AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Personal Freedom and Public Morality

**Smith v. Avino, 91 F.3d 105 (11th Cir. 1996)**

*When Hurricane Andrew struck south Florida in August 1992, the governor declared a state of emergency and issued an order imposing a curfew for Dade county running from 7:00 pm to 7:00 am. In the following weeks, the hours and the geographic scope of the curfew order were gradually reduced until it was finally lifted entirely in November. The curfew order required that all persons residing in the affected area “remain in their homes during the hours of the curfew.”*

*The state chapter of the American Civil Liberties Union filed suit in federal district court seeking to have the curfew order struck down as unconstitutionally interfering with the right to travel. The district court found in favor of the government, and the ACLU appealed to the federal circuit court. The circuit court affirmed the trial court and upheld the curfew as constitutionally justified.*

Judge RONEY.

. . . .

The basic law concerning the vagueness and overbreadth of legislative authority has been established by the Supreme Court. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. *NAACP v. Button* (1963). To pass constitutional muster, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . [and] provide explicit standards for those who apply [it]" to avoid arbitrary and discriminatory enforcement. *Grayned v. City of Rockford* (1972). Even a clear, precise ordinance may be “overbroad” if it prohibits constitutionally protected conduct.

Once a law is determined to be constitutional as written, it may still be challenged if it was applied in an unconstitutional manner.

The key to judicial consideration to the challenge in this instance lies in the circumstances under which the curfew was instituted. The plaintiffs do not argue, nor can there be any doubt, that the devastation and chaos created by Hurricane Andrew required the authorities to act, and act quickly, to protect the interests of the victims. . . .

Cases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction.

In such circumstances, governing authorities must be granted the proper deference and wide latitude necessary for dealing with the emergency. From prior decisions involving natural disasters, both of the judges in the district court gleaned the proper approach in such matters: when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality "is limited to a determination whether the [executive's] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions … imposed were necessary to maintain order." *United States v. Chalk* (4th Cir. 1971). . . .

Plaintiffs concede a curfew was necessary when imposed. There has been no suggestion that the defendants acted in bad faith. The curfew was in direct response to the official emergency declared by the Governor of the State and the factual emergency conceded to exist. Flexibility in any such curfew is a key ingredient to provide the enforcing authorities with the practical ability to carry out the purposes for which it is instituted.

Plaintiffs complain that the curfew is unconstitutionally vague both on its face and as applied because it failed to advise residents of the parameters of their right to travel. Though the curfew allowed "authorized" travel, there was no criteria set forth in the curfew order itself for obtaining authorization; no stated exceptions for necessary travel to or from work, school, religious activities, or in connection with medical or personal emergencies for the residents; nor were there exceptions for emergency personnel, such as ambulance drivers or firefighters to enter the area during the curfew.

Contrary to plaintiffs' argument that this information was unavailable to residents, the district court made factual findings, unchallenged on this appeal, that the police were given guidelines in the exercise of discretion to permit travel for medical reasons, work, or school, and that the police trained the military in the application thereof. There was also testimony that during regular door-to-door visits by police officers, the community was advised of the possibilities for obtaining authorization for travel during curfew hours.

Basically, plaintiffs argue that the curfew is constitutionally flawed because it did not contain "built-in exceptions" for necessary activity. *State of Connecticut v. Boles* (CT 1967). That court, in considering a curfew that was imposed to quell a riot, acknowledged that "under usual and normal circumstances and as a general proposition, this may be true. But the circumstances existing at the time were not usual, nor were they normal." While we would agree with plaintiffs that in a normal situation, the proclamation should be as informative as possible, under the emergency circumstances present in this case, the proclamation was not constitutionally flawed because it did not include exceptions. In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended. *Aptheker v. Secretary of State* (1964); *Korematsu v. United States* (1944).

. . . .

The district court properly held that it could not say that the curfew was so broad or vague that it unconstitutionally denied personal liberty without due process of law. The nature of the emergency and the exigency of the time warranted the imposition and length of the curfew.

. . . .

*Affirmed*.