

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-23

TITLE FRANK MARSH, STATE TREASURER, ET AL., Petitioners
v. ERNEST CHAMBERS

PLACE Washington, D. C.

DATE April 20, 1983

PAGES 1 thru 52



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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 FRANK MARSH, STATE TREASURER, :
4 ET AL., :
5 Petitioners :
6 v. : No. 82-23
7 ERNEST CHAMBERS :
8 - - - - -x
9 Washington, D.C.
10 Wednesday, April 20, 1983
11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at
13 1:18 a.m.
14 APPEARANCES:
15 SHANLER D. CRONK, ESQ., Omaha, Neb.; on behalf of
16 the Petitioners.
17 HERBERT J. FRIEDMAN, ESQ., Lincoln, Neb.; on behalf of
18 the Respondent.
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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Marsh v. Chambers. Mr. Cronk, I think you may
4 proceed whenever you're ready.

5 ORAL ARGUMENT OF SHANLER D. CRONK, ESQ.,
6 ON BEHALF OF PETITIONERS

7 MR. CRONK: Mr. Chief Justice, may it please
8 the Court:

9 This matter is here on petition for certiorari
10 to the Eighth Circuit Court of Appeals. It derived from
11 an action brought by Respondent, a member of the
12 Nebraska legislature, over three years ago by which he
13 sought to challenge the legislature's traditional method
14 of opening each legislative day's sitting with a brief
15 invocation offered by a cleric chaplain, a
16 non-legislator officer of the legislature.

17 The basis of that challenge was that
18 legislative prayers employed by the legislature in that
19 manner per se violated the establishment clause of the
20 First Amendment.

21 QUESTION: On the basis of his claim, would it
22 make any difference whether it was a paid or an unpaid
23 clergyman?

24 MR. CRONK: Senator Chambers' precise claim
25 was that the prayers, apparently definitionally being a

1 per se violation of the Constitution, by practical
2 operation obviated the necessity for compensating anyone
3 to provide them, obviated the necessity obviously,
4 again, from practical considerations of even having a
5 prayer book, and in that way the compensation of the
6 chaplain would fall.

7 It's pretty clear from the record that his
8 case focused exclusively on the proposition that
9 prayers, at least the prayers offered by the then
10 chaplain, the only ones that we have any evidence of in
11 the record, themselves violated the Constitution, so
12 obviously we now would have no reason to compensate
13 anybody to give them, at least Reverend Palmer.

14 I do not believe and I do not think the record
15 reflects any independent basis for invalidating the
16 compensation of the chaplain, and I think that the Court
17 of Appeals realized somewhat of an incongruity in
18 declining to rule the legislative prayers per se
19 unconstitutional and at the same time finding a fault
20 with their compensation, in the absence of any
21 independent basis.

22 I think it is pretty clear that the Court of
23 Appeals attempted to link the compensation problem with
24 the tenure of Chaplain Palmer.

25 QUESTION: Does the record show what the

1 compensation was, how much it was?

2 MR. CRONK: It changed from time to time. At
3 the time of filing the action, it was approximately \$320
4 per month. The legislature sits in biannual sessions,
5 the first year four months, the second year three
6 months.

7 QUESTION: So it is seven months, \$320.

8 MR. CRONK: Roughly, seven months per two-year
9 session.

10 As I mentioned, I think it is pretty clear
11 from the Court of Appeals decision that the per se
12 challenge initiated by the Respondent was rejected by
13 the court and instead, surprising in view of the case
14 that was presented at trial, the Court of Appeals
15 singled out principally an additional factor, and that
16 was the retention and compensation of a particular
17 chaplain for an extended period of time, without any
18 indication of what constituted an extended period of
19 time. We are to conclude from the opinion that 16 years
20 at least is such an extended period of time.

21 There are some particular facts in the record
22 that should be briefly alluded to because they bear
23 directly on what facts and circumstances at all appear
24 in the record relevant to that basis for the court's
25 decision. The chaplaincy practice has existed in

1 Nebraska since 1855, 12 years before statehood.

2 At the time of filing the action, the
3 chaplain, along with three other non-legislator
4 traditional officers, the other three being the clerk,
5 the assistant clerk and the sergeant at arms, were
6 recommended at the beginning of each biannual session by
7 the legislature's Executive Board, its administrative
8 oversight body, for the legislature's full approval.

9 These individuals were essentially treated as
10 employees of the legislature. They were compensated as
11 part of the usual process by which the legislature
12 compensated its employees.

13 And the evidence I think is quite clear,
14 although it's not overly abundant, that the legislature
15 itself had never considered over the course of time the
16 post of chaplain or any particular individual's
17 retention as chaplain as an issue of substantive
18 importance in the legislative process. We have not one
19 hint of any controversy, of any complaint, any concern
20 about either the post of chaplain or any particular
21 chaplain whatsoever prior to the time that Respondent,
22 as a member of the Executive Board in 1979, attempted to
23 get that body to recommend that the post be totally
24 eliminated and, as he put it, failing that at least
25 compensation.

1 QUESTION: Well, Mr. Attorney General, you
2 never had a non-Christian chaplain, did you?

3 MR. CRONK: We don't know that, Your Honor.
4 The only thing we know about --

5 QUESTION: Well, I was going to ask you, if
6 you said so, name him, because I'm sure there's not -- I
7 thought that was admitted.

8 MR. CRONK: No, I don't believe it was, Your
9 Honor. We never had any evidence at all in the record
10 about the denominational affiliations, even the
11 identities, of any chaplains prior to Palmer.

12 QUESTION: Well, you have the prayers are in
13 the record, aren't they?

14 MR. CRONK: On three occasions during chaplain
15 --

16 QUESTION: Aren't the prayers in the record?

17 MR. CRONK: Certain of them are.

18 QUESTION: Do you have any prayer in there
19 that doesn't invoke the guidance of Christ,
20 C-h-r-i-s-t? Can you show me one?

21 MR. CRONK: I believe there are prayers that
22 make reference to deity identifiable to the
23 Judaeo-Christian heritage, as Chaplain Palmer put it.
24 There are certain prayers that expressly mention Jesus
25 Christ. I think the record reflects roughly half, a

1 little less than half of the prayers, in addition to
2 making reference to deity, that might be identified in
3 the Judaeo-Christian heritage, do mention Jesus Christ.

4 QUESTION: But you don't admit it, do you?
5 You don't admit it?

6 MR. CRONK: Don't admit what, Your Honor?

7 QUESTION: That they're all Christians, all of
8 the chaplains have been Christians?

9 MR. CRONK: We simply have no idea, Your
10 Honor.

11 QUESTION: You have no idea?

12 MR. CRONK: Absolutely none.

13 QUESTION: I see.

14 MR. CRONK: The only thing we know about any
15 prior chaplain is that Chaplain Palmer himself became a
16 candidate for the post because of the death of his
17 predecessor in office.

18 One of the important facts relevant to the
19 Court of Appeals' basis for this conclusion is simply
20 the fact that over the entire some 130 year history of
21 the Nebraska chaplaincy, in keeping with the fact that
22 the legislative post and any particular individual had
23 never caused any concern from the public or from the
24 legislature, the practice developed that the chaplain,
25 as well as the other non-legislator traditional

1 officers, would be reappointed.

2 Both Respondent Senator Chambers and Executive
3 Board Chairman Lewis indicated that it simply was the
4 common practice that the four incumbents to the office
5 would be slated again, unless there was an objection
6 from somebody. All that was needed in order to have the
7 Executive Board recommend an incumbent for an ensuing
8 session of the legislature was a five to four vote.

9 There simply had never been any objection to
10 that process, which I think is reflective of the fact
11 that it had never engendered any controversy or concern
12 whatsoever up to this point, up to the filing of the
13 action.

14 Chaplain Palmer, who has served since 1965,
15 clearly indicated that he became a candidate for the
16 vacancy at that time as an individual, not as a
17 representative of his church. His church allows him to
18 become involved in civic activities to the extent his
19 time permits. It's in that capacity that he has
20 served.

21 The only evidence that is in the record
22 concerning Chaplain Palmer's own individual retention
23 comes from the Executive Board Chairman, Frank Lewis,
24 who had been a member of the legislature since 1972 and
25 was Chairman of the Executive Board at time of trial in

1 1979, that Palmer had simply been reappointed because he
2 had done a good job, very much consistent with what the
3 usual process was.

4 QUESTION: Mr. Cronk, is there evidence in the
5 record that Chaplain Palmer ever refused to allow any
6 guest chaplain to appear?

7 MR. CRONK: There is no evidence in the record
8 that there was any such refusal. In fact, the record
9 makes quite clear that on frequent occasion he solicited
10 clergypersons of other denominations to fill in for
11 him. It was frequently the occasion that a member of
12 the legislature, because of a special occasion, the
13 death of a friend or what-not, would suggest that a
14 particular chaplain fill in.

15 No such request was ever denied. Chaplain
16 Palmer indicated there were other denominations and
17 religions represented, mentioning clerics of the Jewish
18 faith in particular. I might add --

19 QUESTION: Does the record disclose when the
20 prayers were recited and at what point in the orders of
21 the day that that practice occurred?

22 MR. CRONK: The record does, Your Honor. The
23 prayer was essentially the first step beginning each
24 legislative day's sitting. The legislature typically
25 was called to order at 9:00 in the morning, sometimes

1 10:00. That would be the first matter of business,
2 depending on when each day's starting time was
3 scheduled.

4 The Petitioners have always maintained that,
5 on the basis of this particular record and on the basis
6 of any record that could have been developed by any
7 different approach to this establishment clause
8 challenge to the legislative practice, that it stands in
9 its entirety, and is not changed by specific analysis on
10 any one of its several components, as essentially a
11 tradition of the legislature, more steeped in ceremony
12 than actually any substantive import, by which the
13 legislature has sought to begin each day's business in a
14 solemn tone, hopefully setting an attitude of high
15 purpose, although Chaplain Palmer quite readily admits
16 that he would be hard pressed to admit that happens on
17 all occasions. And the fact that Chaplain Palmer has
18 served in his post does not change that fact, the fact
19 that he served for some 16 years.

20 Fundamental, we believe, in this analysis is
21 recognition of several historical considerations which
22 clearly are relevant because of the fact that
23 legislative chaplaincies substantially, if not
24 virtually, identical to that in Nebraska have a rich
25 history in our national heritage.

1 I think the importance with regard to certain
2 activities that are interpreted under the religion
3 clauses today that have such a history, of an
4 investigation into that history and of a taking into
5 account in the establishment clause analysis of that
6 history, has been clearly indicated by this Court in
7 cases such as Walz versus Maryland -- Walz versus Tax
8 Commissioner and McGowan versus Maryland.

9 And I believe the factors that were singled
10 out there and that played a substantial part in the
11 decisions in those Courts are also existent here and
12 were totally ignored by the Court of Appeals, which
13 fundamentally flawed its analysis.

14 We do have the benefit of examining an
15 activity today that not only existed at the time the
16 framers were drafting the First Amendment, but was
17 actually practiced by them at the very time the First
18 Amendment was drafted. The existence of evidence
19 contemporaneous with the drafting of any particular
20 amendment which we are today attempting to interpret was
21 recently underscored by this Court in the Minneapolis
22 Star and Tribune case.

23 I think the record before the Court quite
24 convincingly indicates that three days before the final
25 wording of the First Amendment was settled on, including

1 the religion clauses, the very same framers enacted
2 legislation compensating the officers of both of their
3 houses, including chaplains. Even some 15 years prior
4 to that time, the First Continental Congress employed or
5 utilized a cleric to begin its legislative sessions. He
6 was compensated at the end of his tenure and his tenure
7 was for a number of years.

8 Subsequent to the drafting of the First
9 Amendment and the convening of the first Congress under
10 the Constitution, the federal practice has been
11 virtually identical to that that has been employed in
12 Nebraska.

13 Equally important is the fact that the same
14 activity, the same practice in substantially identical
15 form, has enjoyed widespread acceptance throughout the
16 states. The amicus brief filed by the National
17 Conference of State Legislatures reaffirms what had
18 previously been noted in the decisions of a few courts
19 construing cases such as this, that legislative bodies
20 in every state traditionally have opened their
21 legislative daily sessions with prayer, that over half
22 of them have compensated the individuals performing that
23 service, and --

24 QUESTION: Mr. Cronk, in this case did the
25 chaplain do anything other than give a prayer?

1 MR. CRONK: I think the record indicates that
2 his only service is the provision of the morning prayer,
3 and that's provided for by legislative rule.

4 QUESTION: Yes, but I mean that was actually
5 true?

6 MR. CRONK: This is true.

7 QUESTION: May I ask you if you think the
8 result would be the same if the rule had provided that
9 every committee hearing shall open with a prayer?

10 MR. CRONK: It's difficult to assess whether
11 the result would be the same in any particular
12 situation, because this, like most establishment clause
13 cases, has to be determined on the basis of its own
14 facts and circumstances.

15 We would simply have to know, we would have to
16 inquire, we would have to find out, what the reason for
17 requiring --

18 QUESTION: The same reason here, to have a
19 solemn beginning and get everybody in the proper mood to
20 start their deliberations.

21 MR. CRONK: It doesn't strike me that we
22 necessarily would conclude that that, such a practice,
23 moves us more toward the impermissible. But there could
24 be a number of explanations for why such a requirement
25 would ever be evolved in a particular legislature, just

1 as there could be a number of explanations as to why
2 specific state legislatures employ legislative prayer
3 practices or retain particular individuals.

4 What we know here is that there is nothing
5 inform in the way that the Nebraska legislature has done
6 so over the past 100 years.

7 QUESTION: Would you have any trouble with the
8 Nebraska rule if it said -- if 16 years ago they passed
9 a rule that said, for the next 16 years the prayer shall
10 be conducted by a Presbyterian minister?

11 MR. CRONK: I think that that moves us more
12 toward -- the suggestion in your question is that that
13 singles out a particular denomination officially.

14 QUESTION: Well, that's one of the things that
15 apparently troubled the Court of Appeals. I was just
16 wondering if, instead of looking at it in hindsight, we
17 looked at it in advance, would it bother you at all?

18 MR. CRONK: I think that that would cause more
19 problem than has been caused by this situation that we
20 actually have before us. I think clearly it would be
21 good cause for an inquiry as to what the purpose for the
22 requirement was.

23 All that we know now -- and it draws back to
24 the unique circumstances of this case -- all that we
25 know now is that Chaplain Palmer was retained simply

1 because he did a good job, considered as a traditional,
2 relatively unimportant ceremonial functionary of the
3 legislature.

4 QUESTION: How was his appointment -- how
5 often was his appointment made, did you say?

6 MR. CRONK: The sessions, the actual process,
7 is every two years.

8 QUESTION: Is it for every -- is he
9 reappointed every session?

10 MR. CRONK: Every two-year session. So at the
11 time of trial it was 14, he would have been in his sixth
12 or seventh reappointment.

13 QUESTION: And who designates him?

14 MR. CRONK: The Executive Board recommends to
15 the full legislature for approval. That approval has
16 essentially been a rubber stamp.

17 QUESTION: Is that one of the early -- is that
18 one of the first things a new session does, is to --

19 MR. CRONK: The Executive Board? That's not
20 clear. In fact, it's not clear -- well, the session
21 begins the first of the year, I believe, about the
22 second or third week in January. So this action has to
23 be taken by the Executive Board prior thereto, within a
24 reasonable amount of time. And I would presume that
25 selecting the officers is one of the first orders of

1 business.

2 The provision that requires the selection of
3 these officers is the --

4 QUESTION: Does he, does the chaplain, have an
5 office?

6 MR. CRONK: No, he does not. He travels --

7 QUESTION: He just comes in every morning --

8 MR. CRONK: Yes.

9 QUESTION: -- for a few minutes?

10 MR. CRONK: Yes.

11 QUESTION: So he has no place to hang his
12 hat?

13 MR. CRONK: As far as I know, and the record
14 is silent on whether that's the case. My personal
15 knowledge is that he does not. In fact, I believe it
16 can be gathered from his testimony. He indicated that
17 he usually prepares the prayers in his church before
18 getting in the morning to the legislature to give them.

19 This Court I think is aware that in attempting
20 to define the limits of the permissible accommodation
21 --

22 QUESTION: Excuse me. Do you know whether
23 anybody else has ever applied to be the chaplain? Have
24 there been lots of -- down through the years, has every
25 session -- have there been several every session who are

1 applying, and they've always chosen him?

2 MR. CRONK: We don't know. There is evidence
3 in the record that in 1979 there was some confusion
4 between the outgoing Executive Board and the incoming
5 Executive Board prior to the session that began in
6 January of 1980 as to which Board was to select or to
7 recommend the officers.

8 As to how frequently clerics apply, if they
9 even apply at all, the record is simply silent.

10 QUESTION: Well, what about the Lutheran
11 minister that applied?

12 MR. CRONK: I have been asking myself the same
13 question, Your Honor.

14 QUESTION: Well, I know, but the record said
15 that at least one did apply.

16 MR. CRONK: The record says nothing about the
17 denominational affiliation of any other chaplain except
18 Reverend Palmer.

19 QUESTION: I said applicant, not chaplain.

20 MR. CRONK: There is an indication that in
21 1979 the outgoing Executive Board recommended another
22 cleric --

23 QUESTION: That's what I thought.

24 MR. CRONK: -- denomination unknown. The new
25 incoming board, feeling that it was authorized or not

1 knowing that the outgoing board had already taken the
2 action, recommended Chaplain Palmer. When that
3 inconsistency was brought to a head, the confusion was
4 cleared up on the floor of the legislature.

5 QUESTION: General Cronk, let me ask you one
6 other question. I'm a little puzzled about it. The
7 Court of Appeals relied on the publication of the
8 prayers at state expense. But yet, as I understand it
9 there was no -- the district court's order which held
10 that invalid, I believe, was not appealed.

11 What is the status of that part of the case in
12 your view?

13 MR. CRONK: I wish I knew for certain.

14 QUESTION: Kind of puzzling.

15 MR. CRONK: The Plaintiff, Respondent here,
16 challenged the expenditure of state funds for the prayer
17 book. He specifically requested relief that the
18 expenditure of funds be enjoined.

19 The district court judgment I believe purports
20 to enjoin not only the expenditure of funds but the
21 printing of the prayer book.

22 Being of the view that the printing of the
23 prayer book has never been an official part of the
24 legislative chaplaincy anyway, that matter was not
25 appealed to the Court of Appeals. We have been of that

1 view for the reason that in three years during the
2 latter portion of Dr. Palmer's tenure individuals on the
3 floor of the legislature, not pursuant to any
4 legislative rules, apparently toward the end of the
5 session got up and said: I think it would be a good
6 idea if maybe we had some of these printed up for our
7 own use.

8 It is indicated on page 32 or 33 of Reverend
9 Palmer's deposition, Exhibit 5 on the record, that the
10 request was that these books be prepared for the
11 legislators' use. Apparently some of them felt that it
12 had been somewhat inspirational and they thought it
13 would be nice to have copies of the thing.

14 Evidence of the fact that it was intended
15 primarily for their use is quite clear from the print
16 runs of the book. The 1970 book, there were 100 copies
17 that have been made.

18 This chain of events at the time the action
19 was filed was not at all guaranteed to occur in the
20 future. We had no idea whether anybody was going to get
21 up and order that or not. It simply wasn't a part of
22 this case as we viewed it, and for that reason we didn't
23 appeal it.

24 Because the Court of Appeals changed the
25 analysis that the district court had undertaken and

1 insisted that it had to consider the challenge against
2 something called a prayer practice in its entirety,
3 whatever the court meant by that, the prayer book issue
4 was kind of dragged back into the fray.

5 Our position is that it is distinct from the
6 legislative chaplaincy, it is distinct from the
7 principal controlling factor by which the Court of
8 Appeals decided this case, but even if it is considered
9 on its merits, that the district court and the Court of
10 Appeals were wrong to the extent that their decisions
11 stand as a judgment that on an independent analysis
12 those prayer books transcend the establishment clause.

13 I think that the record, portions of the
14 record I have just cited, indicate there was a secular
15 enough purpose for them. To say that 100 of these books
16 given to the legislators for their own personal use
17 amounts to a direct and immediate effect advancing
18 religion, notwithstanding the fact that there were a few
19 odd copies left over and somebody among the public found
20 out about it and requested it and they were given to
21 them, we think stretches the meaning of the primary
22 effect test.

23 I think at this point I would like to reserve
24 any remaining time for rebuttal, Your Honors.

25 CHIEF JUSTICE BURGER: Very well.

1 Mr. Friedman.

2 ORAL ARGUMENT OF HERBERT J. FRIEDMAN, ESQ.,

3 ON BEHALF OF RESPONDENT

4 MR. FRIEDMAN: Mr. Chief Justice and may it
5 please the Court:

6 I'd like to make it clear what this lawsuit is
7 about and what it's not about. It's about a very narrow
8 question that was presented by the Petitioners, drafted
9 by their counsel, and accepted for review by this
10 Court. The question presented is this: whether the
11 Nebraska legislature's compensation and retention of a
12 single individual as chaplain for an extended period of
13 time renders its legislative prayer in violation of the
14 establishment clause?

15 QUESTION: Mr. Friedman, would you still be
16 here, however, if the compensation weren't in the case?

17 MR. FRIEDMAN: Yes, Your Honor.

18 QUESTION: I thought so.

19 QUESTION: So the compensation is irrelevant,
20 then, to this issue that's presented.

21 MR. FRIEDMAN: No, Your Honor, I think the
22 compensation is part of the issue.

23 QUESTION: Well, your response to Justice
24 Blackmun?

25 MR. FRIEDMAN: I'd still be here, but

1 certainly the compensation is part of this issue.
2 They're using public funds for a religious service.

3 QUESTION: I take it you would also be here
4 even if they changed chaplains every session?

5 MR. FRIEDMAN: I think so.

6 QUESTION: You'd be here, but your case
7 wouldn't be as good?

8 (Laughter.)

9 MR. FRIEDMAN: I wish I'd said that, Your
10 Honor.

11 QUESTION: What if, Mr. Friedman, as is often
12 the case, you had a clergyman who was a member of the
13 legislature and as an economy measure they drafted him
14 to give the invocation every morning?

15 MR. FRIEDMAN: Same clergyman every morning?

16 QUESTION: A member of the legislature, yes.

17 MR. FRIEDMAN: I understand that. It poses a
18 problem, but it's not the issue before the Court.

19 QUESTION: Well, we ask hypothetical questions
20 very frequently. You'll get many of them today, I'm
21 sure.

22 What would you think about that?

23 MR. FRIEDMAN: We would disapprove of it.

24 QUESTION: Well, disapprove. Would you say
25 it's unconstitutional?

1 MR. FRIEDMAN: We'd say it would be
2 unconstitutional if there was prayer in the
3 legislature.

4 QUESTION: All right. Now, a non-clergyman
5 member of the legislature, a Nebraska farmer, cattleman,
6 lawyer, gets up and has an invocation.

7 MR. FRIEDMAN: The same religion every day?
8 If it's the same religion every day, we think it's
9 unconstitutional.

10 QUESTION: All right, let's change it, then.
11 You have a lot of members of the legislature. They
12 rotate it alphabetically. Anderson starts off, Babcock
13 next, and Cronk after that.

14 MR. FRIEDMAN: Certainly less unconstitutional
15 --

16 QUESTION: Why?

17 (Laughter.)

18 MR. FRIEDMAN: -- but in our view still
19 unconstitutional.

20 QUESTION: Why?

21 MR. FRIEDMAN: Because it still mixes religion
22 with government.

23 QUESTION: You said less. Why is it less?

24 MR. FRIEDMAN: Because it makes it less
25 obvious that one religion is singled out as being the

1 official religion.

2 QUESTION: Well now, the Congress of the
3 United States, or the Senate, I believe, for about --
4 until recently had, by coincidence, a Presbyterian
5 chaplain for about eight or ten years. You would have
6 thought that was unconstitutional?

7 MR. FRIEDMAN: I would think so, Your Honor.

8 QUESTION: How about our invocation that the
9 Marshal announced this morning when he concluded calling
10 the Court and said at the end, "God save the United
11 States and this honorable Court"?

12 MR. FRIEDMAN: I don't think this lawsuit is
13 asking this Court to take a judicial hammer and chisel
14 and do away with all of the terms of religion, including
15 the opening ceremony by Marshal Wong. That's not what
16 we're trying to do.

17 I think Marshal Wong's ceremonial opening has
18 probably lost any religious significance it may have
19 had, and Marshal Wong is not a chaplain, he's not a
20 clergyman.

21 QUESTION: Well then, we go back to the
22 members of the legislature. If that's your view, then
23 members of the legislature could get up and individually
24 give opening prayers every morning.

25 MR. FRIEDMAN: We'd prefer that they didn't.

1 We think that --

2 QUESTION: We're not here on preferences, Mr.
3 Friedman. We're here to discuss a constitutional
4 issue. You have claimed that the conduct is
5 unconstitutional and for my part I just want to see how
6 far you'll carry that.

7 MR. FRIEDMAN: Your Honor, it seems to Senator
8 Chambers that any time you have a prayer in the
9 legislature it's probably unconstitutional. That is
10 mixing religion with government.

11 Senator Chambers' view is very simple. He's
12 elected to represent his constituents and he is exposed
13 to a religious prayer each morning that's against his
14 religious values and he doesn't think he should have to
15 be exposed to that.

16 QUESTION: Then it would follow, I suppose,
17 that the Constitutional Convention engaged in an
18 unconstitutional practice by having a prayer to open
19 each session in Philadelphia.

20 MR. FRIEDMAN: They were certainly
21 inconsistent, Your Honor, and there's no question that
22 that matter was never raised at that particular time. I
23 think there are some unique distinctions as to the
24 historical argument.

25 This matter has really never been addressed by

1 this Court. It would appear that that was
2 unconstitutional then, too.

3 QUESTION: You mean even before the First
4 Amendment was adopted?

5 QUESTION: It wasn't retroactive.
6 (Laughter.)

7 MR. FRIEDMAN: No, Your Honor.
8 This case does not deal with --

9 QUESTION: Well, wasn't there opposition to
10 the prayer in the First Congress?

11 MR. FRIEDMAN: Yes, there was, Your Honor.

12 QUESTION: Well, so it was brought to it -- it
13 was put on the table, but that was just by a minority.

14 MR. FRIEDMAN: It was debated.

15 QUESTION: Yes, and the people who raised it
16 didn't prevail.

17 MR. FRIEDMAN: At that time they didn't.

18 QUESTION: Yes. Then the -- do you think that
19 Congress would have, if it thought the First Amendment
20 barred that, would have continued having prayer?

21 MR. FRIEDMAN: Well, I don't know that --

22 QUESTION: Well, isn't that a pretty decent
23 inquiry, though?

24 MR. FRIEDMAN: As to what the First Congress
25 --

1 QUESTION: Yes.

2 MR. FRIEDMAN: Your Honor --

3 QUESTION: Well, I just wonder, isn't it a
4 relevant inquiry as to what the framers intended?

5 MR. FRIEDMAN: It's an interesting historical
6 inquiry, but I think it's more important --

7 QUESTION: None of it -- it has no legal
8 significance?

9 MR. FRIEDMAN: I don't believe it has the
10 legal -- I don't believe it has binding legal
11 significance, Justice White. I think that our nation
12 has changed significantly in the past two decades --
13 past two centuries, I should say.

14 And what the framers did then was not what the
15 Nebraska legislature is doing now. They had a
16 completely different approach to the chaplaincy. In the
17 first place, they rotated chaplains. The chaplains of
18 the House and the Senate were of different
19 denominations, and they weren't even officers.

20 QUESTION: They paid them, though.

21 MR. FRIEDMAN: They did pay them. Three days
22 before they passed the First Amendment they voted --

23 QUESTION: To pay them.

24 MR. FRIEDMAN: To pay them.

25 QUESTION: Yes.

1 MR. FRIEDMAN: And it's an inconsistent --
2 perhaps one of those inconsistent things that's come
3 down through two centuries, and we have never brought it
4 to this Court before. The Court has never had an
5 opportunity to rule on it.

6 QUESTION: That's -- you're just assuming it's
7 inconsistent. It may not be at all. That's what the
8 lawsuit's about.

9 MR. FRIEDMAN: I suspect that's what the
10 lawsuit's about, Justice White.

11 I think the elements of the Nebraska
12 legislative prayer practice must be gone into in some
13 detail. The chaplain, first of all, is an officer of
14 the legislature. He is an official. He may not have a
15 desk. I don't know that he has a desk. But he does
16 have a title. He's an officer.

17 His only function is to deliver prayer. He
18 has a uniquely religious function. It's part of the
19 legislative day and you open up the legislative day with
20 that prayer.

21 The chaplain is compensated. He receives a
22 salary each month. His prayers are published.

23 And perhaps the most problem here is that the
24 chaplain has inevitably been a Christian. There is a
25 place in the record, to answer Justice Marshall's

1 question, by cross-examination on Senator Lewis, who was
2 Chairman of the Executive Committee. And the question
3 was: "Would you agree that really the only clergy in
4 the history of the legislature" --

5 QUESTION: Where are you reading from, Mr.
6 Friedman? Could you tell us?

7 MR. FRIEDMAN: Yes. Page 69 of the Joint
8 Appendix, Justice Rehnquist.

9 "Would you agree that really the only clergy
10 in the history of the legislature has always been a
11 Christian clergyman?"

12 Answer: "To my knowledge, that's correct."

13 That's an admission by the Chairman of the
14 Executive Committee of the legislature. Quite frankly
15 --

16 QUESTION: Well, doesn't that just mean "as
17 far as I know"?

18 MR. FRIEDMAN: That's true, Your Honor.

19 QUESTION: And how long has he been in the
20 legislature, seven years?

21 MR. FRIEDMAN: Seven or ten years, something
22 like that.

23 QUESTION: Mr. Friedman, is there any
24 evidence, apart from the symbolic evidence that you just
25 referred to, that the tenure of Reverend Palmer has had

1 the purpose or the effect of favoring one particular
2 religious viewpoint?

3 MR. FRIEDMAN: I think the fact, Justice
4 O'Connor, is that it's always been a Christian and it's
5 always been a mainstream Protestant Christian. Same way
6 with the Congress of the United States. It's always
7 been a mainstream Protestant Christian.

8 QUESTION: Well, what I was asking was, is
9 there anything other than that rather symbolic evidence
10 to demonstrate that a particular religious viewpoint was
11 being advocated?

12 MR. FRIEDMAN: Other than the fact that the
13 symbolic inference here is that one religion stands out,
14 there isn't. This case deals with symbolism. I think
15 that's the crux of this lawsuit in many respects.

16 QUESTION: Could you also address exactly what
17 effects the practice in Nebraska has had on Senator
18 Chambers with some precision?

19 MR. FRIEDMAN: The record is clear on that,
20 Your Honor. Senator Chambers testified to that.

21 QUESTION: Is that what you call your members
22 of your unicameral legislature, "senator," all of them?

23 MR. FRIEDMAN: Yes, Justice Blackmun.

24 I'm trying to refer the Court to the record.
25 On page 44 of the transcript, Senator Chambers

1 testified:

2 "Well, by the simple fact that the
3 legislature, the chaplain is, and I believe always has
4 been, a Christian, there is some sort of, it seems to
5 me, some sort of general tendency to approve of a
6 particular perspective or point of view in religion, and
7 perhaps to disapprove of others. The religious belief
8 of the chaplain is probably representative of the
9 religious belief of the legislature."

10 And then he goes on to testify that that is
11 contrary to his own religious beliefs and has caused
12 some friction between Senator Chambers and the other
13 senators when he has to get up and he leaves.

14 QUESTION: Didn't the chaplain make some
15 adaptation to Senator Chambers' feelings, though, after
16 he learned of them?

17 MR. FRIEDMAN: He did not.

18 QUESTION: I thought that he omitted the
19 reference to Christ.

20 MR. FRIEDMAN: That was after Senator Fellman,
21 a Jewish Senator, came up to him and commented.

22 QUESTION: Well, then he, the chaplain, did
23 make some adjustment after receiving a comment from
24 another Senator who didn't like the Christian aspect of
25 the prayer.

1 MR. FRIEDMAN: He devoided himself of the
2 uniquely Christian aspect. But of course, Senator
3 Chambers doesn't believe in God at all, so the prayers
4 themselves were offensive to him. They were contrary to
5 his spiritual beliefs, or disbeliefs as the case may
6 be.

7 QUESTION: Well, he simply not only didn't
8 believe in God, but prayer as such bothered him, I take
9 it?

10 MR. FRIEDMAN: Prayer in the legislature
11 bothered him. I think it should be made clear right now
12 that this is not an anti-religious lawsuit and Senator
13 Chambers is not questioning the right of people to pray,
14 only to pray on the floor of the legislature.

15 QUESTION: It wouldn't do him much good to
16 question the right of people to pray, would it, with the
17 First Amendment and the religion clauses?

18 MR. FRIEDMAN: Of course not.

19 QUESTION: And no one requires him to pray.

20 MR. FRIEDMAN: Oh, I think that's quite true,
21 Justice Rehnquist. He doesn't have to be there, but I
22 don't think that's the question. Even in the school
23 prayer cases, the children didn't have to be there, but
24 nonetheless they were there and there was certain peer
25 pressure.

1 And in this case there's even a certain amount
2 of peer pressure within the members of the legislature.
3 The fact is that the legislative rule, although it's not
4 obeyed to the letter, says he must be there. He must be
5 there for the opening prayer. And that he finds
6 constitutionally offensive.

7 QUESTION: What if before the legislature met
8 they announced throughout the state that every clergyman
9 in the state would be invited to -- or every clergyman
10 in Lincoln, Nebraska, to eliminate the travel problem,
11 would be invited to come and give one day in rotation?
12 And then they would pull them out of a hat in order.
13 You still think that raised a constitutional question?

14 MR. FRIEDMAN: We think it would, Your Honor.
15 But again, it's not --

16 QUESTION: Well, then the Presbyterian factor
17 is irrelevant to your argument, isn't it?

18 MR. FRIEDMAN: The fact that Dr. Palmer is a
19 Presbyterian?

20 QUESTION: Yes.

21 MR. FRIEDMAN: The fact that Dr. Palmer is a
22 member of a mainline Protestant faith is not
23 irrelevant.

24 QUESTION: But you say the result would be the
25 same if you had all the clergymen in Lincoln, and I

1 suppose there must be 50 or 60 of them, maybe more.

2 MR. FRIEDMAN: More than that. Certainly --

3 QUESTION: Mr. Friedman, you've used the term
4 "mainline Protestant faith" a couple of times. What do
5 you include within that definition?

6 MR. FRIEDMAN: Mr. Justice Rehnquist, I think
7 that basically deals with the Protestant sects who have
8 the most members. I would include in that basically the
9 Lutheran --

10 QUESTION: Be careful, now. You might leave
11 out one.

12 (Laughter.)

13 MR. FRIEDMAN: I'm treading on thin ice, Mr.
14 Justice Marshall.

15 QUESTION: Is that based on a church
16 membership approach?

17 MR. FRIEDMAN: Basically. Here I think if you
18 look at the Congressional history you can find that in
19 the Senate, for example, of the 62 chaplains that they
20 have had since the inception of the Senate, about a
21 third of them have been Presbyterian, a third
22 Episcopalian, and a third Methodist, and a half a dozen
23 other assorted religions. The same thing goes with the
24 House. They've been basically those three or four
25 denominations that we've talked about.

1 There have never been representatives in the
2 Congress of the United States of the smaller religious
3 sects, such as Seventh Day Adventists, which is a strong
4 sect in Lincoln. There has never been any kind of --
5 there has never been any type of representation of the
6 smaller groups. There's never been a Jewish individual,
7 there's never been a Muslim.

8 And I suppose the problem here is really one
9 of symbolism. That may be the major problem that we
10 have here. Aside from the compensation issue, I think
11 the symbolism issue is very important. Symbolically,
12 one individual who represents one religious point of
13 view is inevitably an officer in that legislature.

14 QUESTION: But you've said several times that
15 even if you had chaplains picked at random one day at a
16 time, you'd have the same objection.

17 MR. FRIEDMAN: I think that's true, Your
18 Honor. We must -- I think I must stick with the facts
19 of the case and the issue presented and accepted by this
20 Court for review. But I think it's still a problem,
21 even if you had a mix, even if you had somebody each
22 day, even if they were not paid.

23 But that's not the issue that really is before
24 the Court and that's not the issue that Senator Chambers
25 is litigating at this juncture. But if you're asking

1 what Senator Chambers' opinion is or what my personal
2 opinion is, I think it would still be unconstitutional.
3 I don't believe that you should have any prayer in a
4 legislative setting.

5 QUESTION: You seemed to make a difference
6 earlier in your argument between legislatures and
7 courts. Do you think an extended prayer, as
8 distinguished from the very brief invocation, would be
9 unconstitutional in a court?

10 MR. FRIEDMAN: I would think so, Mr. Chief
11 Justice.

12 QUESTION: Then how about this very short
13 version that the Marshal uses to summon the Court?

14 MR. FRIEDMAN: I suppose that's the -- that's
15 the one question I suppose that I knew was going to be
16 asked, and the one I have been dreading answering, I
17 suspect. I don't suppose anybody looks forward to
18 telling this Court that perhaps the opening ceremony may
19 be unconstitutional, and I'm certainly --

20 (Laughter.)

21 QUESTION: Well, you don't have to go that
22 far, do you, to make -- to win this case? I mean,
23 certainly there could be degrees of secular kind of
24 absorption of something.

25 MR. FRIEDMAN: Mr. Justice Rehnquist, we

1 believe that the opening ceremony of this Court, as well
2 as the name of God on public buildings and God on the
3 currency, have lost all religious significance. Senator
4 Chambers makes no issue about that. They have been
5 reduced to rote and they're not religious at all.

6 But that's not the case with the chaplain's
7 prayers in Nebraska. Those are definitely religious
8 prayers. They're constructed differently each day.
9 They invoke the name of God. Most of them invoke the
10 name of Jesus. They were definitely religious prayers
11 and you can't get around that. You can't compare --

12 QUESTION: Mr. Friedman, do military units
13 still have chaplains?

14 MR. FRIEDMAN: Yes, they do, Justice Powell,
15 and we don't quarrel with that.

16 QUESTION: Why?

17 MR. FRIEDMAN: We feel that people who are in
18 the military service are taken away from their normal
19 place, they are oftentimes overseas, and to deny them
20 some sort of religious inspiration would probably be a
21 violation of the other part of the clause, the free
22 exercise clause.

23 QUESTION: Don't you think legislators are
24 called away from their home counties and are in need of
25 some guidance and inspiration as well?

1 MR. FRIEDMAN: That may be true, Justice
2 O'Connor, but I don't think that that's the same, what
3 we're talking about. And the same with prison
4 chaplains. Prison chaplains of course are provided.

5 But that's not the case here. I think --

6 QUESTION: If you have a military unit
7 stationed at some foreign post, remote generally from
8 other people, are you suggesting the chaplain has no
9 opportunity to influence them?

10 MR. FRIEDMAN: I'm sorry, Justice Powell, I
11 didn't understand the question.

12 QUESTION: I said, military units are
13 stationed all over the world and they're often quite
14 isolated. You are suggesting that it's not appropriate
15 for a chaplain to have an opportunity, by example or
16 otherwise, to influence other people. Do you think the
17 chaplain has no influence whatever in a military unit?
18 I don't know. I'm asking your opinion.

19 MR. FRIEDMAN: I think they do have some
20 influence, and I guess the answer is I don't know,
21 either.

22 QUESTION: Well, in any event, Mr. Friedman, I
23 gather what you're suggesting is that in the case of the
24 military chaplain or the prison chaplain there's a
25 tension between the free exercise and the establishment

1 clauses, and the free exercise clause in this instance,
2 and the interests, override the establishment
3 complications.

4 MR. FRIEDMAN: That's correct, Justice
5 Brennan. That's what I'm trying to say.

6 QUESTION: There's a tension in every
7 application of the religion clauses, a tension between
8 the two branches of the religion clauses. And all of
9 our cases have indicated that, have they not?

10 MR. FRIEDMAN: That's correct, Chief Justice.
11 But I think this case is really a very strong case. It
12 probably goes to the very outer limits. The Nebraska
13 chaplaincy is a paid religious official doing a
14 religious service on the floor of the legislature, and
15 those other cases don't go that far.

16 Even in establishment clauses cases that ruled
17 against the plaintiff, they never had anything that came
18 close to the factual pattern in this case.

19 QUESTION: But Mr. Friedman, that comes back,
20 of course, to the practice of Congress and the practice
21 in Congress at the formation of this nation and at the
22 time of the adoption of the First Amendment.

23 MR. FRIEDMAN: Justice O'Connor, at the time
24 of the First Congress I believe most of the members sent
25 their children to segregated schools. At the time of

1 the passing of the Fourteenth Amendment in 1868, they
2 all sent their children to segregated schools.

3 But times have changed. As Chief Justice
4 Warren said, I believe it was -- in one case --

5 QUESTION: Might be named Brown, Brown versus
6 the Board of Education.

7 (Laughter.)

8 MR. FRIEDMAN: I think you had something to do
9 with that case.

10 We can't turn the clock back to 1868. We
11 simply must recognize the fact that our civilization has
12 changed. And our civilization has changed, Justice
13 O'Connor. It's changed completely.

14 Two centuries ago our forefathers knew
15 religious differences primarily among the differences of
16 Protestant sects. Preparing for this argument today, I
17 went through the Washington telephone book and I noticed
18 the difference of the various religious points of view
19 right here in the nation's capital. We are a
20 pluralistic society. We weren't a pluralistic society
21 two centuries ago.

22 The Congress of the United States represents
23 all of the people. It represents the Muslims and the
24 Hindus and the Bahais and the Jews. And unfortunately,
25 the Congress of the United States has not kept time.

1 QUESTION: Well, certainly Congress in 1789
2 had -- represented and realized it represented Catholic
3 constituencies, certainly some Jews, some deists.
4 Weren't both Jefferson and Madison deists?

5 MR. FRIEDMAN: That's correct, Justice
6 Rehnquist.

7 QUESTION: So to say it's pluralistic now, it
8 was pluralistic then, too.

9 MR. FRIEDMAN: It was not nearly as
10 pluralistic.

11 QUESTION: Well, but does that change in
12 degree really mean that we can't accept the meaning that
13 was intended by the people who drafted the amendment as
14 applicable today?

15 MR. FRIEDMAN: I can't believe that the
16 framers of the Constitution today would accept the
17 practice in Nebraska. They may have accepted it two
18 centuries ago, but when they looked at the change of our
19 society, the change of our culture today, I'm sure they
20 would not approve of this practice.

21 In fact, James Madison, who was the drafter of
22 the establishment clause, later in life changed his mind
23 and said that it was clearly unconstitutional from his
24 point of view.

25 QUESTION: Well, should we take Madison at the

1 time he drafted the amendment or as he recanted many
2 years later?

3 MR. FRIEDMAN: I think what we have to do is
4 take --

5 QUESTION: What he said is that he had made a
6 mistake.

7 MR. FRIEDMAN: That's correct. We think he
8 made a mistake, too, when he voted --

9 QUESTION: That's like saying, well, I know
10 the First Amendment means so-and-so but I wish it meant
11 it something else.

12 MR. FRIEDMAN: Justice White, this matter
13 really has never had the opportunity to be presented to
14 this Court. Back in 1922 --

15 QUESTION: Well, you have the opportunity
16 now.

17 MR. FRIEDMAN: That's what we're trying to do,
18 Justice White. And I think one of the problems is that
19 there was no procedural avenue to get the matter to this
20 Court's attention two centuries ago. The procedural
21 avenue is open now through virtue of the Civil Rights
22 Act, which is the suit -- which is the statute under
23 which this case was filed.

24 And we ask the Court to take a strong look at
25 this, because symbolically this is extremely important.

1 I think the Nebraska practice hits square on with the
2 neutrality theme that this Court has always maintained
3 in most of the establishment clause cases, going through
4 Everson and McGowan, Abington, Walz and Epperson.

5 All of the establishment clause cases,
6 irrespective of whether they held for the plaintiff or
7 for the defendant, the one rule that this Court has
8 always had is that when it comes to government, when it
9 comes to religion, government must remain strictly
10 neutral, neither endorsing or appearing to endorse one
11 religion over another or religion in favor of
12 non-religion.

13 And it seems to me that the record in this
14 case supports the conclusion that one religion is in
15 fact better than others. In the record, for example,
16 there is the testimony of Dr. Palmer, who said -- would
17 you agree that by having a uniquely Christian chaplain
18 in the legislature it adds an air of officialdom to the
19 Christian faith? And he says, it could be perceived as
20 such.

21 But the other witnesses also agreed to that.
22 Reverend Stevens, who is a Unitarian minister, testified
23 as an expert on behalf of the Plaintiff, and he said it
24 certainly adds an air of officialdom to one religion.
25 And of course, Senator Chambers said the same thing.

1 And that probably is one of the key problems
2 that we have here. The whole concept of having one
3 religion that stands out in a very pluralistic society
4 seems to cause some problems.

5 QUESTION: Mr. Friedman, you have to support
6 the position, don't you, that the primary effect of what
7 has been done in the legislature is to promote the
8 establishment of religion? Do you not?

9 MR. FRIEDMAN: That's correct, Justice
10 Powell.

11 QUESTION: What evidence is there of that?

12 MR. FRIEDMAN: Circumstantial evidence and
13 symbolic evidence only. I can't stand --

14 QUESTION: Well, what is the circumstantial
15 evidence? Have the number of mainline Protestant
16 churches increased since 1955 in Nebraska?

17 MR. FRIEDMAN: No.

18 QUESTION: Have the number of parishioners in
19 Protestant churches?

20 MR. FRIEDMAN: Absolutely not.

21 QUESTION: Well, in what way has any
22 establishment of religion been enhanced or furthered?
23 Establishment, now.

24 MR. FRIEDMAN: I understand what you're
25 saying, Justice Powell. And the only thing I can tell

1 the Court is that this practice of having one uniquely
2 religious figure who belongs to one religion is just
3 like having a small statute or a small pennant on the
4 flag with a religious symbol on it. It may be small,
5 but it's there and you can see it and everybody knows
6 that it's there.

7 And that's the problem here. Everybody knows
8 that the officer of that court or the officer of the
9 legislature is a Protestant Christian and always has
10 been, and I submit always will be.

11 QUESTION: And that is an establishment, you
12 say?

13 MR. FRIEDMAN: I perceive it as an
14 establishment problem.

15 QUESTION: Like the -- well, you have to say
16 that that is the establishment, like the symbol on the
17 flag.

18 MR. FRIEDMAN: That's correct.

19 QUESTION: That would be the establishment,
20 wouldn't it?

21 MR. FRIEDMAN: I think 40 years ago in another
22 establishment --

23 QUESTION: You must take that position or else
24 you'll have to then prove that that symbol on the flag
25 or the symbol before the legislature had some real

1 consequences, which you don't care to undertake to
2 prove.

3 MR. FRIEDMAN: I can't prove that.

4 QUESTION: May I ask this. Was that the type
5 of establishment that the framers had in mind when they
6 included the establishment clause in the Bill of
7 Rights? They were thinking about what had happened,
8 indeed, to many of them and to their ancestors in
9 Western Europe.

10 MR. FRIEDMAN: That's correct, Justice
11 Powell. I think --

12 QUESTION: There you had a true establishment,
13 that the church and state were essentially the same.

14 MR. FRIEDMAN: I think that a legal historian
15 could probably make a good argument that one of the
16 reasons they called it "establishment" was that many of
17 the states had their own established churches at that
18 time and they didn't want the Federal Government to get
19 involved in it.

20 It wasn't until 1940 that the establishment
21 clause was held applicable to the states.

22 QUESTION: Mr. Friedman, before this case was
23 filed, in your own estimation how many people outside
24 the legislature knew about the chaplain?

25 MR. FRIEDMAN: Oh, I think the whole state

1 did.

2 QUESTION: The whole state?

3 MR. FRIEDMAN: He was an official --

4 QUESTION: You mean the same state that don't
5 know their own legislators would know that there was a
6 chaplain there?

7 MR. FRIEDMAN: Oh, I think they knew there was
8 a chaplain. I don't think they paid much attention to
9 him, Justice Powell -- Justice Marshall.

10 QUESTION: Now, this has been going on for
11 more than 200 years, right back to the Confederation.
12 Would you say that we are closer to having an
13 established church, such as England and Sweden, for
14 example, today than we were 200 years ago?

15 MR. FRIEDMAN: I can't say that, Mr. Chief
16 Justice.

17 QUESTION: Then where is the establishment of
18 a religion?

19 MR. FRIEDMAN: Symbolically, one religion
20 appears to dominate through government.

21 A number of years ago Mr. Orwell wrote a very
22 poignant satire called "Animal Farm" and he penned the
23 words: "All animals are equal, but some are more equal
24 than others." And I suppose if one would go to the
25 Nebraska legislature every legislative day during its

1 session or go to Congress every legislative day and hear
2 the opening ceremony, one would walk away with the
3 distinct impression that all religions may be equal in
4 this country, but one is more equal than others.

5 We believe that the Eighth Circuit should be
6 affirmed.

7 Thank you.

8 CHIEF JUSTICE BURGER: Do you have anything
9 further, Mr. Cronk?

10 REBUTTAL ARGUMENT OF SHANLER D. CRONK, ESQ.

11 ON BEHALF OF PETITIONERS

12 MR. CRONK: Just briefly, Mr. Chief Justice.

13 If there's one thing that the Court should
14 have pounded into the heads of anybody attempting to
15 discern the proper establishment clause analysis, it is
16 that these are very difficult cases and they depend
17 essentially on facts and circumstances. And if there's
18 one thing that is conspicuous about the symbolic
19 argument that is now advanced by the Petitioners, and
20 that seems to be essentially the core of their position,
21 it's that there is not the slightest shred of evidence
22 to support it in the record. And there's a reason for
23 that.

24 This case started out essentially championing
25 the proposition that prayers per se violate the

1 Constitution. The tenure of a particular chaplain, the
2 identity of Chaplain Palmer by denomination, played no
3 part in the trial of this case. That's the reason that
4 the record is absolutely devoid of any relevance on this
5 particular question. The tenure, even the compensation,
6 were not even listed in the pretrial order as
7 controverted issues.

8 If there's any merit at all in the symbolic
9 argument, this is not the record that can support it.
10 This case stands in stark contrast to the --

11 QUESTION: Mr. Cronk, do you take the position
12 that you never could prove an establishment clause
13 violation without proving that the membership of the
14 favored church had increased over the period that the
15 challenged practice was in effect?

16 MR. CRONK: No, I wouldn't take that blanket
17 position, Your Honor. I think clearly the Court --

18 QUESTION: In other words, say you had a --
19 that Nebraska passed a law saying that for the next 100
20 years we want a Presbyterian minister. Nobody knows
21 whether that will ever make any more people
22 Presbyterians or not. Wouldn't that be plainly
23 unconstitutional?

24 MR. CRONK: I think inquiring as to the
25 impact, attempting to determine some evidence as to

1 what's going on out there, clearly would be in order.
2 That clearly didn't happen here, because this was not
3 the essence of the case.

4 QUESTION: You think in the hypothetical I
5 gave you you'd have to have a Gallup Poll kind of
6 inquiry to decide whether it's unconstitutional or not?

7 MR. CRONK: No, Your Honor, I think that there
8 are --

9 QUESTION: There are some cases -- I'm not
10 suggesting this is one, but there are some cases where
11 you can just look at the practice and say it favors one
12 religion over others, can't you?

13 MR. CRONK: Well, I would have to know a
14 little bit about --

15 QUESTION: Maybe this isn't such a case. I
16 didn't mean that. But I don't think you're really
17 arguing you have to go out and prove what the membership
18 of the churches is in order to identify some practices
19 as violating the establishment clause.

20 MR. CRONK: Absolutely not. That some
21 practices might manifest some identification with a
22 particular religion or a particular religious view is
23 clear. The question is, in the totality of the
24 circumstances does that really advance religion in the
25 manner that the Court has attempted to explain for us as

1 is contemplated by the establishment clause.

2 The reason that we don't have a leg up in
3 answering that question here is because this case, this
4 record, was never tailored to address this question.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen.
6 The case is submitted.

7 (Whereupon, at 2:14 o'clock p.m., the case in
8 the above-entitled matter was submitted.)

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CERTIFICATION

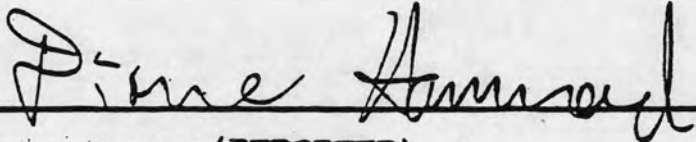
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