

Wednesday, August 22, 2007

Mayor Fenty: Protect the First Amendment.

Bill of Rights. (From the public domain.) Washington, D.C., Mayor Adrian Fenty and his hand-picked police chief, Cathy Lanier, have been in office for many months. Having previously served on the D.C. City Council for several years, Mayor Fenty doubtlessly knows that demonstrators of all stripes come to the nation's capital throughout the year, and that the First Amendment protects their demonstration rights. Going hand-in-hand with the right to demonstrate goes the right to put up posters announcing demonstrations. Consequently, supporters of the September 15, 2007, anti-war demonstration have been putting up ANSWER Coalition posters with water-soluble adhesive, seeing that the applicable regulations call for posters on lampposts to be affixed so that they will stay up. The District of Columbia Department of Public Works has hit ANSWER with around \$10,000 in fines for their posters, apparently for putting them up with paste rather than with tape. On ANSWER's behalf, the Partnership for Civil Justice has filed this Complaint on August 20 in the United States District Court for the District of Columbia, alleging, among other things, that the fines violate the First Amendment; the postering regulations are being selectively enforced on a content-based discriminatory manner; and the postering regulations permit political candidates to leave their posters up until the election and anti-crime messages to stay up indefinitely, but unconstitutionally require all other posters to be removed within sixty days. The Complaint also points out that the pasting of the posters fulfills the regulatory requirement to affix the posters to lampposts in a way that they do not come off easily. ANSWER further asserts that the postering regulation places strict liability on the organization listed on the poster, regardless of the organization's involvement with affixing the poster. ANSWER drew Henry Kennedy as its judge, which I anticipate will be an excellent draw if the case does not get dismissed on federal abstention grounds under the Supreme Court's Younger doctrine. *Younger v. Harris*, 401 U.S. (1971). The Younger doctrine holds that "a federal court should not enjoin a pending state proceeding (including an administrative proceeding) that is judicial in nature and involves important state interests." *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1120 (D.C. Cir. 2004) (argued by me against the D.C. government, in part to challenge whether Younger applies to the District of Columbia, since D.C is not one of the fifty states in the union). Considering the language of the foregoing *JMM Corp.* case, I anticipate good chances that the presiding judge will construe the pending postering infraction notices against ANSWER as administrative proceedings covered by the Younger doctrine, in that the only way to challenge the infraction notices is to proceed to an administrative hearing before a District of Columbia administrative law judge. In any event, the District of Columbia's governing postering regulations, which are at CDCR 24-108, do not reference any statutory authority for issuing such regulations. If such statutory authority is absent, this is a fertile line of attack against the regulations. ANSWER's website asserts that the infractions were spurred by questioning about the postering on Fox News. Selective enforcement based on content is but one of ANSWER's strongest arguments, but it seems like a tough nut to crack to prove that DC's fines against the posters were prompted by Fox New broadcasts. Other strong lines of attack in this litigation appear to include attacking the regulations as unconstitutional and as having been passed without sufficient statutory authority, arguing that ANSWER is not automatically responsible for the postering activities of people acting on their own, and arguing that the regulations do not apply to some or all of the postering activities (e.g., the regulations apply to lampposts and their appurtenances, but not to other publicly-owned structures, including telephone poles and phone boxes). Simultaneously, ANSWER will be faced with showing the extent to which pasting -- versus taping -- is used by other postering parties that do not receive postering fines from the District of Columbia government. Jon Katz. **ADDENDUM:** Thanks to a fellow civil liberties lawyer who e-mailed me about whether any statutory authority exists for this postering regulation. He surmises that this is an old regulation, and that it was issued by the District of Columbia Commissioners pursuant to broad Congressional authority. He says this scenario would constitute statutory authority for the postering regulation.

Posted by Jon Katz in Constitutional Law at 00:02

Hi Jon...I'm glad you blogged about this ridiculous abuse of the 1st amendment by the d.c. mucky- mucks. A.n.s.w.e.r. certainly was in the right when they postered about the upcoming march. But yes, I think that the fine will be dropped upon the jurisdiction issue, and not upon the pasting method argument. It seems to me, after reading the regulations, that a.n.s.w.e.r. used the proper adhesive, and complied with the weather- proof method. The water- based paste is certainly not damaging to the structure provided it is removed with the right solvent. Even clear tape(which is frequently used) can leave residue, but D.C. has allowed clear tape for years. It sounds to me that once again the city mucks are grasping at straws and a.n.s.w.e.r. will happily prevail. I look forward to the march, and I might even tape up a few signs too!!

Anonymous on Aug 25 2007, 16:57

Thanks, John, for your comment.

If Mayor Fenty does not want to come across as just another hack mayor, he'll be wise to personally push for strong demonstrator rights in the District of Columbia.

Anonymous on Aug 26 2007, 21:55