Bulletin #02
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WHAT DO OFFICERS AND AGENCIES NEED TO KNOW?

Free speech is an essential part of an informed and engaged democracy, and subject to strong constitutional protections. The First Amendment's protections for freedom of speech limits the government's authority to restrict or punish speech or expressive conduct. The limits of government authority often depend on the nature of the location—called the "forum"—where the speech occurs. This bulletin provides information about the legal distinctions between different types of forums and the different ways that the government is able to regulate speech within them.

FIRST AMENDMENT | LOCATION-BASED RESTRICTIONS

The First Amendment provides strong protection to speech and expressive conduct. The relevant text of the First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has identified the freedom of speech as a "fundamental personal right[]" that "lies at the foundation of free government by free men."1

In light of the strong constitutional protections, the government cannot generally restrict the freedom of speech by either preventing it before the fact (called a "prior restraint") or punishing it after the fact. Like all rights, however, the First Amendment freedom of speech is subject to a number of limitations. The nature of those limitations often depends on the location in which the speech occurs.

The government's authority to regulate or restrict speech depends on the nature of the location where the speech occurs. Supreme Court caselaw, any given location—called a "forum" 2—is one of three things: a Public Forum, a Limited Public Forum (also known as a Designated Public Forum), or a Nonpublic Forum. This classification depends on how the government typically uses the space and whether the space is generally suited for people to express their views. 3

Importantly, the First Amendment limits the government's ability to regulate speech but does not impose any such restrictions on private property owners.4 Some states have extended free speech protections by passing laws that restrict the ability of private property owners to regulate speech on property that is open to the public, such as shopping malls, but South Carolina does not follow that approach.5

Traditional Public Forums

The government's authority to regulate free speech is most limited in a Traditional Public Forum. A Traditional Public Forum is a location that is customarily open to the public and historically used for public speech, such as public parks,6 including those near courthouses7 and state or local legislatures.8 Sidewalks, parks, and town squares are almost always Traditional Public Forums. Indoor locations, such as public library meeting rooms9 are also typically Traditional Public Forums.

Content-Based Restrictions. In a Traditional Public Forum, the government cannot impose restrictions based on the content of the speech or expressive conduct—that is, the subject matter or message being expressed—unless the restriction is "narrowly tailored to serve a compelling government interest."10 "Narrow tailoring" requires the restriction to be highly precise, with no broader effect. A "compelling government interest" requires the highest level of justification, such as preventing imminent threats to public safety (e.g., a riot).11 Any attempt to engage in content-based regulation must satisfy "strict scrutiny," the most demanding test in free speech jurisprudence.

Time, Place, and Manner Restrictions. The government may impose reasonable content-neutral restrictions on the time, place, and manner of speech or expression. A restriction is "reasonable" when it serves a significant government interest. 12 For example, the government may limit the duration of a protest (time) to mitigate the impact on local businesses, restrict the location (place) to ensure safe and orderly pedestrian traffic, 13 and prohibit soundamplification devices or excessive volume (manner) to limit disturbance in a residential area. 14 Time, place, and manner restrictions can all be used to serve the same purpose; for example, the government could prohibit the use of sound amplification devices (manner) in or near residential areas (place) during evening hours (time) to serve "'the government's interest in protecting citizens from unwelcome noise.'" 15

Any time, place, and manner restrictions must "leave open ample alternative[s]" for the speaker(s) to share their message.16 That means a time, place, or manner restriction must not altogether eliminate a speaker's ability to effectively communicate their message. The government is not required to ensure that the speaker is given the best possible opportunity to share their message, but the alternative must be both realistic and effective in allowing them to do so. For example, a city could prohibit private sound-amplification devices if it offered city-provided devices and technicians to control volume, 17 or it could prohibit sound amplification at night, or it could prohibit sound amplification entirely. The city likely could not, however, avoid neighborhood disruption by prohibiting all demonstrations.

Importantly, time, place, and manner restrictions must remain content and viewpoint neutral. The government is not permitted to base time, place, and manner restrictions based on the topic or subject matter (the content) or on the perspective or opinions (the viewpoint) being conveyed in a Traditional Public Form.

Licensing and Permit Systems. The First Amendment allows local governments to mandate license or permit requirements for demonstrations (e.g., parades or protests) in Traditional Public Forums. 18

However, the licensing or permitting system is subject to the previously discussed limitations: it must be content and viewpoint neutral, and any time, place, and manner restrictions must be reasonable and leave open ample alternatives.

Additionally, whichever government official or office reviews license or permit applications must base their decisions on "narrow, objective, and definite standards" 19 and must not have unbridled discretion to approve or deny permits. 20

The government is permitted to assess fees to cover "the cost of necessary and reasonable protection of persons participating in or observing" the activity. However, these fees may not be adjusted based on the government administrator's perception of how the speech will be received by listeners. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." 21 This means, in part, that while local governments can assess fees, it cannot assess a higher fee to those "wishing to express views unpopular" with the public.22

In short, licensing and permit systems are likely unconstitutional if they

• Give approving officials too much discretion; 23 or

• Impose more significant restrictions based on content, viewpoint, or anticipated hostility. 24

Limited (or Designated) Public Forums

A Limited (or Designated) Public Forum is a location that, while not traditionally used for public discourse, is purposefully opened for public expression. The government designates a Limited Public Forum by making a location that is not a Traditional Public Forum "generally accessible to all speakers."25 For example, if the government makes a public school auditorium or city hall meeting room available for community meetings, that location is likely a Limited Public Forum. The government is not required to create or maintain a Limited Public Forum, but if the government chooses to do so, it is limited in how it can regulate speech and expressive conduct in that location. Subject Matter Restrictions. Unlike Traditional Public Forums, the government can regulate the content—that is, the topic or subject matter of speech or expressive conduct—in a Limited Public Forum, but it must do so in a way that is reasonable and viewpoint neutral. Limitations are reasonable when they align with the forum's purpose. For example, if a school opens its auditorium for educational talks about public health, it could exclude speakers who want to present on unrelated topics (e.g., cryptocurrency). Limitations are viewpoint neutral when consistent restrictions are applied to different perspectives. For example, a city could not permit one group to use public space to hold religious events and prohibit other groups from using that space to hold other religious or anti-religious events, because doing so would be privileging one perspective (about a particular religion or belief) above others.

Speaker Restrictions. The government may limit who can speak based on the forum's intended purpose. As with subject matter restrictions, any restrictions based on speaker identity must be

reasonable and viewpoint neutral. Restrictions based on speaker identity are reasonable when they align with the forum's purpose. For example, if a school opens its auditorium for educational talks about public health, it could choose to only permit medical professionals and exclude others. More generally, a school may allow faculty, staff, and students to use the space while restricting individuals not immediately associated with the school. Restrictions based on speaker identity are viewpoint neutral when different speakers presenting different perspectives on the same topic are treated the same way. For example, if a school allows student groups to use the space to discuss careers (content), it could not permit speakers that promote college attendance or a military career but prohibit speakers that were critical of college education or the military (viewpoint).

Content Neutral Restrictions on Time, Place, and Manner. As with Traditional Public Forums, the government may impose reasonable time, place, and manner restrictions in Limited Public Forums. Licensing and Permit Systems. As with Traditional Public Forums, governments may adopt license or permit requirements that are reasonable and viewpoint neutral. A license or permit for a Limited Public Forum may impose subject matter restrictions, speaker restrictions, and content-neutral time, place, and manner restrictions as discussed above.

Non-Public Forums

A Non-Public Forum is a government-controlled location that is not open for public expression. In such locations, the government retains the most authority to "reserve [the space] for its intended purpose." 26 Government places of business, such as courthouse lobbies, 27 as well as the offices of individual public officials (e.g., the Chief's office) are typically Non-Public Forums. In a Non-Public Forum, the government may restrict or prohibit speech so long as the restrictions or prohibition is reasonable and not an attempt to suppress speech based on the speaker's viewpoint. 28 For example, the government may constitutionally prohibit solicitation inside a public airport terminal (a Non-Public Forum) so long as it imposes that restriction on all solicitation regardless of message or speaker.29 Similarly, a county's "takehome flyer" program that allowed non-profit groups to distribute flyers through public schools was a Non-Public Forum, and the county could impose reasonable restrictions on content, but it could not prohibit a religious group from participating because doing so constituted viewpoint discrimination.30

Implications for Policy & Practice

Understanding the First Amendment's protections—and the government's limited authority to restrict speech in different types of forums—is essential for both agencies and individual officers. Agencies and officers should recognize that their role is not to evaluate the content or purpose of speech, but to uphold the law in a way that respects constitutional rights, preserves public safety, and maintains public trust. Implications for Agencies. Law enforcement agencies should adopt clear, constitutionally sound policies and training that guide officers in responding to public demonstrations and other forms of expressive activity, including:

• If the agency is the permitting authority, set objective, content-neutral criteria for permit and licensing systems, including clearly defined roles and responsibilities to avoid unbridled discretion.

• Prohibit enforcement decisions based on the anticipated public reaction to a message or speaker, and make clear that unpopular or offensive speech remains constitutionally protected;

• Ensure training and supervision on the three types of locations— Traditional Public Forums, Limited Public Forums, and Non-Public Forums—as well as on content-neutrality and time, place, and manner restrictions, including the requirement that such restrictions must be narrowly tailored, serve a significant government interest, and leave open ample alternative channels of communication; and

Agencies should also conduct regular legal reviews of protest-related policies and practices, in consultation with legal counsel, to ensure ongoing compliance with evolving First Amendment jurisprudence. Implications for Officers. Individual officers must remain neutral and professional in the face of speech that may be offensive, provocative, or contrary to personal beliefs. Officers should:

- Be aware of how the First Amendment applies to otherwise applicable state statutes and city ordinances. Even offensive speech may be constitutionally protected, and thus not violate otherwise applicable law (e.g., state "disorderly conduct" statutes or city ordinances) in certain situations;

• Avoid content- or viewpoint-based enforcement, including actions that treat speakers differently based on the message or viewpoint; and

• Document thoroughly, especially when restricting speech, arresting individuals, or imposing time, place, or manner restrictions, so that the agency can demonstrate constitutional compliance if challenged.

Discussion Questions

1. How should officers determine whether a particular location is a Traditional Public Forum, a Limited Public Forum, or a Non-Public Forum? Why does that classification matter?

2. Why must time, place, and manner restrictions "leave open ample alternative channels of communication?" What are some examples? What type of documentation could you use to demonstrate that time-, place-, and manner restrictions were narrowly tailored and left open ample alternatives if the agency's actions are later challenged in court?

3. What role does officer neutrality play in maintaining constitutional compliance during demonstrations or protests? How can agencies reinforce that expectation through training and supervision?

4. What is the difference between “content neutral” and “viewpoint neutral?” What practical steps can officers take on-scene to ensure that any crowd-management decisions (e.g., rerouting a march, limiting sound amplification) are genuinely content and viewpoint neutral?

5. What policies or training practices could your agency adopt—or improve—to better support officers in making legally sound, real-time decisions about free speech and protest activity?

6. What are some examples of Limited Public Forums that schools or other governmental entities have designated in your jurisdiction? What restrictions, if any, on subject matter or speaker have been put into place?

7. Under your disorderly conduct or breach-of-peace statute, where is the line between protected offensive speech and unlawful conduct?

