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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

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

3 After hearing on the President's initial motion to dismiss, the undersigned found that
4 Newdow had standing to challenge the statement of prayers per se at the inauguration. "Electronic"
5 attendance was found to be the same for standing purposes as physical attendance. Newdow's
6 alleged First Amendment injury was sufficiently pled for him to proceed, and the court found that
7 an injunctive remedy directed at prayer in general would be feasible if otherwise warranted.
8 However, the undersigned further found that presidential invocations to the Deity, i.e., prayers, at
9 inaugurations were historical and commonplace. As such, the prayers in general did not offend the
10 Establishment Clause of the First Amendment to the Constitution. Sec Marsh v. Chambers, 463 U.S.
11 783, 103 S.Ct. 3330 (1983). Because the complaint, liberally read, also attacked the content of the
12 prayer, the further standing and merits problems involved in such a prayer specific attack were noted,
13 as well as problems in the defense of the attack. Since no party had briefed the issues relating to a
14 prayer specific attack, the undersigned deferred further findings pending such briefing. The
15 Honorable Lawrence K. Karlton adopted the findings and recommendations in full in his order of
16 September 28, 2001.

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

23 *Issues*

24 The President again attacks Newdow's standing to bring this lawsuit. However, the
25 court notes another threshold jurisdictional issue - that is, the inability of the courts to enjoin the
26 President at all. The President also argues the case on the merits insofar as he claims that the prayers
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1 at issue could not "establish" religion in violation of the First Amendment. However, because of the
2 lack of jurisdiction to proceed, and in any event, Newdow's lack of standing to attack the content
3 of inaugural prayer, the court will not reach the merits of the claimed First Amendment violation
4 past what it has reached already.

5 *Facts*

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

11 May this be the beginning of a new dawn for America,
12 as we Humble ourselves before You and acknowledge You alone
as our Lord, our Savior and our Redeemer.

13 We pray this in the name of the Father,
14 And of the Son the Lord Jesus Christ,
And of the Holy Spirit. Amen.

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

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

1 *Discussion*

2 A: The Court Lacks Jurisdiction to Enjoin the President

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

14 While injunctive relief against executive officials like the Secretary of Commerce is
15 within the courts' power, see Youngstown Sheet & Tube Co. v. Sawyer, *supra*, the
16 District Court's grant of injunctive relief against the President himself is
17 extraordinary, and should have raised judicial eyebrows. We have left open the
18 question whether the President might be subject to a judicial injunction requiring the
19 performance of a purely "ministerial" duty, Mississippi v. Johnson, 4 Wall. 475,
20 498-499, 18 L.Ed. 437 (1867), and we have held that the President may be subject
21 to a subpoena to provide information relevant to an ongoing criminal prosecution,
22 United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), but
23 in general "*this court has no jurisdiction of a bill to enjoin the President in the*
24 *performance of his official duties.*" Mississippi v. Johnson, *supra*, 4 Wall., at 501.
25 *At the threshold, the District Court should have evaluated whether injunctive relief*
26 *against the President was available, and, if not, whether appellees' injuries were*
27 *nonetheless redressable.*

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

29 ²Thus, the President's counsel has not disputed venue or raised personal jurisdiction
30 questions which would be apparent if the President, in his individual capacity, were being sued. Nor
31 does the court face the thorny problems involved when one attempts to sue a sitting president in his
32 individual capacity, including the possibility that the entire action might be stayed pending
33 completion of the President's term in office. See Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636
34 (1997).

1 added).^{3 4}

2 See also Clinton v. Jones, 520 U.S. 681, 718-19, 117 S.Ct. 1636, 1656 (1997) (Breyer, J. concurring)
3 (referencing the plurality and concurring opinion in Franklin, and "the 'apparently unbroken
4 historical tradition...implicit in the separation of powers' that a President may not be ordered by the
5 Judiciary to perform particular Executive acts"); Swan v. Clinton, 100 F.3d 973, 977 (D.C. Cir.
6 1996) (reiterating that the courts have no jurisdiction to enjoin the President in his official acts, nor
7 do they have the power to issue declaratory relief against the President); Made in the U.S.A.
8 Foundation v. United States, 242 F.3d 1300, 1310 (n.24) (11th Cir. 2001) (recognizing the same
9 principles).

10 The court's point was also instructively brought home by Justice Scalia in dissent on
11 a political question issue unrelated to the present one, when he used as an example: "It seems to me
12 clear that courts would not entertain, ... an action for backpay by a dismissed Secretary of State
13 claiming that the reason he lost his Government job was that the President did not like his religious
14 views-- surely a colorable violation of the First Amendment." Webster v. Doe, 486 U.S. 592, 613-
15 14, 108 S.Ct. 2047, 2059 (1988) (Scalia, J. dissenting). The relevant point to be drawn here is that
16 certain grievances are off the judicial table no matter how colorable the First Amendment violation
17 may be.

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

25 ⁴ The Supreme Court left open the possibility that the President could be enjoined for some
26 ministerial act; however, no one herein contends that the decision to utilize prayer at the
27 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.

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

13 In sum, the Judiciary's star shines brightly when the Judiciary recognizes its
14 limitations in a government founded upon separation of powers and mutual respect of its different
15 branches. In a government where the several branches respect the rights of each other to function
16 free of interference in their inherent functions, the Judiciary will not attempt to dictate what the
17 President may, or may not, say at his inauguration, or what selected persons may say on his behalf.
18 There is nothing extraordinary from a Constitutional perspective about a Presidential inauguration
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21 ⁵If indeed, the President had no express or implicit control over his own inauguration
22 ceremonies, a doubtful proposition, the President's cited case of Adler v. Duval County School
23 Board, 250 F.3d 1330 (11th Cir. 2001) (en banc) might be instructive. In Adler, the court found that
24 an elected student's speech, not controlled by the school authorities, could not give rise to a First
25 Amendment violation. However, rather than start the discovery battles over whether the President
26 exercised any control over his inauguration, and the extent to which he did so, the court believes the
27 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.

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

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

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

10 "[B]efore reaching a decision on the merits, we [are required to] address the standing
11 issue to determine if we have jurisdiction." Nat'l Wildlife Fed'n v. Adams, 629 F.2d
12 587, 593 n. 11 (9th Cir.1980). "[T]he standing question is whether the plaintiff has
13 'alleged such a personal stake in the outcome of the controversy' as to warrant his
14 invocation of federal-court jurisdiction and to justify the exercise of the court's
15 remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498- 99, 95 S.Ct.
16 2197, 45 L.Ed.2d 343 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct.
17 691, 7 L.Ed.2d 663 (1962)). There are three requirements for standing: (1) "a
18 plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected
19 interest which is (a) concrete and particularized and (b) actual or imminent, not
20 'conjectural' or 'hypothetical;' (2) "there must be a causal connection between the
21 injury and the conduct complained of--the injury has to be 'fairly ... trace[able] to the
22 challenged action of the defendant, and not ... th[e] result [of] the independent action
23 of some third party not before the court;" and (3) "it must be 'likely' as opposed to
24 merely 'speculative,' that the injury will be 'redressed by a favorable decision.' "

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

21 "The court is not, of course, finding that the actions of the Executive Branch in executing the
22 laws of this Nation are free from judicial scrutiny. As Franklin made clear the cabinet secretaries
23 or other administration officials with purview over a certain governmental function may be sued in
24 their official capacities for statutory and constitutional violations. See also Clinton v. Jones, 520
25 U.S. at 703, 117 S.Ct. at 1649, discussing the suit against President Truman's Secretary of
26 Commerce (Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 (1952) (taking
27 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.

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

3 Washington Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835, 847 (9th Cir.
4 2001) (en banc).

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

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

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

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

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

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

22 On the latter point, the court agrees with the President's discussion of the argued
23 speculative nature of any injunctive/declaratory relief to be awarded. The court previously found
24 that Presidential prayer of some sort at inaugurations was a likely occurrence in the future, and that
25 an injunction ending any prayer would "benefit" Newdow. More importantly, an all inclusive
26 prohibitory injunction against inaugural prayer would be no more difficult to frame than a no school
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1 sponsored prayer injunction. See Lee v. Weisman, supra. However, when the issue becomes what
2 *type of prayer* may be spoken in the future, and the limits to which specific denominational concepts
3 may be referenced, Newdow's argument becomes highly speculative and his claimed injury
4 impossible to redress. Perhaps the next President would eschew any religious reference to a specific
5 denomination's concepts as a matter of principle. Perhaps the next President would not have
6 Reverend Graham or a like minded clergymen deliver an invocation. See Cole v. Oroville Union
7 High School District, 228 F.3d at 1100 (finding that standing of parents who might attend future
8 graduations was too tenuous given that the identity of the future speakers and their speech content
9 was speculative). Moreover, should the court limit the relief to references to Christianity? What
10 if the next President were Jewish or Muslim? Could the court in the context of the present facts issue
11 an injunction enjoining a future President from referencing specific facts unique to those religions?
12 Even if the next president were to be a professed Christian, how far could the court go in defining
13 what Christian philosophy might be referenced? Could the court develop a list of acceptable
14 invocation speakers for future inaugurations? These rhetorical questions and observations highlight
15 the speculative nature of any future "injury," and the fact that no present injunction could be
16 realistically framed to encompass future, speculative, religious inaugural invocations.*

17 C. Newdow Lacks Taxpayer Standing

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

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

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

1 (1968). Both of these cases stand for the proposition, among others, that taxpayers do not have
2 standing to protest incidental expenditures related to the activity which they desire to challenge.
3 Doremus, 342 U.S. at 433-34, 72 S.Ct. at 397 (taxpayer could not identify spending of tax dollars
4 associated with Bible reading); Flast, 392 U.S. at 102, 88 S.Ct. at 1954 (stating rule that incidental
5 tax expenditures will not confer standing, but ultimately finding that taxpayers had identified a direct
6 tax expenditure. See also Doe v. Madison School District, 177 F.3d 789, 795 (9th Cir. 1999) (tax
7 dollars associated with graduation ceremonies which included religious references, but which would
8 have been spent regardless of such religious references, are not sufficient to confer standing to
9 litigate a prayer-at-graduation grievance).

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

16 D. Establishment Clause Violation

17 The President argues at length that the invocation(s) at the inauguration did not
18 sponsor religion or proselytize, and thus cannot be a violation of the Establishment Clause.
19 However, when not focusing upon the status of the President, or his proxies, and the nature of the
20 event, the issues are problematic. Many cases have determined that general references to God do
21 not run afoul of the Establishment Clause, but citations or references to specific denominational
22 concepts are not appropriate. Courts have found difficulty with prayers or symbols that directly
23 reference doctrines or figures in a particular religion or sect. See e.g., the very fractured decision in
24 County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 598-599, 109 S.Ct. 3086,
25 3103-04 (1989) (Nativity scene with inscription "Glory to God in the Highest" was sectarian); Coles
26 v. Cleveland Board of Education, 171 F.3d 369, 384 (6th Cir. 1999) (prayer used to open Board of
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1 Education meetings violated the Establishment Clause in part because of the specific reference to
2 Jesus and the Bible along with the fact that the Board president was a Christian minister); Freedom
3 From Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487, 496 (7th Cir. 2000) (violation
4 of Establishment Clause in having statue of Christ proximate to the highway which gave the message
5 "Christ guide us on our way"); but see American Civil Liberties Union v. Capitol Square and
6 Review, 243 F.3d 289 (6th Cir. en banc) (Ohio motto-- "With God, All Things Are Possible," which
7 was derived from the New Testament, does not violate the Establishment Clause).

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

12 E. No Declaratory Relief Is Appropriate

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

27

1 As set forth above, no injunction is appropriate given the prudential concerns of
2 separation of powers and standing. For those same reasons, declaratory relief is equally
3 inappropriate.⁹
4

5 *Conclusion*

6 Accordingly, the undersigned recommends:

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

10 2. In the alternative:

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

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

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

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

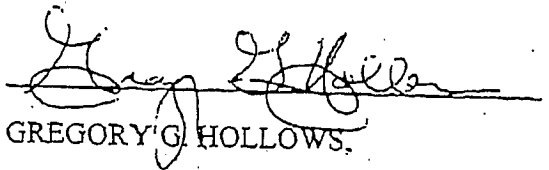
19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days
21 after being served with these findings and recommendations, any party may file written objections
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23 ⁹Plaintiff makes a reference in the text of his complaint to mandamus, but prays for injunctive
24 and declaratory relief. "Mandamus is an extraordinary remedy and is available to compel a federal
25 official to perform a duty only if: (1) the individual's claim is clear and certain; (2) the official's
26 duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no
27 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.

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

6 DATED: December 28, 2001.

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GREGORY G. HOLLOWES,
UNITED STATES MAGISTRATE JUDGE

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

mdk

* * 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.

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

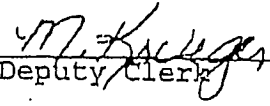
SJ/LKK

VC/GGH

Kristin Sudhoff Door
United States Attorney
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BY:


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