

Litigation Overview
The Constitutional Walking Tour of Philadelphia
versus
the Independence Visitor Center Corporation and the National Park Service

Philadelphia, Pennsylvania – On July 10, 2009, The Constitutional Walking Tour of Philadelphia (“The Constitutional”) filed a civil lawsuit against the Independence Visitor Center Corporation (“IVCC”) and National Park Service (“NPS”)¹ in Philadelphia in Federal Court in the Eastern District of Pennsylvania alleging violations of the Administrative Procedures Act, deprivation of due process, breach of contract, breach of implied agreement to negotiate in good faith, unjust enrichment, tortious interference with existing and prospective contractual relations, and commercial disparagement. This lawsuit is about holding the stewards of the Independence Visitor Center and Independence National Historical Park to the standards of governmental fairness and accountability established by our country’s Founders on that very ground.

The complaint alleges that, contrary to the requirements of the Gateway [Independence] Visitor Center Authorization Act of 1999, Public Law 106-131 (“Visitor Center Act”),² the National Park Service has failed for ten years to enter into a statutorily mandated detailed and long-term management agreement with the Independence Visitor Center Corporation establishing fair and transparent policies and procedures for the management of the Independence Visitor Center.³

In an April 3, 2008 editorial entitled “Mall Madness,” *The Philadelphia Daily News* said that, “For nine years, the [Independence] visitor center and [National] Park Service have failed to come up with an agreement to run the center that might make the rules governing tour companies more consistent and less arbitrary... This is a shameful state of affairs.”⁴

In the absence of a management agreement, the complaint alleges, the National Park Service has improperly delegated full responsibility for the operation of Philadelphia’s primary point of orientation for visitors⁵ to a private entity, the IVCC, which unlike government agencies, makes its decisions clandestinely, is exempt from regulations governing National Park Service concessions and commercial operations, is exempt from the Freedom of Information Act, and does not permit appeals. In spite of their duty to oversee Independence National Historical Park⁶ which includes the Independence Visitor Center, the National Park Service has arbitrarily and capriciously refused to supervise the Independence Visitor Center’s operation and has refused to consider and to resolve complaints about the Independence Visitor Center’s conduct, such as The Constitutional’s complaints of favoritism towards certain vendors and exclusion of other vendors.

Rather than allow The Constitutional to market, to sell tickets for, and to stage its tours in the same way other vendors are allowed, the Independence Visitor Center, with the National Park Service’s approval, has tried to impose an unreasonable and strict confidentiality agreement requirement on The Constitutional Walking Tour as a necessary condition to continue negotiations, which had previously commenced, for a License Agreement for a ticket sales booth inside of the Independence Visitor Center.⁷ *The Philadelphia Daily News* called this tactic “a de facto gag order.”⁸

The Constitutional had been willing to enter into a reasonable confidentiality agreement that detailed exactly what documents or information is confidential (i.e., trade secrets, security, non-public financial data, etc.). However, the Independence Visitor Center insisted on an

unbounded and unspecified range of information in perpetuity even if no ticket sales booth License Agreement was ever executed. Moreover, the proposed Confidentiality Agreement explicitly abrogated the IVCC's duty of good faith and fair dealing inherent in all Pennsylvania contracts, and the common law duty to negotiate in good faith created by IVCC's representations of their intent. The IVCC thus demanded eliminating any obligation to proceed through the negotiations for the License Agreement in good faith even as it tried to prevent plaintiffs through the Confidentiality Agreement from exercising their Constitutional rights, including those to petition government representatives for redress.

Additionally, the complaint alleges that the Independence Visitor Center Corporation has breached its contract with The Constitutional to sell tickets for guided tours to the public (for which the Independence Visitor Center has received, and continues to receive, a twenty-percent sales commission) by acting in bad faith, such as by deliberately providing visitors misleading information about The Constitutional. Further, the complaint alleges the Independence Visitor Center interfered with The Constitutional's business by making false remarks about The Constitutional to a magazine which published editorial content and advertisements on The Constitutional and by making false remarks to another tour company with which The Constitutional had a joint sales agreement, and by thwarting a combined tour and breakfast experience The Constitutional had developed with a hotel.

Even though The Constitutional is consistent with Independence National Historical Park's enabling legislation,⁹ is complementary to INHP's mission and visitor experience objectives, is relevant to INHP, is appropriate for public use and enjoyment of the INHP, is an environmentally friendly "green" tour, does not cause unacceptable impacts on Independence Park,¹⁰ was initially involved in a successful and supportive working relationship in 2005 with the Independence Visitor Center, and benefits the Independence Visitor Center and in turn the National Park Service financially from a percentage of ticket sales for The Constitutional, the National Park Service has exhibited an ongoing pattern and practice of malfeasance and discrimination against The Constitutional in violation of its owners' various Constitutional rights.

This is a case about the stewards of the Independence Visitor Center Corporation and Independence National Historical Park acting in random, arbitrary and capricious manners with regard to denying The Constitutional Walking Tour equitable treatment to other competitive vendors regarding accessibility and visibility to visitors and potential customers (the lifeblood of any small business), both inside and outside of the Independence Visitor Center on National Park Service property.

The lawsuit requests an injunction prohibiting the Independence Visitor Center Corporation and National Park Service from further discriminating against The Constitutional and for compensatory and punitive damages arising from years of preventing The Constitutional Walking Tour from having accessibility and visibility to visitors, on par with what Independence National Historical Park provides to other third party companies and what is provided to third party concession and commercial operations across the National Park Service system.

Since Spring 2006, The Constitutional Walking Tour has been trying to amicably resolve its differences out of court with the National Park Service and Independence Visitor Center Corporation. Unfortunately those efforts, which have included both Senator Arlen Specter and Congressman Robert Brady reaching out to the National Park Service and the Independence Visitor Center, have been unsuccessful.

Statements by Jonathan Bari and Leslie Bari of The Constitutional Walking Tour

“The Constitutional Walking Tour views litigation as a last resort,” stated Jonathan Bari, President of The Constitutional Walking Tour. “However, given the present circumstances, we are confident in the merits of our claims, and we will now rely on the Rule of Law and the equal administration of justice to resolve this matter once and for all.”

“While The Constitutional Walking Tour has had meaningful differences with the senior management of the National Park Service, specifically pertaining to Independence National Historical Park in Philadelphia, we truly value the work and dedication of the thousands of NPS staffers nationwide who proudly wear the National Park Service uniform – the gray and the green,” stated Jonathan Bari.

“The Constitutional supports the laudable mission and goals of the National Park Service in Philadelphia as well as the Independence Visitor Center, but in terms of achieving their missions, the ends simply do not justify the means here,” stated Leslie Bari, Executive Vice President of The Constitutional. “Our Founding Fathers taught us that checks and balances are required for our system of government to work. However, a closer look at the Independence Visitor Center reveals that there are few, if any, meaningful checks and balances in place with the Independence Visitor Center Corporation and the National Park Service to ensure that the taxpayers’ investment in these public trusts is effective, efficient and fair such that the Independence Visitor Center works as the United States Congress intended it to work.”

Legal Representation

The Constitutional Walking Tour is represented in this matter by Maxwell S. Kennerly, Esq. of The Beasley Firm, LLC in Philadelphia, Pennsylvania.

About The Constitutional Walking Tour of Philadelphia

The Constitutional Walking Tour of Philadelphia takes visitors on a walking journey through America’s Birthplace - “Where Every Day is Independence Day!”™. Located in Historic Philadelphia, The Constitutional visits more than 20 of the most historical sites on a 75 minute, 1.25 mile outdoor adventure in the Independence National Historical Park area, which is home to the Liberty Bell and Independence Hall. The Constitutional guides visitors on a walk through history where The Declaration of Independence and the Constitution of the United States were created. The Constitutional Walking Tour complements National Park Service values, communicates the INHP’s mission and offers factual information that is historically accurate and based upon current scholarship. For more information, see www.TheConstitutional.com.

Additional commentary and documentary information can be found at:

- www.IndependencePark.blogspot.com
- www.TheConstitutional.com/nps

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¹ The National Park Service is a bureau within the United States Department of the Interior charged with overseeing and operating federal government parks, including INHP. There are 391 national parks located across the country in 49 states. According to its mission statement, the “National Park Service preserves unimpaired the natural and cultural resources and values of the national park system for the enjoyment, education, and inspiration of this and future generations. The Park Service cooperates with partners to extend the benefits of natural and cultural resource conservation and outdoor recreation throughout this country and the world.” Source: <http://www.nps.gov/aboutus/mission.htm>

² In 1999, the Gateway [Independence] Visitor Center Authorization Act (“Public Law 106-131”) was signed by President Clinton, and it authorized the Secretary of the Department of the Interior to execute a detailed management agreement with the Independence Visitor Center Corporation to construct and operate the Independence Visitor Center on federal land. The Independence Visitor Center is owned by the federal government and administered by NPS, which has contracted with a private entity, the Independence Visitor Center Corporation, to operate the facility. The Congressional intent of the Visitor Center Act, Section 2B, is clearly stated: “The purpose of this Act is to authorize the Secretary of the Interior to enter into a cooperative [management] agreement with the Gateway [Independence] Visitor Center Corporation to construct and operate a regional visitor center on Independence Mall.”

³ In lieu of a long term management agreement, the NPS issued a bare-bones temporary Special Use Permit to the Visitor Center in November 2001 and then has extended it 20 separate times over nine years “to allow additional time to finalize a formal [management] Agreement.” The repeated renewals of the Special Use Permit are also curious in that according to all of the audited financial statements of the Visitor Center since 2003, the NPS and Visitor Center have “substantially established a management agreement” that “calls for the NPS to make an annual payment of \$850,000.00 to the IVCC in exchange for the services provided by the IVCC more fully described in the agreement.” While more than \$6.4 million has been spent by the Federal government to fund the Visitor Center’s operations since 2001, the NPS and Visitor Center have not executed a management agreement, and the management agreement, which is supposedly done, is confidential and not available for public inspection.

⁴ <http://www.theconstitutional.com/news/inhp/mall.madness.pdf>

⁵ The Independence Visitor Center regularly touts its importance with respect to its “economic impact.” For example, in 2006, the IVCC reported that “visitors to the Independence Visitor Center spent nearly \$600.0 million in the region between July 2005 and June 2006. The induced spending (dollars not otherwise anticipated without the efforts of the Visitor Center) within this time period was more than \$62 million [average of \$35.00 per person in FY 2006]. The economic benefit to the region attributed to the Independence Visitor Center Corporation was estimated at more than \$164.0 million.” (Source: 2006 Annual Report, Independence Visitor Center, Page 8, [http://www.independencevisitorcenter.com/ul/pdf/fy06%20annual%20report\(1\).pdf](http://www.independencevisitorcenter.com/ul/pdf/fy06%20annual%20report(1).pdf))

⁶ Independence National Historical Park is America’s Birthplace. “The park represents the founding ideals of the nation and is a national and international symbol of democracy and liberty.”[1] The Bill of Rights was adopted in 1791 in INHP, and the Park has a distinct and singular association with the rights of assembly and free speech. [2] INHP consists of fifty-four (54) acres in the heart of Center City Philadelphia and includes many historic sites such as the Liberty Bell and Independence Hall, which is a World Heritage Site. INHP was established in 1948 and has been restored and maintained through the joint efforts of the NPS, the City of Philadelphia, and private donors. INHP is considered “the premier cultural park in the National Park System,” according to Mary A. Bomar, recently retired Director of the National Park Service (October 2006 to January 2009), former Regional Director of the Northeast Region of NPS (July 2005 to October 2006), former Superintendent of INHP (2003 to July 2005), and former member of the Board of Directors of the IVCC (2005 to 2008).[3] Sources: [1] Independence National Historical Park, Long-Range Interpretive Plan, United States Department of the Interior, December 2007, available at http://www.nps.gov/inde/parkmgmt/upload/LRIP-2110_INDELRIIP_Rev12-13-07.pdf; [2] The Superintendent’s 2004 Compendium for Independence National Historical Park, imposed under Discretionary Authority by former Superintendent Mary Bomar; and [3] Statement of Mary A. Bomar, Nominee for the Position of Director of the National Park Service, Before the Committee of Energy and Natural Resources of the United States Senate, September 21, 2006. <http://www.doi.gov/oc/2006/StatementOfMaryBomar.htm>

⁷ The National Park Service has approximately 6,600 concession contracts and commercial use authorizations in place with third parties across the United States. On information and belief, none of the third party holders of the 6,600 written commercial agreements were required to sign a stand-alone, broad-based Confidentiality Agreement like the one that has been presented to The Constitutional Walking Tour, and in the manner in which it was presented, just to discuss doing business with the National Park Service.

⁸ “For Visitor Center Kiosk Owner, Gag’s No Joke,” Philadelphia Daily News, June 9, 2009.

⁹ “Independence National Historical Park Act of 1948” - U.S. Code, Title 16, Chapter 1, Subchapter LI.
<http://www4.law.cornell.edu/uscode/16/ch1schLI.html>

¹⁰ Management Policies 2006, National Park Service, Section 10, page 144 - Commercial Visitor Services, ISBN 0-16-076874-8, <http://www.nps.gov/policy/MP2006.pdf>