

INAUGUARAL PARADE REGULATIONS CONSTITUTIONAL CHALLENGE

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In the case of *A.N.S.W.E.R. Coalition v. Jewell*, 153 F. Supp. 3d 395; 2016 U.S. Dist. LEXIS 10027 (Dist. D.C. 1/28/2016), the federal district court considered a constitutional challenge to National Park Service (NPS) regulations which restricted the areas open to expressive activity during the Presidential Inaugural Parade in Washington, D.C.

Plaintiff A.N.S.W.E.R. (Act Now to Stop War and End Racism) Coalition ("ANSWER") is an unincorporated grassroots organization that engages in political organizing and activism in opposition to war and racism. Every four years since 2005, ANSWER has organized or attempted to organize a mass demonstration along Pennsylvania Avenue or in Freedom Plaza to engage in political dissent during the Presidential Inaugural Parade.

The Department of the Interior has the authority to issue and implement, through NPS, rules and regulations that oversee the use of federal grounds within the National Park System. See 54 U.S.C. §§ 100101, 100751. Pursuant to this authority, NPS has promulgated regulations for a permitting system that allows the use of National Park System land around the national capital region for special events and demonstrations.

The Secretary of the Interior has additional statutory authority under the Presidential Inaugural Ceremonies Act ("PICA") to "grant to the Inaugural Committee a permit to use [federal] reservations or grounds during the inaugural period, including a reasonable time before and after the inaugural period." 36 U.S.C. § 503(a).

NPS regulations, as amended, grant the Presidential Inaugural Committee ("PIC") exclusive access to some of these same areas in connection with events relating to the Presidential Inauguration. See 36 C.F.R. § 7.96(g)(4)(iii) (2012)

ANSWER claimed "the NPS policy and practice of granting to PIC exclusive use of the public space abutting the Inaugural Parade route is unconstitutional." In so doing, ANSWER argued the First Amendment required "the NPS make the sidewalks abutting the Inaugural Parade generally open for the public for use."

PARADE ROUTE EXCLUSIVE USE

In pertinent part, the NPS regulations at issue "reserved for priority use" in connection with Presidential Inaugural Ceremonies portions of "Pennsylvania Avenue, National Historic Park and Sherman Park" for the "exclusive use of the Presidential Inaugural Committee on Inaugural Day" for ticketed bleachers viewing and access areas. According to NPS, these regulations granted PIC additional priority and exclusive use of approximately fourteen percent of Pennsylvania Avenue along the Inaugural Parade route.

ANSWER alleged enforcement of the regulatory set-aside in the NPS regulations constituted "identity-based, viewpoint-based and/or content-based discrimination" in violation of the First

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Amendment. Moreover, ANSWER contended there was "no compelling purpose served by favoring PIC or the Administration and disfavoring others."

TRADITIONAL FREE SPEECH FORUM

As cited by the federal district court, the First Amendment provides, in relevant part, that "Congress shall make no law abridging the freedom of speech or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I

In this particular instance, the court found ANSWER's proposed demonstration activities were "expressive activities involving 'speech' protected by the First Amendment." Further, the court noted the "general concepts of First Amendment freedoms are given added impetus as to speech and peaceful demonstrations in Washington, D.C., by the clause of the Constitution which assures citizens of the right to assemble peaceably at the seat of government and present grievances."

In so doing, the federal district court found "Freedom Plaza and the sidewalks of Pennsylvania Avenue are quintessential public forums" that "occupy a privileged position in the hierarchy of First Amendment jurisprudence." In these quintessential public forums, the court acknowledged "the government may not prohibit all communicative or expressive activity."

A traditional public forum is one that has traditionally been available for public expression, assembly, and debate, such as public streets and parks. These places have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places is a part of the privileges, immunities, rights, and liberties of citizens.

The federal district court, however, noted that government "may regulate speech in these forums through the promulgation of rules and regulations." Specifically, the court found government "may require permits for the exercise of expressive rights." In so doing, such governmental regulation of speech must be "content-neutral and does not favor one person's or cause's views over another."

The guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum. As a general rule, in such a forum the government may not selectively shield the public from some kinds of speech on the ground that they are more offensive than others.

CONTENT NEUTRAL REGULATIONS

According to the federal district court, "the government may enforce reasonable time, place and manner restrictions" if such restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

In determining content neutrality, the court would determine "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." On the other hand, the court noted government regulation of expressive activity is content neutral "so long as it is justified without reference to the content of the regulated speech." Moreover, the federal district court found the "narrowly tailored" test would require "a *real nexus* between the challenged regulation and the significant governmental interest sought to be served by the regulation."

It is not enough that a regulation is facially reasonable, or that a governmental interest is significant; rather, it must be shown that a reasonable regulation is narrowly tailored *to substantially serve* a significant governmental interest. To put it another way, there must be a close fit between ends and means.

In so doing, the federal district court noted government "must afford all points of view an equal opportunity to be heard." In particular, the court found the First Amendment would not allow government to "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

NARROW OBJECTIVE DEFINITE STANDARDS

In order to "regulate competing uses of public forums," the federal district court found "the government may impose a permit requirement on those wishing to hold a march, parade, or rally, or otherwise use the parks and streets for expressive activity." As noted by the court, "any permitting scheme must "not delegate overly broad licensing discretion to a government official."

Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.

Specifically, the court found the arbitrary application of a government regulation has "the potential for becoming a means of suppressing a particular point of view." To address this risk the court found any permitting scheme or license "must contain narrow, objective, and definite standards to guide the licensing authority" in order to comply with the First Amendment.

Moreover, the federal district court found the government "bears the burden of justifying its permitting restrictions." In particular, the court noted the NPS permitting regulations governing federal parklands within the capital city must be "enforced uniformly and without discrimination." Further, "when faced with disputes about the rights of protesters on Inauguration Day" every four years, the court found "NPS may not reserve all of the sidewalks on Pennsylvania Avenue for PIC."

Accordingly, the issue before the federal district court was "how much, if any, of the Pennsylvania Avenue sidewalks and Freedom Plaza can constitutionally be reserved for the exclusive use of PIC and its ticketed guests on Inauguration Day." In so doing, the court would also consider "how much must be left open so that any peaceful demonstrators may be granted a permit regardless of viewpoint or content."

GOVERNMENT OR PRIVATE SPEECH?

To resolve this First Amendment issue, the court would determine whether PIC's speech in the set-aside areas at the Inaugural Parade government speech or private speech. According to the court, "[w]hen the government speaks for itself and is not regulating the speech of others," the court acknowledged the government "may discriminate based on viewpoint." Conversely, the court noted "the government may not discriminate based on viewpoint when it regulates private speech."

Further, the federal district court acknowledged "the First Amendment's Free Speech Clause does not apply to the government as communicator."

When the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says... When the State is the speaker, it may make content-based choices. The government may favor its own expression and is free to establish venues for the exclusive expression of its own viewpoint.

In this particular instance, the court found "PIC is not a governmental entity," but a "privately funded, non-profit, non-governmental, partisan organization that represents the interests of the President-Elect." That being said, the federal district court noted PIC's involvement in the Inaugural Parade "still may constitute government speech."

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider.

Under the circumstances, the federal district court found "PIC's speech constitutes government speech." Moreover, the court found "the regulatory set-aside of 16% of the parade route for the government, and the restriction for all others to 84% of the route, does not discriminate among private speakers based on content or viewpoint."

GOVERNMENT SPEECH FACTORS

In determining "whether PIC's speech constitutes government speech," the federal district court would examine the following three factors:

(1) the history of the speech at issue; (2) a reasonable observer's perception of the speaker; and (3) control and final authority over the content of the message.

In the opinion of the court, factors one and two weighed in favor of finding "PIC's speech constitutes government speech":

First, since the founding of this nation, the United States government has used the Presidential Inauguration Ceremony and its attendant celebrations to "speak to the public."...

Second, the Inauguration Ceremony and Parade are "closely identified in the public mind with" the United States government... A reasonable and fully

informed observer would understand such expression to be government speech, as distinct from private speech.

According to the federal district court, the third factor, i.e., control and final authority over the content of the message, was "not so cut-and-dried." In particular, the court found "no direct evidence in the record as to the extent to which, if any, the government retains control and final authority over PIC's expressive activities — such as the signs, flags, or banners displayed — within the set-aside areas at the Inaugural Parade." Moreover, the court found "PIC ultimately is in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony." Specifically, the court found the Presidential Inaugural Committee "organizes, plans, and executes most of the inaugural celebration activities, including the inaugural parade and even is responsible for choosing the participants."

On the other hand, the federal district court noted "PIC is controlled by the President-Elect, who becomes the Chief Executive of the United States government upon taking the oath-of-office at noon on Inauguration Day — hours before the Inaugural Parade begins and ANSWER and others wish to protest in the set-aside areas of Freedom Plaza and the seven-block stretch of Pennsylvania Avenue." Further, while "PIC is in charge of the Parade," the court noted "the United States government contributes significant public funds, in addition to the private funding raised by PIC."

Applying these three government speech factors to the circumstances of this particular case, the federal district court concluded "PIC's speech constitutes government speech."

Although the final, and perhaps most important, factor — control over content — arguably weighs to some extent against finding government speech, the first two factors weigh strongly in favor. The Inaugural Parade has long served as a very public platform for the speech of the Administration of the new President — he or she, not PIC, ultimately "sets the overall message to be communicated."

Further, in the opinion of the court, "reasonable observers would readily identify the Parade and the activities surrounding it, including the official viewing stands for the President's ticketed guests, as representing the viewpoint of the United States government."

PRIVATE SPEECH RIGHTS?

Having found PIC's speech to be government speech, the federal district court still had to consider the implications of the regulatory set-aside on the free speech rights of private parties, like ANSWER. While "PIC's speech itself *is not* subject to First Amendment scrutiny," the court acknowledged "the restriction of the expressive activities of ANSWER and all other private persons and entities to limited portions of the parade route and Freedom Plaza *is*."

According to the federal district court, the regulatory set-aside would be valid under the First Amendment if it satisfied the following four criteria:

- (1) it is within the constitutional power of the government;
- (2) it furthers an important or substantial government interest;
- (3) the governmental interest is unrelated to the suppression of free expression; and
- (4) the incidental restriction

on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

In this particular instance, the federal district court noted "ANSWER has made no argument challenging the government's constitutional power." Further, the court found "the restriction is content-neutral." As a result, the only issues remaining for consideration were the following:

(1) does the regulatory set-aside further an important or substantial government interest; (2) is the restriction on First Amendment freedoms substantially no greater than necessary to further that interest; and (3) are there ample alternative channels available for communication?

SUBSTANTIAL INTEREST NARROWLY TAILORED

As described by the federal district court, "a regulation is narrowly tailored when it does not burden substantially more speech than is necessary to further the government's interests." Further, the court noted a "narrowly tailored regulation need not be the least restrictive or least intrusive means of serving the government's content-neutral interests." On the contrary, the court found a regulation is valid "if a substantial portion of the burden it imposes furthers the Government's interest, even though a less intrusive alternative might also exist."

NPS argued that "PIC is recognized by statute as the committee appointed by the President-elect to be in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony." Accordingly, NPS contended the government "has a significant interest in assisting PIC in meeting its statutory duties to plan inauguration ceremonies and activities."

As cited by the federal district court, Congress expressly placed PIC "in charge of the Presidential inaugural ceremony and functions and activities connected with the ceremony." 36 U.S.C. § 501(1) Accordingly, the federal district court agreed with NPS that "the government has a significant and important interest in planning and executing the Inaugural Parade."

In the opinion of the federal district court, "the government's interest is undoubtedly significant — the Inaugural Parade is an event followed worldwide that celebrates "the observance of the inauguration of the Chief Executive of the United States." Moreover, the court noted that "Inauguration Day has been recognized by Congress as a federal holiday."

Further, the federal district court found "the regulation is narrowly tailored to serve that interest." Specifically, the court found the "modest restriction of the space available to the general public is narrowly tailored and cannot be said to burden 'substantially more speech than is necessary' to further the government's interest

To further the government's interest in PIC fulfilling that statutory mandate, NPS has reserved approximately 16% of the parade route for PIC's exclusive use for facilities directly related to effective execution of the Parade. The reserved spaces are used to provide reasonable viewing areas for the President's ticketed guests — a substantial source of PIC's private fundraising — facilities for the media outlets from across the globe that cover the Inaugural Ceremony and Parade, and portable toilets for the public.

AMPLE COMMUNICATION ALTERNATIVES

Most significantly, the federal district court found "the regulatory set-aside reserves only 16% of the Inaugural Parade route, leaving the vast majority of the Pennsylvania Avenue sidewalks and portions of Freedom Plaza open to ANSWER and the general public." As noted by the court, in past inaugurations, ANSWER had been granted "use of several different spaces, including John Marshall Park and a small portion of Freedom Plaza." In particular, the court noted that "ANSWER has engaged in expressive activity at every Inaugural Parade since 2005" and ANSWER has "touted its demonstrations as a success."

Moreover, the court found no case law support for "the proposition that ANSWER is entitled to protest at the specific location that it believes will be most effective."

The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. ANSWER's argument that there is "no other suitable or alternative space along the parade route for its intended rally" is unpersuasive.

Having found "ANSWER and the general public retain access to 84% of the parade route for their expressive activities," the federal district court concluded that "the regulatory set-aside provides ample alternative channels for ANSWER's communication at the Inaugural Parade."

CONCLUSION

Having found the challenged NPS regulations to be consistent with the free speech and assembly requirements of the First Amendment, the federal district court granted summary judgment in favor of defendant NPS.

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