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SECOND CIRCUIT REVIEW

FIRST AMENDMENT JURISPRUDENCE AND THE GUILIANI ADMINISTRATION

MARTIN FLUMENBAUM - BRAD S. KARP

PUBLISHED IN THE *NEW YORK LAW JOURNAL*

APRIL 2000

In this month's column, we discuss two recent decisions in which the United States Court of Appeals for the Second Circuit expressed its frustration at the "relentless onslaught" of First Amendment litigation that has been waged under the Giuliani Administration, and struck down what it characterized as unlawful political determinations made by the current city administration. Beyond their contribution to First Amendment jurisprudence, the opinions are noteworthy for their unusually spirited tenor and the heated (and, at times, intemperate) colloquy among the judges.

A. MacDonald v. Safir

In *MacDonald* v. *Safir*,[1] the Second Circuit ruled that the district court too hastily rejected a First Amendment challenge brought by The Million Marijuana March to Section 10-110 of the New York City Administrative Code, which provides rules for parade permits.

In 1998, after 25 years of annual parades in support of their cause, the Million Marijuana March, a group that advocates the legalization of marijuana, applied to the New York City Police Department for a parade permit. The Police Department denied the permit requested by the group, proposing instead an alternate -- and less desirable -- route. Parade organizer Robert MacDonald filed suit in the Southern District of New York, arguing that Section 10-110 was facially unconstitutional. That section states that the Police Commissioner (the "Commissioner") must deny a permit where he "has good reason to believe that the proposed procession, parade or race will be disorderly in character or tend to disturb the public peace,"[2] and that the Commissioner may also approve "[s]pecial permits for occasions of extraordinary public interest" if the mayor has provided written approval of the event.[3]

Specifically, MacDonald argued that the ordinance grants the Commissioner too much discretion, including the right to deny a permit for an improper reason, such as a subjective belief that a parade may be "disorderly in character." He also argued that the ordinance improperly fails to require the police to grant a permit within a brief, specified time period; fails to provide for prompt judicial review; and fails to require the Commissioner to give reasons for denial or require him to bear the burden of justifying that denial in court. In response, the Commissioner argued that the ordinance does not violate the First Amendment because there exist valid limits to his discretion under each of these provisions in the form of both administrative guidelines and established practices of his office.

The district court granted the Commissioner's motion to dismiss, except sustained the claim regarding the absence of specified time limits in the ordinance. In response, the City amended the code to provide for a mandatory response time of 45 days before the parade if a permit had been filed at least 90 days prior.

On appeal, the Second Circuit remanded the case, ruling that the district court's decision was "premature." In a decision written by Judge Guido Calabresi and joined by Judge John M. Walker and Southern District Judge Richard M. Berman (sitting by designation), the Court of Appeals began by examining *sua sponte* the question of whether MacDonald had standing to attack facially the portion of the ordinance allowing

the Commissioner to issue special parade permits. Concluding that MacDonald did indeed enjoy such standing to bring the action, the Court cited Supreme Court precedent holding that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."[4]

Addressing the Commissioner's discretion under Section 10-110, the Court noted that it was free to "examine not only the text of the ordinance, but also any binding judicial or administrative construction of it," and that it was "required. . . to consider the well-established practice of the authority enforcing the ordinance."[5] The Court noted that an examination of these factors is "essential as we try to make our way through the Scylla of regulations that are so tightly worded that the flexibility needed for administration is lacking, and the Charybdis of language so loose that, as a practical matter, courts become the licensing bureau."[6] Citing a number of First Amendment cases, the Court noted that, in New York City, "the federal courts have recently had to assume this role with some frequency."[7] Upon examination of these "essential" factors, the Court held that the district court had ruled too soon. Specifically, it stated that "most of the evidence that the Commissioner presents to us now [of his practices and parade administration] was not before the district court when it rendered its judgment on these claims. And, significantly, the district court made no reference whatsoever to the practices or guidelines of the Commissioner in its decision, but appears to have looked only to the text of the ordinance."[8]

Turning to the text of the ordinance, the Court ruled that "[t]he language of § 10-110, standing alone, is not . . . sufficiently precise to survive the facial challenge."[9] Indeed, it found that the two sections questioned by MacDonald -- the section allowing the Commissioner to deny a permit if he believes the parade "will be disorderly in character or tend to disturb the public peace," and the section permitting the Commissioner to grant a parade permit for any "occasion[ ] of extraordinary public interest, not annual or customary," unless constrained by administrative construction or by well-established practice -- both seem to afford the Commissioner exactly the sort of discretion that has been found to violate the First Amendment in landmark Supreme Court cases.[10] Without examining how the ordinance had been applied, the Court held that "the district court's judgment, as currently based, cannot stand."[11] Accordingly, the Court held that the "ordinance is not sufficiently precise on its face to pass constitutional muster," and it remanded the matter to the district court "for the submission of further evidence -- by both sides -- regarding the Commissioner's practices and guidelines associated with parade permitting" under section 10-110.[12]

The Court also held that the district court had prematurely resolved against MacDonald the issue as to whether the ordinance unlawfully fails to provide for prompt judicial review and unlawfully fails to require the Commissioner to seek that review and to bear the burden in such a review. The Court stated that this question was governed by the Supreme Court's decision in *Freedman* v. *Maryland*,[13] which requires that the following procedural safeguards be observed in order for prior restraints on speech to be deemed lawful under the First Amendment: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious

judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court."[14] Because the police department guidelines had been amended prior to the appeal to meet the requirements of the first *Freedman* factor, the Court reviewed only whether the ordinance satisfied the second and third *Freedman* factors.

The Second Circuit disagreed with the district court's finding that the second *Freedman* factor was satisfied based on the availability of an Article 78 proceeding in New York state courts, holding that the limited evidence in the record was inadequate to evaluate whether Article 78 proceedings satisfy the second *Freedman* requirement of prompt judicial review. As for the third *Freedman* factor, the Court noted that the requirements that the Commissioner bear the burden of seeking judicial review as well as the burden of proof in any such review would apply only if he has "engaged in censorship of particularly expressive material."[15] The Court held that this *Freedman* factor also was decided prematurely because there existed insufficient evidence to determine whether the Commissioner in fact exercises discretion by passing judgment on the content of any protected speech.

B. Tunick v. Safir

In certifying to the New York Court of Appeals the issue of whether staging public nude photography would violate a state law prohibiting public nudity, the Second Circuit in *Tunick* v. *Safir* again took the opportunity to criticize the Giuliani administration for provoking a "relentless onslaught of First Amendment litigation."[16] In *Tunick*, the panel majority questioned the rationality of the City's efforts to prevent photographer Spencer Tunick from taking group nude pictures on a New York City street. The Court's opinion again was authored by Judge Calabresi, with Judge Robert D. Sack separately concurring in the result. Judge Ellsworth A. Van Graafeiland did not join in either opinion nor did he concur in the result. Instead, Judge Van Graafeiland took the view that the appeal has become moot and indicated that he would file an opinion to that effect at a later time. He issued his separate (and highly charged) dissent last week.

Tunick had been arrested five times for staging photographs of dozens of nude bodies lined up on the bridges and streets of Manhattan. Perceiving that he likely would be arrested yet again for his planned photographic shoot of 75 to 100 naked models in an abstract formation on a lower Manhattan street, Tunick filed an action in the Southern District of New York seeking preliminary and permanent injunctive relief. He argued that his artistic expression was protected under the First Amendment and that, while New York law criminalizes public nudity, the proposed photo shoot fell under the statutory exemption for "a play, exhibition, show or entertainment."[17] District Judge Harold Baer, Jr. agreed, granting an injunction both because he found that the proposed shoot constituted constitutionally protected artistic expression and because it fell under the exemptions to the state law prohibiting nudity. The Second Circuit stayed the injunction pending an expedited appeal, and Tunick clothed his models for that shoot.

The only issue on appeal concerned the constitutionality of the state prohibition against public nudity, not the City's licensing requirements. Without citing any precedent for its position, the City claimed that the exemption to the state nudity law applies only to performances or exhibitions that take place indoors before an audience, and that the shoot therefore was not exempted. But, as the Second Circuit noted, no state appellate court has yet had occasion to construe the statute.

Citing the Supreme Court decision in *Arizonans for Official English* v. *Arizona*,[18] which challenged a provision in the Arizona state constitution establishing English as the official state language, the panel majority noted that the "[c]ertification procedure . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."[19] The panel majority held that "[t]he teaching of *Arizonans* . . . is that we should consider certifying in more instances than had previously been thought appropriate, and do so even when the federal courts might think that the meaning of a state law is ‹plain.'"[20]

The panel majority noted, however, that the *Arizonans* principle was tempered by two subsequent right-to-die cases in which the Supreme Court reached the constitutional merits of two state laws that never had been construed by their respective state courts.[21] In light of these decisions, the panel majority addressed the question: "when is certification appropriate in federal constitutional litigation involving state statutes?"[22]

To answer this question, the panel majority looked for guidance first to the *Pullman* abstention doctrine. The *Pullman* doctrine, which encourages federal court abstention on unsettled questions of state law that are antecedent to federal constitutional questions, is appropriate only where a single adjudication by a state court could eliminate the constitutional question. After some discussion of the Pullman doctrine, the panel majority stated that "[t]he difference in approach between *Arizonans* and the right-to-die decisions seem to turn on the concern that animates both certification and Pullman abstention to begin with -- federalism."[23] It then stated that the potential for friction between state and federal courts "is uniquely heightened -- and certification is therefore particularly appropriate -- when the legislation involves distinct federalism concerns, such as the possible incursion of federal courts into matters at the heart of state sovereignty."[24] The panel majority held that the different results in the Supreme Court cases stand for the principle that "[t]o justify deferral, the federalism concern had to affect . . . the very manner in which the state chose to operate as a government."[25]

The decision whether to defer to the state court must be made on a "case-by-case basis." Because "[r]ights delayed... are often rights destroyed," however, timing remains a critical factor both in questions of *Pullman* abstention and certification,[26] as is whether the asserted right can be adequately safeguarded while the state court is parsing the statute.[27] Thus, the panel majority held that

> The composite lesson of all these cases is that there are at least six factors that must be considered in deciding whether certification is justified. They are (1) the absence of authoritative state court interpretations of the state statute,

> (2) the importance of the issue to the state and the likelihood that the question will recur, (3) the presence of serious constitutional difficulties that could be avoided by a possible interpretation of the statute, (4) the capacity of certification to resolve the litigation and either to render federal constitutional decisions unnecessary or to ensure that they are inescapably before the federal court, (5) the federalism implications of a decision by the federal courts and in particular whether a decision by the federal judiciary potentially interferes with core matters of state sovereignty, and (6) the effect of the delay entailed by certification on the asserted rights at issue.[28]

Based upon the foregoing factors, the panel majority found that certification was indeed appropriate in this case. Only three factors merited extended discussion. The panel majority concluded, with regard to the third enumerated factor, that the constitutional issue raised would be a "grave one."[29] It stated that Tunick likely was entitled to some First Amendment protection and questioned the City's interpretation of laws, especially the "rationality of a law that singled out for prohibition one form of nude expression that is concededly covered by the First Amendment, while permitting, with mighty little explanation, many other equally nude demonstrations."[30] It further noted that "[o]ne need not contemplate why, on the city's reasoning, a totally naked production of Hamlet could be staged in the middle of Grand Central Station during rush hour, while Tunick's photo shoot had to be banned regardless of the time, place or manner in which it occurred."[31]

The panel majority also discussed at some length the last two factors -- whether this case implicates a direct federalism concern and whether the delay of certification would unduly harm the right asserted. The panel majority seized this opportunity to note that "[w]e would be ostriches if we failed to take judicial notice of the heavy stream of First Amendment litigation generated by New York City in recent years," citing eighteen cases in which federal judges had blocked the City or found its actions unconstitutional.[32] The panel majority noted that the federal courts had an important responsibility to uphold First Amendment and other constitutional rights by balancing those rights against the state's interest in enforcing its laws and values. The panel majority observed, however, that there is some danger that the federal courts will become "an agency that performs crucial local government functions."[33] With regard to the last factor -- the effect of certification and its attendant delay -- the panel majority held that, while this issue is a "fundamental" one that often will outweigh the other factors and weigh against certification, in the circumstances of this case, "imposing on plaintiff the delay entailed by certification is the least harmful alternative."[34] This is so because Tunick had acknowledged that he retains an ongoing interest in staging the nude shoot, regardless of when it may actually occur.

Judge Sack wrote separately with respect to this last factor. He took the view -- which Judge Calabresi deemed "eminently plausible" and in many instances correct -- that, even under the circumstances of this case, First Amendment rights cannot adequately be protected pending certification. Accordingly, Judge Sacks stated that this last factor outweighs the other five factors and tips the balance against deferral. He concurred in the

result, however, because, in this case, certification will result in a speedier resolution of Tunick's right to express himself than would any other practically available alternative.

Judge Van Graafeiland's dissent, issued weeks after Judge Calabresi's and Judge Sacks' opinions, is remarkable for its vitriol. Among Judge Van Graafeiland's observations.

> Before addressing the merits of my colleagues' separate opinions, I deem it necessary to review the chronology of events which my colleagues believed created such a need for haste as to justify the filing of their opinions without giving me an opportunity to read and respond to them.
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> The New York Constitution played no role whatever in this case prior to Judge Calabresi's rather obvious effort to justify certification.
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> * * *
>
> Ever since Judge Calabresi moved to this Court from Yale Law School, he has verbosely crusaded for more extensive use of the certification process. In so doing, he has either overlooked or disregarded the burdens on the State courts and the consequent delays that often result. . . . The pursuit of justice is not an academic exercise.
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> * * *
>
> Judge Calabresi warmed up for his present discourse on certification by writing a 17-page dissent in McCarthy.
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> * * *
>
> I do not understand why my colleagues were in such a rush to request certification that they did so before I had a reasonable opportunity to state my opposition.[35]
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> * * *

The *MacDonald* and *Tunick* decisions are noteworthy not just because of their contributions to First Amendment jurisprudence, but because of the Court's willingness to take on, and condemn as unconstitutional, certain practices of the Giuliani Administration. In both opinions, the Court noted -- with clear distaste -- the extent to which the federal courts have been forced to assume the role of local licensors for New York City. As Judge

Calabresi put it in *Tunick*: given the "current and rather remarkable state of affairs in New York City, there is an all too clear danger that the [federal] courts, instead of merely interpreting and defending federal rights, may cross the line and become, in effect, an agency that performs crucial local government functions."[36]

Perhaps it was the highly politicized nature of the issues that provoked Judge Van Graafeiland to launch his most unusual attack on Judge Calabresi. But whatever the cause, it will be interesting to monitor how these issues ultimately play out in a court that long has prided itself on its collegiality.

ENDNOTES

1. 2000 WL 263697 (March 10, 2000).

2. § 10-110(a)(1).

3. § 10-110(a)(4).

4. *Id.* at *3 (quoting *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988)).

5. *Id.* at *6.

6. *Id.*

7. *Id.* at n.4.

8. *Id.* at *7.

9. *Id.* (quoting *Turley* v. *Police Dep't of New York*, 167 F.3d 757, 762 (2d Cir.1999)).

10. *Id.*

11. *Id.*

12. *Id.*

13. 380 U.S. 51 (1965).

14. 2000 WL 263697, at *8 (quoting *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 227 (1990)).

15. *Id.* at *9 (quoting *FW/PBS, Inc.*, 493 U.S. at 229).

16. *Tunick* v. *Safir*, 2000 WL 342706, at *20 (2d Cir. March 24, 2000).

17. N.Y. Pen. L. § § 244.01, 245.02.

18. 520 U.S. 43 (1997).

19. 2000 WL 342706, at *6 (citing *Arizonans*, 520 U.S. at 75-76).

20. *Id.*

21. *See Washington* v. *Glucksberg*, 521 U.S. 702 (1997) and *Vacco* v. *Quill*, 521 U.S. 793 (1997).

22. 2000 WL 342706, at *7.

23. *Id.* at *10.

24. *Id.*

25. *Id.* at *11.

26. *Id.* at *12.

27. *Id.* at *13.

28. *Id.* at *16.

29. *Id.*

30. *Id.* at *18.

31. *Id.*

32. *Id.* at *20.

33. *Id.* at *21.

34. *Id.* at *22.

35. *Tunick* v. *Safir*, No. 99-7823 (2d Cir. April 17, 2000) (Van Graafeiland, J. dissenting).

36. 2000 WL 342706, at *21.

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