

Prayer at public meetings What does the Constitution Allow?

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1st Amendment

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

Two parts:

- Freedom of religion
- Establishment clause
- The issue for prayers at meetings is the Establishment Clause

Recent History of Council meeting prayers in VA, 4th Circuit

- 2004 – Wynne v. Great Falls, SC – council member-led prayers, regularly called on Jesus. Wynne was treated poorly by council members for not taking part in prayers.
 - Violated 1st Amendment Establishment Clause
- Turner v. Fredericksburg City Council – 2008
 - Reverend Turner on council. Council adopted a non-sectarian prayer policy. He sued for right to invoke Jesus. Court ruled opening prayers are legislative prayers, not individual prayers. Therefore, the establishment clause applied & he did not have the right to pray in name of Jesus. His freedom of religion wasn't the issue, rather the Establishment Clause.

Virginia History, continued

- Hudson v. Pittsylvania County 2013 – 2016
 - Hudson complained about board member-led prayers that were consistently in the name of Jesus.
 - County attorney advised board against the policy.
 - In response, all members of board prayed at start of meeting one after another.
 - Next, in public comment session, ministers prayed and board members chimed in with Amens.
- Court ruled
 - Legislative prayer
 - Went beyond what 1st Amendment allows
 - Violated Establishment Clause – small matter of \$75K attorneys fees

County's argument – Hudson a disruptive citizen. Hudson, a Jew, kept coming to board meetings, therefore she was not suffering harm.

Then came the Town of Greece

- Town of Greece, NY v. Galloway, 2014
 - Town board invited any person of any or no faith to deliver opening prayer
 - Mostly Christian, but included Rabbi, Wiccan, Baha'i, atheist
 - Board did not review prayers
- US Supreme Court ruled
 - Prayers at meetings were allowed by Marsh v. Chambers, 1983, Nebraska legislature, prayers by chaplain on state payroll.
 - Prayer at meeting are a solemn way to get members' heads & hearts in the right place
 - Prayers do not need to be nonsectarian to be OK
 - Town did not pressure or coerce any citizen with the prayers
 - Court upheld town's prayer practice

Did the ruling erase the 4th Circuit's dim view of legislative prayers?

The 4th Circuit wasn't done

- Lund v. Rowan County, NC (July, 2017)
 - Filed before Town of Greece decided.
 1. District court – prayers violated Establishment Clause
 2. 4th Circuit panel (after Town of Greece) ruled prayers OK
 3. Full 4th Circuit ruled prayers violated Establishment Clause
 - Court ruled that Town of Greece left council-led prayers unanswered.
 - Council-led prayers not unconstitutional per se. Fact-based test.
 - Various prayers in Lund were proselytizing; that Christianity the only way.
 - Court found that the County board members “signaled disfavor toward non-Christians”

Court had transcripts of long list of prayers aimed at audience.

6th Circuit takes a different path

- Bormuth v. Jackson County, Michigan (September, 2017)
 - Board-led prayers, mostly Christian, but no pressure on attendees
 - When Bormuth complained in public comment, two board members turned their backs to him. (Court: they didn't object to his religion, they just didn't like him. "elected officials know what getting sued by Bormuth feels like, having been in the position many times before.")
 - Court contrasted Lund where prayers were used to pressure audience "litany of prayers 4th Circuit concluded impermissibly advanced Christianity".
- Bormuth has no effect on Lund or 4th Circuit, but shows the debate will continue.

Where does this leave a town or city council in Virginia?

- Council-member led prayers are allowed
- Sectarian prayers are allowed (better if non-Christians participate)
- Prayers by citizens, clergy clearly allowed
- Prayers must be non-coercive, solemn, not proselytizing, not aimed at any members of audience, not condemning of non-Christians
- Prayers should be used to remind council of solemnity of the meeting, and meant to help council get in the right frame of mind
- Obviously, prayer is not required to start meetings
- Safer prayer policy, if prayers will continue – have local clergy deliver, not the council members. But, this is not required.

Practice in Virginia

- Summer 2017 informal survey of Local Government Attorneys.
- Board/Council Members offer invocation: 9 localities
- Clergy invited to offer invocation: 5 localities
- Public asked/invited to stand: 5 *yes*, 9 *no* (not every responder provided information)
- Moment of Silence: 5 localities
- Revisiting the issue: 3 localities
- Nothing – start meeting – 1 locality