

LEGAL UPDATE

Controversy Continues over the Pledge of Allegiance

by Martha M. McCarthy

If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

— *West Virginia State Board of Education v. Barnette*¹

Saying the Pledge of Allegiance in public schools has generated controversy for more than sixty years. On Flag Day, June 14, 2004, the U.S. Supreme Court sidestepped an opportunity to clarify the constitutionality of public school students reciting “under God” in the Pledge of Allegiance.² But this issue is not going away. Following the Supreme Court’s decision, several families voiced interest in mounting new challenges to the religious reference in the Pledge. This article analyzes the 2004 decision and explores how the Supreme Court might rule in a subsequent case regarding the constitutionality of saying the current Pledge in public schools.

Context

The initial version of the “Pledge to the Flag” was written by Francis Bellamy for schoolchildren to say during activities celebrating the 400th anniversary of the discovery of America. It read: “I pledge allegiance to my Flag and to the republic for which it stands, one Nation, indivisible, with Liberty and Justice for all.”³ Subsequently, the wording was altered to clarify *which* flag by adding “of the United States” and later “of America” after “flag.” In 1942, the Pledge became part of the United States Code, along with a detailed set of regulations pertaining to displaying the flag, and its official title became “The Pledge of Allegiance” in 1945.⁴

The final change in the Pledge occurred on Flag Day 1954, when the phrase “under God” was added after “one nation.” The amendment’s

sponsors indicated that the purpose of the addition to the Pledge was to affirm the United States as a religious nation, distinguished from countries practicing atheistic communism.⁵ In signing the law, President Eisenhower said: "In this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war."⁶

Even though it was established more than six decades ago that public school students cannot be required to recite the Pledge of Allegiance if such an observance conflicts with their religious or philosophical beliefs,⁷ there have been some recent claims that students have been coerced to participate in the Pledge. For example, a Pennsylvania law was challenged because it required parental notification if public or private school students opted out of recitation of either the Pledge or the National Anthem at the beginning of the school day. The Third Circuit Court of Appeals held that the parental notification requirement had a coercive effect on student expression in violation of the First Amendment.⁸ The court also found that application of the law to nonreligious private schools interfered with the schools' rights to promote particular values and philosophies. In another recent case, the Eleventh Circuit ruled that neither a principal nor a teacher was entitled to summary judgment on qualified-immunity grounds for disciplining a student who refused to participate in the Pledge, absent disruptive behavior.⁹ Of course, students can be disciplined if they create a classroom disturbance during the Pledge.

The most volatile current controversy focuses on requiring recitation of the Pledge *at all* in public schools. In 1992, the Seventh Circuit rejected an Establishment Clause challenge to an Illinois law requiring daily recitation of the Pledge in public schools, concluding that addition of the words "under God" did not change this patriotic observance into a religious exercise that advances religion.¹⁰ The court held that as long as students can decline to participate in the Pledge, the state law presents no infringement on individuals' constitutional right to refrain from such an observance. Regarding the Establishment Clause claim, the appeals court reasoned that the "ceremonial deism" in the Pledge "has lost through rote repetition any significant religious content," so the contested phrase does not represent religious coercion.¹¹

Thirty-five states have laws or policies requiring the Pledge to be said in public schools.¹² In 2003 a Virginia federal district court reached the same conclusion as the Seventh Circuit in rejecting a constitutional challenge to a Virginia law requiring the recitation of the Pledge in public schools. Even though the school district at issue in that case considered recitation of the Pledge in a citizenship reward program, the court was not persuaded that students were psychologically coerced into

accepting religious views sponsored by the school or that they were being punished by having to listen to classmates recite the Pledge.¹³

Elk Grove Unified School District v. Newdow

The Ninth Circuit attracted national attention in 2002 when it rejected the “ceremonial deism” justification and declared that saying the Pledge in public schools abridges the Establishment Clause by endorsing a belief in monotheism.¹⁴ The Pledge recitation was challenged by Michael Newdow, an atheist, whose daughter was subjected to the daily exercise. The appellate panel emphasized that the words “under God” had been inserted in the Pledge to promote religion rather than to advance the legitimate secular goal of encouraging patriotism. The court reasoned that the Pledge in its current form “sends a message to nonbelievers that they are outsiders,” which is “more acute” for schoolchildren because of the “indirect social pressure which permeates the classroom.”¹⁵ In an amended, narrower ruling, the Ninth Circuit did not invalidate the federal law adding “under God” to the Pledge, but reiterated that the school district’s policy requiring recitation of the Pledge in public schools violates the Establishment Clause because of the coercive effect on students.¹⁶

On appeal to the U.S. Supreme Court, there were two issues: did Newdow have standing to challenge recitation of the Pledge in public schools since he was not the custodial parent, and if so, did such recitation abridge the Establishment Clause because of its religious reference? The Supreme Court’s reversal of the Ninth Circuit’s decision without addressing the constitutional claim was a great disappointment to both sides. The Court was unanimous in reversing the Ninth Circuit,¹⁷ but only five justices based their conclusion on the standing issue. Writing for the majority, Justice Stevens reasoned that Newdow lacked standing to challenge his daughter’s participation in the Pledge because California law deprived him of the right to bring suit as “next friend” on behalf of his daughter. Recognizing that Newdow retained the right to instruct his daughter regarding his religious views, the Court held that this right did not extend to curtailing his daughter’s exposure to religious beliefs endorsed by her mother. The majority reasoned that the California family court had deprived Newdow of such “next friend” status, noting that Newdow’s interests and those of his daughter “are not parallel and, indeed, are potentially in conflict.”¹⁸

Three justices concurred with the result of reversing the Ninth Circuit’s decision, but wrote separately to voice their disagreement with the majority’s handling of the standing issue. These justices would have recognized Newdow’s standing and reversed the Ninth Circuit’s ruling based on their conclusion that the phrase “under God” does not implicate the Establishment Clause of the First Amendment.¹⁹

Future Challenges

If the Supreme Court does agree to address the constitutionality of the religious reference in the Pledge, it probably will agree with the *Newdow* concurring justices who asserted that the brief mention of God does not endorse any religion or turn a patriotic observance like the Pledge into a prayer or an endorsement of any religion.²⁰ The Court likely will rely heavily on the conclusion that the Pledge represents ceremonial deism, which does not make religious demands or call for individuals to do anything. Even Justice Souter, who has been at the separationist end of the continuum compared to the other sitting justices, has commented that the controversial phrase is “beneath the constitutional radar because the words had become so diluted and tepid and far removed from a compulsory prayer.”²¹

However, there is some sentiment that the constitutionally correct response would be to prohibit saying the Pledge in public schools until the religious reference is removed. Indeed, Justice Thomas, although supporting the current wording in the Pledge, actually built a case that the Court should strike down saying “under God” in the Pledge to remain consistent with constitutional precedents. Thomas found greater potential for religious coercion in reciting the Pledge than in having clergy lead graduation prayers, which the Supreme Court invalidated in 1992.²² To be consistent with long-standing precedent that individuals cannot be required to declare a belief, Thomas noted that it is “difficult to see how this [saying the Pledge] does not entail an affirmation that God exists.”²³

The legislative history is clear that the amendment to insert “under God” in the Pledge was religiously motivated, and other religiously motivated legislative acts have been invalidated. For example, in 1985 the Supreme Court struck down an amended silent prayer law in Alabama because the amendment had the religious purpose of encouraging students to pray.²⁴ Also, the massive protests mounted by religious groups against the Ninth Circuit’s decision belie the assertion that “under God” has no current religious significance. Indeed, shortly after the initial Ninth Circuit ruling, more than 100 Republican members of Congress gathered on the steps of the Capitol to recite the Pledge and to display their disdain for the appellate ruling. Both houses of Congress subsequently adopted resolutions denouncing the ruling, so it is difficult to argue that the contested phrase has no current religious meaning.²⁵

Critics of the religious reference in the Pledge contend that simply because a sectarian term is frequently used over time does not make it less religious. In essence, a constitutional violation accepted for years does not eliminate the impairment. If it did, the recitation of various religious messages could be justified in public schools as long as they were regularly repeated over time. One commentator has noted that the cer-

emonial-deism justification can insulate from Establishment Clause scrutiny “long-standing public practices that invoke a nonspecific deity for secular purposes.”²⁶ Newdow argued, and the Ninth Circuit agreed, that for schoolchildren who are saying “under God” *every day*, such recitation can influence their religious beliefs or at least their perception of what our government is telling them is the *correct* belief.²⁷

Although the Bill of Rights was designed to remove certain subjects from the political process, the status of the Pledge is likely to remain engulfed in political controversy. Given the strong emotions involved, the Supreme Court may try to avoid this issue as long as possible. In the unlikely event that the Supreme Court should conclude that the Pledge cannot be said in public schools without eliminating “under God,” the political response would be volatile and quite divisive. Instead of Congress simply returning the Pledge to its pre-1954 version, there would be political pressure to amend the Constitution to authorize saying the Pledge with “under God.”²⁸ And given the widespread negative reaction to the Ninth Circuit’s decision striking down recitation of this phrase in public schools, such a proposed amendment might very well be adopted.

Even if there is no constitutional amendment to authorize the Pledge’s religious reference, widespread defiance to a change in its current wording would be assured, perhaps even greater than the noncompliance that arose when court rulings barred daily prayer and Bible reading from public education in the early 1960s.²⁹ In short, regardless of what the Supreme Court says about the constitutionality of schoolchildren reciting the Pledge with “under God,” the current version is likely to be said in public schools across our nation for a long, long time.

Notes

1. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
2. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004).
3. This version first appeared in a Boston-based magazine for children, *The Youth’s Companion*. See “Pledge of Allegiance & God,” available at *About Agnosticism/Atheism*, <http://atheism.about.com/libraryFAQs/cs/blsm_gov_pledge.htm>.
4. 4 U.S.C. §4 (2004).
5. See *H.R. Rep. No. 83-1693*, at 1–2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339; Steven Epstein, “Rethinking the Constitutionality of Ceremonial Deism,” *Columbia Law Review* 96 (1996): 2118–21.
6. See “Pledge of Allegiance & God.”
7. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
8. *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616 (E.D. Penn. 2003), *aff’d*, 381 F.3d 172 (3d Cir. 2004).
9. *Holloman v. Allred*, 370 F.3d 1252 (11th Cir. 2004). The student also alleged that the teacher encouraged students to pray during the moment of

silence in violation of the Establishment Clause, and this claim was allowed to proceed against the teacher and the school board.

10. *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 447–48 (7th Cir. 1992).

11. *Id.* at 447 (citing *Lynch v. Donnelly*, 465 U.S. 668, 716 [1984]).

12. Jennifer Piscatelli, “Pledge of Allegiance,” *StateNotes: Character/Citizenship Education*. Denver: Education Commission of the States (August 2003).

13. *Myers v. Loudoun County Sch. Bd.*, 251 F.Supp. 2d 1262, 1268–72 (E.D. Va. 2003).

14. *Newdow v. U.S. Congress*, 292 F.3d 597, 607–11 (9th Cir. 2002), *judgment stayed*, No. 00-16423, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002), *opinion amended and superseded by* 328 F.3d 466 (2003), *rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004).

9. *Newdow*, 292 F.3d at 608–09 (citing *Lee v. Weisman*, 505 U.S. 577, 592–93 [1992]).

16. *Newdow*, 328 F.3d 466, 468 (9th Cir. 2003). The panel voted unanimously to deny petitions for rehearing, and the request for reconsideration by the full court did not receive a majority of votes from the twenty-four active Ninth Circuit judges.

17. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301 (2004). Justice Scalia excused himself from the deliberations and decision because he had criticized the Ninth Circuit’s decision.

18. *Id.*, 124 S.Ct. at 2311.

19. *Id.* at 2312 (Rehnquist, C.J., concurring in judgment); *id.* at 2321 (O’Connor, J., concurring in judgment); *id.* at 2327 (Thomas, J., concurring in judgment).

20. *Id.*

21. Oral arguments before the U.S. Supreme Court in *Elk Grove Unified Sch. Dist. v. Newdow*, No. 02-1624 (March 24, 2004).

22. *Elk Grove*, 124 S.Ct. at 2328 (Thomas, J., concurring in judgment). See *Lee v. Weisman*, 505 U.S. 577 (1992).

23. *Id.*, 124 S.Ct. at 2329.

24. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

25. S. Res. 292, 107th Cong., 148 *Cong. Rec.* S6105 (daily ed. June 27, 2002); H. Res. 459, 107th Cong., 148 *Cong. Rec.* H4125 (daily ed. June 28, 2002).

26. Charles G. Warren, “No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court’s Establishment Clause Jurisprudence,” *Mercer Law Review* 54 (2003): 1686.

27. See Michael Newdow, “Pledging Allegiance to My Daughter,” *New York Times*, op-ed contributor (June 21, 2004).

28. Such proposals to amend the Constitution to authorize prayers in public schools have been offered on a regular basis since the Supreme Court barred daily prayer and Bible reading from public schools in the early 1960s.

29. See *Abington Township v. Schempp*, 374 U.S. 203 (1963).

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