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Committee on Natural Resources  
Subcommittee on National Parks, Forests and Public Lands

Oversight hearing on  
The Future of the National Mall  
Tuesday, May 20, 2008

Testimony of Arthur B. Spitzer  
on behalf of the  
American Civil Liberties Union of the National Capital Area

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Chairman Grijalva and members of the subcommittee:

Thank you for inviting me to testify today. I am the Legal Director of the American Civil Liberties Union of the National Capital Area, which is the local affiliate of the ACLU, a nationwide, nonprofit organization representing more than 500,000 Americans who believe that the protection of civil liberties and civil rights – including the freedoms of speech and petition enshrined in the First Amendment – are among our Nation’s proudest achievements.

Those achievements are not self-protecting, however. As we have all learned, they must be actively guarded against the constant pressure of competing interests. As the National Park Service considers a new long-term plan for the National Mall, it must therefore bear in mind the essential role the Mall has played in the life of our democracy as a location for First Amendment expression.

Americans have a constitutional right “peaceably to assemble, and to petition the Government for a redress of grievances.” As the Founders recognized, freedom of speech and the right to assemble peacefully are indispensable characteristics of a government of, by and for the People. When Americans feel the need to communicate emphatically with their government, they have the right to come here, to the Seat of Government, to communicate in person, with their bodies. No one can deny that an assembly of thousands, or hundreds of thousands of people communicates a powerful message about the breadth and depth of feeling behind an issue, in a way that letters or e-mails, or even hiring a lobbyist, simply do not.

Public parks in Washington, D.C., and throughout the nation, serve as vital public forums for the exchange of ideas and public discourse. The Supreme Court recognized that fact, and its constitutional dimension, nearly seventy years ago: “Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). Such “traditional

public forums” receive the highest level of First Amendment protection: “In such places, the government's ability to permissibly restrict expressive conduct is very limited.” *United States v. Grace*, 461 U.S. 171, 177 (1983) (striking down ban on demonstrations on the sidewalks surrounding the Supreme Court).

The Nation’s Capital is a location where the exercise of these historic liberties is particularly appropriate and essential. There is both symbolic meaning and functional practicality in the People’s ability and right to voice their concerns in the place where political decisions are made and public policy is enacted and carried out. As the United States Court of Appeals for the District of Columbia Circuit has noted, “the general concepts of First Amendment freedoms are given added impetus as to speech and peaceful demonstration in Washington, D.C., by the clause of the Constitution which assures citizens of their right to assemble peaceably at the seat of government and present grievances.” *A Quaker Action Group v. Morton*, 460 F.2d 854, 859 (D.C. Cir. 1971). Indeed, the exercise of these rights in proximity to the Capitol or the White House is “of undoubted importance in the constitutional balance,” for this is “where a petition for redress of national grievances must literally be brought.” *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1287 (D.C. Cir. 1972).

Thus, the courts have consistently upheld the First Amendment right to demonstrate peacefully in public areas in the nation’s capital, including the Ellipse, *Women Strike for Peace v. Morton*; Lafayette Park and the White House sidewalk, *A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969); the Supreme Court sidewalk, *United States v. Grace*, *supra*, the Capitol Grounds where we sit this morning, *Chief of Capitol Police v. Jeannette Rankin Brigade*, 409 U.S. 972 (1972) (*summarily affirming* 342 F. Supp. 575 (D.D.C. 1972)); and of course the National Mall, *ISKCON of Potomac v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995); *Henderson v. Lujan*, 964 F.2d 1179 (D.C. Cir. 1992). The right to assemble for First Amendment purposes in these places has been upheld against governmental claims that such activity would create a risk of terrorism, *Lederman v. United States*, 291 F.3d 36 (D.C. Cir. 2002), impair presidential security, *A Quaker Action Group v. Morton*, 460 F.2d 854 (D.C. Cir. 1972), or interfere with the “‘peace,’ ‘serenity,’ ‘majesty,’ maintenance of a ‘park-like setting,’ and the ‘glorification of a form of government through visual enhancement of its public buildings.’” *Jeannette Rankin Brigade*, 342 F. Supp. at 585.

The National Mall stretches for nearly two miles between the U.S. Capitol and the Lincoln Memorial. *ISKCON*, 61 F.3d at 951. The National Park Service refers to it as “America’s national civic space.” NPS National Mall Newsletter Fall/Winter 2007. While many public parks in the nation’s capital are utilized for the purposes of free speech and assembly, the National Mall’s size and central location make it “an area of particular significance in the life of the Capital and the Nation,” *ISKCON*, 61 F.3d at 951, where many of the nation’s most historic demonstrations have taken place. “It is here that the constitutional rights of speech and peaceful assembly find their fullest expression.” *Id.*

The Mall thus has a long tradition of use as a forum for speech and assembly by a wide variety of groups with a diverse array of viewpoints. A few examples will illustrate this breadth of this impressive history.

In 1939, when African-American Marian Anderson was barred from performing at privately owned Constitution Hall, First Lady Eleanor Roosevelt and the NAACP organized an Easter Sunday concert on the grounds of the Lincoln Memorial. More than 75,000 people turned out to hear her sing, one of the largest crowds to have gathered on the Mall up to that time.

In August 1963, the Lincoln Memorial was also the site of the March on Washington for Jobs and Freedom, with more than 200,000 participants hearing Dr. Martin Luther King, Jr.'s historic "I Have a Dream" speech.

In the 1971 "Mayday" demonstrations, more than 500,000 Americans came to Washington to lobby Congress and protest against the Vietnam War. Although the vast majority were peaceful, more than 13,000 were arrested – arrests later declared unconstitutional in ACLU litigation. *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), cert. denied, 414 U.S. 880 (1973); *Dellums v Powell*, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978).

In 1987, 1988, 1989, 1992 and 1996, the AIDS Memorial Quilt was displayed in its entirety on the National Mall – the only place it has ever been displayed in its entirety. The first display was during the National March on Washington for Lesbian and Gay Rights, which drew half a million participants. By the time of the last display, in October 1996, the quilt covered the entire eastern half of the Mall, from the Capitol to the grounds of the Washington Monument. There is probably no other public forum in the nation that could have accommodated it.

In October 1995, nearly four hundred thousand African-American men gathered on the National Mall for the Million Man March, stretching from the foot of the Capitol to the base of the Washington Monument.

In October 1997, the Mall was as the location of "Stand in the Gap," a gathering of perhaps a million Christian men organized by the Promise Keepers organization.

On Mother's Day 2000, an estimated 500,000 people gathered for the Million Mom March, organized after the shootings at Colorado's Columbine High School, to foster handgun violence awareness.

Every January 22, the Mall serves as the starting place for the March for Life, protesting the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). On the other side of the same issue, the pro-choice March for Women's Lives filled the Mall in April 2004.

The Mall has even hosted a celebration of the Mass by Pope John Paul II on a Sunday in October 1979. Although that event was challenged by individuals who alleged that it constituted a prohibited “establishment” of religion, that challenge was rejected by the court, which explained that “the National Mall is a public park that has regularly been made available to all major demonstrations presenting First Amendment values. That is the non-discriminatory policy of the government, evolved in accordance with rulings of this court. The government has applied this policy not only to purely secular uses, but for uses by religious groups.” *O’Hair v. Andrus*, 613 F.2d 931, 937 (D.C. Cir. 1979). (The ACLU of the National Capital Area filed a brief in that case supporting the Pope’s right to use the Mall, as a public forum.)

Of course not all demonstrations on the Mall are of the same magnitude. Each year the National Mall & Memorial Parks area hosts nearly 3,000 events “ranging from parades to national days of tribute and observance to public demonstrations.” NPS Park Spotlight, *available at* <http://www.nps.gov/parkoftheweek/>. But every one is important to those who participate, and to those who are exposed to new ideas and opinions.

This is a history of which we should all be proud – and a tradition that we should all wish to see continue undiluted.

The National Park Service is charged both with protecting the Mall as a place of beauty and majesty, and with protecting its availability for use by the American people for First Amendment activities and such other uses as Congress sees fit to allow, such as motion picture projections, kite-flying competitions, the Smithsonian Folklife Festival, and displays of solar houses. We have no quarrel with any of those activities, and we certainly have no quarrel with the Trust for the National Mall’s laudible goals of restoring and preserving the Mall’s structural elements and creating educational programs and events to enhance the experience of visitors. But what the National Park Service, the Trust for the National Mall, and the Congress, must not ignore is the fact that, of all the activities that take place on the Mall, only one is a matter of constitutional right.

It may be true, for example, that First Amendment assemblies can cause some damage to the turf – but certainly not as much as such long-running events such as the Folklife Festival or the solar homes decathlon (*see* [www.solardecathlon.org](http://www.solardecathlon.org)), which bring tens of thousands of people to the Mall for days and weeks at a time, complete with heavy equipment, enormous tents, stages, dance floors, food service areas and the like. By comparison, a few hours’ presence by even hundreds of thousands of pedestrian demonstrators is not where the problem lies.

One option that the National Park Service reportedly has under consideration is paving Union Square, at the west foot of the Capitol, and making it a special venue for demonstrations. *See* Michael E. Ruane, *The Battle to Remold the Mall, Preservation Proposals Spark Debate Over Protest Rights*, *The Washington Post*, January 20, 2008. While some groups might find such a venue appropriate, others may not – sitting for hours on a shadeless concrete pad on a hot summer day seems more akin to punishment than to freedom.

In our view, to the extent that public use of the Mall must be limited for the purpose of protecting natural resources, the Mall's availability as a forum for First Amendment assemblies must take priority. There is no constitutional right to watch movies on the Mall, to fly kites on the Mall, to display solar homes on the Mall, or to erect food service tents and picnic tables on the Mall. There is a constitutional right peaceably to assemble, and to petition the Government for a redress of grievances on the National Mall.

The ACLU has registered as a consulting party in the Park Service's planning process, and we hope to participate actively in that effort. We know that this subcommittee will continue to provide legislative oversight of that process, and we respectfully urge the subcommittee to bear in mind, and to communicate to the Park Service, the primary importance of the National Mall as the epicenter, so to speak, for the American people's exercise of the vital First Amendment rights of assembly and petition.

Thank you for your attention. I look forward to answering any questions that you may have.

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