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## **Attack on the Separation of Church and State or Mere Congressional Puffery: Examining House Resolution 847**

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### **A. House Resolution 847**

On December 11, 2007 the 110<sup>th</sup> Congress of the United States did what it always does: passed legislation. However, it wasn't a bill on the economy, immigration or campaign finance that stirred emotions in Washington. In fact, it wasn't even a bill at all. By passing House Resolution 847, titled, "Recognizing the Importance of Christmas and the Christian Faith," Congress threw fuel on the ever-burning debate about the separation of church and state - and did so with legislation that has no real effect at all.

Unlike a bill, a non-binding house resolution has no legal consequence. Resolutions are often passed so Congress can approve or disapprove of something they would not otherwise have the ability to pass a bill on - even if

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they are barred from doing so because of its unconstitutionality.<sup>2</sup> Since joint resolutions have legal impact, most major Congressional action hinges on their passing rather than non-binding resolutions.<sup>3</sup> Many non-binding resolutions focus on ceremonial gestures, such as congratulating the Boston Red Sox on winning the 2007 World Series<sup>4</sup>, recognizing the talent of Lucian Pavarotti<sup>5</sup>, and celebrating the 95<sup>th</sup> anniversary of the Girls Scouts of the

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<sup>2</sup> [http://en.wikipedia.org/wiki/Resolution\\_%28law%29](http://en.wikipedia.org/wiki/Resolution_%28law%29) (Last visited 2/10/08).

<sup>3</sup> A historic example of this is the Gulf of Tonkin Resolution. H.R.J. Res. 1145, 88<sup>th</sup> Cong. (1964). This is when President Lyndon B. Johnson gained support from Congress to use military force in Southeast Asia leading to the escalation of the Vietnam War without a formal declaration of war. Id.

<sup>4</sup> S. Res. 359, 110<sup>th</sup> Cong. (2007). (“Whereas the Boston Red Sox victory was the second world title of the Red Sox and the seventh world title in the 107-year history of the revered New England team...”). Id.

<sup>5</sup> H.R. Res. 708, 110<sup>th</sup> Cong. (2007). (“...his achievement in raising the profile of opera with audiences around the world...”). Id.

United States of America.<sup>6</sup> Still, there have been some non-binding resolutions that have dealt with weightier subjects. The Democratic led Congress considered its resolution<sup>7</sup> opposing further troop buildup in Iraq to be a strong political victory.<sup>8</sup>

Even though H. Res. 847 doesn't deal with an issue as important as protecting the lives of American troops, anytime religion is the focus of Congressional legislation, it draws attention. In this resolution, Congress notes

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<sup>6</sup> H.R. Res. 136, 110<sup>th</sup> Cong. (2007). (...“for (1) its efforts to launch a national dialogue on the issue of obesity among young girls; (2) its leadership and expertise in knowing the needs of girls through the work of the Girl Scout Research Institute; and (3) actively promoting issues important to girls.”). Id.

<sup>7</sup> H.R. Res. 63, 110<sup>th</sup> Cong. (2007).

<sup>8</sup> Epstein, Edward. “House passes nonbinding resolution on Iraq,” San Francisco Chronicle, February 16, 2007 (Speaker of the House Nancy Pelosi is quoted as saying “[T]he passage of this legislation will signal a change in direction in Iraq that will end the fighting and bring our troops home.”).

"the great significance" of Christmas to Americans<sup>9</sup> and states that the United States finds much of its history in "Judeo-Christian roots."<sup>10</sup> After this, the resolution has a list of findings which read:

*Resolved*, That the House of Representatives--  
(1) recognizes the Christian faith as one of the great religions of the world;  
(2) expresses continued support for Christians in the United States and worldwide;  
(3) acknowledges the international religious and historical importance of Christmas and the Christian faith;  
(4) acknowledges and supports the role played by Christians and Christianity in the founding of the United States and in the formation of the western civilization;  
(5) rejects bigotry and persecution directed against Christians, both in the United States and worldwide; and  
(6) expresses its deepest respect to American Christians and Christians throughout the world.<sup>11</sup>

The resolution passed with 372 votes in favor (Democrat: 195; Republican: 177), nine votes against (all Democrats) and 40 votes abstaining (Democrat: 19; Republican: 21).<sup>12</sup>

### **B. Separation of Church and State**

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<sup>9</sup> H.R. Res. 847, 110<sup>th</sup> Cong. (2007).

<sup>10</sup> Id.

<sup>11</sup><http://thomas.loc.gov/cgi-bin/query/D?c110:1:./temp/~c110kggy83::> (Last visited 2/10/08).

<sup>12</sup> [http://www.opencongress.org/roll\\_call/show/2226](http://www.opencongress.org/roll_call/show/2226). (Last visited 2/10/08).

The separation of church and state is one of the bedrocks of American law and was set forth in the Establishment Clause<sup>13</sup> and the Free Exercise Clause<sup>14</sup>, or the religion clauses, of the Federal Constitution. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the U.S. Supreme Court famously held there was a three-pronged test to determine if statutes comport with the religion clauses.<sup>15</sup> This court found a Rhode Island statute that supplemented the pay of nonpublic teachers unconstitutional because it failed this test.<sup>16</sup> Even though the Lemon test bars some religious activity,

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<sup>13</sup> U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion....").

<sup>14</sup> U.S. CONST. amend. I. ("...or prohibiting the free exercise thereof)."

<sup>15</sup> Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("To avoid conflict with the religion clauses of the First Amendment, statute must have secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion.").

<sup>16</sup> Id. at 602.

many courts have found that certain kinds of religious expression adhere to the test.<sup>17</sup>

The question then arises whether or not H. Res. 847 violates the Lemon test and is a violation of the religion clauses of the First Amendment. Since nonbinding resolutions are not statutes, the legal argument against the separation of church and state is probably immaterial. However, regardless of its legality, the comingling of a religiously based piece of legislation and the United States Congress is enough to provoke public debate. Just as there are those against the resolution for separation of church and state reasons,<sup>18</sup> there are those in favor of it for the same reason.<sup>19</sup>

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<sup>17</sup> See e.g. Skoros v. City of New York, 437 F.3d 1 (2<sup>nd</sup> Cir., 2006) (finding that school's holiday display policy passed the Lemon test); See e.g. Kiesinger v. Mexico Academy and Central School, 427 F.Supp. 2d (U.S.N.Y. 2006) (holding that religious messages should be allowed on memorial bricks at the school under Lemon test).

<sup>18</sup> R. Gustav Niebuhr, associate professor of religion and the media, College of Arts and Sciences and the S.I. Newhouse School of Public Communications at Syracuse University states, "It seems out of place here in America,

### **C. What Does it All Mean?**

As with any piece of legislation, it is often too easy to simply take things for what they seem. Behind every yea and nay are representatives with agendas to meet and constituents to please. One of the few dissenters, Rep. Jim McDermott (D-Wash.), stated that he voted against the resolution not because he was necessarily against recognizing the holiday, but because it was a protest

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among whose unique, founding ideas (see the First Amendment) is that neither Christianity nor any other faith needs such a thing." "A vote against HR 847," The Washington Post, December 29, 2007, Page B09.

<sup>19</sup> Bishop Keith A. Bulter says that too often, "the old rusty hammer of 'separation of church and state' is pulled out to beat governments into submission," and that "it is encouraging to see that in an anti-God, anti-Christian and anti-Christmas environment, our Congress recognizes and affirms the role of Christianity in our American culture." "Remember reason of season and say "Merry Christmas," The Detroit News, December 18, 2007, Opinions, at 11A.

against President Bush's anticipated veto of a children's health insurance bill.<sup>20</sup>

It is widely speculated that the move to pass a resolution recognizing the importance of Christmas and Christianity was mainly meant to be an answer to a similar resolution<sup>21</sup> passed on October 2 of that year recognizing the Muslim holy month of Ramadan.<sup>22</sup> That resolution passed 376-0.<sup>23</sup> Forty-two representatives voted "present."<sup>24</sup> One of those voting present on the resolution was Rep. Mike Pence (R-Indiana).<sup>25</sup> He also voted "present" on the resolution on Christianity, stating he felt both were violations of the First Amendment.<sup>26</sup> Other representatives weren't as consistent. Explaining Rep. John Yarmuth's (D-

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<sup>20</sup> Kamen, Al, "A Christmas Protest," The Washington Post, December 14, at A37.

<sup>21</sup> H.R. Res. 635, 110<sup>th</sup> Cong. (2007).

<sup>22</sup> Id.

<sup>23</sup> "Recognizing Ramadan," The Dallas Morning News, October 21, 2007.

<sup>24</sup> Id.

<sup>25</sup> Groppe, Maureen, "Just 1 Minute," The Indianapolis Star, December 17, 2007, at 1.

<sup>26</sup> Id.

Kentucky) "present" vote on the Christian resolution and his "yea" vote for the resolution on Ramadan, his spokesman Stuart Perelmuter explained that Yarmuth felt the former "belittled Christmas."<sup>27</sup>

Whatever the motivation, it is unlikely religiously based resolutions will disappear anytime soon. In fact, resolutions declaring May as "American Religious History Month"<sup>28</sup> and requiring the display of the Ten Commandments in the U.S. Capitol<sup>29</sup> have both been introduced and referred to House Committees.

#### **D. Conclusion**

Since the resolution recognizing the importance of Christianity and Christmas - and the one recognizing Ramadan - both had overwhelming, bipartisan support, it is obvious Congress has little apprehension when passing certain religious legislation. Whether or not this lack of apprehension comes from a true belief that religion has a

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<sup>27</sup> Gerth, Joseph, "The Ghost of Christmas 'Present'", The Courier-Journal (Louisville, Kentucky), December 24, 2007, at 1B. (Perelmuter added, "He felt like it was bringing Christmas down to the level of these other holidays.") Id.

<sup>28</sup> H.R. Res. 888, 110<sup>th</sup> Cong.

<sup>29</sup> H.R. Res. 12, 110<sup>th</sup> Cong.

place in government (and vice versa) or the knowledge of the legislation's nonbinding nature is debatable. A more important consideration may be if it even matters. Some say we shouldn't be bothered about what Congress says on religion when it has no legal effect - let it fall by the wayside with other meaningless pieces of legislation that congratulate the Red Sox and praise Pavarotti.

When it comes to religion though, this seems to be a misguided approach. Whether it be a crucifix, a star of David or a crescent moon, symbolism is important in almost every religion. House resolutions may have no binding legal effect on our nation, but when their subject is religion, they are still significant. The symbolism any Congressional legislation has by affirming the importance of a religion or a religious holiday is profound.

It is not wrong to say that Christianity is important and Christmas is a special time. It is also not wrong to recognize the importance of Ramadan. What is wrong is when lawmakers say this in their official capacities. Although the restraint of the religion clauses may not reach nonbinding resolutions, they should serve as boundaries nonetheless. When Congress passes a resolution affirming religion it crosses this boundary - even if its effect is the same as the one celebrating girl scouts.