

Position Paper on Political Speech/Campaigning at Public Libraries

MEMORANDUM

To: Patricia Tumulty, NJLA
From: Frank Corrado
Date: March 20, 2017
Re: Political Speech/Campaigning at Public Libraries

You have asked whether political candidates and political organizations may use public libraries, or the sidewalks surrounding them, for expressive political activity, including meetings, electioneering and the distribution of literature or flyers. In particular, you have asked whether public libraries that have otherwise opened their meeting facilities for public use may prohibit such use by political groups or candidates.

I have reviewed the relevant First Amendment law¹ on these issues, and conclude as follows:

1. The sidewalks outside public libraries are generally "traditional public forums," usually municipally owned, in which government may only restrict speech for a compelling reason and in the narrowest possible way. Otherwise, it may only impose content-neutral restrictions on the time, place and manner of the speech.

2. Much of a public library's interior is not compatible with unrestricted expressive activity, and therefore is not a public forum. In those areas, the library can limit expressive activity. Those restrictions need only be reasonable in light of the library's purpose and viewpoint-neutral. To take an obvious example, a library may prohibit electioneering in its reading rooms.

3. However, to the extent a library has intentionally opened its meeting rooms, information tables or bulletin boards to the public generally, it has likely created a "designated public forum" that it must also open

¹ I've limited this discussion to the First Amendment. New Jersey has an analogous state constitutional provision. Art. I, par. 6, which in some cases provides more protection to speech than the federal constitution does. In this instance, however, except as described in footnote 3 below, I do not believe there would be significant differences between federal and state constitutional law.

to political expression, subject only to the same restrictions allowed in a traditional public forum. One might argue that political expression is qualitatively different than other forms of expression, in a manner that makes it incompatible with a library's purpose, but in my opinion that argument is not persuasive.

My analysis follows. (For simplicity's sake, I've minimized legal citations, but can supply them if anyone wishes.)

With respect to the First Amendment's guarantee of free expression, not all public property is equal. The Supreme Court has identified three categories of public property, or "public forums," and the government's ability to regulate speech depends how a property is categorized.

First, "traditional" public forums are those areas that by history and tradition have served as places for open expression; they include streets, sidewalks, and parks. In such places, the state may impose content-neutral regulations on the time, place, and manner of speech, but may only restrict the content of expression for the most compelling reason, and then only in the narrowest possible way.

Second, the government can create, or "designate," a public forum by intentionally opening for expression property not traditionally devoted that purpose. In such "designated" public forums, restrictions on speech are subject to the same "strict scrutiny" that they receive in traditional public forums.

However, please note that the government does not create a designated public forum simply by inaction or by permitting limited discourse; it must intentionally act to do so. To determine whether the state has intentionally "designated" a forum, a court will look to the government's prior policy and practice, to the nature of the property, and to its compatibility with expressive activity.

Finally, the government creates a "limited" or "non-public" forum² when it opens property for limited use by certain groups or dedicates it solely to the discussion of

²These two terms are functionally equivalent, and courts use them interchangeably.

particular subjects. In these forums, restrictions on speech need only be reasonable (given the forum's purpose) and viewpoint-neutral.

Applied to public libraries and their surroundings, these principles yield several different outcomes.

1. Sidewalks surrounding a library.

This is the easiest category to deal with. Sidewalks and green areas surrounding a library, which are typically municipally or county-owned, should be characterized as traditional public forums. The government (and, to the extent it has control, the library) can regulate the time, place, and manner of speech on this property in a content-neutral way, but it cannot ban or restrict speech simply because it is political.

In other words, while the government can regulate speech to ensure that the library entrances are not obstructed, or that pedestrians have a clear and safe passage along sidewalks, it cannot prohibit speech merely because it is "political" and therefore potentially controversial and susceptible to disagreement or counter-speech. The First Amendment prohibits the state from restricting speech merely because it fears controversy or confrontation.

I am aware of cases, such as United States v. Kokinda, 497 U.S. 720 (1990) where courts have permitted post offices to restrict speech on the sidewalks surrounding them. But those cases turn on a factual quirk: that the Postal Service, a quasi-private corporation, owned the property on which the sidewalk was located.³

The better analogy is to United States v. Grace, 461 U.S. 307 (1983), in which the Supreme Court held that the sidewalk in front of the Supreme Court building itself was

³ Even if the library sidewalk were "privately" owned, this is the one circumstance where the state constitution might provide more protection for speech than the First Amendment does. The First Amendment only applies to government owned property; the state Supreme Court has extended the protections of Art. I, par. 6 to some private property, such as private university campuses and large privately owned shopping centers.

"indistinguishable from any other sidewalk in Washington, D.C.," and treated it as a public forum. I think this is generally true of the sidewalks around libraries, as well.

In sum, subject to reasonable time, place and manner restrictions, political activity can occur on the sidewalks and green spaces around public libraries.

2. The library's interior.

This is another relatively easy call. The interior of a library is not a "traditional" public forum. In fact, large portions of a library's interior space - reading and study areas, computer labs, library stacks - are fundamentally incompatible with unfettered expressive activity.

Although some speech or expression may occur in these areas, no one could reasonably argue that a library has intentionally opened or dedicated these spaces to unrestricted public discourse. These spaces are best characterized as limited, or non-public, forums, in which restrictions on speech need only be reasonable and viewpoint-neutral.

Thus, for example, a library might permit students working on a research project in a library study area to confer about their project, but prohibit electioneering in the same space. The distinction is reasonable in terms of the library's purpose, and is viewpoint-neutral. (Note however, that the library could not allow students to confer about a pro-life research project but prohibit conversation about pro-abortion research. That would be impermissible viewpoint-based discrimination.)

In sum, much of a library's interior is a non-public forum and the library can prohibit political activity there, so long as the prohibition extends to all political viewpoints.

3. Meeting rooms, tables, and bulletin boards.

These areas present the most difficult issues. Generally, the outcome depends on the library's policy (whether written or not).

If the library has affirmatively and intentionally adopted a policy of making its meeting rooms available to members of the public and to organizations, then it has created a "designated" public forum, where speech cannot be restricted because of its content.

In that circumstance, the library must permit political speech in that forum, whether by an individual candidate or a political organization. The same would be true of tables and bulletin boards - again on the assumption that the library has affirmatively adopted a policy of general public access.

The critical question here is whether the library has intentionally opened the meeting room, or bulletin board, to general public access for expressive activity. As noted above, the government cannot create a designated public forum by inaction or by simply permitting some limited public discourse.

Thus, a library might argue that it can limit speech in its meeting rooms, or on its bulletin boards, to "non-controversial" topics that are compatible with a library's purpose; that therefore it has only created a "limited" public forum; and that consequently it can prohibit ostensibly controversial political speech.

There is arguably Supreme Court precedent for this position. In Cornelius v. NAACP Legal Defense and Ed. Fund, 473 U.S. 788 (1985), the Court held that the annual federal fundraising campaign was a limited public forum that could constitutionally exclude advocacy groups from participating. The Court found that 1) the exclusion was reasonable because it prevented the "politicization" of the campaign, and 2) it did not discriminate on the basis of the advocacy group's viewpoint.

Conceivably, a library could make an analogous argument. I find the argument unpersuasive, however. Even if a court were to find that the library's meeting rooms were limited public forums, given the sort of expressive activity that routinely occurs there, the exclusion of political activity does not seem reasonable.

Nor is it likely to be deemed viewpoint-neutral. If, for example, the library permitted Friends of the Earth to use its meeting room to discuss the perils of global

warming, it could not prohibit a candidate who believed global warming to be a hoax from holding a meeting to discuss that topic.

The better analogy in this instance, I believe, are cases like Good News Club v. Milford Central School, 533 U.S. 98 (2001), and Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993), in which the Supreme Court assumed that a school district's meeting room policy created a limited public forum but held that the policy was viewpoint-discriminatory because it forbade discussion of otherwise permissible subject matter from a "religious" point of view. Substitute the word "political" for "religious" in that sentence and you have the situation presented here.

In sum, I believe that if the library allows public access to its meeting rooms, information tables and bulletin boards for expressive purposes, it cannot constitutionally exclude political expression.

Finally, remember that a government entity creates a designated public forum by choice. It always has the option of not creating such a forum. If it chooses that option, however, it either must ban all expressive activity, or comply with the legal requirements governing speech at a nonpublic or limited public forum.

I hope this memorandum addresses your concerns. If you have additional questions, or wish to discuss the matter further, feel free to contact me.

FLC

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