

2004 WL 1012693

Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

ACORN, Usaction, United for Peace and Justice,
and the National Organization for Women
v.

THE CITY OF PHILADELPHIA, the Police
Department of the City of Philadelphia, and the
United States Secret Service of the Department of
Homeland Security

No. Civ.A.03-4312. | May 6, 2004.

Attorneys and Law Firms

Arthur B. Spitzer, ACLU of the National Capital Area,
Washington, DC, Christopher A. Hansen, American Civil
Liberties Union, New York, NY, Stefan Presser,
American Civil Liberties Union of Pennsylvania,
Philadelphia, PA, Witold J. Walczak, ACLU of
Pennsylvania, Pittsburgh, PA, for Plaintiffs.

Christopher I. McCabe, City Solicitor's Office, Joan K.
Garner, U.S. Attorney's Office, Philadelphia, PA, Thomas
W. Millet, U.S. Department of Justice, Washington, DC,
for Defendants.

Opinion

MEMORANDUM AND ORDER

FULLAM, J.

*1 In 1988, organizations and persons who had been precluded from distributing leaflets at public gatherings on property of the Park Service, allegedly because of the views being expressed in the leaflets, obtained, by consent, a permanent injunction in this court (C.A. No. 87-3975), barring the City of Philadelphia, the Philadelphia Police Commissioner, the Regional Director of the United States Park Service, the Superintendent of Independence National Historical Park, and various other officials and persons acting in concert with them "from denying to plaintiffs or any other person permission to lawfully distribute leaflets and other printed matter, or to wear, display or carry signs, placards, or insignia, by reason of the message contained therein and sought to be conveyed" (Injunctive Order dated November 25, 1988).

On July 24, 2003, the plaintiff Acorn ("a nationwide organization The Association of Community

Organizations for Reform Now, ... the nation's largest community organization of low and moderate income families" which seeks a wide variety of social improvements, and which conducts demonstrations in support of its objectives) filed a verified complaint in this action, asserting, among other things, that the defendant City of Philadelphia and its Police Department, in conjunction with the United States Secret Service, was violating the 1988 injunction by preventing plaintiff and its members from demonstrating near the scene of an appearance by the President of the United States, in opposition to the Administration's tax policies, while permitting demonstrations supporting the current Administration. The complaint was filed at the very start of the public event at which the President was appearing, and plaintiff sought immediate judicial relief. The United States Attorney's Office accepted service of the complaint on the day it was filed, and after a brief emergency conference, and without opposition from defense counsel, I entered an order requiring the defendants "to permit plaintiffs to demonstrate peacefully" at (a designated location), "no farther away from the Treasury Financial Facility Building than other demonstrators."

On September 23, 2003, plaintiffs filed an amended complaint, adding as plaintiffs three other organizations (USAction, United for Peace and Justice, and the National Organization for Women), seeking wide-ranging relief. In essence, plaintiffs seek (1) a declaratory judgment to the effect that the Secret Service and police departments working in conjunction with the Secret Service must provide equal treatment to would-be demonstrators at public functions, regardless of whether the protesters support or oppose government policies; (2) preliminary and permanent injunctive relief to the same effect; and (3) an order requiring all of the defendants to comply with the 1988 injunction (consent decree).

The amended complaint names as defendants the City of Philadelphia, the Philadelphia Police Department, and the United States Secret Service of the Department of Homeland Security. By stipulation, the Police Department (a non-suable entity) has been deleted as a defendant. The remaining defendants, the City of Philadelphia and the United States Secret Service, have filed motions to dismiss the complaint for lack of subject matter jurisdiction, on the theory that plaintiffs are not facing an imminent injury in fact, hence have no standing. Since constitutional standing principles are involved, defendants' motions are properly considered under Fed.R.Civ.P. 12(b)(1), rather than 12(b)(6). *Maio v. Aetna, Inc.*, 221 F.3d 472, 482 (3d Cir.2000).

*2 Plaintiffs contend that the United States Secret Service, as a matter of standard practice, treats anti-government protesters less favorably than

pro-government protesters, and treats protesters of any kind less favorably than non-protesting members of the public, in carrying out (in conjunction with local police) its important function of safeguarding public officials and preserving order. Plaintiffs have provided numerous examples (at least 15 instances, in various parts of the country), in which plaintiffs and other organizations of similar bent have allegedly been so discriminated against by the Secret Service. Plaintiffs contend that these facts support the inference that, absent judicial intervention, similar violations of First Amendment rights will be perpetrated against plaintiffs and their members in the near future, especially in view of the prospect of national political conventions and the political functions associated with the forthcoming presidential election.

Plaintiffs concede that they are unable to specify a date and time of official events where such violations are likely to occur, but note that they usually cannot learn of the scheduling of such events in sufficient time to enable them to obtain judicial relief.

It is undisputed that the Secret Service has the ultimate responsibility for safeguarding federal public officials, and preserving order at public events; the local police, in such situations, act under the direction and control of the Secret Service. It is also undisputed that the Secret Service has elaborate written regulations which specifically provide for non-discrimination on the basis of the views sought to be expressed by protesters. In short, everyone agrees that demonstrators opposed to the administration have the legal right to be treated no worse than pro-government demonstrators. It follows that no useful purpose would be served by entering a declaratory judgment to that effect. It also follows that all Secret Service agents are chargeable with knowledge of what the law provides in that regard. Agents who violate the policy cannot successfully assert a defense of qualified immunity.

The gist of plaintiffs' amended complaint is that, in practice, the Secret Service regulations are often ignored by agents on the scene. In essence, plaintiffs seek an injunction directing the Secret Service to see to it that its own regulations are enforced.

Whether plaintiffs have standing, in the constitutional sense, to obtain injunctive relief depends upon whether they can show that they are threatened with real and imminent injury—i.e., that there is a concrete likelihood that their constitutional rights will be violated unless injunctive relief is granted. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

Plaintiff ACORN can be said to have established that, on July 24, 2003, in connection with an appearance by President Bush, the defendants may indeed have violated

plaintiffs' First Amendment rights, and that this court's temporary restraining order was warranted. (The record does not disclose whether that order had any practical impact, or whether the President's visit had ended before the restraining order reached the agents in the field.) But the other plaintiffs were not involved in that incident, and ACORN's complaints about the July 23rd incident are, obviously, now moot.

*3 Thus, the issue is whether the facts alleged by plaintiffs in their amended complaint suffice to permit this court to find that there is a clear likelihood that, at some identifiable future time and place, the defendants will violate plaintiffs constitutional rights if the requested injunction is denied. In my view, plaintiffs' claims are too amorphous to be justiciable at this point in time.

I believe the most that can be said is that there is a likelihood that, at various public appearances by high government officials which are likely to occur at some place and time in the future, disputes will arise as to whether plaintiffs and the persons they represent are being improperly limited in their protest activities, and that, if such disputes cannot be resolved amicably, judicial intervention by some court may be appropriate. Stated otherwise, there may be future disputes as to whether, in a given situation, the Secret Service is abiding by its own regulations. But the proper resolution of any such disputes must take place in the jurisdiction where such disputes arise, and where the specific factual context can readily be developed. The potential violations alleged by plaintiffs are simply not yet ripe.

To summarize, I do not believe this court has subjectmatter jurisdiction to grant the relief requested in this case. In any event, I conclude that any injunctive relief which might be granted at this point would serve no useful purpose. This action will therefore be dismissed.

An order follows.

ORDER

AND NOW, this day of May 2004, IT IS ORDERED:

1. The defendants' motions to dismiss the amended complaint for lack of subject-matter jurisdiction are GRANTED. This action is DISMISSED.
2. Plaintiffs' motion for expedited discovery is DENIED as moot.

