UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIMBI WATERS, et. al., Plaintiffs v. Marion Barry, Jr., et. al. Defendants	Civil Action No. 89-0707

MEMORANDUM OPINION OF
HONORABLE CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

On March 20, 1989 this Court issued a Temporary Restraining Order enjoining the enforcement of what was labeled am emergency curfew law enacted by the D. C. City Council, which the Mayor allowed to become law without approval or disapproval. The City Council and the Corporation Counsel must have agreed with the Courts analysis that the March 20th action of the Court was correct as to that Act's unconstitutionality because they have again passed another measure (hereinafter referred to as the New Curfew Act) which replaces the one previously enjoined. This newly and recently enacted legislation which is before the Court today on plaintiffs application for another Temporary Restraining Order clearly appears to present many of the same insurmountable constitutional problems.

An examination of the pleadings and declarations of the parties and the record herein demonstrates that the still another Temporary Restraining Order must be issued so as to maintain the status quo until further briefing and argument can be had before the Court. The Court simply needs to know more about the Younger v. Harris, 401 U.S. 37 (1971) abstention doctrine and its application, if any, to the District of Columbia and the facts as they are developed for this case. For example, is this Court an appropriate forum for adjudication of a pre-enforcement challenge to legislation alleged on its face to be unconstitutional? At this juncture it appears to be but further research is necessary in light of its importance to both young and old alike.

Previously the Court, because of a like emergency and the necessity for immediate action did not address in any detail the present suggestion by the City Corporation Counsel that the plaintiffs' lacked standing to sue, that the case was not "ripe" because no one has yet been arrested, and that the case should also be dismissed for lack of a case or controversy or "justiciability." The court, on this Temporary Order application, will merely say it is not convinced that the cases relied upon by the city government are controlling and apply here.

The defendants say that there is a compelling state interest in having this law on the books for nintey (90) days because of the current drug crisis in the city. But, as plaintiffs correctly point out this is not legislation carefully drawn and tailored to overcome the same constitutional rights of the both the minors and adults who will be affected by the new law. As previously noted this temporary legislation is nothing more than a reaction as

distinguished from a solution to a very difficult problem. It does not take into account what a life long arrest record entails or might entail in terms of impediments to future licensing and other benefits a free society offers in the United States in this computerized age. To repeat, this law designed to take effect tonight is like throwing the baby out with the bathwater. We simply cannot suspend the constitutional rights of our citizens every time there is a legislative decree of an emergency. This is not to say that there is not a drug crisis in Washington, D.C. and throughout the country in both large and small cities and even in our rural communities. With limited resources available many informed and sincerely concerned professionals believe that our great Metropolitan Police Department and the other law enforcement agencies in our Nation's Capitol should be able to and required to engage in more meaninful activity.

ON THE MERITS

The Corporation Counsel in a memorandum filed with the Court says that three purposes were articulated by the City Council as justification for this New Curfew Law. First, they say that the New Curfew Law will reduce the likelihood that minors will be the victims of criminal acts during curfew hours. Merely shifting the hours or the time and locations where victimization will occur is not a valid legislative purpose. In fact this only increases the Courts due process and equal protection concerns previously mentioned briefly by this Court on March 20, 1989, and that enforcement of this law will impact most heavily upon minorities and the disadvantaged in an invidious and unconstitutional manner. The law enforcement community and the inhabitants of and visitors to our Nation's Capitol should not be subjected to such a draconian measure.

The second reason stated by the City Council is equally flawed. They say that the new Curfew Law will reduce the likelihood that minors will become involved in criminal acts or exposed to drug trafficking during curfew hours. It must be noted that the defendants do not and cannot effectively assert that the law will have the effect of reducing, as against time-shifting primarily on the backs of minorities and the disadvantaged the exposure to or the commission of criminal acts. The Court and surely the public is sophisticated enough to appreciate that a youngster bent on criminal activity or drug-related activity will not quit and go home to bed when the clock strikes eleven .

The third reason given by the defendants is that this new law will aid parents in carrying out their role of reasonable supervision of minors entrusted to their care. This is a presumption that assumes by virtue of the word "entrusted" in the Curfew Law that young people are creatures of the state committed to adults until they reach majority and that child rearing is no different than the loan of a watch for the benefit of a bailee as we say in commercial law. The City governmental defendants and their theories about child-rearing as expressed in this new Curfew Law are entitled to little, if any, deference as the Supreme Court of the United States said in 1923 in Meyer v. Nebraska, 262 U.S. 390 (1923).

EVERY FEDERAL COURT THAT HAS CONSIDERED
A JUVENILE CURFEW LAW SINCE 1976
HAS STRUCK IT DOWN AND EVEN
THE ONE IN 1976 THAT APPROVED
A VERY LIMITED CURFEW IS DISTINGHISHABLE
FROM THE LAW IN QUESTION HERE

The defendants place great reliance upon the Middletown, Pennsylvania, Ordinance that was approved by the United States Court of Appeals for the Third Circuit in Bykofsky v. Borough of Middletown, 535 F. 2nd 1235 (3rd Cir), cert. denied, 429 U.S. 964 (1976). The defendants assert that the New Curfew Law involved here was modeled after the Middletown ordinance, but that simply does not appear to be the case. The Court has examined each, and while no doubt the drafters considered the Middletown ordinance this so called modeling leaves much to be desired. A few examples will suffice for present purposes. First, the New D.C. Curfew Law makes no exception for minors accompanied by adults during curfew hours as did the Middletown ordinance. Second, the New D.C. Curfew Law makes no exception for a minor to walk in front of his own home or a neighbors home while that was not the case in the Middletown ordinance. Moreover, this again causes the Courts attention to focus on the due process and equal protection concerns for minorities and disadvantaged who live in public housing projects where plaintiffs say "all of the outdoor areas of public housing projects are 'streets, sidewalks, parks, or other outdoor public places". Third, the New D.C. Curfew Law contains an exception for emergency errands during curfew hours related to the health or safety of (a) parent or family member and further requires that the minor be carrying a written statement of the circumstances "if practicable". The defendants characterize this as the reasonable necessity provision to prevent undue hardship but this fails again because the Corporation Counsel must have been reading some other version of the law enacted by our City Council because the New Curfew law before the court today does not include the kind of exception for reasonable necessity approved by the third Circuit in Bykofsky, supra. Accordingly, it does not provide for the kind of flexibility the defendants have promoted. In real life terms this may be akin to letting the horse out of the barn because if an arresting officer makes an arrest, and a minor is incarcerated overnight where a parent or guardian cannot be located immediately the damage will have been done and the injury will then, in all probability, be irreparable. Fourth, the D.C. law provides for no exception for emergency permission for night-time activities not otherwise provided for as was the case in the Middletown, Pennsylvania, ordinance. Fifth, the Middletown ordinance permitted the Mayor to suspend the curfew under appropriate circumstances, but no such exception exists in the D.C. law in question today. Sixth and finally, the Middletown ordinance contained an exception for any minor "exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech, and the right of assembly." See Bykofsky v. Borough of Middletown, 401 F. Supp.1242,1269 (M.D. Pa. 1975), supra, (exception (c).

It should be noted that the Court is aware of the Mayor's original version of his proposal for a curfew law did contain an

exception for the exercise of First Amendment rights (see Mayors version attached to Plaintiffs Motion for a Preliminary Injunction filed herein on March 19, 1989). Since that is not before the Court it will express no opinion thereon. The Court also notes that plaintiffs' do not concede that the Mayors' version would pass constitutional muster either.

Before passing to the next aspect of the case, it is interesting to note that curfew ordinances which have been sticken by the federal courts include Johnson v. City of Opelousas, 658 F. 2d 1065 (5th Cir. 1981); Naprstek v. City of Norwich, 545 F.2d 815 (2nd Cir. 1976); and McCollester v. City of Keene, 586 F. Supp. 1381, 1384-85 (D.N.H. 1984).