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REGULATING CONSTITUTIONALLY PROTECTED SYMBOLIC SPEECH IN PARKS

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Before recessing in July, the United States Supreme Court handed down an opinion which held that burning the American flag was symbolic speech protected by the First Amendment. This decision created a firestorm of public protest and calls for an amendment to the Constitution prohibiting desecration of the flag. Although certainly less controversial, the Supreme Court in 1984 issued a similar decision regarding symbolic speech in public park areas.

In the *Clark* decision described below, the Supreme Court had also held that symbolic speech in public parks is protected by the First Amendment. On the other hand, the Court acknowledged that governmental entities may place reasonable time, place, and manner restrictions on the exercise of free speech, including symbolic speech. Further, such governmental regulation may even prohibit certain activity which might otherwise constitute protected speech, as long as the restrictions are content neutral (i.e. regulating behavior rather than speech; the medium, rather than the message.) For example, a ban on *any* open burning in a public park would conceivably be a content neutral regulation which would include symbolic flag burning in public parks. Similarly, in *Clark*, the Court indicated that the National Park Service (NPS) could have constitutionally banned the erection of *any* dwelling structure in the parks. In so doing, NPS would have effectively precluded the construction of a tent city symbolizing the plight of the homeless in America.

REASONABLE CONTENT NEUTRAL REGULATION?

In the case of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 82 L.Ed.2d 221, 104 S.Ct. 3065 (1984), plaintiff Community for Creative Non-Violence (CCNV) argued that National Park Service regulations which prohibited camping in conjunction with a proposed demonstration were unconstitutional. (The named defendant/appellant, William Clark, was then Secretary of the Interior.) The facts of the case were as follows:

> The network of National Parks includes the National Memorial-core parks, Lafayette Park and the Mall, which are set in the heart of Washington, D.C., and which are unique resources that the Federal Government holds in trust for the American people. Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors... The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns, and other greenery. It is bordered by the Smithsonian Institution and the National Gallery of Art...
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> Under the regulations involved in this case, camping in National Parks is permitted only in campgrounds designated for that purpose. 36 CFR § 50.27(a) (1983). No such campgrounds have ever been designated in Lafayette Park or the Mall. Camping is defined as "the use of park land for living accommodation purposes such as sleeping

> activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or... other structure... for sleeping or doing any digging or earth breaking or carrying on cooking activities."
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> Theses activities, the regulation provides, "constitute camping when it reasonably appears, in light of all circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging."
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> Demonstrations for the airing of views or grievances are permitted in the Memorial-core parks, but for the most part only by Park Service permits. Temporary structures may be erected for demonstration purposes but may not be used for camping.
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> In 1982, the Park Service issued a renewable permit to CCNV to conduct a winter-time demonstration in Lafayette Park and the Mall for the purpose of demonstrating the plight of the homeless. The permit authorized the erection of two symbolic tent cities: 20 tents in Lafayette Park that would accommodate 50 people and 40 tents int Mall with a capacity of up to 100. The Park Service, however, relying on the above regulations, specifically denied CCNV's request that demonstrators be permitted to sleep in the symbolic tents.

CCNV alleged that "the regulations were unconstitutionally vague, had been discriminatorily applied, and could not be applied to prevent sleeping in tents without violating the First Amendment." The federal district court granted summary judgment to the Park Service. The federal appeals court, however, found that "application of the regulations so as to prevent sleeping in tents would infringe the demonstrators' First Amendment right of free expression." The Supreme Court granted review of this decision.

In the opinion of the Court, agreed with the appeals court that "overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment."

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of this information.
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> It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.

The Park Service maintained that "the regulation forbidding sleeping is defensible either as a time, place,

or manner restriction or as a regulation of symbolic conduct." The Supreme Court agreed.

> That sleeping like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban any less a limitation on the manner of demonstrating, for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid... [The Park Service] has established areas for camping and forbids it elsewhere, including Lafayette Park and the Mal. Considered as such, we have very little trouble concluding that the Park Service may prohibit overnight sleeping in the parks involved here.

Further, the Supreme Court found that the "requirement that the regulation be content neutral is clearly satisfied."

> [I]t is not disputed here that the prohibition on camping, and on sleeping specifically, is content neutral and is not being applied because of disagreement with the message presented. Neither was the regulation faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways. The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. CCNV does not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.

In addition, the Court found a substantial governmental interest under the circumstances of this case.

> It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to millions of people who wish to see and enjoy them by their presence. To permit camping - using these areas as living accommodations - would be totally inimical to these purposes, as would be readily by those who have frequented the National Parks across the country and observed the unfortunate consequences of the activities of those who refuse to confine their camping to designated areas...
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> [W]e seriously doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people. Furthermore, although we have assumed for present purposes that the sleeping ban in this case would have an expressive element, it is evident that it major value to this demonstration would be facilitative. Without a permit to sleep, it would be difficult to get the poor and homeless to participate or to be present at all. This much is apparent from the permit application filed by CCNV: "Without the incentive of sleeping space or a hot meal, the homeless would not come to the site." The sleeping ban, if enforced, would thus effectively limit the nature, extent, and duration of the demonstration and to that extent ease the pressure on the parks.

As noted above, easing pressure on the parks is a legitimate governmental interest. According to the

Court, "the validity of this regulation need not be judged solely by reference to the demonstration at hand." Further, the Court found that "the regulation responds precisely to the substantive problems which legitimately concern the Government."

> Absent the prohibition on sleeping, there would be other groups who would demand permission to deliver an asserted message by camping in Lafayette Park. Some of them would surely have as credible a claim in this regard as does CCNV, and the denial of permits to still others would present difficult problems for the Park Service. With the prohibition, however, as is evident in the case before us, at least some around-the-clock demonstrations lasting for days on end will not materialize, others will be limited in size and duration, and the purposes of the regulation will thus be materially served. Perhaps these purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas. But the Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.

As a result, the Court found that "the prohibition against camping, with its ban on sleeping overnight" was "a reasonable time, place, or manner regulation that withstands constitutional scrutiny."

> Surely the regulation is not unconstitutional on its face. None of its provisions appears unrelated to the ends that it was designed to serve. Nor is it any less valid when applied to prevent camping in Memorial-core parks by those who wish to demonstrate and deliver a message to the public and the central Government. Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by non-demonstrators. In neither case must the Government tolerate it. All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace. This is no more than a reaffirmation that reasonable time, place, or manner restrictions on expression are constitutionally acceptable...
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> [T]here is a substantial Government interest in conserving park property, an interest that is plainly served by, and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties. That interest is unrelated to suppression of expression.

Having found that the challenged Park Service regulations in this case to be valid time, place, or manner restrictions on CCNV's constitutional rights, the Supreme Court reversed the judgment of the appeals court that the challenged regulations violated the demonstrators' First Amendment rights.