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The Political Conventions and the First Amendment

Posted By [Timothy Zick](#) On September 10, 2008 @ 4:00 pm In [First Amendment](#) | [1 Comment](#)

Now that the major party conventions are over, I thought I would provide a retrospective comparison of these events with their predecessors in 2004 with regard to the exercise of First Amendment liberties. Although there was much that was (disturbingly) familiar, there were some differences worth noting. Here is a brief recap:

More of the Same

1. *The Protest Environment.* As I noted in a prior post, the spaces around the convention centers were "militarized." This involved, among other things, physical barriers and large numbers of officers in the public places surrounding the convention sites. It is difficult to fully appreciate what this looks and feels like on the ground, absent participation in protest activities. Some participants I have spoken to recount feeling surprised and intimidated by the presence of brigades of officers in full riot gear. The show of force is, of course, at least partially meant to maintain public order and secure large public spaces. Is it also meant to intimidate and suppress? Militarization's effects on even lawful protest activity are, of course, very difficult to measure. But is it so implausible to believe that some number of potential protesters might be deterred from attending an event in this environment? We are very likely to see militarization tactics at future conventions and other mass events. I have heard comments to the effect that today's relatively small number of protest participants is indicative of a lack of enthusiasm for such activity, or sincere doubts regarding its efficacy. But we ought to be mindful of the influence of this sort of intimidating, militarized environment on public displays of contention. At some point, the costs of participating may simply be too high for some.

2. *Preemptive Actions.* There are [reports](#) ^[1] that police and other officers engaged in pre-convention raids of some protesters' residences. This has occurred at other mass events, including summits in Washington, D.C. and the previous political conventions. The preemptive model of policing is consistent with the general transformation of public policing at mass events. Methods generally associated with combating terrorism are now being applied prior to and during public demonstrations and protests.

3. *Mass Arrests/Use of Force.* Hundreds of protesters and others were [arrested](#) ^[2] at the conventions. Some of those arrested were engaged in unlawful behavior, for example the destruction of property. But as at prior conventions, many of those arrested in Denver and St. Paul were released after a very short time. At the 2004 Republican National Convention in New York City, more than 1,800 protesters were arrested. Some 90% of these arrests were dismissed or adjourned in contemplation of dismissal. Of those arrested in New York, 550 were released before arraignment owing to a failure to comply with a state mandate that required arraignment within 24 hours. If the past is any guide, the vast majority arrested in Denver and St. Paul were simply in the wrong place at the wrong time. Police in Denver and, especially, St. Paul, appear to have cast very broad "security" nets on the streets. As well, as at past conventions some protesters are alleging that police unlawfully used pepper spray and other means of force to disburse crowds of demonstrators. Some civil actions against the host cities and police have already been filed.

4. *Covert Surveillance.* Judging from claims made by authorities in pre-convention legal challenges, agents once again engaged in extensive Web and other surveillance prior to the conventions. Whether the surveillance was of a similar scope to that performed prior to the 2004 Republican National Convention (18 months, global, and mostly of protesters planning lawful demonstrations and other events) may never be known — unless the information is disclosed, as it was after the 2004 Republican National Convention in New York City, as a result of discovery in future lawsuits.

5. *Protest Zoning.* Finally, as at the 2004 party conventions, officials designated protest or demonstration zones to restrict the movement of protesters and their access to contested audiences and sites. These zones were challenged in court. Not surprisingly, courts in

[Denver](#) [3] and [St. Paul](#) [4] upheld the restrictions, despite acknowledging that they interfered with lawful First Amendment activity including handbilling. As I noted in my prior post, part of the courts' reasoning was that the demonstration zones were not as repressive as those used in Boston and New York City in 2004. In the Denver case, the court held that protesters were not constitutionally entitled to be within "sight and sound" of the convention center. In essence, both courts held that demonstrators were permitted to be "close enough" to the delegates and the contested convention sites, and that there were alternative avenues of communication — the Web, the various representatives present, and other public spaces.

Despite the many similarities, however, there were some critical differences between the 2004 and 2008 conventions with regard to the exercise of First Amendment liberties.

Differences

1. *Preemptive Lawsuits.* In Boston and New York City in 2004, protesters were chided by courts for not challenging protest zones and other restrictions early enough such that proper relief could be ordered. Protesters in both Denver and St. Paul filed lawsuits well before the conventions, in an effort to force authorities to disclose limits on First Amendment activity at the conventions and to entice substantial numbers of participants to join their movements. Although they gained some basic information as a result of this tactic, protesters still found themselves in court just prior to the start of the conventions. Part of the difficulty with this strategy was that authorities either had not yet determined the substantive restrictions that would apply at the two sites, or were not willing to disclose restrictions on the ground that this might compromise security. In short, although protesters were wise to start the judicial process earlier, they gained very little as a result of their preemptive lawsuits.

2. *Liability Insurance.* In what may turn out to be a very significant "first" in terms of convention security, the Republican host committee [purchased a liability policy](#) [5] prior to the convention. The policy covered physical and property damage up to \$10 million, and also covered the legal expenses associated with any lawsuits filed by protesters and others against state, city, and county officers. Host cities for prior conventions and summits, including Seattle and D.C., have been hit with several million dollar judgments. St. Paul was not willing to take that chance. The private insurance approach will obviously save the taxpayers substantial sums should any of the lawsuits lead to damage awards. It also enabled St. Paul to give assurance to officers from outside the city that their legal expenses would be covered, thus increasing the size of the security force at the convention. But there are two potential concerns with this unique arrangement. The first, voiced by some protesters, is that insuring officers in this manner may encourage them to act more aggressively. I'm not sure about that. For one thing, the host cities would generally provide legal defenses for officers engaged in public policing activities. For another, I'm not sure many officers would make this sort of calculation in determining how to act on the ground and in the moment. The other concern, however, is that large damage awards against cities are a form of public accountability for actions by public officials. If the taxpayers are incensed by them, they can vote the bums out. That check no longer exists once the expense is shifted to a private party.

3. *Arrests of Journalists.* The security nets at the 2004 conventions were broad. But I do not recall them sweeping in nearly as many journalists as were arrested at the 2008 conventions, particularly the event in St. Paul. There are reports that AP reporters, camera crews, and well-known journalists like [Amy Goodman](#) [6] were arrested in St. Paul. Journalists do not have any special First Amendment right to be in officially restricted areas. But authorities, out of respect for their constitutional and public functions, and probably to avoid adverse publicity, have generally avoided arresting them—at least without substantial cause. Some of the [video accounts](#) [7] (and this form of evidence, as [Howard Wasserman](#) [8] has noted, is becoming increasingly prevalent) suggest that officers acted quickly (and in some cases forcefully) to arrest journalists who were reporting as protest events transpired. I do not know whether, as some have suggested, journalists were actually *targeted* by police. We can only hope that their being swept into the security dragnet will not affect reporting at future events.

4. *Terrorism Charges.* Finally, some of the protesters in St. Paul apparently face [terrorism-related charges](#) [9] under the Minnesota version of the federal Patriot Act. It will be interesting to see what conduct precipitated those charges. If it was nothing more than

public disruption or, worse, advocacy of "anarchy," future protesters (most of whom are now subject to surveillance) may take note of the enhanced risk of public demonstrations and contention.

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URLs in this post:

[1] reports: <http://www.msnbc.msn.com/id/26471627/>

[2] arrested: <http://thecaucus.blogs.nytimes.com/2008/09/04/hundreds-of-protesters-arrested/>

[3] Denver: <http://www.talkleft.com/media/acludenver.pdf>

[4] St. Paul:

http://www.mncourts.gov/Documents/2/Public/Criminal_Court/62cv087976.pdf

[5] purchased a liability policy:

http://www.startribune.com/politics/national/conventions/27818659.html?elr=KArks7PYDiaK7DU2EkP7K_V_GD7EaPc:iLP8iUiD3aPc:_Yyc:aUU

[6] Amy Goodman: <http://www.commondreams.org/view/2008/09/04>

[7] video accounts: <http://www.youtube.com/watch?v=oYjyvkR0bGQ>

[8] Howard Wasserman: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1219162

[9] terrorism-related charges: <http://www.commondreams.org/view/2008/09/08-0>

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