



September 2019

Volume 2, Issue 4

## Legislative Prayer, the First Amendment, and the Courts

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....”

First Amendment, Constitution of the United States

The term “legislative prayer” refers to an invocation given by a member of the clergy, a lay person, or elected official at the beginning of a government legislative meeting. Since our founding as a country, countless State and local governments have begun their public legislative meetings with prayer. Although the Establishment Clause of the First Amendment does not prohibit legislative prayer, it does impose constraints that must be adhered to in order to avoid a constitutional challenge to governmental prayer practice.

Over the past several years, legislative prayer has been the subject of litigation across the United States. Recent court decisions from the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit (the federal appeals court that covers Maryland) have provided the guideposts that must be

followed by local governments that engage in legislative prayer. These decisions provide direction as to how to proceed and warnings as to how not to.

### A. Clergy-Led Legislative Prayer

The most recent Supreme Court case involving the issue of legislative prayer is *Town of Greece, N.Y. v. Galloway*, decided in May 2014. In that case, the Supreme Court framed the issue as follows: “Whether the town imposed an impermissible establishment of religion by opening its monthly board meetings with a prayer.” The town had re-instituted its prayer practice in 1999. The practice consisted of the town supervisor inviting a local clergyman to the front of the room to deliver an invocation. After the prayer, the town supervisor would thank the minister for serving as the board’s “chaplain for the month” and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.

The town followed an informal practice for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town maintained a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. Prayers were not reviewed in advance of the meetings nor did the town provide guidance as to the prayer's content. The town at no point excluded or denied an opportunity to a would-be prayer giver.

Town leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in the town were Christian, and from 1999 to 2007, all the participating ministers were too. This resulted in invocations that generally asked the divinity to abide at the meeting and bestow blessings on the community. The words "Lord," "Jesus," and "God" were frequently used in the prayers. Some of the prayers mentioned religious holidays, such as Easter, and expressly referenced the Christian faith.

A lawsuit was filed by two persons offended by the Christian themes of the clergy-led prayers. Eventually, the case was decided by the Supreme Court.

The Supreme Court concluded that the town's prayer practice did not violate the First Amendment. At the very outset of the decision, the Court rejected the contention that a prayer's content determined its constitutionality. If it were otherwise, courts would be converted into "supervisors and censors" of religious speech, a clearly unacceptable result. Although the Court upheld the tradition of legislative prayer to open legislative meetings, it did impose

constraints. The Court ruled that legislative prayer must be solemn and respectful in tone; must invite lawmakers to reflect upon shared ideals and common ends; must not belittle nonbelievers or religious minorities; must not preach conversion; and must not apply pressure (direct or indirect) on those in attendance to participate. Finally, the Court ruled that the prayer should include an express statement that those attending the legislative session are not required to stay during its delivery or participate in any way. In sum, legislatures must ensure that clergy-led prayers are inclusive, suited to the legislative setting, and geared towards the ends of the legislative process.

## B. Lawmaker-Led Prayer

Three years later, in *Lund v. Rowan County*, N.C. (4<sup>th</sup> Cir. 2017), the United States Court of Appeals for the Fourth Circuit decided a case involving lawmaker-led prayer. In this case, the plaintiffs challenged the prayer practice of the Rowan County (North Carolina) Board of Commissioners, a five-member legislative body that convened twice a month. Each board meeting began with a prayer composed and delivered by one of the commissioners. After calling the meeting to order, the chairperson asked everyone in attendance to stand. All five board members would then rise and bow their heads, as would most of the attendees. A commissioner would then ask the community to join him in worship, using phrases such as "Let us pray," "Let's pray together," or "Please pray with me." The invocations ended with a communal "Amen."

Board members rotated the prayer opportunity among themselves as a matter of long-standing custom. The content of the prayer rested entirely in the discretion of the commissioner. No one outside the

board was permitted to offer an invocation. The prayers were invariably Christian in content, including prayers naming “Jesus,” “Christ,” or the “Savior.” No religion other than Christianity was represented and some of the prayers implied that Christianity was superior to other faiths. Some prayers even seemed to implore attendees to accept Christianity.

A lawsuit was filed challenging the board’s prayers practice in 2013. The United States District Court in which the suit was filed sided with the plaintiffs, and issued an injunction preventing the board from further adhering to its prayer practice.

Rowan County appealed to the United States Court of Appeals for the Fourth Circuit, and, eventually, the case was argued before the entire court, sitting *en banc*. After oral argument, the court issued its opinion. The court found that Rowan County’s lawmaker-led prayer practice was unconstitutional. Although not prohibiting lawmaker-led prayer outright, the court found that the practice more strongly identifies the government with religion than clergy led prayer. The court further found that lawmaker-led prayer more strongly messaged a need for attendees to participate than clergy-led prayer.

Although the court held the practice in Rowan County to be unconstitutional, it allowed Rowan County to decide what steps must be taken to comply with the First Amendment. The Supreme Court denied Rowan County’s petition to review the case, and, as a result the decision of the Fourth Circuit stood. To comply with that court’s ruling, the Rowan County Commission began using a chaplain from the sheriff’s department to give the legislative prayer. The Commission also ceased asking those in attendance to take part in the prayers and

made sure the public understood that the prayers were for the legislators and their mission, and nothing more.

As a result of losing the legal battle, Rowan County was required by federal law to pay the plaintiffs’ attorneys fees. In January 2019, an agreement was reached by which the county agreed to pay \$285,000 to the plaintiffs’ attorneys.

### C. Conclusion

Local Government legislative bodies must be guided by the decisions in *Town of Greece* and *Rowan County*. Both cases involved legislative prayer at the local level, and, in both, the courts recognized the heightened potential for coercion that legislative prayer has at local council and board meetings. In particular, the *Rowan* court was concerned by the practice of lawmaker-led prayer that preceded board proceedings that involved both legislative and non-legislative matters. In other words, the court was concerned that legislative prayer was preceding board matters that were not legislative in character, and that the practice of mingling both legislative and non-legislative matters subsequent to legislative prayer could be problematic.

Ultimately, the criteria by which all legislative prayer will be measured is simply one of conveying a message of respect and welcome for persons of all beliefs and adopting a prayer practice that advances the core idea behind legislative prayer itself.