"Arrest That Woman for Disrupting the Hearing!"– Handling the Unruly Speaker

by Paul D. Wilson and Jennifer K. Alcarez



As she led the crowd to the exit, a man in plainclothes who identified himself as the precinct captain took her arm and informed Jacobs she was under arrest.

"What are the charges?" Jacobs asked.

The captain said that Toth, the top official from the government, had directed him to arrest her for disrupting the hearing.[1]

And thus was Jane Jacobs, already well-known as the author of *The Death and Life of Great American Cities*–"a book that would revolutionize urban planning"[2]– taken into police custody for her words and actions at a 1968 public hearing. The New York Department of Transportation sought to construct an elevated highway across Lower Manhattan, but Jacobs opposed the project, and her evening, begun as an act of political theater in a hearing room, concluded in a police station.

In many respects, America has become calmer since the tumultuous year in which this controversial author found herself charged with, among other things, inciting a riot and obstructing public administration.[3] But the disruptive speaker remains a common problem. When emotions run high, speakers can be disruptive, or even dangerous.[4]

How can government boards balance their legitimate interest in orderly hearings against a speaker's First Amendment rights? This article will survey recent federal appellate case law on the question, and offer guidelines for handling disruptions.

How Disruptive is Too Disruptive?

Two general principles govern the treatment of a speaker at a public hearing. First, a board may require a speaker to remain "on topic" and to comply with reasonable rules. Second, the board cannot censor the speaker based on viewpoint. This is a distilled version of the "limited public forum" doctrine, which defines how the government can restrict speech in certain public spaces.

The U.S. Court of Appeals for the Fourth Circuit recently addressed the limited public forum doctrine in *Steinburg v. Chesterfield County Planning Commission*,[5] a case in which a citizen contended that he was unconstitutionally removed from a public hearing of a County Planning Commission because the commissioners disagreed with the viewpoint he expressed. The district court entered summary judgment in favor of the defendants, finding that Steinburg was removed from the meeting because of his disruptive behavior;[6] on appeal, the Fourth Circuit affirmed.[7]

The Fourth Circuit began by considering whether the public hearing was a "traditional public forum" or a "limited public forum."[8] Traditional public forums include streets, sidewalks, parks, and general meeting halls. In a traditional public forum, content-based restrictions are acceptable only where there is "a clear and present danger that [the speech] will bring about the substantive evils that the [government] has a right to prevent"[9]– the classic example being Justice Holmes' famous witticism that no man has the right to cry "fire" in a crowded theatre[10]– and where the restrictions are narrowly drawn to serve a compelling state interest.[11] Content-neutral restrictions, such as reasonable limits on the time, place, and manner of speech, are acceptable under a slightly less onerous standard: they must be narrowly tailored to serve a significant governmental interest.[12]

In *Steinburg*, the Fourth Circuit found that the Commission meeting was not a traditional public forum, but a "limited public forum."[13] A limited public forum is a space that "governmental entities may create in a specified location for a limited use, so long as they do not impose those limits in a manner that discriminates based on a speaker's viewpoint."[14] In such spaces, the government need not allow persons to engage in every type of speech.[15] Rather, the government may reserve the forum "for certain groups or for the discussion of certain topics."[16] Yet, even in a limited public forum, the government cannot discriminate against speech on the basis of viewpoint, and "any restriction must be reasonable in light of the purpose served by the forum."[17]

Applying these parameters to the Commission meeting, the Fourth Circuit said:

> [A] governmental entity such as the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business. But any restriction must not discriminate on the basis of a speaker's viewpoint.[18]

With these principles in mind, the court considered Steinburg's claims.

At the *Steinburg* public hearing, the Commission had intended to consider a developer's application for a waiver of a zoning ordinance. Shortly before the meeting, the developer requested that the Commission defer consideration of its application, so the Commission invited citizens to speak on only the limited issue of whether to grant the deferral request. The first two speakers did indeed discuss deferral, but also ventured into a discussion of the merits of the development itself. Although the Commission gently reminded them of

continued on page 8



Paul D. Wilson, a litigator at Mintz Levin Cohn Ferris Glovsky & Popeo in Boston, chairs his firm's multi-disciplinary real estate and land use litigation working group, and its housing practice as well. Paul is an honors graduate of both Princeton University and New York University Law School. He serves as Continuing Legal Education Director of the Section of State and Local Government Law of the American Bar Association, and was a long-time adjunct faculty member at Boston University Law School.



Jennifer K. Alcarez is a former associate of Mintz Levin Cohn Ferris Glovsky & Popeo in Boston, MA. She is now a post-baccalaureate candidate in pre-medical studies at Mills College in Oakland, CA. She hopes to become a doctor and to work at the intersection of law and medicine. She is a graduate of Wellesley College (magna cum laude, 2002) and Harvard Law School (J.D. 2005).

 continued from page 7

the topic restriction, a Commissioner did engage with one speaker about the substance of the proposal. Both speakers were calm and respectful throughout.

The meeting became more volatile once Steinburg took the podium. "[U]nlike the previous two speakers, he made no effort to relate his comments to either the deferral request or the [particulars of the zoning issue]."[19] Rather, he berated the Commission for not paying sufficient attention to its own proceedings:

> One of the things that troubles me when some of these things are being presented this evening is a lot of bantying [sic] about back and forth by some of you who don't seem to be paying attention, or else are talking about something that perhaps, uh, might not even be related. And I can tell you that perception is reality in the eyes of many. What you are talking about, I have no idea. Mr. Gecker, you in particular, leaning over and saying this, that, and the other thing, but I can tell you from a perception standpoint from someone who is concerned, like myself and the others in this room, it's not very flattering. Believe me.[20]

At this point, a commissioner interrupted and told Steinburg that he was "abusing the podium."[21] Steinburg denied the charge, began to bicker with the Commission.[22] The chairman intervened, asking Steinburg to sit, but to no avail. Eventually, two police officers escorted Steinburg out of the meeting.

The Resulting Claims

Steinburg contended that the Commissioner unconstitutionally silenced his speech by, first, enforcing an unconstitutional policy against personal attacks, and second, cutting off his right to speak based on his viewpoint.[23] The Fourth Circuit affirmed the district court's denial of both claims.

Regarding the policy against personal attacks, the court reasoned that such a policy "focuses on two evils that could erode the beneficence of orderly public discussion": a personal attack is surely irrelevant to the substantive issue, and it almost inevitably leads to a response that has the potential to disrupt the orderly conduct of the meeting.[24] On this basis, the court concluded that "a content-neutral policy against personal attacks is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited public forum of decorum and order."[25] In Steinburg's case, however, the court concluded that the Commission had not invoked the policy against personal attacks, finding, instead, that the Commission excluded Steinburg because of his refusal to limit his remarks to the permitted subject, and because of the chairman's observation that the meeting was quickly degenerating.[26]

The court then turned to Steinburg's argument that he was improperly removed from the meeting because of his viewpoint.[27] The court determined that the commissioner's actions had not been content-based; rather, the chairman's concern was "explicitly focused" on having Steinburg stay orderly and "on topic."[28] Further, Steinburg was treated no differently than the other speakers, who were also reminded to stay "on topic."[29]

> He was reminded of the topic of the public hearing, but rather than address the deferral, he became argumentative and disruptive. When it became clear to [the chairman] that Steinburg had no intention of addressing the deferral, but instead intended to continue discussing irrelevant topics, he intervened to cut off Steinburg's comments. Exercising this type of discretion is precisely what … presiding officers may do.[30]

The Fourth Circuit's message, therefore, was that public officials are free to enforce rules of relevance and civility, without doing violence to constitutional rights. They need only avoid content-based discrimination, a concept that *Steinburg* defined narrowly.

A Variation on This Theme: The "Citizen's Forum"

Eichenlaub v. Township of Indiana,[31] a recent case of the U.S. Court of Appeals for the Third Circuit, contains an interesting twist: the complaining speaker was addressing a Township Board of Supervisors during the "citizen's forum" portion of its meeting– a time when, one would think, there was no particular topic to which the Board could confine speakers. Nevertheless, the district court granted summary judgment in favor of the Board, and the Third Circuit affirmed.[32]

The Eichenlaub family had been embroiled in a contentious zoning dispute with the Township of Indiana, Pennsylvania. Eventually, David Eichenlaub sued, asserting, "without any specificity[,] that the Township hindered him from speaking at meetings."[33] He also claimed that, when he did speak during the citizen's forum portion of the Board's public meeting, the chairman "repeatedly interrupted him and did not let him finish his comments" and had Eichenlaub unconstitutionally removed from the same meeting, and that the officials retaliated against Eichenlaub for exercising his First Amendment rights.[34]

Unlike the *Steinburg* court, the Third Circuit did not reproduce the transcript of the meeting at issue in *Eichenlaub*. However, the court did suggest, based on the record, that Eichenlaub "was repetitive and truculent, and that he repeatedly interrupted the chairman of the meeting."[35] As did the court in *Steinburg*, the Third Circuit determined that the public meeting at issue was a limited public forum.[36] Because the citizen's forum was "open to all citizens who wish[ed] to address the Township government," the court called the question a "close" one.[37] Still, that did not mean that anything and everything was allowed, as "even the public discussion session of the Township meeting was designed to be limited to matters pertaining to town government [so] [t]he meeting was not

the equivalent of a municipal theater … or a public park or street."[38] Just as Eichenlaub could not deliver a lecture on medieval history, the court ruled he also had no right to address the Board about what the court called "matters of private concern," even during a portion of the public meeting where there was no set topic.[39]

The Third Circuit then turned to the question of civility. In light of the trial court's findings about Eichenlaub's conduct at the meeting, the court did not deliberate long over whether restraining his speech was justified:

> Restricting such behavior is the sort of time, place, and manner regulation that passes muster under the most stringent scrutiny for a public forum. Indeed, for the presiding officer of a public meeting to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants. We have no difficulty sustaining the decision to remove David Eichenlaub on that basis.[40]

So, even after finding that a particular type of public meeting was "close" to a general public forum, the Third Circuit, nonetheless, quickly found against a "repetitive and truculent" speaker. The court was moved by the necessity of protecting a municipality's ability to conduct orderly and efficient meetings, even to the point of labeling Eichenlaub's diatribe about the Board members a "matter of private concern."[41]

Eichenlaub did not leave the courthouse empty-handed, however. He had also claimed that the Board retaliated against him for speaking his mind (both at the hearing from which he was evicted and, more generally, in his sparring with the Board) by denying him the land use approvals he sought.[42] While the Third Circuit was clear that the Board had a perfect right to toss Eichenlaub out of its citizen's forum for his behavior, it ruled, also, that another aspect of the First Amendment prevented the Board from taking adverse action against him outside the forum room. Accordingly, the court reversed the dismissal of this broader retaliation claim, finding that issues of fact required a trial on the question of "government retaliation for unwelcome communication."[43] So, by justifiably having Eichenlaub removed from its hearing room for intemperate conduct, the Board gave him ammunition to argue that the removal was an act (among several others) by which the Board punished him for his speech. Whether a jury will react sympathetically to such a retaliation claim is another matter.

What Speech is Not Disruptive Enough to Allow Removal?

Steinburg and *Eichenlaub* show that government entities need not tolerate disruptive speakers at public hearings. But, where do courts draw the line drawn between disruptive conduct that can be censored and non-disruptive (but ardent) speech that the First Amendment protects?

A Nazi Salute. The U.S. Court of Appeals for the Ninth Circuit recently found a Nazi salute to be non-disruptive conduct, in *Norse v. City of Santa Cruz*.[44] Norse made a Nazi salute at a city council meeting to protest against the mayor's ruling that the time for open comments had expired. In response, the mayor ordered the sergeant-at-arms to remove Norse from the meeting. The district court dismissed Norse's resulting lawsuit, but the Ninth Circuit reversed.[45]

A council rule authorized the removal, from the meeting, of "any person who interrupts and refuses to keep quiet … or otherwise disrupts the proceedings of the council."[46] The court first determined that this rule was facially valid.[47] Turning to Norse's claim that his salute had lasted for only a second (and that some councillors had not even noticed it),[48] the court reasoned that, if the salute had not disrupted the meeting, Norse had stated a valid claim for a First Amendment violation.[49] Hence the Ninth Circuit's conclusion that the district court should not have dismissed the case.

God Damn! The Sixth Circuit also recently addressed non-disruptive conduct in *Leonard v. Robinson*.[50] Leonard, a resident, had sued Officer Robinson after he was arresting for saying "god damn" when speaking at a township board meeting. After Leonard sat down, the township supervisor told him not to "use the Lord's name in vain."[51] Leonard retorted, "I'll do whatever I want, Don, just like you."[52] Officer Robinson then escorted Leonard out and arrested him on disorderly conduct and obscenity charges. Leonard responded with a Section 1983 lawsuit alleging that the officer had retaliated against him on basis of speech and violated his Fourth Amendment rights by arresting him.

The district court had granted summary judgment in favor of Robinson, but, on appeal, the Sixth Circuit reversed. The appellate court determined that a state law on disturbances of lawful meetings (making it an offence for any person to "make or excite any disturbance or contention … at any … public meeting where citizens are peaceably and lawfully assembled"[53]) was overbroad and unconstitutional, as applied.[54] Prohibiting Leonard from "coupling an expletive to his political speech [was] clearly unconstitutional,"[55] and "no reasonable [police] officer would find that probable cause exist[ed] to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker [was] determined to be out of order by the individual chairing the assembly."[56]

What's a Board to Do?

These four federal court of appeals decisions indicate that government boards can limit their meetings to the discussion of specific agenda items, and impose reasonable speaker restrictions in order to preserve civility and decorum at meetings. In exercising this authority, government actors can take steps to preemptively disarm claims of viewpoint discrimination and other violations of First Amendment rights.

First, boards should have a clear written agenda of the topics for discussion at each public hearing, and should publicize the agenda in advance. This measure will pave the way for sanctions

continued on page 36

Unruly Speakers

cont. from page 9

for those who veer off the meeting topics, while avoiding the appearance of viewpoint discrimination. Second, all speakers at public hearings should be treated similarly. They should receive equal time at the podium, and any restrictions on topic (e.g., to only the agenda items) should be applied to all in the same way.[57] Third, if a speaker does veer off the permitted topic, the speaker should be reminded of the topic and given another opportunity to address it. This approach demonstrates that the government actor is not censoring all speech by the complaining citizen. Fourth, boards should have a written policy for dealing with unruly citizens, and should follow that policy.[58] Legal counsel should review the policy, particularly for vagueness or overbreadth (as in *Leonard*), but a rule similar to that in *Norse* may be a good choice to foster orderly and safe public hearings. Finally, before silencing a speaker, a board chair would always be wise to stop and think about whether he or she is creating an impression of content-based discrimination. Such rational thought, of course, can be in short supply on all sides when tempers flare at a public meeting.

Notes

1. Flint, Anthony, Wrestling With Moses (Random House 2009) at xiv.
2. *Id.* at 92.
3. And not without reason; after being warned by the hearing chairman not to come onto the stage where the hearing officers sat, Jacobs led 50 cohorts across the stage in a "silent protest" that soon degenerated into a pre-planned seizure and destruction of the stenographer's notes of the hearing, allowing Jacobs to proclaim, "There is no record! There is no hearing!" *Id.* at 173-75.
4. *See, e.g., Sixth Victim Dies in City Hall Attack*, N.Y. Times, Sept. 7, 2008, at A29. The article describes how a citizen of Kirkwood, Missouri, shot and killed six people at a city council meeting, ten days after losing a federal lawsuit to enjoin the city from restricting his speech at public meetings. The killer had twice before been convicted of disorderly conduct at city council meetings.
5. 527 F.3d 377 (4th Cir. 2008).
6. *Id.* at 380.
7. *Id.*
8. *Id.* at 384 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)).
9. *Id.* (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).
10. *Schenck*, 249 U.S. at 52.
11. *Steinburg*, 527 F.3d at 384 (citing *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 381 (4th Cir. 2006) and *Perry Educ. Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)).
12. *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1988)).
13. *Id.* at 385.
14. *Id.* at 384-85.
15. *Id.* at 385 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).
16. *Id.* (citing *Good News Club*, 533 U.S. at 106 and *Rosenberger*, 515 U.S. at 829).
17. *Id.* (citing *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006) and *Good News Club*, 533 U.S. at 106-07)).
18. *Id.* (citing *Good News Club*, 533 U.S. at 106-07 and *Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., concurring)).
19. *Id.* at 381-84 (quoting the full transcript of Steinburg's comments).
20. *Id.* at 382.
21. *Id.*
22. *Id.*
23. *Id.* at 384.
24. *Id.* at 386-87 (citing *Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., concurring)).
25. *Id.* at 387.
26. *Id.*
27. *Id.* at 388.
28. *Id.* at 389.
29. *Id.* at 388-89.
30. *Id.* at 389.
31. *Id.* at 277.
32. 385 F.3d 274 (3d. Cir. 2004).
33. *Id.* at 278 n.2.
34. *Id.*
35. *Id.* at 281.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 283.
42. *Id.* at 282.
43. *Id.*
44. 118 Fed. Appx. 177, 2004 WL 2757528 (9th Cir. Dec. 3, 2004) (unpublished decision).
45. *Id.* at *2.
46. *Id.*
47. *Id.* at *1.
48. *Id.*
49. *Id.*
50. 477 F.3d 347 (6th Cir. 2007).
51. *Id.* at 352.
52. *Id.*
53. Mich. Comp. Laws. Ann. § 750.170 (2010).
54. Leonard, 477 F.3d. at 360-61.
55. *Id.* at 360.
56. *Id.* at 361.
57. A recent *Los Angeles Times* article refers to allegations that a mayor used a "mute" button to shut speakers' microphones down when he didn't like what they were saying, instead of waiting for them to use up their allotted three minutes of permitted speaking time. The Los Angeles County district attorney's office is reportedly looking into whether this violates the state's open meetings law. Jeff Gottlieb, *D.A. launches inquiry into Carson mayor's use of a mute button*, Los Angeles Times, Feb. 09, 2010; available at http://www.latimes.com/news/local/la-me-carson-mute9-2010feb09,0,6422587.story.
58. For example, the U.S. Court of Appeals for the Third Circuit has noted that a council president's failure to follow an established procedure for removal of a council member was evidence of viewpoint discrimination. Montiero v. City of Elizabeth, 436 F.3d 397, 405 (3d Cir. 2006). ML

See us at www.imla.org