



The Partnership for Civil Justice Fund

Defending Democracy and Civil Rights in the Courts and in the Streets

The following is a working document from the Partnership for Civil Justice Fund highlighting key provisions in the Department of the Interior / National Park Service's proposed overhaul of rules affecting the ability to protest on public space in the nation's capital.

For additional information go to: www.JusticeOnline.org

To Comment: Go to www.Regulations.gov and search on "NPS demonstrations" to find the release of "Special Regulations, Areas of the National Park System, National Capital Region, Special Events and Demonstrations" (or search on RIN 1024-AE45). Click on the *Comment Now!* button

The Top Twelve Major Changes to National Park Service Regulations on Demonstrations in the Nation's Capital

(more detailed explanation infra)

1. Pay to Protest - - Part 1: DOI/NPS to Charge Costs and Fees on any Demonstration Activity
2. Pay to Protest - - Part 2: Changes Regulatory Definitions to Charge Costs and Fees on Demonstrations that Contain "Special Event Elements" (e.g., musical performances, exhibits or "entertainments") and Allows Government Officials to Deconstruct First Amendment Activities
3. Applications Left in Limbo: Removes the 24-Hour "Deemed Granted" Rule, That Applications Are Deemed Granted Within 24 Hours Unless Denied, and Replaces with a System with No Deadline Whatsoever for the NPS to Finally Act on a Permit Application
4. Closure of the Iconic White House Sidewalk to Demonstration Assembly
5. Closure of Public Spaces on the South Side of the White House
6. A New Hair-Trigger for On-the-Spot Termination of a Demonstration: Officials Can End Protests for Any Violation of a Permit's Terms Committed by Anyone, Even Inadvertently, and Where Such Violation Does Not Rise to a Danger to Public Safety, Health or Order, or Violate Any Law or Regulation
7. Elevates Protection of Grass Over Free Speech: The Proposal Codifies the Extensive and Expensive Requirements of the Turf Management Plan -- Imposing Prohibitively Expensive Restrictions on Use of Grass and Assembly on Parkland, Including Expensive Grass Covers

8. Ends Long Term Vigils and Protest Presences: Maximum Permit Period of 30 Days, Even Less if There is a Structure
9. Imposes the Strictest Existing Restrictions on Signs and Banners On Demonstrations Across Washington, D.C., If Any Part of an Event's Planned Activities Touches Upon the White House Sidewalks or Lafayette Park
10. Prohibition of Structures (Stage, Fixed Sound, etc.) Within the Drip Line of Trees in Lafayette Park or the Ellipse – But Lafayette Park is Filled with Trees
11. Prohibition of Structures, including Stage and Sound Setup or Literature Tables, Absent a Permit, Including in Parks For Which No Permit Is Needed To Have a Demonstration (i.e., Franklin Park, McPherson Park, among others)
12. NPS Seeks Comments on Whether to Decrease or Increase the Number of People Who May Demonstrate Without a Permit in Certain Designated Park Areas (i.e., Franklin Park, McPherson Park, Dupont Circle, among others)



Highlighted Top 12 Changes With Greater Detail

1. Pay to Protest - - Part 1: DOI/NPS to Charge Costs and Fees on any Demonstration Activity

a. NPS seeks comments on the merits of charging demonstrators for “costs” associated with demonstrations. The agency has a non-exhaustive list of such charges, including but not limited to: application fees; costs associated with “event management” which can include paying for NPS staff to monitor your event, including overtime pay; material and supply costs such as barricades and fencing which can be erected at the discretion of police; rehabilitation of demonstration area; clean up of area including trash removal and sanitation; costs associated with resources such as harm to turf, benches, poles and walkways, which may be assessed against organizers after a demonstration. See 83 F.R.40465 – 40466. These costs could be in the tens of thousands to hundreds of thousands of dollars and have a potentially bankrupting impact on grassroots groups.

b. PCJF opposes any charges levied on demonstrations and free speech activities. See Mara Verheyden-Hilliard and Carl Messineo’s OpEd in *The Washington Post* <https://wapo.st/2zNZxdx>

2. Pay to Protest - - Part 2: Changes Regulatory Definitions to Charge Costs and Fees on Demonstrations that Contain “Special Event Elements” (e.g., musical performances, exhibits or “entertainments”) and Allows Government Officials to Deconstruct First Amendment Activities

a. Currently, once an event is deemed a demonstration, i.e., an event “that involve[s] the communication or expression of views and grievances,” it receives “heightened protections under the First Amendment” and there are no charges or costs imposed by NPS for the activity. Applications for First Amendment activities have always been processed on a different track than “special events” which are often commercially sponsored, or commercial filming.

b. NPS proposes specific changes to regulatory definitions, ending the exclusive separate track for demonstrations, creating a new term, “event” and imposing “cost recovery” charges on any demonstration that contains “special event elements.” A special event element apparently includes musical performances that are part of a demonstration or other “entertainments” such as “exhibits,” but generally the NPS definitions and plans are completely unclear, malleable and undefined. See 83 F.R. 40462 – 40463 (proposing charges on special event elements found within demonstrations); 83 F.R. 40474 (creating new definition of “event” at 36 C.F.R. § 7.96(g)(1) that merges demonstrations and special events). This rule will authorize NPS officials to deconstruct First Amendment activities and impose charges, costs, fees and

restrictions where they assert there are performances or exhibits that support the protest.

c. PCJF opposes any charges levied on demonstrations and free speech activities; opposes any changes to the current permitting system which currently recognizes and processes demonstration activities distinctly from special events; and opposes any effort that conflates demonstrations and special events or authorizes government officials to deconstruct First Amendment protected demonstrations and pick out ancillary elements on which to assess charges and add restrictions. PCJF opposes placing any discretionary cost assessments in the hands of officials as such can be proxy for unconstitutional content based determinations.

3. Applications Left in Limbo: Removes the 24-Hour “Deemed Granted” Rule, That Applications Are Deemed Granted Within 24 Hours Unless Denied, and Replaces with a System with No Deadline whatsoever for the NPS to Finally Act on a Permit Application

a. Currently, a permit application is automatically deemed granted if the NPS does not expressly deny it within 24 hours of submission. This 24 hour deemed granted rule was put in place after extensive federal court litigation in the late 1960s – early 1970s. The federal appeals court, the Circuit Court for the District of Columbia, observed “continued complaints that the issuance of permits have been unnecessarily delayed . . . make it appropriate to insist on more formal procedures governing the timing of permit application and consideration.” *A Quaker Action Group v. Morton*, 516 F.2d 717, 735 (D.C. Cir. 1975). The Court imposed the 24-hour deemed granted rule, holding that “an applicant would seem entitled to notice of a proposed denial of his permit within 24 hours after submission of the application.” *Id.*

b. Under the proposed regulations, NPS ends the 24 hour deemed granted rule. 83 F.R. 40468 (“Removal of 24-Hour Deemed Granted Status for Demonstrations”). The NPS no longer has only two statuses for an application, “approved” or “denied,” but creates a third new status, “provisionally reserved.” Any application can be designated as “provisionally reserved,” which means that the application is essentially in limbo, neither denied (which would potentially give rights to appeal to a federal court) nor approved (which would allow organizers to announce, plan or contract in reliance on approval). See 83 F.R. 40468 – 40469.

c. Under the new regulations, NPS would have three business days to designate the status of an application, but this status can be the limbo “provisionally reserved” status and in all likelihood this will become the automatic reply (unless a space is already taken and thus denied). 83 F.R. 40468.

d. The new regulations eliminate any deadline for NPS to act on a demonstration application. If an application is submitted between one year and 60 days in advance and

is designated as “provisionally reserved,” the agency is required to only *begin* reviewing the application to create “an initial, comprehensive list of outstanding issues” to send to the applicant 40 days prior to the event itself. 83 F.R. 40469. The regulations contain no deadline for agency action (i.e., approval or denial), and only require the NPS engage in “reasonable efforts to approve or deny an application at least 30 days in advance of a requested event.” *Id.* For permit applications less than 60 days before an activity there is no guidance at all. This new rule will deprive demonstration organizers of time necessary to organize activities knowing that they have a deemed granted permit even while they work out final logistical details with the NPS. Instead, organizers will be put in a holding pattern, unable to let their constituents know that there is permitted space such that they can make plans to come, unable to contract for stage and sound in a timely fashion, and unable to have a clear response from the NPS such that improper denials can be effectively challenged in court.

e. **Spontaneous Demonstrations** - With the removal of the 24 hour deemed granted rule, the NPS’ new regulatory scheme states that it will “reasonably seek to accommodate” spontaneous demonstrations (applications within 48 hours of an activity, usually in response to a suddenly occurring event) but only so long as the NPS decides, in its discretion, that it has “resources to manage the activity.” The NPS will not allow any structures at all for such rapid response free speech activities. In other words, the NPS asserts that it can refuse to allow the public to demonstrate in emergency response to breaking events and even when it does, it will not allow any fixed sound sufficient to reach a crowd or stage or literature tables.

f. PCJF opposes the removal of the 24 hour deemed granted rule and any regulatory scheme that does not mandate approval/denial within 24 hours of application submission.

4. Closure of the Iconic White House Sidewalk to Demonstration Assembly

a. Without any reference or mention in the narrative, the regulations effect a permanent closure of the iconic White House sidewalk across from Lafayette Park. According to the regulations, “[t]he area of the sidewalk to be closed shall consist of a twenty (20’) foot portion of the sidewalk, extending out from the [White House] North Fence Line, leaving a five (5’) foot portion of the sidewalk for pedestrian access.” 83 F.R. 40475 (changing 36 C.F.R. § 7.96(g)(3)(i)(D)); 83 F.R. 40476 (map showing closure of sidewalks in grey).

b. Currently, there is no such permanent closure of the White House sidewalk, although the police enforce a requirement that persons remain in motion in the central portion of the sidewalk across from Lafayette Park, which necessitates that demonstrations be a circular or oblong moving picket line, which will also be rendered logistically not possible under this proposal.

c. Historically, the Secret Service and the NPS have sought (and failed) to ban demonstration activity from the sidewalks or to impose numeric limitations of merely 100 participants on these iconic spaces. The federal courts, after extensive litigation and a full evidentiary trial, rejected the Secret Service and NPS's claimed justifications. As a result, the federal courts require that there be a minimum of 750 participants allowed on the White House sidewalks, and that the government have a waiver procedure to authorize greater numbers. See *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975).

d. The proposed regulations are an effort to circumvent this ruling and to stifle protest activity by closing all but a five foot sliver of space on the sidewalks for a pedestrian passageway, which is insufficient space for a demonstration, even insufficient for a moving picket line.

e. PCJF opposes any closures of the significant public forum of the White House sidewalk.

5. Closure of Public Spaces on the South Side of the White House

a. The regulations will permanently close public access to areas on the South Side of the White House, including in "the vicinity of the south fence line of the White House and in and around First Division Memorial Park and Sherman Park." 83 F.R. 40465; See also 83 F.R. 40465 – 40466, 40475 (changing regulations), 40476 (map of affected areas).

b. PCJF opposes closures of public forum space absent an evidence-based demonstration of necessity, and lack of alternative options, for such ever expanding closures.

6. A New Hair-Trigger for On-the-Spot Termination of a Demonstration: Officials Can End Protests for Any Violation of a Permit's Terms Committed by Anyone, Even Inadvertently, and Where Such Violation Does Not Rise to a Danger to Public Safety, Health or Order, or Violate Any Law or Regulation

a. Currently, the ranking U.S. Park Police official in charge of an event may revoke a demonstration permit only "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 F.R. 40469.

b. The proposed regulations establish a new hair trigger for revocation, that a demonstration may be terminated "**for any violation of its terms and conditions**, or if 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 F.R. 40469.

c. A demonstration permit is filled with myriad details, from tiny requirements about placement or quantity of items (like the number of folding chairs or literature tables), to substantial permissions. It is a hyper technical and lengthy document regulating minutia. The new proposal is a hair trigger for revocation, allowing revocation for any violation of any of these details, including a violation by any person regardless of whether that person is a demonstration organizer or the permit holder. This means revocation can be based on the actions, large or small, of any individual, including a participant who has never even seen the permit (perhaps an unaffiliated person who shows up to sell t-shirts or buttons which is not allowed, or demonstration participant that ignores fencing and walks on fenced off grass, or a person who climbs a tree or a pole), or even a counter-protester or person who is hostile to the underlying message and does something that is assessed as a violation of the permit terms.

d. The NPS seeks further comment on whether revocation or protest-termination may occur based only on a “material” violation of the permit. 83 F.R. 40469. However, there should be no termination of a First Amendment activity based on violations of a permit *at all* if those violations do not represent a “clear and present danger to the public safety, good order or health or for any violation of applicable law or regulation.” There should be no expansion beyond these current bases for revocation. PCJF opposes allowing the NPS to extinguish a demonstration based on any random individual’s violations of a permit which they have never seen and also where such person may act out of animus against the protest.

e. PCJF opposes termination based on any permit violation unless it poses a “clear and present danger to the public safety, good order or health or for any violation of applicable law or regulation” and then only after notice to designated protest organizers, and willful refusal to cure. We do not believe the constitutional rights of the many thousands of people who have come to engage in a peaceable assembly can be sacrificed by the inadvertent action of one person or even the willful action of a few.

7. Elevates Protection of Grass Over Free Speech: The Proposal Codifies the Extensive and Expensive Requirements of the Turf Management Plan -- Imposing Prohibitively Expensive Restrictions on Use of Grass and Assembly on Parkland, Including Expensive Grass Covers

a. The Turf Management and Event Operations Guide is an extensive document that elevates protection of turf over permission to use the Mall and other green space plazas for free speech. It is an enormous and expansive document, including suggesting very expensive requirements such as the use of plastic turf covers to protect the grass from being stood upon. The document has not been subject to rule promulgation nor have the expensive requirements been subjected to testing in a court. Regardless of such issues, the turf management plan reflects a view that our green space plazas in Washington, D.C. are not naturally suitable for free speech activity and, therefore, substantial

restrictions and often expensive measures must be undertaken by event organizers to avoid “damaging” the grass by using it.

b. The proposal states that permit conditions can incorporate the Turf Management Guide.

c. PCJF opposes this backdoor plan to write the Turf Management Plan into the regulations governing the permitting of demonstrations. The NPS is obligated to put the entire Turf Management Guide out for public comment and provide the public with detailed explanation, and evidentiary justification, for each of the Guide’s requirements and its proposed application to demonstration activities. Our public lands are not for ornamental viewing and from time immemorial have been used for free speech and assembly. The PCJF takes the position that, while grass can grow back, free speech rights are indispensable and are forever lost if they cannot be exercised in our nation’s green spaces and plazas.

8. Ends Long Term Vigils and Protest Presences: Maximum Permit Period of 30 Days, Even Less if There is a Structure

a. The proposed regulations limit the length of time a First Amendment activity - including vigils - may take place to 30 days, and even less if there is a structure involved. Currently permits are authorized for seven days in the White House area (except the Ellipse) and for four months in the Ellipse, National Mall and all other areas.

b. The new proposal will allow a maximum of 30 days, and if structures are requested the NPS will determine the authorized period it will allow First Amendment activities based on the Turf Management Guide.

c. The new proposal will allow renewal of requests if they are made ten days in advance of expiration of a permit and, if a renewal is allowed, demonstrations with structures will be forced to move to another location. Demonstrations without structures may also have to move in order to be allowed to continue, based on the NPS determination as to what is best for the grass.

9. Imposes the Strictest Existing Restrictions on Signs and Banners On Demonstrations Across Washington, D.C., If Any Part of an Event’s Planned Activities Touches Upon the White House Sidewalks or Lafayette Park

a. Currently, based on purported security considerations that exist solely because of proximity to the White House, strict restrictions on the use of signs (e.g., size restrictions) and sign supports (e.g., allowing only tomato stake sign supports) are imposed on events that occur on the White House Sidewalks or in Lafayette Park. Restrictions limit signs to those made of cardboard, posterboard or cloth no greater than three feet in width, twenty feet in length, and one quarter-inch in thickness. No supports

are permitted for signs except those made of wood no greater than three-quarter of an inch dimensions.

b. The proposed regulations dictate that these very strict restrictions be extended to demonstrations at any place in Washington, D.C. if any part of a day's events occur on or move to the White House sidewalks or Lafayette Park. 83 F.R. 40472 – 40473. This means that these strict restrictions will, for example, be imposed on marches or gatherings on the Mall - - where there are no present security justifications for such strict limitations - - if any part of an event will touch on these zones.

c. PCJF opposes expansion of these sign restrictions across Washington, D.C.

10. Prohibition of Structures (Stage, Fixed Sound, etc.) Within the Drip Line of Trees in Lafayette Park or the Ellipse – But Lafayette Park is Filled with Trees

a. The proposal codified a prohibition of any structure within the drip line of any tree in Lafayette Park and on the Ellipse. 83 F.R. 40472. There are few spaces in Lafayette Park that are not so located.

11. Prohibition of Structures, including Stage and Sound Setup or Literature Tables, Absent a Permit, Including in Parks For Which No Permit Is Needed To Have a Demonstration (i.e., Franklin Park, McPherson Park, among others)

a. Currently, there are no regulatory restrictions requiring a permit for structures including sound and stage, except in certain areas such as Lafayette Park and the White House sidewalks.

b. Currently, there are certain parks where demonstrations up to a certain number of participants may occur without any permit. At these parks, sound and stage sufficient to project and communicate with the assembled demonstration can be erected without a permit.

c. Under the new proposed regulations, the only structure allowed without a permit is a “soapbox speakers’ platform” not to exceed 3 feet in height, width and depth. 83 F.R. 40464. See *gen’y* F.R. 40464 – 40465. This is patently insufficient to project over and communicate with an assembled demonstration. Under the new system all structures, including fixed sound, literature tables, folding chairs etc., would require going through permit processing for approval from the NPS, even if a permit would not otherwise be needed where the number of people participating was below permit requirements.

d. PCJF opposes any regulatory restrictions that restrict the ability of demonstration organizers to erect, without a permit, stage and sound sufficient to communicate with the entirety of an assemblage given the anticipated noise of the protest and ambient conditions.

12. NPS Seeks Comments on Whether to Decrease or Increase the Number of People Who May Demonstrate Without a Permit in Certain Designated Park Areas (i.e., Franklin Park, McPherson Park, Dupont Circle, among others)

a. Currently, demonstrations of moderate size are permitted in five park areas without an advance written permit, including Franklin Park (500 person limit), McPherson Park (500 person limit), U.S. Reservation No. 31 across the street from the International Monetary Fund headquarters (100 person), Rock Creek and Potomac Parkway west of 23rd Street and south of P Street (1,000 person limit) and U.S. Reservation No. 46 at 8th Street and D Street (25 person limit).

b. The NPS seeks comment on whether to increase the maximum number of people who may demonstrate at Franklin Park and at McPherson Square from 500 up to a potential maximum of less than 2,500 (the number NPS deems can be accommodated without a medical station with advanced life support) or, alternatively, whether the NPS should eliminate the ability of demonstrations to assemble there without an advance permit (leaving only a limited allowance for groups of up to 25 people). 83 F.R. 40464.

c. The NPS seeks comment on whether it should establish new permissions for demonstrations to occur without a permit at Dupont Circle and Farragut Square. 83 F.R. 40464.

d. NPS seeks comment on whether it should reduce or eliminate the ability of persons who may assemble without a permit at U.S. Reservation Number 31 (i.e., across from the IMF headquarters) and Rock Creek & Potomac Parkway. 83 F.R. 40464.

e. PCJF opposes any limitations on these no-permit park spaces, supports the increase of the number of participants to the maximum feasible for the given areas, and supports the expansion of no-permit provisions to Dupont Circle and Farragut Square. PCJF opposes restrictions that prevent use of sound and stage without a permit in these no-permit parks.