

# THE NATIONAL LEGAL FOUNDATION

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To: Mayors and citizens of cities and towns throughout America

Date: September 25, 2008

***Re: The Right to Display Nativity Scenes on Public Property***

On behalf of a concerned citizen, Bruce Barilla of White Sulphur Springs, West Virginia ([www.nativityhelp.org](http://www.nativityhelp.org)), the National Legal Foundation has been asked to address the legality of displaying nativity scenes on public property. It is clear from case law that nativity scenes can be displayed. However, the legality of these displays hinges on the outcome of two inquiries: first, whether the sponsor of the display is a public entity or private group or individual; and second, (if the sponsor is a public entity), can it be said that the erection of the religious display is an endorsement of religion or merely a display of a religious symbol for an otherwise secular purpose.

As to the first question, a nativity scene is publicly sponsored if it is being erected, overseen, or funded by government action; and it is privately sponsored if a private group or individual takes on all of the administrative duties involved with the display without assistance or involvement by a governmental entity.

The term “endorsement of religion” does not appear in the United States Constitution, but endorsement of religion is what a court will look for if the display is a public one. The term means that government should not show favoritism to Christianity by allowing the display of the nativity scene. One of the leading Supreme Court cases on this subject is *Lynch v. Donnelly*. There, the Court held that the inclusion of a nativity scene in a city’s annual public Christmas display did not violate the Establishment Clause because the city was found to have a secular purpose for including it, and therefore, had not impermissibly endorsed the Christian faith. The main reason the Court allowed the nativity scene was because it was included among other traditional and well-recognized holiday symbols, such as a Christmas tree, Santa Clause, reindeer, and a banner, stating “Season’s Greetings.” The city was merely recognizing a national holiday. The city acknowledged its historic roots, but also emphasized other non-religious aspects.

It must be noted, however, that the mere existence of a secular purpose will not suffice if the display is being dominated by religious purposes. For instance, in *County of Allegheny v. ACLU*, the Supreme Courts found the display of a nativity scene unconstitutional despite its secular purpose because the display showed favoritism towards the nativity scene. It is important, then, to group a nativity scene among a larger display which exhibits all of the holiday symbols neutrally.

If the nativity scene on public property is a private one, the law is much more straightforward. So long as the display is truly private and allowed on equally neutral terms in a public forum (that is public property that is open for use by the public either by tradition or by policy) there are no restrictions on how the religious symbol may be displayed. Most local governments will already have a policy in place that allows private groups to apply to use the property. The government must treat those wishing to erect the nativity scene exactly the same way it would treat any other applicant. In order to remove doubt about the government’s role in the erection of the religious display, it is recommended that all private displays on public property include a sign identifying the display as one sponsored by a private group.

The law in this area can be complicated, and the National Legal Foundation will be glad to consult with mayors, council members, individuals, and groups free of charge about these matters.

Sincerely,



Steven W. Fitschen  
President