Imprisonment for Speech: Are Criminal Penalties for Open Meetings Violations Unconstitutional?

by Scott Houston



Indeed, the Supreme Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general. Further, the [U.S. Supreme] Court reaffirmed that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."[1]

Is jail time appropriate for innocent discussions between elected officials that ultimately involve a quorum of their governmental body? Many state legislatures and attorneys general believe so, but the issue isn't really one of public policy at this point. It is now a matter of constitutional law to be decided by the courts. A group of Texas cities and city officials have sued to invalidate the criminal penalty in the Texas Open Meetings Act (TOMA).[2] The courts will now decide whether imprisonment as a punishment for speech violates the First Amendment to the U.S. Constitution. Depending on the outcome of this litigation, several state legislatures may have to alter their open meetings laws to provide a less restrictive means of promoting open government.

The Background

In October 2004, Katie Elms-Lawrence, a member of the city council in Alpine, Texas, sent an e-mail to other council members asking if they wanted to place an item on a future council agenda. The following day, Avinash Rangra, one of the other members, responded to the recipients of the first e-mail, agreeing that the item should be discussed. (See the sidebar on page 8 for the actual e-mail exchange.) The local prosecutor decided that the e-mail exchange violated the TOMA because the e-mails ultimately involved a quorum of the city council, with the result that two of the council members were criminally indicted by a grand jury.

The two council members were merely trying to get an item on a future agenda for a public discussion by the entire city council. For doing so, they now have an arrest record and could have been imprisoned for up to six months.[3] Although the indictments were later dismissed, the two council members sued in federal court, claiming that the criminal provision of the TOMA infringed upon their right to freedom of speech under the First Amendment.[4] There is no doubt that the TOMA, like other states' open meetings laws, limits city officials' freedom of speech by providing for certain topics that may not be discussed with certain other people at certain times. Most city officials accept that limitation and recognize that it must be balanced against the importance of open government.

Nonetheless, the limitation on free speech raises an important question: What penalty should be imposed on a city official who commits a violation, no matter how inadvertent or inconsequential? In Texas, the penalty can be imprisonment. Several other

states, including Arkansas, California, Florida, Hawaii, Illinois, Michigan, Nebraska, Nevada, North and South Dakota, Oklahoma, South Carolina, and Utah, also provide for imprisonment as a penalty.[5] That leaves 36 states where violations are punished by some other means, such as a civil or criminal fine. Democracy seems to work as well in those states as in those with jail time as a deterrent.

The Texas Problem

The definition of a "meeting" in the TOMA, as interpreted by the Texas Attorney General and the courts and combined with the criminal provision for a violation, shows why imprisonment as a punishment is unconstitutional. Many Texas city attorneys would agree that they can't answer, in a satisfactory way, whether an official subject to the TOMA may communicate—either in person, by phone, or using e-mail—with other members of their governmental body, outside of a properly-posted meeting. The short answer, however, is, "No, if you want to be 100 percent sure you don't go to jail." Obviously, most officials are not satisfied with that answer.

The answer has nothing to do with intentionally-planned, secret meetings to make decisions outside of the public view. Those would clearly violate the TOMA.[6] The issue is about elected officials communicating with one another to share information, learn about an issue, or discuss whether an issue warrants consideration by the entire governmental body.

The complete answer requires a long, drawn-out explanation. In Texas, like in many other states with open meeting laws, any gathering ofthe members of a governmental body is subject to the requirements of the TOMA (including the requirement of 72 hours' notice, an agenda, minutes or a tape recording, and certain others) provided the following two elements exist: first, a quorum is present; and, second, public business is discussed. The TOMA actually has two definitions of a meeting,[7] but, for purposes of explaining when it applies, the "two element" test is the most clear. It seems simple enough to explain, but even a simple test can be deceptive.

Why? The main reason is that the TOMA has been interpreted to apply to situations in which members of a governmental body are not in each other's physical *presence*. For example, e-mail communications, telephone calls, and written correspondence that ultimately involve a quorum may constitute a violation. This is true even if the quorum is not physically present in the same location, and the discussion does not take place at the same moment in time.[8] Such interpretations hamper the ability of city officials to discuss and learn about issues. Discussions between individuals do not normally amount to any systematic attempt to circumvent or avoid the purposes of the TOMA.

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However, a Texas Attorney General Opinion, and similar opinions from other states, coined the term, "walking quorum."[9] The term seems to indicate, assuming that a city council's quorum is three, that: If council member A deliberates with council member B, then council member B deliberates with council member C, and, finally, council member C deliberates with council member A, a quorum was formed. The Texas Opinion actually dealt with the criminal conspiracy provision of the TOMA,[10] pursuant to which discussions among less that a quorum can be a crime. Even so, the reference to the term "walking quorum" blurs the line between discussions that involve less than a quorum and those that involve a quorum.

In spite of the Texas Attorney General's interpretation and the Alpine indictment, at least one Texas appellate opinion indicates that the TOMA is not violated by officials using the telephone to discuss agendas for future meetings.[11] Therein lies the ambiguity: if city officials speak to one another outside of a meeting, whether to simply share information or to decide whether to place an item on a future agenda, a prosecutor might infer that a "meeting of the minds" occurred prior to any formal meeting, even if none did. Discussions with other state league counsel have shown that the same is true in many other states.[12]

Of course, it is essentially impossible to run a local government without any communications at all except during public meetings. Such meetings may occur as infrequently as once a month in many localities. Beyond that, there is a continuum of behavior to consider, with criminal prosecution for innocent and lawful discussions being a real possibility. The default "don't speak" position clearly has a chilling effect on elected officials' speech.

The District Court Ruling

On November 7, 2006, the judge in the Texas constitutional challenge issued his ruling.[13] The following passage sums up the holding in the case:

> Because the speech at issue is uttered entirely in the speaker's capacity as a member of a collective decision-making body, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment from the restrictions imposed by the Texas

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Open Meetings Act.[14]

In other words, the district court concluded that, when a person is elected to public office, his or her constitutional rights vanish. The judge cited a Kansas Supreme Court opinion upholding the constitutionality of that state's open meetings laws. In that case, *actual* secret meetings were prearranged, planned, and carried out for the purpose of deliberations and decisions that were not open to the public.[15] Significantly, the Kansas Open Meetings Act that applied did not have criminal penalties, only the possibility of a civil fine of no more than $500. Clearly, these are not the same facts as in the Texas case.

The judge also relied on the recent U.S. Supreme Court decision, *Garcetti v. Ceballos*,[16] for the proposition that government could restrict elected officials' speech in the same way as it could the speech of public *employees*.[17] (*Garcetti* relied on the *Pickering/Connick* employee speech precedent.[18]) The Alpine officials appealed to the U.S. Court of Appeals for the Fifth Circuit.

The Initial Fifth Circuit Decision

In April 2009, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit released its opinion in *Rangra v. Brown*, finding that the district court had incorrectly applied the *Pickering/Connick* analysis to the case.[19]

As indicated, the district court had assumed that there was no meaningful distinction between the speech of elected officials and that of public employees, and held that, under *Garcetti*, the plaintiffs' speech pursuant to their official duties was not protected by the First Amendment. The appellate court found, instead, that it "agree[d] with the plaintiffs that the criminal provisions of TOMA [were] content-based regulations of speech that require the state to satisfy the strict scrutiny test in order to uphold them."[20] The appellate court concluded that the penalty provision of the TOMA was content-based because the answer to whether a quorum of public officials could properly communicate with each other, outside of an open meeting, depended on whether the content of their speech referred to "public business or public policy over which the governmental body ha[d] supervision or control."[21]

The Fifth Circuit's opinion was based largely on its prior ruling in *Jenevein v. Willing*.[22] There, the court applied the strict scrutiny test to a state judiciary commission's order censuring an elected judge's speech, which disciplined the judge for holding a press conference in which he addressed alleged abuses of the judicial process by lawyers in a pending case. The censure order shut down all communication between the elected judge and his constituents.[23] The court concluded that the order violated the judge's First Amendment rights: specifically, that the order was an unconstitutional, content-based restriction of the elected official's speech because the state had failed to prove that the measure was narrowly tailored to further a compelling state interest.[24]

Ultimately, the Fifth Circuit in *Rangra v. Brown* reversed the district court's judgment and remanded the TOMA case for the application of strict scrutiny review.

The En Banc Dismissal

Shortly after the Fifth Circuit opinion was issued, both parties filed for rehearing en banc. The State of Texas argued that the panel's decision should be overturned; the city officials argued that no additional trial proceedings were necessary and that the court should simply declare the criminal provision of the TOMA unconstitutional. The Texas Municipal League, along with the Texas City Attorneys Association, the Illinois Municipal League, the South Dakota Municipal League, the National League of Cities, and IMLA, filed an *amicus* brief in the case in support of the city officials' position.

The court granted both motions and was set to hear oral arguments.[25] However, in a surprise move, the

Should an e-mail exchange like the following merit imprisonment of city officials?

ORIGINAL E-MAIL:

Avinash, Manuel ... Anna just called and we are both in agreement we need a special meeting at 6:00 pm Monday ... so you or I need to call the mayor to schedule it (mainly you, she does'nt [sic] like me right now I'm Keri's MOM).. we both feel Mr. Tom Brown was the most impressive... no need for interviewing another engineer at this time ... have him prepare the postphonment [sic] of the 4.8 million, get us his firms [sic] review and implementations for the CURE for South Alpine....borrow the money locally and get it fixed NOW.... then if they show good faith and do the job allow them to sell us their bill of goods for water corrections for the entire city.....at a later date..and use the 0% amounts to repay the locally borrowed money and fix the parts that don't meet TECQ [sic] standards....We don't have to marry them ... with a life long contract, lets [sic] just get engaged! Let us hear from you both. KT

RESPONSE E-MAIL:

Hello Katie.... I just talked with John Voller of Hibb and Todds of Abilene ... and invited him to come to the Monday meeting.... I asked him to bring his money man also.... these guys work for Sul Ross ... He said ... he will be at meeting Monday....I'll talk with Tom Brown also after my 8:00 class ... Thanks for the advice..... and I'll talk with Mickey as per your, Anna, and Manuel directions ... and arrange the meeting on Monday.... We must reach some sort of decision SOOOOOOOOOOOOON. Avinash

court dismissed the case on September 10, 2009, in a 16-1 decision, without hearing oral arguments.[26] It held that the plaintiff lacked standing as he was no longer a city official: he was term-limited as a council member and left office at the end of his term on May 19, 2009. Accordingly, the court, in a one-sentence order, found the case was moot.[27] The lone dissenting justice wrote a scathing rebuke, in which he lambasted the other members of the court for essentially taking the easy way out.[28]

Conclusion

The decisive dismissal vote, along with other indications from the court, seemed to indicate that further appeals of the original case would be futile. Because of that, several Texas cities and city officials filed an entirely new lawsuit in December 2009, in the same federal district court and based on the same legal principles as those in the first suit.[29]

Both cases have created frenzy in the media, which has frequently reported that public funds are being used to seek "secrecy in government."[30] In fact, nothing could be farther from the truth. An Alpine city council member paid the costs of the first lawsuit out of his own pocket, and the lawyers volunteered most of their time. In the pending suit, the lawyers are working completely pro bono.

Should city officials be able to communicate with one another to share information, learn about an issue, or discuss whether an issue warrants consideration by the entire governmental body, without the fear of imprisonment for doing so? City attorneys in states where imprisonment is a punishment, and even those in the dozens of states with criminal fines, will want to watch the new lawsuit carefully to see what happens. It is highly likely that the case will ultimately end up before the U.S. Supreme Court, and recent opinions would seem to indicate that the days of the TOMA's criminal penalty are numbered.

Notes

1. Rangra v. Brown, 566 F.3d 515, 518 (5th Cir. 2009).
2. Tex. Gov. Code Ann. § 551.001 *et seq*. (Vernon 2007).
3. The TOMA provides that: "A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly...participates in the closed meeting, whether it is a regular, special, or called meeting." Tex. Gov. Code Ann. § 551.144(a) (Vernon 2007). An offense under the TOMA is "a misdemeanor punishable by: (1) a fine of not less than $100 or more than $500; (2) confinement in the county jail for not less than one month or more than six months; or (3) both the fine and confinement." Tex. Gov. Code Ann. § 551.144(b) (Vernon 2007).

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4. Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas, Plaintiffs v. Frank D. Brown, 83rd Judicial District Attorney, Gregg Abbott, Texas Attorney General, and the State of Texas, Defendants, P-05-CV-075 (W.D. Tex. Nov. 7, 2006).
5. Ark. Code 25-19-104; Cal. Gov't Code § 54950.5; Fla. Stat. § 286.011; Haw. Rev. Stat. § 92-13; 5 Ill. Comp. Stat. 120/4 (2006); Mich. Comp. Laws § 15.272; Neb. Rev. Stat. § 84-1414; Nev. Rev. Stat. § 241.040; N.D. Cent. Code § 44-04-21.3; Okla. Stat. tit. 25, § 314; S.C. Code § 30-4-110; S.D. Codified Laws § 1-25-1; Utah Code § 52-4-1.
6. For example, in *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001), the plaintiffs challenged the adoption of a city's budget. On the eve of the budget vote, the mayor, city manager, and several council members met in small groups in the city manager's office to reach a consensus on changes to the city budget. The participants were careful to avoid the physical presence of a quorum. In fact, on several occasions throughout the evening, the city manager told the group that there were too many people together, and they were at risk of violating the Act. The court held that "the facts of this case present a classic fact pattern of deliberation by a quorum that purposely attempts to avoid the technical definitions of the Act by shuffling members in and out of an office. Clearly, a quorum of council members deliberated and reached agreement concerning the budget...". *Id*. at 474.
7. *See* Tex. Gov. Code Ann. § 551. 001 (4) (Vernon 2007).
8. Op. Tex Att'y Gen. Nos. DM-95 (1992) & LO-95-055 (1995) (members of a governmental body may violate the Act by signing a letter on matters relevant to public business without meeting to take action on the matter in a properly posted and conducted open meeting); JC-0307 (2000) (the circulation of any document that requires approval of the governing body to take effect in lieu of its consideration at a meeting would violate the Act). *But see* Op. Tex. Att'y Gen. No. DM-95 (1992) (the mere fact that two council members visit over the phone does not, in itself, constitute a violation of state law. However, if city council members are using individual telephone conversations to poll the members of the council on an issue, or are making such telephone calls to conduct their deliberations about public business, there may be the potential for criminal prosecution). *See also* Hitt v. Mabry, 687 S.W.2d 791 (Tex. Ct. App. 1985) (members of a school board violated the TOMA by deciding to send out a letter to all parents residing in the school district, without a discussion of the matter in an open meeting).
9. Op. Tex. Att'y. Gen. No. GA-326 (2005).
10. Tex. Gov't Code. Ann. §

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551.143(a) (Vernon 2004) provides that an elected official commits an offense if he or she knowingly conspires, with less than a quorum of the public body, to circumvent the TOMA.
11. Harris County Emergency Serv. Dist. #1 v. Harris County Emergency Corps, 999 S.W.2d 163 (Tex. Ct. App. 1999).
12. Author's notes.
13. Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 07, 2006).
14. *Id.* at *5.
15. State ex rel. Murray v. Palmgren, 646 P.2d 1091, 1099 (Kan. 1982).
16. 547 U.S. 410 (2006).
17. 2006 WL 3327634 at *5.
18. *See* Pickering v. Bd. of Educ. of Tp. High School, Dist. 205, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 147 (1983).
19. Rangra v. Brown, 566 F.3d 515 (5th Cir. 2009).
20. *Id.* at 521.
21. *Id.* at 522.
22. Jenevein v. Willing, 493 F.3d 551, 557-58 (5th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)).
23. *Id.* at 556-58.
24. *Id.* at 559-60.
25. Rangra v. Brown, 576 F.3d 531 (5th Cir. 2009).
26. Rangra v. Brown, 584 F.3d 206 (5th Cir. 2009) (Dennis, J., dissenting).
27. *Id.* at 207.
28. Noting that "This court shirks its duty under the Constitution to afford Rangra a forum for his constitutional challenge and live controversy by dismissing his claim without full briefing, full oral argument, and full judicial consideration and attention." *Id.* at 210.
29. City of Alpine, et al. v. Gregg Abbot and the State of Texas, No. 4:09-CV-00059 (W.D. Tex. filed Dec. 14, 2009).
30. *See, e.g.*, Frank Sturzl, *Texas Newspapers Lash Out at City Officials*, Texas Municipal League Legislative Update (Dec. 10, 2009), available at http://www.tml.org/leg_updates/updatepdf/121009.pdf. ML

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11. Mathews v. Eldridge, 424 U.S. 319 (1976).
12. *Id.*
13. *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975).
14. Neighbors for a Healthy Gold Fork v. Valley County, 176 P. 3d 126, 132 (Idaho 2007); *Mathews,* 424 U.S. at 333.
15. *Mathews*, 424 U.S. at 348.
16. Morrissey v. Brewer, 408 U.S. 471 (1972).
17. *Mathews*, 424 U.S. at 348.
18. *Id.* at 334, quoting *Cafeteria & Restaurant Workers Union, Local 473 AFL-CIO v. McElroy*, 367 U.S. 886 (1961).
19. *See, e.g.,* Dairy Prod. Serv., Inc. v City of Wellsville, 13 P. 3d 581, 593 (Utah 2000); Petersen v. Chicago Plan Comm'n of City of Chicago, 707 N.E.2d 150, 154 (Ill. Ct. App. 1998); Mohilef v. Janovici, 51 Cal. App. 4th 267, 286 (Cal. Ct. App. 1997).
20. West Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P. 3d 182, 193 (N.M. Ct. App. 2002).
21. Barton Contracting Co. Inc. v. City of Afton, 268 N.W. 2d 712, 716 (Minn. 1978).
22. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).
23. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
24. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
25. *Mathews*, 424 U.S. at 335.
26. *Barton Contracting Co. Inc.*, 268 N.W. 2d at 715.
27. Petersen v. Chicago Plan Comm'n of City of Chicago, 707 N.E.2d 150, 154 (Ill. Ct. App. 1998), quoting *Telcser v. Holzman*, 201 N.E. 2d 370 (Ill. 1964).
28. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
29. *Id.*
30. Harris v. County of Riverside, 904 F.2d 497, 504 (9th Cir. 1990), quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983).
31. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
32. Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976).
33. Londoner v. City and County of Denver, 210 U.S. 373, 385 (1908).
34. *See, e.g.*, Idaho Historic Preservation Council, Inc. v. City Council of the City of Boise, 8 P.3d 646, 649 (Idaho 2000).
35. Dairy Prod. Serv., Inc. v. City of Wellsville, 13 P.3d 581, 593 (Utah 2000), citing *V-1 Oil Co. v. Dept. of Envtl. Quality*, 939 P.2d 1192, 1197 (Utah 1997).
36. West Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P. 3d 182, 194 (N.M. Ct. App. 2002); McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County, 49 P.3d 522, 531-32 (Kan. 2002).
37. *Id.*
38. *See West Bluff Neighborhood Ass'n*, 50 P.3d at 193; Medeiros v. Hawaii County Planning Comm'n, 797 P.2d 59, 67 (Haw. Ct. App. 1990).
39. *See, e.g.,* Mohilef v. Janovici, 51 Cal. App. 4th 267, 289-94 (Cal. Ct. App. 1997) and its discussion of cases.
40. *Id.* at 302.
41. *See, e.g.*, Kaelin v. City of Louisville, 643 S.W. 2d 590, 591 (Ky. 1982).
42. *See, e.g.*, Barton Contracting Co. Inc. v. City of Afton, 268 N.W. 2d 712, 715-16 (Minn. 1978).
43. *See Mohilef*, 51 Cal. App. 4th at 300-01.
44. People ex Rel. Klaeren v. Village of Lisle, 737 N.E.2d 1099, 1110-112 (Ill. Ct. App. 2000).
45. Chrobuck v. Snohomish County, 480 P.2d 489, 496 (Wash. 1971). ML

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were not hired filed suit in 1997, alleging that the City's selection practice had a disparate impact.[44] The City responded that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act, that of sorting the scores into eligibility categories.[45] The Court held that no limitation period applied for a disparate impact claim where the plaintiff could prove each element of a disparate impact claim and a discriminatory "employment practice."[46] The issue was not based on when a claimant's claim accrued, but whether the claim could accrue at all.[47] Although Title VII did not define "employment practice," the Court found that it encompassed excluding applicants on a "pass list" that exhibited a disparate