Brief Response to Attorney Albright's Article

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Brief Response to Attorney Albright’s Article
By Prof. Peter Brandon Bayer

Attorney D. Chris Albright’s provocative plea that the phrase "under God" in the Pledge of Allegiance is insufficiently religious to offend contemporary Establishment Clause principles rests on three wobbly premises: (1) a limited perspective of some of the Framers, one which the Supreme Court rightly has eschewed; (2) Supreme Court dicta reflecting at best certain justices’ cursory suppositions about the religiosity of the words "under God," and, (3) the wholly irrelevant, and possibly inaccurate argument that the words "under God" have had scant influence on schoolchildren. Space constraints mandate that responses to Mr. Albright’s contentions be extremely brief.

Beginning with the intent of the Framers, any "accommodation" of religious beliefs afforded under the Establishment Clause must not confound the overarching principle of neutrality. Accommodation outside a realm of neutrality results in unlawful official endorsement or coercion regarding religion. Thus, as noted in my article, a public high school may not refuse student religious organizations the same access that secular student groups enjoy because such accommodation evinces neither favoritism for nor enmity towards religion.1 By stark contrast, the Pledge’s inclusion of "under God" renders it an officially sanctioned vow of national fealty, authored by Congress to testify that devotion to and dependence upon divinity are integral precepts of national identity and purpose. As such, the Pledge does not merely accommodate religion. Rather, it intentionally fosters religion by engraving Government’s endorsement that to truly adhere to American ideas, one must believe that our’s is a "nation under God."2

Consistent with the foregoing, despite Chief Justice Rehnquist’s lament, the Court has long and fittingly rejected the premise that government may affirmatively promote religion as preferable to atheism, agnosticism, and unconventional beliefs.2 Our ever maturing appreciation of Establishment Clause philosophy has heightened our awareness of the myriad ways Government, even with good intentions, may intrude into religious decisions which rightfully and exclusively belong to, "the home, the church and the inviolable citadel of the individual heart."

Consequently, based on our unfolding and increasing consciousness, we may reject discrete practices that the Founders themselves might have been unwilling or unable to recognize as inconsistent with the core purposes of the very Clause they drafted.4 Equally fragile is Attorney Albright’s appeal to a line of Supreme Court dicta that supposes the purposes and effects of reciting the Pledge with the words "under God" are sufficiently secular to withstand Establishment Clause review. Of course, unlike the Ninth Circuit, the Supreme Court has yet to confront squarely the Pledge issue based on a full evidentiary record and thoroughgoing argument. Similarly, Attorney Albright declines to confront the text, texture, and thrust of the 1954 amendment. Like the dicta he cites, Mr. Albright uncritically accepts the term "under God" as dispassionate description — a mere "acknowledgment of religion."5 And ignores both the clear instrumental nature of the Pledge and the inevitable goal of religious fostering that results from, and indeed motivated the addition of those words. By contrast, discussing a document that expresses a particular author’s religious reverence does not require either embracing or pretending to embrace that author’s sectarian preferences. One readily understands, therefore, Justice Brennan’s hesitancy in dictum upon which Mr. Albright relies that "reference to divinity in the revised pledge...may be no more of a religious exercise than the reading aloud of Lincoln’s Gettysburg Address."6 Discussing the philosophy of the Pledge likely is not a religious act, but officially encouraged recitation of the Pledge’s words "under God" is.

The last leg of Mr. Albright’s argument is based on the supposition that because our nation enjoys a wide array of beliefs and practices...

ENDNOTES

continued on page 17
More than 75 attorneys and justices assisted us this year at the local and state levels of the Nevada High School Mock Trial Competitions; many volunteered to judge the competitions. Several more helped by coaching the teams on their strategies and presentations. Well-established attorneys, those new to the legal profession and state and local judges served as presiding judges and scoring judge panel members. Students were judged on their presentation of information and teamwork rather than on their knowledge of the law.

Eight teams of students from across Nevada vied for the state championship in Henderson this past March. High school students representing Green Valley H.S., Reno H.S., Faith Lutheran H.S., Advanced Technologies Academy Team A, Foothill H.S., Advanced Technologies Academy Team C, Galena H.S., and The Meadows took on the roles of attorneys and witnesses to present a fictitious criminal case.

Students had practiced and rehearsed their roles since September under the guidance of a teacher and volunteer attorney coach. The results of the state competition were: 1st Place, Reno H.S., and, 2nd Place, Green Valley H.S. Reno H.S. is now preparing for the national competition which will be held in New Orleans May 8-10.

Brief Response to Attorney Albright's Article

continued from page 16

regarding religion, the words "under God" in the Pledge have not and likely will not endanger Establishment Clause principles. As a threshold point, whatever laudable religious diversity and freedom may depict American society hardly resolves the serious question whether and in what numbers school children (or others) have felt coerced, even subtly, either to embrace or to feign embracing the Pledge's official statement of religious favoritism. That neither a national nor monolithic religion has gripped America since 1954 is no proof that daily obligated recitation of "under God" has no effect on impressionable children's perceptions regarding religion.

Moreover, the purported lack of widespread negative effects is completely irrelevant to the underlying philosophy - and singular grandeur - of Constitutional rights. The Bill of Rights protects individuals. A class of one no less than a class of many may demand full constitutional coverage. Thus, societal approval cannot validate an establishment of religion if one student feels compelled either to utter "under God" or to stand in uncomfortable silence - if one parent feels that State sponsored invocation of God interferes with her right to direct the religious upbringing of her child. Contrary to the assertions of Attorney Albright, to protect freedom for one and all, that is the way it should be.

ENDNOTES
3. Id., at 226.
4. Cf., Brown v. Board of Education, 347 U.S. 483, 492-93 (1954)(Invalidating officially mandated racial segregation of public schools, the Court accented, "... we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson [generally permitting "separate but equal" state mandated racial segregation of public services] was written.")
5. Wallace v. Jaffree, 472 U.S. 38, 78 (1985)(O'Connor, J., concurring)(legislative authorization of a one-minute period of silence violated the Establishment Clause because the legislature's intent was "wholly religious").