

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION

MEMORANDUM

To: **Presidents**
 Chancellor Risser

From: Ned Bastow

Date: Thursday, 27 March 2003

Subject: Resources for Dealing with Campus Demonstrations

Introduction:

The United States is at war with Iraq. Public opinion is sharply divided as to the desirability of this action. In the past, college campuses have been focal points for spirited debate on issues of war and peace and, indeed, for concerted action designed to influence or coerce policymakers. Some higher education administrators are concerned that once again their institutions will be challenged to deal with a political debate that poses a risk of disruption to “normal” campus life.

Questions:

- 1) What measures can State System institutions lawfully take to avert, and/or respond to, concerted group political activities or demonstrations on campus?
- 2) What steps should State system institutions take to ensure that they are prepared for such activities?

Discussion:

Because there is a tremendous degree of variation in the way different institutions approach these issues, the best approach is to provide institution policy makers with readily accessible resources that bear on the main issues. Those issues are:

1. The degree of understanding by campus policy makers of relevant First Amendment legal doctrine. An important related issue involves the scope of academic freedom.
2. Awareness of relevant state statutes pertaining to lawful assembly, including laws that criminalize various types of conduct that could occur in a demonstration.
3. The existence, quality, dissemination, and acceptance of campus policies pertaining to free speech, concerted activity, and use of campus facilities.

Note: There are also equally important non-legal factors to take into account: traditions of free inquiry and expression are central to the history of universities and colleges; much of the doctrine of academic freedom is rooted less in the law than it is in these core traditions; the international aspect of much of higher education with its call for mutual respect and understanding across borders is another important element. Underlying all of this are concepts of civility and the right to know.

Disclaimer: These materials are intended to be informational and educational. They do not constitute legal advice. In any application of these materials to real-life situations, institutional officials should consult with their legal services provider as necessary and appropriate. For those institutions without regular access to legal services, Assistant Attorney General, Lisa T. Davis, who is assigned full-time to our office, is available to work with you. Her direct line number is (405)225-9234.

First Amendment principles

The applicable constitutional law principles are rooted in the First Amendment and involve the right to free speech and related expressive activity. Academic freedom, narrowly conceived, is largely co-extensive with First Amendment doctrine. (To the extent that tenure rights of faculty may be implicated, Fourteenth Amendment property interests come into play.) As is well-known, none of these rights are absolute so some familiarity with their general contours is helpful. The key point here is distinguishing between public forums and limited purpose public forums: with respect to the latter, the institution's authority to establish reasonable time, place, and manner restrictions on the use of its property must be juxtaposed with the First Amendment's hostility to restrictions on the content of speech.

We begin with the question "What is a 'public forum'" and what difference does it make whether a particular forum is public or not?

The Freedom Forum website answers the question this way: "The public forum doctrine was refined over the years, culminating in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), where the Court established a three-tier categorization of public forums." Such property is either (1) a traditional public forum, (2) a limited public forum, or (3) a non-public forum. "The extent of protection afforded to a speaker using government-owned facilities is chiefly dependent upon how a particular property is designated."

The Freedom Forum, which describes itself as "*a nonpartisan foundation dedicated to free press, free speech and free spirit for all people*" has a useful summary of public forum doctrine posted to its website. <http://www.freedomforum.org/packages/first/publicforumdoctrine/#topofpage>

With respect to traditional public forums,

"Traditional public forums include the streets, sidewalks, and parks discussed in [a 1939 U. S. Supreme Court decision] as being held in trust for the public. In a

traditional public forum, the state may not restrict speech based on content unless it can show that its regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest.” Id.

At the opposite end of the spectrum are non-public forums:

“Examples of nonpublic forums are street-light posts, prisons, military bases, polling places, a school district's internal mail system and airport terminals. The Court grants states much greater latitude in regulating nonpublic forums. In addition to applying time, place and manner regulations, the state may reserve 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.” Id.

Finally, but most important, are limited purpose public forums

“Limited or designated public forums are defined as "public property which the state has opened for use by the public as a place for expressive activity" and are treated substantially the same as traditional public forums. *Perry* at 45. Examples of limited public forums include university meeting facilities, municipal theaters and school board meeting rooms. The Court looks for clear governmental intent to create a limited public forum and held in *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 802, that it will not infer the government intent to create a limited public forum. The Court looks to the "policy and practice" of the government to determine whether it intended to designate a nontraditional forum as open to assembly and debate. The Court also considers the nature of the property to ascertain whether it is compatible with expressive activity.

“Although the Court recognizes that a state need not indefinitely keep a limited public forum open to the public, while the limited forum is open, the same restrictions governing traditional public forums apply. *Widmar v. Vincent*, 454 U.S. 263 (1981). Specifically, a state may only impose reasonable, content-neutral time, place and manner restrictions so long as the restriction is necessary and narrowly tailored to serve a compelling state interest.” Id.

These First Amendment principles are applied to expressive activity in government buildings in a helpful outline created by a University of Washington law student.

<http://www.kylewood.com/firstamendment/publicforum.htm>

Selected Campus Policies

The most important task facing institutional decision-makers is the formulation and administration of sound policies in this area. In 21 Okl. St. 2001, §1326, a Vietnam era statute, the Oklahoma Legislature

“recognizes that the boards of regents of all institutions of higher learning in the State of Oklahoma and the boards of education of all the school districts in Oklahoma have the present constitutional power to issue rules, regulations and directives as regards who will, or will not, and under what format and conditions, be allowed to make use of the facilities under their constitutional or statutory jurisdiction.”

<http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=391467>

Of course, the legal authority of governing boards to make rules and regulations pertaining to student life is not open to serious question.

A canvass of campus policies pertaining to expressive activity by students suggests that there is a wide variety of approaches to policy formulation. Many institutions have no policies at all. Others have highly elaborate policies. The perceived need for detailed policies will differ greatly, depending in part on the size and location of the institution as well as character of the student body. Here are a few more or less random examples (selected from different types of institutions) of campus policies from around the state system and around the country.

State System policies

Oklahoma State University has two policies that appear applicable. One, entitled “Public Speaking,” outlines the procedures to be utilized for bringing in outside speakers.

<http://home.okstate.edu/Policy.nsf/483c0b76d56e01c2862562b100059b03/b89110488732453d862562d2006abe00!OpenDocument>. More to the point is the “Extracurricular Use of University Facilities, Areas for the Purpose of Expression” policy. This policy outlines general First Amendment, time-place-manner, and content considerations, as well as a detailed section on “procedural standards” for scheduling the use of university areas or facilities. This latter policy also contains a brief description of speech categories that are not protected by the First Amendment: “fighting words,” obscenity, and words presenting a clear and present danger. <http://www.okstate.edu/ucs/srr.html#A.%20Extracurricular%20Use%20of%20University%20Facilities>,

The University of Oklahoma Student Code, <http://www.ou.edu/studentcode/OUStudentCode.pdf> Contains sections on campus expression, student publications, distribution of information, and campaign activities. The Code provisions also address some of the issues that accompany large gatherings: tables, booths, public address systems and the like.

The University of Science and the Arts (USAO) Student Code provisions, “Regulations Governing Demonstrations,” pages 24-25, are more succinct but otherwise track many of the provisions of comparable provisions of the OU Code.

<http://www.usao.edu/stuservices/stuhandbook02.htm>

An example of a different approach is provided by Oklahoma City Community College (OCCC), which does not have a separate student code provision on expressive activity. Instead, it identifies as misconduct, subject to discipline, “direct or indirect interference ... with functions

or activities of the college” and “solicitation through the distribution of any type of publicity.”
<http://www.okccc.edu/policies/503.html>

The Carl Albert State College Student Handbook contains sections on free expression, disruptive behavior (and specifically, disruptive demonstrations), and disorderly assembly.
http://www.carlalbert.edu/student_affairs/handbook/index.htm

Policies from around the country

The University of Arizona, <http://info-center.ccit.arizona.edu/~studpubs/policies/other.htm>, has a comprehensive, highly detailed policy, with lots of definitions and lots of procedure.

Emporia State University (Kansas), on the other hand, is content to have a two-paragraph statement entitled “Demonstrations of Dissent and Protest.”
<http://www.emporia.edu/stuaff/hdprotes.htm>

Southwest Missouri State University’s “Public Forum Policy” splits the difference between these two extremes. <http://www.smsu.edu/studev/policies/publicforum.htm>

I have also included a link to the University of California at Berkeley because of its reputation as a hotbed of campus protest. <http://uga.berkeley.edu/uga/regs.stm>

Selected Criminal Law statutes: The authority and responsibilities of institutions and their governing boards are creatures of state law, as is the criminal law. There are a number of criminal statutes that could come into play, depending on the exact nature of a campus demonstration. The purpose of the following enumeration is purely educational. Most “protest demonstrations” will not invoke any of these statutes. Nonetheless, it is helpful to know that the legislative branch has taken a dim view of unsanctioned protest activity.

Oklahoma legislation allows college and university officials to exclude from college or university property disruptive members of the broader community (i.e., persons who are not students, faculty, or staff). See, 21 O. S. 2001, §1376. [all citations in this section are to Title 21 of the Oklahoma statutes.

<http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=69864>

As you would expect, the use of bombs and explosives are expressly prohibited --- and are punishable --- under Oklahoma criminal statutes. Telephoned bomb threats, *even if intended as pranks*, are also punishable as felonies (3-10 years). For the whole statute addressing bombs, explosives, and telephone threats. See, §1767.1

<http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=70115>

In this same vein, terrorism hoax is also a felony in Oklahoma. See, §1268.4

<http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=391467>

For a statute making a felony out of damaging works of art or library materials in a public place, see, §1785 <http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=70134>

For obstructing a public highway (misdemeanor). See, §1754
<http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=70105>

As part of the same legislative scheme, certain types of advocacy (e.g., unlawfulness, criminal syndicalism, sabotage, sedition or treason) were prohibited and made felonies as well. See, §1327. <http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=69846>

Anti-riot statutes go back to Oklahoma's infancy. In 1910, "riot" was defined as follows:

“Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot.” Section 1311.

<http://www.oscn.net/applications/oscn/deliverdocument.asp?citeID=69816>

These 1910 statutes also define “rout” (essentially an “assembly” contemplating acts that, if committed, would constitute a riot) and provide misdemeanor penalties for failing to disperse an unlawful assembly and criminalize the failure to leave a lawful assembly that turns unlawful. See, §§1312-14.