
REMAPPING DEBATE

Asking "Why" and "Why Not"

Demonstrators beware: you won't be seen or heard

Original Reporting | By Mike Alberti | Civil liberties, Law

May 16, 2012 — This weekend, Chicago will host the NATO summit. In late August, the Republican National Convention will take place in Tampa, Florida; the week after the GOP Convention, Charlotte, North Carolina will host the Democrats. All three gatherings have been designated "National Special Security Events" by the Department of Homeland Security.

"These are not policies based on the premise that free speech is a cherished value that needs to be defended," said Mara Verheyden-Hilliard of the Partnership for Civil Justice Fund.

All three events are also expected to draw large numbers of demonstrators. Along with local and federal law enforcement agencies, municipal officials in each city are working to impose a variety of restrictions on where, when, and how demonstrators will be able to exercise their First Amendment rights of free speech and assembly. According to legal scholars, one category of restrictions has mushroomed in importance in the last decade. Known as "spatial tactics," these restrictions literally divide the city into some sections where demonstrators will be allowed to gather and march and others from which they will be barred from doing so. In some cases, the tactics also impose other legal constraints on demonstrators within certain parts of the city, such as prohibiting them from carrying certain items, or changing the process through which they may apply for permits.

The use of spatial tactics — such as exclusion zones and euphemistically-titled "free speech zones" have been the subjects of numerous lawsuits by groups such as the American Civil Liberties Union. Broadly, however, many of these tactics have survived constitutional challenge.

But even if, strictly speaking, some of the tactics *are* constitutional, many legal scholars, civil libertarians, and good-government advocates argue that they are inconsistent with the proper goal of public policy: welcoming and encouraging free speech.

"These are not policies based on the premise that free speech is a cherished value that needs to be defended," said Mara Verheyden-Hilliard, executive director of the Partnership for Civil Justice Fund and the co-chair of the National Lawyer's Guild Mass Defense Committee. "They start from the assumption that First Amendment activities will be criminal activities and need to be quarantined."

The restrictions

The restrictions being put in place vary in each city, but they all involve a complicated demarcation of the city into “exclusion zones” — where certain items and activity will be prohibited. In Charlotte and Tampa, they also involve the use of so-called “free speech zones,” or limited areas where people are allowed to demonstrate.

In all three cities, the first level of spatial restrictions begins with the security perimeter that the United States Secret Service will set up around the site of the event, sometimes called the “hard security zone.” These perimeters are generally fenced off and always very tightly policed. While the Secret Service will not announce the dimensions of the security perimeters for the political conventions until late summer, in the case of the NATO Summit in Chicago, demonstrators [will be kept at least two blocks away](#) from the site.

The second level of spatial restriction consists of a “soft” security zone, a much larger area of the city where a significant police presence will be in place; certain items, including such seemingly-innocuous items as lengths of string, will be prohibited, and the normal routine for granting permits will be altered.

The “Miami model,” forerunner of the current restrictions

The municipal ordinance [currently being considered in Tampa](#) to establish an “Event Zone” specifically for the GOP Convention bears a striking resemblance to the [ordinance passed in Charlotte in January](#) that allows the city manager to establish an “Extraordinary Event” zone. Both ordinances ban a wide range of items from being carried by protesters. Both place specific restrictions on the length, thickness, and weight of poles to be used to carry signs, and restrict permissible pole materials as well. Ironically, water guns and “super soakers” are banned, although [actual firearms, regulated by gun-friendly state law, are not](#). (Charlotte’s restrictions are found in Section 15-313 of Article XIV of the municipal code; Tampa’s are found in Section 7 of the proposed ordinance.)

Officials in both cities acknowledged that the measures are based on previous ordinances passed in other cities hosting large events and political conventions. Though various cities have banned some items in specified places for decades, the model for the current legislation is thought to be an [ordinance passed in 2003 in Miami](#), in preparation for the negotiations of the Free Trade Area of the Americas. The list of items banned in that ordinance, along with the tactics used to police the protests there, has since been called the “Miami model.”

“That list has essentially expanded at each large event,” said Kris Hermes of the National Lawyers Guild, who has studied the development of the model. “Every city had added a few things to it over time, so it has become more and more restrictive.”

In Charlotte, the City Council passed an [ordinance](#) in January that allows the City Manager to declare an “extraordinary event” at any time. During such an event and within geographic boundaries determined by the City Manager, a variety of new regulations will go into effect, including a ban on a long list of items, such as backpacks and scarves. The City has already declared five extraordinary events, [including Bank of America’s shareholders’ meeting](#) and the Democratic Convention. Tampa is expected to pass a [similar measure](#) next month, though it will be limited to the duration of the Republican National Convention. In Chicago, while the city has not legislated any restrictions on items, the Federal Protective Service has [designated several downtown blocks](#) as a “Red Zone,” where a militarized police presence will be “highly visible,” according to a department spokesperson.

Both Charlotte and Tampa will set space aside as a so-called “free speech zone,” where demonstrators are allowed to congregate. While the exact location of the free speech zones have not been determined in either city, such zones have been used in several past political conventions, such as the Democratic Conventions of 2000, in Los Angeles, and 2004, in Boston, to keep demonstrators many blocks away from the convention — out of sight and sound of the gathering. In some cases these zones have also, controversially, [been fenced in](#).

Known as spatial tactics, these restrictions divide the city into some sections where demonstrators will be allowed to gather and march, and others from which they will be barred from doing so.

In Chicago, because of the size of the security perimeter designated by the Secret Service, parades will not be allowed to pass within sight and sound of the convention. In Charlotte and Tampa, the parade routes have not yet been announced, though officials acknowledge that many streets will not be available for marches. In both cities, groups attempting to plan marches have objected to the newly adopted permitting process for being unnecessarily vague, and accused the cities of stalling decisions on whether to grant their permit requests.

Legal context

According to Timothy Zick, a law professor at William & Mary Law School and the author of *Speech Out of Doors: Preserving First Amendment Liberties in Public Places*, while each individual tactic has been used before, the combination of spatial tactics being employed by Chicago, Charlotte, and Tampa represent a relatively new way of policing. “There is a temporary, radical change in the legal geography of the city,” he said. “We’ve seen that on a smaller scale for at least the last fifty years, but it has become much more prevalent in the last decade.” (See box titled “Security vs. Speech” on next page.)

While most civil liberties advocates acknowledge that there are some legitimate security concerns at large events, many argue that the balance between security and free speech has tipped too far toward security.

A particular concern has been the placing of a demonstrator zone out of “sight and sound” of the demonstrators’ intended audience, and several lawsuits have been brought on those grounds. Federal courts have ruled both ways. In a case concerning the 2000 Democratic Convention in Los Angeles, for example, the federal district court ruled that the city’s “secured zone,” which would have kept demonstrators 260 yards away from the delegates, was [much too large to pass constitutional muster](#). In contrast, the First Circuit Court of Appeals found that Boston’s imposition of a restricted zone for demonstrations in connection with the 2004 Democratic Convention [did not violate the constitution](#), though the zone, which was heavily fenced in, “imposed a substantial burden on free expression.”

In general, several legal experts agree, most courts will not find restrictions that place demonstrators out of sight and sound of their intended audience unconstitutional.

Providing security, yet welcoming dissent

There are alternatives, however. Several critics of the current model suggested examples of affirmative methods that officials could use to welcome demonstrators, while still maintaining public safety.

Security vs. speech

In each city where spatial restrictions have been imposed, the “significant public interest” used to justify them — a necessary element for time, place, and manner restrictions on free speech and assembly to be considered constitutional — has been the need to maintain the public safety and security. According to Zick and other legal experts, in the post-9/11 period, courts have become extremely deferential to security concerns when considering the limitations on First Amendment activity.

“These types of restrictions are much more harmful to free speech than the courts have recognized,” Zick said. “They are very rarely held up to a meaningful level of scrutiny by the courts, which tend to think about space as a secondary concern, when it is clearly crucial in many cases.”

Don Mitchell, a professor of geography at Syracuse University and the author of *The Right to the City: Social Justice and the Fight for Public Space*, said that it has now become expected for cities to use spatial tactics.

“Cities have found that this is an incredibly effective way of silencing people,” he said. “They have become quite good at zoning free speech in ways that allows them to control it.”

John Whitehead, the founder of the Rutherford Institute, a civil liberties law firm and advocacy organization, said that police departments and federal law enforcement agencies already have a variety of techniques at their disposal to identify threats beforehand. “The vast majority of people who come out to protest at these events are just good folks,” he said. “If there are some [specific] people who are planning to be violent, then it’s certainly the job of the police to try to identify them beforehand,” instead of treating the vast majority of peaceful protesters as though they might intend violence.

Kris Hermes, a legal worker with the National Lawyers’ Guild in Chicago, said that having a security perimeter around the site of a large event was appropriate, but suggested that “the Secret Service should adopt a policy that its perimeters will allow people to get close enough to the site that they can be seen and heard.”

Spatial tactics cause a “temporary, radical change in the legal geography of the city,” said Timothy Zick of William & Mary Law School. The use of those tactics, he said, “has become much more prevalent in the last decade.”

Ed Yohnka, the director of communications and public policy for the ACLU of Illinois, described a variation of that theme, saying that the group had tried to secure some areas within the Secret Service perimeter of the NATO Summit where a limited number of demonstrators might be allowed, provided they were put through the same screening process that will be used for members of the press.

“I think that would be a real sign of opening things up,” he said. “That would show people that security is what they’re really worried about, not just some inconvenience or discomfort.”

According to Alex Vitale, an associate professor of sociology at Brooklyn College who has studied police tactics at demonstrations, when cities require permits for rallies and marches, there are two principles they should follow. First, he said, a determination of a permit application needs to be done in a timely manner. “Groups want to organize months in advance, [and] they need to know whether their permits have been granted first.” Vitale recommended that cities begin their permitting process at least six months before the convention. Second, the permit process “should not be wholly in the hands of the police, but should be handled by a more independent body, and there should be some process of appeal,” he added.

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Vitale also criticized another policy that is currently in place in both Charlotte and Tampa: giving first priority to Convention activity for the use of *all* parks and public spaces in the cities. He suggested that cities either require the conventions to go through the same permitting process as demonstrators, or reserve a significant amount of public space for demonstrations in advance. “How can a city possibly claim to have a fair permitting process when they give the first right of all public spaces to one group?” he said.

Several civil liberties advocates insisted that permitted parade routes, like demonstration zones, should be within sight and sound of the event. According to Anne O’Berry, the southern regional vice president of the National Lawyers Guild, the ability of a city to allow rallies and marches within sight and sound of the convention should be taken into consideration when the convention city is chosen. “If you are not able to show clearly how you are going to have people gathering and marching within sight and sound of the convention, then you shouldn’t be allowed to host it in the first place,” she said.

Finally, Verheyden-Hilliard said, it would be better to pass legislation that clarifies the specific methods available to law enforcement officials when policing demonstrations, instead of the blanket adoption of spatial restrictions that put portions of a city altogether out of reach. (See bottom box titled “What about D.C.?”.)

Encouraging free speech is not our job

Municipal officials in both Charlotte and Tampa, however, were generally not willing to entertain those suggestions, nor consider how their policies would be different if their primary goal was to encourage free speech.

“It’s important that we plan for the worst,” said James Shimberg, the City Attorney in Tampa.

What about D.C.?

As an example, Verheyden-Hilliard pointed to a law that was passed in Washington, D.C. called the [First Amendment and Police Standards Act of 2004](#), which, among other things, restricts the use of certain police tactics such as pepper spray and “hogtying,” and declares that “it shall not be an offense to assemble or parade on a District street, sidewalk, or other public way, in a District park, without having provided notice or obtained an approved assembly plan.”

After several other legal challenges, Verheyden-Hilliard said, Washington D.C. has agreed to allow demonstrators to gather in several areas where the city had previously denied access for security reasons. “People are now allowed to protest on the sidewalk in front of the White House and (across the street) in Lafayette Park. People can protest on the Capitol steps.”

“No one can dispute that D.C. is the site of more protests...than any other city,” Verheyden-Hilliard went on. “We passed this law and the world is not coming to an end here, so if we can do it, other cities can do something similar,” she went on. “That would be a significant step forward toward embracing free speech rights.”

In Charlotte, Senior Deputy City Attorney Robert Hagemann pointed out that, in some ways, cities are constrained both by the demands of the convention organizers and by federal law enforcement activity. For example, the Democratic National Convention Committee’s contract with Charlotte requires that the city use spatial tactics to restrict speech (the contract is explicit about the creation of a “demonstration zone,” for example, implying that demonstrators are not to be allowed more unfettered access). The Democratic National Convention Committee did not respond to repeated requests for comment as to why that provision was put into the contract.

When asked if it is Charlotte’s policy that the free speech zone and parade route must be within sight and sound of the convention site, Hagemann said that his office is developing policy under the belief that the city is not constitutionally required to allow demonstrators that close. When asked whether,

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regardless of its constitutionality, he believed it would be good policy to permit demonstrators within sight and sound of the convention, Hagemann did not respond directly, saying only, “Listen, no matter what we do, some people aren’t going to think it’s good enough. We can’t please everyone.”

Shimberg said that while Tampa is trying to place the free speech zone as close to the convention site as possible, the city will be limited by the security perimeter to be determined by the Secret Service. When he was asked whether he had suggested to the Secret Service that some demonstrators might be allowed inside the security perimeter if they were screened, as suggested by Yohnka of the ACLU, or had otherwise negotiated with the Secret Service regarding the perimeter, he said, “They kind of make it clear that they are making the rules.”

The Secret Service declined to comment for this article.

In regards to the security policies under municipal control, local officials in both cities said that, in general, they defer to their police departments.

“I’m not a security expert,” said Mike Suarez, a Tampa City Councilor who is planning to vote for the proposed ordinance limiting what items people can carry in the city. “Police officers are trained to do certain things. They’re not a vigilante force. So when they tell me they want to ban certain things, I find it difficult to second-guess them.”

Suarez said that the proposed municipal ordinance and other security policy for the convention are based on incidents of violence and vandalism that had occurred at other conventions.

According to Verheyden-Hilliard, “there is this huge mythology that says all these terrible things have happened. I’ve seen intelligence reports saying that protesters were slashing tires, or throwing bags of urine, or throwing ball bearings under horses. When you actually claw away at the claims, frequently those things have not actually happened, or, if they have, they’ve been extremely minor incidents.”

When Remapping Debate asked John Bennett, the assistant chief of operations of the Tampa Police Department, what specific past incidents the policies were based on, he could not name one. Instead, he said, the recommendations are primarily based on the policies adopted by other convention cities in the past, and that he was sure that “those policies were based on previous events.”

Genuine embrace or bare minimum?

But despite the restrictions, officials in both Charlotte and Tampa said that they were doing everything in their power to make sure that people who wanted to demonstrate at the conventions felt welcome and safe.

When asked what, specifically, the City was doing to make demonstrators feel welcome, Shimberg pointed to a “Whereas provision” in the proposed ordinance that says, in part, “Whereas, it is the public policy of the City that persons and groups have a First Amendment right to organize and participate in peaceful assemblies and parades on the sidewalks and rights-of-way and in the parks of the City...”

“It doesn’t matter if they put in a lot of nice language,” said Kris Hermes of the National Lawyers’ Guild. “The legal substance of the ordinances indicates the real intent.”

“Cities will often say that they’re going out of their way to encourage free speech,” said Alex Vitale of Brooklyn College, “but the truth, what you see historically, is that cities do the bare minimum that they are required to do legally, and nothing more.”

That, some say, is a significant loss. “The ability to speak and be heard to try and change society for the better is something that people have fought and died for” said Verheyden-Hilliard of the Partnership for Civil Justice Fund. “I don’t think anybody wants to live in a country where preserving that right is not one of the highest priorities.”

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