

TESTIMONY OF
DR. ROBERT L. MADDOX
EXECUTIVE DIRECTOR
AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE

Mr. Chairman and Members of the Committee,

I am Robert L. Maddox, executive director of Americans United for Separation of Church and State, a 39-year old national organization dedicated exclusively to the preservation of religious liberty and the separation of church and state. We represent within our membership of 50,000 a broad spectrum of religious and political viewpoints. But we are all united in the conviction that separation of church and state is essential. As Justice Wiley Rutledge observed in his 1947 Everson opinion: "We have staked the very existence of our country on the faith that a complete separation between the state and religion is best for the state and best for religion."

We at Americans United believe that religious liberty is the preeminent liberty of the American republic, the benchmark of all other civil liberties. We believe that the constitutional guarantee of religious liberty through the separation of church and state is the single most important contribution this country has made to Western civilization during the past two centuries.

Accordingly, we believe the Senate should ask itself some serious questions as it considers the nomination of Mr. Justice Rehnquist to be Chief Justice of the United States. Indeed we feel that his record of opposition to the principles of religious liberty enunciated by the Supreme Court during the past four decades renders him a questionable choice to be this nation's Chief Justice.

We recognize his qualifications in terms of scholarship and longevity. But these are not enough. As the late and revered Senator Sam J. Ervin of North Carolina wrote in his autobiography Preserving the Constitution: "Experience makes this proposition indisputable: Although one may possess a brilliant intellect and be actuated by lofty motives, he is not qualified for the station

of judge in a government of laws unless he is able and willing to subject himself to the restraint inherent in the judicial process."

Respectfully I suggest we look in detail at Mr. Rehnquist's record on the vital issues affecting the relationship between church and state. In his 1985 dissent in the Alabama silent prayer case, Jaffree v. Wallace [see Appendix I], Mr. Rehnquist attacked the very concept of a wall of separation of church and state. He said the Supreme Court should never have given legal credence to "Jefferson's misleading metaphor." Mr. Rehnquist continued, "There is simply no historical foundation for the proposition that the Framers intended to build the wall of separation that was constitutionalized in Everson." He said the First Amendment was not meant to require "government neutrality between religion and irreligion, nor did it prohibit the federal government from providing nondiscriminatory aid to religion." He claimed that the Everson decision rendered in 1947 lacked historical support and practical workability and concluded, "It has proven all but useless as guide to sound constitutional adjudication. The wall of separation between church and state is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."

This reasoning deeply disturbs us. It is in fact a distortion of our history. Separation between church and state was a major political and religious impulse in the era when the Constitution and Bill of Rights came into being. Our history teaches us that the institutional separation of church and state was the mechanism the Founding Fathers decided upon as a way to preserve religious peace and harmony in the United States and to make possible a flowering of voluntary religion. Most state constitutions and state courts have followed the example of the Federal Bill of Rights. Indeed many of them removed their religious establishments within a few decades of the passage of the Bill of Rights. Every state constitution maintains a vigorous and zealous guarantee of religious liberty.

President Jefferson used the expression "wall of separation between church and state" in a letter to an association of Baptists in Danbury, Connecticut on January 1, 1802. He wished to enunciate some of his principles concerning church and state and what he believed to be the proper intent of the Framers of the Constitution. Mr. Jefferson even cleared his letter with the Attorney General. While it is true that the Supreme Court did not apply the entire Bill of Rights to the several states until the Cantwell decision in 1940, it is also a historical fact that in 1878 a unanimous Supreme Court said that the wall concept "may be accepted almost as an authoritative declaration of the scope and effect of the Amendment."

Mr. Rehnquist's record reflects this misunderstanding of history. In a dissent in a 1981 case (Thomas v. Review Board of Indiana Employment Securities) he expressed regret that the Supreme Court has not allowed "a greater degree of flexibility to the federal and state governments in legislating consistently for the Exercise Clause." He also found the Court's treatment of the Establishment Clause "totally unsatisfying." In a footnote to that case Rehnquist wrote, "It might be argued that cases such as McCollum v. Board of Education, Engel v. Vitale, Abington v. Schempp, Lemon v. Kurtzman, and PEARL v. Nyquist were wrongly decided."

In an analysis of the Rehnquist dissent, Professor Donald Boles of Iowa State University observed, "The impact on present educational policy is stunning. It would mean that programs such as released time religious exercise held in public school buildings would be permissible as would the state-dictated programs of school prayer and Bible reading. In addition, direct state financial aid to parochial elementary and secondary schools would be authorized as would direct state tuition rebates and tax credits to parents with children attending parochial schools. In short, almost forty years of clearly established judicial precedent would be overthrown by this so-called conservative."

At this critical juncture in United States history when change is buffeting our institutions at every level, we simply cannot take a chance on eliminating our best guarantee of

religious freedom and our best safeguard against religious tyranny and religious conflict which has brought sorrow to so many nations on earth. To preserve religious freedom it will be necessary to reject the nomination of Mr. Rehnquist.

As the late Senator Sam Ervin wrote shortly before he died, "If any provision in the Constitution can be said to be more precious than the others, it is the provision of the First Amendment which undertakes to separate church and state by keeping government's hands out of religion and by denying to any and all religious denominations any advantage from getting control of public policy or the public purse. This is so because the history of nations makes this truth manifest: When religion controls government, political freedom dies, and when government controls religion, religious freedom perishes."