IMLA Annual Seminar

Legislative Prayer--
Legislative Immunity

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APRIL 21, 2018

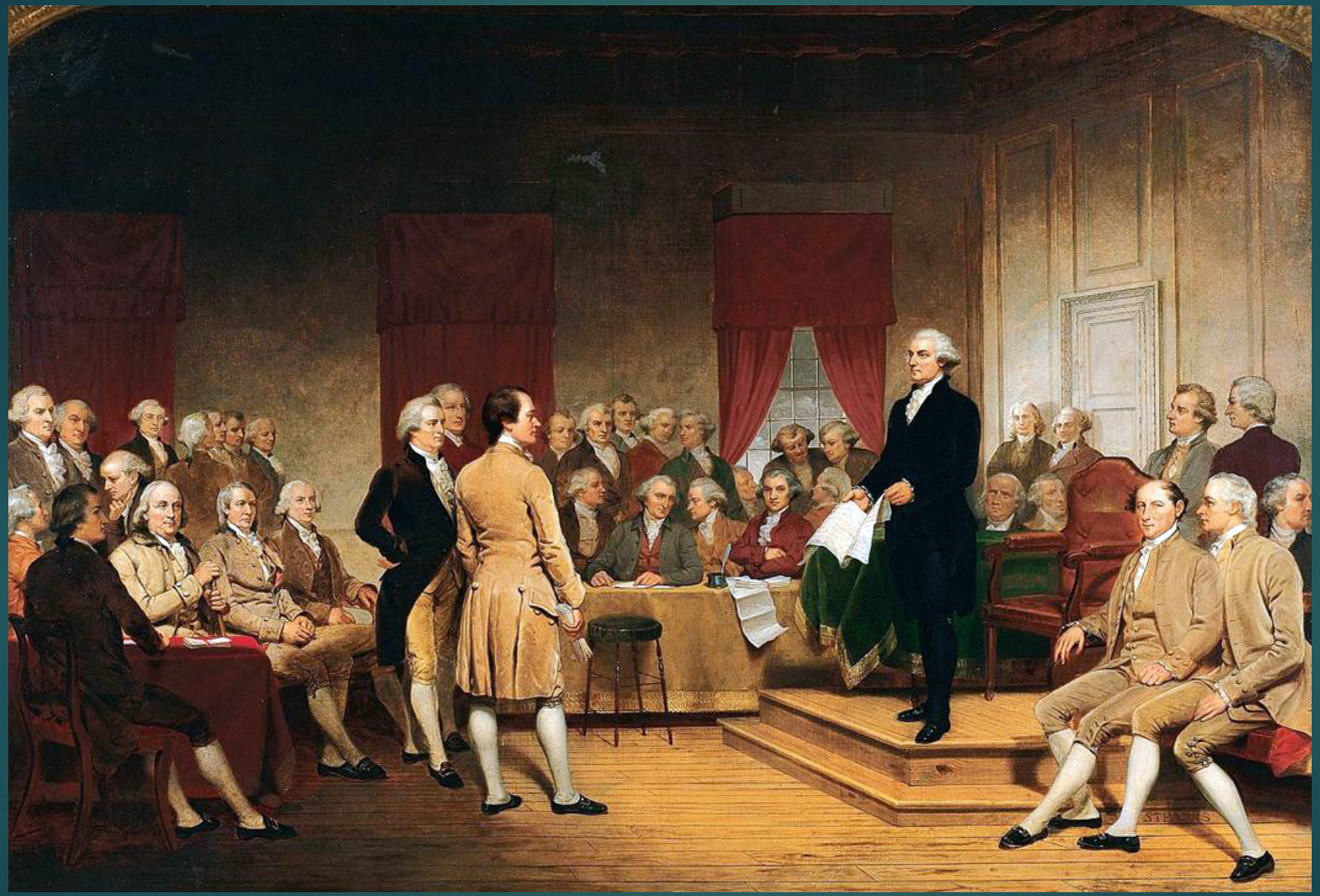


Glorious Revolution of 1688

- *An Act Declaring the Rights and Liberties of the Subject and Setting the Succession of the Crown*. 1 William & Mary Sess 2 c 2.
- "And thereupon the said Lords Sprituall and Temporall and Commons pursuant to their respective Letters and Elections being now assembled in a full and free Representative of this Nation takeing into their most serious Consideration the best meanes for attaining the Ends aforesaid Doe in the first place (as their Auncestors in like Case have usually done) for the Vindicating and Asserting their auntient Rights and Liberties, Declare

  * * *

  That the Freedome of Speech and Debates or Proceedings in Parlyment ought not to be impeached or questioned in any Court or Place out of Parlyment."



United States Constitution
Article I, Sec. 6, cl. 1

- [F]or any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place.
- Speech and debate clause is foundation for legislative immunity.
- Only a handful of cases have explored the limits of the speech and debate clause/legislative immunity.

Speech and Debate Clause—Legislative Immunity

- "Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the ***independence*** and integrity of the legislature." (Emphasis added) *United States v. Johnson*, U.S. 169, 178 (1966).

Speech and Debate Clause—Legislative Immunity

- "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Id.*

- "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." *Id.* at 179.

Legislative Immunity--Limits

- The critical issue becomes, however, whether a legislator is "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376-377.

- "The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gavel v. United States*, 408 U.S. 606, 625 (1972).

Legislative Immunity--Limits

- 1881: Representatives immune form suit for false imprisonment that resulted from a wrongful vote to hold Mr. Kilbourn in contempt of Congress. *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

- 1967: Criminal conviction of former congressman for conspiracy to defraud the United States is set aside, because prosecution relied as proof of the conspiracy the substance of congressman's speech and his motivation for making the speech. *United States v. Johnson*, 383 U.S. 169 (1966). But a member of congress may be prosecuted for bribery if the prosecution does not involve an inquiry into a legislative act or the motivation behind a legislative act. *United States v. Brewster*, 408 U.S. 501 (1972).

Legislative Immunity--Limits

- 1969: Although the House of Representatives did not have power to refuse to seat Adam Clayton Powell after his election to congress in 1966 from the 18th congressional district of New York, Powell could not maintain a declaratory judgment action against individual members of congress. *Powell v. McCormack*, 3395 U.S. 486 (1969).

- 1973: Congress orders release of a critical report on the District of Columbia's school system. Parent of students sue for damages and injunctive relief for invasion of privacy. Court holds that speech and debate clause protects distribution of the report to the public, if upon remand the District Court finds that the publication of the report was within the "legitimate legislative needs of Congress." *Doe v. McMillian*, 412 U.S. 306 (1973).

Legislative Immunity--Limits

- In a fractured opinion the availability of injunctive relief is left uncertain. Justice Rehnquist joined by Berger, Blackmun, and Stewart, wrote:
- "But the prospect of the District Court's enjoining a committee of Congress, which, in the legislative scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution." *Doe* at 344.

Bogan v. Scott-Harris
523 U.S. 44 (1998)

- Mayor Bogan prepares budget proposing to eliminate 135 city positions, including the Department of Health and Human Services, which had one employee—Director Scott-Harris.
- City Council committee chaired by Council Vice-President Roderick approves budget eliminating Scott-Harris' position.
- Council approves the budget.
- Scott-Harris sues Bogan, Roderick, and City of Fall River, Mass., under 42 USC Sec. 1983 alleging racial animus and retaliation for exercising her 1st Amendment rights in filing a complaint against a fellow employee.

Bogan v. Scott-Harris

- A unanimous Court extends legislative immunity to local legislators.

- "The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo–American law. This privilege 'has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries' and was 'taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.'" *Id.* 48-49.

Bogan v. Scott-Harris

- "Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities." *Id.* 49.

- "Even the authorities cited by respondent are consistent with the view that local legislators were absolutely immune for their legislative, as distinct from ministerial, duties. In the few cases in which liability did attach, the courts emphasized that the defendant officials lacked discretion, and the duties were thus ministerial." *Id.* 51.

Bogan v. Scott-Harris

- "Absolute legislative immunity attaches to all actions taken ***in the sphere of legitimate legislative activity***." (Emphasis added) *Id.* 54.

- "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. The privilege of absolute immunity "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id. 54.*

- "Furthermore, it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators." *Id.* 55.

Bogan v. Scott-Harris

- "Respondent, however, asks us to look beyond petitioners' formal actions to consider whether the ordinance was legislative in *substance.* We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office." *Id. 55-56.*

Legislative Prayer

- "Bow your heads with me please. Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna give you all the thanks and all the praise for all that you do. Lord I wanna remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things in your son Jesus's name. Amen."
- *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017)

Legislative Prayer

- Is it consistent with the doctrine of legislative immunity for a court to question a prayer given by a legislator? Some issues to consider:
- 1) Is the prayer offered in a legislative session?
  - Local legislative bodies commonly perform executive functions. *See Bogan*. What if the Falls River council began an executive session about firing Scott-Harris with a prayer?
  - Local legislative bodies commonly perform quasi-legislative functions. What if Falls River council began a zoning variance case with an invocation?

Legislative Prayer

2) Even if in legislative session, is legislator's prayer "acting in the sphere of legitimate legislative activity"?

Is the prayer connected to the legislative work of the body. "Lord help us to make good decisions that will be best for generations to come." (Prayer directed inward to legislator and her or his colleagues and not directed at the audience as if they are a congregation.)

But what about

"Lord I wanna remember bereaved families tonight too, that you would be with them and take them through difficult times."

But what about hybrid prayers as in *Bormuth*?

Courts should be reluctant to parse through a prayer to excise out portions that may appear to outside the sphere of legitimate legislative activity.

Legislative Prayer

"The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1822-23 (2014).

- 3) Does the prayer reflect the personal thoughts of an individual legislator and not the official thoughts of the legislative body?

Legislative Prayer

- What remedy does a court fashion for legislative prayer that the court deems is out of bounds? Can a court consistent with the legislative immunity doctrine issue an injunction against a legislator to stop her or his prayers or change the content of those prayers? Wouldn't such an injunction "boggle" the "minds of the Framers of the Constitution"? *See Doe.*

- A hypothesis:
  - The speech and debate clause protects local legislators giving a ***personal*** prayer from court interference if the prayer is offered in a legislative session.
  - The legislators claim to immunity under the speech and debate clause is strengthened if the prayer is explicitly connected to a matter before the legislative body.