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Speech: Seventh Circuit Enjoins Commission's Permit Policy for War Memorial as Likely not Narrowly Tailored or Content Neutral

Eric Smith v. Executive Director of the Indiana War Memorials Commission, No. 13-1939 (7th Cir. Feb. 4, 2014).

In another case dealing with the often-intertwined issues of free assembly and free speech, the Seventh Circuit has struck down a policy requiring that protestors at a public monument in Indianapolis obtain a permit, finding that the standards for permit issuance were overly restrictive and not sufficiently tailored to advance a governmental interest.

Downtown Indianapolis includes the Soldiers and Sailors Monument, a place relatively common for groups and protestors to gather. It is a quintessential traditional public forum. In the summer of 2012 Eric Smith worried that the United States government would sign the Arms Trade Treaty, a treaty that requires its signatories to monitor international sales of conventional weapons, thus ensuring arms embargoes are enforced and weapons do not fall into the hands of terrorists. Mr. Smith believed the treaty violated the Constitution by infringing on the right to bear arms and sought to organize a protest at the Indianapolis monument.

He put up fliers urging others to be fearful of the "atrocious act" of signing the treaty, which he equated with "taking away the 2nd Amendment," and told readers to "stop being lambs." He asked readers to come to the protest at the monument in July of 2012. The advertisement did not attract a single protestor to the monument on the assigned day. Instead it was only Eric Smith and his son. Undeterred, they brought out their homemade signs, and sought to begin the protest. (As a side note, the U.S. ultimately signed the treaty, but has yet to ratify it.)

Soon after Smith's arrival an Indiana War Memorials Commission (Commission) employee asked if Smith had a permit for his protest and, finding he didn't, told Smith to leave. Smith answered that it was his First Amendment right to protest at the monument, but when state police officers threatened to arrest him, Smith relented.
Smith then sued. He claimed the Commission's permit policy violated the Free Speech Clause of the First Amendment. He moved for a preliminary injunction, arguing the policy was not narrowly tailored, that it allowed too much discretion for decision makers, and that the permit requirement was overbroad. The Commission defended on the ground that the permit policy was necessary to maintain order at the monument. At trial a Commission employee explained that only those that wanted to use the property for a "specific purpose" had to get a permit, and others did not. The district court ruled against Smith, leaving the policy in place. Smith appealed.

HELD: The Seventh Circuit reversed and preliminarily enjoined the policy, finding that it likely violated the Constitution.

DISCUSSION: The Commission's policy on protests at the Soldiers and Sailors Monument has been updated since Smith was forced to leave the grounds. Thus, the Commission's primary argument on appeal was that Smith's argument was moot – for the policy no longer existed. The Seventh Circuit did not agree, instead noting that when a policy at the heart of a lawsuit is amended mid-suit, the case is not moot if a "substantially similar" policy is put in place.

In order to win a preliminary injunction, Smith had to prove "that he [was] likely to succeed on the merits, that he [was] likely to suffer irreparable harm in the absence of preliminary relief, that the 'balance of equities' tip[ed] in his favor (i.e. denying the injunction poses a greater risk to Smith than granting an injunction poses to the Commission), and that issuing an injunction is in the public interest." The Seventh Circuit noted this essentially breaks down to the requirement to establish a reasonable likelihood of success, and started with the fact that the permit policy was not narrowly tailored. For one, the policy – both old and new – required even small groups to obtain a permit to gather, including groups of less than fifteen. The Seventh Circuit said given the size and "layout" of the monument space at issue and the fact that a Commission employee testified that a group of twenty-five could gather without a permit to have lunch, Smith "seem[ed] likely to succeed" in showing requiring a permit for a group of fourteen is not narrowly tailored.

The Seventh Circuit also took issue with a provision requiring a permit for gatherings advertised or to which the public had been openly invited, even if the group is ultimately comprised of less than fifteen people. The Circuit Court held it was too restricting to disallow a fifteen-person protest just because the public was invited and no permit was obtained. Moreover, another provision, which prohibited being on the monument for more than five hours if no permit was obtained, was also too restrictive in the Circuit Court's view.

The court further deemed Smith likely to succeed on the issue of the content neutrality of the permit process. A permitting process may not vest "unbridled discretion" in a decision maker because it may lead to discrimination--but that is precisely what the Commission's policy did. When faced with a protest that did not have a permit the evidence showed that the Commission would sometimes simply offer the protestor the opportunity to fill out a permit on the spot and let the person continue their action. The Commission defended by pointing out that it had never denied a permit. That argument was not persuasive because the Circuit Court found: 1) it merely showed that a permit could be denied at any time without guidelines; and 2) it tended to demonstrate that the whole permit process was an unnecessary restraint on speech. The Circuit Court also pointed to the fact that there were no actual guidelines for staff as to when insurance should be required, whether a permit fee was imposed, or how much the fee would be. This was evident from the testimony of the Commission employee responsible for granting permits when she testified that the insurance requirement would apply to even

very small groups if the members did not already know each other, since “people who know each other are not likely to sue each other or the Commission.”

The Seventh Circuit reversed the decision below and remanded the case so that the district court could determine whether the injunction should apply to only this monument or to all the properties the Commission managed.

http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2014/D02-04/C:13-1939:J:Hamilton:aut:T:fnOp:N:1284497:S:0 (last accessed Feb. 19, 2014).