

Statement by Timothy Zick  
Cabell Research Professor of Law  
The College of William and Mary, Marshall-Wythe School of Law  
Before the  
House Committee on Oversight and Government Reform,  
Subcommittee on Health Care, District of Columbia, Census, and the National Archives  
McPherson Square: Who Made The Decision to Allow Indefinite Camping In The Park?  
January 24, 2012

Introduction

Mr. Chairman, thank you for the invitation to testify regarding the “Occupy DC” demonstration in McPherson Square here in the District of Columbia. Although the Committee is now focusing on events in McPherson Square, it is actually addressing issues that broadly implicate principles of free speech and governmental proprietorship of public parks. In many respects, the D.C. national parks are critically important public resources. In addition to serving the needs of local residents and tourists, such places are deeply inscribed with national political and cultural memories. Almost since their inception, they have been sites of social and political contest and have served as focal points for social movements of all types. Most critically, these places have served as public forums in which citizens have exercised fundamental First Amendment rights of freedom of speech, assembly, and petition.

The National Park Service (NPS) has important responsibilities with regard to these places. As a trustee of parks and other special public forum properties, NPS must ensure that First Amendment rights are fully preserved. As a manager or proprietor of these public places, NPS must protect the interests of the public at large in terms of health, safety, and general welfare. Typically, NPS can discharge these various duties without conflict. Most speech activity in public places is transitory; demonstrators leave shortly after conveying their message. The “Occupy \_\_\_\_” demonstrations, which have taken place across the nation, defy that model of public assembly and expression. The point of these demonstrations is to remain in place. Occupy protests like those taking place in the District of Columbia have forced officials, courts, and members of the public to consider the appropriate limits of public assembly, protest, and petition in public places.

I appear before you today primarily to provide a constitutional and legal framework for your important oversight function. In terms of the First Amendment, the context is somewhat unusual. Here the agency is not being charged with impinging on or limiting the First Amendment liberties of demonstrators. Rather, agency officials have come under criticism for perhaps being too permissive with regard to the exercise of expressive liberties in a public park. In my view, NPS has been appropriately mindful of its obligation not to interfere with the exercise of speech and other First Amendment liberties in McPherson Square. I recognize, however, that some may question the manner in which the agency has discharged some of its managerial duties with regard to McPherson Square. To the extent possible, my testimony also addresses NPS’s enforcement of its regulations.

## The Concept of the “Public Forum”

McPherson Square is not an ordinary public property. Among the vast array of governmental properties, public parks are unique in terms of their relationship to First Amendment rights and values. Unlike other public places, including this Committee room, public parks have a special constitutional status. Under First Amendment free speech doctrine, they are considered traditional or quintessential “public forums.” This special legal and constitutional status imposes certain limits on governmental regulation of speech, assembly, and petition activities in such places.

The concept of the “public forum” has played a critical role in terms of the exercise of First Amendment rights in the United States. Under First Amendment doctrine, public parks were initially treated as belonging to the government and resting exclusively within its control. However, the Supreme Court eventually recognized that such places “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>1</sup> As the Supreme Court has recently and repeatedly emphasized, the government “does not have a free hand to regulate private speech on government property.”<sup>2</sup> Indeed, the Court has acknowledged that “members of the public have strong free speech rights when they venture into public streets and parks.”<sup>3</sup>

Throughout our history, exercise of these rights has been critical to proselytizers, petition-gatherers, and political movements. This has been especially true of parks such as McPherson Square, which are located in the nation’s capital and near the seat of government. The National Mall, Lafayette Square, and the Lincoln Memorial have all been sites in which national moments and public memories have been deeply inscribed.<sup>4</sup> As the D.C. Circuit recognized, local parks in the District “constitute a unique situs for the exercise of First Amendment rights.”<sup>5</sup> Thus, it is especially important that rights to speak, protest, and petition remain as broad and robust as possible in these places.

Of course, First Amendment rights in public places are not absolute. In traditional public forums such as public parks, the courts have held that government cannot restrict or prohibit expressive activities such as demonstrations because they disagree with the message being conveyed, dislike the group conveying the message, or object to the demonstration on aesthetic grounds. Nor can they favor some groups over others in terms of granting permits or other forms of access to public forum properties. Although government may adopt flexible interpretations of rules and regulations concerning public demonstrations and protests, it must at all times remain neutral with regard to the message, idea, or philosophy being conveyed in a public forum.

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<sup>1</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

<sup>2</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

<sup>3</sup> *Id.*

<sup>4</sup> See Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places*, Ch. 6 (Cambridge Univ. Press 2009).

<sup>5</sup> *A Quaker Action Group v. Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975).

Under established First Amendment doctrine, so long as it applies objective criteria, government may generally require that speakers obtain a permit before engaging in expressive activity in public parks. Government may also impose content-neutral time, place, and manner regulations on expressive activities in traditional public forums. The government has broad authority to regulate public demonstrations in furtherance of public order, safety, and aesthetics. So-called “time, place, and manner” regulations must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication.<sup>6</sup>

Under this standard, courts have held that government can generally regulate the times during which demonstrations may take place, the location of protests, the routes of marches and parades, noise levels, posting of signs, use of structures, and other matters unrelated to the content of expression. NPS regulations address these and other requirements in detail, as they relate to demonstrations in McPherson Square and other public parks under the agency’s jurisdiction. *See generally* 36 C.F.R. § 7.96.

#### NPS’s Role as Trustee of a Public Forum

In places like McPherson Square, First Amendment rights have by long tradition been robustly exercised and protected. As a trustee of public forum properties, NPS is charged with ensuring that robust speech, assembly, and petition rights enjoyed in such places are fully protected. It is also charged with preserving and maintaining the public forum for the benefit of the public at large.

#### *Preserving First Amendment Liberties*

Public forum properties such as McPherson Square are treated as special in part owing to their role in facilitating self-government and democracy. As the D.C. Circuit has recognized, “The use of parks for public assembly and airing of opinions is historic in our democratic society, and one of its cardinal values.”<sup>7</sup> In public parks, speakers are able to communicate messages to the public at large on matters of public concern. When they do so, the Supreme Court has held that their activities are entitled to “special protection.”<sup>8</sup> As the Court has emphasized in discussing expression in public forums, “Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.”<sup>9</sup>

NPS appears to have carried out its trusteeship duties in McPherson Square mindful of its obligations to protect demonstrators’ strong rights to assemble, speak, and petition government for redress of grievances. By adopting a policy of negotiated management rather than one of forceful eviction, the agency has ensured that a public place that “time out of mind” has served as a site for

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<sup>6</sup> *Perry Educ. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45-46 (1983).

<sup>7</sup> *A Quaker Action Group*, 516 F.2d at 724.

<sup>8</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2010).

<sup>9</sup> *Schneider v. State*, 308 U.S. 147, 161 (1939).

assembly and discussion of issues of public concern continues to serve that fundamental democratic function.<sup>10</sup> In this respect, its regulatory decisions thus far have been consistent with the concept of the public forum under First Amendment doctrine.

### *NPS's Role as Property Manager*

As noted earlier, First Amendment rights in public forums are not absolute. Public parks facilitate other functions and uses. McPherson Square is held in trust not only for demonstrators, but for the benefit of the public as a whole. As trustee and property manager, NPS must balance expressive uses with preservation and maintenance of McPherson Square for the benefit of the public at large. As discussed above, in undertaking that balance the agency must recognize the special constitutional significance of public forum properties.

This Committee is obviously not bound by principles of judicial review of agency action. However, in the interest of providing legal background for the Committee's oversight function, I would note that courts have typically deferred to agency decisions regarding preservation and maintenance of public forum properties. In *Clark v. Community for Creative Non-Violence*, in which the Supreme Court upheld NPS's prohibition of overnight camping on the National Mall and in Lafayette Square Park, the Court stated that its precedents do not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."<sup>11</sup> As a manager or proprietor of public parks, NPS is ordinarily entitled to substantial judicial deference when applying and enforcing regulations regarding demonstrations in public parks under its control. Among other things, as *CCNV* shows, this deference would extend to matters such as preservation of the lawn areas of McPherson Square and allocation of the scarce resource of park properties.<sup>12</sup>

With regard to the regulations applicable to the Occupy DC demonstration in McPherson Square, assuming that fewer than 500 protesters have been involved in the demonstration, NPS has properly determined that its regulations do not require that a permit be obtained. 36 C.F.R. §7.96(g)(2)(ii)(B). While its regulations do impose time limits for permitted demonstrations and events in certain locations, NPS has also correctly determined that the regulations do not impose any time limit on demonstrations in McPherson Square. Indeed, reviewing an earlier iteration of NPS regulations regarding public demonstrations, the D.C. Circuit invalidated a requirement that permitted demonstrations be limited to no more than seven consecutive days.<sup>13</sup> The court determined that where the duration of a demonstration might raise conflicts with other applications, the regulations could condition the grant of the permit on an appropriate time limit. The court also

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<sup>10</sup> *Hague*, 307 U.S. at 515.

<sup>11</sup> 468 U.S. 288, 296 (1984).

<sup>12</sup> Under administrative law principles, the agency would also be granted significant discretion to determine whether its regulations have been violated and how best to enforce them in the public interest. Moreover, it is well established that an agency's interpretation and application of its own regulations is entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

<sup>13</sup> *A Quaker Action Group*, 516 F.2d at 734.

stated that “[g]overnment regulations could provide that any permit for a period beyond a specified limit is subject to displacement if others seek a permit that precludes double occupancy.”<sup>14</sup> As noted, current NPS regulations do not currently place any time limits on demonstrations in McPherson Square, whether pursuant to a permit or without need for one.

NPS regulations require that demonstrations held without a permit must be “reasonably consistent with the protection and use of the indicated park areas and other requirements of this section.” *Id.*, §7.96(g)(2)(ii). Again, if it were challenged in court, NPS’s determination regarding whether the Occupy DC demonstration in McPherson Square is “reasonably consistent with the protection and use of the indicated park” would ordinarily lie within the agency’s discretion. NPS regulations prohibit the erection of certain structures. *Id.*, §7.96(g)(2)(vi). Although agency personnel and others are in the best position to testify on this matter, my understanding, based on the agency’s recent response to a Committee inquiry, is that the regulations regarding structures have been enforced by NPS and local law enforcement officials on certain occasions during the demonstration in McPherson Square.

Although NPS regulations do not impose any explicit time limits on the Occupy DC demonstration in McPherson Square, they do expressly prohibit “camping” except in designated areas. *Id.*, § 7.96(i). McPherson Square is not a designated camping area. Under NPS regulations, temporary structures may not be used outside designated camping areas “for living accommodation activities such as sleeping, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or doing any digging or earth breaking or carrying on cooking activities.” 36 C.F.R. §7.96(g)(2)(vi). According to the regulations, these activities “constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.” *Id.*

Although the Supreme Court’s decision in *CCNV* upheld the ban on camping in certain public parks in the capital, the decision acknowledged that NPS regulations nevertheless permitted a “day-and-night vigil.”<sup>15</sup> Indeed, the Court specifically relied on this fact in analyzing the burden the camping ban imposed on expressive activity in Lafayette Square Park and on the National Mall. Current NPS regulations do not prohibit round-the-clock vigils in McPherson Square. According to NPS, such vigils have taken place in some D.C. parks that are not designated as camping areas. Further, in *CCNV* the Court noted that despite the camping ban, the tents and other structures used as part of the homelessness demonstration at issue in that case were permitted to remain standing. Again, current NPS regulations permit tents and other temporary structures to be used in

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<sup>14</sup> *Id.*

<sup>15</sup> *CCNV*, 468 U.S. at 295.



McPherson Square, so long as they are not being used “for living accommodation activities.” *Id.*, § 7.96(g)(2)(vi)(C).<sup>16</sup>

Whether the camping prohibition has been or is currently being violated ultimately depends on the agency’s determination whether it “reasonably appears, in light of all the circumstances,” that Occupy DC demonstrators are using McPherson Square as a “living accommodation.” In making that determination, agency personnel would have to assess, among other things, the purpose for which any bedding on the site has been used, whether personal belongings have been stored there, and whether the circumstances as a whole indicate that the demonstrators are engaged in camping activity. Agency and law enforcement personnel are in the best position to testify regarding what they have observed in terms of the use of tents and other structures at the park.

### Conclusion

As the trustee of public parks such as McPherson Square, NPS has the responsibility to ensure that public demonstrations and events are permitted and that fundamental rights of speech, assembly, and petition are protected. As the federal agency charged with preservation and maintenance of McPherson Square, NPS also has the responsibility to ensure that these activities do not unduly harm the property, the surrounding community, or pose a danger to the participants themselves. NPS has discharged its important constitutional obligations to preserve robust expressive liberties in McPherson Square, an important and unique public forum. Owing largely to its reliance on continued presence as a form of public expression, the long-term Occupy DC demonstration in McPherson Square has presented unique public health, safety, and scarcity concerns. In balancing these concerns with the need to preserve fundamental First Amendment rights in a public forum, NPS has complied with its permitting regulations. Further, NPS has properly determined that there is no explicit time limit in its regulations regarding demonstrations in McPherson Square, and the agency appears to have enforced regulations prohibiting the use of certain temporary structures. Whether the Occupy DC demonstrators in McPherson Square have complied with the NPS ban on camping in the park depends upon whether it reasonably appears that camping is taking place, based upon the agency’s consideration of the totality of circumstances.

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<sup>16</sup> Moreover, the Regional Director may also impose “reasonable restrictions upon the use of tents and other temporary structures “in the interest of protecting the park areas involved, traffic and public safety considerations, and other legitimate park value concerns.” *Id.*, § 7.96(g)(2)(vi)(C).

### BIOSKETCH

Timothy Zick is the Cabell Research Professor of Law at William & Mary School of Law. Professor Zick graduated *summa cum laude* from Indiana University-Bloomington and *summa cum laude* from Georgetown University Law Center. Professor Zick was an associate with the law firms of Williams & Connolly in Washington, D.C. and Foley Hoag in Boston. He served as a law clerk to the Honorable Levin H. Campbell of the United States Court of Appeals for the First Circuit. Professor Zick also served as a trial attorney in the Federal Programs Branch of the United States Department of Justice. Prior to joining the William & Mary Law School faculty in 2008, Professor Zick was on the faculty of St. John's School of Law in Jamaica, Queens, NY.

Professor Zick has written on a wide variety of constitutional issues, with a special focus on the First Amendment. His book, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (Cambridge University Press 2009) examines the importance of public places to First Amendment liberties.

Committee on Oversight and Government Reform  
Witness Disclosure Requirement - "Truth in Testimony"  
Required by House Rule XI, Clause 2(g)(5)

Name: Timothy Zick

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2009. Include the source and amount of each grant or contract.

None.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

I am Cabell Research Professor of Law at William and Mary Law School, and am testifying on my own behalf.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

*I certify that the above information is true and correct.*

Signature:

T. Zick

Date:

1-20-12