ORAL ARGUMENT NOT YET SCHEDULED

No. 09-5126

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL NEWDOW, *et al.*,

Plaintiffs-Appellants,

v.

HON. JOHN ROBERTS, JR., CHIEF JUSTICE
OF THE UNITED STATES SUPREME COURT, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL APPENDIX FOR FEDERAL DEFENDANTS/APPELLEES, VOL I

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civil Action No.

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER;

Plaintiff,

v.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES;

Defendant.

ORIGINAL COMPLAINT

Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This is a civil action claiming violations of the First and Fifth Amendments of the Constitution of the United States of America. As such, this Court has jurisdiction under 28 U.S.C. § 1331.

2. This action is founded upon the Constitution of the Unites States of America. As such, this Court has jurisdiction over Defendant under 28 U.S.C. § 1346(a)(2).

3. This action is in the nature of mandamus, and seeks to compel the President of the United States of America, his agents and officers to perform their duties owed Plaintiff under the terms of the First and Fifth Amendments of the Constitution of the United States. As such, this Court has jurisdiction under 28 U.S.C. § 1361.

4. Defendant is an officer or employee of the United States acting in his official capacity or under color of legal authority. Plaintiff resides in this judicial district. Venue is therefore proper under 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff Michael A. Newdow is a citizen of the United States, and a resident of the State of California.

6. Defendant George W. Bush is the President of the United States, in whom is vested the executive Power under Article II, Section 1 of the United States Constitution.

[A]cts like the one in question prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle.[1]

CLAIM FOR RELIEF

7. The First Amendment of the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

8. The United Stated Supreme Court has extended the ambit of these words to include any governmental actor.

9. Defendant George W. Bush is the newly-elected President of the United States.

10. On January 20, 2001, Defendant was inaugurated into the office of President.

11. Under his direction and/or under the direction of his agents and officers, Defendant called upon Rev. Franklin Graham to provide a prayer at the inauguration. See Appendix.

12. To offer prayer at an official governmental ceremony is a religious act per se, and violates the Establishment Clause.

[1] Lee v. Weisman, 505 U.S. 577, 616 (1992) (Souter, J., concurring) (note 3).

13. Not only was the aforementioned prayer clearly religious, it was clearly sectarian as well.

14. By declaring there is a God, the prayer excluded atheistic Americans.

15. By stating the prayer was "in the name of the father, and of the son, the Lord Jesus Christ, and of the Holy Spirit, the prayer further excluded theistic non-Christians.

16. The prayer was facially religious. Thus, it violated the Establishment Clause.

17. The prayer had a primarily religious effect. Thus, it violated the Establishment Clause.

18. The prayer showed a preference for a particular religious belief. Thus, it violated the Establishment Clause.

19. The prayer demonstrated an affiliation of government with a particular religious belief. Thus, it violated the Establishment Clause.

20. The prayer signaled a disapproval of other religious choices. Thus, it violated the Establishment Clause.

21. The prayer violated the principal of governmental neutrality towards religion. Thus, it violated the Establishment Clause.

22. The prayer inculcated a specific religious belief. Thus, it violated the Establishment Clause.

23. The prayer – in a governmental ceremony such as the presidential inauguration – amounted to the coercive imposition of religious dogma. Thus, it violated the Establishment Clause.

24. The prayer placed governments "imprimatur" on a specific religious belief. Thus, it violated the Establishment Clause.

25. Upon information and belief, federal tax dollars were spent – under the taxing and spending power of Article I, 8, of the Constitution – to hold the ceremony, to assist Rev. Graham, and to broadcast the Defendant's religious message. Thus, the Establishment Clause was violated.

26. The federal tax dollars referred to in the preceding paragraph included tax dollars paid by Plaintiff.

27. There is a fundamental constitutional right to observe and participate in the Nation's official ceremonies free from governmental endorsement of religion.

28. Plaintiff watched the inaugural ceremonies on television.

29. The effect of the Rev. Graham's purely religious words was for Christian Americans to perceive them as an endorsement of their Christianity, and for non-Christian Americans, including Plaintiff, to perceive the Pledge as a disapproval of their non-Christianity. Thus, the Establishment Clause was violated.

30. Due to this religious activity, Plaintiff – a minister of a religious faith that specifically denies the existence of God and the veracity of Christianity – was made to feel as an "outsider." Thus, the Establishment Clause was violated.

31. In addition to its constitutional infirmities, the aforementioned activity is void as against public policy. One of the key purposes of an inauguration is to engender national unity. By placing sectarian religion into the ceremony, that unity is frayed.

32. The primary act of the inauguration is the administration of the presidential oath of office.

33. That oath is a declaration that the new President will uphold the Constitution of the United States:

> I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my ability, preserve, protect and defend the constitution of the United States.

34. It is an offense of the highest magnitude that the leader of our nation – while swearing to uphold the Constitution – publicly violated that very document upon taking his oath of office.

WHEREFORE, Plaintiff prays for relief and judgment as follows:

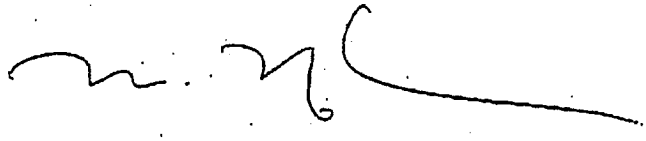
I. To declare that Defendant President George W. Bush – in utilizing any clergyman (much less a Christian minister) in his inauguration – violated the Establishment Clause of the United States Constitution;

II. To enjoin Defendant from repeating this or engaging in any similar religious acts.

III. To allow Plaintiff to recover costs, expert witness fees, attorney fees, etc. as may be allowed by law; and

IV. To provide such other and further relief as the Court may deem proper.

Respectfully submitted,



Michael Newdow, Plaintiff
First Amendmist Church of True Science
PO Box 233345
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(916) 427-6669

APPENDIX

TEXT OF PRAYER OFFERED BY REV. FRANKLIN GRAHAM
AT PRESIDENT BUSH'S INAUGURATION, JANUARY 20, 2001

Let us pray.

Blessed are you, O Lord, our God. Yours, O God, is the greatness and the power and the glory and the majesty and the splendor, for everything in heaven and earth is yours. Yours, O Lord, is the kingdom. You're exalted as head over all. Wealth and honor come from you. You are the ruler of all things. In your hands are strength and power to exalt and to give strength to all.

As President Lincoln once said, "We have been the recipients of the choicest bounties of heaven. We have been preserved these many years in peace and prosperity. We have grown in numbers, wealth and power as no other nation has ever grown. But we have forgotten God. It behooves us then to humble ourselves before the offended powers, to confess our national sins and to pray for clemency and forgiveness."

O Lord, as we come together on this historic and solemn occasion to inaugurate once again a president and vice president, teach us afresh that power, wisdom and salvation come only from your hand.

We pray, O Lord, for President-elect George W. Bush and Vice President-elect Richard B. Cheney to whom you have entrusted leadership of this nation at this moment in history. We pray that you'll help them bring our country together so that we may rise above partisan politics and seek the larger vision of your will for our nation.

Use them to bring reconciliation between the races, healing to political wounds, that we may truly become one nation under God.

Give our new president, and all who advise him, calmness in the face of storms, encouragement in the face of frustration, and humility in the face of success. Give them the wisdom to know and to do what is right and the courage to say no to all that is contrary to your statutes of holy law.

Lord, we pray for their families, and especially their wives, Laura Bush and Lynne Cheney, that they may sense your presence and know your love.

Today, we entrust to you President and Senator Clinton, and Vice President and Mrs. Gore. Lead them as they journey through new doors of opportunity to serve others.

Now, O Lord, we dedicate this presidential inaugural ceremony to you. May this be the beginning of a new dawn for America as we humble ourselves before you and acknowledge you alone as our Lord, our Savior and our Redeemer.

We pray this in the name of the father, and of the son, the Lord Jesus Christ, and of the Holy Spirit. Amen.

PLAINTIFF'S ADDRESS, PHONE, FAX & E-MAIL

Rev. Dr. Michael A. Newdow
First Amendmist Church of True Science
PO Box 233345
Sacramento, CA 95823

Phone: (916) 427-6669
Fax: (978) 359-7866
e-mail: FirstAmendmist@cs.com

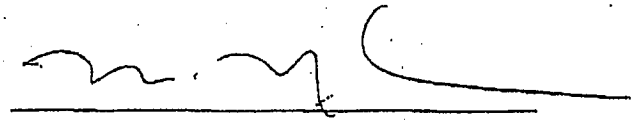
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was/will be mailed on this 1st day of February, 2001, to:

THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE, NW
WASHINGTON DC 20530-0001

GEORGE W. BUSH
PRESIDENT OF THE UNITED STATES
THE WHITE HOUSE
WASHINGTON DC 20500

PAUL L. SEAVE
UNITED STATES ATTORNEY
501 "I" STREET, SUITE 10-100
SACRAMENTO CA 95814-2322



Rev. Dr. Michael Newdow
FACTS
PO Box 233345
Sacramento CA 92823

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW,

Plaintiff, No. CIV S-01-0218 LKK GGH PS

vs.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,

Defendant. FINDINGS AND RECOMMENDATIONS

_____/

This action, in which plaintiff is proceeding pro se, has been referred to the undersigned pursuant to E.D. Cal. L.R. 72-302(c)(21). This action is proceeding against defendant George W. Bush, President of the United States, on the complaint filed February 1, 2001. Defendant's motion to dismiss, for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), filed May 4, 2001, is presently pending before the court. On June 14, 2001, oral argument was held. Plaintiff appeared on his own behalf. Kristin Door appeared on behalf of defendant. Having considered the argument and the record, the undersigned makes the following findings and recommendations. E.D. Cal. L.R. 78-230(h).

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LEGAL STANDARD FOR MOTION TO DISMISS.

A complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that plaintiff can prove no set of facts in support of its claims which would entitle plaintiff to relief. NOW, Inc. v. Schiedler, 510 U.S. 249, 256, 114 S. Ct. 798, 803 (1994); Cervantes v. City of San Diego, 5 F.3d 1273, 1274-75 (9th Cir. 1993). Dismissal may be based either on the lack of cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal theories. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

The complaint's factual allegations are accepted as true. Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir.1984). The court construes the pleading in the light most favorable to plaintiff and resolves all doubts in plaintiff's favor. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.1995). General allegations are presumed to include specific facts necessary to support the claim. NOW, 510 U.S. at 256, 114 S. Ct. at 803, quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).

The court may disregard allegations contradicted by the complaint's attached exhibits. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir.1998). Furthermore, the court is not required to accept as true allegations contradicted by judicially noticed facts. Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987). The court may consider matters of public record, including pleadings, orders, and other papers filed with the court. Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166 (1991). "The court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." Clegg v. Cult Awareness Network, 18 F.3d 752 (9th Cir. 1994). Neither need the court accept unreasonable inferences, or unwarranted deductions of fact. See Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 595-96 (1972). Unless it is clear that no amendment can cure its defects, a pro se litigant is entitled to notice and an opportunity to amend the complaint before dismissal. See Lopez v. Smith, 203 F.3d 1122, 1127-28 (9th Cir.2000) (en banc); Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

ANALYSIS

Plaintiff seeks a declaration that defendant President Bush violated the Establishment Clause of the First Amendment when he permitted the Reverend Franklin Graham to say a prayer at the inauguration on January 20, 2001. Plaintiff also seeks to enjoin the President from repeating this "or engaging in similar religious acts." Plaintiff does not seek to recover any damages.[1]

Defendant moves to dismiss on two grounds. First, defendant argues that plaintiff lacks standing. Second, defendant argues that plaintiff's claim is without merit. However, with due respect to the parties, and based on ambiguities in the complaint, the all or nothing approach taken by defendant, and possibly plaintiff, does not square with the case law. It is one issue to determine whether any prayer can be asserted at an inauguration, and quite another to determine whether the prayer utilized went over the line in terms of advancing one religion over another. Therefore, the court will break out the two issues for analysis herein.

A. Is Any Prayer at All Appropriate

Standing

To demonstrate standing, a plaintiff must 1) "have suffered an 'injury in fact'–an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural or hypothetical;"'" (2) "there must be a causal connection between

[1]The tenor of the complaint is that prayer per se at presidential inaugurations violates the Establishment Clause. The court did not understand that plaintiff would approve of a prayer given by the President himself.

the injury and the conduct complained of–the injury has to be 'fairly ...trace...[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court; '" and (3) "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136-2137 (1992).

Defendant argues that while it is clear that plaintiff was offended by the prayer, this falls short of an actual concrete injury sufficient to confer standing.

Defendant relies heavily on Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752 (1982), the Supreme Court held that psychological injury alone did not establish standing in an action brought pursuant to the Establishment Clause. The Court also identified the proximity of the plaintiffs to the challenged conduct as affecting standing. In particular, the Valley Forge plaintiffs, "Americans United for Separation of Church and State, Inc...and four of its employees, learned of the conveyance [of federally-owned land in Pennsylvania to Valley Forge Christian College] through a news release." 454 U.S. at 469, 102 S. Ct. at 756. The Supreme Court found that the plaintiffs, who lived in Virginia and Maryland, lacked standing to allege violation of the Establishment Clause.

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional err or, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even thought the disagreement is phrased in constitutional terms.
>
> *****
>
> We simply cannot see that respondents have alleged an injury of any kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, PA. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not

constituted as ombudsmen of the general welfare.

454 U.S. at 485-86, 102 S. Ct. at 766-767.

Nonetheless, when a person alleges that he has avoided, or will avoid, public places or services on account of an "offensive" religious symbol or statement, the courts have found that the personal exposure to the religious symbol/statement is unlike the remote after-the-fact exposure in Valley Forge and is sufficient to confer standing. American Jewish Congress v. City of Beverly Hills, 90 F.3d 379, 382 (9th Cir. 1996) (persons who avoided public park because of religious symbol had standing); Hewitt v. Joyner, 940 F.2d 1561, 1564 (9th Cir. 1991) (same); cf Doe v. Madison School Dist. No. 321, 177 F.3d 789, 797 (9th Cir. 1999) (en banc) (parent lacked standing to protest school prayer at graduation because she had no students remaining in the school district and did not allege that she would attend future graduations.)

Defendant asserts that plaintiff's "electronic exposure" in lieu of personal appearance at the inaugural festivities makes all the difference in the standing equation. Defendant appears to concede that if plaintiff had alleged that he had heard the prayer in person he would have standing. However, the Presidential inauguration is a historic event of national importance to which the public is invited, if not encouraged, to view on television. Defendant cites to no authority that one cannot be offended in the First Amendment sense by speech transmitted by electronic means as opposed to an in-the-place sensory hearing. Moreover, defendant's distinction would pose arbitrary and unworkable standards. What would be the case if a person attended the inauguration in person, but was located so far away that the president was only a speck on the horizon, and he could only "hear" and "see" the president by means of an electronically transmitted simulcast of the speech imposed on a remote screen and speaker system? Defendant's "in person" standing requirement is unknown to the law. "This is because [First Amendment] speech is often disseminated by print and electronics, rather than by standing in front of people and talking to them." Finley v. National Endowment for the Arts, 100 F.3d

671, 686 (9th Cir. 1996) (Kleinfeld, J. dissenting), maj. opn. reversed on other grounds, 524 U.S. 569, 118 S.Ct. 2168 (1998).

Defendant argues that plaintiff could have turned off his television in order to avoid being subjected to the prayer. However, "[i]n evaluating standing, the Supreme Court has never required that Establishment Clause plaintiffs take affirmative steps to avoid contact with challenged displays or religious exercises." Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1987). For example, the student plaintiffs in School District of Abington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963) who challenged a school Bible reading, had the option to leave the classroom during the reading. They chose not to assume this burden, and the Supreme Court still found that they had standing to challenge this practice. Schempp, 374 U.S. at 224 n. 9, 83 S. Ct. at 1572-73. Accordingly, defendant's argument that plaintiff lacks standing because he could have avoided contact with the inauguration by turning off his television is without merit.

Defendant also argues that where a party seeks injunctive relief, establishing standing includes demonstrating a real and immediate threat of irreparable injury. Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1100 (9th Cir. 2000). Defendant argues that plaintiff has failed to show that he is in danger of suffering immediate, irreparable harm.

In Cole, the plaintiffs alleged that the Oroville Union High School District violated their freedom of speech by refusing to allow plaintiff Niemeyer to give a sectarian, proselytizing valedictory speech and plaintiff Cole to give a sectarian invocation at their graduation. The Ninth Circuit concluded that the other parties who were added to the students' lawsuit—Chris Niemeyer's brother, Jason, and various Oroville students, parents, and others—lacked standing, in part, because the likelihood of their being selected to speak at a graduation or their attending a future graduation where some student speaker would attempt to offer sectarian speech or invocation was too speculative to satisfy the injury in fact requirement of Article III. 228 F.3d at 1100.

In the instant case, as will be discussed infra, the reading of an inaugural prayer is

a tradition which occurs every four years. Therefore, the threat of injury is not speculative. That this injury (in the view of plaintiff) occurs every four years does not render it any less real or immediate than the injury suffered by students challenging high school graduation ceremonies on Establishment Clause grounds. Defendant's implicit suggestion that plaintiff must wait until shortly before an inauguration to bring his action is not realistic.

Defendant next argues that plaintiff fails to meet the third test for standing, i.e. redressability. In order to meet this prong, the plaintiff must show that he would "personally benefit in a tangible way from the court's intervention." Warth v. Seldin, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210 (1975). Defendant contends that plaintiff's request that the court declare that President Bush violated the First Amendment would do little more than provide plaintiff with the satisfaction of having the court declare that the prayer violated the Establishment Clause.

As discussed above, plaintiff seeks an order prohibiting any prayer from being read at an inauguration. An order prohibiting inaugural prayers would personally benefit plaintiff. Accordingly, defendant's argument that plaintiff has not met the third test for standing is without merit.

For the reasons discussed above, the court finds that plaintiff has standing to bring his Establishment Clause claim, at least insofar as plaintiff seeks a total ban on prayer at the Presidential inauguration. Defendant also argues that plaintiff does not have taxpayer standing to bring this action. However, the court does not reach this problematic issue, see Doe v. Madison School Dist., supra, because plaintiff has standing for the reasons discussed above.

Merits

Defendant argues that the recitation of a prayer at the inauguration does not violate the Establishment Clause of the First Amendment.

In Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983), the Supreme Court held that the Nebraska legislature's practice of opening each legislative session with an invocation did not violate the Establishment Clause. The Supreme Court recognized the

historical tradition of opening "legislative and other deliberative public bodies" with prayer. 463 U.S. at 786, 103 S. Ct. at 3333. The Court observed, "It can hardly be thought that in the same week the Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause to forbid what they had just declared acceptable." 463 U.S. at 790, 103 S. Ct. at 3335. "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." 463 U.S. at 791, 103 S. Ct. at 3335.[2]

Formal prayers by Christian ministers have been associated with inaugurations since the inauguration of George Washington. Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L.Rev. 2083, 2106(1996). Prior to President Washington's first inauguration, a Senate committee resolved that "'after the oath shall have been administered to the President, he, attended by the Vice-President, and members of the Senate, and House of Representatives, [shall] proceed to St. Paul's Chapel, to hear divine service, to be performed by the chaplain of Congress already appointed.'" Id. "The Senate passed this resolution, and the House did likewise, with a minor amendment, the day before Washington's inauguration." Id. Immediately after the administration of the oath of office and President Washington's first inaugural address, the President walked with the members of the House and Senate to St. Paul's Chapel where the Senate Chaplain read prayers from the Book of Common Prayer. Id.

"From President Washington's second inauguration in 1793 until President

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[2] In Marsh, the Court of Appeals for the Eighth Circuit applied the three part test of Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111 (1971), in holding that the chaplaincy practice violated the Establishment Clause. 463 U.S. at 786, 103 S. Ct. at 3333. In evaluating the case, the Supreme Court did not apply the Lemon test. Instead, it focused on the historical significance of legislative prayers. Because the facts of the instant case are so similar to those of Marsh, this court will also not apply the Lemon test, and will instead focus on the historical significance of inaugural prayers.

Franklin Roosevelt's second in 1937, the Senate's Chaplain delivered the inaugural prayers in the Senate chambers as a part of the administration of the oath of office to the vice president." Id. at 2174 fn. 137. "These prayers were technically not part of the 'inaugural ceremony' of the President, which typically took place outside of the Capitol following the Senate proceedings." Id. After this time, prayers were read during the inauguration ceremony. David M. Smolin, Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics, 29 Loy. L.Rev. 1487, 1504 (1996). In addition, every President has included reverent references to the deity in his inaugural address to the nation. 96 Colum. L. Rev. at 2109.

Like prayers opening legislative sessions, inaugural prayers are a historical tradition. While the prayers have only been "technically" included in the inaugural ceremony since 1937, they have always been part of the inauguration proceedings. The history of inaugural prayers, like the history of legislative prayers, indicates that they were not viewed as violating the Establishment Clause.[3] Clearly, if legislative prayers do not violate the Establishment Clause, neither do inaugural prayers.[4]

Accordingly, defendant's motion should be granted on grounds that prayers per se at the Presidential inauguration do not violate the Establishment Clause.

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[3] In Marsh, the Supreme Court also observed that the plaintiff was an adult, "presumably not readily susceptible to 'religious indoctrination,'...or peer pressure." 463 U.S. at 792, 103 S.Ct. at 3336. At oral argument, plaintiff in the instant case mentioned the possibility of amending his complaint to include his daughter as a plaintiff. The Supreme Court's holding in Marsh was based on the historical significance of legislative prayer--not on the age of the plaintiff. Therefore, allowing plaintiff to amend the complaint to include his daughter as a plaintiff would not change the result of the court's recommendation.

[4] Plaintiff argues that Marsh v. Chambers is no longer good law as it has been criticized in later cases. While Marsh may have been distinguished in later cases, it has not been overturned. Marsh is controlling in the instant case as the facts are quite similar in both cases. The Marsh line of authority is thus completely separate from the general-religious-speech-at-a public-event authority, e.g., high school graduation, see Cole, supra. While other cases might bring harder interpretive problems in determining whether a certain function was historical in nature, the present case does not.

B. The Specific Prayer Given

While it is clear that plaintiff abhors the thought of *any* inaugural prayer, it is less clear that he would advocate a back-up argument– that the specific prayer offered at the inauguration violated the Establishment Clause. The complaint and opposition to the motion to dismiss are of two minds. At one point, plaintiff asserts that he is a minister of a religion that "specifically denies the existence of God." Paragraph 30. Plaintiff does not ask for tailored relief, rather, plaintiff seeks the future exclusion of *any* clergyman [saying prayers] at the Presidential inauguration. In his opposition to the motion to dismiss, plaintiff asserts at one point (p.35 n.30): "Plaintiff denies that any prayer can be 'nonsectarian'..." At hearing, plaintiff initially made it clear that he sought the abolition of an inaugural prayer regardless of its sectarian or non-sectarian nature.

On the other hand, the complaint does make reference to the specifics of the prayer given by Rev. Franklin Graham (son of the Rev. Billy Graham), e.g., "By stating the prayer was 'in the name of the father, and of the son, the Lord Jesus Christ, and of the Holy Spirit, the prayer further excluded theistic non-Christians." Paragraph 15.[5] The prayer (attached to the complaint) also included: "May this be the beginning of a new dawn for America as we humble ourselves before you and acknowledge you alone as our Lord, our Savior and our Redeemer." The opposition to the motion to dismiss does stress at times the nature of the wording of the specific prayer offered at the inauguration. Finally, at hearing, plaintiff did slip back into an attack on the words of the prayer itself after he had seemingly, unequivocally asserted that he was not complaining about the words of the prayer.

Defendant does not recognize any ambiguities, but treats the issue herein as only being one of any prayer at all at the inauguration. Thus, there is no argument made by defendant that the specific prayer itself passed Constitutional muster.

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[5] See also: "The prayer showed a preference for a particular religious belief. Thus, it violated the Establishment Clause." Paragraph 18.

The issue of the specifics of the prayer as it may or may not violate the Establishment Clause could make a difference. Plaintiff's standing to raise the argument that the specifics of the prayer are in question becomes problematic as he may be attempting to argue the rights of third parties, i.e., theistic non-Christians, and he, as an expressed non-theistic person may have no right to do that. Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067 (1997); U.S.Dept. Of Labor v. Triplett, 494 U.S. 715, 730, 110 S.Ct. 1428, 1437 (Marshall, J. concurring) (1990). Moreover, the prospect of having the Rev. Franklin Graham preside as chaplain at future inaugurations is much more remote than the prospect of having prayer per se again at the Presidential inauguration. This leads the court to question whether any relief could be fashioned in this case on the specifics of the prayer issue.

This issue poses serious problems for defendant as well in that Marsh does not stand for the proposition that any and all prayer is acceptable at governmental, historical functions. Cole v. Niemeyer, supra, 228 F.3d at 1103. Indeed, courts have found difficulty with prayers or symbols that directly reference doctrines or figures in a particular religion or sect. See e.g., the very fractured decision in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 598-599, 109 S.Ct. 3103-04 (1989) (Nativity scene with inscription "Glory to God in the Highest" was sectarian); Coles v. Cleveland Board of Education, 171 F.3d 369, 384 (6th Cir. 1999) (prayer used to open Board of Education meetings violated the Establishment Clause in part because of the specific reference to Jesus and the Bible along with the fact that the Board president was a Christian minister); Freedom From Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000) (violation of Establishment Clause in having statue of Christ proximate to the highway which gave the message "Christ guide us on our way"); but see American Civil Liberties Union v. Capitol Square and Review, 243 F.3d 289 (6th Cir. en banc) (Ohio motto– "With God, All Things Are Possible," which was derived from the New Testament, does not violate the Establishment Clause).

The court is unwilling to finally recommend the dismissal of the complaint on the

specifics of the prayer at issue given the above ambiguities, and the fact that the parties have not addressed this issue.

Accordingly, IT IS HEREBY RECOMMENDED that the President's motion to dismiss filed May 4, 2001, be granted insofar as plaintiff complains about permitting a chaplain (or the President) from making any prayer at the Presidential inauguration. However, the motion should be denied insofar as plaintiff is attacking the specifics of the prayer as a violation of the Establishment Clause. Further proceedings should ensue on this latter issue.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within ten (10) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten (10) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: July 17, 2001.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:kj:035
newdow.mdm.wpd

ndd

United States District Court
for the
Eastern District of California
July 18, 2001

* * CERTIFICATE OF SERVICE * *

2:01-cv-00218

Newdow

v.

Bush

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 18, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Michael A Newdow VC/GGH
First Amendmist Church of True Science
PO Box 233345
Sacramento, CA 95823 SJ/LKK

Kristin Sudhoff Door
United States Attorney
501 I Street
Suite 10-100
Sacramento, CA 95814

Jack L. Wagner, Clerk

BY: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW,

Plaintiff, No. CIV S-01-218 LKK GGH PS

vs.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,

Defendants. ORDER

_____/

Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 72-302(c)(21).

On July 18, 2001, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within ten days. On August 2, 2001, plaintiff filed a request for extension of time to file his objections. Good cause appearing, this request is granted.

Both parties have filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire

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file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's August 2, 2001, motion for an extension of time to file his objections is granted;

2. The findings and recommendations filed July 18, 2001, are adopted in full;

3. Defendant's May 4, 2001, motion to dismiss is granted insofar as plaintiff complains about permitting a chaplain (or the President) from making any prayer at the Presidential inauguration. However, the motion is denied insofar as plaintiff is attacking the specifics of the prayer as a violation of the Establishment Clause;

4. Within twenty days of the date of this order defendant shall file an answer to the complaint.

DATED: September 27, 2001.

UNITED STATES DISTRICT JUDGE

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ljr

United States District Court
for the
Eastern District of California
September 28, 2001

* * CERTIFICATE OF SERVICE * *

2:01-cv-00218

Newdow

v.

Bush

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 28, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

SJ/LKK

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Jack L. Wagner, Clerk

BY: Deputy Clerk

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FIRM NAME: _____ TELEPHONE #: _____

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CITY: _____ STATE: _____ ZIP: _____

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Kristin Sudhoff Door
United States Attorney
501 I Street
Suite 10-100
Sacramento, CA 95814

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW,

Plaintiff, No. CIV.S-01-0218 LKK GGH PS

vs.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,

Defendant. FINDINGS AND RECOMMENDATIONS

_____/

Background and Summary

On February 1, 2001, plaintiff, Reverend Dr. Michael Newdow ("Newdow") brought his action against President George W. Bush Jr. ("President") in his official capacity challenging the statement of prayers made at the President's inauguration on January 20, 2001. Newdow complained that permitting *any* prayer at the Presidential inauguration offended the Establishment Clause of the First Amendment to the Constitution. He also stated that because the prayer contained specific references to Christian figures and concepts, the prayers given by the clergymen at the inauguration "further excluded theistic non-Christians," and "showed a preference for a particular religious belief." Newdow generally related that the statement of prayer at the inauguration made him feel like an "outsider." Newdow seeks declaratory relief that the President in his official capacity violated the Establishment Clause by permitting prayers, or at least sectarian prayers, at his

inauguration, and also seeks to enjoin the President, in his official capacity, from engaging in future "similar" acts. Newdow does not seek damages.

After hearing on the President's initial motion to dismiss, the undersigned found that Newdow had standing to challenge the statement of prayers per se at the inauguration. "Electronic" attendance was found to be the same for standing purposes as physical attendance. Newdow's alleged First Amendment injury was sufficiently pled for him to proceed; and the court found that an injunctive remedy directed at prayer in general would be feasible if otherwise warranted. However, the undersigned further found that presidential invocations to the Deity, i.e., prayers, at inaugurations were historical and commonplace. As such, the prayers in general did not offend the Establishment Clause of the First Amendment to the Constitution. See Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983). Because the complaint, liberally read, also attacked the content of the prayer, the further standing and merits problems involved in such a prayer specific attack were noted, as well as problems in the defense of the attack. Since no party had briefed the issues relating to a prayer specific attack, the undersigned deferred further findings pending such briefing. The Honorable Lawrence K. Karlton adopted the findings and recommendations in full in his order of September 28, 2001.

The President has now brought a motion for summary judgment arguing that the case should be dismissed in its entirety. Newdow has brought a cross-motion for summary judgment. Hearing was held on the motions on December 20, 2001. After full consideration of the issues, the court finds and recommends that the entire case should be dismissed for lack of jurisdiction. In the alternative, judgment should be entered on behalf of the President insofar as inaugural prayers in general are at issue; any attack on the content of the prayer should be dismissed for lack of standing.

Issues

The President again attacks Newdow's standing to bring this lawsuit. However, the court notes another threshold jurisdictional issue – that is, the inability of the courts to enjoin the President at all. The President also argues the case on the merits insofar as he claims that the prayers

at issue could not "establish" religion in violation of the First Amendment. However, because of the lack of jurisdiction to proceed, and in any event, Newdow's lack of standing to attack the content of inaugural prayer, the court will not reach the merits of the claimed First Amendment violation past what it has reached already.

Facts

The pertinent facts involved in this dispute are easily stated and are not in dispute.[1] On January 20, 2001, the Reverend Franklin Graham, in place of his father, delivered an invocation at the inauguration. The invocation is reprinted at Exhibit A to the Graham Declaration. In pertinent part the invocation sought the assistance of the "Lord" in the carrying out of Presidential and Cabinet functions. The prayer closed with the following request:

> May this be the beginning of a new dawn for America,
> as we Humble ourselves before You and acknowledge You alone
> as our Lord, our Savior and our Redeemer.
>
> We pray this in the name of the Father,
> And of the Son the Lord Jesus Christ,
> And of the Holy Spirit. Amen.

Reverend Graham asserted that he had "total control" over the content of the invocation, although it is doubtful that he would have stated a religious premise at odds with the President's beliefs. In any event, who exercised control over the precise terminology is not ultimately pertinent to the inquiry. Newdow also makes reference to another clergymen's prayer–Reverend Caldwell– which similarly made reference to Jesus Christ. Opposition at 17; President's Exhibit B at 24-25.

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[1]The standards for summary judgment are well established and need not be set forth here especially in light of the fact that all concerned agree that only legal issues require adjudication here.

Discussion

A: The Court Lacks Jurisdiction to Enjoin the President

Newdow correctly sued President Bush in his official capacity, Complaint at 2, as a suit against President Bush, as an individual, would make no sense in the context of his allegations, i.e., that the government was "establishing" or sponsoring a religion when it permitted prayer at the inauguration. See in re Lindsey, 158 F.3d 1263, 1278-79 (D.C. Cir. 1998) (contrasting the President as an individual and as head of the Executive Branch of government.).[2] President Bush, acting as an individual, could not sponsor religion on behalf of the federal government. Moreover, suing President Bush in his official capacity solves one piece of the standing issue in that if the Office of the President is sued, the argument posed by the President that it is speculative to believe that he will be re-elected, falls by the wayside. It is not speculative to believe that the Office of President will continue indefinitely. Thus, the issue is squarely raised concerning whether the courts have the authority to enjoin the President as head of the Executive Branch.

> While injunctive relief against executive officials like the Secretary of Commerce is within the courts' power, see Youngstown Sheet & Tube Co. v. Sawyer, supra, the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, Mississippi v. Johnson, 4 Wall. 475, 498-499, 18 L.Ed. 437 (1867), and we have held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), but in general "*this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.*" Mississippi v. Johnson, supra, 4 Wall., at 501. *At the threshold, the District Court should have evaluated whether injunctive relief against the President was available*, and, if not, whether appellees' injuries were nonetheless redressable.

Franklin v. Massachusetts, 505 U.S. 788, 802-03, 112 S.Ct. 2767, 2776-77 (1992) (emphasis

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[2]Thus, the President's counsel has not disputed venue or raised personal jurisdiction questions which would be apparent if the President, in his individual capacity, were being sued. Nor does the court face the thorny problems involved when one attempts to sue a sitting president in his individual capacity, including the possibility that the entire action might be stayed pending completion of the President's term in office. See Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636 (1997).

added).[3] [4]

See also Clinton v. Jones, 520 U.S. 681, 718-19, 117 S.Ct. 1636, 1656 (1997) (Breyer, J. concurring) (referencing the plurality and concurring opinion in Franklin, and "the 'apparently unbroken historical tradition...implicit in the separation of powers' that a President may not be ordered by the Judiciary to perform particular Executive acts"); Swan v. Clinton, 100 F.3d 973, 977 (D.C. Cir. 1996) (reiterating that the courts have no jurisdiction to enjoin the President in his official acts, nor do they have the power to issue declaratory relief against the President); Made in the U.S.A. Foundation v. United States, 242 F.3d 1300, 1310 (n.24) (11th Cir. 2001) (recognizing the same principles).

The court's point was also instructively brought home by Justice Scalia in dissent on a political question issue unrelated to the present one, when he used as an example: "It seems to me clear that courts would not entertain, ... an action for backpay by a dismissed Secretary of State claiming that the reason he lost his Government job was that the President did not like his religious views– surely a colorable violation of the First Amendment." Webster v. Doe, 486 U.S. 592, 613-14, 108 S.Ct. 2047, 2059 (1988) (Scalia, J. dissenting). The relevant point to be drawn here is that certain grievances are off the judicial table no matter how colorable the First Amendment violation may be.

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[3] Although the President's counsel made a somewhat similar argument in her merits analysis, the Supreme Court recognizes the issue of enjoining the President as a threshold jurisdictional issue, even separate from a standing issue. Because the issue of enjoining the President goes to the authority of the court to act, the issue may be raised sua sponte by the undersigned.

[4] The Supreme Court left open the possibility that the President could be enjoined for some ministerial act; however, no one herein contends that the decision to utilize prayer at the inauguration, or the decision on how to frame the prayer, was ministerial. Moreover, no contention has been expressed that the Presidential inauguration, including its associated ceremonies, is not part of the official duties of the President.

Newdow essentially conceded as much at hearing when he agreed with the court that the President himself could say what he wished at his inauguration, or that members of Congress could employ whatever religious reference on the floors of Congress that they desired without any court being able to control that speech. Newdow's belief, however, that non-governmental clergymen who make specific Christian references acting as proxies for the President present a different situation, is erroneous. To have any applicability here, where the President has been sued as the only defendant, Newdow must assert that the President is actually controlling what is said at his inauguration– not that the participants are, as the President's counsel has posited through the Graham declaration, independent of all control in the substance of their invocations. The point here is that even if Newdow attempted to contest the President's "independent speaker" fact (which he has not), and prevailed on the control issue, the courts would not have the authority to enjoin the controlling President.[5]

In sum, the Judiciary's star shines brightly when the Judiciary recognizes its limitations in a government founded upon separation of powers and mutual respect of its different branches. In a government where the several branches respect the rights of each other to function free of interference in their inherent functions, the Judiciary will not attempt to dictate what the President may, or may not, say at his inauguration, or what selected persons may say on his behalf. There is nothing extraordinary from a Constitutional perspective about a Presidential inauguration

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[5]If indeed, the President had no express or implicit control over his own inauguration ceremonies, a doubtful proposition, the President's cited case of Adler v. Duval County School Board, 250 F.3d 1330 (11th Cir. 2001) (en banc) might be instructive. In Adler, the court found that an elected student's speech, not controlled by the school authorities, could not give rise to a First Amendment violation. However, rather than start the discovery battles over whether the President exercised any control over his inauguration, and the extent to which he did so, the court believes the more correct way to resolve the instant suit is on the point of law expressed above. Moreover, Adler conflicts with the Ninth Circuit decision in Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1102-03 (9th Cir. 2000) (holding that the school officials were in control over an elected student's graduation invocation speech since the school district supplied the means by which the speech could be made.

which would preclude application of the general rule that the President cannot be enjoined by the courts.[6] On the contrary, the fact that the inauguration of the President, and what may be said by the President or his speakers, is wholly integral to the Executive Branch, and the Executive Branch alone, strongly counsel against judicial interference. On this point alone, the President is entitled to have the entire case dismissed on jurisdictional grounds.[7]

B. Newdow Lacks Standing to Argue for a Specific Tailoring of Presidential Prayer Because There is No Relief that the Court Could Fashion

The parties correctly apprehend the essential standards for standing, but the court does not agree with all aspects of the parties' application of those standards.

> "[B]efore reaching a decision on the merits, we [are required to] address the standing issue to determine if we have jurisdiction." Nat'l Wildlife Fed'n v. Adams, 629 F.2d 587, 593 n. 11 (9th Cir.1980). "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). There are three requirements for standing: (1) "a plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical;' " (2) "there must be a causal connection between the injury and the conduct complained of--the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court;' " and (3) "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' "

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[6]For example, this is not a case where the President is attempting to baldly usurp the functions of the Congress or the Judiciary, e.g., declare war, or avoid proper subpoenas, and the Judiciary must step in to authoritatively interpret the Constitution on the point.

[7]The court is not, of course, finding that the actions of the Executive Branch in executing the laws of this Nation are free from judicial scrutiny. As Franklin made clear the cabinet secretaries or other administration officials with purview over a certain governmental function may be sued in their official capacities for statutory and constitutional violations. See also Clinton v. Jones, 520 U.S. at 703, 117 S.Ct. at 1649, discussing the suit against President Truman's Secretary of Commerce (Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 (1952) (taking possession of private steel mills). This case, on the other hand, involves a suit against the President himself in a setting that is uniquely reserved to the Executive Branch. The courts could no more issue an injunction for alleged improprieties in a presidential inauguration than it could in commanding the Senate majority leader on how to open the Senate for business.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted) (alterations in original).

Washington Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835, 847 (9th Cir. 2001) (en banc).

The President had previously argued that Newdow's lack of physical proximity to the inauguration precluded sufficient injury, that the recurrence of any Presidential prayer was speculative, and that there was no possibility of a court issuing an injunction which could adequately redress the issue of Presidential prayer per se at inaugurations, i.e., Newdow's "psychic satisfaction" at the issuance of a court order in his favor did not substitute for an adequate redress of a real injury. Nevertheless, the court initially found that Newdow had standing to contest Presidential prayer per se at inaugurations.

The President has reiterated several of his standing arguments in the context of the present issue-- judicial tailoring of prayers which may otherwise be properly said at inaugurations: (1) Newdow has not suffered sufficient injury; (2) Newdow cannot obtain redress for his injury because he would not benefit from an injunction; (3) the speculative nature of future violations of the First Amendment preclude injunctive relief; (4) Newdow lacks taxpayer standing (an issue not reached by the court before). The court again rejects arguments (1) and (2). For the reasons stated earlier, if Newdow has not suffered an injury in fact from his alleged offense at Presidential prayers, general or specific, it is difficult to understand that anyone has standing to attack governmental sponsored prayer in any forum. That is, nothing distinguishes the plaintiff's alleged injury here in any meaningful way from that in Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992) (father objecting to the school principals use of clergymen giving invocations at his daughter's graduation from middle school). Plaintiffs seeking to halt governmental support of religion, be it verbal or symbolic, suffer the same type of injury.

Moreover, the government's first redressability argument– that Newdow could not benefit from an injunction– again presents the overbroad specter of no person being able to benefit from an injunction of improper government sponsoring of religion, assuming for the moment that

such is the case here. The President cannot adequately distinguish cases such as Coles v. Cleveland Brd of Educ. 171 F.3d 369 (6th Cir. 1999), where the sole benefit to be received by the plaintiff was the cessation of what that plaintiff believed to be unconstitutional activity in violation of the First Amendment's Establishment Clause.

The President has added one standing argument in the context of the present issue. Explaining that Newdow is an avowed atheist, and given that the issue here now centers about alleged overuse of Christian concepts, as opposed to whether prayer can be said at all, the President argues that Newdow cannot represent the rights of theistic non-Christians. The President is correct that in the context of alleged governmental sponsorship of prayer, Newdow cannot simply represent the rights of others, Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1099 (9th Cir. 2000); he must prevail, if at all, on the fact this his own rights were violated. However, the President's premise that Newdow, as an atheist, can only be offended by prayer in general, and not "more offended" by incorporation of specific denominational concepts within prayer, is not supported by authority, or practical realities. Similarly, the President's position that Newdow can only seek a total elimination of prayer at inaugurations, and not be permitted to seek lesser relief, is also flawed.

Nevertheless, the court finds that Newdow's alleged injuries in having been exposed to Christian concepts at the Presidential inauguration could not be redressed by an injunction or declaratory relief. To the extent that enjoining the President is more correctly addressed as a standing redressability issue, the discussion of Section A is incorporated herein. And, the court could not, and should not, attempt to frame an injunction setting forth the content of permissible prayer for future presidential inaugurations.

On the latter point, the court agrees with the President's discussion of the argued speculative nature of any injunctive/declaratory relief to be awarded. The court previously found that Presidential prayer of some sort at inaugurations was a likely occurrence in the future, and that an injunction ending any prayer would "benefit" Newdow. More importantly, an all inclusive prohibitory injunction against inaugural prayer would be no more difficult to frame than a no school

sponsored prayer injunction. See Lee v. Weisman, supra. However, when the issue becomes what *type of prayer* may be spoken in the future, and the limits to which specific denominational concepts may be referenced, Newdow's argument becomes highly speculative and his claimed injury impossible to redress. Perhaps the next President would eschew any religious reference to a specific denomination's concepts as a matter of principle. Perhaps the next President would not have Reverend Graham or a like minded clergymen deliver an invocation. See Cole v. Oroville Union High School District, 228 F.3d at 1100 (finding that standing of parents who might attend future graduations was too tenuous given that the identity of the future speakers and their speech content was speculative). Moreover, should the court limit the relief to references to Christianity? What if the next President were Jewish or Muslim? Could the court in the context of the present facts issue an injunction enjoining a future President from referencing specific facts unique to those religions? Even if the next president were to be a professed Christian, how far could the court go in defining what Christian philosophy might be referenced? Could the court develop a list of acceptable invocation speakers for future inaugurations? These rhetorical questions and observations highlight the speculative nature of any future "injury," and the fact that no present injunction could be realistically framed to encompass future, speculative, religious inaugural invocations.[8]

C. Newdow Lacks Taxpayer Standing

For purposes of the previous motion, the court did not rule upon the issue of taxpayer standing because Newdow was found to have ordinary standing to attack prayer per se at Presidential inaugurations. However, because the court has found Newdow lacks such standing to attack the content of the prayers recited at inaugurations, the issue of taxpayer standing must be addressed.

The President has cited a seminal taxpayer standing case, Doremus v. Board of Education, 342 U.S. 429, 72 S.Ct. 394 (1952). See also Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942

[8]If President Bush were being sued in his individual capacity, the argument made by his counsel, that Newdow lacks standing because the re-election of this current President is speculative, would have merit.

(1968). Both of these cases stand for the proposition, among others, that taxpayers do not have standing to protest incidental expenditures related to the activity which they desire to challenge. Doremus, 342 U.S. at 433-34, 72 S.Ct. at 397 (taxpayer could not identify spending of tax dollars associated with Bible reading); Flast, 392 U.S. at 102, 88 S.Ct. at 1954 (stating rule that incidental tax expenditures will not confer standing, but ultimately finding that taxpayers had identified a direct tax expenditure. See also Doe v. Madison School District, 177 F.3d 789, 795 (9th Cir. 1999) (tax dollars associated with graduation ceremonies which included religious references, but which would have been spent regardless of such religious references, are not sufficient to confer standing to litigate a prayer-at-graduation grievance).

Newdow cannot identify any direct expenditure of taxpayer dollars targeted to the giving of the invocation at the President's inauguration. Indeed, the facts of this case are undisputed that Reverend Graham did not appear at government expense. Graham Declaration at para. 5. Newdow cannot successfully assert taxpayer standing by claiming that government funds were used to conduct the inauguration at which religious invocations constituted but a small part of the ceremonies.

D. Establishment Clause Violation

The President argues at length that the invocation(s) at the inauguration did not sponsor religion or proselytize, and thus cannot be a violation of the Establishment Clause. However, when not focusing upon the status of the President, or his proxies, and the nature of the event, the issues are problematic. Many cases have determined that general references to God do not run afoul of the Establishment Clause, but citations or references to specific denominational concepts are not appropriate. Courts have found difficulty with prayers or symbols that directly reference doctrines or figures in a particular religion or sect. See e.g., the very fractured decision in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 598-599, 109 S.Ct. 3086, 3103-04 (1989) (Nativity scene with inscription "Glory to God in the Highest" was sectarian); Coles v. Cleveland Board of Education, 171 F.3d 369, 384 (6th Cir. 1999) (prayer used to open Board of

Education meetings violated the Establishment Clause in part because of the specific reference to Jesus and the Bible along with the fact that the Board president was a Christian minister); Freedom From Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000) (violation of Establishment Clause in having statue of Christ proximate to the highway which gave the message "Christ guide us on our way"); but see American Civil Liberties Union v. Capitol Square and Review, 243 F.3d 289 (6th Cir. en banc) (Ohio motto– "With God, All Things Are Possible," which was derived from the New Testament, does not violate the Establishment Clause).

The court need not finally determine whether references to Jesus Christ as our "Savior" and "Redeemer", or invocation to the Trinity go over the First Amendment mark. Given that the court cannot enjoin the President, and given that Newdow lacks standing to contest the content of prayer recited at presidential inaugurations, the case should not proceed to the merits.

E. No Declaratory Relief Is Appropriate

"The Declaratory Judgment Act embraces both constitutional and prudential concerns. A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III, section 2 of the United States Constitution.... It must also fulfill statutory jurisdictional prerequisites..... If the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate. This determination is discretionary, for the Declaratory Judgment Act is 'deliberately cast in terms of permissive, rather than mandatory, authority.'..... The Act 'gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.'...." GEICO v. Dizol, 133 F.3d 1220, 1222-23 (9th Cir. 1997) (en banc). Thus, declaratory relief is properly avoided when the subject matter of the lawsuit is ill advised being "'informed by the teachings and experience concerning the function and extent of federal judicial power.'" Green v. Mansour, 474 U.S. 64, 72, 106 S.Ct. 423, 428 (1985). If the effect of declaratory relief is to simply mimic an injunction which is not properly awarded, the courts should decline to award declaratory relief. American Assoc. of Cosmetology Schools v. Riley, 170 F.3d 1250 (9th Cir. 1998).

As set forth above, no injunction is appropriate given the prudential concerns of separation of powers and standing. For those same reasons, declaratory relief is equally inappropriate.[9]

Conclusion

Accordingly, the undersigned recommends:

1. That the entire case be dismissed for lack of jurisdiction because the courts cannot enjoin the President in the circumstances of this case, nor can the courts grant declaratory relief against the President in the circumstances of this case;

2. In the alternative:

a. that prayer pre se at the Presidential inauguration does not violate the Establishment Clause of the First Amendment to the Constitution;

b. Newdow lacks standing to challenge the content of the prayer given at future inaugurations and that part of his complaint should be dismissed;

c. any request for declaratory relief for alleged violations of the First Amendment is improper in the circumstances of this case.

Under either alternative, the President's motion for summary judgment should granted on the grounds discussed above; Newdow's cross-motion for summary judgment should be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections

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[9]Plaintiff makes a reference in the text of his complaint to mandamus, but prays for injunctive and declaratory relief. "Mandamus is an extraordinary remedy and is available to compel a federal official to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available." Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1997). In the context of prayer at presidential inaugurations, mandamus is not properly considered. See Swan v. Clinton, supra.

with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 28, 2001.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

mdk

United States District Court
for the
Eastern District of California
December 28, 2001

* * CERTIFICATE OF SERVICE * *

2:01-cv-00218

Newdow

v.

Bush

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 28, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY: M. Hughes
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW,

Plaintiff,

vs.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,

Defendant.

/

No. CIV S-01-0218 LKK GGH PS

ORDER; FINDINGS AND RECOMMENDATIONS

Background

On February 1, 2001, plaintiff, Reverend Dr. Michael Newdow ("Newdow") brought his action against President George W. Bush Jr. ("President") in his official capacity challenging the statement of prayers made at the President's inauguration on January 20, 2001. Newdow complained that permitting *any* prayer at the Presidential inauguration offended the Establishment Clause of the First Amendment to the Constitution. He also stated that because the prayer contained specific references to Christian figures and concepts, the prayers given by the clergymen at the inauguration "further excluded theistic non-Christians," and "showed a preference for a particular religious belief." Newdow generally related that the statement of prayer at the inauguration made him feel like an "outsider." Newdow seeks declaratory relief that the President in his official capacity violated the Establishment Clause by permitting prayers,

or at least sectarian prayers, at his inauguration, and also seeks to enjoin the President, in his official capacity, from engaging in future "similar" acts. Newdow did not seek damages.

After hearing on the President's initial motion to dismiss, the undersigned found that Newdow had standing to challenge the statement of prayers per se at the inauguration. "Electronic" attendance was found to be the same for standing purposes as physical attendance. Newdow's alleged First Amendment injury was sufficiently pled for him to proceed, and the court found that an injunctive remedy directed at prayer in general would be feasible if otherwise warranted. However, the undersigned further found that presidential invocations to the Deity, i.e., prayers, at inaugurations were historical and commonplace. As such, the prayers in general did not offend the Establishment Clause of the First Amendment to the Constitution. See Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983). Because the complaint, liberally read, also attacked the content of the prayer, the further standing and merits problems involved in such a prayer specific attack were noted, as well as problems in the defense of the attack. Since no party had briefed the issues relating to a prayer specific attack, the undersigned deferred further findings pending such briefing. The Honorable Lawrence K. Karlton adopted the findings and recommendations in full in his order of September 28, 2001.

Thereafter, the President brought a motion for summary judgment, and Newdow brought a cross-motion for summary judgment on the remaining issues in the case. Raising a jurisdictional point, the undersigned found in Findings and Recommendations issued December 28, 2001, that the courts had no jurisdiction to enter an injunction against the President, at that time the sole defendant. The court further found that plaintiff's claim for declaratory relief fared no better in this respect, and similarly, to the extent that any assertion in mandamus was made, the result would be the same. Findings and Recommendations at p. 5, 13 and n.9. Also, and in any event, because it was not possible to frame an injunction on the *type* of prayer to be permitted at the Presidential Inauguration, the court found that the one remaining issue in the case was subject to summary judgement. See Cole v. Oroville Union High School Dist., 228

F.3d 1092, 1099 (9th Cir. 2000) ("Appellants argue that the other students, parents of Oroville students and others likely to attend future graduations joined in the third amended complaint have standing to bring a claim to enjoin the school from prohibiting sectarian speeches and prayers as part of the graduation ceremony. This argument fails because any injury to these parties is too speculative to satisfy the injury-in-fact requirement of Article III....[T]he other students, parents and others likely to attend future Oroville graduations lack standing because the likelihood that they will suffer a future injury depends upon the highly speculative assumption that a student seeking to give a sectarian speech or prayer will be chosen as valedictorian or salutatorian, or will be elected by classmates to deliver an invocation.") The undersigned similarly reasoned that Newdow lacked standing to enjoin the type of prayer to be given at the next inauguration, if any, because one could not with any reasonable accuracy predict its content, i.e., the future speakers would be unknown as would be their proclivities to speak prayers with more than a general reference to God.

During the course of objections to the December 28 Findings and Recommendations, Newdow sought to amend his complaint to bring in the past chairman of the Congressional Committee associated with the Inauguration festivities (Senator Mitch McConnell). Plaintiff did so because of the Supreme Court's language in Franklin v. Massachusets, 505 U.S. 788, 802, 803, 112 S. Ct. 2767, 2776-77 (1992) suggesting that although no jurisdiction existed to enjoin the President, such jurisdiction might be available in suits against heads of Executive agencies. See Findings and Recommendations at p. 5 n.4. Judge Karlton ordered the undersigned to reconsider the December 28 Findings and Recommendations in light of the motion to amend and proposed amended complaint. Order filed February 21, 2002.

The parties set a hearing on the undersigned's calendar on March 21, 2002, to consider the motion to amend. For the reasons expressed below, the undersigned denies Newdow's motion to amend and resubmits the December 28 Findings and Recommendations.

Discussion

A. Motion to Amend

The undersigned may order the denial of a motion to amend the complaint. U.S. Dominator v. Factory Ship etc, 768 F.2d 1099, 1102 (n.1). Although the undersigned rejects the first ground set forth by the President in opposition to amendment of the complaint,[1] the court finds that Senator McConnell, as Chairperson of the Joint Congressional Committee on Inaugural ceremonies is not appropriately sued herein, and finds the speculative nature of the relief sought no different than that found for the President in the December 28 Findings and Recommendations. Allowing amendment would be futile.

Futility of amendment is a legitimate ground for denying leave to amend if no grounds for saving the claims exists under any arguable set of facts or legal theory. Schmier v. Court of Appeals for the Ninth Circuit, 279 F.3d 817, 819 (9th Cir. 2002).

In response to the President's argument that separation of powers precludes suit against Senator McConnell, the court stated at hearing that not enough was known about the nature of Senator McConnell's Committee for the undersigned to find that principles of separation of powers precluded suit. However, upon further independent inquiry, the undersigned has determined that the President is correct. The statute which formalized the Congressional Joint Inaugural Committee, 36 U.S.C. § 729, was repealed in 1998. The present statutory scheme for Presidential Inaugurations, 36 U.S.C. § 501-510, did not reinstitute the Congressional Committee. An Inaugural Committee appointed by the President-elect is referenced therein, and that Committee by law is "in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony." § 501(1). However,

[1] The President indicated that Newdow brought his proposed amendment too late in the case, and should be barred from proposing it at this time. However, the undersigned raised the jurisdictional point late in the case, as was his duty to do so, and Newdow did not have an opportunity to consider the point in writing until objections. If the defect in jurisdiction could be cured by simply naming a different party, the court sees no procedural or equitable impediment to doing so.

recognizing the separation of powers between the Congress and the Executive, the new statutory scheme expressly also provided:

> This chapter [36 U.S.C.A. S 501 et seq.] does not apply to the United States Capitol Buildings or Grounds or other property under the jurisdiction of Congress or a committee, commission, or officer of Congress. A service or facility authorized by or under this chapter is available for the property on request or approval of the joint committee of the Senate and House of Representatives appointed by the President of the Senate and the Speaker of the House of Representatives to arrange for the inauguration of the President-elect and the Vice President-elect.

36 U.S.C. § 507.

Congress continued its role for ceremonies taking place on "Congressional property" in the 2001 Inauguration Ceremonies by joint resolution. Senate Joint Resolution 89, 106th Congress, 146 Congressional Record S10266-04, 2000 WL 1509815, provided:

> There is established a Joint Congressional Committee on Inaugural Ceremonies...consisting of 3 Senators and 3 Representatives...The joint committee is authorized to make the necessary arrangements for the inauguration of the President-elect and Vice President- elect of the United States on January 20, 2001."

Id.

As explained in the Congressional Record, "[t]he JCCIC is charged with the planning and execution of the Inaugural activities at the Capitol: the swearing-in ceremony and the traditional luncheon which follows." Id.

While it is very doubtful that the controlling legislation permits the Congressional Joint Committee to determine what a President will say at an inauguration over which he maintains control, or what is said on his behalf by invited speakers, for the sake of argument in accordance with Newdow's amended complaint, the undersigned will assume that Senator McConnell's committee did have some content control or choice of speaker role in such.

Whether the issue is restraining the President, or the Congress, or both, the same point applies as made earlier about the courts' lack of authority to adjudicate the propriety of the

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internal procedures of the other branches—the courts lack such authority under our system of government. As cited by the President,

> The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

Mississippi v. Johnson, 71 U.S. 475, 500 (1866).

See also, Buckley v. Valeo, 424 U.S. 1, 120, 96 S. Ct. 612, 682-83 (1976) (emphasizing importance of separation of powers); Commonwealth of Mass. V. Mellon, 262 U.S. 447, 487, 43 S. Ct. 597, 601 (1923) ("The functions of government under our system are apportioned.... The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other"); Protestants and Other Americans United for Separation of Church and State v. O'Brien, 272 F. Supp. 712, 715 (D.D.C. 1967) (no authority to restrain Postal Department's picture of the Madonna on a stamp).

For these reasons, the court has no authority to restrain Senator McConnell or declare the rights of plaintiff vis-a-vis Senator McConnell in his role as past chairperson of the JCCIC. Amendment of the complaint would be futile.

Moreover, even assuming, as was done for the President, that the court should exercise cognizance over a suit against Senator McConnell, Newdow continues to lack standing because of the speculative and impractical nature of the relief sought. Here, Newdow's substitution of a U.S. Senator in his official capacity as head of the 2000 Inauguration Committee, would serve no effective purpose. If the claim against the President is too speculative for an injunction to issue, hence denying Newdow standing, it gets no more certain or jurisdictionally cognizable simply because a Senator is named to take the President's place. The fact remains that no effective, non-speculative relief can be fashioned.

Indeed, even beyond the speculative nature of the relief, what would Newdow have this court order—an enjoining of the Committee to "command" the President to watch what

he and his chosen speakers say? Newdow's suggestion at hearing that the Committee could be ordered to ban clergy from the guest list (even if that is a function of the Committee or within its authority), or not let them speak, is clearly an invalid order from a First Amendment standpoint.

Finally, the court would not do indirectly in a declaratory relief action what it could not do directly in an injunctive relief action. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Church of Scientology v. United States, 506 U.S. 9, 12, 113 S. Ct. 447, 449 (1992). Also,

> The Declaratory Judgment Act of 1934, 28 U.S.C. § 2201, permits a federal court to declare the rights of a party whether or not further relief is or could be sought, and we have held that under this Act declaratory relief may be available even though an injunction is not. Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974). But we have also held that the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 241, 73 S.Ct. 236, 239, 97 L.Ed. 291 (1952). The propriety of issuing a declaratory judgment may depend upon equitable considerations, see Samuels v. Mackell, 401 U.S. 66, 73, 91 S.Ct. 764, 768, 27 L.Ed.2d 688 (1971), and is also "informed by the teachings and experience concerning the functions and extent of federal judicial power." Wycoff, supra, 344 U.S. at 243, 73 S.Ct., at 240; cf. Younger v. Harris, 401 U.S. 37, 44-45, 91 S.Ct. 746, 750-51, 27 L.Ed.2d 669 (1971).

Green v. Mansour, 474 U.S. 64, 72, 106 S. Ct. 423, 427-28 (1985).

Here, Newdow asks the court to intrude on the internal functioning of the Executive, and also presumably for the purposes of the motion, the Congress, to declare the principles that should govern future Presidents and Congresses at inaugurations. This is so regardless of whether Newdow asks the court to actually fashion detailed guidelines for the future, or simply issue a statement that what happened in the past 2001 Inauguration fell on the

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prohibited side of what may be said at good and legal inaugurations. The court should decline to consider such advisory declaratory relief.[2]

B. Reconsideration of the Findings and Recommendations

Because substitution of Senator McConnell or any other Inauguration associated person or entity would not affect the undersigned's recommendation for dismissal, the December 28, 2001 Findings and Recommendations, as supplemented herein, are again respectfully submitted for Judge Karlton's review.

Conclusion

Accordingly, IT IS HEREBY ORDERED that Newdow's motion to amend the complaint is denied.

IT IS HEREBY RECOMMENDED that the case be dismissed with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within five days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District

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[2] In an eleventh hour pleading filed the day before hearing, and in an act of apparent "standing desperation," Newdow stated that he would seek to amend to name the ushers and other support personnel at the Inauguration, or the United States itself. Clearly, joining the ushers or program vendors etc. would not bring Newdow effective relief, nor is there a waiver of sovereign immunity for an injunctive relief suit against the United States. The principles requiring dismissal of this lawsuit will not be overcome at this point by naming a multitude of defendants.

Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). Failure to ask for reconsideration of the undersigned's order will result in an inability to appeal the issue.

DATED: March 26, 2002.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:gh:035
newdow.f&r

bd

United States District Court
for the
Eastern District of California
March 26, 2002

* * CERTIFICATE OF SERVICE * *

2:01-cv-00218

Newdow

v.

Bush

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on March 26, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Kristin Sudhoff Door
United States Attorney
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Jack L. Wagner, Clerk

BY: _____
Deputy Clerk

MAY 23 2002

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REV. DR. MICHAEL A. NEWDOW,

Plaintiff,

vs.

GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,

Defendant.

Case No. CIV-S-01-0218 LKK GGH PS

ORDER

/

On March 26, 2002, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within ten days. Plaintiff filed objections on April 3, 2002, and they were considered by the district judge.

This court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are

reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the Proposed Findings and Recommendations in full. Accordingly, IT IS ORDERED that:

1. The Proposed Findings and Recommendations filed March 26, 2002, are ADOPTED; and

2. This case is dismissed with prejudice.

DATED: 5/21, 2002.

UNITED STATES DISTRICT JUDGE

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United States District Court
for the
Eastern District of California
May 23, 2002

* * CERTIFICATE OF SERVICE * *

2:01-cv-00218

Newdow

v.

Bush

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 23, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY: _____
Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED
May 23, 2002
CLERK, US DISTRICT COURT
EASTERN DISTRICT OF
CALIFORNIA
DEPUTY CLERK

JUDGMENT IN A CIVIL CASE

REV DR MICHAEL A NEWDOW

v. CASE NUMBER: CIV S-01-0218 LKK GGH PS

GEORGE W BUSH

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF MAY 23, 2002.

Jack L. Wagner,
Clerk of the Court

ENTERED: May 23, 2002

by: N Duong
NDDuong, Deputy Clerk

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ndd

United States District Court
for the
Eastern District of California
May 23, 2002

* * CERTIFICATE OF SERVICE * *

2:01-cv-00218

Newdow

v.

Bush

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 23, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk

BY: _____
Deputy Clerk

The Pennsylvania State University

The Graduate School

Department of Speech Communication

'God Bless the President': The Rhetoric of Inaugural Prayer

A Thesis in

Speech Communication

by

Martin Jay Medhurst

Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Doctor of Philosophy

August 1980

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appeared. The occasion was the inauguration of the first President of the United States.

Samuel Provoost: First Inaugural Clergyman

The similarities between the selection of Jacob Duché in 1774 and Samuel Provoost in 1789 are worthy of note. Both men were well-known members of the clergy whose prior reputations brought them to the attention of men in the political sphere. Both were Anglicans who possessed oratorical ability and a commanding presence. More importantly, however, both initiated rhetorical traditions under controversial circumstances. Many scholars agree with Leo Pfeffer when he notes that the "first chaplain of the Continental Congress was selected on the basis of political considerations."[50] Inaugural prayer seems to have had an equally political birth.

The Debate Over Divine Service

The "new Government" of the United States convened at Federal Hall in New York City in April of 1789. It was not until April 5, however, that Richard Henry Lee arrived from Virginia to form a quorum. Two days after securing a quorum, Congress appointed a committee "to take under consideration the manner of electing chaplains."[51] This is important because it indicates that officially there was no chaplain when the new government gathered under the guidance of the Constitution. Although chaplains had served under the Articles of Confederation, on April 7, 1789, no one officially occupied the position of chaplain to the United States Congress.

A chaplain had not been elected to America's legislative body since 1785 when Reverend Samuel Provoost and Reverend John Rodgers were selected. It was now necessary to settle on a method for selecting a new chaplain. On April 15 the committee composed of Oliver Ellsworth, Richard Henry Lee, Caleb Strong, William Maclay, and Richard Bassett reported,

> That two chaplains, of different denominations, be appointed to Congress for the present session, the Senate to appoint one, and give notice thereof to the House of Representatives, who shall, thereupon, appoint the other; which chaplains shall commence their services in the Houses that appoint them, but shall interchange weekly.[52]

This report was accepted and Saturday, April 25, was designated as the date to elect a chaplain to the Senate. However, between April 15 and 25 other business was being conducted. On April 23, for example, a committee made up of Richard Henry Lee, Ralph Izard, and Tristram Dalton was appointed to work out the details for inaugurating the new President. This committee had apparently received instructions concerning Washington's wishes concerning the ceremony.[53] Whether these instructions included any mention of a church service is unclear. It is apparent, however, that Lee's committee decided to include divine service as an official part of the inauguration exercises. What makes this story more interesting, as well as more complex, is that on April 25, Samuel Provoost was elected chaplain to the Senate. Two days later, on April 27, the Senate committee made its recommendations.

On the morning of the 27th Richard Henry Lee's committee submitted the following report:

> Resolved. That after the oath shall have been administered to the President, he, attended by the Vice-President, and members of the Senate, and House of Representatives, proceed

> to St. Paul's Chapel, to hear divine service, to be performed by the chaplain of Congress already appointed.[54]

This resolution prompted considerable dissent on the Senate floor and led Senator Maclay of Pennsylvania to note in his diary:

> Lee offered a motion to the Chair that after the President was sworn . . . the Congress should accompany him to Saint Paul's Church and attend divine service. This had been suggested in Joint Committee. But Lee said expressly that they would not agree to it. I opposed it as an improper business after it had been in the hands of the Joint Committee and rejected, as I thought this a certain method of creating a dissension between the Houses. Izard got up in great wrath and stuttered that the fact was not so. He, however, would say nothing more. I made an effort to rise. The Vice-President hurried the question and it was put and carried by the churchman.[55]

It is unclear whether Maclay meant "churchman," as he wrote, or churchmen. The second choice is the more probable in light of Clarence Bowen's contention that the "question of holding services on the day of the inauguration had been agitated by the clergmen in town."[56] Yet, the choice of the singular "churchman" is not altogether inconceivable. There was a person in the room whose primary reason for being present was his role as a churchman. The man was Samuel Provoost and he delivered a prayer that very day. According to Maclay, Provoost had opened the session with a prayer before any business had been transacted. Strangely enough, Maclay records a prayer only on the 27th. Maclay's only mention of prayer between April 24 and May 19 was this single instance on the 27th of April.

Bowen also located Provoost in the middle of the controversy over holding services as part of the inauguration:

> When Bishop Provoost was applied to on the subject he replied, so Ebenezer Hazard wrote, that the Church of England 'had always been used to look up to Government upon such occasions,' and he thought it prudent not to do anything till they knew what Government would direct.[57]

That the good bishop was as neutral as this quotation would suggest is doubtful. As the immediate past chaplain to Congress and the man just elected the first chaplain under the Constitution, Provoost doubtless realized that the responsibilities for any religious service would fall to him. Such an honor would have placed Bishop Provoost in a position similar to that held by the Archbishop of Canterbury during the English coronation service. Perhaps Hazard was aware of the possibly feigned disinterest when he added, "If the good bishop never prays without an order from Government, it is not probable that the kingdom of heaven will suffer much from his violence."[58]

In spite of Senator Maclay's objections the Senate passed the resolution concerning divine service and sent it to the House for concurrence. On April 29, one day before the inauguration, the House passed the resolution amending it to read:

> That after the oath shall have been administered to the President, the Vice-President and members of the Senate, the Speaker and members of the House of Representatives, will accompany him to Saint Paul's Chapel to hear divine service performed by the Chaplains of Congress.[59]

The amendments to the original resolution are particularly enlightening. The House inserted a reference to their leader, the Speaker, to balance the reference to the Vice-President. They also changed "Chaplain" singular to "Chaplains" plural, thus trying to insure that their spiritual representative would be included in the proceedings. By all accounts, he was not.[60] One of the important points to note, however, is that throughout the debate the issue is not separation of church and state. The issue is the relationship between the two houses of Congress. Even Maclay's disapproval was based on the belief that such a service would cause "dissension between the Houses." There is no indication

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that anyone thought it improper to mix the religious and the political realms. This is not surprising since the closest thing to an inauguration with which these men were familiar was the English coronation service.

A Ceremonial Pattern. The ceremonial pattern with which Lee and his committee members were most familiar was the English coronation. The coronation, however, was not really "a civil but an important religious ceremony."[61] Indeed, it was none other than the Archbishop of Canterbury who placed the crown upon the head of George III in 1761. Prayers were an integral part of the coronation service in England.[62] It was only natural that men who were familiar with English protocol should seek to imitate, at least in part, this most impressive of ceremonials.[63]

Of course, not everyone in America was enamoured with kingly ceremony or other rituals which smelled of royalty. The well-known debate over the proper title for the new leader demonstrates the strong convictions which this issue engendered. Some congressmen, like Maclay of Pennsylvania, not only objected to bestowing a special title on the leader but also found ceremonies in general objectionable. Maclay recorded his unreserved views on this subject in his diary, "I have had full opportunity of observing the gentlemen of New England," he wrote, "and sorry indeed am I to say it, but no people in the Union dwell more on trivial distinctions and matters of mere form. They really seem to show a readiness to stand on punctillio and ceremony."[64]

Compared to the English coronation of 1761, Washington's first inauguration was anything but ceremonious. On inauguration day a joint committee was appointed to escort the new leader to Federal Hall. But

the committee arrived at Washington's place of residence more than an hour late. While the escort was in route, Chancellor Robert Livingston discovered that there was no Bible on the premises. An aide ran to St. John's Lodge of Free and Accepted Masons to secure a copy of the holy book. When Washington arrived at Federal Hall there was more confusion. No one had planned the last few steps leading up to the administering of the oath. Finally, Washington took matters into his own hands and, along with Samuel Otis and Robert Livingston, stepped out onto the balcony overlooking the crowd.

Washington placed his hand on the Bible and repeated the oath of office:

> I do solemnly swear that I will faithfully execute the office of the President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.

As the last word still lingered in the air, Washington added spontaneously, "I swear, so help me God." The phrase did not, however, originate with Washington. The new President borrowed this response, it seems, from the English coronation service. Following the administering of the oath to the King, the newly crowned Sovereign would kneel at the altar and place his hands upon the Bible. He would then say: "The things which I have here before promised, I will perform and keep. So help me God."[65] The Sovereign of England would then kiss the Bible. This was exactly what Washington did following his impromptu exclamation.

Inside St. Paul's Chapel. Following the administering of the oath, Washington walked with the members of the House and Senate to St. Paul's Chapel as the congressional resolution had directed. Inside the church

Bishop Samuel Provoost, Chaplain of the United States Senate, read prayers from the "Proposed" Book of Common Prayer. Whether it is true that Washington listened to the same prayers which he "had heard since his boyhood days in the church at Fredericksburg"[66] is unclear. The "Proposed" Book had been formulated in 1786 and contained many changes from the English Book of Common Prayer. Several psalms were omitted from the Psalter, "the Benedicite was omitted . . . the Nicene Creed and the Athanasian were entirely omitted; the clause 'He descended into hell' was dropped from the Apostle's Creed,"[67] and many other significant changes occurred.

Unfortunately, it does not appear that any records of the service or prayers inside of St. Paul's Chapel are now extant. Leicester C. Lewis' work on the history of the Trinity Church parish seems to point to this conclusion. Writing in Lewis' history about the centennial celebration of the first inauguration, Rector Morgan Dix noted:

> As to the Order of Divine Service to be used in St. Paul's on the Centennial Day, the general desire was to reproduce, if possible, the very service held in the Chapel one hundred years before. Unfortunately it was found impossible to do this for the lack of information, as no draft of that service could anywhere be found. The newspapers of the period, the archives of the Parish, the minutes of the vestry, were all searched, but without success, nor does it appear that there is anywhere in existence a full account of the services then held, though something of the kind may possibly be found in the files of private letters of the period.[68]

More recent inquiries have also failed to locate the manuscript used by Samuel Provoost when he spoke inside of St. Paul's.[69]

According to Douglas Freeman, "Doctor Provoost did not preach a sermon,"[70] but simply read from the prayer book. Fisher Ames, who was one of those inside the chapel, later wrote, "I was present in the pew with the President, and must assure you that, after making all deductions

for the delusion of one's fancy in regard to characters, I still think of him with more veneration than for any other person."[71] After singing the Te Deum, Washington entered his carriage and was driven to his residence. A tradition had been born, but its second birthday would not occur until nearly a century and a half later.

50. Leo Pfeffer, Church State and Freedom, rev. ed. (Boston: Beacon Press, 1967), p. 248.

51. See Joseph Gales, Senior, compiler, The Debates and Proceedings in the Congress of the United States, vol I (Washington: Gales and Seaton, 1834), p. 18.

52. Gales, The Debates and Proceedings in the Congress of the United States, vol. I, p. 19.

53. General Washington arrived at Elizabethtown, New Jersey, on the afternoon of April 23. He was immediately escorted into New York City by the Joint Committee and thus had several days in which to make his wishes known to Congress.

54. Gales, The Debates and Proceedings in the Congress of the United States, vol. I, p. 25.

55. William Maclay, The Journal of William Maclay United States Senator From Pennsylvania, 1789-1791 (New York: Albert and Charles Boni, 1927), p. 4.

56. Clarence Winthrop Bowen, "The Inauguration of Washington," The Century Magazine, 37 (April, 1889), p. 824.

57. Bowen, "The Inauguration of Washington," p. 824.

58. Ebenezer Hazard, quoted in Bowen, "The Inauguration of Washington," p. 824.

59. Gale, The Debates and Proceedings in the Congress of the United States, vol. I, p. 241.

60. The House did not select a chaplain until May 1--the day after the inauguration. They elected the Reverend William Linn.

61. W. J. Passingham, A History of the Coronation (London: n.d.), p. 18.

62. At the coronation of King George III in 1761 no less than six prayers were read as part of the service. For a detailed description of this service as well as the complete texts of the prayers offered see Richard Thomson, ed., A Faithful Account of the Processions and Ceremonies Observed in the Coronation of the Kings and Queens of England (London: Printed for John Major, 1820), pp. 48-62.

63. For other aspects of the English coronation see B. Wilkinson, The Coronation in History (London: George Philip and Son Ltd., 1953); William Jones, Crowns and Coronations (London: Chatto and Windus, 1883); Lewis Broad, Queens, Crowns and Coronations (London: Hutchinson and Co. Ltd., 1952); Rev. Robert H. Murray,

The King's Crowning (London: John Murray, 1936), and E. C. Ratcliff, The English Coronation Service (London: Skeffington and Son Ltd., 1937).

64. Maclay, Journal, p. 5.

65. See Thomson, ed., A Faithful Account, p. 55.

66. Douglas Southall Freeman, George Washington: Patriot and President, vol. VI (New York: Charles Scribner's Sons, 1954), pp. 196-197.

67. Francis Procter and Walter Howard Frere, A New History of the Book of Common Prayer (London: Macmillan and Co. Ltd., 1911), p. 239. See pages 234-252 for a complete discussion of the evolution of the American Prayer Book. See also Leighton Pullan, The History of the Book of Common Prayer (London: Longmans, Green, and Co., 1900), pp. 274-294; G. J. Cuming, A History of Anglican Liturgy (London: Macmillan and Co., Ltd., 1969), pp. 168-212; Massey Hamilton Shepherd, Jr., The Oxford American Prayer Book Commentary (New York: Oxford University Press, 1950).

68. Leicester C. Lewis, ed., A History of the Parish of Trinity Church in the City of New York, Part V (New York: Columbia University Press, 1950), p. 173.

69. These inquiries included letters from the author to the Library of Congress, the National Archives, the General Theological Seminary, and James Thomas Flexner.

70. Freeman, George Washington, p. 197.

71. Seth Ames, ed., Works of Fisher Ames, vol. I (Boston: Little, Brown and Co., 1854), p. 34.

CHAPTER 3

THE ROOSEVELT YEARS: A RHETORIC OF SOCIAL JUSTICE

The dignitaries inside of St. Paul's Chapel on April 30, 1789, could not have realized that the privilege of hearing prayers at the inauguration of a president would not fall to an American audience for another one hundred and forty-four years. Not until January 20, 1937, was a prayer offered as an official part of the American ceremony of inauguration. At the 1937 inaugural, however, the practice of inaugural prayer was reborn. The circumstances and personalities surrounding its revival and subsequent establishment as a mainstay of the contemporary ceremony of inauguration form the central core of this chapter.

The Senate Tradition

As demonstrated in the last chapter, the intermingling of the religious and the political spheres under the rubric of prayer is not new. Just as Bishop Provoost's role as the first inaugural clergyman grew out of his affiliation with the Continental Congress, so the rebirth of inaugural prayer grew out of the continuing tradition of congressional prayer. From the re-appointment of Jacob Duché in 1776, to the present, prayers have been an abiding component of the congressional day.

Since the Congressional Record only began to record legislative prayers in 1885, a complete record does not exist. However, a sampling

of Senate prayers from the fifty-year period prior to 1937 demonstrates the ongoing nature of the American myths of state. The myths of chosenness, special destiny, mission, sacrifice, death, and rebirth appear repeatedly in the Senate prayers of this period. Even if one confines the sample to prayers delivered in the Senate chambers prior to the swearing in of the new members, one can easily discern the underlying myths.

In the Senate ceremony of 1885 Chaplain E. D. Huntley tapped into the mythic element of America as God's chosen nation when he said:

> under the direction of Thy Holy Spirit . . . his [Cleveland's] administration shall prove a signal blessing to this nation and so a blessing to the world.[1]

Thus, that which bodes well for America was viewed as necessarily boding well for the rest of the world. This view was quite in keeping with the dominant notion of America's millenial role.[2]

Four years later in 1889, Senate Chaplain J. G. Butler sounded notes on each part of the mythic scale. He began by recognizing the presence of the Deity at the nation's birth:

> We worship Thee, the God of our fathers, our covenant God and Father.[3]

Not only was the Deity the same one upon whom the fathers called, but He was a power who had covenanted with the American people. Just as God made a covenant with Abraham in Old Testament times, so this God had made a covenant with America.

Butler took cognizance of the sacred documents which the Deity had inspired by praying:

> We bless Thee for all the truth and righteouness embodied in the Constitution and laws of this Republic. We thank Thee for the faith of the fathers and for the faith and piety and patriotism and wisdom of their sons.

Hence, the Chaplain drew attention to the inherent sacredness of the American philosophy of government. This philosophy was sacred for it contained the truths of God who, in his mercy, had revealed them to the fathers of the Republic. The fathers, as faithful servants of the Deity, responded with "piety and patriotism," the terms being virtually interchangeable.

Butler returned to the theme of an unbroken covenant when he said:

> We bless Thee for the rich heritage of freedom coming to us, and we thank Thee, O God, that in all our history Thou hast guided and defended us.

Again, the deity had been faithful to his covenant. The Chaplain explicitly played the chord of chosenness by praying:

> Bless the great people of this land Emanuel's land.

Implicit in this request was the assumption that the interests of the American people were the same as the interests of the Deity. Hence, by realizing their own interests, the people would truly be making their land Emanuel's land. In this process America would become a beacon light to all the nations of the world. As Butler said:

> Among the nations of the earth Thou has exalted us. Make us a pattern nation, O God, and let Thy blessing rest upon these Thy servants.

In 1893 Butler again offered a prayer in the Senate chambers in which he recognized the hand of God in the creation of the nation.

> We bring to Thee our heart homage, God of our fathers, thanking Thee for our rich heritage of faith and of freedom, hallowed by the toils and tears, the valor and blood and prayers, of our patriot dead.[4]

To the Chaplain, faith and freedom were inextricably linked together. The faith in the Deity produced the freedom, or so the Chaplain seemed to imply. The patriot dead sent up prayers so Butler, likewise,

petitioned the Deity that "in the future, as in the past, the unseen hand may lead us."

Butler left little doubt that the millenial kingdom was to be ushered in through the American nation: "Bless all the people of this great nation," he prayed, "prospering every right endeavor . . . and bringing in the reign of peace and righteousness more and more." America was God's instrument and through this instrument the Deity would effect righteousness on earth. The beginning of this heaven on earth extended back to the birth of the nation.

For Chaplain Edward E. Hale, America was God's new Israel. In his Senate prayer of 1905 Hale quoted from scripture:

> I will multiply my people, they shall not be few. I will glorify them, and they shall not be small . . . and ye shall be my people and I will be your God. . . . Be not afraid, neither be discouraged. For the Lord Thy God is with thee withersoever thou goest.[5]

This was a succinct statement of the perceived relationship between God and America. If there was any doubt about the nature of this relationship, Hale eliminated it in 1909 when he said:

> Thou has been pleased to make this people Thine own nation.[6]

Thus, from its beginning, America was a nation set apart, a country chosen for a purpose, a people sacred and true.

What evolved in America was the work of God. As Chaplain Forrest Prettyman noted in 1917:

> Thou hast given us a vision of a fair and beautiful form of civilization.[7]

It was this divine vision which had guided the leaders of the nation and that helped them to become God's representatives here on earth. Just as

the Deity called the world into existence by the power of his Word, so he spoke the words that created America. As ZeBarney Phillips noted in his Senate prayer of 1929:

> Thou has called us by our name and we are Thine. Thou has established us in the gateways of the world. Thou hast moulded our speech, mixed our blood from uncorrupted springs and crowned us with every blessing; make us therefore a righteous nation.[8]

One finds in every inaugural prayer offered in the Senate chambers prior to the inauguration of the president explicit statements dealing with the myth of the creation, the relationship of the Deity to the creative act, and the sacred character of America as a chosen nation which has covenanted with an eternal God. Such mythic statements were in keeping with the social position of the persons doing the praying. As members of the dominant religious group--Protestant clergymen--these pray-ers could sing the praises of the Deity and recite the cosmogonic myth with little hesitation.[9] In addition, their audience was limited to those elite few who could gather within the Senate chambers, the majority of whom were of Protestant orientation.

Repetition of the mythic themes invited the listeners to think of their nation in sacred terms. As the nation's sacred character increased, the religions spawned by the nation also became more sacred and secure through their identification with the national ethos. By testifying to the endorsement of the nation by God, the pray-ers were also testifying to the legitimacy of their position within the American religious structure.[10] In 1937, however, a marked change occurred. Not only was inaugural prayer reborn, but it was reborn in the wake of religious and political turmoil. In the midst of this turmoil one found not only a

Protestant chaplain, but also a Roman Catholic priest. One also found a president who understood the rhetorical character of ceremony and who recognized the influence of religious authority. It was in this context that contemporary inaugural prayers were instituted by fiat on January 20, 1937.

Transforming Traditions

The inaugural ceremony of 1937 was a pacesetter in several respects. First, it marked the first time in the twentieth century that the Vice-President had taken the oath of office on the same platform and in the same ceremony with the President. The usual procedure until 1937 was to administer the oath of office to the Vice-President-Elect at the close of the regular legislative session. This allowed the Vice-President-Elect to act in his role as President of the Senate and thus to preside over the Senate on inauguration day. Since he was already sworn in he would simply read his address to the Senators and then preside over the swearing in of the Senators-Elect. All of these activities took place within the Senate chambers and thus out of the sight of the general public.

When the Senate had concluded its business it would usually move to the east portico of the Capitol where the inauguration of the President would take place. From 1793-1933 there were no prayers delivered at the presidential inauguration per se. The only prayer was that delivered by the Senate chaplain in accordance with normal operating procedures. In 1937, however, a new twist was added. Not only did the Vice-President-Elect join the President-Elect on the

inaugural platform, but the chaplain of the Senate also appeared on the platform to open with prayer. Hence, a practice which had originated in Congress was transplanted to the inaugural ceremony. This shift of venue is significant for it set a precedent for all future inaugurals. Whereas the chaplain's prayer was originally directed to the Senators, it now became directed to all attending the inaugural ceremonies as well as those listening or viewing via the media.

The transplanting of the chaplain was not the only significant change that occurred in 1937. In addition to placing the chaplain in the public arena, Roosevelt introduced the first non-chaplain pray-er. Not only was the second pray-er a non-chaplain, but he was a non-Protestant as well. This marked the first time in inaugural history that anyone other than a Protestant clergyman had delivered an inaugural prayer.[11] The pacesetter in this regard was the Right Reverend John A. Ryan of Catholic University in Washington, D. C. Ryan became the first Catholic to pray at an inaugural ceremony and at the same time acquired the distinction of being the first person to deliver an inaugural benediction. Until 1937 there was no benediction pronounced over the ceremonies. A close examination of the presidential addresses from 1793-1933 reveals that the newly elected leader often provided his own benediction in the last few lines of his address. In 1933, for example, Roosevelt ended his address:

> In this dedication of a Nation we humbling ask the blessing of God. May He protect each and every one of us. May He guide me in the days to come.[12]

One might think that by introducing a clergyman to deliver a benediction the mini-benediction would gradually drop out of the

inaugural address. Such has not been the case. Clifford Owsley notes that "with only one exception, every President invoked the blessings of God on his administration and the country in the terminal of his inaugural address, or in one of them if he delivered more than one. Theodore Roosevelt, who made only one inaugural address, did not follow the tradition."[13]

If the benediction did not affect the inaugural address, one might reasonably ask why it was included at all. Indeed, why was there a benediction in 1937 when there had never been one in the entire history of presidential inaugurations? To answer this question one must return to the days prior to Roosevelt's ascent to the presidency. One must return to the sources from which Roosevelt's rhetorical use of religion grew. As we shall see, the rebirth of inaugural prayer was but one manifestation of a much larger pattern involving Roosevelt's conception of the relationship between religion and government.

Roosevelt and Religion--The Beginnings. Franklin Roosevelt was particularly qualified to be president of a country where over 95 percent of the population claimed to believe in a Supreme Being, for Roosevelt was, himself, a believer. Raised by a mother of unitarian leaning and a father dedicated to episcopalianism, the young Franklin learned love of God and Church at a tender age. A communicant at St. James Episcopal Church in his native Hyde Park, Franklin Roosevelt never lost the belief of his youth.

Roosevelt's belief was strengthened at Groton, a private prep school in Massachusetts, where the future president came under the influence of the Reverend Endicott Peabody, an influence that would

NOTES

1. E. D. Huntley, quoted in Congressional Record--Senate (1885), p. 1.

2. For more detail on the dominant conceptions of America's millenial role and mission see Ernest Lee Tuveson, Redeemer Nation: The Idea of America's Millenial Role (Chicago: University of Chicago Press, 1968); H. Richard Niebuhr, The Kingdom of God in America (New York: Harper Brothers, 1937); Sacvan Bercovitch, The Puritan Origins of the American Self (New Haven: Yale University Press, 1975); Perry Miller, The Life of the Mind in America from the Revolution to the Civil War (New York: Harcourt, Brace and World, 1965); Sherwood Eddy, The Kingdom of God and the American Dream (New York: Harper and Row, 1941); Darroll M. Bryant, "America as God's Kingdom," in Jurgen Moltmann, et al., eds., Religion and Political Society (New York: Harper and Row, 1974); and J. F. Maclear, "The Republic and the Millenium," in Elwyn A. Smith, ed., Religion of the Republic (Philadelphia: Fortress Press, 1971), pp. 183-216.

3. J. G. Butler, quoted in Congressional Record--Senate, 51st Congress (1889), p. 1.

4. J. C. Butler, quoted in Congressional Record--Senate, 53rd Congress (1893), p. 1.

5. Edward E. Hale, quoted in Congressional Record--Senate, 59th Congress (1905), p. 1.

6. Edward E. Hale, quoted in Congressional Record--Senate, 61st Congress (1909), p. 1.

7. Forrest J. Prettyman, quoted in Congressional Record--Senate, 65th Congress (1917), p. 1.

8. ZeBarney T. Phillips, quoted in Congressional Record--Senate, 71st Congress (1929), p. 3.

9. Conrad Cherry notes that "during the nineteenth century and well into the twentieth, leading spokesmen for the civil religion couched its beliefs in terms that were unmistakeably Protestant. Sacred ceremonies celebrated the hope for the spread of an 'American Christian civilization,' a Christian civilization that was inclusive enough to embrace the diverse Protestant denominations but seldom large enough to include Roman Catholics." See Conrad C. Cherry, "American Sacred Ceremonies," in Phillip E. Hammond and Benton Johnson, eds., American Mosaic: Social Patterns of Religion in the United States (New York: Random House, 1970), p. 311.

10. The relationship between the "official" pray-ers and the political status quo is a dialectical one. As Berger and Luckmann note: "In other words, conservative political forces tend to support the monopolistic claims of the universal experts, whose monopolistic organizations in turn tend to be politically conservative. Historically, of course, most of these monopolies have been religious. It is thus possible to say that churches, understood as monopolistic combinations of full-time experts in a religious definition of reality, are inherently conservative once they have succeeded in establishing their monopoly in a given society. Conversely, ruling groups with a stake in the maintenance of the political status quo are inherently churchly in their religious orientation and, by the same token, suspicious of all innovations in the religious tradition." See Peter L. Berger and Thomas Luckmann, The Social Construction of Reality (Garden City: Doubleday, 1966), p. 123.

11. Ostensibly there had been Senate prayers by non-Protestants. The first and only Catholic to serve as Chaplain of the United States Senate was Constantine Pise in 1832.

12. Franklin D. Roosevelt, "First Inaugural Address," March 4, 1933, in Inaugural Addresses of the Presidents of the United States (Washington: Government Printing Office, 1965), p. 239. All quotations from inaugural addresses are from this source.

13. Clifford D. Owsley, Inaugural (New York: Olympic Press, 1964), p. 14.

14. Paul K. Conkin, The New Deal (New York: Thomas Y. Crowell Co., 1967), p. 9.

15. Conkin, p. 9.

16. Alfred B. Rollins, Jr., "Young F. D. R. and the Moral Crusaders," New York History, 37 (1956), 4.

17. Rollins, p. 14.

18. Thomas H. Greer, What Roosevelt Thought: The Social and Political Ideas of Franklin D. Roosevelt (East Lansing: Michigan State University Press, 1958), p. 6.

19. James A. Farley, Behind the Ballots--The Personal History of a Politician (New York: Harcourt, Brace and Co., 1938), p. 208.

20. Roosevelt, quoted in William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 1932-1940 (New York: Harper and Row, 1963), p. 8.

21. Sidney E. Ahlstrom, A Religious History of the American People (New Haven: Yale University Press, 1972), p. 920.

101ST CONGRESS, 1ST SESSION SENATE DOCUMENT 101-10

INAUGURAL ADDRESSES

OF THE

PRESIDENTS OF THE UNITED STATES

FROM

GEORGE WASHINGTON 1789

TO

GEORGE BUSH 1989

BICENTENNIAL EDITION

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C.
1989

George Washington

FIRST INAUGURAL ADDRESS IN THE CITY OF NEW YORK

THURSDAY, APRIL 30, 1789

The Nation's first chief executive took his oath of office in April in New York City on the balcony of the Senate Chamber at Federal Hall on Wall Street. General Washington had been unanimously elected President by the first electoral college, and John Adams was elected Vice President because he received the second greatest number of votes. Under the rules, each elector cast two votes. The Chancellor of New York and fellow Freemason, Robert R. Livingston administered the oath of office. The Bible on which the oath was sworn belonged to New York's St. John's Masonic Lodge. The new President gave his inaugural address before a joint session of the two Houses of Congress assembled inside the Senate Chamber.

Fellow-Citizens of the Senate and of the House of Representatives:

Among the vicissitudes incident to life no event could have filled me with greater anxieties than that of which the notification was transmitted by your order, and received on the 14th day of the present month. On the one hand, I was summoned by my country,

whose voice I can never hear but with veneration and love, from a retreat which I had chosen with the fondest predilection, and, in my flattering hopes, with an immutable decision, as the asylum of my declining years—a retreat which was rendered every day more necessary as well as more dear to me by the addition of habit to inclination, and of frequent interruptions in my health to the gradual waste committed on it by time. On the other hand, the magnitude and difficulty of the trust to which the voice of my country called me, being sufficient to awaken in the wisest and most experienced of her citizens a distrustful scrutiny into his qualifications, could not but overwhelm with despondence one who (inheriting inferior endowments from nature and unpracticed in the duties of civil administration) ought to be peculiarly conscious of his own deficiencies. In this conflict of emotions all I dare aver is that it has been my faithful study to collect my duty from a just appreciation of every circumstance by which it might be affected. All I dare hope is that if, in executing this task, I have been too much swayed by a grateful remembrance of former instances, or by an affectionate sensibility to this transcendent proof of the confidence of my fellow-citizens, and have thence too little consulted my incapacity as well as disinclination for the weighty and untried cares before me, my error will be palliated by the motives which mislead me, and its consequences be judged by my country with some share of the partiality in which they originated.

Such being the impressions under which I have, in obedience to the public summons, repaired to the present station, it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency; and in the important revolution just accomplished in the system of their united gov-

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ernment the tranquil deliberations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seem to presage. These reflections, arising out of the present crisis, have forced themselves too strongly on my mind to be suppressed. You will join with me, I trust, in thinking that there are none under the influence of which the proceedings of a new and free government can more auspiciously commence.

By the article establishing the executive department it is made the duty of the President "to recommend to your consideration such measures as he shall judge necessary and expedient." The circumstances under which I now meet you will acquit me from entering into that subject further than to refer to the great constitutional charter under which you are assembled, and which, in defining your powers, designates the objects to which your attention is to be given. It will be more consistent with those circumstances, and far more congenial with the feelings which actuate me, to substitute, in place of a recommendation of particular measures, the tribute that is due to the talents, the rectitude, and the patriotism which adorn the characters selected to devise and adopt them. In these honorable qualifications I behold the surest pledges that as on one side no local prejudices or attachments, no separate views nor party animosities, will misdirect the comprehensive and equal eye which ought to watch over this great assemblage of communities and interests, so, on another, that the foundation of our national policy will be laid in the pure and immutable principles of private morality, and the preeminence of free government be exemplified by all the attributes which can win the affections of its citizens and command the respect of the world. I dwell on this prospect with every satisfaction which an ardent love for my country can inspire, since there is no truth more thoroughly established than that there exists in the economy and course of nature an indissoluble union between virtue and happiness; between duty and advantage; between the genuine maxims of an honest and magnanimous policy and the solid rewards of public prosperity and felicity; since we ought to be no less persuaded that the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained; and since the preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered, perhaps, as

deeply, as *finally*, staked on the experiment entrusted to the hands of the American people.

Besides the ordinary objects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them. Instead of undertaking particular recommendations on this subject, in which I could be guided by no lights derived from official opportunities, I shall again give way to my entire confidence in your discernment and pursuit of the public good; for I assure myself that whilst you carefully avoid every alteration which might endanger the benefits of an united and effective government, or which ought to await the future lessons of experience, a reverence for the characteristic rights of freemen and a regard for the public harmony will sufficiently influence your deliberations on the question how far the former can be impregnably fortified or the latter be safely and advantageously promoted.

To the foregoing observations I have one to add, which will be most properly addressed to the House of Representatives. It concerns myself, and will therefore be as brief as possible. When I was first honored with a call into the service of my country, then on the eve of an arduous struggle for its liberties, the light in which I contemplated my duty required that I should renounce every pecuniary compensation. From this resolution I have in no instance departed; and being still under the impressions which produced it, I must decline as inapplicable to myself any share in the personal emoluments which may be indispensably included in a permanent provision for the executive department, and must accordingly pray that the pecuniary estimates for the station in which I am placed may during my continuance in it be limited to such actual expenditures as the public good may be thought to require.

Having thus imparted to you my sentiments as they have been awakened by the occasion which brings us together, I shall take my present leave; but not without resorting once more to the benign Parent of the Human Race in humble supplication that, since He has been pleased to favor the American people with opportunities for deliberating in perfect tranquillity, and dispositions for deciding with unparalleled unanimity on a form of government for the security of their union and the advancement of their happiness, so His divine blessing may be equally *conspicuous* in the enlarged views,

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the temperate consultations, and the wise measures on which the success of this Government must depend.