived in 1990, its backers have insisted that the legislation remain free of amendments, a goal that is difficult for any piece of legislation to meet. Squabbles over proposed revisions nearly buried the legislation early on.

The United States Catholic Conference (USCC), for example, insisted that the bill contain language ruling out any claims to abortion based on the Free Exercise Clause. Coalition members said the amendment was unnecessary, since nothing in the RFRA would be likely to expand abortion rights. The dispute kept the bill bottled up for two years and prevented an endorsement from then President George Bush.

Following Bush's defeat in 1992, the USCC sensed the shifting political winds and agreed to back the RFRA with only minor changes. From that point on, the legislation began slowly but steadily gaining momentum. The House of Representatives passed it unanimously on a voice vote May 11, and in late October the measure reached the floor of the Senate.

Speaking on behalf of the bill, Kennedy reminded senators that religious freedom is a treasured right of the American people and urged them to return it to its rightful place in constitutional law.

"The Religious Freedom Restoration Act restores to all Americans a fundamental right guaranteed by the First Amendment: the free exercise of religion," the Massachusetts Democrat said. "This act is one of the most significant pieces of legislation in support of religious freedom to ever come before Congress. It has

the backing of one of the broadest coalitions ever assembled to support a bill before Congress.”

Continued Kennedy, “This bill is important to our country because it restores to every American the precious balance conceived by our Founding Fathers between the interests of our government and the religious liberties of our citizens.”

But one final roadblock existed: a dispute over the bill’s possible effect on prisons. A group of seven senators, led by Harry Reid (D-Nev.), attempted to amend the measure to say its provisions would not apply to anyone “who is incarcerated in a Federal, State or local correctional, detention or penal facility.”

Debate over the so-called “prison amendment” began on the evening of Oct. 27 and continued the next day. Pointing to the litigious nature of some prison inmates, Reid insisted that passing the RFRA without his amendment could clog the courts with frivolous lawsuits.

“Inmates are litigious by nature, especially with the new rules....” Reid said. “Applying the compelling state interest test would only exacerbate an already, I believe, deplorable situation. Prisoners would challenge every aspect of their incarceration by merely stating their desires are part of their religious expression, and the lawsuits will be more easily won than in the past.”

But several senators challenged Reid’s claims. Utah’s Hatch, who has been one of the most ardent backers of the bill, noted that prisoners frequently file frivolous lawsuits and will continue to do so with or without the RFRA. He also noted that less than 2 percent of all inmate litigation deals with alleged violations of religious freedom.

“While it is certainly possible some prisoners will attempt to abuse this act, nothing contained in the act will protect these deceptive efforts,” Hatch said. “To be perfectly clear, our courts are well suited to detect the abusive tendencies of our litigious prisoners.”

Hatch also noted that occasionally instances of serious violations of religious freedom occur in prisons. These problems, he said, should not be cast aside through a blanket prohibition of applying the RFRA to correctional institutions.

Observed Hatch, “The inmate who files a frivolous lawsuit against his jailer because he does not like the color of his prison uniform can fully litigate his claim in the courts. In contrast, the Jewish inmate who may want to challenge the denial of his right to kosher meals would be afforded no better a chance to prevail than the claimant making such a frivolous claim about the color of his clothing. Indeed, if the Reid amendment passes, the

religious claimant may have less rights.”

Following debate, the Reid amendment was defeated by a vote of 58-41. When a vote on the full bill was taken moments later, only three senators voted no. Republican Jesse Helms of North Carolina, a frequent ally of the Religious Right who, ironically, often claims to be an advocate for religious freedom, was joined by Democrats Robert C. Byrd and Harlan Mathews of Tennessee in opposing the RFRA. (Mathews was appointed earlier this year to fill Vice President Al Gore’s seat.)

Since the Senate version of the bill differed slightly from the version passed by the House of Representatives last May, the bill returned to the lower chamber for approval. On Nov. 3, the House unanimously approved the Senate version of the RFRA.

Following Clinton’s action, Coalition members held a press conference to hail the new law. Several group representatives

called RFRA the most significant legislative development in religious liberty since the passage of the First Amendment.

Remarking on the diversity of the coalition, Oliver S. Thomas, former attorney with the Baptist Joint Committee on Public Affairs who chaired the pro-RFRA group, saluted the efforts of Kennedy and Hatch but also remarked, “But even more important were the efforts of these 68 organizations—liberal and conservative—that have been willing to lay aside their deep political and ideological differences to

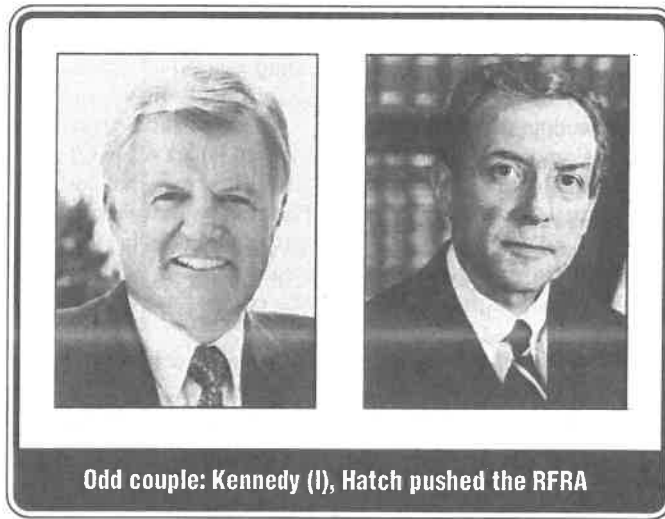
unite in a common purpose for the common good—religious liberty for all.” Thomas, who resigned from the BJC Oct. 31 to move to Tennessee, received praise from Coalition members for patiently guiding the RFRA through Congress for three years.

Despite larger disagreements, longtime adversaries took a moment to rejoice over RFRA’s passage and bask in a rare moment in which everyone was considered a winner.

“This action is long overdue,” remarked Barry W. Lynn, executive director of Americans United. “But I’m glad we stayed with it. We proved, through persistence, that injustices can be righted through legislative action.”

Lynn noted that Americans United staffers Steven K. Green and Kim A. Yelton played key roles in helping the bill become law. AU attorney Green helped drafted compromise language that overcame objections by opponents of the measure. AU government liaison Yelton worked with the Coalition to educate members of Congress throughout the three-year process.

Continued Lynn, “All members of Americans United should be proud of the role they played in helping secure passage of this historic legislation.” □



Odd couple: Kennedy (l), Hatch pushed the RFRA