PERMITTING DEMONSTRATIONS: GUIDING PRINCIPLES

ACLU Virginia

Acknowledgement

The American Civil Liberties Union (ACLU-VA) of Virginia is a private, non-profit organization that promotes civil liberties and civil rights for everyone in the Commonwealth through public education, litigation and advocacy with the goal of securing freedom and equality for all. In addition to the litigation for which the ACLU-VA has been known, we also educate the public, inform the media, lobby legislators, organize grassroots activists, and disseminate information about our constitutional freedoms through our membership and volunteer chapters.

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Executive summary

Protestors have the right to express themselves, gather peacefully, and ask the government to address their concerns. The government sets the rules regulating protests and demonstrations. The regulations cannot, however, favor one side over another and must be necessary to protect public safety and order. This paper summarizes the legal principles that should guide a governmental entity in permitting protests and demonstrations. Listed below are the principles recommended by the ACLU-VA to guide permitting decisions.

- No permitting decisions will be made based on the content of the speech (including anticipated audience reaction to the content of the speech) or the identity of the speaker.
- No permits will be required for individuals or small groups (under 20 people), or for spontaneous demonstrations held in response to current events.
- Permit regulations will specify the number of days in advance of demonstrations that permit applications must be submitted, which will be no longer than 6 days.
- Permit regulations will specify the number of days within which decisions on permit applications will be made, which will be no longer than 3 days.
- Permit regulations will specify that all permit applications will be granted unless specific, content-neutral, and narrowly defined exceptions apply. Examples of such exceptions are: another person has reserved the same space for the same time; or the demonstration will interfere with pedestrian passage or traffic.
- Permit regulations will require decisions on permit applications to be in writing, and denials of applications to state the reasons for the denial, and the time frame and method of appealing the denial.
- Permit regulations may specify that a permit may be denied when there is a well-founded belief based on concrete evidence that the permit applicant will engage in violent or unlawful conduct.
- Permit regulations shall provide that a permit will not be revoked without notice and an opportunity to contest the revocation; notice shall be given promptly to provide the applicant enough time to seek an alternative venue or to challenge the revocation.
- Permits may include reasonable, content-neutral limitations on the size of events based solely on administrative considerations, such as the capacity of the available space and legitimate law enforcement needs, but discretion to impose such limits may not be unfettered.
- Any other restrictions on free speech will be reasonable, content-neutral, and narrowly tailored to legitimate government interests, and will allow ample alternative means of communication. Fees may be imposed only for the costs directly caused by the speaker, not for the costs imposed by the reaction to the speaker, and only if they don't practically preclude the First Amendment activity.

Introduction

Nowhere is the right to free speech more protected than in the streets, parks, and sidewalks where controversial protests traditionally occur. The courts have established standards for the regulation of speech in traditional public forums, but translating these standards into rules that can be applied by government officials is difficult. The purpose of this paper is to provide an overview of specific types of regulations that are and are not permissible. This paper also makes recommendations to public entities considering implementing permitting rules.

Part I: Scope

This paper provides an overview of speech restrictions in traditional public forums. It assumes that (1) speech is occurring in a traditional public forum and (2) the speech falls within First Amendment protections.

This paper begins with a very brief overview of the nature of traditional public forums and the boundaries of the First Amendment. Further, it focuses on the state of the law in Virginia. As such, it relies primarily upon Virginia state law, Supreme Court cases, and Fourth Circuit decisions. Persuasive authority from other jurisdictions is also cited, both to expand on certain points and to provide guidance where no binding authority exists in Virginia. Finally, this paper provides recommendations to any governmental entity seeking to implement permitting procedures.

Traditional public forums

Traditional public forums are held in trust by the government for public use, including expressive activities. The archetypal examples of traditional public forums are streets, parks, and sidewalks. In addition, other venues can qualify as traditional public forums – for example, a school auditorium routinely rented for a nominal fee on a first come, first served basis was held to be a traditional public forum.[1] "No clear-cut test has emerged for determining when a traditional public forum exists. In the absence of any widespread agreement upon how to determine the nature of a forum, courts consider a jumble of overlapping factors."[2] Whether something that is not a street, park, or sidewalk is a traditional public forum is a fact-intensive question that will not be extensively addressed in this paper.

That being said, some discussion of the Lee Monument Emergency Regulations issued by the Department of Social Services is relevant. The Office of the Attorney General of the Commonwealth of Virginia recently argued in approving the regulations that the Lee Monument did not fall within the category of a traditional public forum.[3] The Lee Monument area is a statue located in the middle of a grassy field encircled by a sidewalk and a large traffic circle in Downtown Richmond. The space has been used for various community events for years. The Attorney General's opinion rests largely on the fact that the space has poor pedestrian access. Under clear Fourth Circuit precedent, however, the Lee Monument is a traditional public forum. A traditional public forum is one that (1) has "physical characteristics of a traditional public forum"; (2) has been used and has the purpose of a traditional public forum; and (3)

1 *Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973).

2 *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003). For a thorough discussion of how courts have analyzed the question, see ARTICLE: Dazed and Confused: Explaining Judicial Determinations of Traditional Public Forum Status, 82 Tul. L. Rev. 929.

3 Stephen A. Cobb, Memorandum: Department of General Services ("DGS") – Emergency Regulations to Implement Executive Orders 67 & 68 (McAuliffe 2017) to govern any public use of the Lee Monument.

Part I: Scope

"by history and tradition has been open and used for expressive activity."[4] Alternatively, a forum might be a traditional public forum "because it is merely a combination of the three prototypical examples of traditional public fora – streets, sidewalks, and parks."[5]

The Lee Monument, a prominent public area in Richmond that has been historically used for expressive activity and contains elements of streets, parks, and sidewalks has all the elements of a traditional public forum. The mere fact that the Lee Monument is not accessible by crosswalks does not override this, and neither the Governor's nor Attorney General's Office has provided any authority to support the assertion that the Lee Monument is not a traditional public forum.

Does the First Amendment apply?

Almost any demonstration or protest is speech protected under the First Amendment. Certainly, some categories of statements fall far outside the First Amendment – the First Amendment, for example, does not protect stock tips[6] – but these clear cases are not relevant to the regulation of protests. Rather, the government must consider the boundary issues of whether highly controversial speech rises to the level of a true threat or some other unprotected category, or is merely highly unpopular or hateful speech that enjoys full Constitutional protections. The Supreme Court has consistently affirmed the principle that the government may not regulate or discriminate against disagreeable speech: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate."[7] In the context of demonstrations, fighting words, obscenity, true threats, and the incitement to lawlessness can fall outside of the First Amendment.[8] These doctrines, however, are very narrow, and the government should be wary to apply them to restrict speech.

Fighting words

As a rule, speech may not be restricted simply because it is likely to cause a violent reaction from a crowd.[9] At least historically, "fighting words" – words that incite violence – were not protected under the First Amendment.[10] Whether this exclusion survives today is questionable; the Supreme Court has not upheld any conviction for fighting words since it decided *Chaplinsky* sixty years ago.[11] Because of its

4 *Warren v. Fairfax Cty.*, 196 F.3d 186, 189-90 (4th Cir. 1999) (Sitting en banc, the Fourth Circuit held that a thirty-meter by two-hundred-meter grassy area was not merely a median strip, but rather was a traditional public forum).

5 *Id.* at 190.

6 *U.S. S.E.C. v. Pirate Inv'r LLC*, 580 F.3d 233, 255 (4th Cir. 2009).

7 *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quotations and citations omitted).

8 Defamation and the appropriation of likeness can also fall outside of the First Amendment, but these are private torts rather than a basis for regulation.

9 See, e.g *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 554 (4th Cir. 2010).

10 *Chaplinsky v. State of New Hampshire*, 315 U.S. 766 (1942).

11 Erwin Chemerinsky, Constitutional Law 968 (2d ed. 2002).

uncertain status and very narrow nature, the government would be ill-advised to rely upon the fighting words doctrine in all but the most unusual circumstances.

Obscenity

The government may also regulate obscenity without raising First Amendment concerns, but obscenity for purposes of the First Amendment is extremely narrow. The Supreme Court established a three-factor test as to whether speech is obscene, considering community norms, whether the dominant theme appeals only to the prurient interest, and whether there is any social value to the speech.[12] In practice, only child pornography falls clearly within the obscene speech exclusion.[13]

True threats

The First Amendment does not require the government to permit speech "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[14] Unless the speaker actually calls for violent, immediate action against some identifiable individuals that is likely to occur, however, speech generally does not rise to the level of a true threat. True threats at public demonstrations can be regulated in two main contexts. First, the police have the authority to arrest a speaker for threating another person without violating First Amendment rights.[15] Second, the government might refuse to provide a permit to a speaker when the government can show the speaker will engage in true threats or violence.[16] But the government has a high burden to show that a speaker is likely to issue specific, unlawful threats; an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression."[17] The government needs concrete evidence of some actual harm.[18]

Illegal advocacy

Generally, a speaker may advocate for lawless behavior.[19] Only where a speaker intends to cause serious, imminent lawless action and the lawless action is likely to occur may speech be restrained.[20] For example, if a speaker who led a crowd of a thousand people in Capital Square told the crowd to storm the Virginia State Capitol, the police could intervene. But if the same speaker in Capitol Square implored the same crowd to overthrow the federal government in Washington, the lawless activity would not be sufficiently imminent or likely to allow for the government to restrict the speech.

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12 *Miller v. California*, 413 U.S. 15 (1973).
13 *New York v. Ferber*, 458 U.S. 747 (1982).
14 *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citations omitted).
15 VA Code Ann. § 18.2-60.
16 *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart*, 934 F.2d 318 (4th Cir. 1991).
17 *Tinker v. Des Moines Independent School District*, 393 U.S., at 508.
18 *See Healy v. James*, 408 U.S. 169, 191-92 (1972).
19 *See United States v. Williams*, 553 U.S. 285, 298–99 (2008); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 450 (1974).
20 *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Part II: Content-based regulation

It is often said the government "has no power to restrict a message because of its ideas, its subject matter, or its content."[21]

In general, the government cannot deny, condition, or revoke a permit based on its viewpoint, content[22], or anticipated response.[23] Restrictions on the content of protected speech are not, however, categorically banned, but rather subject to strict scrutiny. Regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[24]For example, narrowly tailored laws to regulate campaign finance[25] or to prevent the financing of foreign terrorist organizations[26] are content-based speech restrictions that have been upheld. But special concerns related to national security or preserving election integrity fall outside the government interests in controlling disfavored protests.

21 *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

22 *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977).

23 *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Bible Believers v. Wayne Cty.*, Mich., 805 F.3d 228, 246 (6th Cir. 2015).

24 *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

25 *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, (2015).

26 *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

Part III: Content neutral time/ place/manner restrictions

Content neutral speech regulations are subject to intermediate scrutiny; restrictions are upheld if they're "narrowly tailored to serve a compelling government interest, and leave open ample alternative channels of communication."[27] Permissible, content neutral restrictions of speech relate to the time, place, or manner of the speech. Courts do not look only to whether a regulation is content neutral on its face; rather, any regulation that in its substance or application restricts speech on the basis of its content will be subject to strict scrutiny.[28]

When can a permit be required?

Demonstrations often impose significant burdens on compelling government interests – for example, a march in the street might impede traffic flow – and permitting schemes can be used to balance the government's interests against the rights of speakers. Moreover, competing First Amendment activities might be incompatible – two groups cannot demonstrate in the same exact place at the same time – and the government needs some way to allocate public forums. But where the First Amendment activity is unlikely to interfere with other interests, the requirement to obtain a permit is an unnecessary and impermissible prior restraint. And where the need to obtain a permit effectively prevents a certain type of speech, like a spontaneous demonstration in response to some news, the requirement to obtain a permit might also be an impermissible burden on speech rights.

Small group exception

Individual speakers and small groups have a right to speak without first seeking a permit.[29] In contrast, the government may require larger groups to seek permits to engage in demonstrations on public property.[30] There is no simple numerical floor below which the government may never require a permit.[31] Rather, the public body that adopts a permitting policy, ordinance, or regulation should consider when permits are required to keep streets, parks, and sidewalks safe, orderly, and accessible.[32] By balancing

27 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

28 *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2226 (2015).

29 *See Kunz v. People of State of New York*, 340 U.S. 290 (1951) (A requirement for a lone preacher to get a permit to preach on public streets was an unconstitutional prior restraint.).

30 *See Cox v. City of Charleston*, SC, 416 F.3d 281, 284-288 (4th Cir. 2005).

31 *Id.* For example, the Fourth Circuit upheld a park permitting requirement for groups of 75 or more people, but declined to say whether the outcome would be the same for a smaller group. *United States v. Johnson*, 159 F.3d 892, 895-96 (4th Cir.1998) (A permit requirement for 75 or more people to use a portion of a National Park was a reasonable restriction on speech.).

32 *Id.*

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all relevant factors, like the size of the venue, the amount of pedestrian and vehicle traffic that needs to pass, and the ingress and egress needs of surrounding buildings, courts will determine whether a permit requirement is permissible. For example, relatively large groups of people have a right to protest without a permit on a sidewalk so long as they allow sufficient room for people to pass, whereas the government may require permits for smaller groups in a small, crowded park.[33]

As the Fourth Circuit has emphasized, permits are not the only way to protect government interests like traffic flow and sanitation; the government can regulate conduct without first putting a prior restraint on speech in the form of permitting requirements.[34] And while the government has greater latitude to impose permit requirements on small demonstrations in confined places, the fact that a public space is confined does not, by itself, allow the government to move the speech to an alternative venue.[35] If a local or state government prefers to simply use a bright-line rule than apply different small group exemptions to every public forum within its jurisdiction, **the ACLU-VA recommends that any protest smaller than 20 people should be exempt from permit requirements.**

Spontaneous demonstration exception

Historically, reasonable permit requirements posed little burden to large events, and thus were not considered an unconstitutional restraint on speech rights. Organizing a large demonstration takes significant time and planning. The requirement to get a permit, so long as the permitting process is reasonable and the decision prompt, imposes little to no additional burden on speech. But sometimes, an event happens and a large number of people converge on a public place in response.[36] In these cases, the burden posed by a permit requirement is far higher than in an ordinary demonstration which can be planned in advance, while the government interest remains the same. **Therefore, the ACLU-VA recommends that spontaneous speakers be exempted from permitting requirements, at least where it would be impossible for a speaker to seek a permit *ex ante*.**

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33 *See Forsyth County, Ga. v. Nat'list Movement*, 505 U.S. 123, 130 (1992); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039, 1040-43 (9th Cir. 2006); *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F. 3d 600, 608 (6th Cir. 2005).

34 *Cox v. City of Charleston*, SC, 416 F.3d 281 (4th Cir. 2005).

35 *See Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 523 (D.C. Cir. 2010).

36 *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) (While as a general rule demonstrations can be planned in advance, and thus a permit requirement, properly applied, is not overly burdensome "when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."); See also *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1038 (9th Cir. 2009); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006).

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When can a permit be denied because of prior misconduct by the speaker?

The denial of a permit for past misconduct of the speaker cannot be justified as a content neutral time, place, or manner regulation. Rather, the government must show that the speaker is likely to engage in the type of unprotected speech or conduct outlined in Part I.[37] When the government cannot satisfy this high burden, the mechanism to regulate unlawful conduct is to punish it after it occurs rather than to ban speech *ex ante*.[38]

When can the government revoke or alter a permit on content neutral grounds?

There are no special rules as to when a permit can be revoked or altered as opposed to denied in the first instance. Demonstration permits on public property are not property rights subject to special protections. Rather, the government must have a valid justification for any restriction on speech whenever it imposes that restriction, and must, through its administrative process create a record that can be reviewed judicially.[39] Further, where a permit is altered or revoked because of the content of the speech, heightened procedures are required, as discussed in Part IV of this paper.

How to prevent violence between adverse speakers without violating the First Amendment.

Police crowd control practices generally try to separate adverse speakers, like protestors and counter protestors, to physically prevent violence. The government has an interest in keeping these groups as far away from each other as possible; the police are better able to preserve order at lower risks to themselves if groups are well segregated from one another and unable to interact. Further, separation provides the police flexibility and time to respond, reducing the risk of violence to the police. Speakers, however, have a countervailing speech interest in being able to interact with those they disagree; a counter protest loses much of its meaning if the government moves it out of sight of a protest. The government must balance its compelling interests against the speech rights of the public using intermediate scrutiny.

The government may generally physically separate a group of protestors from counter protestors.[40] For example, the police may use physical barriers or separate entrances for different groups. In practice, the mechanisms to separate counter protestors from protestors will vary by the size of the demonstrations and the nature of the venue. The government may not, however, move the demonstrations so far apart

37 In theory, the government could deny a permit to speak because of the content of the speech if its reason survived strict scrutiny. For example, the government might be able to prevent a speaker from holding a nuclear non-proliferation rally if it could show the speaker would share classified nuclear weapons secrets at the rally that sufficiently endanger national security.

38 *See Collins v. Jordan*, 110 F.3d 1363, 1372 & n. 19 (9th Circ. 1996).

39 *Niemotko v. State of Md.*, 340 U.S. 268, 271(1951).

40 *See, e.g., Grider v. Abramson*, 180 F.3d 739, 742–43 (6th Cir. 1999).

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that the groups are no longer within sight and sound of each other.[41] Nor can the police prevent the general public from seeing and hearing a protest.[42] People, including the press, have a right to enter traditional public forums, and may choose to interact with either the protestors or counter protestors.[43]

When can the police order dispersal?

Shutting down a protest through a dispersal order must be law enforcement's last resort. In a balance between free speech and the state's power to maintain the peace, "the scale is heavily weighted in favor of the First Amendment."[44] Speech cannot be banned or interrupted because of the potential for disturbance or disorder.[45] Where a protest is largely peaceable, but some members within the protest engage in isolated instances of unlawful conduct, the police should arrest those individuals without infringing upon the speech rights of those who have done nothing unlawful.[46] Only where lesser means of control are not practical, and the threat is both serious and imminent, should the police consider dispersal.

Where a disturbance involves an angry or violent crowd acting against a disfavored speaker, the police need to be wary of the unconstitutional heckler's veto.[47] The police cannot simply treat the crowd as a whole and disperse it for being violent. Rather best practices dictate that the police should protect the unpopular speaker and take appropriate action against the hecklers.

If dispersal is the only option available to police to preserve order, the constitution demands limitations on how the police can proceed in that dispersal. First, the police must provide a clear order to protestors that they must disperse.[48] Second, the police should provide a reasonable means to comply with that order by ensuring that the crowd has unobstructed exit paths and a reasonable time to comply.[49] Only if the individuals remain after the police have given appropriate notice to the crowd to disperse and a reasonable opportunity to comply may the police use force to compel dispersal.[50]

Finally, the police generally should allow journalists to observe an entire protest, including its dispersal, with as little interference as possible.[51] The First Amendment explicitly protects freedom of

41 *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990).
42 *Id.*
43 *Id.*
44 *Bible Believers v. Wayne Cty.*, Mich., 805 F.3d 228, 252 (6th Cir. 2015) (citing Terminiello, 337 U.S. at 4).
45 *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939).
46 *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).
47 *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134, (1992).
48 *City of Chicago v. Morales*, 527 U.S. 41, 58-59 (1999).
49 *Id.*
50 *See Wright v. State of Ga.*, 373 U.S. 284, 293 (1963); *Morales*, 527 U.S. at 59.
51 *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F3d 583, 595 (7th Cir 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir 2011).

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speech and of the press. The ACLU-VA acknowledges this may pose practical problems; reporters may be mingled in a crowd, and in the age of bloggers and social media, defining "the press" is difficult. But, at a minimum, if a credentialed reporter is observing a protest passively, the police should not interfere.

Virginia law provides law enforcement the authority to disperse riots, as defined under Va. Code § 18.2-405 or unlawful assemblies as defined under Va. Code § 18.2-406. The current unlawful assembly statute was written after the courts blocked its predecessor.[52] It has been determined to be facially valid.[53] But for the unlawful assembly statute to be constitutional as applied, the demonstrators must be engaged in unlawful, violent acts as defined under the statute, and, where possible, the police must only use force against those engaging in violence.

When people are "unlawfully or riotously assembled, the sheriff, the police officials of the county, city or town, and any assigned militia, or any of them . . . [shall] command the persons in the name of the Commonwealth to disperse. If upon such command the persons unlawfully assembled do not disperse immediately, such sheriff, officer or militia may use such force as is reasonably necessary to disperse them and to arrest those who fail or refuse to disperse."[54] The police make a factual determinations required regarding what constitutes a riot under §18.2-405 and an unlawful assembly under §18.2-406 in order to issue such an order. In both cases, the appropriate authority must find that there is "serious" jeopardy to public safety, peace or order.

Blanket bans on speech

The Governor of Virginia temporarily banned all demonstrations at the Lee Monument in Richmond, Virginia[55] expressing a generalized concern about public safety. Because Executive Order 67 was a prior restraint on all speech on a particular piece of state property that has long been used as a public forum, the Order is arguably content neutral, although it might be content-based because it only places burdens on speech associated with the monument, like white supremacist speech, while placing little burden on speakers who have no interest in the monument. Regardless, the temporary ban on all speech was likely invalid, because it cannot survive even intermediate scrutiny. The government can restrict the time, place, and manner of speech in a public forum, not ban it all together.[56] Nor can the government simply declare

52 *Owens v. Virginia*, 211 Va. 633, 179 S.E.2d 477 (1971).

53 *United Steelworkers of Am. v. Dalton*, 544 F. Supp. 282, 288-89 (E.D. Va. 1982). The rioting statute has been favorably cited multiple times by the Fourth Circuit and Virginia courts, although it does not appear its validity has ever been challenged.

54 Va. Code § 18.2-411.

55 Executive Order 67 (2017).

56 The governor argues that the monument is not a public forum, which would help support the regulation. The ACLU-VA believes that designating the public green space and sidewalks as anything but a public forum has no basis in law.

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a space is not a park and thus not a public forum; whether something is a public forum is an objective test.[57]

Virginia has a statute, Va. Code § 15.2-925, providing local governments the authority to pass emergency ordinances to "regulate, restrict or prohibit any assembly of persons or the movement of persons or vehicles if there exists an imminent threat of any civil commotion or disturbance in the nature of a riot which constitutes a clear and present danger." This statute, however, is probably unconstitutional on its face. The statute was written in 1968, and modeled after the "clear and present danger" test promulgated by the Supreme Court in *Schenck v. United States*, 249 U.S. 47 (1919). After the statute was written, however, the Supreme Court decided *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Brandenburg* abrogated the clear and present danger test with a heightened test discussed in greater detail in part II of this paper.[58] A mere finding that an upcoming demonstration is a clear and present danger does not provide the government the authority to restrict the speech. Moreover, the statute prescribes no standards to determine whether an upcoming event is a clear and present danger, further weakening the constitutional footing of the statute.[59] While no cases cite to § 15.2-925 such that it has not been explicitly overturned, relying upon § 15.2-925 could expose localities to liability.

What can the government do to restrict weapons at demonstrations?

An important question to consider: what can the government do to reconcile the First Amendment rights of citizens to speak and assemble in public with the Second Amendment and statutory rights of citizens to bear arms?[60] Forty-five states, including Virginia, allow the open carrying of firearms in public. First Amendment jurisprudence is based on the fundamental idea that the government should not restrict the open marketplace of ideas. But when heavily armed people descend upon the public square, intimidation and the threat of violence raise serious concerns about the underlying assumptions that our First Amendment law is built upon, although there is no persuasive legal authority on point yet.

The Fourth Circuit has held that, while strict scrutiny applies to the keeping of weapons in the home for self-defense, citing *DC v. Heller*, intermediate scrutiny applies to the right to keep and bear arms outside the home.[61]

The bounds of the Second Amendment, however, are largely immaterial in the Commonwealth of Virginia because of permissive state gun laws. Virginia provides a right for both the open and concealed

57 *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677(1998).

58 For a more detailed discussion of the clear and present danger test, *see Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 Calif. L. Rev. 1159.

59 *See Forsyth County, Ga. v. Nat'list Movement*, 505 U.S. 123, 130 (1992).

60 This paper does not address the question of whether carrying a gun itself is symbolic expression protected by the First Amendment.

61 *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) (upholding a restriction on the carrying of loaded arms in national parks).

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carry of legal firearms in public. And the ability of localities to regulate weapons at all is broadly limited by Virginia's strict application of Dillon's rule and the lack of any significant legislative delegation of firearm regulatory authority in the Virginia Code.[62] In fact, the Virginia legislature has explicitly curtailed local authority to regulate firearms.[63] Certain localities have a right to exclude high-capacity semi-automatic weapons from public streets, parks, and sidewalks, but no locality has the explicit authority to exclude all firearms from public forums, and most localities have essentially no authority to regulate firearms at all.[64] But even in those localities where large magazine semi-automatic weapons are prohibited in public areas, this restriction exempts large classes of people, most notably people with concealed handgun permits.[65]

The Virginia Supreme Court, in *Digiacinto v. Rector & Visitors of George Mason University,* has upheld a restriction on guns by GMU, which prohibits the carrying of guns on university property.[66]

The Virginia legislature could pass legislation to restrict firearms in public forums, which would provide a legal basis to exclude heavily armed people from assembling at public demonstrations. In the alternative, the Virginia General Assembly could delegate greater authority to regulate guns in public spaces to local governments. But under current law, local governments appear to lack the authority to regulate firearms at public demonstrations.

The same statutory restrictions do not apply to the state, however, and the Governor has asserted authority to regulate weapons at demonstrations in an Emergency Regulation and NOIRA applicable to state property at the Lee Monument in Richmond, Virginia.[67] **The ACLU of Virginia believes that the weapons restrictions in the Emergency Regulation outlined in 1 VAC 30-150-30(C)(1) are reasonable time, place, manner rules that do not raise constitutional questions under the First or Second Amendments to the United States Constitution.**

62 *City of Richmond v. Confrere Club of Richmond,* Virginia, Inc., 239 Va. 77, 79–80, 387 S.E.2d 471, 473 (1990) (citations omitted).

63 Va. Code. § 15.2-915. (no locality "shall take any administrative action, governing the purchase, possession, transfer, ownership, carrying, storage or transporting of firearms, ammunition, or components or combination thereof other than those expressly authorized by statute."); Va. Code. § 15.2-915.1 (localities generally cannot sue the firearms industry); Va. Code § 15.2-912.2 (localities cannot prohibit the transportation or carrying of loaded shotguns in cars, streets, or highways).

64 Large magazine semi-automatic weapons are prohibited in public areas in the Cities of Alexandria, Chesapeake, Fairfax, Falls Church, Newport News, Norfolk, Richmond, or Virginia Beach or in the Counties of Arlington, Fairfax, Henrico, Loudoun, or Prince William. Va. Code. § 18.2-287.4.

65 Va. Code. § 18.2-287.4.

66 *Digiacinto v. Rector & Visitors of George Mason Univ.,* 281 Va. 127, 704 S.E.2d 365 (2011) (upholding 8 Va. Admin. Code § 35-60-20).

67 1VAC-30-150 (2017).

Part III: Content neutral time/ place/manner restrictions

Noise restrictions

Reasonable noise restrictions, like those regulating the use of sound amplifying equipment, are permissible in public parks.[68] Noise ordinances that use general prohibitory language would be unconstitutionally vague.[69] Rather, the regulation of noise at demonstrations should be through clear rules or standards. For example, an ordinance prohibiting the use of sound amplifying equipment at demonstrations without the permission of the chief of police, without any prescribed standards as to when the chief of police should grant permission, is unconstitutional.[70]

Not only must noise ordinances be applied according to clear and content neutral standards, but also they must not be overly burdensome on speech. As an example, a noise ordinance that banned any music that could be heard thirty feet from the musician was too strict.[71] There is no clear rule as to how loud a speaker can be, but factors to consider include the time of day or night or whether the speech occurs in a residential area.

Finally, the government may not use noise ordinances as a means to intentionally hide a protest from onlookers.[72] While content neutral nuisance-like restrictions are allowed in order to balance the speech interests of the protestors with the interests in peace and privacy of neighbors, they cannot be enforced in a way designed to hide some message.

Fees, bonds, and insurance requirements on protestors

The Supreme Court has recognized that fees may be imposed on protestors.[73] These fees, however are subject to significant constitutional limits related both to the procedure by which the fees are assessed and the types of costs for which the state can be reimbursed.[74] Any fee regimes imposed must meet stringent procedural requirements. There must be "narrowly, drawn, reasonable, and definite standards" for fees on protestors, and these must be fairly applied without regard to the content of the speech.[75] Nor may the government deviate from these standards for more favored speakers. For example, the government may not selectively waive fees for the Girl Scouts but apply them to the Klan. Even small fees, when imposed

68 *See Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 490 (4th Cir. 1983); *Asquith v. City of Beaufort*, 139 F.3d 408 (4th Cir. 1998).

69 *Id.* at 489.

70 *Asquith v. City of Beaufort*, 139 F.3d 408, 412 (4th Cir. 1998) (citing *Saia v. New York*, 334 U.S. 558, (1948)).

71 *Hassay v. Mayor*, 955 F. Supp. 2d 505, 522 (D. Md. 2013).

72 *Saia v. New York*, 334 US 558, 561 (1948); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990).

73 *Cox*, 312 U.S. at 577, 61 S.Ct. 762.

74 *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

75 *Id.* at 132 (1992) (quoting *Niemotko*, 340 U.S., at 271, 71 S.Ct., at 327) (internal quotations omitted).

improperly, can be unconstitutional restrictions on speech. For example, a fee schedule capped at $1000 was declared unconstitutional because of improper procedure.[76]

Moreover, the state can only impose fees that reimburse the government for costs directly caused by the speaker. For example, the state may impose fees for cleanup and traffic control. The fees, however, may not consider the costs imposed by the reaction that such speech will likely have on counterdemonstrators.[77] For the government to impose a higher fee on a group because its controversial speech requires the government to deploy more police is an impermissible content-based restriction. Finally, the government may not impose liability on a group for the actions, however damaging, of a few.[78]

Insurance or security deposits to cover the costs of First Amendment events can be permissible fees. Insurance or security bond schemes, however, can fail for one of two reasons. First, they fail if the process provides too much discretion to officials.[79] Second, if a type of First Amendment activity is practically precluded because of a bond requirement, the law cannot be applied. Many groups have insufficient funds to post large bonds or pay insurance fees, or may be unable to gain insurance in the market because insurance companies do not want to be associated with unpopular groups. In these cases, a bond or security deposit would likely be an impermissible burden on speech rights.

76 *Forsyth Cty., Ga. v. Nationalist Movement,* 505 U.S. 123 (1992).

77 *Id.* at 136 (1992)

78 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

79 *See Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011, 1042 (9th Cir. 2009). See also *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006); cf. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

Part III: Content neutral time/ place/manner restrictions

Miscellaneous restrictions on speech regulations

Flag/Sign Size restrictions: Reasonable restrictions on flag size or the size of signs are permissible.[80] However, a complete ban on signs is highly suspect.[81]

Leafleting: The government cannot require a permit in order to leaflet.[82]

Residency requirements: Residence cannot be a requisite for the right to speak in a traditional public forum.[83]

Picketing: Statutes restricting picketing in traditional public forums are generally invalid.[84] They are, however, permissible if the picketing regulation acts as a mere notice to the government.[85] Further, picketing in front of a single residence can be prohibited, but picketing a neighborhood, for example, by marching on residential sidewalks with signs, is protected.[86]

Loitering: Loitering statutes are generally too vague to be permissible, and thus cannot be used to regulate speakers in public venues.[87]

Retaliation: The government may not retaliate against protestors for their prior speech.[88]

80 *Am. Legion Post 7 of Durham, N.C. v. City of Durham,* 239 F.3d 601, 611 (4th Cir. 2001).

81 *City of Ladue v. Gilleo,* 512 U.S. 43 (1994) (an ordinance banning yard sings, even assuming it was content neutral, violates the First Amendment).

82 *Lloyd Corp., Ltd. v. Tanner,* 407 U.S. 551, 564 (1972); see also *Saieg v. City of Dearborn,* 641 F.3d 727, 741 (6th Cir. 2011).

83 *Warren v. Fairfax Cty.,* 196 F.3d 186, 190 (4th Cir. 1999).

84 *Forsyth Cty., Ga. v. Nationalist Movement,* 505 U.S. 123, 130-33; *Shuttlesworth v. City of Birmingham, Ala.,* 394 U.S. 147, 150-51 (1969).

85 *Green v. City Of Raleigh,* 523 F.3d 293, 301 (4th Cir. 2008).

86 *Frisby v. Schultz,* 487 U.S. 474 (1988).

87 *Lytle v. Doyle,* 326 F.3d 463, 470 (4th Cir. 2003).

88 *Ford v. City of Yakima,* 706 F3d 1188, 1196 (9th Cir 2013); *Skoog v. County of Clackamas,* 469 F3d 1221, 1232 (9th Cir 2006).

Part IV: Permitting procedures

Where a permit application is denied, modified, or revoked, the government must always articulate specific reasons for its action and give notice and an opportunity to be heard when it revokes a permit.[89] The reason the government must do so is that the burden is on the government to show that speech in a traditional public forum can be restricted, and the courts need a record to review if challenged. If the government fails to articulate reasons for restricting speech through a permitting process, a court will likely enjoin the restriction's enforcement.

Permit timing

There is no specific rule as to the timing requirement for permits, but any permit application period is subject to intermediate scrutiny.[90] **The ACLU-VA recommends that permit ordinances generally only require no more than six days' notice for expressive activity.** Permit ordinances requiring no more than a week's notice, subject to the spontaneous event exemption, are almost certainly valid, whereas significantly longer notice requirements are likely invalid.[91] The Fourth Circuit has no direct precedent on the issue, but the Virginia Supreme Court struck an ordinance requiring between 30 and 60 days' notice for a parade permit.[92]

89 *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180, 183 (1968).

90 Only truly content-neutral permitting notice periods are granted intermediate scrutiny. If, for example, the government had a formal or informal policy of waiving a notice period for favored groups, strict scrutiny would be applied to the notice period for a permit.

91 *See N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984).

92 *York v. City of Danville*, 207 Va. 665, 152 S.E.2d 259 (1967).

Part IV: Permitting procedures

Prior restraint doctrine and permit decisions

In the Fourth Circuit, permitting regimes for demonstrations are always considered prior restraints.[93] Where speech is restricted through a prior restraint, the state can be obligated to provide procedures for expedited judicial review and judicial pre-approval under *Freedman v Maryland*.[94] These procedures, however, only are required where the government uses a permitting regime to censor speech based on content.[95] If the restriction is content neutral, the government need only provide adequate process to enable judicial review, without any prescribed administrative procedure.[96] This structure creates a major problem; the proper procedure to be applied can only be determined after the nature of a restriction – often, the only contested issue – is determined.

Content-based restrictions on protected speech in traditional public forums will almost never be upheld, so the government will almost always categorize a speech restriction as content neutral. Therefore, the government can assert the authority to deny, revoke, or alter permits through an administrative process without expedited judicial approval. If the restriction is in fact content based, the lack of expedited review violates the speaker's procedural due process rights. But in this instance the speaker's substantive due process rights were almost certainly also violated, and the significance of the procedural violation is limited.

As a matter of policy, the ACLU-VA recommends that governments seek judicial pre-approval through *Freedman v. Maryland* procedures when modifying or revoking permits in response to security concerns at controversial protests. While we advocate such pre-approval because of the way it protects speech rights, Freedman procedures offer benefits to government regulators. Notably, by prospectively seeking approval to revoke, modify, or deny a permit, governments can limit liability, particularly by avoiding any civil rights violation that could allow speakers to recover attorney's fees under 42 U.S.C § 1988.

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93 Following *Thomas v. Chicago*, 534 U.S. 316 (2002), a circuit split developed as to whether content neutral permitting regimes are prior restraints at all. The First Circuit found that content neutral restrictions are not prior restraints at all. *See Sullivan v. City of Augusta*, 511 F.3d 16, 32 (1st Cir. 2007). In contrast, the Fourth Circuit considers them to be prior restraints. See *Covenant Media Of SC, LLC v. City Of N. Charleston*, 493 F.3d 421, 431 (4th Cir. 2007). Whether such restrictions are prior restraints is largely immaterial, however, because in both cases Freedman applies to cases of content-based restrictions and Thomas applies to content neutral restrictions.

94 *See Freedman v. Maryland*, 380 U.S. 51, 85 (1965); *Nat'l Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973).

95 *Covenant Media Of SC, LLC v. City Of N. Charleston*, 493 F.3d 421, 431–32 (4th Cir. 2007) (content neutral prior restraints on speech are not subject to Freedman review, but rather controlled by *Thomas v. Chicago Park District*, 534 U.S. 316, 321–23 (2002)).

96 *Thomas v. Chicago Park District*, 534 U.S. 316, 321–23 (2002) (citing *Niemotko v. State of Md.*, 340 U.S. 268, 271 (1951)).

Conclusion and recommendations

Governments should clearly enumerate rules for permitting protests and demonstrations. Limitations on speech raise First Amendment concerns and expose governments to litigation. This paper summarizes the legal issues to be considered in developing such rules and makes recommendations that will help ensure that government action to regulate or limit speech is taken consistent with constitutional requirements. Following are principles that the ACLU-VA recommends that public officials apply in developing and promulgating rules and policies governing demonstrations and protests in traditional public forums. In this case, as in so many others, the less government regulation the better, and state and local rules that recognize the right to speak and petition the government without unnecessary limits and requirements will best serve the people's interest in constitutional governance and government's interest in serving its people.

GUIDING PRINCIPLES FOR PERMITTING PROTESTS AND DEMONSTRATIONS:

1. No permitting decisions will be made based on the content of the speech (including anticipated audience reaction to the content of the speech) or the identity of the speaker.
2. No permits will be required for individuals or small groups (under 20 people) or for spontaneous demonstrations held in response to current events.
3. Permit regulations will specify the number of days in advance of demonstrations that permit applications must be submitted, which will be no longer than 6 days.
4. Permit regulations will specify the number of days within which decisions on permit applications will be made, which will be no longer than 3 days.
5. Permit regulations will specify that all permit applications will be granted unless specific, content-neutral, and narrowly defined exceptions apply. Examples of such exceptions are: another person has reserved the same space for the same time; or the demonstration will interfere with pedestrian passage or traffic.
6. Permit regulations will require decisions on permit applications to be in writing, and denials of applications to state the reasons for the denial, and the time frame and method of appealing the denial.
7. Permit regulations may specify that a permit may be denied when there is a well-founded belief based on concrete evidence that the permit applicant will engage in violent or unlawful conduct.
8. Permit regulations shall provide that a permit will not be revoked without notice and an opportunity to contest the revocation; notice shall be given promptly to provide the applicant enough time to seek an alternative venue or to challenge the revocation.
9. Permits may include reasonable, content-neutral limitations on the size of events based solely on administrative considerations such as the capacity of the available space and legitimate law enforcement needs, but discretion to impose such limits may not be unfettered.
10. Any other restrictions on free speech will be reasonable, content-neutral, and narrowly tailored to legitimate government interests, and will allow ample alternative means of communication. Fees may be imposed only for the costs directly caused by the speaker, not for the costs imposed by the reaction to the speaker, and only if they don't practically preclude the First Amendment activity.

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