

# LEGAL CONSIDERATIONS FOR THE NATIONAL MALL AND PENNSYLVANIA AVENUE NATIONAL HISTORIC PARK

To aid in the discussion about the future of the National Mall and Pennsylvania Avenue National Historic Park, this document describes guiding principles for the National Park Service (NPS), as well as the national park system, followed by some of the key legal authorities that affect the management of these special areas and that will factor into the planning decisions for the National Mall plan. By no means does this discussion mention all of the authorities that apply.

## Contents

NPS Laws, Regulations, and Policies ..... 1
The National Park System ..... 1
NPS Organic and General Authorities Acts .. 2
Regulating Public Use ..... 2
First Amendment Jurisprudence ..... 3
Memorials and the Reserve ..... 4
Commercial Activities and Transportation..... 4
Pennsylvania Avenue National Historic Park.... 5
For More Information ..... 6

## NPS LAWS, REGULATIONS, AND POLICIES

### The National Park System

The National Mall and Pennsylvania Avenue National Historic Park are part of the national park system, and as such are administered by the National Park Service. NPS historians describe the National Mall as one of the oldest elements of today’s national park system, dating from the creation of the District of Columbia in the 1790s, while Pennsylvania Avenue National Historic Park is among the newer, joining the system in 1996. Knowing why these legal considerations apply is essential to factoring them into the planning decisions for the National Mall plan. In this instance, many of these laws and other requirements are applicable because these areas are part of the national park system. As described by the NPS Management Policies 2006,

The national park system was created to conserve unimpaired many of the world’s most magnificent landscapes, places that

enshrine our nation’s enduring principles, and places that remind us of the tremendous sacrifices Americans have made on behalf of those principles. They are the most remarkable collection of places in America for recreation and learning. Visitors can immerse themselves in places where events actually happened and enjoy some of the most significant natural and historic places in America. As required by the 1916 Organic Act, these special places must be managed in a special way — a way that allows them to be enjoyed not just by those who are here today, but also by generations that follow. (NPS Management Policies 2006, p. iii.)

Laws, regulations, and authorities that govern the management of the National Mall and Pennsylvania Avenue National Historic Park include those that are applicable to all national parks and to the National Park Service as a federal agency. As explained in the NPS Management Policies 2006,

The management of the national park system and NPS programs is guided by the Constitution, public laws, treaties, proclamations, executive orders, regulations, and directives of the Secretary of the Interior and the Assistant Secretary for Fish and Wildlife and Water. (NPS Management Policies 2006, p. 2).

The National Historic Preservation Act, the National Environmental Policy Act (NEPA), the Clean Air Act, and the Clean Water Act are among these laws applicable across the system. There are other laws that apply more narrowly, such as those for making planning decisions affecting parks in the greater Washington, D.C., area and which involve the National Capital Planning Commission and the U.S. Commission of Fine Arts, and there are other laws and

requirements that apply to just the National Mall or Pennsylvania Avenue National Historic Park, such as those for individual memorials.

## NPS Organic and General Authorities Acts

According to the NPS *Management Policies 2006*, (pp. 9–10), the most important statutory directive for the National Park Service is provided by interrelated provisions of the NPS Organic Act of 1916 and the NPS General Authorities Act of 1970, including amendments to the latter law in 1978. The key management-related provision of the Organic Act is as follows:

[The National Park Service] shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. (16 USC 1.)

Congress supplemented and clarified these provisions through enactment of the General Authorities Act in 1970, and again through enactment of a 1978 amendment to that act. These acts added

[t]he authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress. (16 USC 1a-1.)

---

## REGULATING PUBLIC USE

There are regulations in the *Code of Federal Regulations* (CFR) that apply to all federal agencies, and others that apply only to the administration of the national park system, including some specifically for the NPS National Capital Region, where the National Mall is

located. The NPS-specific regulations are in Title 36 of the code, and 36 CFR 7.96 contains those regulations that are just for the greater Washington, D.C., area. The following are provisions that center on public uses and figure prominently in the administration of the National Mall and Pennsylvania Avenue National Historic Park.

**Recreational Activities** — Regulations pertaining to recreational activities require permits for organized games such as baseball and football, and for model airplane flying; prohibit athletics if the grounds are wet or otherwise unsuitable for play without damage to the turf; allow fishing in accordance with state law; allow ice skating only in designated areas; and prohibit swimming (36 CFR 7.96(b) through (e)).

**Demonstrations and Special Events** — Demonstrations and special events are defined as follows (36 CFR 7.96(g)(1)):

- **Demonstrations** — includes 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, engaged in by one or more persons, the conduct of which has the effect, intent, or propensity to draw a crowd or onlookers.
- **Special events** — includes sports events, pageants, celebrations, historical reenactments, regattas, entertainments, exhibitions, parades, fairs, festivals, and similar events (including such events presented by the National Park Service), which are not demonstrations as previously defined, and which are engaged in by one or more persons, the conduct of which has the effect, intent, or propensity to draw a crowd or onlookers.

These terms do not include casual park use by visitors or tourists that does not have an intent or propensity to attract a crowd or onlookers.

Special events and demonstrations with more than 25 people within the National Mall & Memorial Parks generally require a permit issued by the National Park Service. To preserve an atmosphere of calm, tranquility, and

reverence, certain memorial areas exclude demonstrations or special events. These areas include specific portions of the Washington Monument, the Lincoln Memorial, the Jefferson Memorial, and the Vietnam Veterans Memorial (see 36 CFR 7.96(g)(3)(ii) for specific areas excluded).

A permit may be denied if multiple uses cannot be accommodated in the same area at the same time; there is a clear and present danger to the public safety, good order, or health; the proposed demonstration or special event is of such a nature or duration that it cannot reasonably be accommodated in a certain area; or activities are contrary to other applicable laws or regulations. Limitations on permits for demonstrations and special events include how long events may last; hours of operation to avoid unreasonable interference with rush-hour traffic; and allowance of temporary structures erected for the purpose of symbolizing a message or meeting logistical needs (such structures may not unreasonably harm park resources and shall be removed as soon as practicable) (36 CFR 7.96(g)(4)(iii), (5)(vi)).

Sound amplification equipment is allowed in connection with permitted demonstrations or special events as long as it does not unreasonably disturb nonparticipating persons in, or in the vicinity of, the area (36 CFR 7.96(g)(5)(xii)).

**Soliciting** — Soliciting is allowed if under a permit (*ISKCON of Potomac v. Kennedy*, 61 F.3d 949 (D.C. Cir.1995)).

**Sales** — A permit is required for the sale or distribution of books, newspapers, leaflets, pamphlets, buttons, and bumper stickers from a stand or structure during a special event (36 CFR 7.96(k)).

### FIRST AMENDMENT JURISPRUDENCE

Any governmental regulation of demonstration and sales activity is subject to First Amendment jurisprudence. The National Park Service’s regulation of demonstration and sales activities on federal parkland has been the subject of extensive First Amendment litigation for many years.

While recognizing the importance of the National Mall and its nearby monuments and memorials, the United States Court of Appeals for the District of Columbia Circuit has stated that “the Mall is more than home to these enduring symbols of our nationhood.” The court opinion continues,

Its location in the heart of our nation’s capital makes it a prime location for demonstrations. It is where Martin Luther King, Jr., delivered his famous “I Have a Dream” speech, where both sides of the abortion debate have staged their demonstrations, and where on any given day one may witness people gathering to voice their public concerns. As the court has stated before, “It is here that the constitutional rights of speech and peaceful assembly find their fullest expression” (*Friends of Vietnam Memorial v. Kennedy*, 116 F.3d 495, 496 (D.C. Cir. 1997), quoting *ISKCON of Potomac v. Kennedy*, 61 F.3d 949, 952 (D.C. Cir. 1995)).

In the context of such longstanding First Amendment jurisprudence, and consistent with NPS regulations and policies that allow demonstration and sales activities under certain conditions, demonstrations must be considered to be at least legally consistent with the special nature and sanctity of the Mall. Other cases involving First Amendment rights are listed in the following table.

#### Recent First Amendment Case Law Summary

Date	Topic/Issue and Outcome
1972	If one group is allowed to use structures to communicate views, then others must be similarly allowed. <i>Women Strike for Peace v. Morton</i> , 472 F.2d 1273 (D.C. Cir. 1972).
1975	The National Park Service may regulate demonstrations, including permit denial (36 CFR 7.96 (g)) if "enforced uniformly and without discrimination." The National Park Service may not limit the duration of demonstrations in view of the availability of less restrictive methods. <i>A Quaker Action Group v. Morton</i> , 516 F.2d 717 (D.C. Cir. 1975).
1982	The application of NPS camping regulations on the National Mall and in Lafayette Park does not violate the First Amendment. The regulation meets the requirements for a reasonable time, place, or manner restriction of expression, whether oral, written, or symbolized by conduct. The regulation is neutral and narrowly focuses on the federal government’s substantial interest in maintaining the parks in the heart of the

Date	Topic/Issue and Outcome
	capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them. <i>Clark v. Community for Creative Non-Violence</i> , 468 U.S. 288 (1984).
1992	A prohibition against the free distribution of leaflets on certain sidewalks within the restricted zone of the Vietnam Veterans Memorial (36 CFR 7.96(j)(2)(vi)) was voided as not "narrowly tailored." <i>Henderson v. Lujan</i> , 964 F.2d 1129 (D.C. Cir. 1992).
1992	A conviction (36 CFR 2.12(a)(1)(i)) for creating an audio disturbance was voided. While the court recognized that the government may justifiably impose sound volume restrictions, the regulation was not "narrowly tailored." <i>United States v. Doe</i> , 968 F.2d 86 (D.C. Cir. 1992).
1995	NPS sales regulations (36 CFR 7.96(k)) were upheld as consistent with the First Amendment. <i>ISKCON of Potomac v. Kennedy</i> , 61 F.3d 949 (D.C. Cir. 1995).
1997	NPS sales regulations were again upheld as consistent with the First Amendment. <i>Friends of the Vietnam Veterans Memorial v. Kennedy</i> , 116 F.3d 495 (D.C. Cir. 1997).
2001	NPS sales regulations were again upheld as consistent with the First Amendment, as well as consistent with Religious Freedom and Restoration Act and equal protections. <i>Henderson v. Kennedy</i> , 253 F.3d 12 (D.C. Cir. 2001).

- ensure the continued public use and enjoyment of open space in the District of Columbia
- preserve, protect, and maintain the limited amount of open space available to both residents and visitors
- ensure that future commemorative works in areas administered by the National Park Service and the General Services Administration in the District of Columbia and its environs (1) are appropriately designed, constructed, and located, and (2) reflect a consensus of the lasting national significance of the subjects involved

Congress, in the 2003 amendments to the Commemorative Works Act, defined the Reserve as “the great cross-axis of the Mall which . . . generally extends from the United States Capitol to the Lincoln Memorial, and from the White House to the Jefferson Memorial” (sec. 202(a)). Further, Congress provided that following enactment of the 2003 amendments “no commemorative work or visitor center shall be located within the Reserve” (sec. 202(b)). This did not block those unbuilt memorials with previously approved sites on the National Mall, such as the Martin Luther King Jr. Memorial.

## MEMORIALS AND THE RESERVE

Each memorial on the National Mall was placed there pursuant to specific a law or laws enacted by Congress for that particular memorial. Since the mid-1980s the process through which a memorial is authorized, funded, designed, and sited has been governed by the Commemorative Works Act (40 USC 8901 *et seq.*) Provisions of the Commemorative Works Act include those for the review and approval of new memorials by the U.S. Commission of Fine Arts and the National Capital Planning Commission.

The purposes of the Commemorative Works Act are to

- preserve the integrity of the comprehensive design of the L’Enfant and McMillan plans for the nation’s capital

On December 16, 2003, Congress authorized the establishment of the National Museum of African American History and Culture as part of the Smithsonian Museum and stated that it could be sited in some places on the National Mall. The site selected in January 2006 pursuant to that law is on the Washington Monument grounds, between 14th and 15th Streets NW and Constitution Avenue and Madison Drive NW. At present the site temporarily houses a tent from which an NPS concessioner sells refreshments and sundries.

## COMMERCIAL ACTIVITIES AND TRANSPORTATION

The National Park Service Concessions Management Improvement Act of 1998 directs that “except as provided by this title or otherwise authorized by law, the Secretary [of the Interior] shall utilize concessions contracts to authorize a person, corporation, or other entity to provide

accommodations, facilities, and services to visitors of the National Park System” (Public Law [PL] 105-391, sec. 403, 112 Stat. 3504). The NPS regulations concerning concessions are found at 36 CFR Part 51. It is the policy of Congress and the Secretary that visitor services in park areas may be provided only under carefully controlled safeguards against unregulated and indiscriminate use so that visitation will not unduly impair park values and resources. Development of visitor services is limited to locations that are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the park area. It is also the policy of the Congress and the Secretary that development of visitor services in park areas must be limited to those as are necessary and appropriate for public use and enjoyment of the park area in which they are located.

At present, the National Park Service has a concession contract with Guest Services, Inc., to provide an array of services to visitors to the National Mall. Visitors to the National Mall may also obtain interpretive transportation services through the NPS concessioner known as Tourmobile.

The Department of the Interior and Related Agencies Appropriations Act, 2004 (P.L. 108-108, Nov. 10, 2003) contains provisions to prohibit the erection, placement, or use of structures and signs bearing commercial advertising at special events on the National Mall (sec. 145). The sponsors of special events may be recognized provided that the size and form of the recognition is consistent with the special nature and sanctity of the National Mall.

The following regulations restrict commercial activities in all units of the national park system:

- **Advertisements** — Commercial notices or advertisements shall not be displayed, posted, or distributed on federally owned or controlled lands within a park area unless prior written permission has been given by the superintendent. Permission may be granted only if such notices and advertisements are found by the superintendent to be desirable and necessary for the convenience and guidance of the public (36 CFR 5.1).
- **Business operations** — Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited (36 CFR 5.3).

## PENNSYLVANIA AVENUE NATIONAL HISTORIC PARK

Pennsylvania Avenue National Historic Park was created in 1996 when Congress disbanded the Pennsylvania Avenue Development Corporation, which had been created in 1972 when Congress declared Pennsylvania Avenue to be of “blighted character.” The Pennsylvania Avenue Development Corporation was established as a quasi-governmental agency to develop and execute a plan to reclaim the avenue. Congress granted the corporation broad powers, which included acquiring property and, with review and approval by the Secretary of the Interior and others, designing and reconstructing the streetscape.

The subsequent *Pennsylvania Avenue Plan* was released in 1974, and by 1996 the plan had been implemented. At that point Congress disbanded the corporation, and its buildings and commercial property holdings were transferred to the General Services Administration; responsibility for ensuring that use and development were consistent with the original plans, as amended, was given to the National Capital Planning Commission; and the “the right, title, and interest” in property located within the “development area” was given to the National Park Service (40 USC 6702(c)(1)). Pennsylvania Avenue National Historic Park, as well as the GSA holdings, are located within the “development area” (defined at 40 USC 6711); this area also includes Pennsylvania Avenue National Historic Site, which was established in 1965.

In 1996 when Congress created Pennsylvania Avenue National Historic Park, Congress explicitly gave the National Park Service responsibility for “management, administration, maintenance, law enforcement, visitor services, resource protection, interpretation, and historic preserva-

tion” (40 USC 6702 (c)(2)). Congress also authorized the National Park Service to arrange for “special events, festivals, concerts, or other art and cultural programs” (40 USC 6702(c)(3)).

Following the dissolution of the Pennsylvania Avenue Development Corporation in 1996 and simultaneous establishment of the park, the General Services Administration, the National Capital Planning Commission, and the National Park Service signed a memorandum of agreement to ensure that future development and redevelopment of the Pennsylvania Avenue area would comply with the *Pennsylvania Avenue Plan of 1974* and with the Pennsylvania Avenue Development Corporation’s “General Guidelines and Square Guidelines.” The General

Services Administration is the keeper of the plan and will amend it and submit proposals according to the procedures set up in the memorandum of agreement.

## FOR MORE INFORMATION

---

This is by no means a discussion of all the applicable authorities relating to the National Park Service, the National Mall, or Pennsylvania Avenue National Historic Park. For more information about laws and regulations applying to the National Park Service, see the NPS website at <[www.nps.gov/applications/npspolicy/index.cfm](http://www.nps.gov/applications/npspolicy/index.cfm)>. Updates on legal considerations will be posted as needed on the National Mall planning website at <[www.nps.gov/nationalmallplan](http://www.nps.gov/nationalmallplan)>.