IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : 08-MJ-511

MICHAEL MARCAVAGE :

ORDER

AND NOW, this day of , 2008, on consideration of the defendant's motion for judgment of acquittal and the government's response thereto, it is hereby

ORDERED

that the defendant's motion is DENIED.

BY THE COURT:

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HON. ARNOLD C. RAPOPORT
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	08-MJ-511
MICHAEL MARCAVAGE	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

The United States of America, by its attorneys, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and Richard W. Goldberg, Assistant United States Attorney for the District, respectfully submits this response to defendant's motion for judgment of acquittal.

I. INTRODUCTION

Defendant has moved for judgment of acquittal on many grounds. Although many of his complaints are not the proper subject of a motion for judgment of acquittal, the government will address them here for the convenience of the Court.

The defendant's motion, in the main, is based on two erroneous propositions:

1) That the government can never limit demonstrations on a sidewalk used by the public for travel; and

2) That because the defendant's demonstration was disturbing members of the public, that must have been the reason that he was told to move to a different location.

Neither assertion accurately reflects the law or the facts established in this case. For this reason, and others discussed below, the defendant's motion should be denied.

II. STANDARD OF REVIEW

When a defendant moves for a judgment of acquittal at the end of the government's case, the sole issue for the Court is whether,

> viewing the evidence in the light most favorable to the government . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

United States v. Greenidge, 495 F.3d 85, 100 (3d Cir.), *cert. denied*, 128 S. Ct. 551 (2007)(citation omitted). In this case, it is clear that a rational factfinder could find proven the elements of the charged offenses.

III. THE OFFENSES CHARGED

The defendant is charged with two petty offenses: demonstrating in violation of permit conditions and interfering with agency function. 36 C.F.R. §§ 1.6(g)(2) and 2.32. The government's evidence clearly shows that the defendant violated both regulations.

The first offense requires only that defendant

- knowingly

- violated the terms or conditions of an issued permit.

The evidence in this case is clear that the defendant was repeatedly advised 1) that he had been issued a permit, 2) that the permit required him to move away from the entrance and exit of the

Liberty Bell Center, and 3) that the defendant knowingly, in fact intentionally, violated the terms of the permit. Transcript April 22, 2008 (Tr.) 32-34; gov. video evid. at 1:25-26 PM (counter 22:49-23:25).

> The second offense requires that the government prove that
>
> - the defendant knowingly resisted a government employee
>
> - who was engaged in an official duty
>
> OR
>
> - the defendant knowingly violated
>
> - the lawful order
>
> - of a government employee
>
> - during law enforcement actions or
>
> - during emergency operations that involve a threat to public safety or park resources or
>
> - during other activities where the control of public movement and activities is necessary to maintain order and public safety.

United States v. Goldin, 311 F.3d 191, 196 (3d Cir. 2002). The evidence in this case shows multiple violations of this regulation. The defendant, of course, refused to obey orders to move his demonstration according to the permit, thereby resisting Ranger Saperstein and Chief Ranger Crane. Tr. 32-34, 147; gov. video evid. at 2:04 PM (counter 23:25-end). He also refused to speak to Ranger Saperstein at 2:06PM, again resisting Ranger Saperstein and violating an order at a time when the Ranger was engaged in the law enforcement action of enforcing the permit. Tr. 36; gov. video evid. at 2:06 PM. His violation of Ranger Saperstein's and Ranger Crane's

orders also came while they were attempting to clear the chokepoint around the Liberty Bell entrance, thus during an activity where the control of public movement was necessary to maintain order and public safety and there was a threat to public safety. Tr. 24, 35, 57-59, 63, 159, 176-77. And, of course, there was the defendant's repeated use of a bullhorn despite Ranger Saperstein's orders to the contrary. Tr. 15, 17, 27. *See United States v. Bucher*, 375 F.3d 929, 932-33 (9th Cir. 1994)(failure to obey law enforcement officer's order constitutes interference).

The above analysis shows that a rational jury could find the defendant guilty of both charged offenses. The government therefore respectfully requests that the Court enter the attached order denying the defendant's motion.

IV. DEFENDANT'S ARGUMENTS

The defendant makes a series of claims based on his rendition of the trial evidence. As is discussed below, none of the defendant's claims have any merit.

1) The defendant claims that the government provided no evidence that the sidewalks where the defendant held his protest were part of Independence National Historical Park ("the Park"). As testified to repeatedly by the government's witnesses, defendant Marcavage's conduct took place on the sidewalks in the block bounded by 5th and 6th Streets, and Chestnut and Market Streets and that these sidewalks are federal property which is part of the Park. Tr. 12, 26-27, 35-36, 39, 39-40, 56, 78, 136, 141, 148.

2) The defendant complains about the issuance of a verbal permit to the defendant. The Code of Federal Regulations and the Superintendent's Compendium both describe the permitting process. 36 C.F.R. §§ 1.6 and 2.51 and related Compendium section.

These regulations do not specify that the permit must be in writing. The defendant has not cited any authority for the proposition that the permit here was not properly issued.

The defendant also asserts that he did not want a permit. He apparently argues that his refusal to "accept" a permit somehow means that the law does not apply to him. He again cites no legal support for this proposition nor is there any. Mere refusal to accept the law, or a permit issued under the law, does not make the law a nullity. The defendant did not exempt himself from the federal regulations by saying that he did not "accept" a permit.

3) The defendant next complains because there were no signs posted on the park sidewalk to provide him notice that he was on federal property and subject to permit requirements. There are two responses to this argument. The first is that no signs are required. The Code of Federal Regulations give examples of public notification and requires that notification be accomplished by "one or more of the following methods." 36 C.F.R. § 1.7(a). Signs are one method listed, as are maps available in the office of the superintendent and other places convenient to the public. *Id*., at (1) and (2). The trial testimony established that the Compendium, including its rules notifications, was available in the Park's office and on-line over the internet. Tr. 57, 140. Thus this complaint has no merit.

The second response is that the defendant was provided repeated direct personal notice of the Park's rules by Ranger Saperstein and Chief Ranger Crane on the day in question. Tr. 57, 146-48. The defendant now, as on October 6, 2007, chooses to ignore the fact of their instructions to the defendant about the Park's requirements. Having been repeatedly warned of the rules and given ample opportunities to comply, the defendant certainly cannot complain that

he had insufficient notice. *See United States v. Bichsel*, 395 F.3d 1053, 1056-57 (9th Cir. 2005)(receiving oral warning from law enforcement officer sufficient notice of regulations).

4) The defendant next makes argument that there was some impropriety because Ranger Saperstein was previously unaware that the defendant could use the lawn next to the Liberty Bell Center as a permitted demonstration space. Whether the lawn could be used as demonstration space has nothing to do with the lawfulness of the defendant's demonstration at the entrance and exit of the Liberty Bell Center. There was no ambiguity in the Compendium, with Ranger Saperstein, or with Chief Ranger Crane: no demonstration was permitted where the defendant had set up with his other demonstrators. This fact was properly advertised to the public in general and this defendant in particular. That an additional demonstration area on the lawn was made available to this defendant has nothing to do with the this defendant's violative conduct or with public notice that no demonstrations could be mounted at the entrance and exit of the Liberty Bell Center. Thus there is no weight to this complaint.

5) The defendant last claims that the entire permit structure of the Code of Federal Regulations is unconstitutional. He argues, in sum, that the Park cannot impose any permit requirements on a sidewalk which runs through the Park and is traversed by the public. He also claims, despite much evidence to the contrary, that the Rangers told him to move based solely on the content of his presentation to the public. His arguments, founded on incorrect standards of law and his myopic view of the evidence, are without merit.

In analyzing this issue, the government and the defendant agree on some fundamental legal standards established by the courts. The difficulty comes when the defendant omits reference to holdings and doctrines which undermine his position. The matter is not

simply, as the defendant propounds, that speech on a sidewalk cannot be limited. As is discussed below, there are other principles and factors in the analysis, including the nature of the property, the traditional use of the property, the government interest being protected, and the alternative means available for expression. Examined under the appropriate standards, it is clear that the Code of Federal Regulations properly limited the defendant's conduct in order to protect Park property, visitors, and the public.

A) Forum standards

As stated simply by the Supreme Court, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Whether or not regulation of speech is appropriate at a particular government location is dependent, in part, on the type of "forum" which the subject location is considered. *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992); *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth*., 691 F.2d 155, 159 (3d Cir. 1982). There are generally three types of forums: nonpublic forum, limited or designated public forum, and traditional public forum. *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d at 1255-56. The test for evaluating a particular speech restriction depends on the type of forum where the activity is performed.

A nonpublic forum is government property which is not by tradition or designation a forum for public communication. *Id*., at 1256, quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983). Although open to the public, these locations are essentially private property and the government, like any other property owner, has the

power to control the property for its designated use. *Id*. In this setting, the government may make time, place, and manner restrictions to preserve the forum's appropriate use as long as the regulation on speech is reasonable and not an effort to suppress expression because public officials oppose the speaker's view. *Id*. Particularly pertinent examples of government property which are nonpublic forums are the interior of the Liberty Bell Center and sidewalks on government property which are separated from public roads and constructed solely to assist patrons of the post office. *United States v. Goldin*, 311 F.3d at 196-97; *United States v. Bjerke*, 796 F.2d 643, 649 (3d Cir. 1986).

A limited or designated forum is government property which has been opened for some use by the public as a place for expressive activity. *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d at 1255-56. The government is not required to keep this property open for expression. *Id*. While the property is open, however, the government can only impose reasonable time, place and manner regulations which are narrowly drawn to preserve the government's interest. Content-based restrictions are permissible only where necessary to serve a compelling state interest and are narrowly drawn. *Id*. at 1256. Content-neutral restrictions are permissible if they are narrowly tailored to achieve the government's interest and leave open ample alternative channels of communication. *Id*. at 1255-56. An example of this type of forum is a public library. *Id*. at 1256.

The third type of forum is the traditional or quintessential public forum. This description applies to "places which by long tradition or by government fiat have been devoted to assembly and debate." *Id*. at 1255, quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45. Not all public spaces are public forums simply because members of the

public are freely permitted to visit them. *Int'l Soc'y of Krishna Consciousness v. New Jersey Sports and Exposition Auth.*, 691 F.2d at 159. In this category of forum, the government can issue reasonable time, place and manner regulations. *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d at 1255. If content-neutral, these regulations need only be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Id*. If content-based, the regulations must also be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id*. Properties in this category of forum include parks, streets, and sidewalks.

Before applying these principles to this case, it is important to note what this body of law does not hold. Nowhere does the law say that the government cannot regulate speech on a sidewalk used by the public. The principle which defendant espoused again and again at trial and in his brief, that defendant's presence in a part of the Park open to pedestrian traffic is the end of this matter, is simply incorrect. As described above, and implemented in case after case, the law is clear that reasonable time, place, and manner restrictions can be valid on any government property, even traditional public forums. *United States v. Grace*, 461 U.S. 171, 177 (1983).

What follows is an application of the legal principles above to the facts in this case. First there is a discussion of the proper categorization of the forum in this case. Regardless of that categorization, however, the regulation and government conduct in this matter withstand constitutional attack. Even under the most strict time, place, and manner review, that applied to a traditional public forum, the government acted reasonably here. Thus, regardless of

the type of forum that this sidewalk is, there was no unconstitutional regulation of speech in this matter.

B) Forum analysis

The property at issue here is a sidewalk directly adjacent to the entrance and exit of the Liberty Bell Center. While this sidewalk is open to the public for access to the Liberty Bell Center and general use by the pedestrian public, it is hardly a typical urban sidewalk. As publicly advertised in the Park's Compendium:

> Due to the heightened security as a result of the terrorist attacks of September 11, 2001, access to the Liberty Bell Center, Independence Hall, East and West Wings, Congress Hall, Old City Hall & the Mall areas surrounding them is restricted. Prior to entry, visitors must be screened via magnetometers or pat sown and their baggage will be checked either via x-ray machines &/or visual inspection.

Compendium at 6. One of the Park's sidewalks, the South side of Chestnut between 5th and Sixth, has been closed to public pedestrian passage completely. Tr. 136-37. The area around the Liberty Bell Center is restricted by hundreds of four foot high metal bollards, many of which are chained together several feet off the ground, and patrolled by armed guards and Rangers. Tr. 19, 21, 176, 185-86; Gov. Ex. 2-20. The sidewalk on 6th Street between Chestnut and Market, only eleven feet wide, is regularly used as a waiting area for the long line of visitors waiting to get into the Liberty Bell Center. Tr. 11 The Liberty Bell Chamber, which houses the Liberty Bell itself and is the site of interpretive lectures are given by Rangers, is in a specially constructed building which is less than 30 feet from the 6th Street sidewalk. Tr. 26. Finally, and most importantly, the Park has excluded the 6th street sidewalk from the areas open for public demonstrations and issues no permits for that area. Tr. 141-42; gov. ex. 23.

Thus, while the law generally considers a government sidewalk a traditional forum, the sidewalk at issue here bears many hallmarks of a nonpublic forum. The evidence shows that the 6th Street sidewalk, by regulation and by practice, is open for pedestrian passage

but is not open for expressive activity, much like the Liberty Bell Center itself. *United States v. Goldin*, 311 F.3d at 196-97. As the Third Circuit noted in Goldin, the fact that the government evinced no intent to open the property to public speech and had designated spaces in the Park for speeches, suggests that the property is a nonpublic forum. *Id*. The same reasoning applies to the adjacent sidewalk.

Furthermore, in *United States v. Bjerke*, 796 F.2d 643 (3rd Cir. 1986), the Third Circuit ruled that a public sidewalk on Post Office property was a nonpublic forum and that postal regulations restricting conduct were reasonable. The *Bjerke* court noted that the postal sidewalk was distinguishable from other public sidewalks. Had the postal sidewalk been indistinguishable from other public sidewalks, they may have been considered public forums. *United States v. Bjerke*, 796 F.2d at 649. As described above, the sidewalk here had many characteristics which distinguished it from other public sidewalks. Most importantly, the Park had set forth in its published policy that this sidewalk, in the shadow of Independence Hall and so close to the nonpublic interior of the Liberty Bell Center that a bullhorn outside can be heard inside the Bell Chamber, was not a demonstration site. Tr. 91. *See also, United States v. Kokinda*, 497 U.S. 720, 729-30 (1990)(postal entryways may be open to the public, but that fact does not establish that they are traditional public fora where government did not intentionally open forum for public discourse); *Student Coal. for Peace v. Lower Merion Sch. Dist. Bd.*, 776 F.2d 431, 435-37 (3d Cir. 1985) (every place that permits free public access is not a traditional public forum; despite generous public access to school field, neither written policy nor actions manifest intent to open field as public forum so it is a nonpublic forum).

Application of the non-public forum standard to this case means that the regulation must only be reasonable, meaning consistent with the government's interest in preserving the property for its intended use, and non-content based. *United States v. Goldin*, 311 F.3d at 197; *Paff v. Kaltenbach*, 204 F.3d 425, 433 (3d Cir. 2000). Moreover, restrictions on speech are reasonable if interference with the agency's mission may occur, even if they have not yet occurred. *Paff v. Kaltenbach*, 204 F.3d at 433. The regulations here, and the conduct of the Rangers, clearly satisfy this test and show that defendant's claims have no merit.

Of course, it is not necessary to the government's case that the sidewalk at issue be considered a nonpublic forum. Even if the sidewalk is considered a traditional forum, and thus subject to a more stringent time, place, and manner test, there was no unconstitutional government regulation or conduct. The traditional forum time, place and manner test is discussed below.

C) Time, Place and Manner Restriction

Even in a traditional public forum, an important factor in determining reasonableness is whether the demonstration activity is "basically incompatible with the normal character and function of the place." *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth.*, 691 F.2d at 161 (noting that even in Times Square a demonstration can be prohibited at rush hour). The test for time, place and manner restrictions is whether they are content-neutral, narrowly drawn to serve a significant government interest, and leave open ample alternative channels of communication. *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d at 1255. The Park's intent and conduct here satisfies this test.

First, as to content-neutrality, there is not a word of the Code of Federal Regulations or the Compendium which is directed to the content of speech. These documents speak only of public and property safety and the operational needs of the Park. 36 C.F.R. § 2.51(e); gov. ex. 23. The Rangers testified that their actions were based on the regulations and on safety and operational considerations. They further testified that they have hosted the defendant in the Park previously and protected him from assault. Tr. 128, 134-35, 145. The Park grants permits regardless of viewpoint. Tr. 128, 136, 141. Thus, even though Park staff could not help but notice that the defendant's demonstration on October 6, 2007 was upsetting some of the public, there is no evidence that government action was based on that upset. Tr. 174. Thus this prong of the test is amply satisfied.[1]

Second, as to the scope of the restriction, the topography of the Park and the pattern of public use make clear that the regulations are narrow, reasonable and reasonably enforced. The entrance to the Liberty Bell Center screening area is approximately 4 feet wide and lines of visitors spontaneously spring up and line the eleven foot wide 6th Street sidewalk all the way to Market Street even as pedestrians are using the sidewalk. Tr. 11, 18, 26, 192. Over 2 million people per year enter the Liberty Bell Center this way. Gov. ex. 22. The testimony showed that the Liberty Bell Center has only one entrance and exit and that the sidewalks on 6th

[1] Ironically, it is the defendant who raises the content of his speech in an attempt to assert that his religious communication was entitled to greater protection than the speech of others. Brief at 5. This claim to some greater protection, however, is without foundation. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990)(religiously neutral laws of general applicability do not violate the First Amendment, even if they prohibit some religious conduct). It would, of course, most certainly violate the First Amendment for the Park to grant greater demonstration rights to a group because a Ranger judged their speech to be "religious."

and 5th Streets are hemmed in by a wall on one side and Belgian blocks and a busy streets on the other. Tr. 18-19, 142-44; gov. ex. 2-20. The North side of Chestnut Street is an integral part of the historical mission of the Park. Tr. 137-38. The Park gets at least 100,000 demonstrators per year, and some of these groups overlap in time and place or are in conflict with each other and must be separated. Tr. 115, 133-36. While demonstrations are ongoing, the buildings in the Park must remain open and available for safe visitation. Tr. 135. It is impossible to effect safe operations of the Park while managing demonstrations at the only entrance and exit of the Liberty Bell Center by this defendant or by the hundreds of other demonstration groups which come to the Park each year. Tr. 130, 148, 190. *See Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. at 652-54 (disruption caused by access granted to one party is not the standard as courts must look to the impact caused by all similarly situated groups who will get similar access if the restriction is lifted), quoted in, *Mahoney v. United States Marshals Serv.*, 454 F. Supp. 2d 21, 35 (D.D.C. 2006); *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 296 (1984)(regulation not judged solely by reference to the demonstration at hand). Given that the close confines of the Park and the heavy visitation and demonstration traffic, the Park administration's restriction of demonstrations at the entry and exit of the Liberty Bell Center was narrow and reasonable and in furtherance of the government's intent as expressed in the regulation. 36 C.F.R. § 2.51(e); *see Heffron v. Int'l Soc'y For Krishna Consciousness*, 452 U.S. at 650-51 (the safety and convenience of persons using a public forum is a valid governmental interest and must be assessed in light of the characteristic nature and function of the particular forum involved).

Last, the alternative means of communication made available to this defendant are evident on the record. The defendant was offered different demonstration locations in the Park away from the Liberty Bell Center entrance and exit. In particular, he was offered a location on the North side of Market Street next to the Independence Visitor Center, half a block from the Liberty Bell Center and within the Park. Tr. 14. This location is significant in that Market Street has more pedestrian and vehicular traffic than 6th Street and the Visitor Center has more visitation. Tr. 15-16; gov. ex. 22. Thus this defendant was offered a more heavily trafficked location than where he stood at the entrance of the Liberty Bell Center.

There are several case precedents upholding Park regulations and permitting as done here. First is the seminal case of *Clark v. Community for Creative Non-violence*, 468 U.S. 288 (1984), in which the Supreme Court addressed the National Park Service's issuance of a demonstration permit which prohibited camping in an urban park, a traditional public forum. In *Clark*, the Court found that the prohibition contained in the permit was a reasonable time, place, and manner restriction. *Id*. at 297-98. The Court noted that none of the applicable regulations had provisions unrelated to the ends it was designed to serve. The Court noted that, in addition to limiting possible damage to the park, the regulation prevented "partial inaccessibility" of the park to members of the public. *Id*. at 298. The Court also rejected an argument for less restrictive means, saying that this would only make courts, rather than the National Park Service, the manager of the nation's parks. *Id*. at 299. In finding that the permit conditions were constitutional, the Supreme Court wrote:

> All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace. This is no more than a reaffirmation that

> reasonable time, place or manner restrictions on expression are constitutionally acceptable.

Id. at 299. As in *Clark*, the regulation here reasonable served the government's ends and did not unduly burden the defendant.

The District of Columbia Circuit dealt with a situation very similar to that present in this case in *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984). At issue, among other regulations, was a restriction on signs which could be posted on a sidewalk. The purpose of the regulation was to preserve the aesthetics of the park and the public's view of the White House. Using a traditional public forum standard, the Court of Appeals held that Park Service could constitutionally regulate speech on a public sidewalk in the park. *Id*. at 1527. The court also held that the regulation served a substantial government interest and that it was a reasonable time, place, and manner restriction. *Id*. at 1528, 1535-38. Lastly, the court noted that, as courts possess no particular expertise in drafting regulatory measures, it is not the province of the courts to finetune regulations once it is determined that the regulations are within the "boundaries of constitutionality." *Id*. at 1529. Needless to say, the safety and programmatic considerations of this Park are even more substantial than the aesthetic concerns addressed in *White House Vigil*.

In *United States v. Kistner*, 68 F.3d 218 (8th Cir. 1995), the issue again was a regulation enforced by the National Park Service placing a limit on the distribution of printed matter within a national park in St. Louis. This court also upheld the constitutionality of the permit system and the resultant restriction on expressive activity. In particular, the court approved the restriction of expressive activity to five areas in the park as consistent with the regulation's "mandate to avoid injury and maintain tranquility." *Id*. at 222. The court also

affirmed the Park Service's interest in controlling the number of people who might interfere with park activities. *Id*.

In *United States v. Sued*, 143 F. Supp. 2d 346 (S.D.N.Y. 2001), the issue again was a National Park Service regulation, this time at the Statue of Liberty. The defendant protested in the park without obtaining a permit in advance. The court ruled that the demonstration permit regulation (the same one at issue in this case) was content blind, that it did not grant unbridled discretion, that it permitted the reasonable accommodation of the many users of a crowded park, and that it provided ample alternative means of communication, even if those means were off the island where the Statue of Liberty is located. *Id*. at 352-53.

Lastly, in *Mahoney v. United States Marshals Serv.*, 454 F. Supp. 2d 21 (D.C. Cir. 2006), the issue was the power to regulate speech on a public sidewalk. This case involved a public event for dignitaries for which public sidewalks were closed and demonstrators excluded. Two demonstrators, who at no time threatened violence, brought suit to open the sidewalk. The court found that the government had imposed reasonable time, place, and manner restrictions. Among other reasons, the court ruled that the restrictions served the significant government interest in "maintaining a safe and convenient traffic flow for the many pedestrians attempting to enter the facility." *Id*. at 33, n. 3. Also considered by the court were the need to keep the entrances to the building clear for emergency access and prevent interference with the orderly administration of the building. *Id*. at 36, distinguishing *United States v. Grace*, 461 U.S. 171 (1983). Lastly, the court stressed that it does not matter that the complaining demonstrators were only two non-violent people as courts "must look to what would happen if every individual to which a restriction applied were freed of its limitations." *Id*. at 35. Lifting the regulation for

these defendants would mean that all members of the public could demonstrate in the closed area, thereby creating a public hazard. *Id*.

The defendant chiefly relies on one case which he claims controls this case: *United States v. Grace*, 461 U.S. 171 (1983). This case, however, supports the government's position in this matter.

In *Grace*, the Supreme Court addressed the nature of the sidewalks adjacent to the Supreme Court itself. The court wrote that "publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Id*. at 177. The court further noted that it had "regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Id*. at 177-78 (quotation omitted). The court then held that, as there was no distinction between the sidewalk next to the court and other city sidewalks, the traditional public forum test applied. *Id*. at 179-80. The court then reasoned that, in the absence of any showing that there was interference with the court's operations, the ban on flags and banners on the sidewalks did not serve the government purpose of protecting the integrity of the court. *Id*. at 182. Therefore there was no connection between the regulation and any government need. *Id*. Lastly the court wrote that, while these sidewalks could be the subject of reasonable time, place and manner restrictions, this particular time, place and manner regulation was unconstitutional. *Id*. at 183-84.

In examining *Grace*, it is first important to note, as described previously, that the sidewalks in Independence National Historical Park are distinctive, including a surrounding bollard and chain fence. *Cf. United States v. Grace*, at 180 (there is no separation, no fence, no

indication whatever that the public has entered a special enclave). More importantly, and crucial to *Grace* and to understanding its relation to this case, is this passage in the opinion:

> There is no suggestion, for example, that [the demonstrators'] activities in any way obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds.

Id. at 182. This sentence, of course, completely divorces *Grace* from the facts in this case. The evidence here is that, on a crowded sidewalk in an urban park, the defendant created a chokepoint and safety hazard at the only entry and exit of a building housing a national icon. A bullhorn used by the defendant's group could be heard inside the Liberty Bell chamber. The defendant's conduct violated a regulation which makes it possible for this small Park to host simultaneously 100,000 demonstrators and over 2 million visitors in a year. Most importantly, unlike in *Grace*, the regulation here is directly related to the government's interest in assuring safe visitation and public passage in the Park, as well as programmatic integrity, tranquility, and property protection. Simply put, this defendant's conduct was not at all like that of the defendant in *Grace*, nor was the sidewalk location and purpose of the regulation similar.

Using a reverse analogy, applying the facts in this case to the property in *Grace*, shows the limited nature of *Grace* and makes clear the absurdity of the defense position. Substitute the Supreme Court for the Liberty Bell Center, with an outside bullhorn audible in the courtroom, dangerous congestion at the only entry and exit, and small sidewalks which cannot accommodate a horde of visitors, pedestrians, and large demonstrations. It is inconceivable that the court would strike down a content-neutral regulation designed to limit this chaos inside and outside of the courthouse.

Finally, it is worth closing this examination of *Grace* by noting what it does not say about time, place and manner restrictions on a sidewalk. The defense has argued that *Grace* stands for the proposition that such restrictions cannot apply on a sidewalk used by the public. The plain language of *Grace* is explicitly to the contrary:

> Of course, this is not to say that those sidewalks, like other sidewalks, are not subject to reasonable time, place and manner restrictions, either by statute or regulations....

Id. at 183-84. It is for this reason that courts have time and again ruled time, place and manner restrictions, like the regulation in this case, constitutional.

D) Remaining defense arguments

The bulk of the defendant's arguments have been addressed above. He claims that his speech was restricted because of its content and that he was "censored purely on the basis of the viewpoint it contained." Brief at 10. All of the testimony in this case is to the contrary. The defendant's bare allegation is without support.[2]

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[2] The defendant finds fault with the Rangers' discussion with him that he was holding the visitor public hostage by demonstrating at the entrance and exit of the Liberty Bell Center. This, of course, is not a content based objection by the Rangers but a procedural one; the defendant's message was not censored or removed from the Park, only directed to a location where visitors would be free to walk away without losing their right to see the Liberty Bell. Restrictions which protect a captive audience are constitutional. *Berger v. City of Seattle*, 512 F.3d 582, 605 (9th Cir. 2008)(authorities had the right to protect captive audiences seeking to enjoy functions without being forced to choose between enduring harassment and leaving the facilities), citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)(approving buffer zones around entrances; captive audience does not require literal captivity); *see also Hill v. Colorado*, 530 U.S. 703, 718 (2000)(while there is a right to persuade, no one has a right to press ideas on an unwilling recipient and the right to be left alone must be balanced with the right to communicate)

Defendant makes reference to the permit requirement being a prior restraint on speech. It is questionable whether this Park's permit process, in which spontaneous oral permits are granted , is a prior restraint.[3] Tr. 136, 150. Regardless, a prior restraint is constitutional where there is no impropriety in the underlying regulation and the government official is not given overbroad discretion. *Nationalist Movement v. City of York*, 481 F.3d 178, 183 (3d Cir.), *cert. denied*, 128 S. Ct. 375 (2007). In this case, discretion is strictly limited to the factors in the regulations and the compendium and there is no basis for complaint. Tr. 196, 198. Furthermore, the Chief Ranger explained the need for a permit process in order to prepare facilities for demonstrations, avoid overcrowding, negotiate overlapping requests for space, and attempt to preserve tranquility. Tr. 130-36.

Last, the defendant presses his argument that he was told to "completely remove" from the public forum and that he was deprived of an ample means to communicate with the public. Brief at 10 and 11. The record shows that the defendant was given opportunity to move to a location a half block away in the Park where he would have had greater access to the public. The defendant refused this offer. This complaint, like his others, is hollow.

[3] Worth noting is that the procedures of this Park are considerably more liberal in granting permits to accommodate public speech than the permit processes of other parks described, and held constitutional, in the cases discussed.

V. CONCLUSION

The evidence produced by the government demonstrates that the defendant committed the offenses charged, especially when viewed in the light most favorable to the government. Furthermore, given the content-neutral and narrow regulation, and the Rangers' multiple reasonable attempts to balance the defendant's right to demonstrate with the needs of the Park, there was no constitutional violation.

The government respectfully requests that this Court enter the attached order denying the defendant's motion.

Respectfully submitted,

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United States Attorney

_____/s/_____
RICHARD W. GOLDBERG
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Government's Trial Memorandum has been served this date, by electronic filing and first class United States mail on:

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/s/
RICHARD W. GOLDBERG
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DATE May 22, 2008