

By Terence R. Boga

# Questioning the Prompt Judicial Review Requirement

## The prompt judicial review requirement undermines local authority

One of the important tasks traditionally performed by cities and other local government entities is regulation of free speech activities. Regulation ensures, for example, that use and enjoyment of public property is not hampered by disorderly street parades,<sup>1</sup> excessively loud park concerts,<sup>2</sup> or hazardously placed sidewalk newsracks.<sup>3</sup> It also protects communities from adverse effects of free speech activity on private property, most notably the operation of adult entertainment businesses.<sup>4</sup>

Unfortunately, local authority to regulate free speech activities has been jeopardized in recent years by a legal doctrine known as the prompt judicial review requirement. This legal doctrine mandates that entities of the government cannot require that parties obtain a permit before engaging in constitutionally protected expressive conduct—unless there is a guarantee of prompt judicial review of the permitting decisions. In the Ninth Circuit, the guarantee is not satisfied by simply affording prospective speakers access to the courts.

The review standard entails a higher standard—specifically, “a prompt hearing and a prompt decision by a judicial officer.”<sup>5</sup>

The prompt judicial review requirement has resulted in a phenomenon worthy of the absurdist logic of *Alice in Wonderland*. Some courts now routinely invalidate laws affecting free speech activity solely because those laws do not compel courts to render a decision quickly enough. Reconsideration of the prompt judicial review requirement is warranted to resolve a conflict among the circuit courts and to eliminate an infringement upon the legitimate regulatory prerogatives of local government.

The origins of the requirement can be traced back to the U.S. Supreme Court’s 1965 decision in *Freedman v. Maryland*.<sup>6</sup> This case arose when a Baltimore theater owner opted to show the film *Revenge at Daybreak* without first submitting it to Maryland’s movie screening agency (which was unabashedly named the State Board of Censors).

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Maryland law assigned the censorship board with the duty of separating “moral and proper” films from those that were obscene or that were likely “to debase or corrupt morals or incite to crimes.”<sup>7</sup> The theater owner contended that the requirement of submission to the board effectively barred exhibition of disapproved films without any judicial participation and therefore constituted an invalid prior restraint.

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The Supreme Court overturned Maryland’s movie censorship regime. The majority opinion reasoned that a non-criminal government process for prescreening films passes constitutional muster only if three procedural safeguards are incorporated. First, the censor must bear the burden of proving that the movie is unprotected expression. Second, the censor must be obligated to choose within a specified brief period between issuing a license or going to court to restrain showing of the film. Lastly, to minimize the deterrent

effect of an interim license denial that might be erroneous, the procedure must assure “a prompt final judicial decision.”<sup>8</sup>

For a time after *Freedman*, movie censorship remained the target when the Supreme Court applied the decision’s safeguards. For example, three years following the decision, the Court struck down Chicago’s motion picture censorship ordinance due to the protracted administrative process that took 50 to 57 days before the onset of judicial proceedings, and the “absence of any provision for a prompt judicial decision by the



trial court.”<sup>9</sup> Months later, the Court noted in dicta that a Dallas motion picture classification ordinance assured a “prompt final judicial decision” by guaranteeing that a trial judgment would occur within nine days of the city’s determination whether a film was “suitable for young persons.”<sup>10</sup>

### Going Beyond Movies

In short order, however, the Supreme Court applied the test established in *Freedman* to free speech regulations not relating to films. In *Blount v. Rizzi*,<sup>11</sup> the Court ruled that the safeguards established in *Freedman* were lacking in the Postal Reorganization Act provisions that allowed the Postmaster General to halt use of the mails and postal money orders for commerce in obscene materials. Significantly, the Court characterized the *Freedman* decision as requiring “prompt judicial review,” which it described as “a final judicial determination on the merits within a specified brief period.”<sup>12</sup> In *United States v. Thirty-Seven Photographs*,<sup>13</sup> the Court applied *Freedman* by affixing time limits to Tariff Act provisions that authorized customs agents to seize obscene materials at the border. Finally, in *Southeastern Promotions, Ltd. v. Conrad*,<sup>14</sup> the Court used *Freedman* to find a prior restraint in the Chattanooga Memorial Auditorium’s rejection, on grounds of obscenity, of a production of the musical *Hair*. Once again, the Court described *Freedman* as requiring “a prompt final judicial determination.”<sup>15</sup>

In this way, the prompt judicial review requirement expanded from a safeguard against movie censorship to a test applied in challenges to the suppression, without judicial participation, of allegedly obscene speech. A further expansion, however, occurred in 1990.

### A Further Expansion

The prompt judicial review requirement reached full fruition 25 years after *Freedman*. In *FW/PBS, Inc. v. Dallas*,<sup>16</sup> a divided Supreme Court applied the *Freedman* safeguards to licensing laws affecting businesses engaged in free speech activity. *FW/PBS* concerned the validity of a Dallas ordinance regulating the operation of sexually oriented businesses. The licensing component of the ordinance obligated such enterprises to obtain from the chief of police an annual permit that would be issued only after health, fire, and building department inspections. While the ordinance prescribed a 30-day period for processing permit applications, it also forbade approval if the inspections had not been conducted, and it set no deadline for the completion of the inspections.

By a 6-3 vote, the Supreme Court held the Dallas licensing scheme to be an uncon-

stitutional prior restraint. A majority could not agree, however, on the extent to which the *Freedman* safeguards should apply in the licensing context. Justices O’Connor, Stevens, and Kennedy concluded that only two of the three safeguards were warranted, because the subject ordinance did not present the dangers of a censorship system. They deemed it unnecessary for Dallas to bear the burden of going to court to effect a permit denial or to bear the burden of proof once in court. In contrast, Justices Brennan, Marshall, and Blackmun reasoned that all the safeguards were indispensable to protect speech adequately. The three dissenters (Chief Justice Rehnquist and Justices White and Scalia) objected to the application of any of the safeguards.

Following *FW/PBS*, lower courts have applied a truncated version of *Freedman* scrutiny to a variety of local government regulations that impose some form of permit requirement on free speech activity. The case law is replete with examples involving the licensing of adult entertainment businesses.<sup>17</sup> Yet the criteria also have been utilized to evaluate the enforceability of restrictions governing expressive conduct on public property in situations involving political rallies in parks,<sup>18</sup> newsstands on sidewalks,<sup>19</sup> and religious proselytizing in subway stations.<sup>20</sup>

The significance of *FW/PBS* stems only in part from its extension of the *Freedman* safeguards to a situation that did not involve the potential suppression, without judicial participation, of allegedly obscene speech. Equally important is that the decision formally established the requirement of prompt judicial review.

O’Connor’s plurality opinion in *FW/PBS* studiously avoids directly quoting the judicial review element of the *Freedman* safeguards. *Freedman* had demanded that Maryland’s movie censorship statute provide for “a prompt final judicial decision.” In contrast, O’Connor’s *FW/PBS* opinion describes *Freedman* as necessitating “expeditious judicial review.”<sup>21</sup> Next, the opinion characterizes the safeguard as “the possibility of prompt judicial review in the event the license is erroneously denied.”<sup>22</sup> The opinion then faults the Dallas ordinance for failing to provide “an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial.”<sup>23</sup> Lastly, the opinion concludes that “the availability of prompt judicial review,” in conjunction with time limits on permitting decisions, is sufficient to protect free speech in the licensing context.<sup>24</sup> The redundancy of these statements strongly suggests that O’Connor intended to redefine the judicial review component of *Freedman*. Unfortunately, the ambiguity of her language

has confused lower courts trying to decide whether the redefinition is substantive or limited to nomenclature.

### Ninth Circuit Decisions

The Ninth Circuit addressed the meaning of the prompt judicial review requirement in three cases: *Baby Tam I*, *Baby Tam II*, and *Baby Tam III*.<sup>25</sup> The litigation concerned enforcement of an adult bookstore licensing ordinance in Las Vegas against a store known as Hot Stuff. The city’s ordinance expressly advised unsuccessful license applicants that mandamus review could be sought in state court. At the time the litigation began, however, Nevada law did not impose a deadline for a judicial hearing to be held or for a decision to be rendered.

In *Baby Tam I*, the Ninth Circuit invalidated the Las Vegas ordinance for not satisfying the prompt judicial review requirement. The court held that the ordinance did not ensure “a prompt hearing and a prompt decision by a judicial officer.”<sup>26</sup> The court remanded the case with instructions that Las Vegas be enjoined from denying a license for Hot Stuff at its existing location. This decision is remarkable both for its failure to acknowledge the city’s lack of jurisdiction over state courts and for its authorization to Hot Stuff to operate at a location where adult bookstores were prohibited by the city’s zoning ordinance.

In *Baby Tam II*, the Ninth Circuit held that the prompt judicial review requirement had been satisfied. The about-face on the prompt judicial review issue, which still did not save the Las Vegas ordinance, reflected the enactment of a variety of legislative amendments following *Baby Tam I*. Specifically, Las Vegas had revised the ordinance to provide for issuance of a temporary bookstore license in the event a court decision had not been rendered within 30 days of the filing of a petition. Additionally, both the Nevada legislature and the local judicial district court had created an expedited process for judicial review of claims involving prior restraint allegations. The fatal defect for Las Vegas this time was that the ordinance allowed indefinite postponement of decisions on license applications.

After the travails of *Baby Tam I* and *Baby Tam II*, the Ninth Circuit upheld the Las Vegas ordinance in *Baby Tam III*. This decision is noteworthy because the Hot Stuff proprietors raised the novel argument that, notwithstanding *Baby Tam II*, the prompt judicial review requirement remained unsatisfied due to the lack of a guarantee of an expedited hearing in federal court. In response to this suggestion, the Ninth Circuit tersely answered that there is “no constitu-

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tional requirement of prompt judicial review by both court systems."<sup>27</sup>

Seven other circuit courts have considered the meaning of the prompt judicial review requirement in the wake of *FW/PBS*. Only two of them concur with the Ninth Circuit's position that the requirement demands a decision by a judicial officer.<sup>28</sup> The remainder instead have ruled that the requirement is satisfied by access to the courts.<sup>29</sup> These other circuits have acknowledged that, while the prompt judicial determination principle is meritorious in the context of obscenity suppression, it is not an appropriate constitutional imperative in other settings.

The evolution of the prompt judicial review requirement from *Freedman* to *FW/PBS* produced the current situation in which some courts will invalidate laws affecting free speech activity solely because the laws do not compel courts to render a decision quickly enough. This outcome was predictable, given the combination of the extension of the judicial review safeguard to the licensing context and the ambiguousness of O'Connor's redefinition of the safeguard. The outcome was not inevitable, however, as demonstrated by the many circuit courts that have interpreted the requirement as calling for access rather than a decision.

The consequences of the prompt judicial review doctrine can be dire when the requirement is deemed to necessitate a court decision. Even though there may be legitimate content-neutral reasons for denying a permit for a particular free speech activity, a local government entity may have no alternative but approval. Consider, for example, this suggestion by the Fourth Circuit: "[T]he County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until a judicial determination is rendered affirming a denial of a special permit."<sup>30</sup> Such a solution effectively negates the longstanding authority of local government, acting in the public interest, to regulate free speech activity.

California cities and local governments might be able to escape this predicament by relying on Code of Civil Procedure Section 1094.8 to rebut prompt judicial review challenges. Enacted in 1999, that statute creates an expedited procedure for mandamus review of claims involving permits for free speech activity. Whether or not the procedure satisfies the prompt judicial review requirement remains an open question, however.

Fortunately, the Supreme Court has already begun the process of reconsidering the prompt judicial review requirement. In *Thomas v. Chicago Park District*,<sup>31</sup> the court unanimously held that the requirement is

inapplicable to regulations governing the use of a public forum such as a permit prerequisite for large-scale events in a park. This ruling allowed the court once again to avoid resolving the circuit court split on the meaning of the requirement.<sup>32</sup> Still, the fact that in *Thomas* the court describes the *Freedman* safeguards as “extraordinary”<sup>33</sup> is cause for hope that it will soon narrow the reach of the doctrine. ■

<sup>1</sup> Cox v. New Hampshire, 312 U.S. 569 (1941).  
<sup>2</sup> Ward v. Rock Against Racism, 491 U.S. 781 (1989).  
<sup>3</sup> Kash Enters., Inc. v. City of Los Angeles, 19 Cal. 3d 294 (1977).  
<sup>4</sup> City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).  
<sup>5</sup> Baby Tam & Co., Inc. v. City of Las Vegas, 154 F. 3d 1097, 1101 (1998) [hereinafter Baby Tam I].  
<sup>6</sup> Freedman v. Maryland, 380 U.S. 51 (1965).  
<sup>7</sup> *Id.* at 52 n.2.  
<sup>8</sup> *Id.* at 59.  
<sup>9</sup> Teitel Film Corp. v. Cusack, 390 U.S. 139, 142 (1968).  
<sup>10</sup> Interstate Circuit v. Dallas, 390 U.S. 676, 690 n.22 (1968).  
<sup>11</sup> Blount v. Rizzi, 400 U.S. 410 (1971).  
<sup>12</sup> *Id.* at 417.  
<sup>13</sup> United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).  
<sup>14</sup> Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).  
<sup>15</sup> *Id.* at 560.  
<sup>16</sup> FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990).  
<sup>17</sup> See, e.g., Nightclubs, Inc. v. City of Paducah, 202 F. 3d 884 (6th Cir. 2000); Boss Capital, Inc. v. City of Casselberry, 187 F. 3d 1251 (11th Cir. 1999); 4805 Convoy, Inc. v. City of San Diego, 183 F. 3d 1108 (9th Cir. 1999); 11126 Baltimore v. Prince George’s County, 58 F. 3d 988 (4th Cir. 1995); Grand Britain, Inc. v. City of Amarillo, 27 F. 3d 1068 (5th Cir. 1994).  
<sup>18</sup> Beal v. Stern, 184 F. 3d 117 (2d Cir. 1999).  
<sup>19</sup> Graff v. City of Chicago, 9 F. 3d 1309 (7th Cir. 1993).  
<sup>20</sup> Jews for Jesus, Inc. v. MBTA, 984 F. 2d 1319 (1st Cir. 1993).  
<sup>21</sup> FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990).  
<sup>22</sup> *Id.* at 228.  
<sup>23</sup> *Id.* at 229.  
<sup>24</sup> *Id.* at 230.  
<sup>25</sup> Baby Tam I, 154 F. 3d 1097 (1998); Baby Tam & Co., Inc. v. City of Las Vegas, 199 F. 3d 1111 (2000) (Baby Tam II); Baby Tam & Co., Inc. v. City of Las Vegas, 247 F. 3d 1003 (2001) [hereinafter Baby Tam III].  
<sup>26</sup> Baby Tam I, 154 F. 3d at 1101.  
<sup>27</sup> Baby Tam III, 247 F. 3d at 1007.  
<sup>28</sup> See Nightclubs, Inc. v. City of Paducah, 202 F. 3d 884 (6th Cir. 2000); 11126 Baltimore v. Prince George’s County, 58 F. 3d 988 (4th Cir. 1995); East Brooks Books, Inc. v. City of Memphis, 48 F. 3d 220 (6th Cir. 1995).  
<sup>29</sup> Boss Capital, Inc. v. City of Casselberry, 187 F. 3d 1251 (11th Cir. 1999); Beal v. Stern, 184 F. 3d 117 (2d Cir. 1999); Grand Britain, Inc. v. City of Amarillo, 27 F. 3d 1068 (5th Cir. 1994); TK’s Video, Inc. v. Denton County, 24 F. 3d 705 (5th Cir. 1994); Graff v. City of Chicago, 9 F. 3d 1309 (7th Cir. 1993); Jews for Jesus, Inc. v. MBTA, 984 F. 2d 1319 (1st Cir. 1993).  
<sup>30</sup> 11126 Baltimore, 58 F. 3d at 1001 n.18. See also 4805 Convoy, Inc. v. City of San Diego, 183 F. 3d 1108, 1185 (9th Cir. 1999); Nightclubs, Inc., 202 F. 3d at 894.  
<sup>31</sup> Thomas v. Chicago Park Dist., 122 S. Ct. 775 (2002).  
<sup>32</sup> Cf. City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001).  
<sup>33</sup> Thomas, 122 S. Ct. at 780.

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