AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **March 2015**
From: **A. Eric Johnston**
Re: **School Board Prayer**

The issue of whether school boards for public schools may open with prayer has never been resolved by the U.S. Supreme Court. The issue comes up from time to time in various states. Recently, a school board in North Carolina visited the issue and, more recently, the Williamson County School Board in Tennessee has considered the issue. We were contacted by interested parties for the latter and provided an opinion to them, which we will summarize in this Update.

The State of Tennessee is in the Sixth Judicial Federal Circuit. The case of *Coles v. Cleveland Board of Education,* 171 F.3d 369 (6th Cir. 1999) held that the opening of a school board meeting with prayer was unconstitutional. That court reviewed a number of U.S. Supreme Court authorities for determining the constitutionality of public prayer. The divining line for the court was whether they should consider the student school prayer cases, of which there are a number, or the single case dealing with legislative prayer, *viz., Marsh v. Chambers,* 463 U.S. 783 (1983).

The only other circuit court level case dealing with school board prayer is that of *Doe v. Indian River School District,* 653 F.3d 256 (3rd Cir. 2011), which considered opening school board meetings with prayer for a local Delaware school system. Similarly, that court studied the many public prayer cases, analyzing the student prayer and the legislative prayer issues, again coming down on the side of student prayer decisions.

There are not other circuit court decisions applicable to the issue and the Supreme Court has not taken an opportunity to address it. We believe it is an important issue that should be addressed by the U.S. Supreme Court, but the likelihood of it agreeing to hear such a case is *de minimis*.

The public school student prayer cases relied on deal exclusively with student initiated prayer, prayer at football games, prayer over PA systems, *etcetera*. In other words, they deal with either student prayer or prayer when students are present. Those cases do not deal with legislative prayer by a governing body, i.e., a school board.

On the other hand, *Marsh* is a case that upheld opening the Nebraska Legislature with prayer. The U.S. Congress opens with prayer. Recently, the U.S. Supreme Court decided *Town of Greece v. Galloway,* 134 S.Ct. 1811 (2014). This involved not a legislature opening with prayer, but a small town in New York. The U.S. Supreme Court upheld the ceremonial nature of such a prayer. The Court said proper ceremonial prayers "strive for the idea that people of many faiths may be united in the community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground and a desire to show respect for the divine in all aspects of their lives and being."

The Court pointed out the prayers were for the city council in its guidance and deliberations, not for the singular benefit of persons in attendance. The Court did not view the prayers as coercive and not for the purpose of proselytizing or for promoting any particular religious observance. Because someone may be simply offended by the prayer is not coercion, according to the Court. In fact, the Court found that a "generic" prayer would be improper, because it would require the city council to determine what was proper prayer. As long as the prayer was ceremonial in nature, even invoking the name of Jesus, or the prayer of any other faith, is acceptable.

Similarly, why is it not reasonable for a school board to be opened with a proper ceremonial prayer? We believe the decisions in *Coles* and *Doe* were entirely misdirected. In addition to student prayer cases, the judges in those cases relied heavily on the *Lemon* test, the 1973 Supreme Court analysis used to determine establishment clause cases. It is a test that should long ago have been abandoned and as Justice Scalia has pointed out, it is like a ghoul that rises from the grave and stalks establishment clause jurisprudence. The U.S. Supreme Court rarely references the *Lemon* test, although the lower courts heavily rely on it. It is not an adequate test for determining establishment clause issues because it almost always finds any religious activity is a violation of the Constitution.

School boards are activities of adults, not students. While they do not pass statutes, they do pass regulations and have discretionary legislative authority in running school districts. They are entrusted with no more or no less an important an asset as the future of our children. Some may say this exceeds the importance of city councils determining who should collect their residents' garbage, collect their taxes, or do other city functions. Seriously, both are engaged in important and unavoidable governmental functions. Rather than rely on when students can pray and not pray, courts should rely on adults being able to distinguish for themselves whether government is supporting religion or simply seeking divine guidance.

We believe it unlikely that any school board, whether in Tennessee, North Carolina or any other state will make any progress on this issue at the present time. There is a five-four U.S. Supreme Court which, we believe, would uphold the constitutionality of school board prayer. The problem is getting a case before it.