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Controlling Public Protest
First Amendment Implications

By
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The Supreme Court has indicated that in the context of protests, parades, and picketing in such public places as streets and parks, "...citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[1] Police face difficult constitutional and operational issues when tasked with the dual responsibility of maintaining public order and protecting the first amendment rights of protestors and marchers. This article discusses recent court decisions concerning the constitutionality of permit requirements and injunction-based restrictions that limit the time, place, and manner of expressive activity in public places.

Three general first amendment principles guide departmental decisionmaking in controlling public protest. First, political speech in traditional public forums, such as streets and parks, is afforded a very high level of first amendment protection, and blanket prohibitions of such speech are generally unconstitutional. Second, reasonable time, place, and manner restrictions on such speech are permissible if they are content-neutral, narrowly tailored to serve substantial government interests, and leave ample alternative ways for the speech to occur. Third, speech or expressive conduct can be restricted because of its relationship to unlawful conduct, such as disorderly conduct or trespass.

Content-Neutral Permit Requirements

The first amendment permits the government to impose a permit requirement for those wishing to engage in expressive activity on public property, such as streets, sidewalks, and parks.[2] Any such permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored

to serve a significant governmental interest, and must leave open ample alternatives for communication.[3] The Supreme Court has held that any permit regulation that allows arbitrary application is "...inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."[4]

The Supreme Court has ruled unconstitutional permit schemes that vest government decisionmakers with uncontrolled discretion in deciding whether to issue a particular permit.[5] Ideally, a permit scheme should include:

1) A written description of the permit/license application process

2) Comprehensive and unambiguous standards for implementation and the objective criteria officials will use in determining whether to grant or deny a permit application

3) A time frame for the application process and for decisionmakers to consider an application

4) A provision for notifying the applicant that a permit request has been denied and the reasons for the denial

5) An established route to appeal a denial of an application

6) Language that avoids inherently vague terms, the meaning of which are not self-evident or easily discernible, such as "first amendment activities," "special or unique circumstances," "unique hardship," "public nuisance," or "detrimental to public health and safety," and

7) The identity of the person or persons with the authority to grant or deny a permit request.

A permit process must be narrowly tailored to serve significant government interests. For example, a Federal district court ruled unconstitutional a city's refusal to grant permission for a nonprofit organization to set up portable tables at particular locations on the public sidewalks of the city's commercial and historic district. The nonprofit organization intended to distribute literature, discuss issues of spiritual ecology, and sell T-shirts carrying messages related to the organization's religious tenets.[6] The court said the lack of a coherent permit scheme, narrowly tailored to serve city interests, gave the city unbridled discretion to grant or deny a request.[7]

However, the court suggested the first amendment would permit the city to use narrowly tailored regulations to minimize interference with pedestrian movement on crowded sidewalks, such as established times for such activity and limitations on the size and precise positioning of the tables.[8] Moreover, the city's legitimate interest in preserving the character and appearance of its historic district might justify restrictions, if the city's permit scheme has content-neutral standards narrowly tailored to serve that objective and the city proves that its aesthetic concerns are sufficient to warrant the abridgment of first amendment rights.[9]

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"Law enforcement often has the responsibility of balancing the legitimate need to maintain public order with the important interest in protecting first amendment rights."

Restrictions Based on Threat of Violence

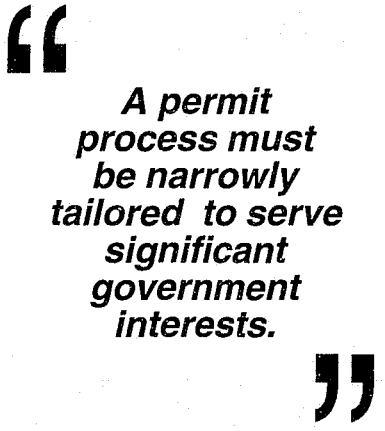
The U.S. Court of Appeals for the District of Columbia stated in

Christian Knights of KKK v. *District of Columbia*[10] that when using a public forum, "...speakers do not have a constitutional right to convey their message whenever, wherever and however they please."[11] Accordingly, the government may regulate a marcher's use of the streets based on legitimate interests, such as: 1) Accommodating conflicting demands by potential users for the same place; 2) protecting those who are not interested onlookers, like a "captive audience" in a residential neighborhood, from the adverse collateral effects of the speech; and 3) protecting public order.

The court emphasized that a permit process cannot be used to "...impose even a place restriction on a speaker's use of a public forum on the basis of what the speaker will say, unless there is a compelling interest for doing so, and the restriction is necessary to serve the asserted compelling interest."[12] The court ruled the city's denial of a permit request from the Ku Klux Klan to march 11 blocks and the resulting decision to limit the march to only 4 blocks was unconstitutionally based on anticipated listener reaction, which turns on the group marching, the message of the group, and the extent of antagonism, discord, and strife the march would generate.[13]

However, the court also held that a restriction based on the threat of violence could be constitutionally justified if that threat of violence is beyond reasonable control of the police. The court noted:

> "[W]hen the choice is between an abbreviated march or a bloodbath, government must have some leeway to make adjustments necessary for the protection of participants, innocent onlookers, and others in the vicinity...Regardless of the Klan's message, and its opinion of the precise route needed to express it, some governmental interests are weighty enough to justify restrictions on speech in a public forum—particularly restrictions, like this one, that limit but do not ban or punish a march, and indeed allow use of a significant segment of the street requested."[14]



Nonetheless, because of conflicting police testimony and evidence, the court concluded the threat of violence posed by the proposed Klan march was not beyond reasonable police control and that the restriction therefore violated the first amendment.[15]

A court-ordered weapons ban at a particular Klan rally site, based on the threat of violence and the stated intention and practice of the Klan to bring firearms to their rallies, may justify police conducting general magnetometer searches of persons and packages at that site without regard to standards of reasonable suspicion or probable cause. However, mass pat-down searches of persons entering the rally sites would likely violate the fourth amendment.[16]

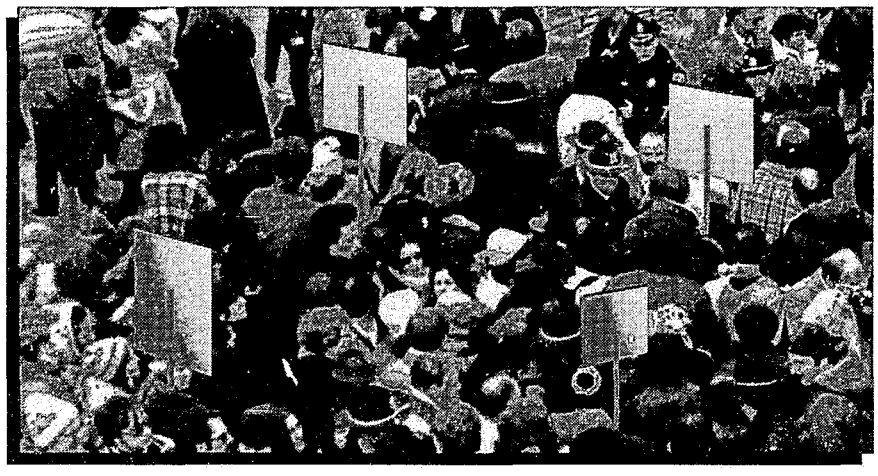
Supreme Court Rejects Permit Fee Based on Listener Reaction

To what extent can the government assess fees and costs for the issuance of a permit authorizing expressive activity in a public forum? In *Forsyth County, Georgia* v. *The Nationalist Movement*,[17] the Supreme Court ruled unconstitutional a parade ordinance that permitted a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order. The Court said that a $1,000 cap on the parade permit fee did not render the otherwise invalid ordinance constitutional. Specifically, the Court noted that there were no articulated standards, either in the ordinance or in the county's established practice, to guide the decision of how much to charge for police protection or administrative time—or even whether to charge at all.[18] Not only was there a possibility of censorship through such uncontrolled discretion, but the county's fee also often depended "...on the administrator's measure of the amount of hostility likely to be created by the speech based on its content."[19]

While those wishing to express views unpopular with bottle-throwers might have to pay more for their permit, the Court noted the county did not even charge for police protection for 4th of July parades, which drew large crowds that required the closing of streets.[20] The Court concluded the county imposed a fee only when it became necessary to provide security for parade participants from angry crowds opposing their message and that listener's reaction to speech is not a content-neutral basis for assessing a permit fee.[21]

Permissible Fees and Costs

The Supreme Court in *Forsyth County* did not decide whether only nominal charges are constitutionally permissible, but four Justices agreed in a dissenting opinion that the Constitution does not limit a parade permit fee to a nominal amount and permits a sliding fee to account for administrative and security costs.[22] In that regard, lower courts have upheld the practice of assessing permit fees in accordance with projected police expenses if certain conditions are met.



For example, a Federal district court upheld the Kansas City Police Department's policy of requiring parade sponsors to pay for the cost of traffic control.[23] The court concluded the department's extensive list of factors used to project associated police costs were content-neutral, with the exception of a "crowd control" factor, which the court said was unconstitutional and needed to be severed from the otherwise constitutional policy.[24]

Similarly, the U.S. Court of Appeals for the Sixth Circuit upheld a Columbus, Ohio, ordinance that required prepayment of an $85 fee for the cost of processing a parade permit application and prepayment of the cost for traffic control. The court ruled that the ordinance 1) did not permit speculation about the degree of violence a parade may provoke; 2) provided protection for the marchers without consideration of its cost; and 3) contained objective standards related to traffic control and not related to speculation about the potential for disturbances based on the parade's content.[25]

Precedential support for the assessment of costs also can be found in a California appellate court decision upholding portions of an ordinance that requires a parade permittee to reimburse the city for, and pay in advance, an estimate of "all city departmental service charges incurred in connection with or due to the permittee's activities under the permit." The ordinance also requires that "if city property is destroyed or damaged by reason of permittee's use, event or activity, the permittee shall reimburse the city for the actual replacement or repair cost of the destroyed or damaged property."[26]

The court said the fees correspond to the size of the parade and its impact on normal traffic and not the size of the crowd in attendance. Also, the departmental service charge and cleanup reimbursement requirements are textually tied to the activities of the permittee itself and does not purport to impose responsibility for the acts of others.[27]

It is constitutionally significant that in all the above cases upholding permit fees and costs, indigent groups unable to pay the fees were not precluded from engaging in expressive activity, because an alternative forum was available. For example, sidewalks were free for conducting a parade because traffic control was not affected and parks were available without cost for related speech activities.

Injunction-Based Restrictions

Injunction-based restrictions on expressive activity may be a viable

and operationally effective option for law enforcement to maintain public order. In *Madsen* v. *Women's Health Center, Inc.*,[28] the Supreme Court reviewed an injunction entered by a Florida State court that prohibited antiabortion protestors from demonstrating in certain places and in various ways outside a health clinic that performs abortions. The protestors were enjoined from blocking or interfering with public access to the clinic and from physically abusing persons entering or leaving the clinic.

However, the protestors continued to impede access to the clinic by congregating on the paved portion of the street leading to the clinic and by marching in front of the clinic's driveways.[29] As vehicles heading toward the clinic slowed to allow the protesters to move out of the way, "sidewalk counselors" would approach and attempt to give the vehicle's occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns. Protesters also picketed in front of clinic employees' residences.

Because of this conduct, the Florida court issued an amended injunction which, *inter alia*, excluded demonstrators from a 36-foot buffer zone around the clinic entrances and driveway and the private property to the north and west of the clinic. The injunction also restricted excessive noisemaking within the earshot of, and the use of "images observable" by, patients inside the clinic, prohibited protesters within a 300-foot zone around the clinic from approaching patients and potential patients who do not consent to talk, and created a 300-foot buffer zone around the residences of clinic staff.

The Supreme Court concluded that injunction-based restrictions must burden no more speech than necessary and that an injunction regulating a particular group's activities that express a particular viewpoint is not impermissibly content-based when premised on the group's past illegal or inappropriate actions.[30] Because all injunctions, by their very nature, apply to particular groups or individuals, the Court said the test for determining content-neutrality is whether the government's purpose in regulating the speech is without reference to its content.[31]

> ***"...a restriction based on the threat of violence could be constitutionally justified if that threat of violence is beyond reasonable control of the police."***

The Court held that injunctions carry greater risks of censorship and discriminatory application than generally applicable statutes and ordinances and that content-neutral injunctions must therefore be evaluated under a somewhat more stringent test to determine if "...the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[32] The Court then determined the constitutionality of the injunction's buffer zones, noise restrictions, ban on the display of signs and visual images, and restriction on residential picketing.

Buffer Zones

The Supreme Court upheld a 36-foot buffer zone around the Florida abortion clinic's entrances and driveway, finding it burdened no more speech than necessary to accomplish the governmental interest in protecting unfettered ingress to and egress from the clinic and because it ensured that traffic would not be blocked.[33] The Court concluded this buffer zone also was justified by the failure of the earlier injunction to accomplish its purpose of protecting access to the clinic.

Conversely, the Court said that a portion of the 36-foot buffer zone that extended to private property on the back and side of the clinic was unconstitutional because it burdened more speech than necessary to protect access to the clinic.[34] Because there was no evidence that the protestors had ever used the private property to obstruct access to the clinic, the Court found that this portion of the buffer zone did not serve a significant government interest.

The Supreme Court also held unconstitutional a buffer zone provision that ordered protestors to refrain from physically approaching any person seeking services of the clinic, unless such person indicates a desire to communicate in an area within 300 feet of the clinic. While

the stated purpose of this restriction was to prevent clinic patients and staff from being "stalked" or "shadowed" as they approached the clinic, the Court said a prohibition on *all* uninvited approaches, regardless of how peaceful the contact may be, burdens more speech than necessary to prevent intimidation and to ensure access to the clinic.[35] The Court found this ban on all uninvited approaches unconstitutional "...absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm."[36]

Using a similar rationale, the Supreme Court of New Jersey held an injunction provision creating a buffer zone was too broad-based on an insufficient history of threats and intimidation.[37] Rather than prohibiting all expressional activities on the sidewalk directly in front of the medical center, the court said the injunction should have allowed a limited, controlled form of expression near the entrance, while restricting the troublesome mass of protestors to a location across the street. The court said the injunction should give consideration to the right of protestors to make their presence known and to the role of sidewalk counseling in that process, while at the same time protecting against any harassment of the patients or others who wish to enter the clinic.

Nonetheless, a history of intimidation by a particular group may justify a restrictive buffer zone. For example, the California Supreme Court upheld an injunction provision creating a "clear zone" that effectively barred antiabortion protestors from the public sidewalk in front of a clinic by requiring that all picketing, demonstrating, or counseling take place on the public sidewalk directly across the street.[38] The court said the restriction was justified based on the group's history of intimidation and the fact that the first amendment does not guarantee the right to a captive audience.

> ***"Injunction-based restrictions on expressive activity may be a viable and operationally effective option for law enforcement to maintain public order."***

Noise Restrictions

The Supreme Court in *Madsen* upheld a portion of the injunction that restrained the protestors from singing, chanting, whistling, shouting, yelling, and using bullhorns, auto horns, or sound amplification equipment within earshot of the patients inside the clinic during the hours of 7:30 a.m. through noon on Mondays through Saturdays. Noting the importance of noise control around hospitals and medical facilities during surgery and recovery periods, the Court found the noise restriction burdened no more speech than necessary to ensure the health and well-being of the patients at the clinic. The Court noted that patients should not have to "...undertake Herculean efforts to escape the cacophony of political protests."[39]

Other courts have upheld disorderly conduct prosecutions for unreasonable noise based on the government's broad powers to protect citizens from unwelcome noise. This can extend to any situation in which individuals cannot escape bombardment of their sensibilities and which substantially threatens their privacy interests.[40]

Bans on the Display of Signs and Visual Images

The Supreme Court in *Madsen* ruled unconstitutional a provision in the injunction that prohibited protestors from using images observable to patients inside the clinic during the hours of 7:30 a.m. through noon on Mondays through Saturdays. The Court suggested the first amendment would not be violated by an injunction-based prohibition on the display of signs that could be interpreted as a threat or veiled threat to patients or their families. However, the *Madsen* injunction's broad prohibition on all "images observable" burdens more speech than necessary to achieve the purpose of limiting such threats.[41] If the purpose is to reduce the level of anxiety and hypertension suffered by patients who find the message expressed in the placards disagreeable, the Court distinguished the ban on signs from restrictions on noise by noting that "...it is much easier for the clinic to

pull its curtains than for a patient to stop up her ears."[42]

Restrictions on Residential Picketing

The Supreme Court in *Madsen* ruled unconstitutional a provision in the injunction that prohibited picketing within 300 feet of the residences of clinic staff. The Court said the protection of residential privacy and tranquility is a legitimate governmental interest of the highest order and affirmed its prior decision upholding the constitutionality of an ordinance that prohibited "focused picketing taking place solely in front of a particular residence."[43]

However, the Court found the 300-foot zone around residences burdened more speech than necessary because it banned general marching through residential neighborhoods or even walking a route in front of an entire block of houses.[44] The Court concluded that "...a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result."[45]

A Federal district court ruled an ordinance could be enforced to prohibit continuous picketing in front of a doctor's home but not to prevent picketing in the doctor's neighborhood, so long as the picketers did not picket in front of the doctor's home or the two homes on either side of the doctor's home.[46] The court noted sympathetically that police need bright-line standards to help them enforce such ordinances that raise difficult first amendment issues.

Conclusion

The Supreme Court has interpreted the first amendment as creating a "...profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[47] Law enforcement often has the responsibility of balancing the legitimate need to maintain public order with the important interest in protecting first amendment rights.

Because the legality of the various enforcement options discussed in this article depends on a complex and fact-specific analysis, law enforcement decisionmakers should obtain competent legal review of any proposed restriction on expressive activity. In that regard, a particular group's past violent or disruptive conduct should be carefully documented because it is relevant to this analysis. Finally, it is recommended that officers receive legal training on the basic principles of first amendment law before being assigned the difficult task of controlling public protest.✦

Endnotes

[1] *Boos* v. *Barry*, 485 U.S. 312, 322 (1988).

[2] *See Cox* v. *New Hampshire*, 319 U.S. 569, 574 (1941).

[3] *See United States* v. *Grace*, 461 U.S. 171, 177 (1983). *See also, Rubin* v. *City of Santa Monica*, 823 F.Supp. 709 (C.D. Calif. 1993) and *Paulsen* v. *Lehman*, 839 F.Supp. 147 (E.D.N.Y. 1993).

[4] *Heffron* v. *International Society for Krishna Consciousness Inc.*, 452 U.S. 640, 649 (1981).

[5] *See, e.g., Freedman* v. *Maryland*, 380 U.S. 51 (1965).

[6] *One World One Family Now* v. *City of Key West*, 852 F.Supp. 1005 (S.D. Fla. 1994).

[7] *Id.* at 1011.

[8] *Id.*

[9] *Id.* at 1012.

[10] 972 F.2d 365 (D.C. Cir. 1992).

[11] *Id.* at 372.

[12] *Id.*

[13] *Id.* at 373-74.

[14] *Id.* at 374-75.

[15] *Id.* at 375-76.

[16] *Wilkinson* v. *Forst*, 832 F.2d 1330 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 1593 (1988); *Wilkinson* v. *Forst*, 717 F. Supp. 49 (D. Conn. 1989).

[17] 112 S.Ct. 2395 (1992).

[18] *Id.* at 2403.

[19] *Id.*

[20] *Id.* at 2404 n.12.

[21] *Id.* at 2403.

[22] *Id.* at 2406 (Chief Justice Rehnquist dissenting).

[23] *Gay and Lesbian Services Network, Inc.* v. *Bishop*, 841 F.Supp. 295 (W.D. Mo. 1993).

[24] *Id.* at 296.

[25] *Stonewall Union* v. *City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 275.

[26] *Long Beach Lesbian & Gay Pride* v. *Long Beach*, 17 Cal.Rptr.2d 861 (Cal. App. 2 Dist. 1993).

[27] In *Pritchard* v. *Mackie*, 811 F.Supp. 665 (S.D. Fla. 1993), the court held that a requirement for the Klan to obtain a $1 million liability policy before it could receive a rally permit violated the first amendment.

[28] 114 S.Ct. 2516 (1994).

[29] Legal scholars disagree regarding the constitutionality of the recently enacted Freedom of Access to Clinic Entrances Act (FACC). *See, e.g.*, Paulsen and McConnell, "The Doubtful Constitutionality of the Clinic Access Bill," 1 Va.J.Soc.Pol'y & Law 261-289 (1994); and Tribe, "The Constitutionality of the Freedom of Access to Clinic Entrances Act of 1993," 1 Va.J.Soc.Pol'y & Law 291-308 (1994).

[30] 114 S.Ct. at 2523-24.

[31] *Id.*

[32] *Id.* at 2525.

[33] *Id.* at 2527.

[34] *Id.* at 2528.

[35] *Id.* at 2529. In *Sabelko* v. *City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994), the court ruled unconstitutional an ordinance that effectively rendered sidewalk counseling, whether peaceful or not, dependent on the subjective reaction of the person approached.

[36] *Id.*

[37] *Horizon Health Center* v. *Felicissimo*, 638 A.2d 1260 (Sup. Ct. N.J. 1994).

[38] *Planned Parenthood Shasta-Diablo, Inc.* v. *Williams*, 873 P.2d 1224 (Sup. Ct. Cal. 1994).

[39] 114 S. Ct. at 2528.

[40] *See, e.g., Ward* v. *Rock Against Racism*, 109 S. Ct. 2746 (1989) and *Price* v. *State*, 622 N.E.2d 954 (Sup. Ct. Ind. 1993).

[41] 114 S. Ct. at 2529.

[42] *Id.*

[43] *Id.* at 2529-30. *See also, Frisby* v. *Schultz*, 108 S.Ct. 2495 (1988).

[44] *Id.* at 2430.

[45] *Id.*

[46] *Vittitow* v. *City of Upper Arlington*, 830 F.Supp. 1077 (S.D. Ohio E.D. 1993).

[47] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.