
IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 03-CT-680

ANDREW E. BLOCH,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

On Appeal from the Superior Court
Criminal Division - Traffic & D.C. Branch
[No. D-620-03]

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF
THE NATIONAL CAPITAL AREA, *AMICUS CURIAE***

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November 22, 2004

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REQUIRED BY RULE 29(c)**

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Arthur B. Spitzer

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INTEREST OF *AMICUS*

The American Civil Liberties Union of the National Capital Area is the local affiliate of the American Civil Liberties Union, a non-partisan, non-profit corporation with more than 400,000 members nationwide whose mission is to protect and expand the civil liberties and civil rights of all Americans. To that end, the ACLU has participated in many cases before this Court, on behalf of litigants and as *amicus curiae*. The ACLU has an interest in the issue presented in this appeal because the District of Columbia Police Line regulation is sometimes enforced—as it was in this case—against individuals who are exercising First Amendment rights.

The American Civil Liberties Union of the National Capital Area files this brief pursuant to the invitation in this Court’s order of October 14, 2004.

ISSUE ADDRESSED BY *AMICUS*

As specified by the Court's order, *amicus* addresses the constitutionality of the District of Columbia Police Line regulation, 24 DCMR § 2100, as applied to the facts of this case.

STATEMENT

On the evening of March 17, 2003, President Bush addressed the nation from the White House, stating that “events in Iraq have now reached the final days of decision. . . . Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict, commenced at a time of our choosing.”¹ On the evening of March 19, the President again addressed the nation, announcing that “at this hour, American and coalition forces are in the early stages of military operations to disarm Iraq.”²

On the morning of March 19, the Park Police set up “bicycle fencing” (so called because it resembles a bicycle rack) along the north curb of Pennsylvania Avenue between 15th and 17th Streets, part of which is also the south side of Lafayette Park. Supp. Tr. 18. Eight to fifteen uniformed officers stood behind the fence along this two-block stretch. Supp. Tr. 19. Pennsylvania Avenue and the White House Sidewalk, south of this fence, were closed to the general public. Supp. Tr. 18-

¹ The text of the President's March 17, 2003, address is available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> .

² The text of the President's March 19, 2003, address is available at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> .

19.³ This closure was put into effect specifically because the police anticipated that some protesters would gather near the White House to protest the commencement of the war. Supp. Tr. 18; Tr. 32.

Some protesters did gather. During the hours leading up to the attack, individuals and small groups of people gathered in Lafayette Park to protest the coming war. Significantly, there was not a *large* anti-war demonstration in Lafayette Park on March 19—and the authorities knew there would not be one—because permits are required for groups larger than 25, *see* 36 CFR § 7.96(g)(2)(i), and no permit had been issued.⁴ Those who gathered in the park were entirely peaceful. Tr. 49 (“It was a very peaceful demonstration” (Sgt. Dawson)).

About one o’clock in the afternoon a group of 20 to 23 people, including defendant-appellant Andrew Bloch, stepped over the fence into Pennsylvania Avenue and then knelt down. Supp. Tr. 32. Three or four others later crossed the fence and joined them. *Id.* All were subsequently arrested and charged with crossing a police line. Supp. Tr. 33.

At trial, the government presented minimal, and contradictory, testimony as to the purpose of the bicycle fence police line.

³ Although the stretch of Pennsylvania Avenue between 15th and 17th Streets, N.W., had been closed to vehicular traffic since September 11, 2001, Pennsylvania Avenue and the White House sidewalk had remained open to pedestrians.

⁴ This is why Park Police Sgt. Dawson testified that “demonstrators were allowed to come to the park in certain groups of 25.” Tr. 47. A search of the [washingtonpost.com](http://www.washingtonpost.com) news archive finds no story about any protests in Lafayette Park on March 19, 2003. Photographs from that day, available at <http://www.andybloch.com/gallery/2003-03-19> (which are not in the record of this case), suggest that there were a few dozen protesters in the park.

Park Police Officer Peter Ward, who was the designated arresting officer for the defendants, Supp. Tr. 33, testified that he understood “through, you know, my experience,” that “the Secret Service perceived that they needed to expand the area around the White House to allow for a police staging area for the crowds that are generally anticipated [to] occur when these types of actions are taken by the Government.” Tr. 32.⁵

The only other government witness was Park Police Sergeant Dale Dawson, who was Officer Ward’s supervisor, and who testified that he had been instructed to keep people from entering onto Pennsylvania Avenue. Tr. 47. He was asked, “Do you know what the purpose of these instructions were?” He answered:

A. Yeah, just to make sure traffic could move freely and the only traffic, really, on Pennsylvania Avenue since it closed down is mostly police vehicles.

Tr. 48. Thus, one government witness speculated that the purpose of the police line was to create a “staging area” and the other testified that it was simply to keep the

⁵ When Officer Ward began testifying as to his understanding of the reason why the police line was established, a defendant objected on the ground that he was speculating. Supp. Tr. 20 (“I don’t know who gave the—specifically who gave the authority to establish the police zone and so therefore their motivation—any other motivations other than that person’s motivations are hearsay”). The trial court sustained the objection “in part,” ruling, “I’ll take it only insofar as it informs this gentleman’s behavior. In other words, that was his understanding and upon which he proceeded.” Supp. Tr. 20.

That objection was made on behalf of all defendants, pursuant to the trial judge’s ruling that “every defendant is entitled to the benefit of any defendant[’s] objection, and is entitled to the consideration of all of the evidence . . . and any remarks made by any co-defendant, and share equally in any relief which may be afforded to any defendant.” Supp. Tr. 6-7.

Officer Ward’s testimony a few minutes later that his experience led him to believe that the police line was erected to create “a police staging area” was therefore not admitted as direct evidence of the purpose for the police line but only to explain Officer Ward’s actions.

street open for the movement of traffic.⁶ Both government witnesses conceded that they had no first-hand knowledge about who had directed the creation of the police line or why the police line was established. Tr. 32-33 (“no, I was not involved in the discussions that occurred with the higher ups in the organizations” (Officer Ward)); Tr. 38 (“Q. You said that the secret Service directed that the emergency zone be set up? A. I said the Sergeant said that the area was closed” (Officer Ward));⁷ Tr. 47 (“Q. Who’s [*sic*] instructions were those that you were given? A. I would imagine that it would be from the Chief of Police Q. She didn’t speak to you personally? A. No.” (Sgt. Dawson)).

On June 4, 2003, defendant Bloch and several others were convicted after a bench trial (Stephen G. Milliken, J.) at which they represented themselves. Each was sentenced to three months of unsupervised probation with a special condition to perform community service and fined \$50 (which was suspended). Tr. 128. Only defendant Bloch has appealed.

⁶ Thus, Officer Ward’s testimony indicates that the police line was established pursuant to 24 DCMR § 2100.1(a) (“a clearing for . . . the operation of firemen or policemen”), while Sgt. Dawson’s testimony indicates that the police line was established pursuant to 24 DCMR § 2100.1(c) (“a clearing for . . . the movement of traffic”). Although the government has defended this police line as justified under subsections (a) or (e), *see* Brief for D.C. at 9-11, the only competent testimony in the record is that it was established under subsection (c), a purpose for which the government has offered no justification. *See* footnote 7, below.

⁷ The sergeant from whom Officer Ward received his information was Sgt. Dawson. *See* Tr. 48 (“Q. Did you provide instructions to Officer Ward? A. Yes I did. . . . I had a squad of, I believe eight to ten officers.”) This confirms that Officer Ward’s belief that Pennsylvania Avenue was being kept open as a “staging zone” was plainly nothing but his own speculation, as the supervisor from whom he received his information and instructions had no such knowledge or understanding. The trial court’s admission of Officer Ward’s testimony on this point “only insofar as it informs [his] behavior” was therefore well justified.

SUMMARY OF ARGUMENT

Even a facially valid regulation must be subjected to careful First Amendment analysis when it is applied to prohibit political speech in a traditional public forum. The applicable analysis is the familiar test for regulations of the “time, place and manner” or speech: the restriction must be content-neutral, it must be narrowly tailored to serve a significant governmental interest, and it must leave open adequate alternative channels for the person’s speech.

The evidence in this case shows that the police line erected along Pennsylvania Avenue on March 19, 2003, was invalid. First, its justification had reference to the anti-war protest content of defendant’s speech. Second, the police line was not reasonably necessary for the purpose of creating a “staging area” for the police, as it was not in fact used for that purpose; nor was it reasonably necessary for the purpose of maintaining the movement of traffic, as two lanes of Pennsylvania Avenue would have been more than adequate for that purpose, and that purpose does not in any way justify the closing of the White House sidewalk. Finally, allowing protesters to gather in Lafayette Park was not an adequate alternative venue for their speech because it did not enable them to bring their message within sight and sound of those in the White House or to create an image of protest in front of the White House.

ARGUMENT

THE GOVERNMENT FAILED TO PROVE THAT THERE WAS A CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR THE POLICE LINE IN THIS CASE

The Police Line regulation, 24 DCMR § 2100, provides that:

2100.1 When fires, accidents, wrecks, explosions, parades, or other occasions cause or may cause persons to collect on the public streets, alleys, highways, or parkings, the Chief of Police, an inspector or captain of the police, or an officer acting for him or her may establish an area or zone that he or she considers necessary for the purpose of affording a clearing for the following:

- (a) The operation of firemen or policemen;
- (b) The passage of a parade;
- (c) The movement of traffic;
- (d) The exclusion of the public from the vicinity of a riot, disorderly gathering, accident, wreck, explosion, or other emergency; and
- (e) The protection of persons and property.

* * *

2100.3 No person shall enter the emergency area or zone unless duly authorized by the person in command of the emergency occasion, except as provided in § 2100.4.

As a general matter, the Police Line regulation is not aimed at restricting speech. In most of its applications (*e.g.*, fires, car accidents, crime scenes) freedom of expression will not be affected at all, and no special First Amendment analysis will be necessary or appropriate. *See Virginia v. Hicks*, 539 U.S. 113, 121-124 (2003) (trespass regulation not aimed at speech is not subject to First Amendment overbreadth challenge). But where a police line is established for the purpose of restricting speech, its constitutionality must be measured by the legal standards

applicable to governmental regulations on speech. *See Washington Mobilization Committee v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977) (testing Police Line regulation against First Amendment standards; upholding it against facial challenge and as applied in that case).⁸

The proper application of as-applied First Amendment analysis in this case is exemplified by *United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992), which would be the controlling precedent if this prosecution had been brought in federal court.

Doe arose at the time of the United States' previous incursion into Iraq, the Persian Gulf War of 1991. The defendant protested that war by beating a drum in Lafayette Park until she was arrested for violating the National Park Service's noise regulation, 36 C.F.R. § 2.12(a)(1)(i), which prohibits "operating . . . an audio device . . . in a manner that exceeds a noise level of 60 decibels measured on the A-weighted scale at 50 feet." 968 F.2d at 87. *Doe* was convicted at trial but the federal court of appeals reversed her conviction and ordered the charges dismissed because the noise regulation was unconstitutional as applied to the circumstances of her arrest. *Id.* at 91.

Like the Police Line regulation, the Park Service noise regulation is not, as a general matter, aimed at restricting speech. It applies to all National Park Service property in the United States, and most of its applications involve wilderness "settings

⁸ Of course this Court is not bound by the D.C. Circuit's decision in the *Washington Mobilization* case, *see M.A.P. v Ryan*, 285 A.2d 310, 312 (D.C. 1971), but *amici* were not asked to address the facial constitutionality of the Police Line regulation and it is not necessary to do so.

where even a modest noise . . . might disturb the wildlife or detract from other visitors' ability to enjoy the soothing sounds of silence.” *Id.* at 90.

As the D.C. Circuit recognized, however, the noise regulation had to be subjected to careful First Amendment analysis when applied to restrict political speech in the neighborhood of the White House. The court's reasoning proceeded as follows:

First, the court recognized that “beating a drum in the context of a clearly identified anti-war demonstration” was symbolic speech or “expressive conduct protected by the First Amendment.” *Id.* at 87. Here, too, there is no dispute that the defendant's conduct was protected expression.

Second, the *Doe* court recognized that “Lafayette Park is a ‘quintessential public forum,’” *id.* (quoting *White House Vigil for the ERA Committee v. Clark*, 746 F.2d 1518, 1526-27 (D.C. Cir. 1984)), where “‘the government's ability to permissibly restrict expressive conduct . . . is very limited.’” *Id.* at 88 (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)). Likewise here, Pennsylvania Avenue in front of the White House is a quintessential public forum. Indeed, the area under discussion in *White House Vigil* was not actually Lafayette Park but the White House Sidewalk on the other side of Pennsylvania Avenue, directly outside the White House fence. As the court in *White House Vigil* explained, public “[s]idewalks . . . streets and parks” equally “occupy a privileged position in the hierarchy of first amendment jurisprudence.” *Id.* at 1526-27 (emphasis added).

The courts in this jurisdiction have long recognized “the unique quality of demonstrations in front of the White House from the viewpoint of First Amendment interests.” *A Quaker Action Group v. Morton*, 516 F.2d 717, 733 n.49a (D.C. Cir. 1975). As the *Quaker Action Group* court explained:

The general concepts of First Amendment freedoms are given added impetus as to speech and peaceful demonstration in Washington, D.C., by the clause of the Constitution which assures citizens of their right to assemble peaceably at the seat of government and present grievances.

Id. at 724. Thus, over the government’s objection, the federal courts have ruled that demonstrations of *at least* 3,000 persons must routinely be permitted in Lafayette Park, and demonstrations of *at least* 750 persons must routinely be permitted on the White House sidewalk, *id.* at 731-32. The Park Service regulations now so provide. *See* 36 CFR § 7.96(g)(5); *see also id.* § 7.96(g)(5)(ii)(A) (even larger demonstrations may be permitted “upon a showing by the applicant that good faith efforts will be made to plan and marshal the demonstration in such a fashion so as to render unlikely any substantial risk of unreasonable disruption or violence”). While no specific number has been fixed for Pennsylvania Avenue itself, it is clear that the small number of protesters who entered the street on March 19, 2003, did not overcrowd that forum because of their numbers.⁹

Third, the D.C. Circuit applied the familiar test for restrictions on the time, place and manner of First Amendment protected speech in a public forum:

⁹ Indeed, groups as large as 25 require no permit to demonstrate even on the White House sidewalk. *See* 36 CFR § 7.96(g)(2)(i).

Even in a public forum the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open alternative channels for communication of the information.”

Doe, 968 F.2d at 88 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The Police Line Here Was Not A Valid Restriction of Time, Place or Manner

1. The police line was not content-neutral

In *Doe*, the first prong of this three-prong test was not at issue, as the parties agreed that the noise regulation was content-neutral on its face and as applied. 986 F.2d at 88 (“no one claims here that the regulation has been applied inconsistently or that Nomad has been singled out for prosecution because of her message”). The record here, however, leads to the opposite conclusion. There is no general rule against pedestrian use of Pennsylvania Avenue, and pedestrian use necessarily implies First Amendment use, for “one who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.” *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

The government’s own witness testified that Pennsylvania Avenue was closed on March 19, 2003, *because* anti-war protesters were expected to come to the White House to protest the beginning of the war. *See* Supp. Tr. 18; Tr. 32. And yet there was no evidence that those protesters—small in number and “very peaceful,” Tr.

49—presented any threat to White House security.¹⁰ The logical conclusion is that Pennsylvania Avenue and the White House sidewalk were closed to the public that day for the *purpose* of preventing messages of dissent from being seen or heard inside the White House, or, perhaps to prevent them from being seen in front of the White House by television news cameras, which might convey to the nation and the world an image suggesting that our country was not united behind the President in this war.¹¹

While it is true that Pennsylvania Avenue was closed to all members of the general public, that alone does not make the government’s action “content neutral.” The test for content-neutrality is whether the *justification* for the restriction had reference to the content of the regulated speech. *Ward v. Rock Against Racism, supra*,

¹⁰ Nor could it plausibly be contended that they did, considering that Pennsylvania Avenue and the White House sidewalk have generally remained open to pedestrian traffic in the post September 11 era. Protesters are no more dangerous than other pedestrians. *See Lederman v. United States*, 291 F.3d 36, 45 (D.C. Cir. 2002) (“We likewise reject the proposition that demonstrators of any stripe pose a greater security risk to the Capitol building and its occupants than do pedestrians, who may come and go anonymously, travel in groups of any size, carry any number of bags and boxes, and linger as long as they please.”).

¹¹ This administration’s desire to prevent visible protest in the President’s vicinity has been widely reported. *See, e.g.*, James Bovard, “‘Free-Speech Zone’: the administration quarantines dissent,” *The American Conservative* (Dec. 15, 2003) (available at http://www.amconmag.com/12_15_03/feature.html) (reporting that “When [President] Bush travels around the United States, the Secret Service visits the location ahead of time and orders local police to set up ‘free speech zones’ or ‘protest zones’ where people opposed to Bush policies (and sometimes sign-carrying supporters) are quarantined. These zones routinely succeed in keeping protesters out of presidential sight and outside the view of media covering the event.” . . . “For Bush’s recent visit to London, the White House demanded that British police ban all protest marches, close down the center of the city, and impose a ‘virtual three day shutdown of central London in a bid to foil disruption of the visit by anti-war protesters,” according to Britain’s *Evening Standard*. But instead of a ‘free speech zone’ — as such areas are labeled in the U.S. — the Bush administration demanded an ‘exclusion zone’ to protect Bush from protesters’ messages”).

491 U.S. at 791. The evidence noted above strongly suggests that the *justification* for the March 19 police line had everything to do with the content of the speech of those who were expected to gather in Lafayette Park. As the Supreme Court affirmed in another First Amendment case in which the government sought to disguise its narrow purpose by pursuing a broader course, “[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.” *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (striking down city’s effort to get list of NAACP contributors by enacting ordinance requiring *any* organization operating within the city to supply such information to the City Clerk upon request).

Because the purpose of the March 19, 2003, police line was not truly content-neutral, the regulation’s application cannot be upheld as a valid restriction of time, place or manner.

2. The police line was not narrowly tailored

Nor was the regulation’s application “narrowly tailored,” and for that reason it also fails the second prong of the “time, place and manner” test, as did the application of the noise regulation in *Doe*.

The “test of ‘narrow tailoring’ . . . [i]s a balancing test, inquiring whether the restriction ‘burdens more speech than is necessary to further the government’s legitimate interests.’” *Doe*, 968 F.2d at 88 (quoting *Henderson v. Lujan*, 964 F.2d 1179, 1184 (D.C. Cir. 1992). “In a First Amendment challenge, the government bears the burden of showing that its restriction of speech is justified under the traditional

‘narrowly tailored’ test.” *Id.* at 90; *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (“it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified”). This “[balancing] test, moreover, must be applied in a realistic manner which takes into account the nature and traditional uses of the particular [forum] involved.” *Doe*, 968 F.2d at 90.¹²

The government has made no real effort to meet its burden in this case.¹³ The government witnesses simply stated their speculative (Officer Ward) or multiple-hearsay (Sgt. Dawson) understanding of *why* Pennsylvania Avenue had been closed—to provide a “staging area” or “just to make sure traffic could move freely”—but they offered no reason why it was *necessary* or even *reasonable* to close

¹² *Doe* teaches that “[w]hether the regulation meets the ‘narrowly tailored’ requirement is . . . a question of law.” 968 F.2d at 88. It is therefore a question that this Court can address even though it was not addressed by the trial court.

¹³ Of course the defendant had the burden of raising the First Amendment as a defense, and he did that. *See* Supp. Tr. 13-15 (opening statement on behalf of all defendants):
The Court: [Y]ou would say that . . . as a matter of fact, the Government failed to establish the right to restrict access to protected songs [*sic*; should be “forums”] for First Amendment Activity.

Defendant Meza: Yes, sir. That’s one of the points that I would make.
See also Tr. 103 (closing argument by defendant Bloch):

[T]he zone was . . . merely a pretext for abridging the freedom of speech [at] a very important moment.

The defendant was not required to lay out his legal arguments in scholarly detail, particularly as he was *pro se*. *See United States v. Popa*, 187 F.3d 672, 674-75 (D.C. Cir. 1999). And where, as here, “First Amendment concerns are implicated [this Court] ‘must make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Citizens Committee for D.C. Video Lottery Terminal Initiative v. District of Columbia Bd. of Elections and Ethics*, ___ A.2d ___, 2004 WL 2192320 at *15 (D.C. 2004) (quoting *Guilford Transp. Indus, Inc. v. Wilner*, 760 A.2d 580, 592 (D.C. 2000)).

it for either of these reasons. Contrary to Officer Ward’s speculation, it appears quite clear from the evidence that Pennsylvania Avenue was not, in fact, used as a police staging area, for the testimony indicates that there were only 8 to 15 officers there. Supp. Tr. 19.¹⁴ Nor did Sgt. Dawson explain why it would not have been adequate to keep open, say, two lanes of Pennsylvania Avenue for the movement of traffic (considering that the Avenue was closed to all but police traffic, Tr. 48) rather than all six lanes. Indeed, had the 20 to 23 protesters who crossed the bicycle fence simply been allowed to demonstrate on the White House sidewalk, as Park Service regulations permit them to do without a permit,¹⁵ all of Pennsylvania Avenue could have remained available for a staging area, or for the movement of vehicular traffic, while allowing the defendant and others to exercise their First Amendment rights in the forum they desired.¹⁶ No reason was offered why the White House sidewalk needed to be closed.

¹⁴ “Staging area. *n.* A place where troops or equipment in transit are assembled and processed, as before a military operation.” The American Heritage Dictionary of the English Language (4th ed. 2000).

¹⁵ 36 CFR § 7.96(g)(2)(i). The White House sidewalk is 35 feet wide by 765 feet long, or 26,775 square feet in area. *A Quaker Action Group v. Morton*, 362 F. Supp. 1161, 1171 (D.D.C. 1973). This is large enough to accommodate at least 750 demonstrators, as the regulations recognize. 36 CFR § 7.96(g)(5).

¹⁶ The concept that protesters must be accommodated even when this area is being used for other purposes is not a novel one, and is familiar to the Park Police. *See Saffron v. Wilson*, 481 F. Supp. 228, 257 (D.D.C. 1979), *aff’d mem.* No. 79-2236 (D.C. Cir. 1980) (“Defendants’ removal of plaintiff from the White House sidewalk on Inaugural Day 1973 constituted an unconstitutional invasion of his First Amendment rights of free expression; and Plaintiff is entitled to exercise his First Amendment rights in the White House vicinity on Inaugural Days”); that ruling is now reflected in the Park Service regulations, *see* 36 CFR § 7.96(g)(4)(i)(F).

It is crucial to the protection of freedom of speech that the government “may not by its own *ipse dixit* destroy the ‘public forum’ status of streets and parks which have historically been public forums.” *United States Postal Service v. Greenburgh Civic Assn’s.*, 453 U.S. 114, 133 (1981). If a police official can simply close the White House sidewalk and Pennsylvania Avenue when he feels like it, arrest those who seek to speak there, and convict them without giving any more of a reason than “the street was closed,” then he could equally well close Lafayette Park, or the National Mall, or any other public forum. And to give as the rationale for such a closure that “protesters were anticipated” is even worse—if such reasoning were accepted, the suppression of dissent would become its own justification.

There is no reason to presume that the United States Government did not have the personnel and equipment necessary to deal with the protesters they anticipated on March 19, 2003.¹⁷ In any event, in the absence of evidence on the point this Court must presume that it did, for it is the government’s burden to justify the restriction it imposed on speech in a public forum. “Where constitutionally protected activity is implicated, [the Court] cannot simply defer to the Park Service's unexplained judgment.” *Doe*, 968 F.2d at 90. Here, as in *Doe*, “it [was] the government's case to prove and it has failed to do so. There is nothing upon which [the Court] can base a holding that [the closure of Pennsylvania Avenue and the White House sidewalk were] ‘narrowly tailored’ to promote” a significant governmental interest. *Id.* at 91.

¹⁷ Organizing a large protest requires widespread publicity. Law enforcement agencies make it their business to be aware of large protest gatherings before they occur, whether or not permits have been applied for.

In this country, it should not be possible to convict a citizen for committing free speech in a traditional public forum without the government saying something better than “we decided to prohibit free speech here today.”¹⁸

3. The police line did not leave adequate alternatives for defendants’ speech

As *Doe* demonstrates, a restriction on First Amendment activity must pass all three prongs of the “time, place and manner” test in order to be constitutionally sound. It therefore cannot save the constitutionality of this police line for the government to show that Lafayette Park provided an adequate alternative location for defendants’ speech. In *amicus*’ view, however, it did not provide an adequate alternative.

¹⁸ The District argues that the police line was needed to “protect[] the President and the White House.” Brief for D.C. at 9. But there is nothing in the record to substantiate that assertion. As we have already pointed out, the federal courts in this jurisdiction have determined that the White House sidewalk can accommodate at least 750 demonstrators, and that Lafayette Park can accommodate at least 3,000, without causing concern for the safety of the President or the White House, and the government has operated safely under those rules for nearly thirty years. No evidence was presented to the trial court that a few dozen peaceful demonstrators presented a threat to the safety of the President and the White House on March 19, 2003. Responding to a similar argument in *United States v. Grace*, 461 U.S. 171 (1983), the Supreme Court said:

We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on [demonstrations] substantially serves these purposes. There is no suggestion, for example, that appellees’ activities in any way obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds.

Id. at 182. Likewise here there is no suggestion in the record that the defendant’s activities, or the activities of anyone who was in Lafayette Park that day, posed any threat to anyone, or that the police had any intelligence causing them to believe that some serious threat was at hand. If all it takes to defeat the First Amendment is a barely-articulated concern by a police officer that some people gathered in Lafayette Park are a cause for concern, then the First Amendment is in weak health indeed.

While Lafayette Park is a very important free speech forum, it is not actually close to the White House. It is separated from the White House by the 240-foot-wide north lawn within the White House fence, *A Quaker Action Group v. Morton*, 362 F. Supp. 1161, 1171 (D.D.C. 1973), plus the 35-foot wide White House sidewalk, *id.*, and by six lanes of Pennsylvania Avenue. It is an inadequate substitute for the same reasons that the D.C. Circuit concluded that the Ellipse is not an adequate substitute:

We interject to take note of a point pressed at oral argument by Government counsel's asking: Why can't applicants hold their demonstrations on the Ellipse, with the speakers framed against the rear of the White House? The answer is that there are First Amendment values in use of the White House sidewalk; and citizens seeking redress of grievances are not unreasonable if they propose to come to the front of the House rather than be shunted to the back door.

A Quaker Action Group v. Morton, *supra*, 516 F.2d at 733 (footnote omitted). This is but an instance of the fundamental rule that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)); *see also United States v. Grace*, 461 U.S. 171, 180-181 (1983) (sidewalk across the street from Supreme Court sidewalk not an adequate alternative for persons wishing to express views concerning the Supreme Court).

As noted above, confining the March 19, 2003, protesters to Lafayette Park prevented them from having their message of dissent seen or heard by persons in the White House and prevented them from creating an image of protest in front of the White House. "Freedom of expression would not truly exist if the right could be

exercised only in an area that a benevolent government has provided as a safe haven for crackpots.” *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 513 (1969). Because (as we have already shown) the government has provided no persuasive reason for closing Pennsylvania Avenue and the White House sidewalk, it follows that Lafayette Park was not an adequate alternative for defendant’s speech.

CONCLUSION

Because the use of the Police Line regulation to criminalize appellant’s peaceful speech did not satisfy the constitutional requirements for a restriction of speech in a public forum, the regulation was unconstitutional as applied to him, and his conviction for crossing a police line should be reversed.

Respectfully submitted,

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November 22, 2004