International Municipal Lawyers Association
2015 Annual Conference
Las Vegas, Nevada

Work Session X: "How the Supreme Court has Shaped First Amendment Issues for Local Governments from Signs to Legislative Prayer: A Discussion of *Town of Greece* and *Reed v. Town of Gilbert*"

Let Us Pray – Question Mark or Exclamation Point? Developments in Legislative Prayer since *Galloway v. Town of Greece*

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In *Galloway v. Town of Greece*, 134 S.Ct.1811, 188 L. Ed. 2d 835 (2014), the Supreme Court gave local governments additional latitude, and additional guidance, regarding the practice of beginning a council meeting with a prayer.[1] Nevertheless, the entire Court acknowledged that the analysis is "fact-sensitive,"[2] so whether any city's current practices meet the court's test may not be clear. One option for the practitioner would be to adopt the precise Town of Greece program approved by the Court; alternatively, what practices now have the approval (or will likely gain the approval) of the Court?

Although Justice Kennedy resists the idea that an entirely different analysis is applicable to legislative prayer ("Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation."[3]), it is indisputable that the analysis that is applicable to other Establishment Clause cases (the *Lemon* test[4]) is not used to decide legislative prayer cases. In fact, Justice Brennan's dissent in *Marsh* is cited by numerous lower courts to explain why legislative prayer cases are different.[5] One of the questions to be answered, therefore, is what constitutes "legislative prayer" that qualifies for *Marsh* analysis rather than *Lemon* analysis?

Two of the key aspects of legislative prayer that seem to be critical to the Supreme Court justices are (1) that the audience of the prayer is not the public, but the legislators themselves; and (2) that careful parsing of prayers to ensure that some constitutionally-mandated script is followed will run afoul of yet another constitutional proscription: "excessive entanglement." A legislative prayer is seen by *Marsh* and *Galloway* as an effort by Legislators to obtain for themselves the benefits of an invocation for divine inspiration and guidance. However, while *Marsh* was interpreted by many to require constitutionally permissible legislative prayer to be "non-sectarian,"[6] *Galloway* either changed

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[1] Another paper presented with this work session will provide a more detailed and comprehensive analysis of *Galloway*, so I will not repeat that effort here.

[2] *Galloway*, 134 S.Ct. at 1825 (Kennedy, J., writing for the plurality); at 1838 (Breyer, J., writing in dissent). *See also Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S.Ct 1355, 1370, 79 L.Ed.2d 604 (1984) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.")

[3] *Id*, at 1819.

[4] *Lemon v. Kurtzman*, 91 S.Ct. 2105, 505 U.S. 577, 29 L.Ed.2d 745 (1971).

[5] *See, e.g., Bormuth v. County of Jackson*, – F.Supp.3d –, 2015 WL 4477853, at *2 (E.D. Michigan, July 22, 2015).

[6] *Marsh v. Chambers*, 463 U.S. 783, 793, 103 S.Ct. 3330, 3337, 77 L. Ed. 2d 1019 (1983), in note 14. This suggestion was even accepted by the Court itself in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603, 109 S.Ct. 3086, 3106, 106 L. Ed. 2d 472 (1989): "The legislative prayers involved in *Marsh* did not violate this principle [of affiliating the government with any one specific faith] because the particular chaplain had 'removed all references to Christ.'"

that course or corrected that misperception, permitting more explicitly Christian prayers.

Because both *Marsh* and *Galloway* dealt with the legislative body choosing one or more members of clergy to present the invocation before a meeting, the applicability of that analysis is called into question when dealing with another common practice: presentations of invocations by members of the legislative body. Three recent cases from federal district courts discuss this variation on the *Galloway* fact pattern, and fail to reach the same conclusion.

***Lund v. Rowan County,* – F.Supp.3d –, 2015 WL 2072345 (M. D. N.C., May 4, 2015).**

Rowan County, North Carolina's Board of Commissioners regularly opened its meetings with a call to order, an invocation, and the pledge of allegiance. After calling the meeting to order, the Board Chair would ask the audience to rise, and one of the members of the Board would deliver the invocation. Because all of the elected commissioners were Christian, all of the invocations were explicitly Christian, and usually included "references to Jesus, the Savior, and other tenets of the Christian faith." *Id.* at *1.

Before *Galloway*, the binding precedent of the Fourth Circuit held that all legislative prayer must be non-sectarian. *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir.). Because the Rowan County prayers did not meet that standard, plaintiffs challenged the prayers and a preliminary injunction was issued. While the case was pending, however, *Galloway* was decided, announcing that *Marsh* did not require all legislative prayer to be non-sectarian. Both parties then moved for summary judgment, each arguing that their position was supported by the *Galloway* decision.

The District Court held that the practice of the Board of Commissioners was unconstitutional. The primary basis of this holding was that the prayer *by* the legislators was not appropriately analyzed under the *Marsh* standard. Instead, the court applied the *Lemon* test, and that test was failed.

One of the arguments advanced by the county raised a new and different approach. The county argued that because the activity complained of was the actions of the commissioners themselves, the Board was shielded by legislative immunity. However, the court found that legislative immunity applied only to actions against the legislators, not the local government as an entity. The court went further, however, suggesting that even if the action had been against individual commissioners, the immunity would not apply because (1) the prayers

were governmental speech, not individual speech, and (2) the invocations were not "integral to the legislative process." *Id.* at *5.[7]

The court found that the practice of the board was distinguishable from the practice of the Town of Greece in several important ways:

- The historical precedent that underlies the different analysis under *Marsh*, and subsequently *Galloway*, was not present in *Rowan County*. None of the precedents cited by the Court involved prayer by legislators.

- The fact that the legislators are the prayer-givers raised the concerns about excessive entanglement that were important to Justice Kennedy. Necessarily, when the legislator delivers the invocation, the government is involved in editing and approving the prayers.

- Because the legislators had been exclusively Christian, the practice was necessarily discriminatory in a way that the Town of Greece had striven to avoid.

- The prayer was not directed at the Legislators, but directed at the public by the Legislators.

The court found that these distinctions justified analyzing Rowan County's practices under the traditional *Lemon* test rather than the *Marsh/Galloway* test. The commissioners' practice of inviting the audience to stand and join in the prayer involved an element of coercion that was not present when a guest clergyman presented the invocation to the city council.[8] Using a quote from Justice Kennedy's opinion, the court noted that "[o]ur Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior."[9] The court concluded, therefore, that the County's practice violated the First Amendment as a matter of law, and granted summary judgment for the plaintiffs.

The decision of the district court has been appealed to the Fourth Circuit. Amicus Briefs supporting Rowan County have been filed on behalf of 13 states and 18 current and former members of the U. S. Congress.

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[7] Interestingly, this argument runs counter to the primary argument advanced by the County, which is that the Commissioners' prayers are not legally distinguishable from the clergy's prayers in Galloway, and so they should be similarly permitted.

[8] It is notable that the court found important that the attending public was never made aware of their option to remain seated or leave the room. However, it was essentially this action ("If you don't want to hear this prayer, you can leave.") that was found by another court to be "far too close to 'singl[ing] out dissidents for opprobrium." *Hudson v. Pittsylvania County*, – F.Supp.3d –, 2015 WL 3447776 at *10 (W. D. Va., May 28, 2015).

[9] *Lund* at *20 (quoting *Galloway*, 134 S.Ct at 1822).

***Hudson v. Pittsylvania County*, – F.Supp.3d –, 2015 WL 3447776 (W. D. Va., May 28, 2015).**

As in *Lund*, the *Hudson* case began as a challenge to prayers on the basis of their explicitly Christian content that violated Fourth Circuit precedent in *Joyner* and *Wynne v. Town of Great Falls*, 276 F.3d 292 (4th Cir. 2004), *cert. denied*, 545 U.S. 1152, 125 S.Ct. 2990, 162 L.Ed.2d 910 (2005). The trial court had issued a permanent injunction, and that injunction had been upheld on appeal (774 F.3d 231 (4th Cir. 2014), although on non-substantive grounds. After *Galloway* was issued, however, the county moved to dissolve or modify the Preliminary Injunction.

The court agreed that the *Galloway* decision had eliminated the basis of one of its rulings: that any invocations must be generic or nonsectarian. However, relying on the same distinctions that the *Lund* court found controlling, it continued its injunction in place, as modified.

The court cited language from *Galloway* for its decision. For instance, it noted that Justice Kennedy wrote "[t]he analysis would be different if town members directed the public to participate in prayers." The opinion also distinguished between the coercive effect of invitations to rise made by the town leaders from invitations from the guest ministers. Justice Kennedy's analysis of whether prayers must be non-sectarian is also cited, particularly the fact that Justice Kennedy apparently found important that government officials play no role in composing the sectarian prayers. It noted that while the prayers are directed to the legislators in Galloway, in Pittsylvania County the prayers are directed by the legislators at the public. Finally, as in *Lund*, the court found it troubling that the Supervisors in Pittsylvania county had all been Christian, thus eliminating all opportunities for other religious traditions to be represented during the invocation.

***Bormuth v. County of Jackson*, – F.Supp.3d –, 2015 WL 4477853 (E.D. Michigan, July 22, 2015).**

In contrast to *Lund* and *Hudson*, the Eastern District of Michigan upheld the practice of Jackson County, Michigan, in which individual members of the County Board of Commissioners gave the opening prayers at their meetings.

Mr. Bormuth, *pro se*, sued the County of Jackson to enjoin their practice of opening their meetings with prayer led by an individual member of the Board. The court found the fact that all of the commissioners were Christian "immaterial." The court also rejected complaints that the prayers attempted to proselytize or denigrate nonbelievers.[10]

[10] The Court rejected the claim that a prayer to "[b]less the Christians worldwide who seem to be targets of killers and extremists" was "violently offensive" because it sought the protection of only Christians.

The court in Michigan does not seek to distinguish the Jackson County actions from those in North Carolina or Virginia. Instead, it rejects the analysis. It treats the all-Christian roster of invocation-givers as nothing more than a benign reflection of the community that elected them. It decides that the statement "please rise," or "let us pray" by a government official is not reasonably interpreted as a coercive command, but as a polite invitation to participate that may be easily declined without fear of incident. Noting that the involved prayer would easily have passed muster had it been given by a member of clergy chosen as in *Galloway*, the court finds that the changed identity of the speaker does not change the outcome.[11]

Mr. Bormuth has appealed the court's summary judgment, and is still acting *pro se*.[12]

Analysis

These three courts all have recognized that the key distinction between the cases I have discussed and *Galloway* is the identity of the speaker. For the *Lund* and *Hudson* courts, there was little difficulty identifying the speaker as the government itself. However, I think that the average councilmember presenting an invocation will not view the prayer as an action of the city, but as his individual action. They may find comfort in *Galloway's* statement that "For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree."[13] However, Justice Kennedy made this statement in the context of approving the purpose of the prayer: not to proselytize the audience, but to meet the spiritual needs of the councilmember. In this sense, the decision to open a meeting with prayer is analogous to a decision by the council to have only low calorie meals at their meetings, as distinguished from a regulation that the public eat only healthy foods.

Further, the case law indicates that because the legislative prayer is "government speech," it is subject to greater control by the government itself. For instance, in *Turner v. City of Fredericksburg, Virginia*, 534 F.3d 352 (4th Cir., 2008), Justice O'Connor (sitting by designation after her retirement) rejected the challenge by a councilmember who was not permitted to give the invocation

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[11] It seems possible that the identity of the plaintiff—a *pro se* litigant who takes "violent offense" when the official asks blessings on Christians who are targets of killers and extremists and insists that the case should be decided in accordance with the 1797 Treaty of Tripoli—may have affected the outcome of this case. Certainly, it is conceivable that the legal arguments in opposition to the county's practice may have been less effectively presented.

[12] Seventh Circuit Cause No. 15-1869, filed July 29, 2015.

[13] 134 S.Ct. 1811, 1826.

because of his refusal to follow the Council's policy requiring the invocation to be nonsectarian. Justice O'Connor wrote (prior to *Galloway*) that the First Amendment rights of the councilmember were not violated by the policy, because the invocation was that of the city itself, not the individual. *Id.* at 356. "Turner was not forced to offer a prayer that violated his deeply-held religious beliefs. Instead, he was given the chance to pray on behalf of the government. Turner was unwilling to do so in the manner that the government had proscribed, but remains free to pray on his own behalf, in nongovernmental endeavors, in the manner dictated by his conscience." *Id.*

On the other hand, the briefs on behalf of Rowan County argue with some persuasiveness that there is little to distinguish a paid chaplain (such as in *Marsh*) from a councilmember. How is one of these "government speech" and another not? Again, the distinction is most likely found in one of Justice Kennedy's key factors: that the chaplain is hired by the legislators, not to direct either a prayer or a sermon to the audience. The distinction lies not with the speaker, but with the audience.

Neither *Lund* nor *Bormuth* addressed the potentially competing First Amendment rights of individual councilmembers. In light of current trends, however, when individual public officials have been encouraged to resist legal mandates on the basis of their religious beliefs, it seems likely to be a source of litigation in the near future. That argument seems tenuous, however, in light of Justice O'Connor's analysis. Would a city be prohibited from choosing to have no invocation because that policy violated the religious freedom of the councilmembers? That outcome seems far-fetched.

It seems possible, also, that a legislator's invocation might be permissible if it followed the restrictions implicit in the *Marsh* footnote and rejected by *Galloway*. First, the major concern of Justice Kennedy regarding excessive entanglement in editing and supervising the prayers of the clergy invited to attend would not be present if the government is, as concluded by Justice O'Connor, merely regulating the speech given on its behalf—i.e., editing and supervising itself. Further, the elements of coercion that underlie the concerns in *Lund* and *Hudson* would be significantly ameliorated if the prayers were "generic" and "non-sectarian."[14] Finally, the *Lemon* test that prohibits actions that favor one religion over another would be more closely met by a non-sectarian prayer.

Another underdeveloped factor that may ultimately prove to be telling is the pervasiveness of this practice, especially historically. *Lund* specifically states that this practice "deviates from the long-standing history and tradition of a chaplain, separate from the legislative body, delivering the prayer." *Lund* at *9. On the other hand, the amicus brief filed by the State of West Virginia (on behalf

[14] *Lund* specifically states that the outcome "might" be different if the prayers were different. *Lund* at *9, note 4.

of 12 other states) makes a strong argument that the practice of legislators presenting invocations is not nearly the unusual practice that the trial court made it out to be. While the "everybody does it" defense is typically as unsuccessful in the courts as it is when presented by a 10-year-old to its parental tribunal, it is made more powerful by the fact that *Marsh* explicitly relies on long-standing tradition as a basis for approval. However, even the extensively researched amicus brief is almost exclusively directed to current practices, while *Marsh* found persuasive the actions of the first Congress in the 18th Century.

Finally, there is a question that may be relevant to some larger communities. What would be the significance of a religiously diverse city council? While *Bormuth* said it was immaterial, it is clearly important to the courts in *Lund* and *Hudson* that the governing boards were exclusively Christian. Would the practice of legislator-led prayer be more palatable if that rotation also included Jewish, Muslim, or even non-religious members?[15]

As the jurisprudence on this practice consists only of three federal district court opinions, it is clear that the final answer is yet to be pronounced. Nevertheless, it seems reasonably certain that for invocations by councilmembers to survive challenge, it would be preferable to make the prayers non-sectarian, and to somehow accommodate a more ecumenical array of prayer leaders.

Conclusion

While *Galloway v. Town of Greece* offered cities a significant amount of guidance regarding what is and is not permissible in the realm of legislative prayer, I believe that further guidance (from the courts of appeals, if not the Supreme Court) will be necessary to confidently advise city councils whether their council-led invocations are constitutionally permissible.

[15] In fact, an internet search revealed that in 2009 there were at least 2 openly "pagan" local elected officials.