William & Mary Bill of Rights Journal

Volume 17 (2008-2009)
Issue 2 Symposium: How We Vote: Electronic Voting and Other Voting Practices in the United States

Article 10

December 2008

Giving Dissenters Back Their Rights: How the White House Presidential Advance Manual Changes the First Amendment and Standing Debates

Kimberly Albrecht-Taylor

GIVING DISSENTERS BACK THEIR RIGHTS: HOW THE WHITE HOUSE PRESIDENTIAL ADVANCE MANUAL CHANGES THE FIRST AMENDMENT AND STANDING DEBATES

Kimberly Albrecht-Taylor*

INTRODUCTION

> Restriction of free thought and free speech is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.
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> —William O. Douglas[1]

In September 2007, the Presidential Advance Manual (the Manual),[2] outlining instructions for White House staff members on how to deal with potential dissenters and protesters at presidential events, was uncovered. The Manual came out during the discovery phase of a lawsuit filed by the American Civil Liberties Union (ACLU) on behalf of Nicole and Jeffery Rank (the Ranks), who were arrested and physically removed from a presidential speech on July 4, 2004, because both were wearing anti-Bush t-shirts.[3] This incident in West Virginia was not an isolated occurrence, and has been repeated across the country at various presidential events.[4] In one extreme case, three audience members were removed because of a bumper sticker affixed to the car

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* J.D., William & Mary School of Law, 2009; B.A., Columbia College, 2005. I want to thank the professors and editors who helped shape this Note along the way. Also, I want to thank my family and friends for their constant support and encouragement.

[1] William O. Douglas, Justice, U.S. Supreme Court, The One Un-American Act, Remarks to the Authors Guild Council in New York (Dec. 3, 1951), *in* NIEMAN REPORTS, Jan. 1953, at 20.

[2] OFFICE OF PRESIDENTIAL ADVANCE, PRESIDENTIAL ADVANCE MANUAL (2002) [hereinafter MANUAL], *available at* http://www.aclu.org/pdfs/freespeech/presidential_advance_manual.pdf.

[3] Complaint at 4, Rank v. Jenkins, 2004 WL 3026751 (S.D. W.Va. 2004) (No. 2:04-0997) [hereinafter Rank Complaint].

[4] *See* American Library Association, *Is it Legal: Library, Schools, Church and State, Access to Information, Freedom to Demonstrate, Privacy and Surveillance, Broadcasting, Internet, Copyright, Harmful to Minors*, 53 NEWSL. ON INTELL. FREEDOM 65, 68–69 (2004) (describing multiple incidents of protesters and dissenters being removed from presidential events).

they drove to the event.[5] President George W. Bush is not, however, the first President, or presidential candidate, to employ these practices at presidential events and political rallies.[6] These more recent occurrences caught the media's attention and many of the incidents resulted in lawsuits against the Bush administration, White House staffers, and event volunteers who took part in removing audience members deemed to be potential dissenters.[7] As of September 2008, a court has yet to rule on whether the recent incidents of removal constituted a violation of the removed persons' First Amendment rights. Prior case law, stemming from a 1996 political rally, sets a precedent against the removed persons.[8] In *Sistrunk v. City of Strongsville*, the Sixth Circuit held that a woman who was forced to remove a button supporting Bill Clinton before entering a Bush-Quayle rally did not suffer a violation of her First Amendment rights.[9] Although lawyers for the George W. Bush administration pointed to this case as supporting the Presidential Advance Office's actions, this case is easily distinguishable from the recent occurrences.[10] The event at issue in *Sistrunk* was a private political rally.[11] Conversely, many of the recent events were "official" presidential events, where the President, in the course of his job, appeared at an event for the purpose of promoting a White House policy proposal.[12] Recognizing the distinction between the prior case law in *Sistrunk* and the facts of the recent events, the argument that the President has the right to keep dissenters out of the audience of "official" events can no longer pass constitutional muster.

The discovery of the Manual, which spells out the specific policies of the White House, sheds new light on these recent cases. The existence of the Manual demonstrates that President Bush has an established policy for removal of potential dissenters from

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[5] Dan Frosch, *2 Ejected From Bush Speech Posed a Threat, Lawyers Say*, N.Y. TIMES, Apr. 15, 2007, at 20.

[6] *See, e.g.*, PATRICK S. HALLEY, ON THE ROAD WITH HILLARY: A BEHIND-THE-SCENES LOOK AT THE JOURNEY FROM ARKANSAS TO THE U.S. SENATE 38 (2002) (explaining that Hillary Clinton also used "etiquette" squads and volunteers to squash dissent at campaign events).

[7] *See* Todd Dvorak, *Dissenters at Rallies Look to Court for Justice*, TULSA WORLD, July 23, 2006, at A18 (discussing multiple incidents of people being removed from events and the court cases filed in response).

[8] Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997).

[9] *Id.* at 196.

[10] *See* Ann Imse, *Lawyers Argue Bush Can Eject Protesters: Brief Defends Pair's Ouster From President's Talk*, ROCKY MOUNTAIN NEWS, Apr. 13, 2007, at 30 ("The president's right to control his own message includes the right to exclude people expressing discordant viewpoints from the audience . . . ." (quoting brief filed on behalf of the Bush administration)).

[11] *Sistrunk*, 99 F.3d at 196 ("The Strongsville Republican Organization obtained a permit from the city to use certain municipal property, including the Strongsville Commons, for a political rally . . . .").

[12] MANUAL, *supra* note 2, at 67. Funding for "official" events comes from the White House, whereas funding for "political" events comes from the Republican National Committee. *Id.*

"official" events and that the decision to remove such people can no longer be blamed on private actors who are immune from the restrictions of the First Amendment.[13] In light of this new evidence, this Note attempts to answer the question of whether the Bush administration's policies of removing potential dissenters from the audience of presidential events is a violation of the potential dissenters' First Amendment rights. Arguing that the administration's actions are unconstitutional, this Note then addresses whether an individual would be able to meet the strict standing requirements needed to gain injunctive relief prohibiting the Bush administration from continuing to remove dissenters from the audience of presidential events.

Part I explains the policy of the White House under George W. Bush, as laid out in the Manual, and also provides details of specific occurrences of these policies being carried out at presidential events. Part II lays out the framework for analyzing a First Amendment freedom of expression claim, starting with the defining of public and private forums, and the application of such standards to the facts of the recent events involving the Ranks and the Denver Three. Part III addresses the need for injunctive relief as a remedy for the injuries suffered by those removed from presidential events solely because of their viewpoint, and establishes that the existence of the Manual creates a much stronger argument for standing in such a claim than potential plaintiffs previously had.

I. WHITE HOUSE POLICY UNDER GEORGE W. BUSH AND ENFORCEMENT OF THE POLICY AT PRESIDENTIAL EVENTS

A. White House Policy Under George W. Bush

The Manual clearly states that "the principles and guidelines covered in th[e] manual can be applied to any type of event" in which the President participates.[14] Events identified by the Manual that are common for the President to attend include "speeches (to both large and small groups), rallies, roundtable meetings and tours."[15] However, the Manual does distinguish between two categories of events: "official" and "political."[16] "Official" events are defined as "those that the President is participating in on behalf of the administration."[17] "Political" events, are events "held on behalf of a particular candidate or office holder" which "typically involve fund-raising activities."[18] Even though the policies set forth in the Manual do apply to all events,

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[13] *See* Scott McClellan, White House Press Sec'y, Press Briefing (Apr. 27, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/04/20050427-1.html (claiming a volunteer was responsible for the removal of the Denver Three).

[14] MANUAL, *supra* note 2, at 12.

[15] *Id.*

[16] *Id.* at 67.

[17] *Id.*

[18] *Id.*

this Note seeks only to analyze the events labeled as "official" because those events are financed and organized through the White House Office of Administration.[19]

Further, the Manual describes what actions should be taken at actual events in order to deter potential protesters.[20] The Manual explains that one of the best ways to control the crowds at events and deter potential protesters is to employ a method of ticket distribution that divides tickets into two categories: "VIP" and "general."[21] VIP tickets are given to those people who are "*extremely* supportive of the Administration," and people holding VIP tickets are typically seated either directly behind the podium where the President is to speak, or in the area between the front stage and the "main camera platform."[22] General tickets are given to fill out the bulk of the seating available at the event.[23] The Manual directs staffers or volunteers working the events to collect admission tickets before audience members go through the Magnetometer checkpoints, and that at the time of ticket collection, volunteers should be used to check for protesters or people with signs.[24]

The Manual warns that staffers working the event should "[a]lways be prepared for demonstrators, even if the local organization" has said "there will not be any."[25] As part of the plan to prevent demonstrators from disrupting an event or being seen by the media, staffers are instructed to prepare for events by creating "rally squads" which can be used to act as a shield between demonstrators and the media platform.[26] Rally squads are "small groups of volunteers [used] to spread favorable messages using large hand held signs, placards, or perhaps a long sheet banner."[27]

The Manual does allow for demonstrators to be ignored "[i]f it is determined that the media will not see or hear them and that they pose no potential disruption to the event."[28] However, if the demonstrators have signs, are "trying to shout down the President, or [have the] potential to cause some greater disruption to the event, action needs to be taken *immediately* to minimize the demonstrator's effect."[29] The Manual further instructs staffers to avoid physical contact with protesters, and to determine before taking action whether the solution will cause more negative publicity than just leaving the demonstrators be.[30] Ultimately, the Manual's instructions are intended to ensure that a presidential event will be covered without the media having an opportunity to see any dissenters in the audience.

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[19] *Id.*
[20] *Id.* at 32–35.
[21] *Id.* at 33.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 34.
[25] *Id.* at 33.
[26] *Id.* at 34.
[27] *Id.*
[28] *Id.* at 35.
[29] *Id.*
[30] *Id.*

B. Removing Dissenters from Events

Perhaps even more interesting than the words in the Manual are the actual actions taken by staffers at presidential events. On July 4, 2004, President George W. Bush spoke at an Independence Day celebration on the grounds of the West Virginia state capitol in Charleston, West Virginia.[31] Prior to the start of the President's speech, two members of the audience, Nicole and Jeffery Rank, were forced to leave the event because they were wearing t-shirts with anti-President Bush slogans.[32] Although the Ranks had valid tickets to attend the event, when they refused to remove or cover their t-shirts, they were arrested by the Charleston City Police and put in jail for approximately two hours.[33] The charges filed at the time of the arrest were subsequently dropped, and the Ranks filed suit against the Bush administration for the violation of the Ranks' First Amendment rights.[34] The Ranks settled out of court for a payment of $80,000 by the Bush administration, but the administration did not ever admit to any wrongdoing.[35]

Almost two months later, a similar incident happened in Cedar Rapids, Iowa. On September 3, 2004, two school teachers, Christine Nelson and Alice McCabe, were arrested for trespassing when they showed up at the event with a "Kerry-Edwards" campaign button and a sign with the message "No More War."[36] Although the event was being held at a public park, the two women were approached by Secret Service Agents who told them the Republican Party had rented the park and the sidewalks were considered private property and that the women had to leave.[37] The women moved, but apparently not far enough away from the event, because they were then instructed to move across the street.[38] The women were then told a third time to move even farther away; Nelson claims she did not immediately comply with the third request, but rather inquired as to why the two were being singled out.[39] The two women were then arrested, but the charges were later dropped.[40] The women filed a lawsuit against the

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[31] Rank Complaint, *supra* note 3, at 3.

[32] *Id.* at 5. As described in the Complaint, "both Plaintiffs' t-shirts bore the international 'no' symbol (a circle with a diagonal line across it) superimposed over the word 'Bush,'" and a small photograph of President Bush on the left sleeves, again with the international symbol for "no" superimposed over the photograph. *Id.* at 4. Both shirts also had a "Kerry" button attached to the right sleeve. *Id.* The message on the back of Jeffery Rank's shirt said "Regime Change Starts at Home," and the message on the back of Nicole Rank's shirt said "Love America, Hate Bush." *Id.* at 45.

[33] *Id.* at 5–6.

[34] *Id.* at 1, 5.

[35] Nat Hentoff, Op-Ed., *Targeting the First Amendment: The Presidential Advance Manual vs. Free Speech*, WASH. TIMES, Sept. 17, 2007, at A19.

[36] Dvorak, *supra* note 7.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

law enforcement officials who participated in their arrest.[41] A jury ultimately found that the law enforcement officers' decision to arrest the two women was not "motivated" by their protest of President Bush, and the court subsequently dismissed the First Amendment claim; the decision was upheld on appeal.[42]

On March 21, 2005, President Bush appeared at the Wings Over the Rockies Air and Space Museum in Denver, Colorado to discuss his proposed changes to Social Security.[43] At this event Leslie Weise, Alex Young, and Karen Bauer (the Denver Three), who all had tickets to attend the event and were originally allowed to be seated, were removed from the audience and forced to leave the event.[44] However, this time, unlike the prior events involving the Ranks and the two school teachers, Weise, Young, and Bauer were not wearing anti-President Bush t-shirts and did not have any sort of anti-Bush paraphernalia on their persons; the three were removed from the event because they had arrived to the event in a car which had a "No More Blood for Oil" bumper sticker.[45] Upon arriving at the security checkpoint outside the event, Young was let into the event without hassle, but Weise and Bauer were stopped at the door and warned that they had been "ID'd" and "if they tried any 'funny stuff' that they would be arrested," but that they were going to be let in.[46] Once inside the event, while sitting in the audience and not causing any type of disturbance, all three were approached by an event staff member[47] and told it was a "private event" and they were going to have to leave.[48] After being removed from the event they were not arrested, but Weise and Young brought suit against the Bush administration for violation of their First Amendment rights.[49]

The incidents of removing presumed dissenters do not stop with Independence Day speeches or social security discussions. Although the events previously discussed fall under the purview of the White House administration, numerous other incidents

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[41] Complaint, McCabe v. Macaulay, 551 F. Supp. 2d 771 (N.D. Iowa 2005) (No. 05-CV-73-LRR).

[42] McCabe v. Maculay, No. 05-CV-73-LRR, 2008 WL 2980013, at *9 (N.D. Iowa Aug. 1, 2008).

[43] Frosch, *supra* note 5.

[44] Faith M. Sparr, *Town Hall Meetings Without the Town: Were the Denver Three's First Amendment Rights Violated?*, 12 COMM. L. & POL'Y 91, 92–93 (2007).

[45] Complaint and Jury Demand at 4–8, Weise v. Jenkins, 2007 WL 1552600 (D. Colo. Mar. 15, 2007) (No. 07-cv-00515), *available at* http://www.aclu.org/pdfs/freespeech/weise_v_jenkins_complaint.pdf.

[46] *Id.* at 5.

[47] According to the Complaint and Jury Demand, at the time of the incident both Weise and Young believed that the staff member was a Secret Service Agent. *Id.* at 7. However, after the fact, it was revealed that he was not employed by the Secret Service, but was simply a federal employee working as an event volunteer. Ann Imse, *Bush Staff "Unwelcomed" Pair: White House Aid Ordered Two Out of Denver Event*, ROCKY MOUNTAIN NEWS, Mar. 3, 2007, at 4.

[48] Complaint and Jury Demand, *supra* note 45, at 6.

[49] *Id.* at 1–2.

demonstrate a similar approach towards expression of an opposing viewpoint. Though the following incidents are not directly linked to the policies set out in the Manual, they do demonstrate the need to examine the attitude governmental officials have towards dissenting opinions.

On February 1, 2006, two women—Cindy Sheehan, the mother of a solider who was killed in Iraq, known for protesting the Iraq war, and Beverly Young, a Congressman's wife— were ejected from the Capitol building for wearing t-shirts the Capitol Police did not approve of during President Bush's State of the Union Address.[50] Sheehan's shirt said "2,245 Dead. How Many More?" and Young's shirt said "Support the Troops."[51] Sheehan was arrested and charged with a misdemeanor, while Young was allowed to leave the viewing gallery without being arrested.[52] The charges against Sheehan were dropped and the Capitol Police issued an official apology to both women, stating, "The officers made a good faith, but mistaken effort to enforce an old unwritten interpretation of the prohibitions about demonstrating in the Capitol."[53] The then-Capitol Police Chief Terrance Gainer, also stated that "[n]either guest should have been confronted about the expressive T-shirts."[54]

In Saint Louis, Missouri, two protesters carrying signs that bore messages critical of President Bush's Iraq policy were arrested when they would not move into a designated protest area.[55]

President Bush is not the only politician who has used these techniques to keep his audiences free of dissenters. Hillary Clinton reportedly employed the use of "etiquette squads" while campaigning for her husband, Bill Clinton, in his bid for the Presidency.[56] ABC News reported that Senator John Kerry also employed similar techniques at his campaign rallies while running for President in 2004.[57] However, political experts claim President Bush took stronger measures during his campaign events in 2004 than did John Kerry, to ensure his rallies and public appearances were dissent-free, even going as far as requiring some event attendees to sign loyalty oaths before

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[50] David D. Kirkpatrick, *Two T-shirts, Two Messages and Two Capitol Ejections*, N.Y. TIMES, Feb. 2, 2006, at A20.

[51] *Id.*

[52] Laurie Kellman, *Capitol Cops Give Sheehan an Apology: She, Another Woman Confronted Over T-shirts*, ST. PAUL PIONEER PRESS, Feb. 2, 2006, at 4A.

[53] *Id.* (quoting then-Capitol Police Chief Terrance Gainer).

[54] *Id.*

[55] Eunice Moscoso, *Secret Service Quashing Dissent, ACLU Lawsuit Says: Protesters Kept Out of Sight*, DAYTON DAILY NEWS, Sept. 24, 2003, at A4.

[56] HALLEY, *supra* note 6. Halley did emphasize that he always made sure to give his "etiquette squads" a "thorough briefing and assigned specific responsibilities." *Id.* He objected to the use of the term "goon squad" and was proud of the fact that not a single member of his squads was ever arrested during participation in a Hillary Clinton event. *Id.*

[57] Posting of Justin Rood to The Blotter, http://blogs.abcnews.com/theblotter/ (Aug. 17, 2007, 12:16 EST).

being allowed entrance into the event.[58] Moreover, both political parties are known for placing heavy restrictions upon speech at their party conventions.[59] At this point there has not been any court decision regarding whether the Bush administration or any other politician employing these tactics has acted unconstitutionally.[60] With the long list of incidents involving the removal of citizens from public events, and the recently uncovered Manual on how to deal with protesters and dissenters at rallies, the argument can be made that the President will continue to limit access to these public events. Additionally, with the President's "success" of using this strategy it is easy to imagine that future presidents and politicians will continue to employ similar strategies at public events in order to maintain the appearance of overwhelming audience support. It is this likelihood of continuation in removing dissenters that requires an in-depth look into whether it is possible to keep the current administration and future administrations from restricting citizens' rights to free speech and expression.

II. ANALYSIS OF POTENTIAL FIRST AMENDMENT FREEDOM OF SPEECH CLAIM

The framework for addressing First Amendment freedom of speech claims is to first determine in what type of forum the speech was restricted.[61] The Supreme Court has found that speech within a public forum can be far less restricted by the government than speech taking place in a private forum.[62] Therefore, it must be determined

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[58] Dvorak, *supra* note 7. For further discussion on the use of loyalty oaths for entrance into presidential events, see John D. Castiglione, Note, *Sign Here, Please: The First Amendment Implications of Requiring a Loyalty Oath for Admission to Political Events*, 74 GEO. WASH. L. REV. 345 (2006) (discussing loyalty oaths used in multiple places, including Rio Rancho, New Mexico; Dubuque, Iowa; and even at the Baghdad airport in Iraq at a Thanksgiving Day meal for the soldiers stationed there, which was attended by President Bush); Greg Wolenberg, Comment, *Candidate Endorsement Forms as a Prerequisite to Political Event Entry: Disloyal to the People's Right to Freedom of Speech*, 37 U. TOL. L. REV. 841 (2006).

[59] *See, e.g.*, Steven Thomma, *More Politicians Targeting Dissent: Debate Now Extends to Printing on T-shirts*, ST. PAUL PIONEER PRESS, Feb. 5, 2006, at 16A; Nat Hentoff, Editorial, *Muzzling Dissenting Democrats*, WASH. POST, Aug. 1, 1992, at A21 (discussing how dissenters at the Democratic National Convention, although registered with the Democratic Party, were removed from the audience).

[60] A District Court in Iowa held, in an Order issued in *McCabe v. Macaulay*, that the public forum doctrine governs the plaintiff's First Amendment Rights claim, and that at the time Nelson and McCabe were arrested at the event "[i]t was abundantly clear . . . that the First Amendment would not tolerate state law enforcement officers arresting persons based upon the content of their speech." 551 F. Supp. 2d 771,792 (N.D. Iowa 2007). However, the court has not yet given a final ruling on the case; it denied a motion to dismiss filed by the defendants. *Id.* at 796.

[61] *See* Parks v. City of Columbus, 395 F.3d 643, 648 (6th Cir. 2005) (holding that the district court erred by not determining which type of forum was at issue in a freedom of speech claim).

[62] *See* United States v. Grace, 461 U.S. 171, 177 (1983) (stating "the government's ability to permissibly restrict expressive conduct is very limited" in public forums).

whether the presidential events from which the potential dissenters were removed qualified as public or private forums. The answer to this question will determine what level of scrutiny a court should apply when addressing a freedom of speech claim.[63] Secondly, after determining the nature of the forum in which the incidents of removal are occurring, the government justifications must be examined to determine whether they meet the scrutiny requirements for that type of forum.

A. Public vs. Private Forums: Level of Scrutiny

1. Types of Public Forums

The Supreme Court recognized that the right to use government or public property for the purposes of speech or expression, and that what restrictions, if any, are allowed to be placed on the speech or expression, are dependant upon the "character of the property at issue."[64] In *Perry Education Ass'n v. Perry Local Educators' Association,* the Court laid out the three categories of public forums: (1) traditional public forums, (2) forums designated by the government to be a place for expressive activity, and (3) non-public forums.[65]

Traditional public forums are defined as places such as "streets and parks which 'have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[66] In cases following *Perry Education*, the Supreme Court has defined these traditional public forums very narrowly[67] and refused to expand the list to include other areas commonly conceived as public, such as airport terminals[68] and shopping malls.[69] Within traditionally public forums, any content-based government restriction of communicative or expressive activity can withstand court scrutiny only if the state regulation is shown to be necessary to serve a compelling state interest, and the regulation is narrowly drawn to achieve that purpose.[70] By contrast, time,

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[63] *See generally* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (laying out the level of scrutiny the courts should apply to each type of public forum free speech claim).

[64] *Id.* at 44.

[65] *Id.* at 45–46.

[66] *Id.* at 45 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

[67] *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 727 (1990) (O'Connor, J., plurality) (holding that "[t]he mere physical characteristics of the property cannot dictate forum analysis," and that sidewalks outside a United States Post Office, although not distinguishable from other municipal sidewalks in the area, are not a traditionally public forum).

[68] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (holding that airport terminals "hardly qualif[y] for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity" (quoting *Hague*, 307 U.S. at 515)).

[69] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[70] *Perry Educ. Ass'n*, 460 U.S. at 45.

place, and manner restrictions are allowed to be made by the government as long as they are content-neutral and are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[71] A widely used example of such time, manner, and place restrictions is the local government requirement to obtain a permit to use public forums for large gatherings and events.[72]

The second category of public forum described in *Perry Education* is the designated or limited public forum. These forums are public properties which have been opened by the state for use by the public for communicative or expressive activity.[73] Examples of such forums cited by the Court are university meeting facilities,[74] school board meetings,[75] and municipal theaters.[76] The Court pointed out that although the state is not required to leave these forums open for public use indefinitely, while the forum is available for public use the state is bound by the same standards as applied in the traditional public forum analysis.[77] If the government wants to regulate speech based on the content of that speech, the government must demonstrate the regulation is serving a compelling state interest and the regulation is narrowly tailored to achieve that purpose.[78] Also in this category are forums which have been created for a limited purpose for use by certain groups, or for the discussion of certain topics.[79] Examples given by the Court of such forums are ones created for the limited use of student groups[80] or the discussion of school board business.[81]

The third category encompasses property which is government owned but has not been designated to be a forum for public communicative or expressive activity.[82] The Court reiterated previous holdings by stating that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the

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[71] *Id.*

[72] *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316 (2002). The Supreme Court upheld Chicago Park District's practice of allowing some permits and denying other permits for use of public parks for similar events when denials were not based on content of speech or expression, but were based on content-neutral time, place, and manner regulations. *Id.* The Court stated, "To allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech." *Id.* at 322 (quoting Thomas v. Chi. Park Dist., 227 F.3d 921, 924 (2000)).

[73] *Perry Educ. Ass'n*, 460 U.S. at 45–46.

[74] *Id.* at 45 (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

[75] *Id.* (citing City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n., 429 U.S. 167 (1976)).

[76] *Id.* at 45–46 (citing Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)).

[77] *Id.* at 46.

[78] *Id.* at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

[79] *Id.* at 46 n.7.

[80] *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

[81] *Id.* (citing City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976)).

[82] *Id.* at 46.

government."[83] The government is allowed to enforce time, place, and manner regulations on speech, as well as reserve the right to keep the forum for its "intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[84] The scrutiny for content-based speech regulation within this forum is not nearly as high as in the traditional and designated public forums.[85]

2. Private Forums

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* the Supreme Court plainly stated that "the guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct.'"[86] This protection of a private organization's rights to limit speech within their private forum is even extended to private forums that are generally open to the public.[87] In *Lloyd Corp. v. Tanner,* the Supreme Court emphasized that although the First Amendment "safeguard[s] the rights of free speech and assembly by limitations on *state* action," action taken by private property owners to restrict speech on their private property does not fall under the same First Amendment scrutiny.[88] The Court wrote that it "ha[d] never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only."[89] Following the Court's decision in *Lloyd,* the Supreme Court said even more plainly that "[i]t is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."[90] It is clear that private forums lend themselves to a more favorable environment for a presidential administration to hold a "supporters only" event.[91]

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[83] *Id.* (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129 (1981)).

[84] *Id.* at 46 (citing *Greenburgh Civic Associations*, 453 U.S. at 131 n.7).

[85] *Id.*

[86] 515. U.S. 557, 566 (1995) (quoting Shelley v. Kramer, 334 U.S. 1, 13 (1948)).

[87] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (holding that an owner of a shopping center, which was typically open to the general public, was allowed to restrict the distribution of handbills on his property).

[88] *Id.* at 567.

[89] *Id.* at 568.

[90] Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).

[91] Although the Denver Three were told that the event they were attending was a "private event," the arguments supporting that statement are not all that convincing. *See* Complaint and Jury Demand, *supra* note 45, at 6.

B. Defining the Forum: Are These Events Public or Private?

Because First Amendment protection does not reach private forums in the same way it does public forums, it is important to establish whether the forum, from which a potential plaintiff was removed, was public or private. If a forum is determined to be private, a plaintiff's First Amendment challenge to content-based restrictions will most likely fail. If, however, the forum is determined to be public, the plaintiff has a stronger chance of making a successful claim.

In the incidents involving the Ranks and the Denver Three, the plaintiffs asserted that the presidential events from which they were removed were public.[92] The event in West Virginia took place on the grounds of the West Virginia state capitol,[93] and the event in Denver took place at the Wings Over the Rockies Air and Space Museum, which is typically open to the public.[94] By pointing to the *Sistrunk* decision as supporting the administration's actions,[95] the administration would most likely argue that although the forums are typically public, they were privatized for the presidential events.

There are two arguments that support the plaintiffs' claim that the events were not private, and should be subjected to public forum scrutiny. First, the plaintiffs can argue that privatization of a public forum for the purposes of restricting speech is contrary to what the Supreme Court intended when it defined public forums as a venue for speech.[96] Second, because the government is so entwined in these events, even if the forum was to be considered something other than a "traditional public forum," the First Amendment still acts as a safeguard against viewpoint discrimination.[97]

1. Privatization of Public Forums

In many of the cases where presumed dissenters have been ejected from audiences, or not allowed to attend at all, the argument has been made by the administration or organization that the forum where the event was taking place, although originally or typically considered a public forum, was designated a private forum for that particular event.[98] The holding in *Sistrunk v. City of Strongsville* provides support for such an

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[92] *See id.* at 1; Rank Complaint, *supra* note 3, at 1.

[93] Rank Complaint, *supra* note 3, at 3.

[94] *See* Complaint and Jury Demand, *supra* note 45, at 11.

[95] *See supra* notes 8–9 and accompanying text.

[96] *See* Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMENDMENT L. REV. 201, 207 (2007).

[97] This argument can be made using the holding in *Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061 (W.D. Mo. 2005), *aff'd*, 481 F.3d 591 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007), discussed *infra* Part II.B.2.

[98] *See, e.g.*, Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); Bishop v. Reagan-Bush '84 Comm., 819 F.2d 289, 1987 WL 35970 (6th Cir. 1987) (unpublished table opinion); Schwitzgebel v. City of Strongsville, 898 F. Supp.

argument.[99] The Sixth Circuit held that it was possible for a municipality to lease a traditional public forum to a private entity for a specific event, and thus prohibit attendance of the event by anyone not a member of, or exhibiting speech approved by, the private entity.[100]

However, the leasing of a public forum to a private organization is not the only way in which the government has sought to transform public forums into private forums for the purposes of limiting First Amendment rights. As Kevin O'Neill discusses, there are six ways the government can attempt to transform a traditionally public forum into a private forum with the purpose of restricting speech and expression.[101] First, the government can attempt to regulate a traditional public forum so that its status becomes one of a non-public forum.[102] For example, government entities have attempted to restrict speech and expression on sidewalks, but the Court has been reluctant to allow such restrictions.[103] The Court in *United States v. Grace* struck down a statute which prohibited handing out leaflets or displaying signage on the sidewalks outside the Supreme Court building.[104] Although in *United States v. Kokinda*, the Court did allow a similar restriction to be placed on sidewalks outside a United States Post Office,[105] *Kokinda* can be distinguished from *Grace*. The government in *Kokinda* was not trying to change the status of the sidewalks and the holding still supports the idea that the government cannot simply change the status of a traditional public forum by adopting a new regulation.[106]

Second, the government tries to assert that events held in a public forum are simply non-public events.[107] Third, the government either allows the physical transformation of, or takes action itself to physically transform, the property so that it is no longer considered to be a traditional public forum.[108] Fourth, the government tries to convert public forums into private forums by selling the property to a private entity.[109] Fifth, the government, as allowed by the courts, can issue content-neutral time, place, and manner restrictions, in the form of permits, for private use of public forums—this action by the government is analogous to renting out public forums for private use.[110] Finally,

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1208 (N.D. Ohio 1995), *aff'd mem.*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied sub nom.* Delong v. City of Strongsville, 522 U.S. 827 (1997).

[99] 99 F.3d at 194.

[100] *Id.*

[101] O'Neill, *supra* note 96, at 207–13.

[102] *Id.* at 207.

[103] *See* United States v. Grace, 461 U.S. 171 (1983); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939). *But see* United States v. Kokinda, 497 U.S. 720 (1990).

[104] 461 U.S. 171.

[105] 497 U.S. 720.

[106] *See id.* at 727–30.

[107] O'Neill, *supra* note 96, at 207–09.

[108] *Id.* at 209.

[109] *Id.* at 209–11.

[110] *Id.* at 211–12.

O'Neill describes that governments have also attempted to convert traditionally public forums by granting themselves, the governments, a permit to use the forum on a specific occasion.[111]

There are very few court decisions addressing whether public forums can be privatized for the purpose of limiting speech and expression. There are, however, two cases, arising from the same event, in which the government argued the public forum in question had been privatized for the purposes of the event.[112] Although the facts and results of both cases are similar, the analysis was not—the government was successful in convincing one court that a public forum could be privatized.[113] Thus, these two cases provide two different approaches to analyzing whether a public forum can be privatized by the issuance of a permit to a private entity.

The first case is *Sistrunk v. City of Strongsville*, where the Sixth Circuit held that a municipality could lease a traditional public forum to a private entity.[114] By granting a permit to a private entity, protesters could be prohibited from attending the event, solely because the protesters' message was different from that of the private entity that had rented the forum.[115] A high school student brought a suit alleging a violation of her First Amendment rights because she was not allowed to enter President George H. W. Bush's re-election rally while wearing a pro-Bill Clinton button; the student complied with the order to remove her button, and then was allowed inside the event.[116] The Strongsville Republican Organization organized the event, and the organization obtained a permit from the City of Strongsville to use the Strongsville Commons for a Bush-Quayle '92 rally.[117] Even though the plaintiff argued that the Strongsville Commons was a public forum and was designated for public use, the Court found that the City of Strongsville had the right to regulate the use of the Commons and could do so through the issuance of permits.[118] The *Sistrunk* court conceded that the Supreme Court's holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*[119] was not binding in this case, but the majority argued that the facts were similar and that it could be interpreted from the *Hurley* decision that requiring the organizers of the rally to allow campaign buttons for the opposing presidential candidate

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[111] *Id.* at 212–13.

[112] Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); Schwitzgebel v. City of Strongsville, 898 F. Supp. 1208 (N.D. Ohio 1995), *aff'd mem.*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied sub nom.* DeLong v. City of Strongsville, 522 U.S. 827 (1997).

[113] *Sistrunk*, 99 F.3d 194.

[114] *Id.*

[115] *Id.* at 200.

[116] *Id.* at 196.

[117] *Id.*

[118] *Id.*

[119] 515 U.S. 557 (1995) (holding that the private organization could not be forced to allow groups with opposing viewpoints to march in the organization's parade).

into the event would "alter the message the organizers sent to the media and other observers."[120] The Court found there was not a constitutional violation of the student's First Amendment rights because the private organization had the right to choose what message they wanted to portray and that a dissenter being allowed to attend the event would have infringed upon the organization's autonomy.[121]

The dissent in *Sistrunk* disagreed quite vehemently with the majority and argued that *Hurley* should not have been considered when deciding the facts of the case.[122] In the mind of the dissent, simply attending a rally as a spectator, even while wearing a button for the opposing candidate, did not amount to active participation in the event or the forcing of the event organizers to adopt a different message.[123]

The second case, arising from the same event, is *Schwitzgebel v. City of Strongsville*.[124] In this case, two men attended the same Bush-Quayle '92 rally, but once inside attempted to silently protest by holding up a sign with a message of dissent.[125] The men were arrested and removed from the event, but later the charges were dropped.[126] Differing from the opinion in *Sistrunk*, the court in *Schwitzgebel* used an analytical framework from *Bishop v. Reagan-Bush '84 Committee*[127] to analyze the claim before them.[128] The *Schwitzgebel* court held that the Commons remained a public forum, even if rented out to a private party, and that the proper analysis should be that which is applied to a restriction of speech within a traditionally public forum.[129] The court argued that allowing the government to transform a traditionally public forum into a private forum would be "to allow the government to suspend, if only temporarily, the existence of an historically protected arena used to safeguard the communication

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[120] *Sistrunk*, 99 F.3d at 199.

[121] *Id.* at 200.

[122] *Id.* at 201 (Spiegel, J., dissenting).

[123] *Id.* A similar argument about the distinction between attending and participating in an event was made by the District of Columbia Court of Appeals. Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997). The court in *Mahoney* refused to extend the decision in *Hurley* to cover the exclusion of protesters from standing on the sidewalks as a parade went by. *Id.* at 1456.

[124] 898 F. Supp. 1208 (N.D. Ohio 1995), *aff'd mem.*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied sub nom.* DeLong v. City of Strongsville, 522 U.S. 827 (1997).

[125] *Id.* at 1212.

[126] *Id.* at 1213. One sign said, "The Government Has Blood On Its Hands! One AIDS Death Every 10 Minutes," and the other sign had the message, "1,500,000 DEAD FROM AIDS. STOP THIS MONSTER! ACT UP," printed over a picture of the first President Bush. *Id.* at 1212.

[127] 819 F.2d 289, 1987 WL 35970, at *3 (6th Cir. 1987) (per curiam) (unpublished table decision) (citing Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 797 (1985)) (setting out the analytical framework for these types of cases to, first, define the relevant forum, and then second, determine the nature of the forum, and third, assess the justifications for restricting the forum to determine whether they meet the standards set forth by the Supreme Court).

[128] *Schwitzgebel*, 898 F. Supp. at 1214.

[129] *Id.* at 1216.

of thoughts between free citizens."[130] The court then proceeded to apply the relevant test for restriction of speech and expression in a public forum and found that the policy of granting permits to private parties was narrowly tailored and did serve a significant government purpose; therefore, the organization had the right to keep people with opposing messages out of their event.[131]

Although the two courts reached the same outcome—the political party hosting the event was a private party and had the right to decide who could and could not attend the event—the two courts differed on whether a public forum can actually be *transformed* into a private forum, leaving the issue unsettled. Although one treatise on constitutional law may recognize this practice as established law,[132] there has been some debate as to whether the *Sistrunk* decision would pass constitutional muster.[133]

Historically, the Supreme Court has placed great emphasis on the importance of protecting free speech and expression.[134] Justice Brennan, writing for the majority in *New York Times v. Sullivan*, discussed at length the Court's history of protecting free speech and stated that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[135] Justice Harlan once wrote that "[i]t is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them."[136] Especially when it comes to political speech and debate of political issues, it is impossible for both sides of the issue to be talked about in a public forum when one side of the debate is allowed to suffocate opposing viewpoints.

Kevin O'Neill argues that the decision in *Sistrunk* was wrongly decided in the face of the Supreme Court's holding in *United States v. Grace*.[137] In *Grace*, the Supreme Court held transformation of a traditionally public forum by the government into a non-public forum was unacceptable.[138] In *Bishop v. Reagan-Bush '84 Committee*, the Sixth Circuit suggested as well that "the nature of certain public forums *cannot*

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[130] *Id.*

[131] *Id.* at 1218.

[132] *See* 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 8:34 (perm. ed., rev. vol. 2007) (citing only *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* and *Sistrunk v. City of Strongsville*, while ignoring cases, like *Schwitzgebel*, which hold that privatization of traditional public forums is not possible).

[133] *See, e.g.*, Chris Ford, *Reclaiming the Public Forum: Courts Must Stand Firm Against Government Efforts to Displace Dissidence*, 2 TENN. J.L. & POL'Y 146, 217–33 (2006) (referring to privatization as the "theft of the public forum" and arguing that the *Sistrunk* court "failed even to reach an appropriate finding"); O'Neill, *supra* note 96, at 220 (calling the holding in *Sistrunk* "untenable" in the face of the Supreme Court's decision in *United States v. Grace*).

[134] New York Times v. Sullivan, 376 U.S. 254 (1964).

[135] *Id.* at 269–70.

[136] A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting).

[137] O'Neill, *supra* note 96, at 220 (citing United States v. Grace, 461 U.S. 171, 180 (1983)).

[138] *Grace*, 461 U.S. at 180.

be altered, either by governmental fiat or private will."[139] Combining O'Neill's argument that public forums can not be transformed with the importance the Supreme Court has placed on maintaining free speech and expression within American society, it seemingly follows that the practice of allowing event permits to drastically change the status of a forum violates the First Amendment. Event permits have been allowed by the Supreme Court only when the permits are distributed in a content-neutral way.[140] However, arguing that these permits should change the status of the forum, in a way which gives rise to systematic and unchecked content-based restrictions of speech, goes against the very purpose of allowing the permits to be granted in the first place. Privatization of public forums is merely a loophole in the protections of free speech and should not be allowed by the courts.

2. Significant Government Entwinement

In *Wickersham v. City of Columbia*, the court held that an event being held at a non-public forum is subject to First Amendment regulations if the government is shown to be "inextricably involved" in the event.[141] In this case the plaintiffs sought to hand out leaflets in opposition to the Iraq War at a Memorial Day Air Show, but were denied permission from the event coordinators and had been arrested for doing so at the air show in years past.[142] The court held that although the air show was being held in a non-public forum—at the city-owned airport, which had never been designated by the city as a public forum—the corporation running the event was so closely partnered with the city to make the event happen[143] that the corporation was not free to prohibit speech simply because the event organizer disagreed with it.[144] Furthermore, the court applied a reasonableness test, as set forth by Justice O'Connor's concurrence in *International Society for Krishna Consciousness v. Lee*,[145] which required that the "reasonableness of the Government's restriction [on speech in a non-public forum]

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[139] 819 F.2d 289, 1987 WL 35970, at *2 (6th Cir. 1987) (per curiam) (unpublished table decision).

[140] *See* Thomas v. Chi. Park Dist., 534 U.S. 316 (2002) (holding that an ordinance requiring individuals to obtain a permit before holding large events in a public park is not unconstitutional as long as the permit scheme is content-neutral).

[141] 371 F. Supp. 2d 1061, 1064 (W.D. Mo. 2005), *aff'd*, 481 F.3d 591 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 387 (2007).

[142] *Id.* at 1068–69.

[143] In order for the event to take place, "[t]he City runs the Airport during the Air Show and provides other necessary support such as special police, fire and sanitation resources. While the Corporation plans the order of the aerial demonstrations, the plan must be approved by the City's Airport personnel." *Id.* at 1064. Furthermore, the federal government would not provide planes for the event "unless the City attests that the City is making the airport available for the Air Show and it is officially supported by local government." *Id.*

[144] *Id.* at 1088–93.

[145] 505 U.S. 672, 687–90 (1992) (O'Connor, J., concurring).

must be assessed in light of the purpose of the forum and all the surrounding circumstances."[146] Following the holding in *Lee*, the *Wickersham* court found it was an unreasonable regulation to prohibit leafleting at the air show and ruled in favor of the plaintiffs on that issue.[147]

Applying the reasoning used in *Wickersham*, even if a court found that a political party—a private entity—was involved in the planning or sponsoring of an event, a strong government entanglement in planning and supervising presidential events should be enough to gain higher scrutiny of speech restrictions. This is where the existence of the Manual really changes the debate.

The two men who ejected Weise and Young from the Denver presidential event in March 2005 were forced to name who ordered the ejection.[148] In sworn legal depositions, both Steve Akiss, a former White House official, and Jamie O'Keefe, a current White House staffer, were named as the two who ordered the event volunteers to remove Weise, Bauer, and Young.[149] In an interview conducted after being named, Steve Akiss admitted that it was the policy of the White House to remove potentially disruptive guests from presidential events.[150] Akiss's comments contradicted earlier comments made by former-White House spokesman Scott McClellan, who claimed that volunteers, not White House staff, were responsible for removing Weise, Young, and Bauer.[151] Therefore, even if the Bush administration attempted to argue that it was a private party who organized the event, there is strong evidence that members of the Bush administration were the ones making decisions about which audience members should be thrown out. This is clearly a government or state action restricting speech, and should be held to a higher level of scrutiny than that of private action.

C. Applying Strict Scrutiny

As laid out in *Perry Education*, if a government attempts to regulate content-based speech within a traditional public forum the government must: (1) do so to serve a compelling state interest and (2) do so in a manner that is narrowly tailored to achieve that purpose.[152]

The White House has argued that potential dissenters removed from the events were a threat to the President.[153] The safety of the President is indeed a compelling interest,

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[146] *Wickersham*, 371 F. Supp. 2d at 1089 (quoting *Krishna Consciousness*, 505 U.S. at 687).

[147] *Id.* at 1093.

[148] Bruce Finley, *Activists' Expulsion Cited as Bush Rule*, DENVER POST, Mar. 4, 2007, at A1.

[149] *Id.*

[150] *Id.*

[151] *Id.* For a transcript of Scott McClellan's press briefing in which he briefly discussed the subject, see McClellan, *supra* note 13.

[152] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see also supra* notes 67–70 and accompanying text.

[153] Frosch, *supra* note 5.

and one in which deference should be given to the White House and Secret Service; however, the Manual does not differentiate between demonstrators that are a threat to the President's safety, and demonstrators who are peacefully demonstrating.[154] In fact, the Manual does not even define "demonstrators."[155] The only clue it gives to staffers to help in identifying demonstrators is to "[l]ook for signs that they may be carrying, and if need be, have volunteers check for folded cloth signs that demonstrators may be bringing to the event."[156] The government will have to craft a pretty creative argument to prove that a folded cloth sign being brought into the event forum poses a credible threat to the safety of the President.

Further, the language of the Manual does not support that the safety of the President is the main concern of the policy. The Manual clearly states, "If it is determined that the media will not see or hear [the demonstrators] and that they pose no potential disruption to the event, they can be ignored."[157] This implies that the reason for implementing the policies is not to protect the President from physical threats, but to protect the President's image in the media and to guarantee the event looks full of only President Bush supporters. Protecting the political safety of the President is a substantially different interest from protecting the physical safety of the President, and it would be bold to argue that preserving a positive political opinion of the President trumps citizens' First Amendment rights. The White House policies laid out in the manual simply do not support the compelling interest the government claims to have. The policies are overly broad and not narrowly tailored to meet the interest claimed by the government. Thus, if a court found that the events were being held in a public forum, the administration's policies would not survive the strict scrutiny applied to content-based public forum speech restrictions.

III. MAKING THE CASE FOR INJUNCTIVE RELIEF

A. Why Injunctive Relief is Needed

Paying monetary damages after the fact has not kept the Bush administration from enforcing the policies set out in the Manual.[158] Yet, under the strict scrutiny analysis, the Bush administration's consistent use of viewpoint discrimination at presidential events is not constitutional. Therefore, President Bush, or any future President, should not be allowed to continue to enforce such unconstitutional policies. If presidential administrations are unwilling to stop the practice themselves and do not begin to respect the rights of citizens, then the courts must step in and issue injunctive relief prohibiting the administration from this type of action. Only awarding monetary

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[154] MANUAL, *supra* note 2.

[155] *See id.*

[156] *Id.* at 34.

[157] *Id.* at 35.

[158] *See, e.g.*, *supra* text accompanying note 35.

damages to potential dissenters removed from the audience does not keep the rights guaranteed by the First Amendment intact. The Supreme Court noted the importance of timing when it comes to political speech, stating, "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances."[159] Removing dissenters from these presidential events stifles the political debate, and payment of monetary damages after the fact does not restore the debate. Further action needs to be taken to protect freedom of speech and expression so that all viewpoints can be shared at the same time, giving the American public more information upon which to base their political decisions.

B. Making the Case for Standing

Not just anyone has the ability to stop a President from enforcing unconstitutional policies. The Supreme Court has clearly laid out the three elements required in order to meet the constitutional minimum for standing.[160] First, plaintiff must demonstrate that she has suffered "an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent.'"[161] Second, plaintiff must demonstrate a causal connection between her injury and the actions she is challenging.[162] Third, plaintiff must demonstrate that it is "likely" that the injury will be redressed by a decision in favor of the plaintiff.[163] Although the Court has established the three elements which must be met to achieve standing, the elements have not been defined by the Court with precise language as to allow for a bright-line rule. As the Supreme Court noted in *Allen v. Wright*, a "standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."[164] Meaning, standing is often hard to analyze in a hypothetical situation, and must be established on a strict case-by-case basis. Often, the existence of one or two facts in a case can make all the difference in making the argument for standing.

Realistically, for a potential plaintiff under a set of facts similar to those found in the Ranks' case or the case of the Denver Three, proving causation and redressability should be straightforward. It is the stricter requirement of "actual injury," as established by the Supreme Court in *City of Los Angeles v. Lyons*[165] and subsequent case law, which will be the most difficult element to prove.

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[159] Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 182 (1968) (quoting A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting)).

[160] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[161] *Id.* at 560 (citations omitted).

[162] *Id.*

[163] *Id.* at 561.

[164] 468 U.S. 737, 752 (1984).

[165] 461 U.S. 95 (1983).

1. Actual Injury

In *Lyons*, the Supreme Court clarified the standard a plaintiff must meet in order to show that she has suffered an actual injury and that she is likely to suffer future injury from the challenged actions.[166] The defendant in *Lyons* was stopped by Los Angeles police officers for a traffic violation and during the traffic stop the officers applied a "chokehold" on the defendant, which rendered the defendant unconscious and caused other injuries.[167] The defendant sued the City of Los Angeles and the four police officers involved in the stop both for damages and injunctive relief.[168] The defendant wished to prohibit the department from allowing such chokeholds, except in situations where the person being stopped "reasonably appears to be threatening the immediate use of deadly force."[169] The Court found that, although the defendant had standing to claim damages against the city and the officers, his injury did "nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him."[170]

The Supreme Court's decision in *Lyons* established that, for a plaintiff to have standing to seek an injunction, it is not enough that the plaintiff establishes that an actual injury has occurred in the past.[171] The plaintiff must also establish that there is a "sufficient likelihood that he will again be wronged in a similar way" in the future.[172] According to the majority in *Lyons*, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[173] Therefore, in a case where a plaintiff has alleged that she was removed from a presidential event in violation of her First Amendment rights in the past, the plaintiff must be able to demonstrate that there is a likelihood that she will be harmed in the same manner again in the future. Since *Lyons*, proving future harm has become a large hurdle for some protesters attempting to gain injunctive relief against the government.[174] However, the existence of the Manual provides a potential plaintiff against the Bush administration with two strong arguments, which distinguish her case from *Lyons*.

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[166] *Id.* at 105–08.

[167] *Id.* at 97–98.

[168] *Id.* at 98.

[169] *Id.*

[170] *Id.* at 105.

[171] *Id.* at 102.

[172] *Id.* at 111.

[173] *Id.* at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974)).

[174] *See, e.g.*, Elend v. Basham, 471 F.3d 1199 (11th Cir. 2006) (holding that free speech advocates did not have standing, in part, for failure to establish injury); Moss v. U.S. Secret Service, No. 06-3045-CL, 2007 WL 2915608, at *14–16 (D. Or. Oct. 7, 2007) (holding that protesters failed to demonstrate "threat of future injury").

First, the Manual demonstrates that the actions taken at the presidential events are a matter of policy or practice and are authorized by the White House. Under the facts of *Lyons*, the Supreme Court stated there were two ways in which the defendant could establish an actual controversy in his case:

> Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such manner.[175]

Applying the reasoning in *Lyons* to the facts of a removal case, the language in *Lyons* suggests that if a plaintiff is seeking an injunction against the Bush administration's policies of removing dissenters, the plaintiff would not be required to demonstrate that *all* staff members at *all* presidential events take action to remove dissenters. Rather, a plaintiff could demonstrate that the White House "ordered or authorized" the staff members, who have removed dissenters in the past, to take such action.

The District Court in Oregon recognized the validity of this argument in a case filed by protesters against the City of Portland.[176] Although the protesters did not ultimately gain the injunctive relief requested, the court in *Marbet v. City of Portland* did find that the complaint sufficiently alleged a likelihood of future harm.[177] The court clearly stated that the holding in *Lyons* did not require that the protesters demonstrate that the defendants would "definitely" harm the protesters again in the future, but rather the protesters must only show a "likelihood of future harm."[178] The protesters were able to meet this burden by demonstrating that the City of Portland had a specific policy, and had "engaged in a pattern and practice of using excessive force against lawful protesters."[179]

Similar to *Marbet*, a plaintiff seeking injunctive relief against the Bush administration in order to stop the removal of dissenters can now, with the discovery of the Manual, demonstrate a "pattern or practice." In addition to the plain language in the Manual requiring staffers to take action to keep potential protesters out of the event, the admission by former White House staffer Steve Akiss demonstrates that the actions of removal were authorized by the White House Office of Presidential Advance, and therefore meet the policy requirement established in *Lyons*.[180]

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[175] City of L.A. v. Lyons, 461 U.S. 95, 105–06 (1983).

[176] Marbet v. City of Portland, No. CV 02-1448-HA, 2003 WL 23540258 (D. Or. Sep. 8, 2003).

[177] *Id.* at *11.

[178] *Id.*

[179] *Id.*

[180] *See* Finley, *supra* note 148.

There is a second significant way a plaintiff seeking to enjoin the Bush administration can distinguish her case from the case presented in *Lyons*. In *Lyons*, the defendant was unable to argue that he would once again be subjected to the illegal chokehold he was challenging, unless he demonstrated he would again act in some way that would require the police to arrest him.[181] The Court, reiterating its holding in *O'Shea v. Littleton*,[182] made the assumption that "[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct."[183] The plaintiff removed from a presidential event, however, if removed only because of her viewpoint, does not have to allege that a future injury is incumbent upon her illegal activity. Her freedom of expression at a presidential event is not illegal, and therefore a court would be able to assume that future injury would result from legal, rather than illegal, activity.

The Fifth Circuit found this distinction to be "critical" in *Hernandez v. Cremer*.[184] In *Hernandez*, the court upheld an injunction ordered by the district court against the Immigration and Naturalization Service (INS) San Antonio District, requiring the INS to "follow certain minimal procedures" when evaluating documentary evidence of an applicant for entry into the United States.[185] The plaintiff's right to travel had been affected by the INS policy in place prior to the injunction, and the Fifth Circuit court firmly stated, "The injury alleged to have been inflicted did not result from an individual's disobedience of official instructions and Hernandez was not engaged in any form of misconduct; on the contrary, he was exercising a fundamental Constitutional right."[186]

Just as the right to travel is a fundamental constitutional right, so is the right to exercise one's viewpoints freely, without being silenced by the government. Dissenters being removed from the presidential events are not violating the law by attending the public event and expressing their thoughts in a peaceful manner, either on a t-shirt or bumper sticker. In both instances of actual removal, the Ranks and the Denver Three all had obtained tickets to enter the event, and had not used physical force or trickery to gain entrance to the event.[187] Their actions did not cause a threat to the safety of the President, and they did not engage in any other action that could be considered illegal.[188]

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[181] City of L.A. v. Lyons, 461 U.S. 95, 108 (1983).

[182] 414 U.S. 488 (1974).

[183] *Lyons*, 461 U.S. at 103.

[184] 913 F.2d 230, 234 (5th Cir. 1990).

[185] *Id.* at 233.

[186] *Id.* at 234–35 (citation omitted).

[187] *See* Complaint and Jury Demand, *supra* note 45, at 4; Rank Complaint, *supra* note 3, at 3–4.

[188] *See* Complaint and Jury Demand, *supra* note 45, at 4–8 (describing the removal incident step-by-step, beginning with the time the plaintiffs arrived to the time they were removed); Rank Complaint, *supra* note 3, at 5 (stating that the plaintiffs were standing "peacefully on the public grounds of the West Virginia State Capitol").

Additionally, the Manual does not require that a potential protester engage in any illegal activity before the policies of the Manual take effect. Attendees who are deemed to be demonstrators must be dealt with immediately if they are "carrying signs, trying to shout down the President, or ha[ve] potential to cause some greater disruption."[189] This language does not require illegal activity on behalf of the dissenter before the dissenter can be removed from the event. Thus, under the holdings in *Lyons* and *Hernandez*, a potential plaintiff could argue that the court would not have to assume the plaintiff would behave illegally in order to foresee a future injury. Future *legal* action by the plaintiff, which gives rise to an injury by the government, should be granted protection from an invasion of her constitutional right of freedom of expression.

2. Causation

After demonstrating an actual injury, a plaintiff must demonstrate that the actions of the government, or presidential administration, are responsible for her injury. The standard set out by the Court in *Lujan v. Defenders of Wildlife* is that the "injury has to be *'fairly trace*[*able*] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"[190] This means a plaintiff needs to demonstrate that her injury was directly caused by the entity from whom she is seeking relief.

In *Allen v. Wright*, the Supreme Court rejected a request for injunctive relief because the causal link of the alleged injury was "attenuated at best."[191] In *Allen*, the plaintiffs alleged that the IRS's granting of tax exemptions to private schools which were racially discriminatory was leading to the inability of some students "to receive an education in desegregated public schools."[192] The Court did not believe that the connection between the IRS's action and the plaintiffs' alleged injuries was direct enough to meet the standing requirement of causation.[193]

The argument for causation under the facts of the recent removal incident is much more straightforward. Although the Bush administration has claimed that volunteers working the previous presidential events chose to remove the dissenters,[194] the presence of the Manual adds "directness" to the injury. Causation is bolstered in a scenario where the plaintiff is able to obtain an admission from a White House staffer explicitly naming the person who gave the order for removal.

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[189] MANUAL, *supra* note 2, at 35.

[190] 504 U.S. 555, 560–61 (emphasis added) (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

[191] 468 U.S. 737, 757 (1984).

[192] *Id.* at 739–40.

[193] *Id.* at 757.

[194] McClellan, *supra* note 13. When asked about the removal of the Denver Three, McClellan stated, "[M]y understanding is the *volunteer* was concerned about these individuals, and that's why *he* asked them to leave." *Id.* (emphasis added).

Even if a potential plaintiff is unable to establish who exactly ordered her removal, she can point to the policies in the Manual as evidence that the Bush administration's staff is responsible for making the decision. Thus, if the plaintiff demonstrates that she was removed because her viewpoint differed from the President's, not because she was behaving illegally, and that if the policies of the Manual were not in place the plaintiff would not have been removed, then the plaintiff has fulfilled the causation requirement of proving her standing to bring suit.

3. Redressability

Finally, a plaintiff must address the element of redressability, meaning that the plaintiff must demonstrate that the requested remedy is "likely" to redress the alleged injury.[195] In *Marbet,* the plaintiffs lost their injunctive relief claim because the court did not believe that the plaintiffs' proposed relief would actually remedy their injuries.[196] The remedy sought by the plaintiffs was "an order directing the City of Portland to install and execute a civilian police review board," because the plaintiffs believed that implementation of such a review board would deter future injuries similar to their own.[197] The court, however, did not believe the creation of a citizen review board would actually keep future injuries from occurring; plaintiffs would have to prove "that a police officer planning to use unlawful force [in the future] would likely consider the presence of a citizen review board and refrain from exercising excessive force because of the presence of the board."[198]

A claim for injunctive relief brought against the Bush administration is clearly distinguishable from the facts in *Marbet.* A plaintiff seeking a court order prohibiting the Bush administration from acting on the unconstitutional policies set forth in the Manual would in fact redress the injury suffered by the plaintiff. The link between the policies of the administration and the injury to the plaintiff removed from a presidential event is much more clear than the link between the injury in *Marbet* and the creation of a review board.

CONCLUSION

The policy of removing potential dissenters from a presidential event being held in a public forum should no longer be tolerated. Such blatant viewpoint discrimination is contrary to the purpose of the First Amendment. Understandably, the President and his staff should be allowed to remove people who pose a potential threat to the

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[195] *Lujan*, 504 U.S. at 561 (1992).

[196] Marbet v. City of Portland, No. CV 02-1448-HA, 2003 WL 23540258 (D. Or. Sep. 8, 2003).

[197] *Id.* at *10–11.

[198] *Id.* at *11.

President's safety. However, removing individuals who are not acting illegally, simply to keep them from being seen by the media, is not a valid or legitimate government purpose. The President is a public servant, and when making public speeches in relation to his duties as President, should not be afforded the right to silence and completely remove from the debate those people who may potentially share a different view. The discovery of the Manual helps solidify the argument that the President's purpose does not withstand constitutional scrutiny.

Furthermore, simply awarding monetary damages to parties who have been removed from these events will not keep the President or future Presidents and politicians from employing the same tactics. In order to secure the freedom of speech and expression as guaranteed by the First Amendment, a court must order the White House to stop enforcing the policies outlined in the Manual. If the White House is going to continue to hold public events, where the President appears to discuss political issues relevant in today's society, all citizens should be allowed to attend such events regardless of whether they agree with the President's beliefs. The existence of the Manual gives potential plaintiffs a much more credible argument for standing to bring suit.

While former presidential administrations may have been able to get away with similar actions in the past, the Manual creates a strong case against the Bush administration by changing both the First Amendment and standing analysis. There is now hope that the First Amendment rights of *all* who attend future presidential events will be protected.