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*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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On April 17, 1952, with the U.S. nearly two years into the bloody “police action” against the “Godless Communists” in Korea and Tailgunner Joe McCarthy at the height of his foaming and fulminating power in the Senate, President Truman signed into law a bill requiring presidents to exhort Americans to do the one thing the First Amendment seems most emphatic the federal government should never ask citizens to do—pray. The law establishing the National Day of Prayer was the result of a mass effort of evangelical Christians, such as Billy Graham, who rallied support for it during one of his “crusades,” to use the organs of government and the bully pulpit of the presidency to aid them in their effort to further Christianize the nation. After a push by the doddering Senator Strom Thurmond from South Carolina, who for decades expressed a uniquely southern zeal for God matched only by his uniquely southern zeal for racial segregation, the law was amended in 1988 so that the National Day of Prayer would be fixed on the first Thursday of every May. It has since become a jealously guarded and zealously promoted evangelical holiday of the politically active Christian right, who use it to perpetuate the false and self-serving narrative that a nation whose founding documents were drafted largely by Enlightenment-era skeptics and deists was actually designed by a council of holy men to be an Augustinian City of God. Tony Perkins, President of the theo-reactionary Family Research Council, inhabited this role as it is typically played during a segment on the National Day of Prayer on CNN’s *Anderson Cooper 360°* in 2010, citing the supposed “Christian orientation” of America’s founders and enlisting James Madison, the author of the Virginia Statute for Religious Freedom and one of history’s great advocates of separating church from state, to his cause.¹

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Gail Schnitzer Eisenberg

TURN TO THE CONSTITUTION
IN PRAYER: *FREEDOM FROM
RELIGION FOUNDATION V. OBAMA*, THE
CONSTITUTIONALITY AND THE POLITICS
OF THE NATIONAL DAY OF PRAYER

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion.”¹ The underlying goal of the Establishment Clause is to maintain government “neutrality” in matters concerning religion.² Therefore, “government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.”³

By statute, first enacted in 1952 and amended in 1988, the federal government has designated the first Thursday of every May as the “National Day of Prayer.”⁴ On that day, the President issues a commemorative proclamation that “the people of the United States may turn to God in prayer and meditation at churches, in groups and as individuals.”⁵ Though the National Day of Prayer has been on the books for many years, the controversy surrounding the statute was reinvigorated during the Bush Administration.⁶ Each year of his presidency, President Bush hosted an ecumenical service in the East Room of the White House.⁷ Under George W. Bush, “the day was a political event, confirming a conviction that religion was a core tenant of Republican politics.”⁸

The United States District Court for the Western District of Wisconsin struck down the law in April 2010 and issued an injunction against further enforcement, finding that the National Day of Prayer violates the Establishment Clause of the U.S. Constitution.⁹ The district court judge stayed her judgment until the appeals process was exhausted.¹⁰ Nevertheless, the Obama administration issued a statement that they would not have obeyed the injunction.¹¹ Though the Obama administration has not held a White House National Day of Prayer event like the Bush administration, the administration issued a National Day of Prayer proclamation both in 2010¹² and 2011.¹³

The appeal garnered much attention from religious groups,¹⁴ non-profit organizations,¹⁵ and politicians.¹⁶ In fact, Rep. Lamar Smith of Texas and

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Rep. Todd Tiahrt of Kansas introduced two separate resolutions in the House of Representatives April 20, 2010. Smith's resolution proclaimed "that it is the sense of the House of Representatives that the National Day of Prayer is constitutional and a needed tribute to the value of prayer and a fitting acknowledgement of our Nation's religious history."¹⁷ Tiahrt's resolution also called on Attorney General Eric Holder to appeal the Wisconsin decision.¹⁸ The National Day of Prayer Task Force responded to the district court decision by launching a "Save the National Day of Prayer" campaign.¹⁹ May 5, 2011 marked the sixtieth anniversary of the National Day of Prayer.²⁰

Such interest was understandable, as the debate raises multiple constitutional issues. First, the district court decision challenges the limits of religion-laden ceremony and acknowledgements of religion. Second, the Obama Administration's decision touches on separation of powers issues in its decision to continue issuing National Day of Prayer Proclamations. Finally, the district court's decision conflicts with dicta in *Lynch v. Donnelly*, in which the Supreme Court included the National Day of Prayer on a list of permissible recognitions of religion.²¹

The Seventh Circuit's opinion, however, touched on none of these concerns. Instead, the court held that the Freedom from Religion Foundation members lacked standing to sue.²² In so holding, the Seventh Circuit avoided distinguishing the National Day of Prayer from permissible ceremonial deism and acknowledgements of prayer. Given the decision, it is difficult to imagine a situation in which the legislation can be challenged in court.

This article argues that, had the Seventh Circuit found the FFRF had standing to sue, the court should have found the National Day of Prayer an impermissible form of state religious action. Were they so inclined, this leaves opponents of the National Day of Prayer with two choices: (1) find a plaintiff with standing or (2) lobby to change the law. Neither option will be easy, but action is necessary. The longer the National Day of Prayer remains law, the longer this country sends a message of religious establishment and exclusion of the non-religious to our citizens.

I. The National Day of Prayer: Recent Advent, Deep Roots

The National Day of Prayer in its current incarnation was established on April 17, 1952 by unanimous vote of both houses of Congress.²³ With President Harry Truman's signature,²⁴ the government officially memorialized another chapter in recognition and endorsement of Christian evangelism.

Religious leaders were instrumental in promoting the legislation from the beginning, most notably evangelist Billy Graham.²⁵ In fact, Graham waged

a six week prayer campaign in Washington, D.C. prior to the bill's introduction.²⁶ The campaign included an evangelical sermon delivered from the east steps of the Capitol Building calling on Congress to establish an official national day of prayer on which the President would deliver a proclamation thereof.²⁷ A resolution doing just that was introduced the next day.²⁸ When the bill was introduced in the House, Rep. Percy Priest noted that it was to "embody the suggestions made on the steps of the Capitol by the great spiritual leader, Billy Graham."²⁹

The National Day of Prayer enacting legislation was passed against a backdrop of McCarthyism³⁰ and the Second Red Scare.³¹ The communists were "godless."³² Thus, Americans distinguished themselves from their foe by their godliness.³³ "American religiosity tempered and shaped American anti-communism, creating the pervasive sentiment that the United States engaged in a religious battle with a religious foe, rather than a political battle with a collectivist answer to capitalism."³⁴ In such a stressful atmosphere, no legislator would vote against a bill featuring God without expecting to be called in before McCarthy's Senate Government Operations Committee or the House Un-American Activities Committee.³⁵ Sponsors even noted the importance of turning to God as a way to combat the atheist forces of Communism during the legislative debates.³⁶ Though statements of sponsors are not dispositive, they do allude to the legislative purpose.³⁷

The text of the Senate resolution is also instructive in identifying the legislative purpose:

Whereas this Nation is facing serious problems in Korea and elsewhere in the world because of the challenge of communism to religious freedom and the fundamental tenets of democracy, which are based on faith in God and the teachings of His Holy Word; and

Whereas a vast throng of consecrated men and women will on the afternoon of Sunday, February 17, assemble at the Washington Monument, which was erected by a grateful people in honor of the Father of Our Country, to offer prayers that God may guide and protect our Nation and preserve the peace of the world; and

Whereas ministers of the District of Columbia of all faiths have petitioned this honorable body to express its interest in a national observance of this day of prayer: Now, therefore, be it Resolved, That it is the sense of the Senate of the United States that it would be timely and appropriate for all the people of the United States to offer up their petitions on Sunday, February 17, 1952, in the spirit of those Founding Fathers who, in declaring their independence from a foreign ruler, stated their "firm reliance on the protection of the Divine Providence."³⁸

Ultimately, the enacting legislation for the National Day of Prayer would pass both houses of Congress by Joint Resolution.³⁹

In its original form, the President was charged with selecting a day for national prayer each year.⁴⁰ The chosen date fluctuated.⁴¹ This made it difficult for groups to plan ahead for observances. But this did not stop National Day of Prayer observances. The National Day of Prayer Task force claims that the first National Day of Prayer observance organized by the National Prayer Committee took place in 1983 at Constitution Hall in Washington, D.C. Then Vice President George H.W. Bush and Dr. Lloyd Ogilvie spoke.⁴²

The National Prayer Committee and other religious right organizations successfully lobbied for a set date for the National Day of Prayer, which was established in 1988.⁴³ Senator Strom Thurmond introduced the current enacting bill on June 17, 1987.⁴⁴ The bill received broad bi-partisan support.⁴⁵ The new version called on the President to

set aside and proclaim the first Thursday in May in each year as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, in groups, and as individuals.⁴⁶

The amended National Day of Prayer enacting bill passed the Senate April 22, 1988 and the House⁴⁷ May 2, 1988, both by a voice vote.⁴⁸ The main purpose for the amendment was to “assist private organizers for the Day of Prayer.”⁴⁹

President Ronald Reagan signed the bill into law on May 5, 1988.⁵⁰ He commented that “On our National Day of Prayer, then, we join together as people of many faiths to petition God to show His mercy and His love, to heal our weariness and uphold our hope, that we might live ever mindful of His justice and thankful of his blessing.”⁵¹ Despite his pluralistic sentiments, Reagan made his evangelical affinities known.⁵² Vonette Bright, Pat Boone, Susan Sorensen, and Dr. Jerry C. Nims from the National Prayer Committee were among those present at the signing.⁵³

Every President since has issued a proclamation in recognition of the National Day of Prayer.⁵⁴ In doing so, other presidents have echoed Reagan’s conception of the National Day of Prayer as a multi-faith event.⁵⁵ Presidents, however, do not reference agnostics, atheists, or adherents to religions without an individual God who listens to prayer. In fact, not one proclamation has encouraged Americans to “meditate” in accordance with the statute’s dual proscription.⁵⁶ President Obama’s 2011 proclamation comes the closest.⁵⁷

The Fiftieth anniversary of the National Day of Prayer in 2001 was marked with approximately 40,000 events across the country, attended by an estimated

2.5 million people.⁵⁸ National Day of Prayer programs have included prayer breakfasts⁵⁹ or luncheons, Bible reading marathons, band and choir concerts of prayer, rallies, church prayer vigils and services, student flagpole gatherings, daytime prayer walks and observances held in sports stadiums.⁶⁰ Though widely supported by both the public⁶¹ and state officials,⁶² the National Day of Prayer has not been without debate and protest. The use of public and governmental buildings and tax money⁶³ for National Day of Prayer events has been particularly controversial.⁶⁴

As discussed below, The National Day of Prayer Task Force is the driving force behind most observances.⁶⁵ Still, many groups representing interfaith, various faith groups, and even atheist groups, have organized public events on the National Day of Prayer.⁶⁶ Some events are inclusive, inviting many faith communities and even communities of non-believers.⁶⁷ However, National Day of Prayer Task Force programs are generally only for evangelical Christians.⁶⁸

In 2003, various humanist, agnostic, atheist and other secular groups began observing the National Day of Reason slated for the first Thursday in May just like the National Day of Prayer.⁶⁹ “The Day of Reason ... exists to inspire the secular community to be visible and active on this day to set the right example for how to affect positive change ... The important message is to provide a positive, useful, constitutional alternative to the exclusionary National Day of Prayer.”⁷⁰

Supporters of the National Day of Prayer attempt to trace its history beyond the 1952 enacting legislation to distinct national days of prayer⁷¹ and public encouragements of prayer.⁷² Though the National Day of Prayer in its modern form began pursuant to statute in 1952, there were other national prayer days in our nation’s history.⁷³ Most such cases, however, were in reaction to particular events of national stress such as the Revolutionary War, Civil War,⁷⁴ and World War II.

The first day of prayer was as early as 1775 when the Continental Congress “designated a time for prayer in forming a new nation.”⁷⁵ The “Treaty of Paris officially ended the long, weary Revolutionary War during which a National Day of Prayer had been proclaimed every spring for eight years.”⁷⁶

Controversy surrounding such days is almost as old. Thomas Jefferson and James Madison, the architects of the First Amendment’s religion clauses, have both weighed in against national prayer days. After Thomas Jefferson was elected President of the United States in 1800, religious groups came to him suggesting a national day of fasting and prayer to help the nation recover from the strenuous election. Jefferson’s response has become legend:

Believing with you that religion is a matter which lies solely between man and his God, that he owes to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with solemn reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus *building a wall of separation between Church and State*.⁷⁷

The proper height and strength of that wall has remained controversial.⁷⁸ One thing is clear; the wall is short enough to allow some government involvement with religion and affiliated practice.⁷⁹

James Madison also expressed his concerns that national days of prayer did not pass Constitutional muster. In the 1817 “Detached Memoranda,” Madison noted that national days of prayer “seem to imply and certainly nourish the erroneous idea of a national religion.”⁸⁰ A national religion would clearly violate the Establishment Clause.

A. National Day of Prayer Task Force and the modern NDP

In 1974, the National Prayer Committee was founded as a subcommittee on prayer at the International Congress on World Evangelization in Lausanne, Switzerland.⁸¹ In 1987, the Committee incorporated as a not-for-profit organization.⁸² From the beginning, the Committee integrated leaders from other religious right organizations like Campus Crusade for Christ, Religious Heritage for America, and World Vision.⁸³ By 1981, the Committee had begun envisioning the present-day National Day of Prayer and made contacts with the Public Liaison office of the White House.⁸⁴ In fact, it was the National Prayer Committee’s Vonette Bright who contacted Sen. Strom Thurmond regarding the drafting of the 1988 enacting legislation fixing the National Day of Prayer at its current date in order to facilitate their efforts.⁸⁵

Once the 1988 bill had passed, the National Prayer Task Force founded the “Official Task Force” which was tasked with organizing events across the country in observance of the National Day of Prayer “conforming with the Judeo Christian system of values.”⁸⁶ In 1991, Shirley Dobson became the Chairperson of the National Day of Prayer Task Force and remains in that position today.⁸⁷

The National Day of Prayer Task Force was created to “communicate with every individual the need for personal repentance and prayer, mobilizing the Christian community to intercede for America and its leadership in the seven centers of power: Government, Military, Media, Business, Education, Church and Family.”⁸⁸ The Task Force is a privately-funded group that organizes thousands of events across the country in celebration of the National Day of Prayer.⁸⁹ In order to facilitate such activities, the Task force appoints an

honorary chair⁹⁰ each year and formulates an annual theme inspired by the Christian Scriptures.⁹¹ The Task Force chairperson, Shirley Dobson, writes to each state governor each year to request a prayer proclamation.⁹² The letter includes a reference to the year's theme and accompanying scriptural reference.⁹³ Usually the governors of all fifty states issue the proclamation as requested, many referencing the "official" theme and/or supporting Christian scripture.⁹⁴ Governors may not have the political choice not to issue the prayer proclamation.⁹⁵ For instance, when then New York Governor Elliot Spitzer refused to issue a National Day of Prayer Proclamation, James Dobson's Focus on the Family sent out an email blast asking his supporters to berate Gov. Spitzer until he acquiesced to the Task Force request.⁹⁶ The e-mail played on members' emotions and, as some Jewish organizations have noted, anti-Semitism.⁹⁷ The campaign worked; on April 30, 2007, Gov. Spitzer signed a National Day of Prayer Proclamation.⁹⁸

Many Task Force events take place in public and government buildings.⁹⁹ In fact, each state is supposed to have a NDP Task Force Capital Coordinator tasked with organizing events at their respective state capital.¹⁰⁰ According to the Task Force, "[t]he most visible gathering has been held historically at our nation's Capitol in Washington, D.C. on the first Thursday of May. The executive, legislative, and judicial branches of government are represented, as well as the military."¹⁰¹ Under President George W. Bush, Ronald Reagan, and George H.W. Bush, Task Force events even took place in the White House.¹⁰²

The task force specifically and unapologetically espouses a Christian vision of the National Day of Prayer while claiming theirs to be a "Judeo-Christian expression."¹⁰³ In their "Official Policy Statement on Participation of Non-Judeo-Christian Groups in the National Day of Prayer," the Task force encourages those who disagree with them theologically and philosophically to organize and participate in other events "consistent with their own beliefs."¹⁰⁴ They claim that Congress intended "not that every faith and creed would be homogenized, but that all who sought to pray for this nation would be encouraged to do so in any way deemed appropriate."¹⁰⁵

In order to volunteer to serve as a NDP Task Force Coordinator, one is required to "indicate their acceptance of the Lausanne Covenant," a 1974 declaration of evangelical Christianity.¹⁰⁶ Coordinators are then instructed to plan events that are church sponsored in conjunction with local government leaders.¹⁰⁷

B. Why Separate Church and State?

The American Constitution reflects many Enlightenment ideals.¹⁰⁸ The First Amendment's religion clauses were particularly inspired by natural law,

social contract, freedom of conscience, and deist philosophies. The drafters were heavily influenced by the writings of John Locke.¹⁰⁹

Locke is credited with originating the separation of church and state philosophy.¹¹⁰ The separation serves a number of functions as explained in Locke's *A Letter Concerning Toleration*. For one, it avoids "[c]ontroversies between those that have, or at least pretend to have, on the one side, a Concernment for the Interest of Mens Souls, and on the other side, a Care for the Commonwealth."¹¹¹ Further, the separation serves institutional competence concerns. The Commonwealth is organized to "preserve Life, Liberty, Health and Idolency of the Body; and the Possession of outward things" while the church is organized to save souls.¹¹² Third, the separation recognizes the personal nature of faith and salvation, allowing individuals to practice religion as reflected by their inner convictions rather than governmental sanction.¹¹³ This rationale is also explored in Locke's writings on conscience and social contract.¹¹⁴ Fourth, the separation "insulate[s] politics from the imperialistic impulses of the churches."¹¹⁵ Locke himself had observed the turmoil caused when this impulse is acted upon.¹¹⁶ Importantly, Locke did not call for a secular state. In fact, he considered "teaching, admonishing and persuading" citizens as to the truth of a faith legitimate.¹¹⁷

Our founding fathers were further inspired to craft the First Amendment in response to religious establishment in England.¹¹⁸ For instance, English "establishment had been characterized by public endowment for the clergy of the Church of England. The presence of its prelates in the legislature, plus coercive power in the ecclesiastical courts."¹¹⁹ Under the British Test Act, those who did not take an oath of allegiance and supremacy to the Church of England, deny transubstantiation, and receive the sacraments of the Church of England were fined and disqualified from office. Under the Conventicle Act, those who prayed in non-Anglican groups could be imprisoned.¹²⁰ Thus, the framers envisioned an America where Congress could not establish a formal and legal union with any church, religion or sect; an America where no church, religion or sect would be given a preferential status; an America where Congress could not interfere with an individual's religious convictions.¹²¹

The First Amendment's religion clauses were an attempt to enshrine that vision so it might become reality. That does not mean, however, that America has always lived up to that vision. Indeed, the drafters of the First Amendment, as well as the founding generation, favored government actions that would, and should, be considered religious establishment under today's Establishment Clause jurisprudence.¹²² Our framers would likely not recognize the Bill of Rights as it is now interpreted. Still, they crafted

for this country a Constitution, a document meant to govern this nation as she grows and changes with time.¹²³ The separation of church and state was radical when proposed by John Locke.¹²⁴

II. Freedom from Religion Foundation, Inc. v. Obama

The suit was brought by the Freedom from Religion Foundation (FFRF), a Wisconsin organization devoted to “promot[ing] the constitutional principle of separation of church and state.”¹²⁵ The Foundation primarily utilizes the courts to this end.¹²⁶ “The national Foundation has brought more than 40 First Amendment lawsuits since 1977, and keeps several Establishment law challenges in the courts at all times.”¹²⁷

Originally, FFRF named President Bush, White House Press Secretary Dana Perino, Wisconsin Governor Jim Doyle and National Day of Prayer Task Force Chairman Shirley Dobson as defendants.¹²⁸ The complaint was amended February 10, 2009 in consideration of the changed administration, replacing President Bush with President Barack Obama and White House Press Secretary Perino with Robert Gibbs as defendants.¹²⁹

A. Standing Controversy

As a preliminary matter, the district court held that FFRF had standing to challenge the National Day of Prayer because its injury, “feeling of unwelcomeness and exclusion” was sufficiently concrete, particularized, and redressible.¹³⁰

To have standing, the plaintiff must allege: (1) that he has suffered an injury in fact; (2) that is fairly traceable to the action of the defendant; and (3) that will likely be redressed with a favorable decision.¹³¹ “To allege adequately an injury in fact, a plaintiff must show ‘an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.’”¹³² As the Seventh Circuit held in *Doe v. County of Montgomery*, “Direct and unwelcome exposure to a religious message,” in that case to a religiously themed sign above the entrance to a court house, is considered a sufficiently actual, concrete and particularized injury in the Seventh Circuit.¹³³

FFRF and its members had standing to sue to enjoin the enforcement of the National Day of Prayer because, similar to the plaintiffs in *Books*, its members came into direct and unwelcome conduct with the religious message of the National Day of Prayer in their attempts to be well-informed, active citizens. In fact, many of the plaintiffs in this case noted that they learned of the National Day of Prayer through press coverage or some sort of White House publication.

Unlike the plaintiffs in *Montgomery* or *Books* who had to physically pass by the religious message, the FFRF did not have to physically come into contact with the message. Despite that, the district court noted, “they are confronted with the government’s message and affected by it just as strongly as someone who views a religious monument or sits through a ‘moment of silence,’ if not more.”¹³⁴ Because the first Thursday in May is the National Day of Prayer, there is no way for FFRF members to avoid the government’s religious message.¹³⁵ After all, the National Day of Prayer and its associated Presidential proclamations and events are meant to serve as a “national message intended to reach all Americans.”¹³⁶ In addition, the religious message is traceable to the government in that it stems from federal legislation.¹³⁷ Finally, an injunction would cure the plaintiffs’ injuries because FFRF members would no longer be directly exposed against their will to a National Day of Prayer. Thus, FFRF, as a representative of all its members, had standing to pursue this claim.¹³⁸

Although the FFRF challenged more than the National Day of Prayer, including the actions of the National Day of Prayer Task Force and Presidential Prayer Proclamations generally, only the constitutionality of the federal law was decided on the merits.¹³⁹ The district court found that the plaintiffs had not alleged that Shirley Dobson of the National Day of Prayer Task Force had injured them and therefore dismissed the case against her.¹⁴⁰ The court also dismissed any claim challenging Presidential prayer proclamations generally because FFRF did not allege sufficient injury as all persons who had read or heard such proclamations expressly sought them out.¹⁴¹ Thus, the injury was self-imposed and not attributable to the tested government action, the Presidential prayer proclamations.¹⁴² But the court distinguished such general proclamations from that found within the language of the statute.¹⁴³ The court reasoned, “with respect to plaintiffs’ challenge to the National Day of Prayer itself, ignorance of the language in the proclamations is not a barrier to standing because plaintiffs are harmed any time they know that the President has enforced the statute by proclaiming the National Day of Prayer.”¹⁴⁴

B. District Court’s Reasoning on the Merits

In holding that the National Day of Prayer was unconstitutional, the court applied the *Lemon* Test which directs the court to analyze the purpose and the effects of the government action to ensure that the government would not be viewed by the reasonable observer as endorsing religion.¹⁴⁵ The *Lemon* Test requires a government action to satisfy three requirements: (i) it must have a “secular legislative purpose”; (ii) its primary effect must neither “advance nor inhibit” religion; and (iii) it must not create “excessive government entanglement” in religious matters.¹⁴⁶

Relying on the legislative history of the National Day of Prayer,¹⁴⁷ the court reasoned that the law had the effect of endorsing religion because prayer is a particularly religious practice.¹⁴⁸ The court found the law in conflict with the Establishment Clause because the National Day of Prayer could not be considered a valid accommodation or acknowledgement of religion and had the effect and purpose of endorsing religion.¹⁴⁹

It is important to note that the Wisconsin decision was limited to the unconstitutionality of the National Day of Prayer enacting legislation. The court did not address the constitutionality of the Presidential proclamations in recognition of the National Day of Prayer.¹⁵⁰

C. Seventh Circuit's Reasoning

The Seventh Circuit Court of Appeals never decided whether the National Day of Prayer was unconstitutional. Instead, the court found that the plaintiffs lacked standing because “neither the statute nor the President’s implementing proclamations injures” them.¹⁵¹ The court thus vacated the district court’s judgment and remanded the case for dismissal.¹⁵²

The court began its analysis by noting that Section 119 imposes no duties on members of the general public.¹⁵³ Only the President must proclaim the National Day of Prayer. The public need not take any action in response to such proclamations. “If anyone suffers injury, therefore, that person is the President, who is not complaining.”¹⁵⁴ Since “[n]o one has standing to object to a statute that imposes duties on strangers,”¹⁵⁵ and the plaintiffs did not suffer an invasion of their own rights, FFRF lacked standing to challenge the National Day of Prayer legislation.

According to the court, the plaintiffs are not injured by the prayer proclamations because they are addressed to Americans as a whole and constitute a mere request that citizens turn to God in prayer.¹⁵⁶ “No one is obliged to pray, any more than a person would be obliged to hand over his money if the President asked all citizens to support the Red Cross and other charities.”¹⁵⁷ The individual citizen need not like what the President requests. In such cases, he can simply decline.¹⁵⁸ The court suggests that “[t]hose who do not agree with a President’s statement may speak in opposition to it.”¹⁵⁹

Recall that the district court had found the FFRF’s feeling of unwelcomeness and exclusion were sufficient to impart standing.¹⁶⁰ The Seventh Circuit discounted such injuries both specifically and generally. Chief Judge Easterbrook, writing for the court, thought it “difficult to see how any reader of the 2010 proclamation would feel excluded or unwelcome.”¹⁶¹ Judge Easterbrook then supposes that the plaintiffs do in fact feel “slighted”, but claims

that “hurt feelings differ from legal injury.”¹⁶² In support of this proposition Easterbrook cites *United States v. SCRAP*¹⁶³ and *Newdow*.¹⁶⁴ Neither case supports his sweeping proposition that “hurt feelings differ from legal injury.”

While the *SCRAP* court does note that the judicial process is not meant to be a “vehicle for the vindication of the value interests of concerned bystanders,”¹⁶⁵ it does so in distinguishing *SCRAP* from *Sierra Club v. Morton*.¹⁶⁶ In *Sierra Club*, the Court held the organization lacked standing because the club failed to allege it was injured itself.¹⁶⁷ Instead, the club alleged an injury to the public-at-large.¹⁶⁸ The Court emphasized that it was not the fact that the interests injured were shared by many that defeated standing,¹⁶⁹ it was the fact that the Sierra Club had not alleged a particularized injury.¹⁷⁰ The club’s longstanding interest in environmental issues was considered insufficient to impart standing.¹⁷¹ In contrast, the organization in *SCRAP* had standing because they alleged specific harm as users of the natural resources they claimed affected by the challenged regulations.¹⁷² Like the plaintiffs in *SCRAPP*, FFRF is here alleging a particular injury, feelings of exclusion, that distinguish them from the public-at-large.

It is true that the Court held that the plaintiff in *Newdow*, the father of a student forced to say the Pledge of Allegiance, lacked standing to challenge the words “under God” in our nation’s pledge.¹⁷³ In that case, the father challenged the phrase based on his relationship as an affected student’s noncustodial father, not as next friend for the daughter.¹⁷⁴ The Court refused to entertain the father’s claim given its prudential standing doctrine that customarily leads the Court to decline to review domestic relations cases.¹⁷⁵ The court never reached the question of whether “hurt feelings” could constitute injury in fact.

The Seventh Circuit went on to distinguish its cases conferring standing on forced observers of religious displays on public property.¹⁷⁶ In those cases, the court argued, the plaintiffs had altered their daily commute and thus incurred actual costs to avoid the religious display.¹⁷⁷ It was not enough that a plaintiff was offended by the display.¹⁷⁸ Since FFRF members have not altered their conduct in reaction to the National Day of Prayer, the Seventh Circuit found their reliance on the observers’ standing cases misguided.¹⁷⁹ The Seventh Circuit conveniently disregarded cases in which they had previously found standing where there was no change in the plaintiff’s behavior.¹⁸⁰ As the district court had noted in those cases, the “only possible injury was the emotional distress caused by being confronted with a government endorsement of religion.”¹⁸¹ The Seventh Circuit’s only attempt at a response was to note that many of the decisions cited were decided before *Newdow* and the one decided after it, *Books II*, did not mention *Newdow*.¹⁸² It is unclear why

the *Newdow* Court's refusal to find a justifiable federal controversy due to its unwillingness to address domestic relations issues, would have changed the analysis much in these cases.

Even though the district court was clear in its opinion invalidating the National Day of Prayer enacting legislation that it was not expressing an opinion as to the constitutionality of the Presidential proclamations in recognition of the National Day of Prayer, the Seventh Circuit spent a number of paragraphs discussing the proclamations.¹⁸³ In fact, the court never addresses the district court's holding that the National Day of Prayer *itself* was unconstitutional. Instead, the court noted that the President frequently makes requests of its citizens or his supporters or references God in speeches.¹⁸⁴ This was not a case about the President's First Amendment rights but about the First Amendment rights of American citizens to be free from established religion.

It was of no consequence to the court that their ruling might mean no one has standing to challenge the National Day of Prayer.¹⁸⁵ In fact, it is unlikely given the Seventh Circuit's opinion that anyone other than the President will have standing to challenge the statute.

III. Turning to the Constitution in Prayer

Given the Seventh Circuit's opinion that the FFRF lacked standing and that there may well be no one with standing to challenge the National Day of Prayer, it is even more important to address the constitutionality of the enabling statute here since it is unlikely that any court will do so. Part A of this section will discuss the Supreme Court's Establishment Clause jurisprudence including the *Lemon* test, the coercion test, and the endorsement test. Part B will argue that the National Day of Prayer fails the *Lemon* test, the primary Establishment Clause test. Parts C and D will then distinguish the National Day of Prayer from permissible ceremonial deism and acknowledgements of religion respectively. Since the National Day of Prayer does not fall into either exception, the statute violates the Establishment Clause of the First Amendment and should be removed from our statute books.

A. Overview of Establishment Clause Jurisprudence

The *Lemon* test was modified by the Supreme Court's 1997 decision in *Agostini v. Felton*, which combined the last two requirements in favor of a two-prong analysis of (i) the purpose of the government action, and (ii) the effects of that action.¹⁸⁶ The *Agostini* decision also offered three criteria that can be used to determine the effects of a government action: (i) government indoctrination, (ii) choosing recipients of government funds or benefits based on religion, and (iii) excessive entanglement with religion.¹⁸⁷ However, the

Court stressed that “the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed.”¹⁸⁸

A distinct “coercion test” has developed alongside *Lemon*. The coercion test provides that the government only violates the Establishment Clause when (i) aid provided for religion tends to lead to the establishment of one church or (ii) actions coerce people to support religion or participate in religious activities.¹⁸⁹ The Supreme Court employed this test to find that a prayer at a high school graduation violated the Establishment Clause because of the “coercive pressure in the elementary and public schools” to conform and the fact that students were in effect compelled to attend.¹⁹⁰

Finally, Justice O’Connor offered an “endorsement test,” which strikes down government actions that create a “perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion.”¹⁹¹ Under this test, if a government action makes religious minorities feel like outsiders while favoring other members of the political community because they belong to the religious majority, then the Establishment Clause would be violated.¹⁹² Courts have found that the import of the “endorsement test” is the same as the *Lemon* test, as both analyze whether the action has the primary effect of advancing or inhibiting religion.¹⁹³ Of the three tests, the *Lemon* test is the predominant test and “remains the law of the land.”¹⁹⁴ Most jurisdictions, including the Seventh Circuit, still recognize that the *Lemon Test* “as refined by Supreme Court precedent” as controlling their Establishment Clause analysis.¹⁹⁵

The Supreme Court, however, has “repeatedly emphasized [their] unwillingness to be confined to any single test or criterion in this sensitive area.”¹⁹⁶ In fact, a number of Supreme Court cases discuss the weighing of several factors including the nature of the alleged establishment,¹⁹⁷ whether the practice is deeply rooted in national history and ubiquity,¹⁹⁸ whether the practice coerces citizens to participate in religion¹⁹⁹ or divides them,²⁰⁰ and whether the seeming religious establishment was merely a permissible acknowledgement²⁰¹ or accommodation of religion.²⁰² Many of these factors can be said to go to the questioned practice’s effect or purpose.

B. The National Day of Prayer is a Lemon

The National Day of Prayer fails under the first prong of the *Lemon* Test because the National Day of Prayer was established solely for religious purposes. As the *Lemon* Court noted, a permissible government religious action must have a “secular legislative purpose.”²⁰³ A legislative purpose is unconstitutional under *Lemon* if an objective observer would view the

government's actual purpose as endorsing or advancing religion given the totality of the circumstances.²⁰⁴

For example, in *Books*, the Seventh Circuit found that, although the Ten Commandments can be "stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document." Under the circumstances, the purpose of a display of the Ten Commandments on the lawn in front of a municipal building was "to promote religious ideals."²⁰⁵ In contrast, the Seventh Circuit found that an Indiana law giving its employees a legal holiday for Good Friday did not violate the Establishment Clause because the state had presented evidence of its valid secular purpose for closing that day.²⁰⁶ The court reasoned that the Good Friday closing "serve[d] [the state's] interests as an employer to give generous holidays" especially on days when other Indiana institutions are closed and the majority of its employees would likely take off during a period where there are no other legal holidays.²⁰⁷

As the Good Friday litigation demonstrates, "[a] law that promotes religion may nevertheless be upheld either because of the secular purposes that the law also serves or because the effect of promoting religion is too attenuated to worry about."²⁰⁸ The "Establishment Clause [is] not offended when [a] state law's reason or effect coincides with religious ones."²⁰⁹ The government, however, still has the burden of proving that the law has a secular purpose.²¹⁰ The government lacks a secular purpose only when "there is no question that the statute or activity was motivated wholly by religious considerations."²¹¹

The sole purpose of the National Day of Prayer is to endorse and encourage the religious practice of prayer. First, like the dedication of the Ten Commandments monument invalidated in *Books*, religious leaders were instrumental in promoting the legislation, including evangelist Billy Graham who was pivotal in the introduction of the statute that led to the National Day of Prayer.²¹² As noted above, the bill sponsor Rep. Percy Priest recognized Graham's involvement in the bill's introduction from the House floor.²¹³ Of course, "what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted it."²¹⁴ Sponsor statements, however, can be used to elicit the legislative purpose.²¹⁵ Furthermore, unlike the Ten Commandments, prayer cannot be stripped of its religious significance in this context as discussed below.

The National Day of Prayer similarly fails the second prong of the Lemon test because a reasonable person informed and familiar with the history the statute and the ubiquity of the National Day of Prayer would conclude that the statute amounted to the endorsement of religion given the circumstances.²¹⁶ The mere appearance of government religious endorsement is sufficient to fall under the second prong.

In *Freedom from Religion Foundation v. Marshfield*, the Seventh Circuit held that a reasonable observer with full knowledge of the history of a public park founded to house a Jesus statue would perceive the Jesus statue on a carved-out private parcel to be a city endorsement of religion.²¹⁷ Similarly, in *Santa Fe Independent Public School District v. Doe*, the Court held that an invocation delivered before a football game had the effect of state endorsement of religion because it was “clothed in traditional indicia of school sporting events.”²¹⁸

A reasonable person informed and familiar with the historical association of the National Day of Prayer with Christian evangelism would conclude that it “is a straightforward endorsement of the concept of ‘turn[ing] to God in prayer.’”²¹⁹ Each National Day of Prayer, “the State affirmatively sponsors the particular religious practice of prayer,” and thus offends the Establishment Clause.²²⁰ National Day of Prayer events are often held in public buildings. Encouraging Americans to “turn to God in prayer” while within the walls of our government buildings “necessarily conveys the message of approval or endorsement. Prevailing doctrine condemns such endorsement, even when no private party is taxed or coerced in any way.”²²¹

Furthermore, the National Day of Prayer endorses Christianity specifically as well as religion in general. The government may not “promote or affiliate itself with any religious doctrine or organization.”²²² The National Day of Prayer endorses Christianity by allowing the National Day of Prayer Task Force, a private organization, to speak at National Day of Prayer services at the White House, participate in the drafting of the commemorative Presidential proclamations, and hold itself out as the “official site” of the National Day of Prayer. As noted above, the Task Force encourages specifically Judeo-Christian values and organizes thousands of events in conjunction with the day that exclude other faiths.²²³

That said, the Task Force is a private organization. A law can only fail under the effects prong of *Lemon* if “the government itself has advanced religion through its own activities and influence.”²²⁴ Government endorsement of private religious organizations, however, violate the First Amendment to the same regard as direct State action. For instance, in *Clarke* the Seventh Circuit held that because a Sheriff’s invitation of a Christian group to give presentations at mandatory staff meetings had the appearance of endorsing religion, it violated the Establishment Clause.²²⁵ Further, “[u]nder *Capital Square*, when private religious expression is made at a traditional public forum, the government’s condonation of such expression may be government action endorsing religion, even if the government makes no overt act

in furtherance of religion.”²²⁶ Like the presentations by the Christian Centurions in *Clarke*, the National Day of Prayer Task force’s presentations on an official National Day of Prayer gives, at least, the appearance of endorsement by the federal government. In this case, the government endorses the private religious expression of the Task Force by enforcing the National Day of Prayer, allowing the Task Force to hold observances in the White House and other government buildings, and utilizing their themes in their National Day of Prayer proclamations. By doing so, the government endorses religion.

Such endorsement leads to an impermissible creation of in-group and out-groups.²²⁷ The Supreme Court has cautioned that government “sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.’”²²⁸ In inviting Americans “to turn to God in prayer and meditation at churches, in groups, and as individuals,” the National Day of Prayer statute tells millions of Americans including atheists, agnostics and Buddhists that they are somehow not as American. After all, only those who do turn to God in prayer are following the direction of their Commander-in-Chief. Those who do not are disregarding the leader of the Free World.

A reasonable observer would therefore interpret the National Day of Prayer as a state endorsement of religion given the context in which it is communicated to US citizens, its history, and the integral involvement of Christian organizations.

Thus, if one applies a strict *Lemon* test, the National Day of Prayer clearly tilts to the side of advancing religion and entangling the federal government in religious matters. However, a strict *Lemon* test is unlikely to be applied. Since *Lemon*, two categories of permissible legislative purposes and effects have developed that complicate the Establishment Clause analysis. The following two sections will analyze the National Day of Prayer in relation to these permissible forms of government religious action: Ceremonial Deism²²⁹ and Acknowledgement of Religion.

C. Ceremonial Deism

Ceremonial deism jurisprudence allows the Court to uphold secular references to God in ceremonies that are longstanding and ubiquitous.²³⁰ The theory is that such references have lost their religious meaning in such contexts and have been maintained for some secular purpose,²³¹ like encouraging patriotism or establishing an occasion’s solemnity.²³² They are “interwoven . . . deeply into the fabric of our civil polity.”²³³ As Justice Brennan noted

in his dissent in *Lynch v. Donnelly*, such practices are considered “uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases.”²³⁴ The courts have considered legislative prayer,²³⁵ the Court’s own invocation,²³⁶ the national motto,²³⁷ and the Pledge of Allegiance²³⁸ as examples of ceremonial deism either explicitly or *in dicta*.

Ceremonial Deism has been used by the Seventh Circuit to uphold religious references in the face of First Amendment challenges. In *Sherman v. Community Consolidated School District 21 of Wheeling Township*, the Seventh Circuit upheld the pledge of allegiance, including the phrase “under God,” because it is “a ceremonial reference to God” rather than “a supplication for divine assistance.”²³⁹ The Seventh Circuit went on to note that “everything would be different if it were a prayer or other sign of religious devotion.”²⁴⁰

Prayer is a supplication for divine assistance by definition; thus, its government endorsement is a violation of the Establishment Clause.²⁴¹ In addition, the defendants in *Freedom from Religion Foundation v. Obama* “do not deny that prayer is an inherently religious exercise.”²⁴²

However, prayer in certain contexts has been considered permissible ceremonial deism, especially legislative prayer.²⁴³ In the seminal case, *Marsh v. Chambers*, the Court upheld the Nebraska legislature’s session opening prayer noting that it was merely “ceremonial deism” and had an “unambiguous and unbroken history of more than 200 years.”²⁴⁴ The Court made this determination based on the secularization of prayer in the context of opening a legislative session and its “unique history,” not on the idea that prayer itself is in any way secular.²⁴⁵ In fact, the *Marsh* exception is considered just that, an exception.²⁴⁶ Prayer in other contexts like school football games or middle school is unconstitutional.²⁴⁷ Legislative prayer, the argument goes, solemnizes a legislative session in a way not shared by other instances of public prayer. Such prayer serves a secular purpose.

The National Day of Prayer legislation clearly contemplates an endorsement of religion. The statute explicitly asks the President to encourage Americans to “turn to God in prayer and meditation at churches, in groups and as individuals.”²⁴⁸ The phrase “to God” is modifying the way Americans are to “turn.” Though direct references to God do not always signify an endorsement of religion,²⁴⁹ in this case, a normal grammatical reading of the statute clearly encourages Americans to participate in supplication to God.

On the other hand, the statute does provide for the President to encourage meditation as well as prayer which may be considered secular.²⁵⁰ As the *Van*

Zandt court noted, “meditation may run the gamut from clearly religious phenomena to spiritual exercises having little ‘religious’ content to quiet thought about how things are going.”²⁵¹ However, the resolution in *Van Zandt* did not specify, as the statute here does, that the meditation be directed towards God. In addition, the statute invites Americans to “turn to God in prayer *and* meditation” instead of inviting Americans to turn to God in prayer *or* meditation. This conjunction connotes a compound object rather than a choice. In this case, it is clear from context and grammar that the meditation, unlike that upheld in *Van Zandt*, is meant to mean religious meditation.

Indeed, “meditation” was likely added to the statute as an afterthought. The statute creates a National Day of Prayer, not a National Day of Prayer and Meditation.²⁵² Further, the strong advocacy on the part of fundamentalist Christian groups and strong opposition by Jewish, atheist, and other non-Christian groups discussed in Part I reflects the general understanding that the Day was about prayer rather than nonreligious meditation.

Nevertheless, “none of the parties [in *FFRF v. Obama*] suggest that the inclusion of the phrase ‘or meditation’ has any effect on the establishment clause analysis.”²⁵³ Therefore, it is unlikely that the government could prove that it had an actual secular purpose, ceremonial or otherwise, in passing the National Day of Prayer based on their inclusion of “meditation” in the statute. Unlike “under God,” legislative prayer, or “In God we Trust,” which elicit patriotism and ceremony, the National Day of Prayer elicits solely religious behavior.

D. Acknowledgment of Religion

Acknowledging religion is also considered a valid secular purpose for a seemingly religious government action, especially when it is a part of a larger secular message.²⁵⁴

Unlike ceremonial deism where the Court rationalizes that the religious endorsement has lost its religiosity and is therefore wholly secular, the Court can find a government endorsement of religion a permissible acknowledgment of religion while maintaining the religiosity of the endorsement. In fact, as an exception to the normal *Lemon* analysis, the battle over acknowledgements of religion can be seen as a battle between two completely antithetical perspectives on the role of religion in the public sphere.²⁵⁵ As Justice Scalia has noted:

In the context of public acknowledgements of God there are legitimate competing interests: On the one hand, the interest of the minority in not feeling “excluded;” but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a

people, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.²⁵⁶

It is interesting to note that such “feelings of exclusion” are precisely the injury claimed in *Freedom from Religion Foundation*. The ability to “give God thanks and supplication as a people” was the primary motivation of the National Day of Prayer Task Force in pushing for the 1988 amendment to the enacting legislation.²⁵⁷

The Acknowledgement of Religion doctrine is most often invoked in cases of public religious displays like that of crosses, Christmas trees and Chanukiahs, the Ten Commandments or nativity scenes. The first Supreme Court case to address such displays was *Lynch v. Donnelly*. In *Lynch*, Pawtucket, Rhode Island displayed a Christmas tree, Santa Claus’ house, a nativity scene and a “Season’s Greetings” sign in their shopping district.²⁵⁸ In holding that the nativity scene did not violate the Establishment Clause, the Court noted that there “is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.”²⁵⁹ Thus, Pawtucket had a legitimate secular purpose in displaying the nativity scene given the “context of the Christmas Holiday season.”²⁶⁰ In that context, “the crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”²⁶¹

Notably, the *Lynch* Court included the National Day of Prayer on a list of appropriate government recognitions of religion in that case alongside Jewish Heritage Week, Presidential Christmas and Thanksgiving proclamations, Congressional and military chaplains, funding for art museums featuring art with religious motifs, the national motto and “under God” in the Pledge of Allegiance. The Court, however, has made it clear that that list does not constitute a ruling as to the constitutionality of the National Day of Prayer,²⁶² and the National Day of Prayer has not been included on subsequent similar lists.²⁶³

The National Day of Prayer is not a part of a larger secular message as to our shared history, culture or ideals and thus is not a permissible acknowledgement of religion. The National Day of Prayer stands alone. Though it can be found in the statutes alongside of secular observances like Constitution Day, National Freedom Day and Mothers Day, the religious message communicated to Americans on the first Thursday each May is solely religious: “turn to God in prayer and meditation.”²⁶⁴

However, a court could disagree. After all, there are thousands of NDP observations each year. Many are organized by the Task Force while others involve other Christian groups or other theistic religions including Judaism, Islam, and Sikhism.²⁶⁵ As the Task Force website notes,

This diversity is what Congress intended when it designated the Day of Prayer, not that every faith and creed would be homogenized, but that all who sought to pray for this nation would be encouraged to do so in any way deemed appropriate.²⁶⁶

Such diversity surely speaks to our shared history, culture and ideals in our “melting pot” society.²⁶⁷ As previously noted, however, the vast majority of National Day of Prayer events are organized by the National Day of Prayer Task Force, an evangelical, private organization that is often referred to and refers to themselves as “official.” Outlying events held by other organizations should not impact the analysis as to whether the National Day of Prayer is a permissible acknowledgement of religion.

IV. Conclusion

Ultimately, the National Day of Prayer fails the *Lemon* test and is neither ceremonial deism nor a permissible acknowledgement of religion. Therefore, the law violates the Establishment Clause. But with the Seventh Circuit’s holding that the Freedom from Religion Foundation lacked standing, opponents of the National Day of Prayer will need to (1) find a plaintiff who does have standing or (2) seek the law’s repeal in order to strike the National Day of Prayer from our the U.S. Code.

As to the first option, a plaintiff with standing may be hard to come by. As the Seventh Circuit noted, there may not be any plaintiff with standing to challenge the National Day of Prayer.²⁶⁸ The Seventh Circuit did imply that the President may be the elusive plaintiff that would have standing to challenge the Day.²⁶⁹ However, it is unlikely that a President, with her nation-wide constituency and considerable duties, would challenge the National Day of Prayer herself. It is as impolitic today to oppose the National Day of Prayer as it was to oppose “Under God” in the Pledge of Allegiance or “In God We Trust” as the national motto when they were codified during the Cold War.²⁷⁰

In the alternative, a plaintiff could be sought with clearer observer standing. Under the Seventh Circuit’s observer’s standing doctrine, plaintiffs may have standing to challenge the Day if they “altered their conduct . . . or incurred any cost in time or money.”²⁷¹ Such a plaintiff will be hard to come by, however, since she must not seek out the injury. Perhaps a government official working in a building where a National Day of Prayer Task Force event is taking place during the workday would fit the bill if he felt compelled to miss work to avoid the religious observance. Even then, the Seventh Circuit set the stage in *Freedom from Religion* to revisit observer’s standing in light of *Newdow*.²⁷² They might overturn the doctrine instead of allowing such a plaintiff to challenge the legislation.

Even if a court finds standing, though, the court is likely to try to reconcile the National Day of Prayer with either the ceremonial deism or acknowledgment of religion doctrines in order to maintain its judicial credibility with the people who favor the National Day of Prayer, baseball, and apple pie.

Thus, the more probable way to repeal the National Day of Prayer is to seek legislative action. This too will be no easy task. Perhaps a political official will be inspired to take his oath to defend the Constitution seriously and call for the repeal of National Day of Prayer enacting legislation.²⁷³ Of course, this seems unlikely if the recent vote to reaffirm “In God We Trust” as national motto is any guide.²⁷⁴

In the meantime, the National Day of Prayer will continue to be a source of conflict between church and state, force the government into a religious leadership role for which it is not competent, take the government’s focus away from the general welfare, undermine the personal nature of faith, and feed the imperialistic impulses of a number of religious leaders and the groups they lead. These are precisely the ills Locke wished to alleviate by calling for a separation of church and state—ills surely the framers would not have envisioned at this point in our nation’s growth. Thus, we can only hope the court or Congress turns to the Constitution for the answer rather than continuing to encourage Americans to “turn to God in prayer.”

NOTES

1. U.S. CONST. amend. I.
2. See *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Ark.*, 393 U.S. 97, 104 (1968) (“The touchstone for the court’s analysis . . . is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”)). See Section I. C for additional information on the philosophical underpinnings of the Establishment Clause.
3. *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984).
4. See 36 U.S.C. § 119 (1998).
5. See 36 U.S.C. § 119.
6. Though there were two other documented White House National Day of Prayer events prior to the George W. Bush, even the National Day of Prayer Task Force Vice Chairman, Brian Toon, acknowledged that such events were not regular until George W. Bush took office. Dan Gilgoff, *National Day of Prayer Task Force Knocks Obama White House*, U.S. NEWS, May 4, 2009, <http://politics.usnews.com/news/blogs/god-and-country/2009/05/04/national-day-of-prayer-task-force-knocks-obama-white-house.html>.
7. Johanna Neuman, *No National Day of Prayer Service at White House*, L.A. TIMES, May 8, 2009, <http://articles.latimes.com/2009/may/08/nation/na-prayer8>.

8. *Id.*
9. See U.S. CONST. amend. I; *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1070 (W.D. Wisc. 2010).
10. *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1070 (W.D. Wisc. 2010).
11. The White House issued a statement just hours after the decision was handed down via *Twitter* saying: “As he did last year, President Obama intends to recognize a National Day of Prayer.” See *National Day of Prayer Unconstitutional, Judge Rules*, HUFFINGTON POST, (April 15, 2010, 7:04 PM), <http://www.huffingtonpost.com/2010/04/15/national-day-of-prayer>; *Congress Has No Authority to Tell Americans When and How They Should Pray, Watchdog Group Says*, COMMON DREAMS (Oct. 8, 2010), <http://www.commondreams.org/newswire/2010/10/08-5>.
12. See, *National Day of Prayer Goes on Despite Controversies*, HUFFINGTON POST, (May 6, 2010, 5:20 PM), http://www.huffingtonpost.com/2010/05/06/national-day-of-prayer-20_n_566525.html(updated July 6, 2010). See also President Barak Obama, Presidential Proclamation on the National Day of Prayer (May 6, 2010), in NATIONAL DAY OF PRAYER TASK FORCE, <http://nationaldayofprayer.org/news/2010-presidential-proclamation/> (last visited Oct. 31, 2010).
13. President Barack Obama, 2011 National Day of Prayer Proclamation, (May 5, 2011), in NATIONAL DAY OF PRAYER TASK FORCE, <http://nationaldayofprayer.org/news/2010-presidential-proclamation/2011-proclamation/> (last visited Oct. 16, 2011) (“Now, therefore, I, Barack Obama, President of the United States of America, do hereby proclaim May 5, 2011, as a National Day of Prayer. I invite all citizens of our Nation, as their own faith or conscience directs them, to join me in giving thanks for the many blessings we enjoy, and I ask all people of faith to join me in asking God for guidance, mercy, and protection for our Nation.”).
14. A USA Today/Gallup poll conducted May 1-2, 2010 found that 74 percent of those who considered religion important in their lives favored the National Day of Prayer. Jeffery M. Jones, *Few Americans Oppose National Day of Prayer*, GALLUP POLITICS (May 5, 2010), <http://www.gallup.com/poll/127721/few-americans-oppose-national-day-prayer.aspx>. See also, 60% Support Government-Recognized National Day of Prayer, RASMUSSEN REPORTS (Apr. 23, 2010), http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/april_2010/60_support_government_recognized_national_day_of_prayer (“74% of those who attend church, synagogue or mosque every week or nearly every week support the National Day of Prayer.”).
15. For example, “The American Civil Liberties Union, the Americans Civil Liberties Union of Wisconsin and the Interfaith Alliance Foundation joined Americans United in filing the brief in *Freedom From Religion Foundation v. Obama*.” Press Release, Americans United for Separation of Church and State, *Americans United Urges Appeals Court to Strike Down the National Day of Prayer: Congress Has No Authority to Tell Americans When and How They Should Pray, Watchdog Group Says*, COMMON DREAMS (Oct. 8, 2010), <http://www.commondreams.org/newswire/2010/10/08-5>.
16. For example, “American Center for Justice... filed a brief in the case supporting the law on behalf of 31 members of Congress.” *National Day of Prayer Unconstitutional, Judge Rules*, *supra* note 11. Furthermore, as First Amendment Center scholar Charles Haynes put it, the National Day of Prayer is “like waving a red flag in front of politi-

- cians, and who wants to say we don't support prayer? . . . That's like being against apple pie and motherhood." *Legal Skirmish Colors National Day of Prayer*, HUFFINGTON POST (Apr. 22, 2010, 4:42 pm), http://www.huffingtonpost.com/2010/04/22/legal-skirmish-colors-nat_n_548516.html (updated June 22, 2010).
17. Expressing the Sense of the Congress with respect to the National Day of Prayer, H.R. 1273, 111th Cong. (2010) (referred to the House Committee on Oversight and Government Reform on April 20, 2010, no action since).
 18. Calling for an appeal of the ruling which found the National Day of Prayer to be unconstitutional and expressing the support of the House of Representatives for the institution of an annual National Day of Prayer, H.R. 1279, 111th Cong. (2010) (referred to the House Subcommittee on the Constitution, Civil Rights and Civil Liberties on July 26, 2010, no action since).
 19. *National Day of Prayer Goes on Despite Controversies*, *supra* note 12.
 20. The theme is "A Mighty Fortress is Our God" and is based on the verse from Psalm 91:2, which states: "I will say to the Lord, my refuge and my fortress, my God in whom I trust." *Theme and Verse*, NATIONAL DAY OF PRAYER TASK FORCE, <http://nationaldayofprayer.org/coordinators/theme/> (2011).
 21. *Lynch v. Donnelly*, 465 U.S. 668, 676-78 (1984).
 22. *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011).
 23. *See* National Day of Prayer, Pub. L. No. 324, 66 Stat. 64 (1952) (codified as amended at 36 U.S.C. § 119).
 24. B.A. Robinson, *History of the National Day of Prayer*, RELIGIoustolerance.ORG, http://religioustolerance.org/day_pray2.htm (1999).
 25. For Billy Graham's biography and a sense of his evangelism, *see Billy Graham—Profile*, BILLY GRAHAM EVANGELISTIC ASSOCIATION, http://www.billygraham.org/biographies_show.asp?p=1&d=1 (2011).
 26. Emily Ronald, Research Report, *America's National Day of Prayer*, PLURALISM PROJECT AT HARVARD UNIV. (2006), <http://pluralism.org/reports/view/66>.
 27. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2116 (1996)(citing 98 Cong. Rec. 771(1952)).
 28. 98 Cong. Rec. 771 (1952). The National Day of Prayer Task Force credits Conrad Hilton of Hilton Hotels and Senator Frank Carlson of Kansas with the initiation of the enacting legislation. *National Day of Prayer—Time Line*, NATIONAL DAY OF PRAYER TASK FORCE, <http://nationaldayofprayer.org/about/history/time-line/> (2011) [hereinafter Time Line].
 29. 98 Cong. Rec. 771(1952)(statement of Rep. Priest). But cf. 98 Cong. Rec. 771 at 976 (Rep. Percy Priest called for a proclamation of "a day which members of all faiths and all religions could spend in meditation and prayer").
 30. *See generally*, ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1999).
 31. DAVID CANTOR, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE & PLURALISM IN AMERICA* 59 (Alan M. Schwartz ed., 1994)("In the early post-war years, Presidents Truman and Eisenhower responded to the threats of the Cold War with calls for national spiritual rejuvenation.").

32. This proposition is often bolstered by references to Karl Marx's introduction to *A Contribution to the Critique of Hegel's Philosophy of Right* in which he famously says "religion . . . is the opium of the people." KARL MARX, *CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT'* 131 (Joseph O'Malley ed., 1970). The Religious Kibbutz Movement in Israel, for one, undermines the proposition. In addition, the phrase is subject to various interpretations not all of which lend support to communism being inherently irreligious or anti-religious. See generally Andrew M. McKinnon, *Reading "Opium of the People": Expression, Protest and the Dialectics of Religion*, 31 *CRITICAL SOCIOLOGY* 15, (2005).
33. See Thomas Aiello, *Constructing "Godless Communism": Religion, Politics, and Popular Culture, 1954-1960*, 4 *AMERICANA: JNL. AM. POPULAR CULTURE*, (2005), http://www.americanpopularculture.com/journal/articles/spring_2005/aiello.htm ("Mid-twentieth century America clung to the Manifest Destiny of earlier generations, claiming a superiority and godliness diametrically opposed to Communist claims of superiority and godlessness.").
34. *Id.*
35. *Id.* This era also saw the addition of "Under God" in the Pledge of Allegiance (1954), the addition of "In God We Trust" on coins (1956) and then on paper money (1957) and the adoption of "In God we Trust" as the National Motto (1956); all by Congressional act. B.A. Robinson, *The U.S. National Mottos: Their History and Constitutionality*, RELIGIUSTOLERANCE.ORG, http://www.religioustolerance.org/nat_mott.htm (2000).
36. For instance, Sen. Absalom Robertson stressed the need for a national day of prayer to counteract threats "at home and abroad by the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in the Almighty God on which it is based." 98 Cong. Rec. 976, 976 (1952) (statement of Sen. Robertson). Rep. Brooks asserted that "the national interest would be much better served if we turn aside for a full day to pray for spiritual help and guidance from the Almighty during these turbulent times." 98 Cong. Rec. 771 (1952) (statement of Rep. Brooks). Rep. Rodino referenced international affairs as well in stating that "it is fitting and timely that the people of America, in approaching the Easter season, as God-fearing men and women, devote themselves to a day of prayer in the interests of peace." 98 Cong. Rec. 771, A1770 (1952). Rep. Rodino, however, favored a fixed date for that day of prayer: Good Friday. Interestingly, official recognition of Good Friday as with days off of government work has been more controversial than a separate and distinct National Day of Prayer. Epstein, *supra* note 27, at 2095-96 (calling the public holiday of Good Friday "fringe ceremonial deism while the National Day of Prayer is "core ceremonial deism," the latter being much more generally accepted than the former.)
37. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987). See also *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 249 (1990) ("What is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted it.").
38. S. Res. 276, 82d Cong., 98 Cong. Rec. 977, 66 Stat. 64 (1952)(emphasis added).
39. The text of the original Joint Resolution reads:
Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, "That the President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on

which the people of the United States may turn to God in prayer and meditation in groups, and as individuals.”

National Day of Prayer, Pub. L. No. 324, 66 Stat. 64 (1952).

40. *Id.*
41. Ronald, *supra* note 26 (citing varying dates on which U.S. Presidents had proclaimed the National Day of Prayer).
42. Time Line, *supra* note 28. Dr. Ogilvie would later be elected Chaplain of the United States Senate.
43. *Id.* (The National Day of Prayer Task Force notes that the National Prayer Committee made contacts with the White House Public Liaison Office, the Vice President, and lobbied Sen. Thurmond directly).
44. A bill to provide for setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated, S.B. 1378, 100th Cong. (1987) (enacted).
45. Main bill sponsors included Congressmen Tony Hall (D-Ohio), Carlos Moorhead (R-California), Frank Wolf (R-Virginia), and Bob Garcia (D-New York); and Senators Howard Heflin (D-Alabama), Strom Thurmond (R-South Carolina), and Bill Armstrong (R-Colorado). *Time Line, supra* note 28. The Library of Congress lists more senate co-sponsors including Bob Dole and Dan Quayle. Bill Summary & Status: S.1378, LIBRARY OF CONGRESS: THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d100:SN01378:@@@L&summ2=m&#summary> (last visited Nov. 6, 2010).
46. 36 U.S.C. § 119.
47. A matching bill was initiated in the House by Rep. Tony Hall, a Democrat from Ohio. Robinson, *supra* note 24.
48. Bill Summary & Status: S.1378, *supra* note 45.
49. Freedom from Religion Found., Inc. v. Ritter, No. 08CV9799 (Dist. Colo. Oct. 28, 2010), *available at* <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf>.
50. Bill Summary & Status: S.1378, *supra* note 45.
51. Robinson, *supra* note 24.
52. *See* CANTOR, *supra* note 31, at 62 (“[O]n August 22, 1980, Reagan told the Religious Roundtable’s National Affairs Briefing in Dallas that evangelicals had revitalized American politics. In extemporaneous phrases that many observers believe at once cemented the bond between Reagan and the religious right and established the new movement’s national prominence, Reagan asserted: ‘Now I know this is a nonpartisan gathering and so I know you can’t endorse me, but I only brought that up because I want you to know that I endorse you and what you are doing.’”).
53. Time Line, *supra* note 28.
54. Epstein, *supra* note 27, at 2118. *See also* Lynch v. Donnelly, 465 U.S. 668, 677 n.5 (1984)(citing proclamations since 1962).
55. President Clinton’s National Day of Prayer Proclamations tended to include a call to American citizens “each in his or her own manner” or “way” or “according to their faith.” *See, e.g.*, President William J. Clinton, Presidential Proclamation on the National Day of Prayer (May 1993) (“Through prayer our people take a moment away from the concerns of everyday life to understand the greater power that gives us guidance. We come together in an act common to all religions.”) (May 1994) (“I

encourage the citizens of this great Nation to gather, each in his or her own manner, to recognize our blessings...) (May 1995) ("I call upon every citizen of this great Nation to gather together on that day to pray, each in his or her own manner, for Gods continued guidance and blessing.") (May 1996) ("And though our citizens come from every nation on Earth and observe an extraordinary variety of religious faith [sic] and traditions, prayer remains at the heart of the American spirit.") (May 1997) ("...let us uphold the tradition of observing a day in which every American, in his or her own way, may come before God to seek increased peace, guidance and wisdom for the challenges ahead.") (May 1998) ("In every city, town and rural community across the country, people of every religious denomination gather to worship according to their faith."), in Robinson, *supra* note 24.

56. See 36 U.S.C. § 119.
57. See Obama, *supra* note 14 ("Let us be thankful for the liberty that allows people of all faiths to worship or not worship according to the dictates of their conscience, and let us be thankful for the many other freedoms and blessings that we often take for granted. I invite all citizens of our Nation, as their own faith or conscience directs them, to join me in giving thanks for the many blessings we enjoy, and I ask all people of faith to join me in asking God for guidance, mercy, and protection for our Nation.").
58. *FAQ's*, NATIONAL DAY OF PRAYER TASK FORCE, <http://nationaldayofprayer.org/about/faqs/> (2011).
59. The National Day of Prayer does not coincide with the National Prayer Breakfast, which is held outside of the White House every year on the first Thursday of February. See Neuman, *supra* note 7.
60. See, e.g., National Day of Prayer in the United States, Timeanddate.com, <http://www.timeanddate.com/holidays/us/national-day-prayer> (last visited Nov. 6, 2010); *FAQ's*, *supra* note 58.
61. A USA Today/Gallup poll conducted May 1-2, 2010 found that 57% of Americans favor the National Day of Prayer. Only 5% opposed NDP and 38% of those polled said the National Day of Prayer did not matter either way. See Jones, *supra* note 14. See also RASMUSSEN REPORTS, *supra* note 14.
62. Most governors issue proclamations on the National Day of Prayer. See Freedom from Religion Found., Inc. v. Ritter, No. 08CV9799 (Dist. Colo. Oct. 28, 2010), available at <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf> ("In 2007, 2008 and 2009, the governors of all 50 states issued honorary proclamations or otherwise acknowledged... days of prayer.") But see JESSE VENTURA & DICK RUSSELL, DON'T START A REVOLUTION WITHOUT ME 58 (2008) ("I was the only governor of all fifty who would not declare a National Day of Prayer. I took a lot of heat for that, and my response was very simple: Why do people need the government to tell them to pray? Pray all you want! Pray fifty times a day if you desire, it's not my business! . . . If I declare National Day of Prayer, then I've got to declare National No-Prayer Day for the atheists. They are American citizens too."). Also, the attorneys general of Texas, Wisconsin, Alabama, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington and Wyoming submitted a brief as amici curiae in support of the National Day of Prayer. Amicus Curiae Brief for the

- Petitioner, *Freedom from Religion Found. v. Obama*, No. 10-1973 (7th Cir. 2010), available at http://www.ffrf.org/uploads/legal/ObamaNDP_amicusAG.pdf.
63. Certainly requiring taxes to support religion and worship was a part of established religion back in England. “The combined effect of compulsory church attendance and compulsory support of ministers was to require unbelievers to pay for the privilege of having preachers try to convert them.” TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* 90-91 (1998). Most tax money spent on religion today is in forgone revenue from tax exemptions for religious organizations. *Waltz v. Tax Commission of the City of New York* summarizes the history of real estate tax exemptions for religious bodies before upholding New York’s exemption. 397 U.S. 664, 677, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). The court found this history indicative that such exemptions did not violate the Establishment Clause. *Id.* at 680. Not all tax benefits are created equal. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5, 109 S. Ct. 890, 894, 103 L. Ed. 2d 1 (1989), the Supreme Court struck down Texas sales tax exemption for only religious publications as violating the Establishment Clause and not mandated by the Free Exercise Clause. The proactive use of tax dollars to promote religious activities is a different issue because such subsidies favor one religion over another or irreligion.
 64. For example, on May 4, 2000 the Texas Metroplex Atheists held a peaceful protest at a National Day of Prayer event in Bedford, Texas where the headquarters of the Christian Coalition are located in opposition of the use of tax money and public property for religious observances such as prayer. In 2001, several members of American Atheists protested outside of the Andover, Kansas City Hall where a National Day of Prayer event was taking place. See Robinson, *supra* note 24. Since *Freedom from Religion v. Obama* was a facial challenge to the enabling statute, this comment will not address the particular Establishment clause issues associated with the use of public facilities for religious practice. However, “Under *Capital Square*, when private religious private religious expression is made at a traditional public forum, the government’s condonation of such expression may be government action endorsing religion, even if the government makes no overt act in furtherance of religion.” *Freedom from Religion Found., Inc. v. Marshfield*, 203 F.3d 487, 487 (7th Cir. 2000) (*citing* *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 787 (1995) (Souter, J., concurring). Encouraging Americans to “turn to God in prayer” while within the walls of our government buildings “necessarily conveys the message of approval or endorsement. Prevailing doctrine condemns such endorsement, even when no private party is taxed or coerced in any way.” *Doe v. Crestwood*, 917 F.2d 1476 (7th Cir. 1990). See also *Am. Jewish Congress v. Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) (finding that the presence of a nativity scene in City Hall endorsed Christianity “because city hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with government approval”).
 65. See generally, TEXAS FREEDOM NETWORK EDUCATION FUND, THE NATIONAL DAY OF PRAYER TASK FORCE: TURNING A DAY OF FAITH INTO A RALLY FOR THE CHRISTIAN RIGHT 3 (2005), http://www.tfn.org/site/DocServer/NDOP_Report_2005_Revised.pdf?docID=241 (noting that the media often incorrectly reports that the NDP Task Force is the official organizing committee for the National Day of Prayer and that in 2005 the Task Force organized 50,000 prayer events).
 66. See generally Ronald, *supra* note 26.

67. *Id.* For example in 2005, 150 Muslims, Christians, Jews, Pagans and atheists participated in a National Day of Prayer event in Oklahoma City. Tim Talley, *Religious Leaders Call for Diversity on National Day of Prayer*, A.P., May 5, 2005.
68. TEXAS FREEDOM NETWORK EDUCATION FUND, *supra* note 65, at 3.
69. Am. Humanist Ass'n and the Wash. Area Secular Humanists, *About*, NATIONAL DAY OF REASON, <http://www.nationaldayofreason.org/> (last visited Feb. 26, 2011).
70. *Id.*
71. *See, e.g.*, President Ronald Reagan, Proclamation 5017 on the National Day of Prayer 1983 (May 5, 1983), in RONALD REAGAN PRESIDENTIAL LIBRARY ONLINE ARCHIVES, available at <http://www.reagan.utexas.edu/archives/speeches/1983/12783h.htm> (noting a national days of prayer during the Revolutionary and Civil Wars before proclaiming May 5, 1983 the National Day of Prayer); Proclamation No. 6877, 61 Fed. Reg. 15, 175 (1996) (President Clinton's 1996 National Day of Prayer proclamation included a reference to the 1775 national day of prayer).
72. *See, e.g.*, Shirley Dobson, quoted in David Waters, *National Day of Prayer Ruled Unconstitutional*, WASH. POST, (April 15, 2010), http://newsweek.washingtonpost.com/onfaith/undergod/2010/04/national_day_of_prayer_ruled_unconstitutional.html ("Since the days of our Founding Fathers, the government has protected and encouraged public prayer and other expressions of dependence on the Almighty.").
73. *See generally* Ronald, *supra* note 26.
74. In 1862, the Senate called upon President Lincoln to set apart a day of prayer just as it would in 1952. Cong. Globe, 37th cong., 3d Sess. 1448, 1501 (1862)(referring specifically to prayer to "Jesus Christ"). In accordance with the resolution, President Lincoln made such a proclamation noting that Americans, "[i]ntoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us." In Reagan, *supra* note 71.
75. Robinson, *supra* note 24.
76. Reagan, *supra* note 71.
77. Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins and Stephen S. Nelson of the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802) in THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, 281 (Albert Ellery Bergh ed., 16th Ed. 1907)(emphasis added). Jefferson also noted in an 1808 letter to Reverend Samuel Miller:
- Fasting and prayer are religious experiences; the enjoining them an act of discipline. Every religious society has a right to determine for itself the time for these exercises, and the objectives proper for them, according to their own particular tenants; and right can never be safer than in their hands, where the Constitution has deposited it. Robinson, *supra* note 24.
78. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)("The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.").

79. *See, e.g.,* *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)(The Court interpreted Jefferson’s metaphor to mean that the Establishment Clause “requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary” in upholding the use of government funds to transport school children to both public and parochial schools).
80. Ronald, *supra* note 26. However, Madison issued three proclamations himself encouraging public humiliation and prayer. Arlin M. Adams and Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1587 (1989). His career also included incidences of what would be today considered religious establishment. For instance, Madison introduced a bill in the Virginia legislature to criminalize work on Sundays, the Christian Sabbath. ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION*, 216-17 (1982).
81. Time Line, *supra* note 28. The first members were a veritable who’s who of Christian evangelism including Vonette Bright, co-founder of the Campus Crusade for Christ and Frank Insen of World Vision.
82. Federal EIN: 75-1914068, tax exempt 501(c)(3) corporation.
83. Time Line, *supra* note 28.
84. *Id.*
85. *Id.*
86. *About Us*, NATIONAL DAY OF PRAYER TASK FORCE, <http://nationaldayofprayer.org/about/> (2011).
87. Time Line, *supra* note 28. In fact, Shirley Dobson was one of the original defendants named in *Freedom from Religion Foundation v. Obama* but was dismissed by Judge Crabb. Dobson’s husband is Dr. James C. Dobson, founder of Focus on the Family. The Task Force shared office space with Focus on the Family in Texas from 1991-2009 though now has its own independent office in Colorado Springs, CO. Focus on the Family also awarded the Task Force grants between 1991-1993. FAQs, *supra* note 58. Further, it seems that the Task Force’s Vice Chairperson, James Weidmann was at some point on the Focus on the Family payroll. TEXAS FREEDOM NETWORK EDUCATION FUND, *supra* note 65, at 3. For background information on Focus on the Family please *see* CANTOR, *supra* note 31, at 75-84.
88. *About Us*, *supra* note 86. *Accord* Religion Found., Inc. v. Ritter, No. 08CV9799 at 5 (Dist. Colo. Oct. 28, 2010), *available at* <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf> (The NPD Task Force stipulated that their purpose was to encourage prayer).
89. *Id.*
90. The 2011 Honorary Chair is Joni Eareckson Tada. Past chairs have included: Franklin Graham (2010) – Billy Graham’s son, Beth Moore (2009), Dr. Ravi Zacharias (2008), Dr. Charles R. Swindoll (2007), Dr. Henry T. Blackaby (2006), Rev. Max Lucado (2005), Oliver North (2004). *See, e.g.,* Associated Press, *Army Pulls Billy Graham’s Son’s Prayer Day Invite*, USA TODAY, Apr. 23, 2010, http://www.usatoday.com/news/religion/2010-04-22-franklin21_ST_N.htm for information on Franklin Graham’s controversial chairmanship including his 2001 comments that Islam is evil, which led to his invitation to speak at the Pentagon for the National Day of Prayer being revoked.
91. *Theme and Verse*, NATIONAL DAY OF PRAYER TASK FORCE, <http://nationaldayofprayer.org/coordinators/theme/> (2011) (The 2011 theme is “A Mighty Fortress is

Our God” which is based on Psalm 91:2: “I will say to the Lord, my refuge and my fortress, my God in whom I trust.”).

92. Religion Found., Inc. v. Ritter, No. 08CV9799 at 2 (Dist. Colo. Oct. 28, 2010), *available at* <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf>.
93. *Id.*
94. *See Id.* (“In 2007, 2008, and 2009, the governors of all 50 states issued honorary proclamations or otherwise acknowledged (e.g. by letter) days of prayer. Many ... made reference to the theme and/or supporting scripture suggested by the NPD Task Force in its annual letter.”). For example, the Colorado Day of Prayer Proclamation in 2008 read as follows: “Whereas, in 2008, the National Day of Prayer acknowledge Psalm 28:7 – ‘The Lord is my strength and shield, my heart trusts in Him, and I am helped....’” According to the *Texas Freedom Network Education Fund, supra* note 65 at 5, more than half of the states that issued NDP proclamations included a reference to the NDP Task Force theme without mention of the Task Force’s non-governmental, non-official, sectarian status.
95. *See* CHRISTOPHER L. EISGRUBER AND LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 148 (2007) (“Patriotism and religion are a potentially combustible mixture.”) For an example of a governor who stood up to such pressures *see* VENTURA, *supra* note 62, at 58.
96. E-mail from James Dobson, Focus on the Family to listserv (Apr. 27, 2007), http://www.jewsonfirst.org/07b/fof_spitzer.pdf.

We want to make you aware of a slap in the face the governor of New York has delivered to people of faith all across the country.

Gov. Eliot Spitzer—who just a few days ago promised to sign a bill to legalize same-sex marriage in his state, should one land on his desk—apparently has refused to sign a proclamation supporting Thursday’s observance of the National Day of Prayer. . . . *How arrogant that the governor of New York, which was the target of the vicious and unprovoked attacks on 9/11, does not believe the people of his state need divine guidance and protection.*

Won’t you take a minute or two—no matter what state you live in—to let Gov. Spitzer know what you think about his refusal to acknowledge the National Day of Prayer? *Remind him that this country was founded as a Christian nation—and he will insult and offend millions if he continues down the path he is on.(emphasis added.)*

The Focus on the Family e-mail disregards The Treaty of Tripoli, ratified in 1797, which pronounced that “. . . the government of the United States is not, in any sense, founded on the Christian religion. . . .”

97. *National Day of Prayer a Subsidiary of Focus on the Family*, JEWSONFIRST.ORG, http://www.jewsonfirst.org/hijacked_day.html (2007)(“The appending of “Judeo” like a fig leaf over sectarian, right-wing evangelical Christianity, is particularly insolent in light of James Dobson’s harassment campaign against New York Governor Eliot Spitzer. Dobson’s message about Spitzer had a distinctly anti-Jewish edge.”)
98. *Id.*
99. *See supra* text accompanying note 63. *See also* Freedom from Religion Found., Inc. v. Ritter, No. 08CV9799 at 2 (Dist. Colo. Oct. 28, 2010)(describing the Colorado Day of Prayer Committee’s annual celebration on the West Steps of the Colorado Capital building), *available at* <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf>.

100. *Coordinator Responsibilities*, NATIONAL DAY OF PRAYER TASK FORCE, <http://ndptf.org/wp-content/uploads/2009/11/Responsibilities-positions-COORD.pdf> (last visited Nov. 13, 2010).
101. *FAQ's*, *supra* note 58.
102. Gilgoff, *supra* note 6.
103. Though the Task Force claims to represent “a Judeo Christian expression of the national observance, based on our understanding that this country was birthed in prayer and in reverence for the God of the Bible,” one of its stated visions is to “publicize and preserve America’s Christian heritage.” *About Us*, *supra* note 86 (“The Task Force represents a Judeo Christian expression of the national observance, based on our understanding that this country was birthed in prayer and in reverence for the God of the Bible.”).
104. *Id.*
105. *Id.*
106. Texas FREEDOM NETWORK EDUCATION FUND, *supra* note 65 at 3 (noting that among the tenets of the Lausanne Covenant are a belief in Biblical inerrancy and the Christian exclusivity of salvation).
107. *Coordinator Responsibilities*, *supra* note 100.
108. See Susan Jacoby, *Freethinkers: A History of American Secularism*, in RELIGION IN LEGAL THOUGHT AND PRACTICE 114, 115-16 (Howard Lesnick, ed., 2010).
109. ROBERT L. CORD, *supra* note 80, at 22.
110. RONALD BEINER, CIVIL RELIGION: A DIALOGUE IN THE HISTORY OF POLITICAL PHILOSOPHY 150 (2011).
111. *Id.* at 151 (quoting JOHN LOCKE, POLITICAL WRITINGS, 26 (David Wooton, ed., 2003)).
112. *Id.*
113. *Id.* (quoting LOCKE, *supra* note 111, at 27-28 (“All the Life and Power of true Religion consists in the inward and full persuasion of the mind; and Faith is not Faith without believing.”)).
114. *Id.* at 154.
115. *Id.* at 153.
116. *Id.* at 154.
117. *Id.* at 152 (quoting LOCKE, *supra* note 111, at 35).
118. CHESTER JAMES ANTIEAU, ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES ix (1964).
119. *Id.*
120. *Id.* at x.
121. ROBERT L. CORD, *supra* note 80, at 5.
122. See generally ROBERT L. CORD, *supra* note 80; Antieau et. al., *supra* note 118.
123. See *McCulloch v. Maryland*, 17 U. S. 316, 407 & 415 (1819) (“... we must never forget that it is a Constitution we are expounding... a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human af-

fairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”).

124. BEINER, *supra* note 110, at 153.
125. *About the Foundation FAQ*, FREEDOM FROM RELIGION FOUNDATION, <http://www.ffrf.org/faq/about-the-foundation/what-is-the-foundations-purpose/> (last visited Nov. 7, 2010).
126. *See, e.g.*, *Freedom from Religion Found., Inc. v. Perry*, CIV.A. H-11-2585, 2011 WL 3269339 (S.D. Tex. July 28, 2011); *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1070 (W.D. Wisc. 2010); *Freedom from Religion Found., Inc. v. Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000); *Freedom from Religion Found., Inc. v. Ritter*, No. 08CV9799 (Dist. Colo. Oct. 28, 2010), available at <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf>; *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995).
127. *Legal*, FREEDOM FROM RELIGION FOUNDATION, <http://www.ffrf.org/legal/> (2011).
128. *Complaint, Freedom from Religion Found. v. Obama*, 705 F. Supp. 2d 1039 (WD Wisc. 2010) (No. 08-CV-588) available at <http://ffrf.org/uploads/news/dayPrayer-Complaint.pdf>.
129. *Amended Complaint, Freedom from Religion Found. v. Obama*, 705 F. Supp. 2d 1039 (WD Wisc. 2010) (No. 08-CV-588) available at <http://ffrf.org/uploads/legal/Amended%20Complaint.pdf>.
130. *See Freedom from Religion Found. v. Obama*, 691 F. Supp. 2d 890, 909-910 (W.D. Wis. 2010). Other courts have also found such an injury sufficient to meet standing requirements. *See, e.g.*, *Freedom from Religion Found., Inc. v. Ritter*, No. 08CV9799 (Dist. Colo. Oct. 28, 2010) (analyzing standing under Colorado law), available at <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf>.
131. *Books v. Elkhart County*, 235 F.3d 292, 299 (7th Cir. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).
132. *Id.* (citing *Lujan*, 504 U.S. at 560).
133. 41 F.3d 1156 (7th Cir. 1994) (plaintiffs had standing to sue for the removal of a religiously themed sign above the main entrance to the county courthouse). *Accord Books*, 401 F.3d at 299-300 (court found that plaintiffs had standing to challenge the placement of the Ten Commandments monument on the law of the Municipal Building because the plaintiffs had to come in contact with the monument in order to participate fully in government and to fulfill their legal obligations despite not attempting to alter their routines to avoid it).
134. *Freedom from Religion Found.*, 691 F.Supp.2d at 895. Judge Crabb was likely referring to *Sherman v. Twp. High Sch. Dist.*, 594 F. Supp. 2d 981 (N.D. Ill. 2009), rev'd, 623 F.3d 501 (7th Cir. 2010) in which the court held the Illinois Silent Reflection and Student Prayer Act unconstitutional in discussing standing for a plaintiff forced to sit through a mandated “moment of silence.”
135. It is irrelevant that most Americans are likely unaware on the first Thursday in May that it is indeed the National Day of Prayer. *See Jones supra* note 14 (reporting that 38% of Americans polled said the National Day of Prayer doesn't matter); *see also*

RASMUSSEN REPORTS, *supra* note 14 (reporting that 12% of Americans are “unsure” if they favor or oppose the National Day of Prayer). The plaintiffs in this case, the members of the FFRF, were all aware the National Day of Prayer as a part of their quest to be good, active citizens and active members of an organization that monitors and fights entanglements of church and state.

136. *Freedom from Religion Found.*, 691 F.Supp.2d at 894.
137. *See* 36 U.S.C. § 199.
138. *See* Van Zandt v. Thompson, 839 F.2d 1215, 1217 (7th Cir. 1988) (holding that FFRF had standing to sue as a representative of its members who are Illinois taxpayers alleging harm under *Flast v. Cohen*, 392 U.S. 83 (1968)).
139. This comment will only focus on the decision as it relates to the National Day of Prayer.
140. *Freedom from Religion Found.*, 691 F. Supp. 2d at 895.
141. *Id.* at 895 (“...none of the plaintiffs has read or heard such a proclamation except when they expressly sought one out. Such a self-inflicted “injury” cannot establish standing.”); *Id.* at 910:
 Plaintiffs Annie Laurie Gaylor and Dan Barker have personally read some of the presidential statements accompanying proclamations designating the National Day of Prayer, but both admit that the only reason they did so was that they were looking expressly for the proclamations. They do not suggest that they happened upon the proclamations while watching the news or reading the newspaper. In fact, Gaylor and Barker emphasize that they closely monitored the websites of the Task Force and the White House for the purpose of reading the proclamations. Thus, to the extent that such conduct qualifies as an injury at all, whatever distress plaintiffs experienced from reading the proclamations was ‘fairly traceable’ to their own research efforts rather than anything defendants did.
See generally *Freedom from Religion Found., Inc. v. Ritter*, No. 98CV9799 (Dist. Colo. Oct. 28, 2010) (finding sufficient injury from the Governor’s National Day of Prayer proclamation to establish standing under Colorado standing standards), available at <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf>.
142. *Freedom from Religion Found.*, 691 F. Supp. 2d at 895.
143. *Id.*
144. *Id.* at 910.
145. *Id.* at 1048 (“The test applied most commonly by courts when interpreting the establishment clause was articulated first in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Under *Lemon*, government action violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion.”).
146. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).
147. *Freedom from Religion Found.*, 750 F. Supp. 2d at 1053-55.
148. *Id.* at 1051.
149. *Id.* 2d at 1057.
150. The judge felt that the plaintiffs did not suffer a sufficient injury as to the Presidential prayer proclamations or Shirley Dobson. *See* Part II B *supra* for a discussion of the standing controversy. Interestingly, such prayer proclamations made by state gov-

ernors were recently upheld by a District Court in Denver Colorado. Freedom from Religion Found., Inc. v. Ritter, No. 98CV9799 (Dist. Colo. Oct. 28, 2010), *available at* <http://www.ffrf.org/uploads/legal/Colo-ndp-order.pdf>.

151. Freedom From Religion Found., 641 F.3d 803, 805 (7th Cir. 2011).
152. *Id.* at 808.
153. *Id.* at 805.
154. *Id.*
155. *Id.* (*citing* Allen v. Wright, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)).
156. *Id.* at 806.
157. *Freedom From Religion Found.*, 641 F.3d 803, 806(7th Cir. 2011).
158. *Id.* (*citing* Florida v. Rodriguez, 469 U.S. 1, 5–6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (police are entitled to ask people to answer questions, or consent to search, even when they lack the authority to compel favorable action); United States v. Childs, 277 F.3d 947 (7th Cir.2002) (en banc) (same)).
159. *Id.*
160. Freedom from Religion Found. v. Obama, 691 F. Supp. 2d 890, 909-910 (W.D. Wis. 2010).
161. Freedom From Religion Found., Inc. v. Obama, 641 F.3d 803, 807 (7th Cir. 2011) (quoting from Obama’s 2010 National Day of Prayer Proclamation). Perhaps such exclusion would have been more apparent to Judge Easterbrook if he read some of the less pluralistic National Day of Prayer proclamations.
162. *Id.*
163. 412 U.S. 669, 687, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).
164. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004).
165. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687, 93 S. Ct. 2405, 2416, 37 L. Ed. 2d 254 (1973).
166. Sierra Club v. Morton, 405 U.S. 727, 739, 92 S. Ct. 1361, 1368, 31 L. Ed. 2d 636 (1972).
167. *Id.* at 741.
168. *Id.* at 734-36.
169. *Id.* at 734.
170. *Id.* at 735.
171. *Id.* at 739.
172. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689, 93 S. Ct. 2405, 2416-17, 37 L. Ed. 2d 254 (1973).
173. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18, 124 S. Ct. 2301, 2312, 159 L. Ed. 2d 98 (2004).
174. *Id.* at 17.
175. *Id.* at 12.

176. *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (distinguishing *Am. Civil Liberties Union v. St. Charles*, 794 F.2d 265 (7th Cir. 1986); *Gonzales v. North Twp.*, 4 F.3d 1412 (7th Cir.1993); *Books v. City of Elkhart*, 235 F.3d 292, 299–301 (7th Cir.2000) (Books I); *Books v. Elkhart Cnty.*, 401 F.3d 857 (7th Cir.2005) (Books II)).
177. *Id.*
178. *Id.* (quoting *St. Charles*, 794 F.2d at 268).
179. *Id.* at 808.
180. *Freedom from Religion Found., Inc. v. Obama*, 691 F. Supp. 2d 890, 901 (W.D. Wis. 2010) (citing Books II, 401 F.3d at 861-62 (passing by religious display once a year); *Doe v. Cnty. of Montgomery, Ill.*, 41 F.3d 1156, 1160 (7th Cir. 1994) (walking under sign on courthouse stating, “THE WORLD NEEDS GOD”); *Saladin v. City of Milledgeville*, 812 F.2d 687, 693 (11th Cir.1987) (concluding that plaintiffs were injured by city seal that used word “Christianity” because they claimed that seal “makes [them] feel like second class citizens”); *Mather v. Vill. of Mundelein*, 699 F. Supp. 1300, 1303 (N.D.Ill.1988) (in case involving challenge to religious display, noting local resident’s testimony that display “gives her a sense of inferiority. She feels that by the display the Village of Mundelein endorses Christianity, gives no credence to her religion and views her religion as far less important than the Christian religion”)).
181. *Id.*
182. *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011).
183. *See, id.* at 806.
184. *Id.*
185. *Id.* at 808 (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n. 13, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *Hein v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974)).
186. *Agostini v. Felton*, 521 U.S. 203, 205-06 (1997)
187. *Id.* at 205-206.
188. *Id.* at 222.
189. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring).
190. *Lee v. Weisman*, 505 U.S. 577, 592 (1997).
191. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).
192. *Id.* at 688.
193. *See, e.g. Linnemer v. Bd. Tr. of Purdue Univ.*, 260 F.3d 757, 764 (7th Cir. 2000) (noting that the *Lemon* test requires court to “determin[e]... whether [the government action] constitutes an impermissible endorsement or disapproval or religion”); *Freedom from Religion Found., Inc. v. Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000) (noting that the purpose of the *Lemon* test is “to determine whether government action constitutes an endorsement of religion”).
194. *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1169 (7th Cir. 1993).
195. *Books v. Elkhart County*, 235 F.3d 292, 298 n.5 (7th Cir. 2000). *See also* *Milwaukee Deputy Sheriffs’ Ass’n v. Clarke*, 588 F.3d 523, 527 (7th Cir. 2009).
196. *Lynch*, 465 U.S. at 679.

197. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (noting that the Lemon test was “not useful” in assessing the constitutionality of a Ten Commandments monument and that “the nature of the monument and . . . our Nation’s history” were the important factors)(plurality opinion).
198. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983)(upholding the Nebraska legislatures session opening prayer noting that it was merely “ceremonial deism” and had an “unambiguous and unbroken history of more than 200 years”).
199. *Lee v. Weisman*, 505 U.S. 577, 577 (1997)(the “subtle and indirect” coercive effects of a particular action can be taken into account when determining constitutionality). This test is generally called the “Coercion Test.”
200. *Van Orden*, 545 U.S. at 704 (Breyer concurring) (discussing the relevance of a lack of divisive history prior to suit)
201. *Lynch*, 465 U.S. at 674 (acknowledgements of religion have an “unbroken history” in America)
202. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989)(accommodations of religion can be appropriate in order to alleviate government-imposed burdens on the free exercise of religion).
203. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).
204. *See* *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Milwaukee Deputy Sheriffs’ Ass’n v. Clarke*, 588 F.3d 523, 527 (7th Cir. 2009); *Books v. Elkhart County*, 235 F.3d 292, 302 (7th Cir. 2000).
205. *Books*, 235 F.2d at 302-04.
206. *Bridenbaugh v. O’Bannon*, 185 F.3d 796, 799 (7th Cir. 1999).
207. *Id.*
208. *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (finding that Illinois law making Good Friday a legal holiday in the public school system violated the Establishment Clause because the government failed to provide evidence to support a secular justification for the law).
209. *Bridenbaugh*, 185 F.3d at 800 (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (holding that Sunday closing laws served a valid secular purpose of creating one day of general rest)). *But see Metzl*, 57 F.3d at 620.
210. *Metzl*, 57 F.3d at 622. *See also* *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 600-02 (1989)(finding that nativity scene was unconstitutional where the display endorsed Christian Doctrine and did not have any other secular purpose); *Lynch v. Donnelly*, 465 U.S. 668, 681 n. 6 (1984)(finding that celebrating the holiday season and depicting its historical origins in a nativity scene on public property did not violate the establishment clause because the government had a secular purpose which need not be the only purpose for the action).
211. *Lynch*, 465 U.S. at 680.
212. *See* legislative history discussion in the Historical Background of the National Day of Prayer section above (Section I.A.).
213. 98 Cong. Rec. 771 (1952).
214. *Bd. of Educ. of Westside Comty. Sch. v. Mergens*, 496 U.S. 226, 249 (1990).
215. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 587 (1987).

216. *See Allegheny*, 492 U.S. at 592 and 597; *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Clarke*, 588 F.3d at 528; *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005).
217. *Marshfield*, 203 F.3d at 495-6.
218. *Santa Fe Independent Public School District v. Doe*, 530 U.S. 290, 307-08 (2000). *See also Lee*, 505 U.S. at 593 (“For many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi’s Prayer... What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.”)
219. *Allegheny*, 492 at 672 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting 36 U.S.C § 199). *See Part I* for background on the historical association of the National Day of Prayer with Christian evangelism.
220. *Santa Fe*, 530 U.S. at 313. *See also Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003) (“[T]he Establishment Clause prohibits a state from promoting religion by . . . promoting prayer for its citizens.”)
221. *Doe v. Crestwood*, 917 F.2d 1476 (7th Cir. 1990). *See also Am. Jewish Congress v. Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) (finding that the presence of a nativity scene in City Hall endorsed Christianity “because city hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with government approval”).
222. *Allegheny*, 492 U.S. at 590.
223. *See* section IA for more information about the National Day of Prayer Task Force.
224. *Blackwelder v. Safnauer*, 689 F.Supp. 106, 143 (N.D.N.Y. 1988) (internal quotations omitted).
225. *Milwaukee Deputy Sheriffs’ Ass’n v. Clarke*, 588 F.3d 523, 525-26 (7th Cir. 2009).
226. *Marshfield*, 203 F.3d at 487 (citing *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 787 (1995)) (Souter, J., concurring).
227. *See Books*, 235 F.3d at 306.
228. *Santa Fe*, 530 U.S. 290 at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)(O’Connor, J., concurring)).
229. The phrase “ceremonial deism” was coined by Walter Rostow, former Yale Law School Dean, while speaking at Brown University. He defined ceremonial deism as “a class of public activity, which ... could be accepted as so conventional and uncontroversial as to be constitutional.” Epstein, *supra* note 27 at 2091.
230. *Marsh*, 463 U.S. at 791.
231. *See Bruce Ledewitz, The New New Secularism and the End of the Law of Separation of Church and State*, 28 BUFF. PUB. INTEREST L.J. 1, 15-16 (2009) (“Non-theistic use of the word God is not a new phenomenon. In an earlier time, John Dewey exasperated some by refusing to abandon the word God when he abandoned Christian dogma. In Dewey’s view, “[u]se of the worlds ‘God’ or ‘devine’ to convey the union of actual with ideal may protect man from a sense of isolation and from consequent despair or defiance.”).
232. *See, e.g., Engel v. Vitale*, 370 U.S. at 435 n.21 (in holding prayer in school unconstitutional, Justice Black noted that such “unquestionable religious exercise” was different from permissible references to religion in “patriotic or ceremonial occasions”).

233. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (discussing the use of the national motto “In God We Trust”).
234. *Lynch v. Donnelly*, 465 U.S. 668, 717 (1984)(Brennan, J., dissenting).
235. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983)(upholding the Nebraska legislatures session opening prayer noting that it was merely “ceremonial deism” and had an “unambiguous and unbroken history of more than 200 years”).
236. *See, e.g. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004)(“This category of ‘ceremonial deism’ most clearly encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’).”).
237. *See id.; see also, Allegheny*, 492 U.S. at 602 (listing national motto and pledge of allegiance as permissible ceremonial deism); *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970) (“It is quite obvious that the national motto and the slogan on coinage and currency ‘In God We Trust’ has nothing whatsoever to do with the establishment of religion. Its use is of patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.”)
238. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)(overturning Ninth Circuit ruling that the Pledge of Allegiance was an endorsement of religion because plaintiff lacked standing to sue as a non-custodial parent). *See also, id.* at 37 (O’Connor, J. concurring) (“This case requires us to determine whether the appearance of the phrase “under God” in the Pledge of Allegiance constitutes an instance of such ceremonial deism. Although it is a close question, I conclude that it does . . .”).
239. *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 446 (7th Cir. 1992).
240. *Sherman*, 980 F.2d at 445.
241. MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://mw4.merriam-webster.com/dictionary/prayer> (2010).
242. *Freedom from Religion Found.*, 705 F. Supp. 2d at 1050 (citing *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (stating that prayer is intrinsically religious)).
243. *See, e.g. Marsh*, 463 U.S. at 792.
244. 463 U.S. at 791.
245. *Id. See also Engel v. Vitale*, 370 U.S. 421 (1962) (holding that non-denominational prayer in schools unconstitutional).
246. *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (calling *Marsh* a “special instance”); *see also, Coles ex rel. Coles v. Cleveland Bd. of Edu.*, 171 F.3d 369, 381 (6th Cir. 1999) (“*Marsh* is one of a kind”).
247. *See, Santa Fe*, 530 U.S. at 313; *Lee*, 505 U.S. at 592. *But see Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997) (ruling that a non-sectarian invocation and benediction at college graduation did not violate the Establishment clause in part because college graduates are more “mature” than high school graduates).
248. 36 U.S.C. § 119.

249. See, e.g., *Van Zandt*, 839 F.2d at 1221 (upholding Illinois resolution creating a room in the capital building for prayer and meditation where the resolution contained references to God solely in the whereas clauses and not in the operative language).
250. Eisgruber and Sager argue that offering a secular form for a ceremonial reference to God is the “most important” feature of permissible ceremonial deism in advocating for an alternative form of the Pledge of Allegiance should be offered to school children. EISGRUBER AND SAGER, *supra* note 95, at 150.
251. *Van Zandt*, 839 F.2d at 1221.
252. *Freedom from Religion Found.*, 705 F. Supp. 2d at 1052.
253. *Id.*
254. See *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). See also *Van Orden*, 545 U.S. at 704 (ruling that Ten Commandments monument was constitutional when displayed in the context of a larger display of Texan foundational ideals).
255. Ledewitz, *supra* note 234, at 15-16 (identifying the suit over the National Day of Prayer itself as a battle between these competing and irreconcilable world views).
256. *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).
257. See Section I for details.
258. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).
259. *Id.* at 674.
260. *Id.* at 680.
261. *Id.*
262. See *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603 n.52 (1989): It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. But, as this practice is not before us, we express no judgment about its constitutionality.
263. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (“This category of ‘ceremonial deism’ most clearly encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’)”); *Allegheny*, 492 U.S. at 602 (listing national motto and pledge of allegiance as permissible ceremonial deism).
264. 36 U.S.C. § 101-124 (“Patriotic and National Observances”).
265. *Robinson*, *supra* note 24.
266. *About Us*, *supra* note 86.
267. The “melting pot” metaphor for the fusion of many nationalities into one united America has been criticized recently as ahistorical and replaced by some by a “tossed salad” metaphor for the mixed, diverse but distinct character of various nationalities and ethnicities in this country. No matter the metaphor, the point stands that the court could consider such diversity in observance of the National Day of Prayer to be evidence of its permissibility as an acknowledgement of religion.

268. *Freedom From Religion Found., Inc.*, 641 F.3d at 808. See also *Freedom from Religion Found., Inc. v. Perry*, CIV.A. H-11-2585, 2011 WL 3269339 (S.D. Tex. July 28, 2011) (dismissing challenge to Gov. Perry’s NDP proclamations and involvement in an American Family Association prayer rally for lack of standing).
269. *Freedom From Religion Found., Inc.*, 641 F.3d at 805 (“Section 119 imposes duties on the President alone. It does not require any private person to do anything—or for that matter to take any action in response to whatever the President proclaims. If anyone suffers injury, therefore, that person is the President, who is not complaining.”).
270. See Jacoby, *supra* note 108, at 114-15 (“Since the terrorist attacks of September 11, 2011, America’s secularist tradition has been further denigrated by unremitting political propaganda equating patriotism with religious faith.”).
271. *Freedom From Religion Found., Inc.*, 641 F.3d at 808.
272. *Freedom From Religion Found., Inc.*, 641 F.3d at 807 (noting that the observer’s standing cases occurred before *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) and that they “may need to revisit the subject of observers’ standing in order to reconcile this circuit’s decisions”).
273. “I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.” 5 U.S.C. § 3331. Yes, this author notes the irony of arguing for legislative action for political officials required to take the oath of office, which contains the words “so help me God.”
274. 157 Cong Rec H 7186 (Nov. 1, 2011) (“there were—yeas 396, nays 9, answered “present” 2, not voting 26”). Rep. Charlie Rangel perhaps summed up the reasoning of many of representatives in voting for the motto when he said he “reluctantly supported it because [he] didn’t want anyone to believe that [he] didn’t trust God.” 157 Cong Rec H 7215 (Nov. 2, 2011) (statement of Rep. Rangel).



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Katherine Hughes

ANATOMY OF A "TERRORISM"
PROSECUTION: DR. RAFIL DHAFIR
AND THE HELP THE NEEDY
MUSLIM CHARITY CASE

What was the result of Feb 26, 2003 besides imprisoning of innocent people? Scores of innocent elderly American cancer patients died needlessly, innumerable tens of thousands of Iraqi needy (children, women and men) died and more than that suffered malnutrition and the humiliation of poverty. An entire segment of our society here was treated as criminals, intimidated, interrogated and threatened. Never in the history of the Islamic Society of Central New York had we had so many cases of depression and suicide that the mosque had to engage the services of a psychiatrist to help out. The dream of this Republic being a sanctuary for the oppressed was shattered on that day and a new sad reality was erected in its place.¹

At approximately 6:30 am on February 26, 2003, upstate New York oncologist Dr. Rafil Dhafir pulled out of his driveway in Fayetteville, heading to his practice in the underserved area of Rome; he has never returned. Just moments later, he was pulled over and arrested by two federal investigators and a New York state trooper on charges that he had violated International Emergency Economic Powers Act (IEEPA)² by sending food and medicine for 13 years through his charity Help the Needy (HTN) to sick and starving Iraqi civilians. Back at the house he had just left, Mrs. Dhafir was now standing in her entryway with five guns pointed at her head after government agents broke down the door because she had failed to answer quickly enough.

In this operation code-named Imminent Horizon,³ four others associated with the charity were simultaneously arrested: two in the Syracuse area, one in Boise, Idaho, and one in Amman, Jordan. From 6 to 10 AM that Wednesday, 150 local Muslim families were interrogated.⁴ Immigration agents visited noncitizens, FBI agents visited citizens and IRS agents visited doctors' offices and other businesses.

As Kelly Tubbs, Dhafir's office manager and transcriptionist, pulled into her usual parking spot, government agents in flak jackets with guns immediately surrounded her car. She attempted to introduce herself, but the agents told her there was no need to since they knew exactly who she was.

Katherine Hughes was born and raised in Glasgow, Scotland. A ceramic artist, she has long had a passion for civil liberties. She attended the 14-week trial of Dr. Rafil Dhafir and has written articles about Dr. Dhafir's case, and on the plight of Islamic Charities in the U.S. in the post 9/11-period. Her website, dedicated to the preservation of civil liberties for all, is www.dhafirtrial.net. This article originally appeared in Truthout.org. Reprinted with permission.

Well trained by Dhafir to take the utmost care of patients, she begged to be allowed to call to tell them not to come to the office. She was not allowed to. (Had the office been raided on a Friday, when staff had their office meeting, no patients would have been present.) Agents seized the office contents—including all the patients’ medical records. It took six weeks before patients received their records back.

The arrests were accompanied by a media circus: helicopters hovering over Dhafir’s house and all day-reports of the comings and goings of 80 federal agents. Attorney General John Ashcroft announced that “funders of terrorism have been arrested”⁷⁵ and Gov. George Pataki claimed the arrests proved the existence of “terrorists living here in New York state among us . . . who are supporting or aiding and abetting those who would destroy our way of life and kill our friends and neighbors.”⁷⁶

Initially, local prosecutors also followed the “terrorism” line and Assistant US Attorney Greg West argued that because HTN defendant Ayman Jarwan had degrees in nuclear and radiological engineering, he was capable of making a dirty bomb and therefore shouldn’t receive bail. (He did.) A groundswell of public support after the arrests meant that local prosecutors backed away from “terrorism” charges and instead said that Dhafir was a common thief. Dhafir was still held and denied bail on five occasions.

Seven government agencies had been conducting extensive surveillance on Dhafir and HTN for many years. They intercepted his mail, email, faxes and telephone calls; bugged his home, office and hotel rooms; went through his trash; and conducted physical surveillance. On one occasion, a hotel room in Washington, DC, was bugged and the government had seven translators listening in to the conversation (though none of the translators spoke Dhafir’s dialect). Nothing related to terrorism was uncovered and no charges of terrorism were ever brought against Dhafir.

The first indictment against Dhafir contained fourteen charges related only to the Iraq sanctions. Later, when Dhafir refused to accept a plea agreement, the government piled on more charges and he finally faced an indictment of 60 counts of white-collar crime at trial. State and national level government officials continued to tar Dhafir with the terrorism brush via the media, and just before his trial began—when he had already been held for nineteen months—Governor Pataki described the case as a “money laundering case to help terrorist organizations . . . conduct horrible acts.”⁷⁷ It was an announcement perfectly timed to reach potential jurors.

Show Trial

The trial was conducted on the 12th floor of the Syracuse Federal Building, which was reached after passing two security points.⁸ Inside the courtroom,

there were two court guards who changed regularly, one at each exit. And because Dhafir would not submit to a strip search (on religious grounds) as he was ferried from prison to the trial, two federal marshals were also always present in the courtroom, one sitting adjacent to the jury and one directly behind Dhafir. There were five of these federal marshals who traded off approximately every forty minutes in full view of the jury. The changing of the guard took place at least 250 times during the proceedings and was a powerful nonverbal message to the jury.

Three prosecutors sat close to the jury, while behind them, at another table, were three government agents who remained there throughout the trial except when they were testifying. FBI Agent Jim Kolbe testified for sixteen days, eight of them as the sole witness and eight of them as one of only two witnesses: it was his testimony that, essentially, convicted Dhafir. Social Security agent Michael McCole testified for about twenty minutes. The Defense Department agent, a young, blonde woman who previously worked at the Syracuse Post-Standard, did not testify.

The defense team of Devereaux Cannick, Philip Gaynor and Joel Cohen sat beyond the prosecution further away from the jury at two separate tables, one in front of the other. Dhafir mostly sat at the front table with whichever lawyer was cross-examining a witness and the other two lawyers sat behind them. Cohen typed the proceeding on his laptop because the defense had no money for transcripts (at 50 cents a page) and the court had denied a request for transcripts at the expense of the court.

A motion granted by Judge Mordue before the trial began meant the defense could not challenge the government's real reason for prosecuting Dhafir during proceedings. Such motions are often used in criminal trials by the defense to shield the jury from information that could be prejudicial to a defendant. Its use in this case had the opposite aim and effect: although prosecutors could hint at more serious (terrorism) charges throughout the trial, the defense team couldn't respond to these inflammatory innuendos head on.

Just days into the trial, FBI Agent Jim Kolbe told of items that had been found in the dumpster of an apartment building where HTN defendant Ayman Jarwan had been living. He described Islamic magazines showing military operations and said that there was a gun-cleaning kit also in the dumpster (this was later shown to be from a Thanksgiving hunting trip). When Cannick tried to explore this line of questioning, the prosecution objected because a pre-trial motion had been granted made this line of questioning inadmissible. The objection was upheld.

The defense objected and asked that the jury (and later Kolbe) leave the courtroom. In their absence, Gaynor argued that the defense should be allowed

to follow up the line of questioning because it was the government that had introduced it. The defense aired other concerns about what they believed to be insinuation without proof by the government and then requested a mistrial because Kolbe's testimony "left a ringing bell in the ears of jurors" with its powerful suggestion that Dhafir was still under investigation for more serious charges that were still pending. The request was denied.

At another point in the proceedings, the prosecution referred to the religious group of Islam that Osama bin Laden was a member of, Salafi, and made the court aware that Dhafir was also a member of this particular Islamic religious tradition. (Salafi merely means a Muslim who is a strict adherent of the Koran and looks to the ancestors for guidance. It is comparable to someone in the Christian faith who looks to the Scriptures, church fathers and traditions of the early church for guidance.)

Other testimony also hinted at more serious charges pending. Because the defense was not allowed to respond to these insinuations, the proceedings at times were surreal. This was the case in the testimony of Colleen Williams, a tax preparer Dhafir had hired to help HTN sort out its tax returns and give advice on a 501(c)(3) application for the charity. (Up until then HTN had been under the 501(c)(3) umbrella of another charity, a not uncommon practice among charities. During the trial, it became clear that the government had put a hold on the HTN application, preventing it from moving forward.) The government wanted Williams to inform on HTN and she described how FBI Agent Jim Kolbe, IRS Agent Mark Sweeney and US Attorney Brenda Sannes had spent three days, first individually and then together, asking her to wear a recorder in her meetings with HTN defendant Ayman Jarwan. She described them as "waving the flag" and telling her that, "9/11 may not have happened if people were involved." She felt the HTN people "were being pursued" and got rid of them as a client after only three meetings. She never agreed to wear a wire and refused to refer the case to a government attorney.

The government called more than 50 witnesses to testify, but neglected to call two key people: Kelly Tubbs, Dhafir's office manager of ten years who was proud of the fact that Dhafir's office had never failed an audit; and Maher Zagha, a co-defendant who was the HTN representative in Jordan. Zagha organized for food, clothing and medicine to go by land and sea to Iraq. He also sent money to Dhafir's elder brother (also a physician) in Baghdad, so that animals could be bought, sacrificed and given to the needy, particularly around Muslim holidays.

Arrested in Jordan on the same day as Dhafir's arrest in the US, Zagha was held and questioned for three weeks by Jordanian authorities under FBI

direction. In the end, Jordanian authorities released him, satisfied that he had indeed sent aid to sick and starving Iraqi civilians on behalf of HTN. Zaghera was presented as a fugitive at trial when, in fact, he was living in the house he had always lived in and would gladly have come to the US to testify on Dhafir's behalf. Neither the prosecution nor the defense asked him to testify.

The government did not call Tubbs because it considered her a "hostile witness," and, sadly, despite Tubbs calling the defense lawyers regularly asking to testify, they did not contact her either. The total extent of government's reach in this case can be surmised by the surveillance conducted on Tubbs alone. Tubbs, who had nothing to do with HTN, had her home bugged and her telephone conversations monitored. On one occasion, government agents even entered her house and copied her computer hard drive. Told of the bugging after Dhafir's arrest, she and her husband began announcing their arrival when they got home, even alerting those "listening in" that they wouldn't be able to hear anything on the evenings her husband's band was practicing. She and her husband have since moved, and although her experience has shaken her trust in the government to the core, her trust in Dhafir remains steadfast.

Witnesses who were obliged to testify against Dhafir in exchange for either immunity or a plea deal spoke of their respect for Dhafir and his kindness and generosity, often saying he was "like a father" or "like a brother" to them. Several Iraqi-born witnesses broke down on the stand as they talked about conditions in Iraq during the sanctions. On the fourth day of the trial, Walid Smare, a witness who had accepted immunity in exchange for his testimony, broke down as he was being cross-examined about his family's circumstances during the sanctions.

This prompted all hell to break loose in the courtroom: the government objected to its own witness crying; the defense objected to the government's objection and the witness insisted he wasn't looking for sympathy. Once things calmed down, Judge Mordue, the presiding judge, instructed the jury, "[M]embers of the jury, we're not here to judge whether it's a noble thing in the world and the right thing, that's fine. But the thing we're here for is whether or not there's been a violation of the law done according to what the allegations are by the government."

A Compliant Media

The government was duplicitous in this case from the outset, yet no media outlet directly challenged its inconsistency.⁹ And because no terrorism charges were brought against Dhafir, only the local newspaper, the *Syracuse Post-Standard*, covered the trial. Prosecutors could not have written better articles themselves. Early in the trial, the coverage prompted one of Dhafir's

three lawyers to write to the paper asking for better representation of defense cross-examination of witnesses.¹⁰ American Civil Liberties Union (ACLU) court watchers attending the trial also wrote letters asking the paper to give more balance in its coverage. And a multifaith group, who prayed together outside the courthouse each day before proceedings began, met with editorial staff and was told that the defense's side of the case would be more fully represented when it started calling its own witnesses.

In the fourteen-week trial, the defense called one witness for fifteen minutes, Dr. Edward Cox, director of Health Now, for Medicare, and his testimony appeared to confirm the defense reading of a rule in the Medicare Handbook on which all the Medicare counts rested. Next day, the *Post-Standard* reported this testimony as it was given. However, the following day, the paper ran a story on the front page, with a picture of Cox, in which he appeared to contradict his own testimony.

The paper eventually offered a couple of small challenges to the government duplicity in an editorial and a cartoon. Other than that, it aided and abetted the government in transforming Dhafir's image in the community from that of a compassionate humanitarian to a crook and supporter of terrorists.

Bait and Switch

In the end, Dhafir was found guilty on 59 counts of violations of the economic sanctions against Iraq, money laundering, mail and wire fraud, tax evasion, visa fraud (all of the above related to running HTN) and Medicare fraud. (The jury was not allowed to deliberate on one count in which the government had listed the wrong bank.)

Although the government acknowledged that Dhafir donated \$1.4 million of his own money to HTN over the years, he was still convicted of spending more than \$500,000 dollars of HTN money on himself and his friends. And despite receiving less reimbursement from Medicare for the previous year than he had spent on chemotherapy alone, he was convicted of Medicare fraud.

In 1993, Dhafir wrote a letter to Medicare complaining about its "ever-changing" rules and disrespect of his staff.¹¹ For this action, his office was put on a "pre-payment flag," which meant that his office would not receive payment until someone at Medicare checked his office's billing. At trial, the defense was unable to find out when, if ever, Dhafir's office was taken off this flag. Medicare charges usually involve fictitious patients and made-up illnesses; Dhafir's case had none of this. The government does not dispute that Dhafir's patients received care and expensive chemotherapy; its argument for all 25 counts of Medicare fraud was that because Dhafir's Medicare claim

forms had been filled out incorrectly, his office was not due any reimbursement for the treatment or chemotherapy his office had administered.

After the guilty verdicts came down, District Attorney Glenn Suddaby (now a federal judge) told reporters he didn't want anyone saying anything about terrorism and that, regardless of 9/11, this prosecution would have gone ahead. But six months later, on submitting a sentencing memo that asked for a sentence of not less than 24 years, he announced that Dhafir had links to terrorism. Dhafir and other HTN defendants are now listed on the government's list of successful terrorism prosecutions along with Mrs. Dhafir and William Hatfield, Dhafir's personal accountant.¹²

The Post-Standard covered this announcement as if its reporter had not been present every day of the 14-week trial. A prominent front-page article with a very large headline announced, "US Says Manlius Doctor Was Linked to Terrorists," and a few pages later another headline announced, "Prosecutors say video links Dhafir to al-Qaida founder." The connection? On several occasions during the 1980s, Dhafir was in Pakistan as a volunteer with Doctors Without Borders in mujahedeen refugee camps. On one of these trips, he briefly met and interviewed Abdallah Azzam, who was later known as a teacher and mentor of Osama bin Laden, and Gulbuddin Hekmatyar, future Taliban prime minister of Afghanistan. At the time Dhafir met these two, they were friends of the US and the government even noted this in a footnote of its memo.

In fact, they were then very good friends of the US, which was funding them and other Afghan mujahedeen to the tune of millions of dollars to aid their fight against the Soviet Union. Throughout the 1980s, both these people were welcomed to the US and allowed to fundraise freely throughout its length and breadth. In 1985, Hekmatyar was part of a delegation of mujahedeen leaders who came to the US to lobby diplomats at the UN General Assembly, and Ronald Reagan hosted this group of "freedom fighters" at the White House (although Hekmatyar declined to attend because he thought it would be bad for his image).¹³ Hekmatyar is a brutal warlord, who killed and oppressed the Afghan people while in power, and the US is once again courting him as a partner who can help "bring stability" to the region.

Criminalizing Compassion in the War on Terror

That the government strategy for prosecution was premeditated can be seen in a 2003 "Terrorist Financing" paper published shortly after Dhafir's arrest. Written by Jeffrey Breinholt, then coordinator of the Department of Justice Terrorist Financing Task Force and research and practice associate at Syracuse

University Institute for National Security and Counterterrorism (INSCT), it sets out the game plan for prosecutions. In the introduction Breinholt says:

Persons cannot be convicted of the federal crime of terrorism because there is no such crime. Instead, terrorism crimes have developed in the same manner as other crimes, policymakers determine what evil (or 'mischief') should be prevented and then craft criminal laws that take into account how such mischief is generally achieved. On occasion, acts that are criminalized are not ones that should necessarily be discouraged, if committed by persons not otherwise involved in the targeted conduct. In such cases, laws are crafted to criminalize such conduct only in particular circumstances.¹⁴

Within weeks of Dhafir's sentencing to 22 years in prison, Breinholt presented a lecture containing the essence of this paper to a group of third-year law students at Syracuse University. Entitled "A Law Enforcement Approach to Terrorist Financing," it highlighted the Dhafir and HTN case.¹⁵ Greg West, one of the three HTN prosecutors, helped present the lecture, while the other two prosecutors, Michael Olmsted and Steve Green, were in attendance to answer questions. Law school faculty was also present along with representatives from the INSCT,¹⁶ a sponsor of the lecture.

Breinholt told the students that Dhafir's case had been under-prosecuted and in the context of the lecture's title the implication was clear: West told the class that one of the biggest frustrations of his career was having access to intelligence and not being able to share it. Breinholt enumerated the statutes being used as powerful tools for prosecution of terrorist financing and explained that these tools were not widely known even among prosecutors. He voiced a hope that law schools could serve as a kind of farm system educating students in this new field of law and that this, in turn, would create lawyers who would be familiar with and who could use these new prosecution tools.

He explained that because the "American public won't tolerate anything less than the rule of law," creative ways had to be figured out to draft laws that can be used to prosecute what they are trying to prevent. According to Breinholt, this task was addressed by a Department of Justice Terrorist Financing Task Force that came together to craft ways to apply white-collar expertise to the problem of terrorism. A major tool that emerged from the work of this task force, Breinholt told students, is the use of IEEPA violations to gain convictions in terrorist financing cases. He said that to convict under IEEPA all that was necessary was to build a chain of inferences from available circumstantial evidence.

Dhafir and other HTN defendants are listed on page 20 of Breinholt's paper under the heading "Clean money cases." Others under this heading

include: Enaam Arnaout of Benevolence International Foundation (BIF); Sami Al-Hussayen, a graduate student at the University of Idaho, associated with Islamic Assembly of North America (IANA); Sami Al-Arian, a Palestinian professor from Florida; and the Holy Land Foundation, the biggest Muslim charity that was shuttered in 2001, but not prosecuted until six years later.¹⁷

Later in “Terrorism Financing,” under the heading “Crimes of terrorist financing,” Breinholt lists the statutes used in prosecution of these cases. Statutes under this heading that were used in Dr. Dhafir’s case are 50 USC. §§ 1701, 1702 (IEEPA) and USC. §§ 1956(a)(2)(A), “operating an unlicensed money transmitting business.”

Neither Breinholt nor West told the class that these “powerful prosecution tools” are being used mostly against Muslim charities and individuals associated with those charities, while violations by large corporations like Halliburton and Chevron Texaco, that did billions of dollars worth of business in defiance of IEEPA, go largely unpunished.¹⁸ At the most, these corporations have gotten a slap on the wrist and a fine, but no individual board member or officer has ever faced prosecution. And although many non-Muslim charities work in the same troubled regions of the world as Muslim charities, not a single non-Muslim charity has been closed. None of this was mentioned at the lecture.

By hosting this lecture, Syracuse University Law School gave credence to a charge never brought against Dhafir and HTN and, in so doing, became an accomplice in the government’s subterfuge. After the lecture, a request was made to Dean Hannah Arterian that (ACLU) court watchers who attended the trial be allowed to address the students; it was denied.

Pre-Emptive Prosecution: The New Paradigm

In the wake of 9/11, the FBI and Justice Department indicated that their goal was to prevent terrorist attacks before they occurred by prosecuting under a new paradigm they called pre-emptive prosecution. The strategy used in the Dhafir and the HTN case is just one variant and the government has many tools in its arsenal to help prosecute successfully. These include, but are not limited to, use of agent provocateurs/informants who help frame innocent Muslims and are rewarded with money and US citizenship; use of staged press conferences and pre-trial publicity that hype unfounded and sensational terrorist allegations in order to scare communities, damage the reputation and credibility of Muslims and influence the jury pool; use of strategies for intimidating juries into believing that the defendants are real terrorists by excessive security, by insisting on anonymous witnesses and/or jurors and by constantly referring in trials to 9/11 and to known terror-

ists such as Osama bin Laden even when these references are irrelevant to the charges; excessive and inappropriate use of conspiracy charges and the use of guilt by association to smear those who have innocent contacts with known or suspected terrorists, including the accused having met these people years before they were labeled terrorists by the US government; use of secret evidence and secret court opinions; and use of multiple trials—if it is unsuccessful in a first trial, the government keeps going until conviction is achieved either in a new trial or by coercing the defendant into a plea deal.¹⁹

Project SALAM (Support and Legal Advocacy for Muslims), a group founded by two lawyers from one of these cases, has a database documenting these post-9/11 “terrorism-related” prosecutions that, “have included a significant number of Muslims who were in fact innocent of any crime, and others who were severely overcharged and/or over sentenced.” Over the last two years, Project SALAM has written a series of letters to President Obama and Attorney General Holder asking for review of these cases involving preemptive prosecution. It has yet to receive an answer.²⁰

Although this type of prosecution is currently being used mostly against Muslims and Arabs, it’s unlikely this will always be the case. A bill currently in the first step of the legislative process is titled in part “To direct the secretary of state to submit a report on whether any support organization that participated in the planning or execution of the recent Gaza flotilla attempt should be designated as a foreign terrorist organization ... “ If this bill passes and is used in conjunction with the recently passed National Defense Authorization Act (NDAA), which authorizes the US military to indefinitely detain anyone suspected of being a terrorism supporter, many more humanitarians could find themselves in a similar situation to Dhafir’s.

Communication Management Units

Dhafir has served most of his sentence in a Communication Management Unit (CMU) in Terre Haute, Indiana, that houses almost exclusively Muslim and/or Arab men, many of them principals of now defunct Muslim charities. There are currently two of these special units; the other located in Marion, Illinois. Conditions in these units are extreme: visiting and phone calls are severely restricted; no contact visits are allowed; units are equipped with 24-hour video surveillance that covers every inch of the facility; incoming and outgoing mail is monitored through Washington; and prisoners have no recourse to challenge their designation to these units.²¹

The Terre Haute CMU is housed in the old death row building that had been vacant for a number of years before Muslim prisoners from all over

the country were moved there in December 2006. Because the building is old and dilapidated, prisoners are subject to extreme heat in the summer and cold in the winter, including snow in some of the cells.²²

The Center for Constitutional Rights (CCR) sued the Bureau of Prisons (BOP) in March 2010 saying the units were unconstitutional, but the case is not resolved and prisoners are still being held there.²³ On October 7, 2011, members of Congress wrote a letter to the BOP expressing concern about policies and practices at the CMUs including the extraordinary restrictions on communications, lack of due process and disproportionate number of Muslims being held there. They have not yet received a reply from the BOP.²⁴

Resentencing

A decision handed down by the Second Circuit Court of Appeals in August 2009 upheld Dhaafir's conviction, but suggested the district court look again at the sentencing guidelines. The sentencing guidelines range on which his sentence was based was erroneously increased as if he were a third-party (professional) money launderer rather than the reality, which showed that he transmitted funds derived from the very same offenses which he had been convicted for personally committing ("mail fraud" and "tax fraud").²⁵ Resentencing was scheduled for January 5, 2012, and just 13 days before it, Dhaafir was suddenly moved out of the CMU into the general population at Terre Haute.

One might hope that this move is a preparation for release, but it's more likely that it is in order to steal thunder from the 75 letters written to the Judge Mordue on Dhaafir's behalf telling, in part, of extreme conditions in the CMU and asking for clemency. People who have written to Judge Mordue on Dhaafir's behalf include Denis Halliday and Hans Von Sponeck, both of whom resigned from the UN because they were unwilling to implement a genocidal policy of sanctions against Iraq; Nobel Laureate Mairead Maguire; and many other individuals, including members of Dr. Dhaafir's family, families of his former patients, people from his faith community, and people across the world who greatly appreciate his humanitarian outreach.²⁶

February 26, 2012, marks the ninth anniversary of Dhaafir's arrest and incarceration. He is in his sixties now and has a number of health issues that certainly affect his ability to endure the circumstances in which he is serving his sentence. He developed a heart condition after his arrest and has not always had the heart medication that his condition requires. He's also had two extremely painful episodes of gout that could easily have been prevented if he had been given medication. And he had to wait a long time to have a painful hernia treated, which has unfortunately now recurred, requiring further

surgery. He will likely die in prison if he does not get relief at resentencing.

Following Nuremberg Principle IV, Dhafir did violate the Iraq sanctions, but this does not make him a terrorist. At resentencing, which is now scheduled for February 3, the prosecution will be asking that Dhafir's sentence be increased; the defense is hoping for immediate release or, at the very least, a significant sentence reduction. It remains to be seen if justice will finally be done in this case.

Editor's Note: Dr. Dhafir was resentenced to 22 years in prison in February, 2012. Donations to his defense, with "Dhafir Appeal" written in the subject line, can be sent to his attorney at: Law Office of Peter Goldberger, 50 Rittenhouse Place Ardmore, PA 19003-2276

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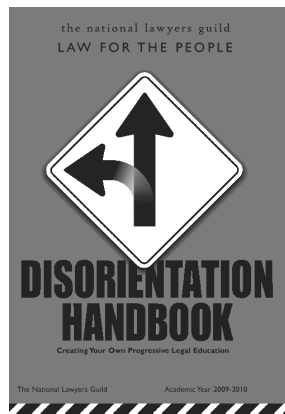
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17. See Katherine Hughes, *Denial of Due Process to Muslims Disgraces Us All*, 64 GUILD PRAC. 111 (2007) (describing what happened to people in each of these cases. At the time of this article, the HLF case had not yet been prosecuted. After being convicted in a second trial, HLF's two main principals each received 65 years and three others received lesser sentences).
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Nathan Goetting

THE NATIONAL DEFENSE
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YEAR 2012: BATTLEFIELD EARTH

If President George W. Bush was right and jihadist terrorists attacked us on 9/11 because “They hate our freedoms”¹ they must be a lot happier with us now. Since that terrible September morning the federal government has chosen to regard the old constitutional paradigm, under which the powers of the president expanded during war and contracted during peace, as quaint and obsolete, just as it has chosen to regard the Geneva Conventions themselves.² While troop deployments in Iraq and Afghanistan are drawing down, the assault on the civil liberties of terror suspects the world over keeps ratcheting up. Beginning with Bush’s ultimatum to the world, “[E]ither you are with us, or you are with the terrorists,”³ every nation on earth, including our own, is the site of either a potential or actual military operation. With military operations comes martial law. Regarding the pursuit of accused terrorists, President Obama has in many ways done more to stretch the limits of executive power than his predecessor. Once again, civil libertarians will have no voice among the major-party presidential candidates in 2012.

Because the enemy is an abstract noun that can never be defeated, “terror,”⁴ we are living in what journalist Mark Danner (borrowing from Italian philosopher Giorgio Agamben⁵ and others) calls a “State of Exception,”⁶ wherein a powerful nation whose well-being is largely unthreatened by others is ruled by a government that acts as if in a continual state of emergency. Since 9/11 martial powers have entrenched themselves so deeply into the foundations of government and society that, despite the absence of any successful terrorists attacks on U.S. soil in over ten years, they’ve become difficult to rescind. As time elapses the restoration of lost civil liberties becomes even more unlikely. Our State of Exception reached a new level of authoritarianism in 2011 with the implementation of President Obama’s “Kill List,”⁷ a targeted assassination program of suspected terrorists, including American citizens, adults and at least one American child, and his signing of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), which allows for the due-process-free indefinite military detention of suspected terrorists wherever they may be found, again including American citizens, even on U.S. soil.

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Before the NDAA's passage one of its promoters, Senator Lindsay Graham (R-SC), himself a military lawyer, summarized its contents by saying that this bill will "basically say in law for the first time that the homeland is part of the battlefield."⁸ Graham is, of course, incorrect. It's refreshing to see that in a fit of enthusiasm a senator from South Carolina is capable of forgetting the Civil War for a moment. What Graham likely meant to say was that this is the first time since the end of Reconstruction the U.S. military is legally empowered to turn inward and perform the ordinary tasks of domestic law enforcement against its own citizens.⁹ If so he'd be right.

We've come a long way in a short time. In 1995 Ramzi Yousef, Pakistani national, jihadist militant, and nephew of future 9/11 planner Khalid Shiekh Muhammed, was arrested in Islamabad and extradited to New York where, upon being afforded his constitutional trial rights, the same as any other criminal defendant, he was convicted by a civilian judge in a federal district court for the 1993 bombing of the World Trade Center. Since his conviction the U.S. criminal justice system has dealt with him severely and effectively. He is serving a life sentence in solitary confinement in the so-called "Alcatraz of the Rockies," the federal supermax prison in Colorado,¹⁰ where he no longer poses any threat and, given recent studies on the physical and psychological effects of long-term solitary confinement,¹¹ is no doubt feeling enough pain and anguish to satisfy the strongest urges for retribution. Setting aside genuine concerns about the cruelty of protracted punitive isolation, Yousef's case is a clear example of how our system of justice is supposed to work¹² and how it has regularly worked in the past. This is not merely a process we've been proud of and happy with. Its essential attributes—an impartial judge, the presumption of innocence, proof beyond a reasonable doubt and everything else that together we call due process of law—have become central parts of our national self-definition. This once quintessentially American way of fighting terrorism is becoming a rapidly fading memory.

The first casualty of the elimination of due process is truth. Trials are essentially investigative in nature. Beyond establishing minimum standards of humane treatment for the accused, the primary purpose of the criminal procedure provisions of the Bill of Rights, including the right to due process of law, is to ensure that the facts of the case are revealed during court proceedings, which in turn minimizes the risk that innocent defendants will be convicted. It's not a coincidence that most of the detainees at the Guantanamo Bay detention camp, roughly 600 of them, have been released without charge.¹³ When due process ends, and mere accusations become a substitute for criminal convictions, the exponential rise of false imprisonments begins.

For the first decade after the attacks on the World Trade Center and the Pentagon the foremost concern among civil libertarians was to ensure that the rights enumerated in the constitution, particularly those related to criminal procedure, would continue to apply to everyone, including accused terrorists. However, in the wake of the “Kill List” program, which has included the premeditated extra-judicial assassinations of Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki, all three American citizens, the goalposts have shifted in the direction of dramatically increased executive power. Obama insists his actions are constitutional.¹⁴ We’ve moved from debating whether the president can detain indefinitely without trial to who the president can detain indefinitely without trial to, finally, who the president can kill outright without even bothering to first detain. In 2002 John Walker Lindh, a 21-year-old American citizen, was sentenced to twenty years in prison by a federal court after being captured fighting against the U.S. alongside the Taliban. While the government employed constitutionally suspect tactics during his interrogation,¹⁵ Lindh was ultimately allowed an attorney and offered a plea bargain, which he accepted. That same year the notorious shoe bomber, Richard Reid, a British national and al-Qaeda member, was sentenced to life in prison with his attorney at his side in federal court. Other accused terrorists subsequently received civilian trials under the law enforcement model, including the so-called “20th hijacker” Zacarias Moussaoui. Last year the U.S. killed an American citizen, Awlaki, with a Hellfire missile while he fled for his life in Yemen¹⁶ and, two weeks later, killed his 16-year-old son with another one.¹⁷ “We needed a court order to eavesdrop on him,” former NSA (1999-2005) and CIA (2006-2009) Director Michael Hayden said of Awlaki, “but we didn’t need a court order to kill him. Isn’t that something?”¹⁸

All governments seek to control their populations through violence and secrecy. Comparatively free societies have populations that through various methods of resistance minimize these natural tendencies of government. Secrecy—from Congress, the courts, and the American people—is an essential attribute of Obama’s targeted assassination program,¹⁹ which with its constant deployment of high-priced unmanned drones, continues to grow increasingly massive and expensive. On the frontlines of the “war on terror” drone-killings have become “the only game in town,” according to former CIA Director and current Defense Secretary Leon Panetta in 2009.²⁰ “[N]o president has ever relied so extensively on the secret killing of individuals to advance the nation’s security goals,” says Greg Miller of *The Washington Post*²¹ of our current commander-in-chief, swept into office, incidentally, on a wave of anti-war and progressive support. One cannot help but suspect that, particularly in high-profile cases such as those of Awlaki and, even more so, Osama bin

Laden, assassination has become a helpful way to thwart the thorny legal and political debates over how they should be treated that would've arisen had they been arrested and detained, as civilian law requires. Drone strikes help ensure that such debates are killed along with the suspects. The question of which rights the Constitution affords these suspects is definitively answered in advance—none whatsoever.

While President Obama has made his reasons for killing Awlaki fairly clear,²² alleging that he was an al-Qaeda operative involved in plots against the U.S., we may never know why the jihadi preacher's 16-year old son, Abdulrahman al-Awlaki, was shot down in a separate attack.²³ There has been a pregnant silence across the political and media landscape for the past ten years regarding U.S. treatment of the minor children of terrorist suspects. Because military and intelligence agencies keep information on this subject secret, we can't be sure what standard operating procedure is regarding child interrogation and detention—or, as with young Awlaki, execution. However, in light of the secret disappearance and still-unknown fate of the young sons of Khalid Sheikh Muhammad, then eight and six years old respectively, by the CIA in 2002, it has become an open question whether the U.S. government any longer recognizes constitutional limitations on its power to interrogate and punish children for the sins of their parents. Shortly after these young boys disappeared in September 2002 an anonymous CIA official assured an English newspaper that “we are handling them with kid gloves.”²⁴ This claim is contradicted, however, by an affidavit submitted to a 2007 combatant status review tribunal in Gitmo by Ali Khan, father of Gitmo detainee Majid Khan, who claimed that Pakistani guards told his son that, while in U.S. custody, the boys were “denied food and water by other guards. They were also mentally tortured by having ants and other creatures put on their legs to scare them and get them to say where their father was hiding.”²⁵ It goes without saying that the reliability of Mr. Khan, like that of any affiant, is open to dispute. However, in August 2002, just a month before the boys were captured, former head of the Justice Department's Office of Legal Counsel (now federal circuit court judge) Jay Bybee issued a memo authorizing the use of insects during custodial interrogations related to the “War on Terror.”²⁶ Moreover, a CIA interrogator has reported that Khalid Sheikh Muhammad was told that if the U.S. is attacked again, “We're going to kill your children.”²⁷

As far as anyone other than the U.S. government knows, these children simply vanished from the face of the earth after their arrest. I suppose that in some minds, including some putatively serious ones, whether the Constitution grants the president the power to torture and kill children is an open question. Jay Bybee's underling in the Office of Legal Counsel, tenured

Berkeley professor John Yoo, famously said child torture can be a presidential prerogative that no statute or treaty can elide.²⁸ But the very essence of democracy requires that controversial political questions, particularly morally charged ones like the treatment of Awlaki's and Muhammed's children, be debated openly. President Obama will not share the current U.S. policy on an issue that cuts right to the heart of a nation's moral identity—how it treats the young children of its enemies—again illustrating that it is that part of us that still values democracy and the rule of law that we are losing.

Since 9/11 Congress has failed to check the executive branch's unconstitutional overreaching. Instead it has helped Bush and Obama along by passing a lengthy sequence of increasingly draconian laws constricting basic freedoms, including the 2001 Authorization for Use of Military Force, the Orwellianly named USA PATRIOT Act, the Military Commissions Act, the FISA Amendments Act, and now the NDAA. Our national security laws continue to grow more expansive in scope and oppressive in application, even as the need for them grows less acute. Not only have there been no successful terrorist attacks in the U.S. since 9/11, but recently Defense Secretary Leon Panetta announced that the U.S. has the depleted al-Qaeda terrorist organization "on the run"²⁹ and that we "have undermined their ability to conduct 9/11 attacks."³⁰ With the threat diminishing, civil liberties should be expanding, not contracting.

The NDAA, just signed into law last New Year's Eve, grants congressional approval to many of the more controversial martial powers the Bush and Obama administrations have already been exercising. Most notoriously, the NDAA allows for the indefinite military detention, without trial, of anyone "who [according to the president] was part of or substantially supported al-Qaeda, the Taliban, or associated forces."

Hoping to retain a measure of due process for some of those who will eventually be imprisoned under this law, Senator Dianne Feinstein (D-Cal) proposed an amendment that would limit its application by exempting American citizens.³¹ This amendment was rejected, thus making plain the Senate's intent to truly universalize the pool of suspects whose constitutional rights the president can ignore. The boundary lines between the battlefield and the home front, blurry since 9/11, are now being erased. Domestic law enforcement, which already uses war-like weaponry and tactics in the course of routine tasks like crowd dispersal³² and the execution of drug warrants,³³ will become even more militarized under this law. As the framers of the Constitution understood, and so often repeated in defense of their system of limited government and checks and balances, it is in the very nature of political power to expand beyond parameters consistent with the social and

political well-being of the governed.³⁴ Powers granted to the president for one purpose will always be used—and aggrandized—in pursuance of others. Just as history has shown that, regardless of party, presidents seek to build upon the powers arrogated by their predecessors. Powerful executive bureaucracies, like most other forms of plague, cannot help but grow.

The brunt of the increased militarization of our law enforcement brought on by the NDAA will likely be felt most immediately by those it was designed to target, suspected radical jihadists. However, the government will soon find it a handy tool for use against other targets within the general domestic population, who in turn will be made to live in an atmosphere of increased fear, suspicion, self-censorship, and resentment. Consider the 2011 arrest of the Brossart family in North Dakota, anti-government separatists who, we now know, were paranoid while the government really was simultaneously out to get them. Suspecting them of refusing to return six wandering cattle to their neighbor, the local sheriff borrowed a 154 million dollar unmanned MQ-9 B Predator drone, larger and more advanced than the MQ-1 model which killed Awlaki, from the Department of Homeland Security for the purpose of spying on them.³⁵ Citing anonymous government sources “in charge of the fleet [of drones],” on December 10, 2011 *The Los Angeles Times* reported that Congress has authorized drones as a domestic surveillance tool. “[I]nterior law enforcement support,” the article explains, is “part of their mission.”³⁶

It would be alarmist and ahistorical to say that we have lost something that cannot be regained. During times of fear and confusion the American people have repeatedly demonstrated a remarkable insistence on reclaiming (or gaining new recognition for) rights afforded them under the Constitution. The great constrictions of civil liberties during the eras of paranoid overreaching known as the Red Scare—which surfaced twice, first after the Russian Revolution in 1917 and again in the late 1940s and 1950s with the coincident rise of Soviet-dominated Eastern Europe and Communist China—were, after all, only temporary bouts of hysteria each of which, due to mass protest movements, gave way to eras of significant reform and civil liberties. Eventually, with World War I’s end and the booming economy of the roaring ’20s, many Americans shook off their fear and proved that the collective gullibility of the populace wasn’t infinite. They realized that the government’s pursuit of the global communist conspiracy could be used as a pretext for any unconstitutional outrage. Less than four years after socialist leader Eugene V. Debs’ conviction for blaming capitalists for World War I was upheld unanimously by the Supreme Court, he was given a presidential pardon. Less than five years after his notorious “I have here in my hand”

speech, Joseph McCarthy was censured by the U.S. Senate and cast into permanent disrepute.

In 1988 legislation was ultimately passed apologizing for and paying reparations to the victims of America's quintessential program of paranoid war psychology--Japanese American internment during World War II.³⁷ War fever can give way to political awareness. The light of liberty can, and in the not so distant past has, come out of our darkest bouts of panic and finger-pointing.

If the current trajectory toward a military state is going to be reversed—that is, if our current state of exception isn't going to become our permanent way of life—it is going to be the result of a popular recognition of just how Red Scare-like, both in its effects on mass psychology and the attenuation of liberty, the “war on terror” has become.

NOTES

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Since the law was amended in 1988 presidents from both political parties have played along, “proclaiming” these prayer days and participating in their pious ceremonies and exercises. The constitutionality of this law was finally challenged in 2008 by a group of humanists and freethinkers called the Freedom from Religion Foundation (“FFRF”). This group succeeded in having the law overturned in the United States District Court for the Western District of Wisconsin, only to have their case dismissed by the Seventh Circuit Court of Appeals for lack of standing. In “Turn to the Constitution in Prayer: *Freedom from Religion Foundation v. Obama*, the Constitutionality and the Politics of the National Day of Prayer,” Gail Eisenberg, a third-year law student at Northwestern University Law School who will soon begin a staff clerkship with the Seventh Circuit herself, provides a thoughtful history and analysis of the National Day of Prayer statute, the failed effort of the FFRF, and the First Amendment case law by which the statute’s constitutionality will be measured should another challenge arise.

The two remaining features in this issue deal with different aspects of the ongoing and increasingly ominous government overreaction since the terrorist attacks of 9/11. In “Anatomy of a ‘Terrorism’ Prosecution: Dr. Rhafil Dhafir and the Help the Needy Muslim Charity Case,” Katherine Hughes tells the story of the trial of a respected American oncologist from upstate New York sentenced to 22 years in federal prison for sending food and medicine to Iraqi civilians in violation of U.S. sanctions against Iraq. Ms. Hughes was an eyewitness to Dr. Dhafir’s 14-week prosecution, which she calls a “show trial,” conducted in a federal courtroom in upstate New York haunted by the specter of 9/11. Immediately after his arrest in 2003, trumpeting politicians such as Attorney General John Ashcroft and New York Governor George Pataki publicly branded Dr. Dhafir as a supporter of terrorism and, with no small amount of self-congratulation, spoke as if his arrest marked the breakup of an imminently dangerous terrorist plot. Media covering the trial continued to feed this narrative, publishing sensational and misleading headlines casting Dr. Dhafir as a menacing Islamic terrorist cell with dangerous ties abroad. In this feature, Ms. Hughes tells the story of an American physician, sworn to a life of healing, who sought to stem the civilian death toll, already in the hundreds of thousands, caused by harrowing international sanctions meant to punish a dictator but that instead were ravaging an already-oppressed and desperate population. It is a story of hysteria, demagoguery and, more than anything else, the terrible swiftness with which a fair trial can be made impossible in an atmosphere of contagious war psychology.

In “The National Defense Authorization Act for Fiscal Year 2012: Battlefield Earth,” I argue that, unlike past conflicts, during which civil liberties

constricted for a time but ultimately expanded again after the conflict was resolved, the global “war on terror” is instead creating a state of perpetual authoritarianism and constitutional disregard about which all of us should be gravely concerned—and determined to resist.

—Nathan Goetting, *Editor in chief*

- Anderson Cooper 360°: Judge: National Day of Prayer Day Unconstitutional (CNN television broadcast, Apr. 16, 2010).



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—work it has been doing for over 65 years and,
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“to the end
that human
rights shall
be more
sacred than
property
interests.”

—Preamble, NLG
Constitution



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