

# THE RUTHERFORD INSTITUTE

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October 15, 2018

Brian D. Joyner, Chief of Staff  
National Mall and Memorial Parks  
National Park Service  
900 Ohio Drive, SW  
Washington, D.C. 20024

**Re: Comments of The Rutherford Institute on Proposed Rule (83 Fed. Reg. 40460) to Amend Regulations on Demonstrations in the National Capital Region, Regulation Identifier 1024-AE45**

Dear Mr. Joyner:

As a civil liberties organization that works to ensure a robust First Amendment, The Rutherford Institute<sup>1</sup> is gravely concerned about the government's latest declaration of zero tolerance for individuals exercising their First Amendment rights in the form of proposed amendments to National Park Service rules (Proposed Rule (83 Fed. Reg. 40460) to Amend Regulations on Demonstrations in the National Capital Region, Regulation Identifier 1024-AE45).

One of the key ingredients in a representative democracy is the right to freely speak our minds to those who represent us. In fact, it is one of the few effective tools "we the people" have left to combat government corruption and demand accountability. Yet these proposed restrictions limit the fundamental right of the people to engage in protest and expressive activities in Washington, D.C., the very place where their voices should be heard by government representatives who have been charged with heeding and carrying out the will of the people.

The preservation of our liberty requires that these draconian restrictions on freedom of speech and other lawful First Amendment activities be rejected outright by the National Park Service.

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<sup>1</sup> The Rutherford Institute is a national civil liberties organization that works to safeguard the fundamental rights enshrined in the United States Constitution, particularly the rights guaranteed by the First Amendment to speak freely, assemble peacefully, protest, and petition the government for a redress of grievances. As part of its non-profit legal and educational outreach, the Institute assists individuals whose civil liberties are threatened or infringed and works to safeguard the constitutional rights of all Americans.

The proposed amendments to 36 C.F.R. § 7.96 are a continuation of a sustained and elitist effort to insulate government officials from those they have been appointed to serve and represent.

Indeed, in recent years, government officials have gone to great lengths to evade their contractual, constitutional duty to make themselves available to their constituents and hear their grievances. Press conferences, ticketed luncheons, televised speeches and one-sided town hall meetings held over the phone now largely take the place of face-to-face interaction with constituents.

Additionally, protest laws, free speech zones, bubble zones, and trespass zones have conspired to further corrode our core First Amendment freedoms. There has, in fact, been an increased use by both major political parties of so-called “free speech zones,” designated areas for expressive activity used to corral and block protestors at political events from interacting with public officials.

As detailed below, the proposed amendments to 36 C.F.R. § 7.96 serve to further erode the rights of citizens to demonstrate in places that immemorially “have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). In particular, the following changes to the regulations pose a grave danger the First Amendment rights and should not be adopted:

Permanent Security Zones Near the White House (Proposed Change 7): One proposed amendment would establish “permanent security zones” near the White House, which would include the vast majority of the sidewalk along the North Fence Line of the White House. Analysis of the proposed change indicates it would require demonstrators to remain within a 5-foot wide path on the 25-foot sidewalk, virtually eliminating protesters from a place that has been the scene of historic protests from the Suffrage Movement to the anti-war demonstrators during the Vietnam War.

Closing the sidewalk in order to ban demonstrations is a blatant violation of the right to freedom of speech. Sidewalks are traditionally left open for the exercise of First Amendment rights and the total closure of areas of a sidewalk cannot be considered a reasonable regulation of speech. *United States v. Grace*, 461 U.S. 171 (1983). Any claim that this security zone is required to protect the White House and its occupants is baseless because plans are already in place to improve the fencing protecting the White House.<sup>2</sup> The so-called “security zones” are instead another government plan to eliminate dissent and spare the President from exposure to criticism.

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<sup>2</sup> See <https://www.nps.gov/whho/learn/news/white-house-fence-design-receives-final-approval.htm>.

Imposing Fees on Demonstrators (Proposed Change 6): The NPS asserts it has a right to recover the costs of activities within the National Capital Region and proposes that it exercise that power to recover fees from demonstrators. It suggests a host of costs that persons conducting demonstrations could be tagged with: setting up and removing structures, barricade and fencing costs, costs for the clean-up and trash removal of a permitted area, and costs associated with resource damage such as harm to grass, benches, poles, and walkways.

This proposal is in essence a tax on free speech, an idea which strikes at the heart of the First Amendment. As Justice John Marshall noted, the power to tax is the power to destroy, and the NPS's proposed tax on speech would undoubtedly drive demonstrators out of the National Capital District by making demonstrations prohibitively expensive. Furthermore, there is no way to assure such fees are assessed in a non-discriminatory manner.

There is every reason to believe that groups that challenge adopt positions in opposition to the government's authority will be punished with high fees and pay a steep price for challenging the government.

Restrictions on Spontaneous Demonstrations (Proposed Change 9): A number of the proposals make the National Capital District less available for spur-of-the-moment demonstrations that might be driven by breaking events. For example, although the current regulation waives the requirement that a permit application be made 48 hours in advance if NPS resources "can reasonably be made available" sooner, it is proposed that the regulation be changed to read a waiver is available only if NPS "has resources available." Under the proposed change, the NPS is under no obligation to seek to assist spontaneous protest activities.

It is established that the First Amendment's protection of freedom of expression and the right to peaceably assemble guarantee the right of citizens to assemble and speak in a spontaneous manner in response to emergent public issues. *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9<sup>th</sup> Cir. 1994). The government should not be making it more difficult for such speech to take place, yet that is what the proposed amendments to 36 C.F.R. § 7.96 would do.

The right of political free speech is the basis of all liberty.

No matter what their political persuasion may be, every American has a First Amendment right to speak their mind, gather together and protest against government programs with which they disagree.

It is the citizen's right to confront the government and demand that it alter its policies. But first, citizens have to be seen and heard, and only under extraordinary circumstances should free speech ever be restricted.

Brian D. Joyner  
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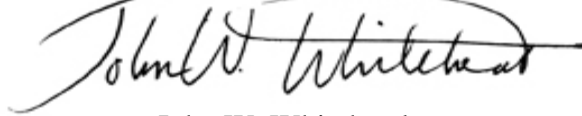
The centers of power should not be shielded from the citizenry.

Our representatives have a contractual, constitutional duty to make themselves available to “we the people.”

The proposed changes to 36 C.F.R. § 7.96 do nothing to reverse this threat to our democracy and will only further erode the First Amendment rights of citizens.

Thus, I urge the NPS to reject any proposed change to the regulations that do not enhance the fundamental rights of the people to be seen and heard by those appointed to serve them.

Sincerely yours,

A handwritten signature in black ink, reading "John W. Whitehead". The signature is written in a cursive style with a large, sweeping initial "J" and a long horizontal line extending from the end of the name.

John W. Whitehead  
President