

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

1140 Connecticut Avenue, NW
11th Floor, Suite 1150
Washington, DC 20036
202.249.7190 Fax 202.223.2683
www.brennancenter.org

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Brian D. Joyner
Chief of Staff
National Mall and Memorial Parks
National Park Service
900 Ohio Drive, SW
Washington, DC 20024
Via the federal eRulemaking portal
<http://www.regulations.gov>

Re: Proposed rule regarding demonstrations and special events in the National Capital Region, 83 Fed. Reg. 40460 (Aug. 15, 2018)
Regulation Identifier No. 1024-AE45

Dear Mr. Joyner:

The Brennan Center for Justice at New York University School of Law (“Brennan Center”) appreciates this opportunity to submit comments on the National Park Service’s (NPS) proposed revisions to Title 36 of the Code of Federal Regulations, section 7.96 regarding protests for the National Mall, President’s Park and other national parks in the Washington, D.C. area. The Brennan Center is a nonpartisan law and policy institute that seeks to improve the United States’ systems of democracy and justice. Through that work, we frequently engage with matters concerning free speech and associational rights, and we frequently rely on these rights in order to advance our interests. Our namesake, former U.S. Supreme Court Justice William J. Brennan, was one of the strongest defenders of free speech rights to have sat on the U.S. Supreme Court. Unfortunately, many aspects of the proposed regulations are antithetical to the First Amendment and to American values.

At the outset we note that these attempts to place onerous conditions on the ability to assemble and protest—highly troubling in their own right—also cannot be viewed in isolation from this administration’s efforts to limit and undermine First Amendment rights and interests in other ways. News and other reports show that these include actions by President Trump and senior administration officials to: label journalists as “enemies of the people”; block critics on social media platforms; threaten to revoke broadcast licenses of media outlets critical of the administration; and allege that the protestors who assembled in opposition to the nomination of now-Justice Brett Kavanaugh to the U.S. Supreme Court were paid to do so.

Moreover, many of the proposed regulations will affect not only areas located near the President’s White House residence and offices but also the Trump Hotel. This would have the effect of further insulating the president from criticism. The values protected by the right to critique the government—including through protest—are at the core of the First Amendment. Justice Brennan opined over half a century ago in the seminal case of *New York Times v. Sullivan*, “debate on public issues should be uninhibited, robust, and wide-open and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

We oppose many of the proposed changes, and in this we support the comments submitted by the American Civil Liberties Union of the District of Columbia, as well as those submitted by Public Citizen. We do not attempt to reiterate all of those comments here, and instead highlight some key areas of concern.

In relation to **Proposed Revision 2**, we oppose the removal of the language defining “special events” as those that do not qualify as demonstrations on the ostensible basis that “[e]xperience managing events has shown that some demonstrations have elements that are special events.” In addition to the lack of a satisfactory definition in the proposed regulation as to how to interpret “elements that are special events,” in our view, if a gathering is a demonstration, all actions done as part of that are inherently part of that demonstration, *i.e.*, there are no “elements that are special events.” A song played as part of a protest is not a “special event” element of a demonstration, it is part of the demonstration. The current wording in the regulation recognizes that the key task is to identify whether the nature of the event is one of demonstration, or of special event, and defining special event in the negative ensures that there is no overlap between the two. Attempting to impute “special event” elements into a demonstration—along with the attendant regulations that special events bring with them—is not only confusing but harmful to core First Amendment speech.

Proposed Revision 5 is too restrictive. While we are not opposed to all permit requirements for structures, the proposed revision indicates that a permit would be required for any structure not qualifying as “small lecterns, speakers’ platforms, portable signs, or banners.” Given that the size of the speaker platform size is limited to a three-foot-cubed size, there are many structures that

would cause minimal or no harm to the stated concerns underlying the proposed revisions and thus should be allowed without permit.

We strongly oppose the attempt in **Proposed Revision 6** to “consider” a levy of fees on persons and groups engaged in protests and/or demonstrations. While it is no doubt true that demonstrations can have impacts on resources, these costs should—and always have been—borne by the federal government. Indeed, as the proposed revisions state in the “Background” section, “[t]he National Mall and areas surrounding the White House in Washington, DC are managed by the National Park Service (NPS) on behalf of the American people” (emphasis added). Asking protestors to pay for the privilege of exercising their core constitutional rights on public lands is inappropriate. Moreover, the burden of the proposed fees would fall disproportionately on those with fewer financial resources. The ability to exercise fundamental constitutional rights should not depend on a person’s ability to pay.

The Brennan Center is opposed to the closure of the areas described in **Proposed Revision 7**. We believe that the NPS acted inappropriately in burying a change as significant as closing almost all of the White House sidewalk in the proposed amended language without highlighting, justifying, or addressing it in the proposed rule explanation. We also note that the closures proposed (whether new closures, or permanent imposition of closures enacted temporarily under this Administration in April 2017) would have their most pronounced effects on protests within sight-lines of executive officials—including President Trump—within the White House. Being within view of the White House is frequently a significant motivating factor of those choosing to protest at the White House.

The extensive closure along the north fence of the White House, and the thin sliver of sidewalk left for protest, is especially troubling given the White House sidewalk’s historical and emblematic significance in American history. In addition, the proposed closure of the entire First Division Memorial and Sherman Parks would be overly broad responses to the asserted justification that “the Secret Service determined that parts of these areas must be kept clear for security reasons” (emphasis added) and to “temporary” closures in recent years.

In relation to **Proposed Revision 8**, we oppose closing more areas surrounding the Washington Monument. The government’s decision to re-landscape an area does not expand the area needed to provide a “contemplative visitor experience,” particularly given the countervailing interest in maintaining significant areas available for First Amendment activities such as protests. There is adequate space on the granite plaza both for visitors to “contemplate the meaning of the Monument and of George Washington,” and for protestors to assemble. Indeed, the “meaning of the Monument and of George Washington” includes at least in part the importance of our Constitution, and its guarantees of free speech, assembly, association, and the right to petition the government.

The Brennan Center opposes **Proposed Revision 9**, which suggests that the Regional Director has no obligation to endeavor to accommodate demonstrations within less than the 48-hour notice period beyond resources that may be on hand. The Regional Director should endeavor to accommodate all such reasonable requests given the importance of spontaneous demonstrations in reacting to actions by government actors (and others). In addition, the complete prohibition on “structures,” as defined, is overly broad. There are many types of structures that can be accommodated for a demonstration with less than 48 hours’ notice.

NPS has sought comment on “whether the regulations should state that [the NPS] may only revoke a permit for ‘material’ violations of permit conditions.” The Brennan Center responds in the affirmative. Any standard less than material violations would be unreasonable, and not allow for occasional minor violations that inevitably occur, including unintentionally and by persons not affiliated with those who requested the permit.

In relation to **Proposed Revision 12**, the Brennan Center is opposed to the restriction of additional areas from having “structures” during protests on the basis that they would adversely impact the “viewshed”. It is unsurprising that a study carried out by NPS this year—presumably in anticipation and support of this regulation revision—“to better understand how structures associated with demonstrations and special events within the National Mall and Memorial Parks and President’s Park could adversely impact the historic and cultural viewshed,” concluded that structures associated with demonstrations and special events in those areas could adversely impact the historic and cultural viewshed. Freedom of speech and assembly are fundamental aspects of the history and culture of the United States, but were ignored by the NPS study. We would also note that the entire purpose of protests generally, and structures in protests in particular, is to invite attention and to be seen. There is no reason that “viewshed” interests should overrule free speech interests. It may be reasonable to limit structures that can cause permanent, serious damage to the locations they are in, but this proposed revision is not adequately targeted to that goal.

Finally, we oppose the extension of the sign restrictions detailed in Proposed Revision 13. Again, these measures seem aimed at reducing the visibility of protests, and would be a severe restriction on First Amendment rights.

We do support some of the changes proposed. For instance, we support an increase in the maximum number of persons that can demonstrate without a permit at certain locations as described in **Proposed Revision 4** (while not endorsing the reasonableness of those limits as a maximum). We oppose any decrease in the current numbers.

In closing, we encourage the NPS to incorporate respect for First Amendment values in its regulations. Any revisions to the regulations affecting demonstrations in these historic protest locations must protect—and ideally enhance—these core American values. The right to protest policies and actions are at the core of the American story, going as far back as the Boston Tea

Party. The nation's capital must remain open to robust opportunities for demonstration and protest.

Sincerely,

The Brennan Center for Justice