Legislative Prayer

There are many who would argue that the Legislature needs to pray more and argue less. The issue of legislative prayer was recently addressed in *Fields v. Speaker of the Pennsylvania House of Representatives*, 2019 U.S. App. LEXIS 25310 by the United States Court of Appeals for the Third Circuit. Writing for the majority was Circuit Judge Ambro.

The Pennsylvania House of Representatives begins most legislative sessions with a prayer. The House invites guest chaplains to offer for the prayer but it excludes "nontheists." A nontheist is one who does not espouse a belief in a God or gods, though not necessarily an atheist. A nontheist may not serve as chaplain on the theory that "prayer" presupposes a higher power. Visitors to the House Chamber pass a sign asking them to stand for the prayer, and the Speaker of the House requests that audience members "please rise" immediately before the prayer. At least once a House security guard was said to have pressured two visitors who refused to stand.

A group of nontheists challenged the theist-only policy under the United States Constitution; the First Amendment. The First Amendment to the United States Constitution prohibits the establishment of any religion and requires the free exercise thereof. Other constitutional provisions were raised as well.

The nontheists also challenged as unconstitutional the request to "please rise" for the prayer. The Court found that issue moot and the sign not to be coercive.

The Plaintiffs who sued the Pennsylvania House of Representatives wanted to offer an opening prayer as well. They represent a variety of nontheist organization including Secular Humanist, Unitarian Universalists, and Freethinkers. These organizations, according to the Court, may act as a church and synagogue, but they do not profess belief in the existence of a higher power. For this reason, the House denied their request to offer a prayer. Each group had proposed an uplifting secular message of unity, decency, hope, peace, compassion, tolerance and justice; all values that our legislators could use a healthy dose of.

The lawsuit did bring about some change. The Speaker of the House asked guests to "please rise" if they are "able." A sign was added outside the House chamber which explained that the legislative session begins with a prayer and the Pledge of Allegiance. It asks all guests "who are physically able" to rise during this order of business. The word "physically" was late dropped.

When an individual refused to rise and remain seated, a House security guard singled him out. However, they were not asked to leave and no action was taken against non-risers.

The Court found that the legislative branch may discriminate against nontheists and in favor of theists. A lengthy discussion from the Court, including review of many United States Supreme Court cases, led the judges to the conclusion that Pennsylvania's practice is "historically sound." In essence the Court relied upon tradition and that prayer presumes invoking a higher power. It makes one squirm a bit to have courts determine what prayer means and precisely what the purpose is of an individual's prayer.

The Court did acknowledge that legislative prayer achieves a secular purpose. Prayers are said to "accommodate the spiritual needs of lawmakers." Who could argue that lawmakers could use significant elevation of their spiritual needs? One, hardly tongue in cheek, may ask how successful these public prayers have been in making our legislatures more civil or more productive. The Founders of this country, especially Benjamin Franklin, were very skeptical of prayer as hypocrisy and there was certainly opposition to such prayer at the Constitutional Convention in Philadelphia. In the Continental Congress, both John Jay and John Rutledge opposed legislative prayer. There simply were too many religious sentiments in opposition to formulate an agreeable prayer. Both men were future Chief Justices of the United States Supreme Court. Samuel Adams had no problem with prayer, regardless of who offered it, and his view won out.

Once the court determined what "traditional" prayer is all about and what it means, it concluded that a legislative body is simply free to open its sessions with any sort of invocation, including secular ones: "We only hold that it is not required to do so."

The Court denied that its decision opens the door to more extreme exclusions. "Taken too far, importing historical legislative-prayer practice would justify excluding all sorts of theists." The Court understood that once a legislature is permitted to discriminate in favor of one kind of prayer over another, the chances for stomping on religious sensitivities becomes imminent. Judge Ambrose posed the hypothetical question that if the house may rely on historical practice to exclude nontheists, may it also do so to prohibit prayers by Hindus, Jews, and Quakers? "Plainly not." Why not? Who is to define what a "higher power" is to another individual. Some Muslims, for example, consider Christians idolaters because in the view of some Muslims that Christians do not worship one God but rather a man. To a believing Middle Eastern Muslim, a Christian is not therefore praying to a "higher authority."

The Court stretches logic by defining what religions and denominations are acceptable in terms of "traditional" prayer and which evidently are not. Clearly it is understood that the categorical inclusion of certain faiths based upon their beliefs is unconstitutional. ". . . a prayer by a Muslim is different in kind from one by a nontheist – different enough that a legislature may permissively exclude the latter but not the former." This certainly sounds like the legislature creating a litmus test for what prayer is permissible and that which is not. There are some Christians who believe that Muslim prayer does not appeal to a "higher power" because Mohammed was considered a murderer whose mission was to conquer the World by use of the sword. Whose standard will we utilize in determining whether the Christian or the Muslim is praying to a higher power?

These are difficult issues which a court should not be involved with. A court should never be in a position of determining whose prayer is more legitimate or traditional than another. It would have been easy enough for the court simply to strike down the "two-sect" rule of the Pennsylvania Legislature.

The Third Circuit also acknowledged a brewing dispute in the United States Supreme Court over what sort of legislative prayer is constitutional. The Court explained that in the name of non-discrimination, the House may have to abide prayers from nontheists, Satanists, and groups that deride religion altogether. The simple answer to that problem would be to skip the prayer altogether or have a moment of silence.

Finally, the Court admits that legislative prayer is government speech. Naturally, and not surprisingly, legislative prayers may not proselytize or denigrate any faith. The government may not mandate a civil religion. Acknowledging the many difficulties with legislative prayer in today's social environment, the Court nevertheless argues for the proposition that there is nothing coercive about the Pennsylvania House policy. In the conclusion the Court reiterated that the legislative prayer "fits squarely within the historical tradition" of such prayer. The next debate will be over the meaning of both history in a world where such notions are changing rapidly.

The dissenting opinion by Judge Restrepo disagree with the Pennsylvania House's process of selecting guest chaplains, which the Judge believes violates the Establishment Clause of the First Amendment. Do not be surprised to see this matter heard *en banc* or by the United States Supreme Court.

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