

Church, State and Obama

THE GOOD, THE BAD AND THE UGLY

By Rev. Barry W. Lynn



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The Supreme Court has intervened in numerous cases related to the separation of church and state.

THERE WAS A FORESHADOWING of the Obama administration's ambivalent view of the role of religion in public life even before Inauguration Day in 2009.

The president had chosen Pastor Rick Warren, author of the book *The Purpose Driven Life*, to do an invocation. Many of us would prefer presidents not add religious messages to what is essentially a governmental event, but in this case, the choice was even more startling. Warren had notoriously supported Proposition 8 in California, which sought to invalidate a California Supreme Court ruling requiring the state to recognize same-sex marriages. The court noted that marriage is a "fundamental right" and that persons needed to be treated equally in regard to such rights.

Warren disagreed, making a video in support of the proposition and asserting

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in one interview that being gay was like taking part in incest or bestiality. Even after weeks of objections, Warren ended up performing a lengthy prayer at the inauguration, invoking Jesus in four different languages, and appending the Lord's Prayer, an explicitly Christocentric affirmation, in conclusion. So much for a nod to diversity.

But then, just a few minutes later, the newly sworn-in president gave a "shout out" to America's "nonbelievers." It has been rare for any chief executive, or any candidate for that position, to recognize that at least 15 million Americans are nonbelievers, although, in candor, even George W. Bush did so on occasion.

create new lines. He pointed out earlier regulations in which "rather than furthering discovery, our government has forced ... a false choice between sound science and moral values." This was a notable advance over the previous administration, which seemed to be more interested in promoting a medieval theological analysis than a 21st century biological or medical one.

Regrettably, one federal judge has put a preliminary halt to the policy after several anti-embryonic cell researchers (who claimed they could lose grant money for their research on adult stem cells) sued in partnership with fundamentalist Christian groups. Making

the controversial and unsuccessful District of Columbia "opportunity scholarship program"—the voucher system dumped on the city by the Bush administration. Most of the funding for this program ended up in the coffers of private religious schools. Bush's own education department concluded on four occasions that the program not only failed to generally improve academic performance but didn't even increase the satisfaction students had about going to school.

Both House Speaker John Boehner and Senator Joseph Lieberman of Connecticut have indicated that the proposed 2011 appropriation of \$40 million to DC public schools might turn out to be con-

In a number of religious liberty cases, the administration has weighed in on the wrong side, defending the seemingly indefensible.

The incident was telling—and the pattern it set is still sending ripples. It is accurate to conclude that in the first two and a half years of President Obama's role in matters of church and state, we've seen a mix of "the good, the bad and the ugly."

This article takes a look at how Obama has dealt with three types of issues. First, what has he done in policy matters where the previous administration had displaced evidence with theology? Second, what does his engagement with major church and state legal cases tell us? Third, what can we learn from his personal religious observance and his "outreach" to religious communities?

The president should be credited with having the right instincts and taking the proper initial steps on two issues where Bush had allowed ideology to sweep away a cavalcade of scientific principles and evidence. Early in the administration, Obama signed new regulations that allowed federally funded research to be conducted on nearly 800 new lines of embryonic stem cells developed by private researchers. Federal law still precludes tax dollars to

matters worse, the National Institutes of Health has been slow in developing new rules for the Bush-era stem cell lines.

The second area in which Obama took note of a paucity of supporting evidence was in the justification of the continued funding for so-called "abstinence-only" sex education programs. His first budget virtually eliminated all the money for such programs. An estimated \$2 billion has been spent on these efforts over the past 15 years, but no reliable data exists that such programs significantly reduce the onset of sexual activity; in fact, some research indicates that they may even make slightly delayed encounters more dangerous because young people have not learned the basics of safer sex and contraceptive use.

But even here Obama had to swallow an amendment to his healthcare reform package by Sen. Orrin Hatch (R-Utah), which added \$50 million over the next five years for the same useless initiatives. (For more on this subject, see the article by Jen Heitel Yakush on p23.)

To the president's credit, he has sought to terminate new student enrollment into

tingent on the mayor's willingness to accept another \$20 million to keep adding students in the voucher program. Obama has said nothing about this ploy.

One other bizarre note had already been sounded by the administration when the Supreme Court took a case, *Arizona Christian School Tuition Organization v. Winn*, involving a "tuition tax credit" scheme in Arizona. Under the legislation, taxpayers could choose to give a portion of what was owed, not to the state treasury, but to one of several "school tuition organizations" (STOs) that gave scholarships to private schools. They would then get a dollar-for-dollar tax credit up to a maximum of \$1000. In 2009, 91.5 percent of the \$52 million collected through donations to STOs went to religious schools with the apparent requirement that scholarship recipients participate in religious activities while at school.

What's worse, the legislation, as originally conceived, allowed participants to contribute to one of the STOs that placed children in, say, only Catholic schools. Legislators didn't want to make the

scheme seem self-serving by allowing contributors to help their own children, but they were allowed to designate that the money would go to a neighbor's child. By making a reciprocal arrangement, the neighbor could give the same amount and designate it for the original contributors' own son or daughter, effectively using the STO as a family scholarship.

The law has been changed a bit to prevent such flagrant abuses, but most observers view this as belated "lipstick on the pig" legislating because the real problem still remains: the tuition tax credits are funneling taxpayer money to religious schools at the expense of public schools. Incredibly, the Obama administration has sided with Arizona to uphold this law by sending the acting solicitor general to help argue the case at the Supreme Court.

In the context of the tax credit legislation, Arizona also asserted that taxpayers do not have standing to raise a constitutional objection. (But who else could?) The Obama administration seconded Arizona in that view as well. It is notable that this move was not an example of an administration seeking some perfunctory manner to uphold the constitutionality of a federal statute passed by a previous administration. The president and the Department of Justice (DOJ) could have avoided the issue completely.

In two other religious liberty cases, the administration has also weighed in on the wrong side, defending the seemingly indefensible. In the first, Elena Kagan (now Supreme Court associate justice, then US solicitor general) argued before the high court in favor of a congressional "deal" in which some obscure acreage in the Mojave National Preserve in California was exchanged by the Veterans of Foreign Wars (VFW) for a single roadside acre which had been, on and off for 40 years, the site of a large Latin cross that the VFW asserted was a memorial to all of America's service members.

That view did not please the Jewish War Veterans organization, nor atheist

veterans (who are, it turns out, found in foxholes) nor a Buddhist who had attempted to add a symbol on the same acre when it was owned by the United States but was rebuffed.

The Supreme Court ruled that the trial court would need to review evidence clarifying that the cross had some secular or at least nonspecific religious meaning, but the majority made it clear that not much evidence would be necessary to prove such a status. (Ironically, the cross was stolen a few days after the opinion was issued.)

In a similar exercise, the DOJ weighed in to overturn a Wisconsin federal trial judge's well-reasoned opinion that the statute enacting a "National Day of Prayer" back in 1952 was unconstitutional.

Since the law specifying this occasion as the first Thursday in May was passed at that time as a way to honor the Rev. Billy Graham—who had just had a big evangelical crusade in Washington—and the statute calls for prayer only in homes and churches (apparently no synagogues, temples, mosques or Wiccan sanctuaries were known at the time), it is difficult to find even a shred of "secular" purpose behind the law. The administration defended it anyway.

Not all of the news out of the DOJ is bad, however. The administration has shifted gears and will not defend the Defense of Marriage Act (DOMA).

In doing so, Obama's DOJ bypassed a demand by that great scholar Newt Gingrich, who preposterously asserted that a president's failure to enforce an existing law violates his oath of office.

In fact, there is no obligation of one branch to kowtow to the constitutional interpretation of another. Thus, when the DOJ—with the avowed personal approval of the president—decided not to defend DOMA (which purports to allow states to decide not to honor the lawful marriage of same sex couples in other jurisdictions), it was operating within clear constitutional boundaries.

When all of the policy matters are set aside, there are some other curious ways in which this president discusses his

faith. He rarely attends church and has not even found a "church home" in Washington. On the other hand, he has repeatedly noted that the head of the White House Office on Faith-Based and Community Partnerships, Joshua DuBois, sends him a message on his BlackBerry early every morning giving him a Bible passage to ponder.

USA Today has noted that Obama invokes the name of Jesus with far more regularity than did his predecessor. His "outreach" efforts are mainly to pastors and preachers who could not be confused with the Rev. Jeremiah Wright, the Chicago United Church of Christ preacher who became controversial during the presidential campaign and was thrown under the campaign bus at the earliest opportunity Obama found to distance himself.

When the president set up his Advisory Panel on Faith-Based and Community Partnerships, it contained just the right mix of liberal and conservative members (almost all religious) to guarantee that no truly significant policy recommendations would be forthcoming—and they weren't.

Although a separate article in this issue will discuss the "800-pound gorilla" of the Faith-Based Initiative (see p. 31), it seems apparent that some of the most significant issues in this program inherited by Obama have been either resolved in the same way as they were by Bush (allowing government services to be run out of places where evangelical symbols, icons and scriptures festoon the space) or are being ignored completely (refusing to end the practice of allowing faith-based beneficiaries of government funds to hire only people who share their religious beliefs—also known as religious discrimination).

Where does this leave us? Sadly, it may be safe to conclude that although the president may have been well-regarded as a professor of constitutional law in Chicago, he has since then had some significant memory loss on subject matter from the textbooks he undoubtedly once used. ■

President Obama's Religion Problem

IGNORING THE LAW AT THE OFFICE OF FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS

By Sarah Posner

AFTER PRESIDENT BARACK Obama gave a congratulatory shout-out to Joshua DuBois, director of his Office of Faith-Based and Neighborhood Partnerships (OFBNP), at the National Prayer Breakfast in February, Georgetown University religion scholar Jacques Berlinerblau wondered in the pages of the *Washington Post* “what exactly that office is doing—a never-ending source of confusion, and even awe, among reporters, policy analysts and professors in Washington, DC.”

Berlinerblau compared the OFBNP to the Kremlin—apparently because of its ironclad hold on information about its activities, which are frequently reduced to cheery blog posts on the White House website extolling the virtues of faith-based provision of social services to people in need, but rarely addressing the thornier controversies that plague its mission.

Beneath its do-gooder exterior, the White House has taken few steps that have allayed the concerns of both advocates of church-state separation concerned about the OFBNP's constitutionality and advocates of transparency and accountability. Meanwhile, as taxpayer dollars continue to be dispensed to faith-based organizations, it is still unclear how an executive order Obama signed in November 2010, which set out new requirements intended to reduce some constitutional concerns, will actually be implemented.

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Joshua Dubois, Executive Director of the White House Office of Faith Based and Neighborhood Partnerships, speaks to the US Department of Agriculture at a National Food Summit in 2010.

Obama first launched the OFBNP in February 2009, shortly after taking office. At the time, he mostly kept policies from the Bush administration in place, including maintaining the arrangement of having a faith-based office in the White House, as well as offices in twelve federal agencies. Religious contractors and grantees would continue to receive federal funding under the “level playing field,” a Bush-era term meaning that faith-based organizations would not be at a disadvantage relative to secular organizations in applying for federal funds. In one major change, Obama created an

advisory council, to be made up of religious and community service leaders, to develop recommendations on how to improve the functioning of the office and increase partnerships between the government and faith-based groups in addressing societal problems.

Obama's first appointments to the council caused waves: conservatives complained about members it considered too liberal, and liberals complained about conservative members—a circumstance emblematic of how candidate Obama's robust defense of constitutional principles had yielded to political consider-