Democratic senators join Republicans to attack latest court ruling on Pledge of Allegiance

John Andrews
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Contrary to the predictions of most legal commentators, a majority of the 24 active judges on the United States Court of Appeals for the Ninth Circuit declined a request that the court as a whole review last June's three-judge panel decision that the phrase "under God" in the Pledge of Allegiance violates the Establishment Clause of the First Amendment to the US Constitution. Nine judges dissented, voting in favor of rehearing the case "en banc."

At the same time, the original panel narrowed its earlier ruling. Instead of invalidating the 1954 Act of Congress that added "under God" to the Pledge, the amended decision in *Newdow v. US Congress* only prohibits reciting the Pledge in public schools.

Plaintiff Michael Newdow, a physician representing himself in court, told the Associated Press, "This makes our country stronger when everyone's views are given equality, especially when it comes to religion."

Although the ruling is a logical application of Supreme Court decisions prohibiting public school prayer that date back more than 40 years, it has been denounced by right-wing commentators in the media as well as by politicians from both major parties. Demonstrating the ever more reactionary trajectory of the American ruling elite, Senate Democrats have moved to the right of many Republican judicial appointments from years past on core issues of democratic rights.

There is nothing radical or extreme about the Ninth Circuit rulings. The Establishment Clause, the opening phrase in the Bill of Rights, reads, "Congress shall make no law respecting an establishment of religion." Thomas Jefferson called it "a wall of separation between Church and State." Obviously, the 1954 law adding "under God" to the Pledge violated both the letter and spirit of the Establishment Clause.

Political conservatives claim to believe in "strict construction" of the Constitution when they attack court decisions upholding laws protecting personal rights, but they have no compunctions about ignoring the Constitution's text when it comes to integrating religion into the government.

The Ninth Circuit ruling contains two lengthy opinions on the decision not to rehear the case "en banc." Diarmuid O'Scannlain, one of the Ninth Circuit's most right-wing judges, referred to the "public outcry" generated by the original decision, and denied that reciting the pledge with the words "under God" was "a religious act," because "patriotic invocations of God simply have no tendency to establish a state religion." O'Scannlain ignored both logic and the fact that the First Amendment does not enjoin the establishment of "a state religion," but rather prohibits the "establishment of religion" as such.

O'Scannlain's dissent was answered sharply by the Ninth Circuit's leading liberal, Stephen Reinhardt, who called the reference to "public and political reaction" a "disturbingly wrongheaded approach to constitutional law." Reinhardt wrote, "The Bill of Rights is, of course, intended to protect the rights of those in the minority against the temporary passions of a majority which might wish to limit their freedoms or liberties."

There are decades of Supreme Court precedent applying the Establishment Clause to curtail governmental sponsorship of religion. In one of the more notable decisions, 1962's *Engel v. Vitale,* the Supreme Court invalidated a New York law mandating a "non-denominational" prayer at the beginning of the

school day.

Six years later the Supreme Court ruled in *Epperson v. State of Arkansas* that states cannot prohibit the teaching of evolution in public schools. Associate Justice Arthur Goldberg wrote for a unanimous high court that "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice." He continued: "It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

These court decisions, while opposed vociferously by some, were widely accepted at the time by politicians and commentators as necessary corollaries of American democracy. The *Newdow* decision is a straightforward application of the principles underlying those decisions, but conditions are much different today than they were in the 1960s.

Predictably, Attorney General John Ashcroft said the Justice Department would "spare no effort to preserve the rights of all our citizens to pledge their allegiance to the American flag."

Resolutions to amend the Constitution were introduced in both the House and Senate, but the most remarkable action was a Senate resolution, passed unanimously on March 4, condemning the Ninth Circuit for standing by its earlier ruling. The Senate measure was passed only two business days after the latest court ruling.

The Senate resolution "strongly disapproves of a decision by a panel of the Ninth Circuit in *Newdow*, and the decision of the full court not to reconsider this case en banc." Republican Senator Lisa Murkowski of Alaska, the sponsor, accused the entire Ninth Circuit of "decades" of "dysfunctional jurisprudence." Orin Hatch, a Republican from Utah, called the decision "truly a remarkable feat of judicial activism" and "ludicrous."

Hatch denounced the *Newdow* ruling as a hindrance to the promotion of US militarism: "Millions of students in the Ninth Circuit will be prevented from pledging allegiance to our flag and our Nation. It is truly regrettable that they will be prevented from doing so at a time when our Nation is under attack by terrorists and when we particularly need everyone to come together and support our President and our troops all over the world."

No Democrat spoke in support of the Ninth Circuit ruling. Instead, Democrat Harry Reid of Nevada gave a cringing speech, correcting the Republicans for suggesting "that the whole problem with the Pledge of Allegiance case has been caused by Democratic appointees." Reid pointed out that the *Newdow* opinion was drafted by Alfred Goodwin, a Reagan appointee, and that three judges appointed by Republicans voted against rehearing the case, while six of the nine dissenters were appointed by Clinton.

This cowardly and reactionary measure passed 94-0, providing yet one more demonstration of the collapse of American liberalism and the lack of any serious support for democratic rights and principles within any section of the US political establishment.

Democratic presidential candidates John Kerry, John Edwards and Joseph Lieberman all supported the resolution. Senator Bob Graham was not present. Hillary Clinton also voted in favor.

The next legal step is a petition for certiorari to the Supreme Court, where the Ninth Circuit will almost certainly be reversed. Associate Justice Antonin Scalia, the leader of the High Court's right wing, violated canons of judicial ethics which prohibit judges from commenting on matters that might come before them by denouncing the *Newdow* ruling in a speech last January.

The Ninth Circuit has issued an order staying implementation of the decision until the Supreme Court decides whether to review the case.