

**Testimony before New York City Council Committee on State and Federal Legislation
June 9th, 2005
Forest D. Montgomery**

in support of THE RELIGIOUS FREEDOM PEACE TAX FUND BILL H.R. 2631

Mr. Chairman, my name is Forest Montgomery. I appreciate this opportunity to appear before you this afternoon. I am here at the request of Marian Franz, Executive Director of the National Campaign for a Peace Tax Fund. And I am here because I treasure religious freedom for all.

First, a brief word about myself. The G.I. bill enabled me to attend the Georgetown University Law Center where I was an editor of the Law Review. After graduating in June 1956 I went to work as a tax attorney in the IRS Chief Counsel's office. I left there in 1965 to take a position as Chief, Legal Opinion Section in the General Counsel's Office at the Treasury Department. Later I served as Counselor to the General Counsel. In 1980 I retired from public service in order to work primarily on religious liberty issues in the Public Affairs Office of the National Association of Evangelicals. I retired in 2000. One of my fond memories is President Reagan's famous "evil empire" speech at NAE's 1983 annual convention in Orlando, Florida. Incidentally, I am a life-long registered Republican.

I lay no claim to being a constitutional scholar. However, 20 years in the trenches -- lobbying, testifying, filing friend-of-the-court briefs, etc.-- imbued me with a familiarity with, and great respect for, the Religious Liberty Clauses of the First Amendment. In 2001, The Freedom Forum presented me its First Amendment Outstanding Service Award for championing the cause of religious liberty for all.

My statement reflects solely my personal views. While I am an evangelical lawyer -- that's not an oxymoron -- I do not purport to speak for the National Association of Evangelicals. I would, however, like to note in passing that, in its Statement of Conscience Concerning World Wide Religious Persecution, NAE expressed its "deep concern for the religious freedom of fellow believers, as well as people of every faith." I welcome this opportunity to share with you my thoughts on a *genuine* issue of religious freedom. It has long been little noted, unlike the press coverage eagerly given those public moralists who, in the name of religious freedom, demagogue the decalogue.

I greatly admire the perseverance of those wonderful people who continue to press for enactment of the Religious Freedom Peace Tax Fund bill, although I do not share their pacifist faith. We all wish that the nations and peoples of this world would learn war no more. However, as the tragic events of September 11 sadly attest, we live in a sinful, imperfect world. Hence I believe in peace through strength. A fundamental purpose of our Federal Government, as the Preamble to the Constitution states, is to "provide for the common defense." Unfortunately, that purpose will remain relevant for the foreseeable future. As President John F. Kennedy said, "War will exist until that distant day when the conscientious objector enjoys the same reputation and prestige as the warrior does today."

Religious freedom is the bedrock value that animates our republic, underpins morality, and defines us as a people. Yet the pleas of our fellow Americans who are conscientiously opposed to paying taxes for military purposes have largely fallen on deaf ears. They want to pay their fair share of the tax burden, but as a matter of conscience and deep religious conviction are opposed to paying for war. What is needed is a trust fund established by law which will guarantee that their tax dollars

will no longer be used for military purposes. They want no part of war, either directly as combatants, or indirectly as taxpayers., They believe both are equally immoral. I agree.

While the establishment clause prohibits government endorsement of religion, it does not bar *accommodation* of religion. And that Congress has repeatedly done. For instance:

In 1965 Congress exempted self-employed Amish from the Social Security tax. The IRS had seized the four prize mares of an Amish farmer who refused to pay the self-employment on the basis of his religious belief. (The Amish "take care of their own."). Congress rightly considered this accommodation of religious belief appropriate and fair because the Amish, again as a matter of religious belief, do not accept Social Security benefits and would not be entitled under the law to them.

In 1988 Congress also exempted Amish employers of Amish employees from the employer's share of the Social Security tax, thus legislatively overruling *United States v. Lee, 455 US 252* (1982). The Supreme Court had accepted the government's arguments that accommodation of Amish religious belief would threaten either tax administration or the budgeting and appropriation process. Congress flatly rejected these Chicken Little arguments; the Social Security system did not suffer as a result.

In 1984 the Church Audit Procedure Act was passed by Congress to prevent unwarranted audits of churches. The Gulf Coast Covenant Church had been charged by certain disgruntled members with private inurement. These charges were unfounded, but it took two years and \$100,000 to straighten out a misunderstanding that readily could have been resolved initially in a conference with IRS representatives. (The National Association of Evangelicals was heavily involved in securing enactment of that remedial legislation.)

In 1984 Congress addressed threatened civil disobedience by fundamentalist churches because the 1983 Social Security amendments made churches liable for the payment of the employer's share of Social Security taxes. Senator Robert Dole adopted NAE's suggested solution: Allow churches to elect whether to pay the employer's share of the Social Security tax. Since such election was voluntary, it removed the compulsion to pay the tax and allowed these churches to pay it "without taxing the collection plate" which would have "rendered to Caesar what belongs to God." However, to preserve the universal coverage principle of the Social Security system, if a church did elect not to pay the tax, its employees would be treated as self-employed.

Again in 1984, Congress passed the Equal Access Act to allow student-run religious clubs in the nation's high schools. This fine law legislatively overruled lower court decisions holding that such prayer in the public schools violated the Establishment Clause. (One court even said allowing such religious clubs was "too dangerous to permit.") The Supreme Court in *Grand Rapids School District v. Ball* upheld the constitutionality of that Act, Justice Sandra Day O'Connor observing that "There is a crucial difference between government speech endorsing religion which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 473 U.S. 373, 385 (1985).

In 1986 the Supreme Court upheld an Air Force Regulation which, among other things, prohibited the wearing of a yarmulke while on duty. Congress responded quickly by enacting legislation permitting the wearing of neat and conservative religious apparel by the military while in uniform, providing it did not interfere with the performance of military duties.

These representative examples of congressional responses to the religious interests of various groups of people is by no means the whole story. Far from it. As the Congressional Research Service has stated: "Congress has repeatedly created statutory exemptions to take account of the religious needs of various organizations. ... The United States Code is filled with religious exemptions." See the Report for Congress, "Congressional Protection of Religious Liberty" of Louis Fisher, Congressional Research Service, p. 55 (Aug. 26, 2002).

So how is one to account for the seeming lack of concern for our fellow Americans who oppose serving as combatants in war or paying for war with their tax dollars? I suspect that there persists a latent bias against conscientious objectors who are perceived as "refusing to fight for their country." This, despite the fact that they serve during times of war in noncombatant capacities and love their country as much as anyone else. They are not somehow "un-American." It was not always thus as the past teaches us.

In Colonial America, New Jersey was split into the Province of West New Jersey and the Province of East New Jersey. West New Jersey was the first Quaker colony in America. Another group of Quakers bought East New Jersey in 1682.

This no doubt accounts for a fascinating constitutional provision of the Province of East New Jersey. It stated that "no man that declares he cannot for conscience sake bear arms" should be forced to do so, nor "forced to contribute any money for the use of arms," but shall "bear so much in other charges, as may make up that portion in the general charge of the Province." See the reprint in American State Papers and Related Documents on Freedom in Religion, Fourth Revised edition, p. 59 (1949). This essentially is what the Religious Freedom Peace Tax Fund bill, introduced by Rep. John Lewis of Georgia on May 25 with more than 30 cosponsors, is designed to do.

And why not? Conscientious objectors in Colonial times, when the very fate of a fledgling nation hung in the balance, were exempted from having to bear arms. They were also exempted in the Civil War when the fate of the Union was at stake. The relevant law today remains the Selective Service Act of 1940 which exempts conscientious objectors from bearing arms and instead provides "alternative service."

Yesterday's draft law has become virtually a dead letter in this day of all-volunteer armed forces. Today there is a pressing need for relief from the real problem -- the use of conscientious objectors' tax dollars for war. As I have indicated, participating in war as a combatant or paying for war are moral equivalents. H.R. 2631 would end the present dichotomy by providing that the tax dollars of conscientious objectors can only be used for nonmilitary purposes. If enacted, it would resolve the conflict between the legitimate government duty to "provide for the common defense" and the rights of conscience of those opposed to war by providing "alternative service" for their tax dollars. Congress, in a manner of speaking, provided "alternative service" for tax dollars when it established the Presidential Election Campaign Fund in an attempt to protect the fundamental right to vote. Rights of conscience are at least as fundamental.

When laws, as applied, threaten religious freedom, those impacted will naturally strive to change them. That is good. But it would be ennobling if men and women of good will, of whatever faith (or no faith), would lend their wholehearted support to remedial legislation because they believe in religious freedom for *all*. Anything less than that principled stand diminishes us.

If the past is prologue, a difficult road lies ahead. Thus far H.R. 2631 is primarily a Democratic initiative, although it has some Republican support. Hopefully more Republicans will sign on as cosponsors. Needless to say, religious freedom is a traditional value and would seem an essential component of "compassionate conservatism." Moreover, Justice Antonin Scalia has said that legislative accommodation of religious belief is "desirable." *Employment Division v. Smith*,

494 U.S. 872, 890 (1990).

The political atmosphere on Capitol Hill is currently so poisonous it approaches outright acrimony. How refreshing it would be if there were an opportunity to lessen the tension. The Religious Freedom Peace Tax Fund bill presents Congress with such a golden opportunity at this time to put aside differences in a bipartisan effort to enhance religious freedom. As Dr. Martin Luther King, Jr. said "The time is always right to do right."

I thank you for this opportunity to speak to this important issue of religious freedom, and urge adoption of your fine resolution.