

**Comment of A.J. Muste Memorial Institute. ANSWER Coalition, CASA de Maryland, CASA in Action, Cindy Sheehan’s Soapbox, Coalition for Peace Action, CodePink, DC Jobs With Justice, Defending Rights and Dissent, Greenpeace USA, Howard County Peace Action (Maryland), Justice First, Knowdrones.com, LinkUp, Maryland United for Peace and Justice, Metro Washington Council AFL-CIO, National Lawyers Guild, New Jersey Peace Action, ONE DC, Partnership for Civil Justice Fund, Peace Action, Peace Action Maine, Peace Action Montgomery, PEN America, Popular Resistance, SEIU 32BJ, September 11th Families for Peaceful Tomorrows, UNITE HERE Local 25, United for Peace and Justice, United National Antiwar Coalition (UNAC), Veterans for Peace, Virginia Defenders for Freedom, Justice and Equality, Western States Legal Foundation, Women’s March on the Pentagon,**

**on the Notice of Proposed Rulemaking:**

**“Special Regulations, Areas of the National Park System, National Capital Region, Special Events and Demonstrations”**

**National Park Service, RIN 1024-AE45**

Submitted to:

Brian D. Joyner

Chief of Staff

National Mall and Memorial Parks

National Park Service

900 Ohio Drive, SW

Washington, DC 20024

via [www.regulations.gov](http://www.regulations.gov) portal

Submitted by:

Partnership for Civil Justice Fund

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Dear Mr. Joyner:

We the undersigned civil rights, civil liberties, peace, justice, environmental and labor organizations submit this comment to convey our strong opposition to the National Park Service’s above-referenced proposed rulemaking [RIN 1024-AE45]. The proposed rulemaking, which radically rewrites the regulations governing permitted demonstrations in the nation’s capital, would burden and restrict access to public spaces for constitutionally protected First Amendment activities in Washington, D.C., and would fundamentally undermine democratic freedoms. Our organizations and the constituencies and communities we serve and represent would be negatively affected by the proposed changes to the ability to engage in free speech activities on federal lands in the capital of the United States, the site of the most significant public fora in the country.

The proposed rulemaking represents one of the most substantial and wholesale alterations of the existing permitting regulations in the history of the National Park Service. The proposed

regulations affecting demonstrations repeal existing regulations and protections that have been forged over decades of civil rights and constitutional rights litigation, court oversight and intervention, and the sacrifice and efforts of all those who have come to Washington, D.C. to exercise cherished free speech rights. Many of the provisions that the NPS proposes to eliminate or alter were promulgated in response to federal court orders requiring the NPS to remedy unconstitutional handling of demonstrations and permitting.

The proposed regulatory changes are vast in scope and impact and will materially alter the process, means and ability of the people to access public space for demonstrations in Washington, D.C. The proposals will have considerable, and damaging, consequences on all demonstrations, small and large, from vigils and pickets to mass assemblies.

### **I. The NPS Should Not Levy Fees and Costs on First Amendment Activities**

We oppose the proposed “pay to protest” provisions whereby the NPS would charge protesters for “the Costs of Administering Permitted Activities That Contain Protected Speech.” 83 Fed. Reg. 40465 (Aug. 15, 2018).

Free speech is not a cost to society. It is a value. It is a fundamental pillar of democracy. Facilitating and handling demonstrations is part of the basic mission of the National Park Service. The D.C. Circuit previously admonished the NPS: .

We find it necessary to stress this basic proposition in view of the Park Service's continued hostility to the use of local park areas for First Amendment activity. Indeed, in this case and others, we have encountered a recurring Park Service theme that the use of parks for demonstrations is “not an appropriate use of Federally-owned park lands . . .,” that such activity is not a part of the “basic mission” of the Park Service or that demonstrators are somehow not “bona fide” visitors to park sites. This approach of the Park Service is rooted in a premise that is unacceptable.

A Quaker Action Grp. v. Morton, 516 F.2d 717, 724 (D.C. Cir. 1975) (citations omitted)

It is improper for the NPS to segment out this one of its many functions, and assert this part of its “basic mission” is an extraneous, additional “cost” or burden to the NPS subject to recovery from the public when we exercise our First Amendment rights.

To maintain the vitality of democracy, we oppose any and all charges on permitted demonstrations.

We oppose the NPS proposal to charge for any “event management” costs in relation to demonstration activity. This includes the cost of barricades and fencing erected at the discretion of police, the salaries of personnel deployed to monitor the protest, trash removal and sanitation charges and permit application charges.

The NPS also proposes assessing costs on “harm to turf” for engaging in free speech on our green spaces including the National Mall. As members of Congress pointed out last year in a letter to the NPS, “[T]he Mall is not a turf sanctuary—it is a public park designed to host a

variety of diverse, high-traffic events. Moreover, our understanding is that the new turf on the Mall is a proprietary blend that is designed to withstand heavy use.” (Letter from Representatives Norton, Cummings et al. to the Acting Director, NPS, November 14, 2017.)

Any assessed charges will decrease and burden opportunities to assemble and speak out on matters of social import and to petition the government for a redress of grievances in the nation’s capital. The scope of charges proposed by the NPS would stop grassroots organizations from being able to organize demonstrations as the upfront costs, as well as the threat of after-the-fact invoicing for damage to the grass by assembling upon it, would be prohibitive and possibly bankrupting.

According to the NPS’ own numbers, the smallest number of permits is issued to demonstrations, which make up less than 20% of permit applications. 83 Fed. Reg. 40461. The vast majority of permit applications, more than 80%, are for “special events” and commercial filming, not free speech activities. The NPS has been under a requirement to recover costs from these corporate-sponsored, commercial, and private use “special events” but according to its own filing it has failed to do so and instead has been allowing the taxpayer to subsidize that use of public space and resources. If the NPS needs to raise revenues and Congress refuses to appropriate funds, the agency should look to its for-profit and corporate sponsored “special event” applicants for “cost recovery,” not to the exercise of constitutionally protected free speech rights.

We also oppose the regulatory revisions that could allow the government to impose charges on demonstrations by altering regulatory definitions to combine demonstrations and special events into a new category called “events,” and potentially authorizing officials to deconstruct First Amendment activities to assess fees or costs on what they assert are “special event elements” within demonstrations. 83 Fed. Reg. 40463.

Currently, the term “demonstration” means “demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct that involve the communication or expression of views or grievances. . .” 36 C.F.R. § 7.96(g)(1)(i).

Under current definitions, once an event is deemed a demonstration, the event as a whole “enjoys heightened protection under the First Amendment,” 83 Fed. Reg. 40463. Under the new definitions, a demonstration will lose benefit of those protections if, within the demonstration, government officials deem that there are any “special event elements.” *Id.*

A demonstration is a demonstration. If a demonstration as a whole involves the expression of views and grievances, the demonstration should be protected and not subject to officials’ reviewing its content to impose fees and restrictions if a demonstration contains ancillary components that, in officials’ discretion, are deemed insufficiently political or expressive. This discretionary authority can also be used as a proxy to make content-based determinations that burden disfavored speech and the NPS provides no criteria or narrow standards that will be used to carefully restrict such discretionary decisions.

Additionally, the NPS fails to state specifically what the elements are that will trigger different processing and fee assessments or provide any criteria for determination such that we, and the public, can fully know or understand what the rule change will entail and provide more detailed comment as to impact.

## **II. We Oppose the Closure of the White House Sidewalks to Demonstrations**

The NPS has written into its proposed regulations an otherwise unannounced substantial closure of a major public forum, the White House sidewalk along the North fence line across from Lafayette Park. The NPS planned regulatory change states:

Public access is not allowed on the south sidewalk of Pennsylvania Avenue NW, adjacent to the North Fence Line of the White House Complex, from the security post located just north of West Executive Avenue NW to the security post located just north of East Executive Avenue NW. The area of sidewalk to be closed shall consist of a twenty (20') foot portion of the sidewalk, extending out from the North Fence Line, leaving a five (5') foot portion of the sidewalk for pedestrian access.

83 Fed. Reg. 40475.

There is no justification or even reference to this public forum closure in the Secretary's narrative description accompanying the rulemaking. The NPS has sneaked into drafted regulations the closure of this public forum without proper announcement, disclosure or explanation.

We oppose the NPS plan to close most of the White House sidewalk, remove it from the public forum and eliminate the physical space necessary for expressive activity through demonstration assembly, allowing only a sliver for pedestrian passageway.

If these regulations had existed in the past, the most iconic images of dissent that are synonymous with the expansion of democracy in America would never have existed: marchers with signs making demands on the government for suffrage, to stop lynching, end wars, protect the environment and advance civil and labor rights, with the White House directly in the background, have been powerful images of dissent and forces of change.

Our organizations and constituencies have organized or participated in protests, rallies, pickets and other expressive activities on the White House sidewalk and intend to do so in the future. The substantial closure of this critical location for the exercise of First Amendment rights will have a major impact on our constitutionally protected ability to speak out and raise awareness on matters of concern that are central to our missions.

## **III. We Oppose the NPS's Attempt to Rescind the 24 Hour "Deemed Granted" Rule**

Under the proposed rules, the NPS would move from a system in which demonstration permit approval is deemed granted within 24 hours to one in which there are no enforceable deadlines whatsoever for issuing administrative action, i.e., final approval or denial of a demonstration permit, by the agency. 83 Fed. Reg. 40468 – 40469.

The “deemed granted” rule was put in place as a result of litigation over these same regulations and the D.C. Circuit’s objection to the lack of a deadline for administrative action by the NPS, which the Court stated was “an essential feature of a permit system.” It further stated that an applicant should receive notice of denial within 24 hours of submission. *A Quaker Action Grp.*, 516 F.2d at 735.

The D.C. Circuit observed that, in the absence of this requirement, there were “continuing complaints that the issuance of permits has been unnecessarily delayed or that applicants are being harassed by officials, making it appropriate to insist on more formal procedures governing the timing of permit application and consideration.” *Id.* at 734-735.

The NPS proposes creating a new status called “provisionally reserved” through which the NPS can place the application in limbo for months and is required only to begin reviewing the application to raise issues with the applicant 40 days prior to the event itself. 83 Fed. Reg. 40469.

As many of our organizations and constituencies organize and attend demonstrations under this permitting system, we oppose the implementation of the “provisionally reserved” system. Many of us have first-hand experience with organizing demonstrations and know that early and timely notice of permit treatment including both approval or denial, to organizers is fundamental.

Orderly demonstrations require planning. From the need to announce an event to the public, which may need to make travel arrangements; to the detailed logistical planning; to assurances to vulnerable communities that free speech actions are safe, permitted and lawful; to planning march routes; to contracting or arranging for sound and stage, nearly every detail of orderly planning and mobilization requires prompt notice and certainty that a permit is granted, even where there is ongoing discussion with officials to finalize logistical details.

Under the NPS’ proposed rules, for a demonstration application submitted one year in advance, the agency would be allowed to sit on the application for almost 11 months (until 40 days before the event) before even *beginning* to substantively advance the application. This is not reasonable.

An essential characteristic of a permit system is that an applicant who files an application well in advance should have final permit issuance within a reasonably short fixed period of time *as measured from time of application submission*. A deadline for agency action that is framed in terms of the date of the event, i.e., allows the agency to delay permit issuance until 40, 60 or 90 days in advance of an event, fails to account for the avoidable disruption to organizing and planning that such delay creates.

The agency should maintain the 24-hour deemed granted rule. We suggest that it be required to additionally have deadlines by which the NPS must issue a final written permit, within a reasonable period of time after it has received necessary logistical information from the

applicant. However, the Agency should not be allowed to delay the processing of the permit and logistical discussions for months after an application is submitted, and there is no justification to do so.

The NPS' proposed rule does not even comport with how the Agency reviews and processes applications. For demonstrations that require logistical information, the Agency holds a meeting with the organizers where NPS officials ask questions and receive answers. Sometimes there is follow-up information required, sometimes not. A written permit issues thereafter. The Agency's proposed rule, which states that it will now provide an "initial, comprehensive list of outstanding issues and requested information" by 40 days prior to an event, does not explain whether it intends to eliminate the necessary permitting meetings that it holds, or if not, where its new written request for information fits into that process. *See* 83 Fed. Reg. 40469.

The failure of the NPS to promptly advise of the status of permit applications is disruptive and chills protected speech activity. The NPS should not abandon the 24 hour deemed-granted rule, nor should it permit the unsustainable creation of a new category of permit limbo which "provisionally reserves" without issuance of permit approval.

While seeking to eliminate the 24 hour deemed granted rule, the NPS also proposes that it will only allow spontaneous rapid-response demonstrations, those with less than 48 hours' notice, in its discretion based on its determination of NPS resources to "manage the activity." *See* 83 Fed. Reg. 40467-40468. It states that if it does allow assembly, structures will be banned. The Agency incorrectly states that this would "provide more flexibility for spontaneous demonstrations." It would not, and the NPS fails to explain how removing the 24 hour deemed granted rule and replacing it with a rule that gives the NPS discretion to bar free speech activities that must take place in rapid-response to events does so. The NPS also fails to explain why all types of structures must be banned in all locations, which includes amplified sound systems sufficient to reach a crowd. The NPS justifies this ban on the assertion that a group once sought to erect a wooden barn on parkland. If the NPS wants to ban barn building, it can prohibit structures of a certain dimension. It should create regulations that fit the purpose which they are purported to advance. Here, however, the NPS proposes banning all structures, and defines structures so expansively and beyond the scope of ordinary usage so as to encompass virtually any item, including ordinary and safe items customarily associated with and facilitative of free speech. We oppose this proposal.

Spontaneous demonstrations in response to breaking events are not only a core right under the First Amendment, but are inevitable. In Washington, D.C., it is routine for people to gather together to express themselves in response to court rulings, sudden policy announcements, new wars, elections, and other important events. The NPS would be better served not by seeking authority to prohibit such gatherings, but by developing a plan to facilitate quickly organized rapid-response events.

#### **IV. We Oppose the Creation of Hair-Triggers to Extinguish Free Speech Assemblies**

Currently, a demonstration permit may be revoked on the spot "if continuation of the event presents a clear and present danger to the public safety, good order or health or for any

violation of applicable law or regulation.” 83 Fed. Reg. 40469. The new NPS rulemaking would authorize summary termination of First Amendment assemblies “for any violation” of the “terms and conditions” of a permit. *Id.* This would be a shutdown of a protest, in progress, while people are literally engaged in protected activity, having travelled however far to assemble in common cause.

In addition to substantial permissions, demonstration permits are often lengthy documents filled with myriad details and tiny requirements about placement or quantity of items (like the number of folding chairs or literature tables). The NPS asks for comment on whether such termination should be based only on “material” violations of a permit. We believe that the issue is not whether the terms of permit are violated are minor or material, but rather that there is *no justification* for such an expansion that could extinguish the peaceful and lawful First Amendment activities of groups of persons by revocation of a permit based on circumstances that *do not rise* to a danger to public safety, good order or health and are not violations of applicable law or regulation.

By its terms, the shutdown of an entire protest can be triggered by one individual who perhaps walks into an unpermitted area, climbs a tree, brings unauthorized tables or chairs to a protest, or conducts unauthorized sales of items.

The proposed regulation does not specify that the violation be committed by a person who even has knowledge of the permit such that they could have any way to know that their actions are contrary to its terms. Typically, while one or multiple key organizers of an event may have knowledge of a permit’s terms and conditions, likely no other demonstration participants do.

Because the provision does not require violation by a protest organizer or the event as a whole, it authorizes protest shutdown based even on the actions of a counter-protester or person who holds an animus against the underlying event.

We reject the notion that, even if one or a few individuals are observed violating a permit’s terms or even breaking the law, that the NPS can exact a collective punishment by terminating the constitutionally protected free speech of others.

## **V. We Oppose Extending the Strict Limitations on Signs at the White House to Other Park Areas**

The Park Service should not extend the strict White House Sidewalk sign size and composition limits to all park areas as it proposes to if any part of the activity or day’s event occurs or moves to the White House area. Fed. Reg. 40472-73.

Under this proposal, if a mass assembly was occurring on the National Mall, we would not be able to have large scale signs and banners if the participants were later going to march past the White House, or if there was an ancillary part of the day’s free speech activities that was scheduled to take place in Lafayette Park. A march would not be allowed to have a traditional large lead front banner if any portion of activities included persons using Lafayette Park or the White House sidewalk for expression, even if the banner was not going to enter into areas where

it would be prohibited. There is no justification that supports this extreme restriction on our First Amendment rights and ability to display and communicate our messages.

Large banners are allowed on Pennsylvania Avenue, which is under the jurisdiction of the District of Columbia, adjacent to the White House sidewalk. The NPS fails to explain or address whether or how its proposed rule change will affect or impact the continued ability to display large messages on banners on Pennsylvania Avenue directly in front of the White House. We would also strenuously object to any restriction on this right.

The NPS disingenuously states that its proposal would “simplify event planning.” *Id.* As organizations who participate in the planning of these events, we can say unequivocally that it would not simplify the planning and to the contrary would make planning more onerous, complicated and restrictive. We are not aware of there being an existing, ongoing or substantive problem with lack of conformance to the regulations governing signs at the White House and the NPS does not provide any concrete explanation or actual examples of such problems.

The NPS states that the proposed rule would serve to avoid “negative interactions with law enforcement.” *Id.* We do not understand exactly what this phrase is intended to mean. The NPS supervises its Park Police and has the authority, and the responsibility, to train them properly. Restricting the public’s expressive rights in order to avoid “negative interactions” with law enforcement is constitutionally unsound.

## **VI. We Oppose the Ban and Restrictions on Long Term Vigils and Sustained Protest**

The Park Service proposes to limit any protest in one location to 30 days and even less if there is a structure involved, like a symbolic encampment. Fed. Reg. 40470-71. Long term protest presences that remain in one location are an important form of advocacy showing sustained commitment and sacrifice and drawing attention to a cause. The Park Service already maintains and enforces rules that do not allow sleeping or camping during such symbolic protests.

The elimination of this form of First Amendment activity is not justified. If the government intends to ban a form of protest in order to protect the grass, it should provide detailed analysis and an evidence based justification that can be evaluated and challenged, which the National Park Service has not done. Nor has it explained that it has pursued plausible alternatives to advancing its stated interests without restricting free speech.

While advancing a proposal to curtail the length of free speech actions, the NPS continues to maintain an extended exclusive use set-aside for the Presidential Inaugural Committee that places major public fora off limits to free speech at critical times. The National Park Service should revise its regulations to limit the amount of time that the White House sidewalk and Lafayette Park is placed off limits to protests, currently almost six months around an inauguration. It gives long term exclusive use only to the Presidential Inaugural Committee, a private political entity supportive of the incoming President, and in so doing bars all First Amendment activity in this area for nearly half the year around every presidential election and inauguration.



## **VII. We Oppose the Prohibition on All Manner of Structures Within the Drip Line of Trees**

Lafayette Park is full of trees. Such a ban would severely restrict the ability of demonstrations to have stage or sound. If the NPS has evidence that certain structures are causing harm, and we are not aware of any such evidence nor is any presented in the record, they should present such evidence in the record for evaluation.

Currently the NPS's own rules require that a demonstration be limited to one single structure in Lafayette Park which requires stages to be built to support all necessary activities on one platform, including program speakers, sound, chairs for the disabled, and press riser as well as hold all necessary items like political literature, First Aid materials and packages of water bottles during summer events. The NPS will not allow any additional structures including literature tables, chairs or any other small structure in a single demonstration permit in Lafayette Park. The NPS should allow multiple smaller structures to support First Amendment activities rather than itself requiring the construction of one large structure to accommodate basic needs. We note that in contradiction to NPS' stated interests, every four years Lafayette Park is filled with large trailers, bathrooms, bleachers, tables, chairs and numerous other structures for a protracted period of time to accommodate the Presidential Inaugural Committee's private event and that the NPS is thus failing to uniformly require or enforce restrictions on structures in its permitting administration.

## **VIII. We Oppose Additional Proposed Revisions to the Existing Regulatory System that Effect Burdens and Restrictions on the Constitutional Right to Free Speech and Assembly in the Nation's Capital**

We also oppose the other restrictions in the Park Service's proposed rulemaking that restrict use of structures and sound for demonstrations and assemblies, including those that do not require permits, and the imposition of additional permitting requirements, processes and burdens. We do not believe these changes are substantially explained or justified and these changes will create added burdens and limitations on free expression that are unnecessary and harmful to our organizations and our constituents' abilities to engage in protected activity in Washington, D.C. We support all proposals to increase the number of persons who may gather to engage in First Amendment activities in our public parks and oppose any efforts to restrict our public gathering places or further burden the exercise of First Amendment rights.

The proposed rulemaking lacks substantial explanation of, or justification for, the many proposed changes, burdens and restrictions, and thus fails to provide proper notice to those who will be affected by it and makes it difficult for us to fully evaluate and comment on these proposals.

Indeed, the NPS in its rulemaking does not provide adequate explanation or analysis, and in some areas offers no attempted explanation or analysis whatsoever, to justify the need to rewrite the regulations governing demonstrations, nor has it explained how the revised regulations would resolve an asserted issue. We strongly oppose all proposed rulemaking that

negatively alters, and further burdens or restricts, the ability to use our public lands in Washington, D.C. for First Amendment protected activities.

Washington D.C., as the seat of federal government, has been the location of many of the most historic and impactful demonstrations in our nation's history that have moved our country and changed society for the better. The proposed overhaul of the regulations governing demonstrations seeks to undo the progress forged through the struggle of past generations and stifle the voices of future generations who would come to Washington, D.C. demanding change.

For the reasons as stated above, we oppose the NPS's proposed rulemaking.

Respectfully submitted,



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For the Partnership for Civil Justice Fund  
and on behalf of the following organizations:

A.J. Muste Memorial Institute

ANSWER Coalition

CASA de Maryland

CASA in Action

Cindy Sheehan's Soapbox

Coalition for Peace Action

CodePink

DC Jobs With Justice

Defending Rights and Dissent

Greenpeace USA

Howard County Peace Action (Maryland)

Justice First

Knowdrones.com

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Maryland United for Peace and Justice  
Metro Washington Council AFL-CIO  
National Lawyers Guild  
New Jersey Peace Action  
ONE DC  
Peace Action  
Peace Action Maine  
Peace Action Montgomery  
PEN America  
Popular Resistance  
SEIU 32BJ  
September 11th Families for Peaceful Tomorrows  
UNITE HERE Local 25  
United for Peace and Justice  
United National Antiwar Coalition (UNAC)  
Veterans for Peace  
Virginia Defenders for Freedom, Justice and Equality  
Western States Legal Foundation  
Women's March on the Pentagon