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.

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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,

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[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)(1). 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

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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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Jack L. Wagner, Clerk

BY: _____
Deputy Clerk