Ex parte Tucci: Free Speech Requires Least Restrictive Means

by Nathaniel P. Holzer

FREE SPEECH HAS GREATER protection under the Texas Constitution[1] than under the U.S. Constitution,[2] as a result of the Texas Supreme Court ruling this summer in *Ex parte Tucci*.[3] In *Ex parte Tucci*, the court laid down an unequivocal "least restrictive means" standard that Texas courts must use when testing state actions that infringe on free speech rights. To comply with this holding, district courts must now conduct a fact-specific inquiry in each instance before granting an injunction affecting free speech. Only then will injunctions restricting speech be constitutional in Texas.

Despite the fact that the *Tucci* briefs were based primarily on federal constitutional law, the court did not rely on federal precedent for it's holding. This approach is appropriate under the holding in *Davenport v. Garcia*,[4] decided last year. In fact, the majority mentioned federal jurisprudence primarily to criticize it, calling it "unduly restrictive" and referring to recent U.S. Supreme Court decisions that cut back on federal protection of citizens' rights as "unfortunate."[5]

PROCEDURAL HISTORY

Ex parte Tucci came before the court on a writ of habeas corpus. During the 1992 Republican National Convention, Randall Terry, Keith Tucci, and several other right-to-life protesters disregarded part of a temporary restraining order, requiring them to stay at least 100 feet away from the entrance to a Houston abortion clinic.[6] Their subsequent arrest for violating the order resulted in a $500 fine and six months in jail for each of them; with the jail time waived if each person arrested paid the fine and announced in open court their intention to abide by the injunction.

The restraining order was justified initially by a claim of imminent and irreparable harm to the women desiring access to the clinic. Such access is an exercise of their constitutional right of privacy, a federal right recognized under *Roe v. Wade*,[7] and a right deemed "imperative" under the Texas Constitution.[8] The clinic, and nearby businesses acting as intervenors, offered uncontroverted evidence that Terry and his followers posed a threat of injury. In addition, they claimed actual injury from trespass and intimidation. However, the parts of the injunction prohibiting trespass, blocking entrances, physical intimidation and harassment of patients and employees of the clinic were not in issue. Those provisions were not challenged, because, as the court noted, free speech rights under the Texas Constitution do not include a license to block the public way or the entrance to a place of business. Only the 100 foot limitation was challenged as unconstitutional. The protesters initially appealed to the Court of Appeals in Houston, but that court, in an unpublished per curium opinion, refused to grant relief.[9]

ANALYSIS AND DECISION

On direct appeal, the Texas Supreme Court considered the validity of the 100 foot limitation as a restriction on free speech under Article I, Section 8 of the Texas Constitution, stating that " . . . we must look first to our Texas Constitution [because it] . . . provides greater rights of free expression than its federal equivalent."[10] While the court referred to federal jurisprudence on First Amendment free speech claims as "better reasoned" than state doctrine, it went on to criticize the U.S. Supreme Court for abdicating its previous standard of review for free speech cases.[11] The court termed the change in the federal standard of review a dilution of the right to free expression that was sure to lead to a trampling on citizens' rights, and unambiguously affirmed the "least restrictive alternative" analysis as the standard to be applied under the Texas Constitution.[12]

In its opinion, the *Tucci* court first noted that Texas courts have often granted habeas relief

to parties confined for disregarding court orders being challenged as unconstitutional. It then recognized that Texas' collateral bar rule is less restrictive than that enforced in federal courts, citing *Walker v. City of Birmingham*[13] as an example of the inequity of the federal rule. The court further observed that the unduly restrictive nature of the federal collateral bar rule was recognized by four states besides Texas — California, Arkansas, Washington and Arizona. In Texas, said the court, " . . . an order unconstitutional on any grounds is not enforceable by contempt."[14]

Next the court cited early Texas Bill of Rights jurisprudence to advance the proposition that Texans have long enjoyed free speech rights protected from legislative and judicial encroachment. For example, in 1893 the Texas Court of Criminal Appeals overturned an ordinance forbidding sale of an out-of-state newspaper,[15] and in 1935 it overturned another ordinance making disloyal statements a felony.[16] In 1920, the same court quashed a judicial order precluding publication of testimony from a murder trial.[17] In the first civil case invoking the right to free speech, the Dallas Court of Civil Appeals prevented issuance of an injunction designed to stop a newspaper from publishing a libel.[18] The first Texas Supreme Court case invoking the free speech language of the Texas Bill of Rights came in 1920, when the court granted habeas relief to a person held in contempt for violating an order forbidding communication with telephone operators during a union dispute.[19]

Citing modern precedent, the *Tucci* court then restated its conclusions in *Davenport v. Garcia*: first, that judicial orders could only be aimed at the effect of expression, not the expression itself; and second, that restraints imposed must represent the least restrictive means. The court then held that the *Davenport* standard of strict scrutiny applied in this case:

> Freedom of expression may not be restricted solely on grounds that its exercise will have the effect of producing imminent and irreparable harm. Restraints may be imposed only if the injunctive relief granted encompasses the least restrictive means of protecting against the alleged harmful effect. In resolving both whether the alleged effect was imminent and irreparable and whether the temporary injunctive relief granted here was the least restrictive means to prevent that harm, we look to the injury asserted, the relief requested, and the underlying evidence.[20]

The one hundred foot limitation was found to exclude the protesters from an entire city block, and investigation of the trial court record revealed no evidence of any inquiry into whether the legitimate rights of the clinic and its patients could be protected in a less restrictive manner. Arguments for uniform restrictions as an administrative convenience were dismissed out of hand: they can have "no weight as against those safeguards of the Constitution which were intended by our fathers for the preservation of the rights and liberties of the citizen."[21] Recognizing that the district court's decision to grant relief was warranted by the possible interference with the rights of the patients of the clinic, and noting the increasing likelihood of violence at abortion clinic protests, the court nevertheless held the 100 foot limitation to be unconstitutional due to the absence of a specific inquiry by the trial court into whether any less restrictive ban would have accomplished the same purpose.

CONCURRENCE AND DISSENT

The majority opinion of *Tucci* is dwarfed by a dissent, two concurring opinions, an appendix responding to one of the concurrences, and another appendix containing the free speech clauses from all 50 state constitutions. Justice Gonzalez concurred in the result but criticized the majority for ignoring the fact that the injunction had only an indirect effect on the protester's free speech rights. He observed that the right-to-life protesters were not prevented from expressing their views, rather the restriction merely kept them from express-

ing those views in a particular location. Reasonable time, place, and manner restrictions, argued the justice, should be the touchstone in determining whether indirect speech restrictions are constitutional. The reasonable time, place, and manner test is acceptable for deciding Texas cases under the holding in *Davenport*, because it is taken from "well reasoned and persuasive federal procedural and substantive precedent."[22] Justice Gonzalez said that this would be a more workable test than the least restrictive alternative analysis required by the majority. Since indirect restrictions on speech do not have the egregious effect of regulating the content of speech, a balancing of interests — in this case privacy versus speech — should be acceptable. Justice Gonzalez then reached the same result as the majority by making a slight change in the federal test he proposed. In recognition of "Texas's strong and long standing commitment to free speech,"[23] Justice Gonzalez would have required a narrowly tailored restriction that serves a compelling state interest.[24]

Justice Hecht dissented, joined by Justice Enoch, on grounds that the collateral bar rule should prevent those challenging the constitutionality of a court order from ignoring the order until it is legally set aside. As described in his dissent, the actions of the protesters were outrageous: they flaunted their challenge to the court in front of the television cameras, shredding the order and openly declaring their intention to violate it. To Justice Hecht, the protesters wishes seemed obvious; they wanted a jail term for contempt of court. He would have granted their wish. Thus, the weight of his argument rests on the fact that the protesters did not try to challenge the injunction through the judicial process, even though there was time and opportunity to do so. As a result, he would allow collateral challenge through habeas writs only when there is no opportunity for effective review, or when the injunction is "transparently invalid," or when a rule is changed from prior practice without notice.[25]

Chief Justice Phillips, on the other hand, continued his solo assault against the court's newfound reliance on the Texas Constitution. His lengthy concurrence attacked the textual and historical underpinnings of doctrines looking to the Texas Bill of Rights for more protection than the federal Bill of Rights. He argued that although some states have recognized additional rights beyond those guaranteed by the federal constitution, more states have not. Aside from his historical analysis, which is stingingly criticized in the plurality's appendix response, the Chief Justice primarily complained about the pitfalls of unrestrained judicial activism.

CONCLUSION

Ex parte Tucci attempts to create a test that can be applied uniformly without interference of a judge's personal bias. It is also a broad holding that may come to haunt the court in the future. As the opinion noted:

> Today our court continues to favor the growth and enhancement of freedom, not its restraint. The fact that vigorous debate of public issues in our society may produce speech considered obnoxious or offensive by some is a necessary cost of that freedom. Our Constitution calls on this court to maintain a commitment to expression that is strong and uncompromising for friend and foe alike.[26]

Stirring words, indeed. ❖

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ENDNOTES

[1]"Every person shall be at liberty to speak . . . and no law shall ever be passed curtailing the liberty of speech . . . ." Tex. Const. Art. 1, Sec. 8.

[2]"Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. 1.

[3]*Ex parte Tucci*, 859 S.W.2d 1 (Tex. 1993).

[4]*Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992). *Davenport* held that Texas courts must look first to the Texas Constitution when considering constitutional challenges, and

then to the U.S. Constitution. Many times in the past, Texas courts considered federal jurisprudence first, and ruled accordingly, failing entirely to consider Texas law.

[5]*Ex parte Tucci*, 859 S.W.2d at 7.

[6]*Id.* at 4. The part of the restraining order challenged forbade "demonstrating within one-hundred (100) feet from either side of or in front of any doorway entrance or exit, parking lot, parking lot entrance or exit, driveway, or driveway entrance or exit at [any of the] clinic[s] or parking lots."

[7]*Roe v. Wade*, 410 U.S. 113 (1973).

[8]*Ex parte Tucci*, 859 S.W.2d at 3; *see Diamond Shamrock Ref. & Mktg. Co. v. Mendez*, 844 S.W.2d 198, 203 (Tex. 1992) (Hightower, J., concurring).

[9]*Ex parte Tucci*, 1992 WL 211497 (Tex. App.-Houston [1st Dist.] 1992).

[10]*Ex parte Tucci*, 859 S.W.2d at 5, *citing Davenport v. Garcia*, 834 S.W.2d at 12.

[11]*Id.* at 7. The old federal standard required government action to be narrowly tailored to serve a compelling state interest. Current federal jurisprudence asks only if other means would be less effective.

[12]*Id.*

[13]*Walker v. City of Birmingham*, 388 U.S. 307 (1967). In *Walker*, the collateral bar rule was invoked to hold Dr. Martin Luther King in jail for conducting protests in violation of a court order.

[14]*Ex parte Tucci*, 859 S.W.2d at 2, n. 2.

[15]*Ex parte Neil*, 22 S.W. 923 (Tex. Crim. App. 1893).

[16]*Ex parte McCormick*, 88 S.W.2d 104 (Tex. Crim. App. 1935).

[17]*Ex parte Foster*, 71 S.W. 593 (Tex. Crim. App. 1903).

[18]*Mitchell v. Grand Lodge Free & Accepted Masons*, 121 S.W. 178 (Tex. Civ. App. 1909).

[19]*Ex parte Tucker*, 220 S.W. 75 (Tex. 1920). The person arrested was shouting epithets at operators who crossed picket lines set up by striking workers.

[20]*Davenport*, 859 S.W.2d at 6.

[21]*Id. citing McCormick*, 88 S.W.2d at 107.

[22]*Ex parte Tucci*, 859 S.W.2d at 59 (Gonzales, J., concurring).

[23]*Id.* at 62 *citing Davenport*, 834 S.W.2d at 10.

[24]The federal test for indirect regulation of speech looks only for a significant state interest, not a compelling one.

[25]*Ex parte Tucci*, 859 S.W. 2d at 63 (Hecht, J., dissenting).

[26]*Id.* at 8.