

MOLESTER PARK BAN CONSTITUTIONAL PROCESS

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In the case of *Brown v. Michigan City, Indiana*, 2005 U.S. Dist. LEXIS 20447 (N.D. Ind. 2005), plaintiff Robert Brown, a convicted child molester, was banned from entering the City's parks. Brown alleged that defendant Michigan City "violated his procedural and substantive due process rights guaranteed by the Fourteenth Amendment to the United States Constitution." In pertinent part, the Fourteenth Amendment provides that no State shall deprive a citizen of the United States of "life, liberty, or property without due process of law."

FACTS OF THE CASE

Brown, a Michigan City resident, had been going to the City's Washington Park for years. Brown often drove his van to Washington Park, located on the shore of Lake Michigan. Since his wife's death in 1988, Brown had been going there on a daily basis to drink coffee, listen to the radio, and smoke cigarettes. Brown reported that he parked his van in a position to observe the beach area of the park, but he didn't leave his vehicle.

Some days, Brown entered and stayed in the park more than once, using his parking pass, which permitted free park entry. Brown said that he had fished and launched his boat from a public access area. He also said he had gone on a picnic with his daughter and her family, and attended an in-water boat show at Washington Park.

In early July 2002, the recreation director of LaPorte, Indiana informed the recreation director of Michigan City that lifeguards at LaPorte's Stone Lake park had observed Brown parking his van by the lake on a regular basis and looking at beach patrons through binoculars. The LaPorte director notified city police and an investigation revealed that Brown was a convicted child molester. The director in Michigan City was provided with a copy of the police report from LaPorte which indicated police had questioned Brown about his activities at Stone Lake. According to the report, Brown had apparently left the beach area in LaPorte because of the continued police presence around the lake.

Michigan City police and forwarded this information to the Michigan City Park Board attorney and Washington Park lifeguards and staff. The recreation director instructed staff at the gatehouse entrance to Washington Park to keep a log of Brown's visits to the park. Washington Park staff informed Michigan City police that Brown entered the park on a daily basis, sometimes more than once a day, and they had observed him driving slowly past the children's day camp area of the park and looking at people through his binoculars for hours each day.

Brown reported that on a number of occasions in mid-July while he was sitting in his van in Washington Park, Michigan City police officers approached him and suggested that he leave the park area. On one such occasion, officers informed Brown of his obligation to register as a convicted sex offender with the Michigan City Police Department based on his 1994 child

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molesting conviction. Brown registered with City police; but said he previously believed that his registration with the LaPorte County Sheriffs Department was sufficient. In late July, Michigan City police and a deputy city attorney approached Brown, took his parking pass from him, and told him he would be arrested if he entered the park again.

On July 31, Mr. Brown received a letter, signed by the Superintendent of Parks and hand-delivered to him by a Michigan City police officer, informing him that the banning of his presence from the City's parks would "be presented to the Michigan City Parks and Recreation Board, Thursday, August 1st at 6:00 in the 1st floor of the Park Office."

Brown did not attend the meeting at the Park Office, which is located on the grounds of Washington Park. In explaining his absence, Brown claimed he couldn't secure written assurance from City officials that he wouldn't be arrested if he entered the park to go to the meeting.

At the August 1 meeting, the Michigan City Parks and Recreation Board adopted a resolution "Prohibiting The Use Of Park Department Properties By An Individual Having A Child Molesting History." In this resolution, the Board noted that Michigan City Parks and Recreation Department was legally "responsible for the safety of all persons using the Park Department facilities or participating in Park Department programs." Further, the resolution acknowledged its duty to "put forth extraordinary effort and vigilance to fulfill their duties when it comes to the protection of the safety of children."

In particular, the resolution noted that Brown, a convicted child molester, was observed by City police and park staff "frequenting Washington Park in a recreational/camping vehicle, while having a set of binoculars and a camera in his possession." Accordingly, "to discharge its responsibilities of child protection and safety," the Board found it "necessary to designate all properties and programs under the jurisdiction of this Department to be OFF LIMITS to any person who has been convicted of child molesting under Indiana Code 35-42-4-3, or convicted of any other sex crime in which the victim is a child under the age of 18 years and to ban such person from all Michigan City Parks and Recreation Department properties indefinitely." Further, the Board resolution provided that any such individual "found upon any such property, he shall be considered a trespasser, and shall be removed forthwith, or be subject to arrest for failure to depart the premises."

Brown challenged the resolution. Subsequently, Michigan City Parks and Recreation Board met in special session and passed a second resolution which only applied to Brown. In this second resolution, the language in the original resolution relating to the banning from the parks of "any person" convicted of child molesting or a crime against a child was deleted.

### PROPERTY INTEREST

In his complaint against the City, Brown claimed his procedural due process rights were violated when Park Board officials denied him a meaningful opportunity to be heard before the City's confiscation of his parking pass and termination of his right to enter Michigan City parks. According to the federal district court, a procedural due process claim would require Brown to

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demonstrate that he was “deprived of a constitutionally protected property or liberty interest and that the deprivation occurred without due process of law.”

Brown maintained that his resident parking pass and his ability, like that of other members of the public, to enter and use the City's parks amounted to a property interest worthy of constitutional protection. According to the court, a constitutionally protected property interest required a “legitimate claim of entitlement,” as opposed to a mere need, desire, or unilateral expectation of a particular benefit or opportunity. In this particular instance, Brown asserted that the City parks' availability for use by the public represented an entitlement deserving of due process protection.

According to the court, “[t]he range of interests protected by procedural due process is not infinite.” In particular, the court noted that “[a] protected property interest generally must be more than a *de minimis* [i.e., minimal, insignificant] interest.” In this particular case, the court found no legal basis to support Brown’s claim of a “constitutionally protected property interest in a parking pass or his ability to enter public parks in Michigan City.” Moreover, the court found Brown could “enter and enjoy public parks in other locales,” despite the loss of his parking pass and his being banned from Michigan City parks.

### PROCEDURAL DUE PROCESS

Assuming Brown did have a constitutionally protected property interest in his parking pass and/or his right to enter the City's parks, in the alternative, the federal district court considered whether Brown had “received all the process that was due.”

As described by the court, “[p]rocedural due process includes the right to notice of the proposed action, a meaningful opportunity to be heard, and a fair and impartial process appropriate to the nature of the case.”

[T]he precise timing and form of the procedures that the government must afford an individual hinge upon the particularities of the situation... [D]etermining what process is due in a particular case requires a balancing of: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

According to Brown, his due process rights were violated because the notice he received relating to the August 1 meeting was untimely and insufficient. Moreover, Brown claimed he received no notice of the August 29 meeting. As a result, Brown contended that “his parking pass and ability to enter the City's parks were stripped from him without a prior hearing or opportunity to be heard.” Brown also maintained that “the minutes of the Park Board meetings ‘reflect a predetermined decision,’ which established that the meetings were shams.”

## NOTICE

According to the federal district court, “[d]ue process requires that the notice provided to Brown must have been reasonably calculated, under all the circumstances, to apprise him of the pendency of the action and afford him an opportunity to present his objections.” In this particular instance, Brown admitted “he received notice of the Park Board meeting, but claimed that receipt on July 31 of notice of a meeting scheduled for August 1 was untimely.” In the opinion of the court, Brown had failed to “set forth any circumstances to support a finding that 24-hours was insufficient” to satisfy the due process requirement of “reasonable efforts at notice.”

While circumstances may show that a one-day notice is not sufficient, Mr. Brown hasn't.. alleged that he couldn't contact witnesses or gather evidence he needed for the meeting; he hasn't said that work or other obligations prevented him from attending the meeting on the scheduled date and time; he hasn't said he needed more time to hire an attorney to accompany him to the meeting; he hasn't argued that his attorney was unavailable to attend the meeting on the day in question..

Brown's conclusory statement that he didn't have time to properly prepare doesn't support a finding that a one-day notice was unreasonable under the circumstances presented in this case.

Brown also claimed “the notice was insufficient in that it didn't inform him that he could be heard at the meeting and didn't contain a summary of the City's evidence against him.” The federal district court rejected this argument.

The notice received by Mr. Brown informed him of the meeting's purpose: to address the City's ban of him from its parks. And, Mr. Brown has set forth evidence in support of his motion that confirms he was aware that he could attend the meeting.

Due process requires that parties must be notified in advance of the precise issues to be raised in the hearing. Mr. Brown's notification that the Park Board would be meeting on August 1 to discuss his ban from the City's parks satisfied due process. The language of the notices specifically referred to future actions the city might take.

## OPPORTUNITY TO BE HEARD

As noted by the federal district court, “Brown was advised by police that he would be arrested if he entered the parks” in late July, i.e., prior to the August 1 Park Board Meeting which addressed the proposed ban on Brown's park access. Brown claimed that he “wasn't told that he had an opportunity to be heard.” According to the court, Brown's contention would not “establish that his due process rights were violated in this regard.” On the contrary, the court found Brown had been provided with an opportunity to be heard. Specifically, the court found that “Brown was

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informed that his ban from the parks was going to be discussed and he learned that he could attend the meeting.” Brown, however, chose not to attend the meeting unless the City issued a written assurance that he wouldn't be arrested if he attended the meeting on park property.

Had he attended the meeting, Brown claimed the minutes of the Parks Board meetings indicated he would have had no opportunity to be heard because “there were no witnesses, no evidence was taken, and there was no opportunity to contest the resolutions.” The federal district court rejected Brown’s assessment of the proceedings. In so doing, the court acknowledged that “[t]he concept of due process generally demands fewer procedural safeguards at informal administrative proceedings than during formal judicial hearings.” Further, the court found “[t]he minutes of the August 1 meeting show that an open discussion was held, and questions were accepted and answered.”

A Resolution was presented to the Park Board for its consideration. Prior to a vote on the Resolution, Patrick Donoghue, Park Department Attorney, discussed the functions and responsibilities of the Park Board and Park Department personnel, presented the evidence gathered from the LaPorte Police Department, Michigan City Police Department, and Michigan City Park Department staff relating to Mr. Brown, and reviewed possible legal ramifications of adopting the Resolution

John Espar, Deputy City Attorney for Michigan City, discussed how the Resolution would be implemented. Numerous questions were asked and answered during the meeting. Resolution 548 was then adopted by unanimous vote of the Park Board.

Accordingly, the court found “[t]he minutes of the August 1 meeting don't support Mr. Brown's claim that the meeting was a sham.” Further, the court found that “the August 29 meeting didn't result in a violation of Mr. Brown's procedural due process rights” because the second resolution simply eliminated references to persons other than Mr. Brown in the first resolution.

### SUBSTANTIVE DUE PROCESS

As described by the federal district court, the Due Process Clause also protects individuals against “arbitrary action of government,” i.e., “the exercise of governmental power without reasonable justification.”

Substantive due process “provides heightened protection against government interference with certain fundamental rights and liberty interests,” that is, “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”

As characterized by the court, Brown claimed “his ban from the City's parks violates his fundamental right to enter public spaces like city parks, as guaranteed by the Due Process Clause of the Fourteenth Amendment.” While “not unimportant,” the federal district court found “the liberty interest here at issue - the right to enter and use city parks” was not a “fundamental right.”

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As described by the court, a fundamental right is one essential to one's "personhood" which courts have held to include the following:

right of parent to make decisions concerning the rearing of children; right to choose abortion; right to refuse unwanted medical treatment; fundamental liberty interest of natural parents in the care, custody, and management of their child; right of individual to make decision of whether to have a child; right of marital privacy; right to bodily integrity; right of parents in the custody, care and nurture of their children; right to have children; right of parents and guardians to direct the upbringing and education of their children.

In comparison to these fundamental rights, the court found Brown's asserted "right to enter the parks and loiter" was not fundamental to his "personhood," nor was it "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." Rather, the court found the City had only deprived Brown of his right to go the City's parks for allegedly innocent, recreational purposes.

According to the court, if a governmental practice does not encroach on a fundamental right, "substantive due process requires only that the practice be rationally related to a legitimate government interest" i.e., a "reasonable fit" between the "state interest and the means chosen to advance that interest" which is "neither arbitrary nor irrational."

While conceding the "compelling" governmental interest in preventing child abuse, Brown contended that there was "no rational connection between that interest and his ban from the City's parks." Specifically, Brown argued that the City's ban was "fundamentally irrational and violates substantive due process" because he had not "engaged in conduct that could be construed as inappropriate sexual contact with children." The federal district court disagreed. In the opinion of the court, "Michigan City's ban of Mr. Brown is rationally related to its compelling interest in safeguarding children in its parks."

The City argues that its ban of Mr. Brown from the parks is rationally related to its strong and legitimate interest in protecting children who visit its parks. The City says statistics and studies show that rate of recidivism among child molesters is high. The City claims Mr. Brown has engaged in suspicious behavior while at the park: he entered the park on a daily basis, "spending hours alone in his RV in the middle of the heat of the summer months. His use of binoculars to watch women and children on the beach was also suspicious." And the City notes that it isn't possible for its personnel to monitor the activities of Mr. Brown, a convicted child molester, on a minute-by-minute basis.

The federal district court, therefore, found that Brown had not been subjected to "the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." According to the court, the threshold issue in analyzing a substantive due process claim is "whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Given the government's compelling interest in safeguarding the physical and psychological well-being of

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children in public parks, the court held that the City was “not bound to wait until Mr. Brown again committed the crime of child molestation or attempted child molestation in order to act.”

As a result, the federal district court concluded that the City was “entitled to summary judgment on Mr. Brown's substantive due process claim.”

### SEE ALSO:

*Hobbs v. County of Westchester*, No. 00 Civ. 8170 (S.D.N.Y. 8/13/2003) reviewed in “Pedophile Clown Brings His Act To Playland”

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*Doe v. City of Lafayette*, No. 01-3624, 2004 U.S. App. LEXIS 15762 (Cir. 7<sup>th</sup> 2004) reviewed in “Sexual Addict” Banned From Parks After “Cruising” For Kids

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