YOU CAN FIGHT CITY HALL
THE CASE OF
THE POPE’S PLATFORM

By M. Kelly Tillery
Thirty years ago, just as I just settled into my new apartment at The Dorchester, I watched Mayor Frank L. Rizzo proudly announce on the evening news that Pope John Paul II would visit Philadelphia and that the city was already constructing a huge cylindrical platform over Logan Square where the pope would celebrate a Roman Catholic Mass. Viewers with a sense of history, and irony, might have been reminded of another pope, in another time, also on a platform – Pope Urban II, who from a “lofty platform in the midst of an open plain” at the Council of Clermont in Auvergne on Nov. 27, 1095 – appealed to his bishops to start what would become the First Crusade.
I, however, as a recent graduate of the University of Pennsylvania Law School awaiting my bar exam results and about to join a Philadelphia law firm, was simply stunned. How could this be? While perhaps not the most serious joining of church and state since the conversion of Constantine, I knew that this undertaking struck at the heart of the fundamental principle embodied in the Establishment Clause of the First Amendment – separation of church and state. I had studied the U.S. Supreme Court’s First Amendment cases on this topic and this was an obvious violation of the Establishment Clause. And it had to be stopped. Not the pope’s Mass, of course. Just taxpayers paying for it.

I spent the balance of that evening drafting a federal lawsuit against the City of Philadelphia and showed up on the doorstep of the American Civil Liberties Union first thing the next morning with a draft complaint in hand. Hilda Silverman, executive director of the ACLU, concurred with my analysis and the ACLU took the case.

Later that same day, I slipped quietly into a news conference featuring a bevy of city officials, including Commissioner of Public Property Robert Silver, Managing Director Hillel S. Levinson, City Representative Joseph A. LaSala and even the chief legal officer, City Solicitor Sheldon L. Albert. They all positively beamed and strutted when announcing that hard-earned taxpayers’ monies would be and were being used to design, plan and construct the pope’s platform upon which he would celebrate a solemn and sacred Roman Catholic religious ceremony.

To me, this appeared to be a classic display of the arrogance of power. I could not believe what I was hearing and seeing. Was the academic world I had left only a few months before so divorced from this reality? I looked around for Rod Serling.

Since I was not yet a member of the bar (my admission would not come until eight days after the pope’s Mass), I could not handle the case as a lawyer. Although I considered serving as plaintiff, I soon discovered that the law firm I was to join had very close ties to Mayor Rizzo. Suing the City of Philadelphia probably was not a good career move.

I had set this train in motion, however, and there was no stopping it. The ACLU soon found a plaintiff taxpayer, Susan Jane B. Gilfillan, and veteran First Amendment litigator Henry W. Sawyer III, and suit was filed seeking a temporary restraining order and preliminary injunction. But the parties, based upon representations from a non-party, the Archdiocese of Philadelphia, agreed that if the court ruled in favor of plaintiff, the Archdiocese would reimburse the city for any unconstitutionally expended funds. Construction of the “pope’s platform” continued unabated and the pope celebrated Mass without incident on Oct. 3, 1979 on top of the beautiful $205,569 stage paid for, at least for the moment, by the taxpayers of Philadelphia. Frankly, I thought this temporary “compromise” was unwise, unnecessary and constitutionally impermissible. But what did I know? I was not even a lawyer yet.

In my naïveté, I actually believed that since the legal issues were so clear and obvious the city would “do the right thing” and either not construct the platform with taxpayers’ dollars or require some other entity, such the Archdiocese, to pay for...
it. Boy, was I wrong. Rather than do the constitutionally proper thing, the unflappable Mayor Rizzo spent hundreds of thousands of dollars in time, legal fees and other costs defending this lawsuit in both the U.S. District Court and the U.S. Court of Appeals for the Third Circuit, both of which ruled against the city, finding that erection of the papal platform amounted to “public sponsorship of a religious service” and that $205,569 in taxpayers’ money was expended unconstitutionally to build, in essence, an outdoor church (with a 30-foot-high cross) for the pope to celebrate Mass. *Gilfillan v. City of Philadelphia*, 480 F.Supp. 1161 (E.D.PA. 1979) affirmed 637 F.2d 924 (3rd Cir. 1980).

Fortunately, the federal courts stood as a bulwark against the ill-advised actions of this rogue mayor, ruling against the city’s disingenuous and sophist arguments to find that the “religious effect” of these expenditures was “both plain and primary” and, as such, violated the First Amendment of the U.S. Constitution.

The First Amendment is not only numerically first, it is first among equals in substantive import. As originally proposed, it was the third of 12 amendments, but became “the First” when the First Congress failed to ratify the two others considered previously. The Establishment Clause of the First Amendment actually is the first prohibition of six contained in it and provides that “Congress shall make no law respecting an establishment of religion, …” The 14th Amendment applies the First Amendment to the states and thus to political subdivisions such as the City of Philadelphia. Curiously, the particular language as enacted came not from the pen of any of the famous framers who felt strongly about this issue such as James Madison, Patrick Henry or Thomas Jefferson, but rather from an early legislative vehicle of compromise – the Congressional Joint Committee.

As Leonard W. Levy says in his scholarly work, *Origins of The Bill of Rights*, “Above all, the establishment clause functions to protect religion from government, and government from religion.”

U.S. District Judge Raymond J. Broderick stated the issue before him simply as: “… whether or not the Constitution of the United States permits the expenditure of public funds by the city for the construction and preparation of the platform which served as a base for the altar used by the pope and the clergy in the celebration of the Mass before approximately 1 million people assembled at Logan Circle (sic).” My Philadelphia-born-and-raised Yankee wife tells me his law clerk was obviously not from the city, as locals know it is really Logan Square.

Judge Broderick ruled that the U.S. Constitution did not permit these acts. The U.S. Court of Appeals for the Third Circuit agreed. The Archdiocese of Philadelphia, as it had agreed to do in the beginning of the case in the event that the city lost, reimbursed the city (the taxpayers) $205,569, purportedly the amount of the unconstitutional expenditures. The city actually spent more than $1.2 million in connection with the pope’s visit, but went to great and sometimes absurd lengths to except certain expenditures as allegedly not
directly related to the Mass. As with the TRO “compromise,” I also thought it unwise and wrong to leave unchallenged many of these expenditures and claims that some items were “not related” or “reusable.” But again, I was unprepared to disagree with the ACLU’s lead counsel who had successfully argued First Amendment cases in the U.S. Supreme Court.

The city argued that the platform was for the security of “an international dignitary and head of state,” the safety of the crowd, and to maximize access and visibility for all who wished to see and hear the pontiff. On appeal, “creative” city lawyers devised a fourth, new “reason,” not argued below, that the money was for a “public relations bonanza” for the city. Although Judge Broderick went out of his way to say that “the court does not question the sincerity of the city’s expressed reasons for building the platform at Logan Circle (sic) in preparation for this extraordinary event,” many scoffed at these belated and apparently pretextual arguments. The Third Circuit was less kind calling the city’s arguments “transparent,” “imaginative,” having “no merit” or “only superficial appeal” and “only partially true.”

It is true that popes, on occasion, since as early as 882, when John VIII was beaten to death (albeit by his own entourage), have been targets of assassins. Pope John Paul II himself was victim of such an attempt less than two years after his Philadelphia visit, which was the genesis of the oddly eponymous “popemobile.” For those diehards tempted to say, “I told you so,” however, the Third Circuit Court of Appeals cogently observed “... the pope’s position on the platform made him a clear target in any direction.”

Judge Broderick wisely found that the city’s acts (1) amounted to public sponsorship of a religious service, (2) had the primary effect of advancing religion, (3) fostered an excessive entanglement of government with religion, of two types – (a) joint participation in the planning of and preparation for a religious function, and (b) promotion of divisiveness among and between religious groups, thus failing not one (which alone would have doomed the acts), but all three of the U.S. Supreme Court tests to determine a violation of the Establishment Clause.

Amazingly, the city engaged in yet additional unconstitutional activity after the case was filed when it ordered the platform be left standing for more than a week to let Philadelphians visit it and, as the Third Circuit said, “… thus created a temporary shrine” – “activity not compatible with the Constitution.”

It is interesting to note that the pope also visited Washington, D.C., that same month and said an outdoor mass for hundreds of thousands of people on a $400,000 platform. That platform, however, was paid for by the Washington Archdiocese, not the City of Washington, without the need for litigation.

Philadelphia compounded its decision to pay for the platform with the decision to fight relentlessly for the right to compel taxpayers to pay for it in the federal district court and then again with the decision to fight it in the federal appeals court. The city
surely spent more litigating this case than it spent on the platform. With thanks to heaven for little favors, city taxpayers were finally delivered from the unconstitutional burden of the costs of Rizzo’s crusade, when cooler and wiser heads finally prevailed and, after two defeats, the city decided not to appeal to the U.S. Supreme Court.

I am no longer so naïve to believe that other elected officials may not in the future choose so audaciously to flaunt constitutional imperatives such as the Establishment Clause. I do, however, believe that these important court decisions make them think twice in this regard. The mayor of the City of Philadelphia wasted an enormous amount of taxpayer money in disputing a clear legal position and was chastised by the judiciary entirely appropriately.

Thirty years later, most of the players in this constitutional drama have passed this vale of tears. Pope John Paul II, Mayor Rizzo, Judge Broderick, Henry Sawyer and the ACLU’s Silverman are all no longer with us. But the First Amendment lives on. And Gilfillan v. City of Philadelphia remains good law.

As for me, I passed the bar and built a career protecting the intellectual property rights of a wide variety of clients, including, perhaps ironically, Madonna, Black Sabbath and The Grateful Dead.

Although I am Jesuit-educated and sometimes ribbed for having “sued the pope” (not precisely true), I am pleased and proud that I was able to play a small part in preventing a serious violation of a very important part of the First Amendment to the U.S. Constitution. We fought the good fight. We fought City Hall and we won. ■

M. Kelly Tillery (tilleryk@pepperlaw.com) is a partner in the Intellectual Property Group at Pepper Hamilton, LLP in Philadelphia.