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Recommended Citation

Hashway, Jenna Wims and Roger Williams University, "RWU First Amendment Blog: Jenna Hashway's Blog: Blocking Women's March from Key D.C. Sites Risks Infringing on First Amendment Rights 12-12-2016" (2016). *Law School Blogs*. 457.
https://docs.rwu.edu/law_pubs_blogs/457

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December 12, 2016

RWU 1st Amendment Blog

Blocking Women's March from key D.C. sites risks infringing on First Amendment rights

December 12th, 2016 by efitzpatrick



Jenna Wims Hashway, professor of legal practice at the RWU School of Law:

The president-elect's respect for (and indeed, grasp of) First Amendment rights has been a source of concern for many. Now, with the announcement that the National Park Service (on behalf of the Presidential Inauguration Committee) has issued a massive omnibus block permit — barring access to the National Mall and Lincoln Memorial for days or weeks before, during and after the inauguration — the right of peaceful assembly is also at risk.

Notably, the Women's March scheduled for Jan. 21 in Washington, D.C., is expected to draw hundreds of thousands of people seeking to express their opposition to the new president's stated positions. With such a large amount of space now off the table, it is unclear how the Women's March will proceed. The Inauguration Committee apparently has the power to release permitted space once its own plans are in place. But as of this writing, it has not done so.

The Lincoln Memorial has been the site of historic protests, from the Vietnam era to the Million Man March. So, can the government make it off limits to the Women's March? Peaceful picketing is protected speech, and spaces such as the Lincoln Memorial that are "historically associated with the free exercise of expressive activities" are deemed "public forums," as the U.S. Supreme Court stated in its 1983 *U.S. v. Grace* ruling. Within public forums, the government's ability to restrict speech is very limited. The government may impose reasonable "time, place and manner" restrictions, but these restrictions must be content neutral and must leave open "ample alternative channels of communication." So, the government can set aside space for inauguration activities, but it cannot favor one group's message over another's. Due to an interesting timing issue, the government's block permit may fail the content-neutrality test.

March for Life, an anti-abortion demonstration, takes place every year on or around the anniversary of *Roe v. Wade* (Jan. 22). This year, the March for Life is scheduled for Jan. 27. It is always held just after the inauguration. In 2013, the inauguration was held on Jan. 21 and the march on Jan. 25. In 2009, the inauguration was held on Jan. 20 and the march on Jan. 23. Given the president-elect's expressed intent to appoint a conservative Supreme Court justice who might vote to overturn *Roe v. Wade*, it's hard to believe he wouldn't lift the block before Jan. 27 to allow the March for Life to go forward. However, he's certainly capable of leaving the block in place through Jan. 21, just long enough to greatly curtail the Women's March.

It's impossible to predict what the president-elect will do. He would be well advised to lift the block in time to allow the Women's March to take place -- because if the block is challenged (even assuming that it is content-neutral), the government would still need to show that the restriction was "narrowly tailored to serve a significant government interest." The desire to avoid public criticism has never been a "significant government interest."

Posted by: efitzpatrick December 12th, 2016