



2017

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Recommended Citation

Waggoner, Andrew (2017) "THREE ISSUES THE NATIONAL PARK SYSTEM FACES IN 2017," *University of Baltimore Journal of Land and Development*: Vol. 6 : Iss. 2 , Article 2.

Available at: <https://scholarworks.law.ubalt.edu/ubjld/vol6/iss2/2>

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COMMENT

THREE ISSUES THE NATIONAL PARK SYSTEM FACES IN 2017

Andrew Waggoner

I. INTRODUCTION AND ISSUES PRESENTED

It's 2017; a new year, complete with an entirely new administration. Celebrating a new year is all about change. However, change is elusive to the National Park Service (NPS) which, nearly 150 years after its creation, faces intriguing hurdles going into the new year. This paper will diagnose three issues that the NPS faces going into 2017 and will provide solutions along with additional facts to alleviate the concerns of those who support the NPS.

The first concern that NPS supporters will face in 2017 is the resurgence of the Republican party which now controls the House, Senate, and presidency.¹ A conservative Washington may prove harmful towards conservation efforts.² There are numerous instances of conservative attempts to open up protected lands for drilling, mining, and so forth.³ Further, members of the party have attempted to indirectly affect the viability of the NPS with their hostile sentiment towards the application of the Antiquities Act of 1906.⁴ The Act gives the president the power to “designate ‘historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States’ as monuments.”⁵ Legislation has been introduced that would cripple the power

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1. Sarah Frostenson, *Republicans now control the presidency, the Senate, and the House*, Vox (Nov. 9, 2016), <http://www.vox.com/presidential-election/2016/11/9/13572972/republicans-control-presidency-senate-house>.
 2. See Zoe Schlanger, *WHAT CAN A DONALD TRUMP PRESIDENCY DO TO NATIONAL PARKS?*, NEWSWEEK (Nov. 13, 2016), <http://www.newsweek.com/trump-presidency-national-parks-520514>.
 3. See Jenny Rowland, *The Rise to Power of the Congressional Anti-Parks Caucus*, AMERICAN PROGRESS.ORG (Apr. 11, 2016), <https://www.americanprogress.org/issues/green/reports/2016/04/11/135044/the-rise-to-power-of-the-congressional-anti-parks-caucus/>.
 4. See Claire Moser, *New Congress Begins Anti-Environment Attack With ‘No More National Parks’ Bill*, (Jan. 16, 2016), <https://thinkprogress.org/new-congress-begins-anti-environment-attack-with-no-more-national-parks-bill-59c982fa2bee#.nbj11o8ev>.
 5. Coral Davenport, *Obama Designates Two New National Monuments, Protecting*

of the Act by severely limiting the amount of land that any future president could potentially protect and preserve, or turn into a national park.⁶ Such disdain could, in a Republican-controlled Congress and presidency, create a rift in the people's desire to protect national parks and could drastically impair the ability to maintain national parks for future generations.

A second concern of those looking to expand the role of the NPS is a lack of racial diversity in the NPS.⁷ In 2014, over 250 million people visited a national park in some way, shape or form.⁸ However, despite this massive number, many of those who visited were "white and aging."⁹ As the demographic of America changes, so too will the future of the NPS.¹⁰ As the Census Bureau emphasizes, "the country will have a majority nonwhite population by 2044."¹¹ If that new majority has little or no relationship with the outdoors, then the future of the nation's parks, and the retail and nonprofit ecosystem that surrounds them, will be in trouble."¹²

Lastly, park safety is a concern that the NPS must address and attempt to remedy through legislative reform as it continues into the new year. This comment will focus on perhaps the weirdest safety concern facing the NPS in 2017: the possible exploitation of "the Murder-Zone," a reference to a piece of land situated on the outskirts of Yellowstone National Park between Idaho, Montana, and Wyoming.¹³ Here, the rules of civil procedure, and constitutional law are simple; there are no rules.¹⁴ When Yellowstone National Park was created in 1872,¹⁵ the legislature decided that the area encompassed by the park would solely belong within the

1.65 Million Acres, N.Y. TIMES (Dec. 28, 2016), http://www.nytimes.com/2016/12/28/us/politics/obama-national-monument-bears-ears-utah-gold-butte.html?_r=1.

6. See Rowland, *supra* note 3.

7. Emily Mott, *Mind the Gap: How to Promote Racial Diversity Among National Park Visitors*, 17 VT. J. ENVTL. L. 443, 444 (2016).

8. Glenn Nelson, *Why Are Our Parks So White?*, N.Y. TIMES (Jul. 10, 2015), https://www.nytimes.com/2015/07/12/opinion/sunday/diversify-our-national-parks.html?_r=0.

9. *Id.*

10. *See id.*

11. *Id.*

12. *Id.*

13. Blake Rogers, *Due to a Legal Loophole, there's a murder zone in Yellowstone National Park*, NERDIST (Aug.14, 2016), <http://nerdist.com/due-to-a-legal-loophole-theres-a-murder-zone-in-yellowstone-national-park/>.

14. *Id.*

15. *Primary Documents in American History, Act Establishing Yellowstone National Park*, LIBRARY OF CONG., <https://www.loc.gov/rr/program/bib/ourdocs/yellowstone.html> (last visited Feb. 25, 2017).

federal district of Wyoming even though the park encroached into parks of Montana and Idaho.¹⁶ This designation, paired with core constitutional law principles, has led pop culture to devise the concept of a lawless area called the “Murder-Zone.”¹⁷

II. BACKGROUND AND ISSUE

A. *The Origins of the National Park Service*

Preserving wide swaths of land for conservation in the United States had been a novel, yet never fully realized, idea that was endorsed by many major societal figures of the early era.¹⁸ After all, nothing like this had been done before.¹⁹ There was no road map or original scheme to go off of.²⁰ Long before the creation of the NPS, which would eventually range from the “rugged shores of Maine to the active volcanoes in the Hawaiian Islands,”²¹ the “painter and explorer George Catlin had proposed the idea that the Western prairies might be preserved as ‘a Nation’s Park’ in 1832.”²² These ideals of preservation soon caught on as the state of California reserved Yosemite as a parkland for the first time.²³ After witnessing this, the Government soon followed in the steps of California leading to further implementation of this National Park idea that would become a milestone in the realm of environmental protection and conservation.²⁴

The lands of the West would become a catalyst for the preservation movement.²⁵ During this pre-National Park era, the American public’s view of the West changed - a metamorphosis.²⁶ Before, “the West had been a place to cross over on the way to the Pacific Coast or a place of mystery,

16. Brian Kalt, *The Perfect Crime*, 93 GEO. L.J. 675, 678 (2005).

17. *See id.*

18. *See Document Information Section, Our documents*, <https://www.ourdocuments.gov/doc.php?doc=45> (last visited Feb. 22, 2017).

19. *Id.*

20. *See generally* History E-Library, *National Park System Timeline*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/hisnps/NPSHistory/timeline_annotated.htm (last visited Mar. 1, 2017).

21. Denise E. Antolini, *Article: National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 851, 852 (2009).

22. ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE, Chapter 1 (3d ed. 1987). https://www.nps.gov/parkhistory/online_books/runte1/chap1.htm (last visited Mar.3, 2017).

23. *See supra* note 18 and accompanying text.

24. *Id.*

25. *See supra* note 18 and accompanying text.

26. *See id.*

fearsome in either case. Now it became America's wonderland."²⁷ Struck by its wonder, viewers of the land created photos and canvasses that "conveyed the monumental size and geological complexity of the region and enticed viewers to experience its scenic splendors themselves."²⁸

However, such allure to these areas and natural wonders contrarily opened the door to their possible destruction.²⁹ With discovering new lands, commercialization and development would surely follow.³⁰ After his observations of the Wyoming area, Ferdinand Hayden began a campaign hoping to protect the land he had fallen in love with.³¹ From then on Hayden did a number of things that ranged from writing articles detailing the wonders he had encountered to lobbying Congressmen.³²

In response to efforts set in motion by Hayden and a newly found sense of national pride "of the natural wonders in this nation,"³³ Yellowstone National Park, the world's first national park, was created by President Ulysses S. Grant on March 1, 1872.³⁴ The name Yellowstone "derives from the French Roche Jaune—yellow stone—for the large tributary that joins the Missouri River near the present Montana-North Dakota line."³⁵

Following the creation of Yellowstone, "the United States authorized additional national parks and monuments, many of them carved from the federal lands of the West."³⁶ At the time, numerous lands and national monuments were under the protection of many different agencies ranging from the Department of the Interior to the War Department.³⁷ However, without unified leadership, the newly created parks and monuments "were vulnerable to competing interests"³⁸ and became unmanageable.³⁹ Virtually "no central organization existed to manage them."⁴⁰ Consequently, many

27. *Id.*

28. *Id.*

29. *Id.*

30. *See supra* note 18 and accompanying text.

31. *Id.*

32. *Id.*

33. *Supra* note 20 and accompanying text.

34. *Supra* note 15 and accompanying text.

35. Tamsen Emerson Hunt, *Yellowstone, the World's Wonderland*, WYOHISTORY, <http://www.wyohistory.org/encyclopedia/yellowstone-national-park>. (last visited Mar. 10, 2017)

36. *About Us*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/history.htm> (last visited Mar. 3, 2017).

37. *Id.*

38. *Supra* note 20 and accompanying text.

39. *Id.*

40. *Id.*

lacked protection and funding.⁴¹ In the early 20th century, the future character of parks remained very much in doubt.”⁴² Commercialization soon caught wind of the public’s romantic park sentiment and began to take advantage of the national parks, often exploiting them for their resources without oversight or restrictions.⁴³

However, it was not until the devastating loss of the Hetch Hetchy Valley in Yosemite National Park that the preservationists began to really push for park management reform.⁴⁴ In response to the population growth of San Francisco, Congress passed legislation that allowed the valley “to be damned to provide water and power” to the city.⁴⁵ Seeing the damage done to the valley, preservationists soon championed for a “comprehensive park management scheme to help increase the ability of the parks to attract visitors.”⁴⁶

To provide a single agency that would provide unified management over the parklands and prevent the lands from being completely depleted by private interests, Congress passed the Organic Act.⁴⁷ Once in effect “[t]he Organic [A]ct creat[ed] the National Park Service, a new federal bureau in the Department of the Interior responsible for protecting the 35 national parks and monuments then managed by the department and those yet to be established.”⁴⁸ It further set in place measures and actors (the Park Service) “responsible for managing the national parks ‘to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner. . . as will to leave them

41. *National Park System Timeline*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/hisnps/NPSHistory/timeline_annotated.htm (last visited Mar. 10, 2017).

42. *U.S. National Parks- In the Beginning*, NAT’L GEO. (May, 26, 2015), <http://www.nationalgeographic.com/travel/national-parks/early-history/>.

43. *Supra* note 41 and accompanying text.

44. Richard J. Annsen Jr. & Dalton L. Hooks Jr., *Protecting and Preserving our National Parks in the Twenty-First Century: Are additional reforms needed above and beyond the requirements of the 1998 National Parks Omnibus Management Act?*, 62 MONT. L. REV. 213, 218 (2001) (“Hetch Hetchy was once a resplendent glacier carved valley, with towering cliffs and waterfalls cascading onto a serene valley floor. Pioneer conservationist John Muir called it a “remarkably exact counterpart” to the now world-famous Yosemite Valley - 15 miles to its south. Hetch Hetchy was one of Earth’s most beautiful places.”). *Id.*

45. *Id.* (In 1913, President Woodrow Wilson signed the Raker Act which allowed for the Hetch Hetchy Valley to be damned ultimately leading to the destruction of the once beautiful valley.).

46. *Id.* at 218.

47. *NPS Organic Act*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/enrd/nps-organic-act> (last updated May 12, 2015).

48. *Supra* note 36 and accompanying text.

unimpaired for enjoyment of future generations.”⁴⁹

In 1933, changes in within the executive branch of the government significantly impacted the relatively young NPS.⁵⁰ Two executive orders from the Roosevelt administration would vastly expand the role of the NPS.⁵¹ The first executive order, numbered 6166,⁵² reassigned 56 national monuments that had been previously managed by the War Department to the NPS.⁵³ These measures were passed in an attempt to, “consolidate[] all the national parks, monuments, memorials, and cemeteries into a single national park system.”⁵⁴

The “National Park Service [then] received all the national monuments held by the Forest Service and the responsibility for virtually all monuments created thereafter”⁵⁵ pursuant to executive order 6288.⁵⁶ With this act, the parks located in our nation’s capital were now under the protection of the NPS.⁵⁷ This included the transfer of national cemeteries to the Department of the Interior.⁵⁸

In 1935, the Preservation of Historic Sites Act was another influential piece of legislation to affect the NPS.⁵⁹ It “declared ‘a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States.’”⁶⁰ The act broadened the powers and duties of the Secretary of the Interior.⁶¹ One of the goals of the act was to provide measures for determining which historic sites “possessed exceptional value” to illustrate U.S. history.⁶² The NPS was now “authorized to conduct research; to restore, preserve, and maintain historic properties directly or through cooperative agreements with other parties; and to mark properties, establish

49. Robert B. Keiter, *The National Park System; Visions for Tomorrow*, 50 NAT. RESOURCES J. 71, 72 (2010).

50. *Supra* note 41 and accompanying text.

51. *Id.*

52. *America’s National Park System: The Critical Documents*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/online_books/anps/anps_3b.htm (last visited Jan. 29, 2017).

53. *Supra* note 36 and accompanying text.

54. *A Brief History of the National Park*, WRTA (May, 9, 2016), <http://wrta.com/a-brief-history-of-the-national-park-service/>.

55. *Supra* note 41.

56. *Supra* note 52.

57. *Supra* note 41.

58. *Supra* note 52.

59. *Supra* note 41.

60. *Id.*

61. See *Id.*

62. *Id.*

and maintain related museums, and engage in other interpretive activities for public education. The legislation's provision for a historic site survey proved valuable in identifying potential additions to the National Park System."⁶³ Over the next several decades, numerous improvements and acts would pass in an effort to maintain, preserve, and keep relevant the NPS.⁶⁴

The effects of the more recent acts, such as the Omnibus Management Act of 1998, remain prevalent in the park system today.⁶⁵ The Omnibus Management Act was broadly tailored to improve accountability and management for various NPS programs.⁶⁶ Part of its purpose was to reform "the process by which areas [were] considered for addition to the National Park System." It required a congressional mandate for those wishing to investigate an area's potential for inclusion into the NPS.⁶⁷ Locating potential park areas was perhaps the least of the act's capability.⁶⁸ It also "instituted the first legislative reforms of the Service's concessions management practices in a generation."⁶⁹ In response, the NPS posted "new regulations and guidelines for concessions contracts, commercial use authorization, and the use of franchise fees," which granted it the ability to "retain concessions franchise fees in the parks in which they were collected."⁷⁰ Effectively, the Act "removed anti-competitive barriers while at same time giving park officials incentive to obtain more reasonable concession fees."⁷¹

Now, "the park system has grown from an original handful of western parks to now include over 390 units situated in 49 states and several territories"⁷² and embodies America's significant cultural heritage.⁷³ Given that in 2016 the NPS boasted over 282 million visitors, its 6th highest year ever, and a 3 million increase since 2011, it appears that the NPS has managed to keep alive the spark of wonder and awe first noticed in the late 1800s.⁷⁴

63. *Id.*

64. *See Id.* (Acts such as: The Endangered Species Act of 1973; the Redwood National Park Expansion Act of 1978; the National Trails System Act of 1968; the Wilderness Act of 1964; and the National Environmental Policy Act of 1969).

65. *See* Annsen Jr. & Hooks Jr., *supra* note 20, at 218.

66. *Supra* note 41.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Supra* note 41.

71. Annsen Jr. & Hooks Jr., *supra* note 20, at 223.

72. Keiter, *supra* note 49, at 72.

73. Annsen Jr. & Hooks Jr., *supra* note 20, at 214.

74. Jennifer Errick, *Park Service Release Most-Visited National Park Data for 2012*, NAT'L PARK CONSERVATION ASSOC., (Apr. 2013),

III. ANALYSIS

A. *A Conservative Challenge to the Future of the National Park System*

Despite its storied existence, the NPS will always face challenges. Perhaps the most prevalent issue facing the NPS is the lopsided balance of power between the Democrats and Republicans in Washington. During the 114th Congress, the Republican party captured both the House and Senate and retained enough seats over the years to keep majorities in both.⁷⁵ Now, with the election of Donald Trump, the Republicans have control of the House, Senate, and presidency; a conglomerate of events that hasn't happened since 1929.⁷⁶ In the past, Congress and the president have diametrically opposed each other.⁷⁷ It is rare for one party to control both Congress and the presidency.⁷⁸

i. The Anti-Parks Caucus

This conservative shift in power could prove harmful to the NPS. On numerous occasions, the Republican party has introduced legislation that would ultimately prove harmful to parks if enacted.⁷⁹ Further, Republicans have also sought to disrupt the NPS in various manners such as funding cuts.⁸⁰ Many believe that a park system in distress would then leave the Republicans reason to call the agency a failure and to allow corporate interference with the country's park system.⁸¹ Also, "Congress has been incapable of passing individual parks and wilderness bills, [and] legislators are pressing to sell off tens of millions of acres of publicly owned land."⁸² From 2013 through 2016, a conservative-controlled Congress "filed at least 44 bills or amendments that attempted to remove or undercut protections for parks and public lands—making the 114th Congress the

<https://www.npca.org/articles/202-park-service-releases-most-visited-national-park-data-for-2012#sm.000apeo4m1d3sfl5pjy1mxxo15d5e>.

75. *Visual Guide: The Balance Of Power Between Congress and the Presidency*, <http://wiredpen.com/resources/political-commentary-and-analysis/a-visual-guide-balance-of-power-congress-presidency> (last visited Mar. 8, 2017). Republicans now have 52 members in the senate and 246 in the house.

76. *Id.*

77. *See id.*

78. *See id.*

79. *See* Rowland, *supra* note 3.

80. R. Muse, *Success GOP Style: America's National Parks are Going Corporate*, POLITICS USA (May 18th, 2016), <http://www.politicususa.com/2016/05/18/gop-success-americas-national-parks-corporate.html>.

81. *Id.*

82. *See* Rowland, *supra* note 3.

most anti-conservation Congress in recent history.”⁸³

Upon a deeper examination of the Republican party, a staunch group of anti-parks politicians emerge. Deeper within the conservative Congress lays the anti-parks caucus, an association of around 20 members of Congress who vehemently oppose the creation and development of national parks.⁸⁴ The Caucus emerged during the Tea Party surge of 2010.⁸⁵ It includes members such as Senator Lisa Murkowski (AK), who has introduced numerous anti-park bills such as Amendment 838,⁸⁶ which encouraged the selling and transferring of public lands to the states.⁸⁷ Those who favored it faced severe backlash when it passed.⁸⁸ Another prominent member of the anti-parks caucus is Representative Jason Chaffetz of Utah who introduced H.R. 435, “the Disposal of Excess Federal Lands Act, which would dispose of 3 million acres of shared public lands by competitive sale.”⁸⁹ In cooperation with Rob Bishop, Chaffetz also co-sponsored a public initiatives act that would “authorize expanded oil and gas development on public lands.”⁹⁰ As noted by the National Parks Conservation Association, the act:

[I]gnores much of the progress made over the past three years and the collaborative approach taken in several of the state’s counties. Overall, the bill is a missed opportunity to protect and preserve some of America’s greatest national parks and their surrounding public lands. Instead, H.R. 5780 would subject much of eastern Utah’s public lands to excessive development and off road vehicle use, while weakening environmental protections.⁹¹

It is a quandary as to why Congress’ affinity for the NPS seems to have eroded given that numerous polls show that Americans have strong feelings of support towards the NPS and those who protect it.⁹² Even the great Republican ideologue, Theodore Roosevelt, was known for his staunch

83. *Id.*

84. Mary Ellen Kustin, *Tea Party Wave Washes Up ‘Anti-Parks Caucus’ in Congress*, (Apr. 11, 2016), <https://thinkprogress.org/tea-party-wave-washes-up-anti-parks-caucus-in-congress-12a4085934f#v8b94wvs5>.

85. *Id.*

86. *See* Rowland, *supra* note 3.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Position on HR 5780, Utah Public Lands Initiative*, NAT’L PARKS CONSERVATION ASSOC., (Sept. 12, 2016), <https://www.npca.org/articles/1320-position-on-hr-5780-utah-public-lands-initiative#sm.000apeo4m1d3sfl5pjy1mxxo15d5e>.

92. Rowland, *supra* note 3.

support for National Parks.⁹³

ii. Attacking the National Park System through Limitation of the Antiquities Act

The Antiquities Act gives the President the authority to declare “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments.”⁹⁴ It further gives the president the ability to “reserve a part thereof parcels of land, compatible with the proper care and management of the objects to be protected.”⁹⁵

Presidents have often “modified national monuments created by their predecessors, often by elevating them to full national parks.”⁹⁶ Park creation and preservation would surely be stifled with the collapse of the Antiquities Act.⁹⁷ Despite this steep consequence, the Act has been attacked by the conservatives numerous times.⁹⁸ Conservative minded Congress’ have “introduced bills to specifically limit or repeal the Antiquities Act, but... ha[ve] rarely succeeded.”⁹⁹ Conservatives often go after it, for the potential power it gives the president to declare land as federally protected or a national monument which often clashes with ideals geared towards development and commercialization.¹⁰⁰ Legislation to attack the Antiquities Act usually follows controversial designations of land by presidents.¹⁰¹ One such example could be after President Clinton’s controversial designation of the Grand Staircase Escalante.¹⁰² During the Clinton administration, a Republican-controlled Congress attempted to pass numerous bills that

93. See *Theodore Roosevelt and the National Park System*, NAT’L PARK SERV., <https://www.nps.gov/thrb/learn/historyculture/trandthenpsystem.htm>.

94. Antiquities Act of 1906, 16 U.S.C. § 431.

95. *Id.*

96. Kevin Miller, *Could Trump undo the new Katahdin-area national monument?*, PORTLAND PRESS HERALD, (Nov. 12, 2016), <http://www.pressherald.com/2016/11/12/trumps-election-puts-katahdin-area-national-monument-back-in-spotlight/>.

97. See generally *The Antiquities Act Under Attack*, NAT’L WILDLIFE FEDERATION (Sept. 29, 2016), <http://keepitpublic.nwf.org/2016/09/the-antiquities-act-under-attack/>.

98. Rowland, *supra* note 3.

99. Brian J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUB. LAND & RESOURCES L. REV. 153, 169 (2011).

100. Rowland, *supra* note 3.

101. Hartman, *supra* note 99, at 169.

102. See *id.* at 174. Many native “Utahns” deemed the act, “the mother of all land grabs” when in 1996, President Clinton used the Antiquities Act to federally protect 1.7 million acres of land.

would limit the power of the act.¹⁰³ These attempts were unsuccessful.¹⁰⁴

A more recent attempt to limit the power of the Antiquities Act was led by representative Rob Bishop of Utah.¹⁰⁵ In 2013, Bishop crafted The Ensuring Public Involvement in the Creation of Natural Monuments Act (H.R. 1459).¹⁰⁶ The bill sought to limit the president's power to decree land as a national monument or federal park by amending the Antiquities Act of 1906.¹⁰⁷ The bill:

Prohibits: (1) the President from making more than one such declaration in a state during any presidential four-year term of office without an express Act of Congress, or (2) such a declaration from including private property without the informed written consent of the affected private property owner.

Requires such a declaration: (1) to be considered a major federal action under NEPA, except if it affects 5,000 acres or less; (2) to be categorically excluded under NEPA and to expire three years after the date of the declaration (unless specifically designated as a monument by federal law) if it affects 5,000 acres or less; and (3) to be followed by a feasibility study that includes an estimate of the costs associated with managing the monument in perpetuity, including any loss of federal and state revenue, and the benefits associated with managing the monument in perpetuity.

Allows a declaration to become permanent if: (1) it is specifically designated as a monument by federal statute, or (2) the President follows the review process under NEPA. Prohibits this Act from being construed to increase the amount of funds that are authorized to be appropriated.¹⁰⁸

Conservatives assail the Antiquities Act arguing that it “no longer serves its original purpose, and [that] federal ownership of land has taken management control away from the states and local interests.”¹⁰⁹ It is clear that the act has the potential to destroy public lands and historical sites.¹¹⁰

103. *Id.*

104. *Id.*

105. *See Moser, supra* note 4.

106. Report of *H.R. 1459 (113th): Ensuring Public Involvement in the Creation of National Monuments Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/113/hr1459> (last visited Jan. 3, 2017).

107. *See id.*

108. H.R. 1459, 113th Cong. (2013) (“NEPA is a federal law that requires federal agencies to evaluate the likely environmental effects of proposed projects on the environment.”) <http://naturalresources.house.gov/legislation/?legislationid=373659>.

109. Nicolas Loris, *The Antiquated Act: Time to Repeal the Antiquities Act*, THE HERITAGE FOUNDATION (Mar. 25, 2015), <http://www.heritage.org/research/reports/2015/03/the-antiquated-act-time-to-repeal-the-antiquities-act>.

110. *See supra* note 97 and accompanying text.

The question is with this new conservative Washington, will similar acts be proposed and passed despite “new polling data show[ing] that 70 percent of American voters strongly support efforts by President Obama to permanently protect some public lands for future generations as national monuments of wildlife refuges, including 76 percent of independent voters[?]”¹¹¹

iii. Ameliorating National Park Concerns

So, what’s left? What do we do in such an anti-parks climate? Many fear for the future of the NPS given the conservative climate. Further with the NPS, which tweeted negatively about President Trump in the last weeks, such an issue could be on his radar now.¹¹² Regarding a Republican attack on the Antiquities Act, which would ultimately hurt the National Park Service, one thing is for certain. The “success of the Antiquities Act in promoting the conservation and preservation of America’s historical and scientific sites cannot be questioned.”¹¹³ Further, “although the Antiquities Act has a tendency to generate controversy, history indicates that the Act is not in serious jeopardy of repeal or significant amendment.”¹¹⁴ History also lends comfort in the fact that no president has ever reversed a national monument designation.¹¹⁵ It is unlikely that President Trump would be the first. It must be noted as well that since the art of business has notably been his “claim to fame,” it is likely that President Trump would embrace the economic values in the parks rather than destroy them.¹¹⁶ In regards to the sale of public lands, Democrats may breath easy given that the President has affirmatively said that he has no plans to sell the land in an effort to “keep the lands great.”¹¹⁷ This may be a good indicator of the manner in

111. See Moser, *supra* note 4.

112. Dan Merica & Dana Bash, *Trump admin tells National Park Service to halt tweets*, (Jan. 23, 2017), <http://www.cnn.com/2017/01/21/politics/trump-national-park-service-tweets/> (Perhaps in an act of defiance, the NPS retweeted images negatively comparing President Trump’s inaugural crowd to that of Barack Obama’s in 2008).

113. Hartman, *supra* note 99, at 176.

114. *Id.*

115. Miller, *supra* note 96.

116. Kurt Repanshek, *How Will A Trump Administration Treat the National Park System?*, NAT’L PARKS TRAVELER (Nov. 10, 2016), <http://www.nationalparkstraveler.com/2016/11/how-will-trump-administration-treat-national-park-system>.

117. Michelle Nijhuis, *What Will Become of Federal Public Lands Under Trump?*, THE NEW YORKER (Jan. 31, 2017), <http://www.newyorker.com/tech/elements/what-will-become-of-federal-public-lands-under-trump>.

which President Trump intends to deal with the NPS. Perhaps the President will be able to find the sweet spot between improving the economy of the NPS and exploiting the park system's resources.

We must also have hope in the President's selection for the Secretary of Interior, the branch of government that manages the NPS. As of last week Ryan Zinke was confirmed by the Senate.¹¹⁸ Zinke, a former navy seal and former Representative from Montana, may be a good fit for the NPS. When asked about future actions he would take, nominee Zinke "told the Senate Natural Resources Committee that Trump's infrastructure spending plans should 'prioritize the estimated \$12.5 billion in backlog of maintenance and repair' at hundreds of national parks across the county."¹¹⁹ Further, Zinke has publicly acknowledged climate change, which isn't a given in the Trump administration.¹²⁰ This bodes well for NPS supporters who fear the possibility of a climate denier as the head of the NPS. Continuing to sully the concerns of Democrats, Zinke has affirmatively stated that he is opposed to the transfer or sale of public land.¹²¹ Demonstrating his strict adherence to the position, Zinke even quit the "GOP platform-writing committee last summer after the group included language that would have transferred federal land to [the] states."¹²² To remain loyal to a belief in such a polarizing political climate demonstrates a desire to truly rehabilitate the NPS rather than extort its resources.

The most obvious solution, however, would be for the Democrats to win back their seats in the House and Senate, the more probable of the two being the Senate given the narrower number of seats needed by the Democrats to attain a majority.¹²³ Any seats won by democrats could prove to be the seats that ultimately provide a balance to an anti-parks Washington.

Finally, it must be noted that not all past and present conservatives share such disdain for the national parks as do the anti-parks caucus; many revere the parks.¹²⁴ These conservatives must be brought to the forefront of the

118. Darryl Fears, *Interior secretary nominee Zinke: National parks repair list should be part of Trump infrastructure plan*, THE WASH. POST (Mar. 1, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/01/senate-confirms-ryan-zinke-as-interior-secretary/?utm_term=.7e571feac927.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. See Jeff Stein & Sarah Frostenson, *Can Democrats Retake Congress? Here's the math- and for Nancy Pelosi, it's grim*, Vox (Nov. 4, 2016), <http://www.vox.com/2016/11/3/13495816/vox-congress-tracker>.

124. See generally Rowland, *supra* note 3.

national park debate to influence their peers. Effectively managing wide swaths of federal land benefits all parties in one way or another.¹²⁵ In order to come to a solution, the fine line between over-commercialization, the fear of many Democrats, and federal lands sitting around and wasting away, a Republican concern, must be found to promote efficient land management.¹²⁶

B. A Lack of Diversity Among the National Park System

Another major issue facing the NPS in 2017 is diversity, or a lack thereof. This isn't a new problem as "[u]nderrepresentation of diverse racial and ethnic groups in national parks has been an issue for many years."¹²⁷ Many different factors contribute to the lack of diversity in the NPS such as cost, lack of knowledge, park concerns and poor service, lack of access, disparate treatment and implicit racial bias to name a few.¹²⁸ Going into the new year, the park system faces significant hurdles in undermining racial stereotypes that have slowly accrued throughout the decades.¹²⁹ With close to 80% of the park service's employees being white, racial stigmas associated with that may be hard to overcome.¹³⁰ This percentage may also derive from bigger cultural and political implications.¹³¹ Out of over 300 environmental organizations, foundations, and government agencies, minorities did not exceed 16% of each organizations board or staff.¹³²

Many minorities, who have yet to visit a National Park, believe that the parks "provided poor service and were not safe to visit."¹³³ Sadly, this "means that perceptions ha[ve] congealed into reality among what should be an important constituency for the parks."¹³⁴ As one African-American noted when describing her thoughts on the NPS:

There was always nervous banter as we cruised through small rural towns on our way to a park. And there were jokes about finding a "Whites

125. *Id.*

126. *See generally* Andrew Follett, *Enviros Back Trump's Pick for Interior Secretary*, THE DAILY CALLER, Jan. 24, 2017), <http://dailycaller.com/2017/01/24/enviros-back-trumps-pick-for-interior-secretary/>.

127. Rebecca Stanfield McCown & Daniel N. Laven, *Evaluation Research to Support National Park Service 21st Century Relevancy Initiatives*, NAT'L PARK SERV. (Sept. 2008), <https://www.nps.gov/civic/resources/narrative.pdf>.

128. Mott, *supra* note 7, at 460.

129. *See id.*

130. Nelson, *Why Are Our Parks So White?*, *supra* note 8.

131. *See id.*

132. *Id.*

133. *Id.* (In the 2011 park service survey, nonwhites were more than three times as likely

134. *Id.*

Only” sign at the entrance to our destination or the perils of being lynched or attacked while collecting firewood after the sun went down. Our cultural history taught us what to expect.¹³⁵

Another significant barrier that has disinclined minorities from visiting National Parks could be a lack of historical connection to the areas forever preserved.¹³⁶ This lack of connection which results in a “lack of cultural attachment” can lead to minorities not wishing to visit the national parks.¹³⁷ In support of this theorem, the “NPS notes that successful park programming is low ‘ if participants do not feel as though their history and culture are part of the park’s interpretive story.’”¹³⁸ Advertising also plays a key role into marketing the NPS. Similar to “the rest of the nation, [the] NPS celebrates African American History month” yet many feel it is not marketed, advertised, or announced in an efficient manner.¹³⁹

More concerns faced by minorities debating on whether to visit national parks center around park concerns and poor service. Given that “[r]oughly a quarter of all racial minorities surveyed by the NPS found national parks to be unsafe or unpleasant,” a central feeling of being unwelcome began to emerge amongst minorities as a whole in the NPS.¹⁴⁰ Further, the effects of a segregated country have trickled down into the present day.¹⁴¹ Many remember a time where they weren’t allowed to visit a national park before the fruition of the civil rights movements.¹⁴² Thus, this sentiment of being unwelcome engrained into the hearts and minds of many minorities still bears its teeth today.¹⁴³

i. An Answer to Diversity Issues

This idea “that the national parks and the rest of nature are an exclusive club where minorities are unwelcome,” which seems to have permeated itself into the cultural identity of millions of Americans, must be “demolished.”¹⁴⁴ We must further note that “the United States government has taken action to promote racial diversity” in the past by manner of federal regulation. These regulations have proved to be successful.¹⁴⁵

135. *Id.*

136. Mott, *supra* note 7, at 452.

137. *Id.* at 452-53.

138. *Id.*

139. *Id.*

140. *Id.* at 459.

141. *See id.* at 455-59.

142. *Id.*

143. *Id.* at 459.

144. Nelson, *supra* note 8.

145. Mott, *supra* note 7, at 448; *See infra* text accompanying note 153.

However, six themes have been identified by extensive studies done by the NPS that identify possible areas to improve.¹⁴⁶ These themes include: community involvement, inclusive interpretation and histories, national park service climate, program sustainability, workforce diversity, media and communication.¹⁴⁷ As noted in the study, “[c]ommunity involvement emerged as an important theme associated with the ways in which national parks can effectively engage diverse communities.”¹⁴⁸

Further, even simple fixes such as providing transportation to and from the parks could aid in lessening the racial gap between attendees throughout the NPS.¹⁴⁹ One way to do this could be the expansion of transit systems or the creation of programs aimed at providing a means for those without a means to get to the parks.¹⁵⁰ Some parks have already undertaken similar measures such as Saguaro National Park, which employs a park ranger to be a liaison between local schools and the parks in an effort to coordinate fieldtrips and other activities.¹⁵¹ Social scientists have also addressed a lack of access as a barrier to the NPS such as Myron Floyd, who offers many theories such as the marginality hypothesis which “theorizes that minority groups do not participate in park visitation due to limited socioeconomic circumstances as a consequence of historical patterns of discrimination.”¹⁵²

Another avenue to improve relations between minorities and the NPS could be the further creation of urban based national parks or monuments.¹⁵³ This idea has “become an increasingly popular topic of discussion, especially in conversations about making the NPS more relevant to an increasingly diverse population.”¹⁵⁴ One such successful example, could be that of New York’s own Central Park which has played a role in “building and maintaining healthier and more livable cities and communities.”¹⁵⁵

Those concerned with diversity issues plaguing the NPS must also look towards effectively utilizing its Urban Agenda program. The creators of the

146. McCown & Laven, *supra* note 127.

147. *Id.*

148. *Id.*

149. *Id.*

150. Mott, *supra* note 7, at 465.

151. *Id.* at 466.

152. *Id.* at 460.

153. See 2016 Urban Agenda Call to Action Initiative, NAT’L PARK SERV. https://www.nps.gov/subjects/urban/upload/urbanagenda_web.pdf (last visited Feb. 19, 2017).

154. Sarah J. Morath, *A Park For Everyone: The National Park Service In Urban America*, 56 NAT. RESOURCES J. 1, 14 (2016).

155. See *supra* note 153.

Urban Agenda began as a small sect of NPS leaders who eventually went on to “enlist over 350 people from within and outside the NPS, representing almost every state and over 40 park units.”¹⁵⁶ The Agenda acknowledges the value of the NPS to young people from different walks of life and aims to provide a doorway to “outdoor recreation and natural arts, culture and history; and perhaps most importantly, gain some sense of confidence and encouragement about their own future.”¹⁵⁷ The physical and aesthetic quality of urban neighborhoods can be significantly influenced by parks.¹⁵⁸ As noted in the NPS’s “urban agenda”, “the environmental, economic and social well-being of the nation hinges on the vitality and prosperity of its cities.”¹⁵⁹

Cities are dynamic cultural and information hubs constantly driving new ideas, trends and innovation out across the nation.”¹⁶⁰ The current and future urban parks must remain relevant “to all city residents, especially those who may not be able to access the more distant park lands like Yellowstone, Yosemite, and the Grand Canyon, the kind of places for which the National Park Service (NPS) is well known.”¹⁶¹ Despite the many hurdles that challenge the NPS in designating urban areas as national parks, such as zoning laws, industrialization, and overlapping jurisdictions, there are many urban areas deserving of national designation.¹⁶²

Another way in which the NPS has already addressed its diversity issues is through its creation of Groundwork USA.¹⁶³ The NPS created this program in 1998 to “create green spaces in post-industrial cities, revitalize urban waterways, and restore brownfields that hinder community development.”¹⁶⁴ Groundwork aims to work with “residents of marginalized communities to transform neighborhoods into green, healthy, resilient places where all can thrive.”¹⁶⁵ These efforts have provided an avenue for urban youth to participate in conservation, which could in turn encourage urban youth from different demographics to visit and participate in park

156. *Id.*

157. *Id.*

158. Chris Walker, *The Public Value of Urban Parks*, THE URBAN INSTITUTE, <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/311011-The-Public-Value-of-Urban-Parks.PDF> (last visited Mar. 3, 2017).

159. *See supra* note 153.

160. *Id.*

161. *Id.*

162. *Id.* at 2.

163. Curt Collier & Liz Carver, *Changing the Face of Conservation in America*, GROUNDWORK USA, <http://groundworkusa.org/changing-face-conservation-america/>

164. *Id.*

165. *Id.*

activities.¹⁶⁶ One can see the effectiveness of Groundwork USA given that 90% of the 18,731 youth enrolled in 2014 were of color, and were successfully connected to the NPS.¹⁶⁷

To further combat diversity issues, the NPS could pull out one of its older plays, and create a modern-day Civilian Conservation Corps, otherwise known as the “CCC.” Back in March of 1933 the CCC was created as a New Deal Program under the Roosevelt administration.¹⁶⁸ The CCC provided jobs to young men during the Great Depression.¹⁶⁹ In order to secure jobs for unemployed youth and to get them off the streets, the CCC gave many the ability to live in camps to work on soil conservation and reforestation.¹⁷⁰ The young men “planted millions of trees on land made barren from fires, natural erosion, or lumbering...Corpsmen also dug canals, and ditches, built over thirty thousand wildlife shelters, stocked rivers and lakes with nearly a billion fish.” In return, those who worked in the CCC were given “benefits of education and training, a small paycheck, and the dignity of honest work.”¹⁷¹

Applied to the modern day, a new CCC could get similarly situated young men and women off the streets and working around nature, thus creating a relationship with the NPS that would hopefully transcend race, and perpetuate into future generations. There would be plenty of work given the many far reaching designations created by President Obama. With over 20 designations that span over millions of acres,¹⁷² surely a park management program could be created for those less fortunate to find an honest job in such a tough job climate.

As noted by Jonathan B. Jarvis, the former director of the NPS, “The National Park Service’s first century was about bringing people to the parks. It’s second century will be about bringing parks to the people.”¹⁷³

166. *Id.*

167. *Id.*

168. *Civilian Conservation Corps*, NAT’L PARK SERV. <http://www.history.com/topics/civilian-conservation-corps> (last visited Mar. 3, 2017).

169. *Id.*

170. *See id.*

171. *Id.*

172. *See Monuments Protected Under the Antiquities Act*, NAT’L PARKS CONSERVATION ASSOC. <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act#sm.0001h3c69pegaec9v391srztt95x1> (last visited Mar. 3, 2017).

173. *National Parks Service in the 21st Century: Building Relevancy in Urban America Through Recreation*, NAT’L PARK SERV. http://www.recpro.org/assets/Conference_Proceedings/2014_building_relevancy_urban_america-ratcliffe.pdf. (last visited Mar. 3, 2017).

Though Mr. Jarvis is gone, we must retain his sentiment and despite having tried in the past, we must continue strive to defeat diversity issues to help assure a better relationship between minorities and the NPS.

C. Safety and the Murder-Zone

It might not be the most pressing issue that the NPS faces in 2017 but perhaps the most intriguing, the “Murder-Zone,” has shed light on poorly drawn jurisdiction lines in Yellowstone National Park.

In constitutional law, venue and vicinage go hand in hand to determine where a trial is held (venue) and the place in which the jurors are pooled from (vicinage.)¹⁷⁴ These concepts are basic requirements of Articles III and VI of the United States Constitution.¹⁷⁵ In order for the location of a trial be constitutionally sound, it must occur in the state where the crime was committed as required by Article III.¹⁷⁶ For the jury’s decision to be a valid and binding judgment, the individual jurors must have been drawn from both the state and district court in which the crime occurred.¹⁷⁷ This is where the concept of the so-called Murder-Zone derives from. An example provided by the discoverer of the loophole, Professor Brian Kalt, should help to demonstrate. Suppose that you are in the Idaho portion of Yellowstone and commit numerous criminal acts.¹⁷⁸ You are then:

arrested [and] arraigned in the park, and bound over for trial in Cheyenne Wyoming before a jury drawn from the Cheyenne area. But article III, Section 2 plainly requires that the trial be held in Idaho, the state in which the crime was committed. Perhaps if you fuss convincingly enough about it, the case would be sent to Idaho. But the Sixth Amendment then requires that the jury be from the state (Idaho) and the district (Wyoming) in which the crime was committed. In other words, the jury would have to be drawn from the Idaho portion of Yellowstone national Park, which, according to the 2000 Census, has a population of precisely, zero.¹⁷⁹

With a population of zero, a jury trial could not be had for any would-be criminals in the Idaho portion of Yellowstone. This, combined with how the issue has caught on as a viral trend, and lack of congressional attention, could lead to people attempting to exploit the lawless zone.

In the 2005 Georgetown Law Journal, Professor Brian Kalt published an essay with his discovery of what has been designated as the Murder-

174. Kalt, *supra* note 16, at 675.

175. *Id.*

176. U.S. CONST. art. III, § 3, cl. 2.

177. *See id.*

178. Kalt, *supra* note 16, at 675.

179. *Id.* at 687.

Zone.¹⁸⁰ His essay noted “that there was a 50-square mile ‘Zone of Death’ of the United States where you can commit crimes with impunity.”¹⁸¹

Pop-culture immediately caught ahold of the story and ran with it.¹⁸² The discovery even inspired a novel called ‘Free Fire’ written by CJ Box who based the book largely in part on the curious jurisdictional boundaries found in Yellowstone.¹⁸³ In the novel, an attorney named Clay McCann “admi[ts] to slaughtering four campers in a back-country corner of Yellowstone National Park.”¹⁸⁴ Due to the quirky issues with the park’s jurisdiction, McCann is let free in a seemingly hopeless prosecutorial situation.¹⁸⁵ While describing the problems presented in his essay, Kalt discussed the zone in depth and proposed that Congress ultimately close the loophole; a fix as simple as Congress passing a law that would place Idaho’s portion of the park inside the district of Idaho.¹⁸⁶ However, years later, Congress has not taken action to amend the boundaries of the park.¹⁸⁷

A few years later Kalt wrote a follow up article entitled “Tabloid Constitutionalism: How a Bill Doesn’t Become a Law.”¹⁸⁸ In it, he notes that he “alerted the Department of Justice, the US Attorney for Wyoming, and the House and Senate Judiciary Committees of the loophole a year before publishing his piece,” in hopes of preventing people motivated by the article from going out and committing crimes in Yellowstone.¹⁸⁹

Unfortunately, the “press blitz,” and attempts to close the park’s loophole weren’t enough.¹⁹⁰ Numerous representatives didn’t think that the loophole was a significant issue.¹⁹¹

It is interesting to note that the parts of the park that encroach into Montana and Idaho were given to Wyoming’s jurisdiction.¹⁹² The real question is why the legislature did this knowing that portions of the land encroached into other states? It appears that it was a simple mistake rather than a decision fueled by lobbying and political gamesmanship. Further,

180. Dylan Matthews, *Yellowstone has a 50 square mile “Zone of Death” where you can get away with murder*, VOX (Oct. 29, 2016).

181. *Id.*

182. *See id.*; Rodgers, *supra* note 13.

183. Matthews, *supra* note 180.

184. *Author Page for CJ Box*, <http://www.cjbox.net/free-fire/> (last visited Mar. 10, 2017).

185. *Id.*

186. Matthews, *supra* note 180.

187. *See id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Kalt, *supra* note 16 at, 677.

“[w]hen Congress set up United States District Court for the District of Wyoming, it must have seemed too much trouble to divide Yellowstone between Wyoming and two other districts, especially when crime was rampant in the park and going unpunished.”¹⁹³ The rarity of this allegedly “lawless zone” is basically unprecedented in American history, there has only been one other scenario where a federal jurisdiction has been comprised of two or more states.¹⁹⁴ This area was known as the District of Potomac.¹⁹⁵ Though it’s life was short, approximately a year, the District of Potomac was federal jurisdiction that comprised the District of Columbia, and portions of Maryland and Virginia in 1801.¹⁹⁶

When Yellowstone was created, Wyoming was given sole federal jurisdiction over the park as indicated in 28 USCS 131 which holds that “Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho constitute one Judicial District.”¹⁹⁷ Further, when Montana and Idaho were admitted as states, each “ceded exclusive jurisdiction of its portion in Yellowstone to the federal government.”¹⁹⁸

The designation giving Wyoming sole federal jurisdiction over the park creates constitutional problems that derive from the venue and vicinage clauses of the Constitution.¹⁹⁹

i. The Park’s Article III and VI implications

The two major factors that lend themselves to the creation of the “Murder-Zone” are Article III section 2 clause 3 (venue) and Article VI (vicinage) of the Constitution.²⁰⁰ The object of Article III, section 2, clause 3 “was to preserve unimpaired trial by jury in all those cases in which it had been recognized by common law and in all cases of like nature as they might arise in future, but not to bring within sweep of guaranty those cases in which it was then well understood that jury trial could not be demanded as of right.”²⁰¹ It mandates that “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State

193. *Id.*

194. *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_special_dc.html (last accessed Oct. 26, 2016).

195. *Id.*

196. *Id.*

197. 28 U.S.C. § 131.

198. Kalt, *supra* note 16, at 677.

199. *Id.*

200. *See id.* at 678.

201. *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (Under the Articles of War, eight Germans trying to enter the United States in order to commit espionage were precluded from having a jury trial at common law in the civil courts.).

where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”²⁰²

As described in *United States v. Levy Auto Parts*, the Constitution “requires that local crimes be prosecuted locally in order to alleviate a defendant’s hardship at being sent to a strange locality to defend himself against the powerful prosecutorial resources of the government.”²⁰³

Though Article III’s “venue provision did not specifically address the location from where the jury would be drawn, it did indirectly guarantee that a defendant would be tried by a jury drawn from the state.”²⁰⁴ As such, “[t]he language in Article III played a significant role in leading to the drafting of what eventually became the Sixth Amendment. Since Anti-Federalists feared that Article II did not preserve the common law practice of trial by a jury of the vicinage, they sought a specific vicinage right in the Constitution as a limit on the power of the federal government.”²⁰⁵

The vicinage clause is an all but forgotten component of the Sixth Amendment which lends itself to the creation of the Murder-Zone.²⁰⁶ It answers the question as to where juries will be pooled from to participate in a trial and is perhaps the most crucial party to the Yellowstone jurisdiction analysis.²⁰⁷ The Sixth Amendment holds:

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.²⁰⁸

Most would read this provision and wonder what’s the difference? Well, the vicinage clause separates itself from Article III, section 2, clause 3 of the Constitution in that it deals with vicinage, otherwise known as where the jury is actually selected from such as a county or district.²⁰⁹ In contrast, Article III section 2, clause 3 merely declares the cursory rule that one shall

202. U.S. CONST. art. III, § 3, cl. 2.

203. *United States v. Levy Auto Parts*, 787 F.2d 946, 952 (4th Cir. 1986).

204. Sanjay K. Chhablani, *Re-Framing the “Fair Cross-Section” Requirement*, 13 U. PA. J. CONST. L. 931, 950 (2011).

205. *Id.*

206. *See* Kalt, *supra* note 16, at 677.

207. *See id.*

208. U.S. CONST. amend. VI.

209. *Id.*

be tried by a jury by the state in which the crime was committed.²¹⁰

Historically, the “importance of having the jury be drawn from the geographic area in which the crime was committed can be traced back several centuries to the time when jury trials were first held.”²¹¹ Back then, part of selecting jurors actually relied upon the selection of those with close ties to the individual on trial along with the area in which the alleged crime was committed.²¹² Not only were jurors asked to review the facts presented to them by the attorneys like in modern day trials, they were also asked to “their own personal knowledge of the crimes and defendant.”²¹³ The personal knowledge required by the courts “would have been lacking in jurors who did not reside in the geographic locale in which the crime was committed and so the right to a jury trial came to be inexorably linked to the right to have jurors drawn from the vicinage of the crime.”²¹⁴ Before the Constitution was amended, it only provided “that the venue of the trial be in the state in which the crime occurred.”²¹⁵

Eventually, in 1789, an early form the of the Sixth Amendment was proposed by James Madison.²¹⁶ At the time, Madison had intended for “his proposals to replace Article III’s venue provision directly rather than be included as a separate amendment to the Constitution.”²¹⁷ However, early on the proposal was met with opposition,²¹⁸ due to the phrasing and the use of the actual word vicinage.²¹⁹ Many at the time believed the word “vicinage” to be too vague.²²⁰ Vicinage could have encompassed numerous things ranging come close-knit communities to huge districts.²²¹ A major problem in shaping the amendment was the differences in procedure that most states had in selecting juries.²²² In some states jurors were drawn from the community arbitrarily, while in others they were drawn from large districts that were comprised of multiple counties.²²³

After much debate, the House of Representatives adopted the language

210. U.S. CONST. art. III, § 3, cl. 2.

211. Chhablani, *supra* note 204, at 949.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 950.

216. *Id.* at 953.

217. *Id.* at 951.

218. *Id.*

219. *Id.*

220. *Id.*

221. *See id.*

222. *Id.* at 953.

223. *Id.*

that we now read in Article Six today.²²⁴ To address the concerns that the Senate had previously quarreled over, “the House version did not contain the word ‘vicinage,’ assuaging Senate fears about the potential ambiguity. Rather, the concept of vicinage was tied to a ‘district,’ which was a geographic area with definite boundaries that could be defined by the Judiciary Act.”²²⁵ The House’s proposal was then accepted by the Senate on September 25th.²²⁶ In terms of defining what the House referred to in its amendment proposal as “district,” it was left to those who debated the Judiciary Act of 1789.²²⁷ Over the course of the debates, the term “district” was subject to three possible definitions regarding vicinage in the federal courts. The definitions held:

First, Section 29 mandated that jurors for capital cases should be drawn from the county where the crime was committed, unless doing so would cause ‘great inconvenience.’ Second, the Act gave judges broad latitude with regard to vicinage for noncapital cases, stating that a federal judge could draw jurors ‘from such parts of the district from time to time as the court shall direct so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense or unduly burthen [sic] the citizens of any party of the district with such services.’ Although jurors had to be drawn from the district, the judge had discretion to determine what location within the district jurors would be drawn from. Third, the Act allowed a hybrid of the first two vicinage situations for capital cases in which ‘great inconvenience’ would occur if jurors were only drawn from the county of the crime. In such a situation, the Judiciary Act mandated that twelve jurors be chosen from the county of the crime, and the court had discretion to choose the vicinage of the rest of the jurors to round out the jury pool.²²⁸

In sum, the vicinage clause played a crucial role in the formation of the Sixth Amendment.²²⁹ With it, “[d]efendants in all criminal prosecutions were guaranteed not only a trial located in the state where the crime allegedly occurred, but also a trial conducted before a jury drawn from the ‘district’ in which the crime was allegedly committed.”²³⁰

ii. Solution and Assurance

Numerous things must be addressed when discussing the Murder-Zone

224. *Id.* at 955.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 955.

229. *Id.* at 956.

230. *Id.*

loophole and its exploitation. First, for those who are concerned for their safety, this area has existed for several hundred years and has had precisely zero incidences of crime.²³¹ There has only, as of recently, been one case ever to even come close this area. In *United States v. Belderrain*, the defendant was “indicted with charges stemming from his unlawful killing of a bull elk while within Yellowstone National Park in southwestern Montana.”²³² Officials “learned about an elk’s head in a taxidermist’s shop in Montana. In the investigation, Mr. Belderrain, the taxidermist, and others told the government that Mr. Belderrain had shot the elk in the Buffalo horn drainage, an area outside of Yellowstone National Park, while Mr. Belderrain was on an outfitting expedition.”²³³ Evidently, the defendant “was standing in Yellowstone when he fired the shot and dragged the elk’s head to a truck parked in Yellowstone, so he was indicted in the US District Court for the District of Wyoming.”²³⁴

Eventually, Belderrain objected, citing Kalt’s published paper and argued that “he had a right to be tried by jurors from the Montana portion of the park. That’s actually somewhat possible, as the Montana part of Yellowstone is inhabited, but there are few enough residents that a trial would be difficult.”²³⁵ Instead of appeasing Belderrain’s request to “call such a jury or present an argument for why the Sixth Amendment did not entitle Belderrain to such a trial, the court dismissed the argument out of hand, precisely because it would imply that Yellowstone contains a Zone of Death.”²³⁶ Though it may not comport to the Constitution in the truest sense, in the practice of legal realism could show, that even if a crime was to be committed in the zone the court would likely overlook it and find other grounds to convict or dismiss.

Further, the prosecution’s power is far reaching in its inherent ability to find a way to successfully pursue potential perpetrators.²³⁷ This latitude in prosecutorial ability can be inferred by 18 U.S.C.A sec. 3237(a) which “authoriz[es] prosecution in any district in which an offense ‘was begun, continued, or completed.’”²³⁸ For example, should someone conspire with others to commit a crime in this zone, prosecutors could have the trial in the place where the significant element of the crime was planned or conspired

231. Matthews, *supra* note 180.

232. *United States v. Belderrain*, No. 08-8016, at 1 (10th Cir. Jan. 29, 2009).

233. *CSI Yellowstone, or Whatever Happened to Bambi?*, TENTH CIRCUIT BLOG http://circuit10.blogspot.com/2009_01_01_archive.html (Jan. 30, 2009).

234. Matthews, *supra* note 180.

235. *Id.*

236. *Id.*

237. See generally Kalt, *supra* note 16 at, 682-33.

238. *United States v. Levy Auto Parts*, *supra* note 203.

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thus nullifying the problem with the small zone.²³⁹

Also, determining constitutional venue can be broadly interpreted, that given that “there is no single defined policy or mechanical test to determine constitutional venue, rather, the test is best described as substantial context rule that takes into account number of factors.”²⁴⁰ Factors such as the “site of defendants acts, elements and nature of crime, locus of effect of criminal conduct, and suitability of each district for accurate fact finding.”²⁴¹

Despite the unlikelihood of the zone ever being exploited, what Kalt suggests rings true. It appears that the best action in remedying this would be to convince Congress to amend the jurisdictional error.²⁴² However, Congress has perhaps shed light on the zone’s true significance by failing to address it in general, believing it not to be a pressing issue.

IV. CONCLUSION

The new year will without a doubt bring many challenges to the NPS. These challenges will vary ranging in their far-reaching effects.²⁴³ From anti-parks sentiment in D.C. to diversity issues or safety concerns, solutions must be pursued by the NPS in an effort to maintain the wonder of the NPS. As a hyper conservative anti-parks caucus slowly emerges, we, as a society, must place trust “in the system” and believe in precedent which has showcased conservative efforts in the past failing to limit land designating presidential powers such as the Antiquities Act. We must also do our part to place leadership and priority upon the shoulder’s of moderate conservatives and try to find an agreeable line between over-commercialization and a lack of management of federal lands.

The NPS must further strive to attain diversity in its cultural outreach and programs.²⁴⁴ With such high attendance being, for the most part, comprised of older white male and females, cultural diversity must be improved in an effort to extend the services of the NPS to those who lack access to the parks which in turns fosters a lack of connection or care for the NPS.²⁴⁵ Programs that have been established such as Groundworks USA, who provide a means for urban youth to get out and see the parks must be built upon, and past programs such as the CCC must be reinvigorated to address minorities affected by an economy riddled with job loss. This could provide

239. See Kalt, *supra* note 16 at, 682-33.

240. *United States v. Reed*, 773 F.2d 477, 481 (2nd Cir. 1985).

241. *Id.*

242. See Kalt, *supra* note 16, at 688.

243. See generally Nijhuis, *supra* note 118.

244. See *supra* note 184.

245. See Nelson, *supra* note 8.

a means for those affected to essentially “get out there” and see the parks, earn a paycheck, and foster a connection to the NPS through their own hard work.²⁴⁶

With hundreds of millions of miles of federally protected land in the United States, safety concerns involving crime will inevitably be an issue for the NPS.²⁴⁷ More specifically in 2017, the Murder-Zone, which has captured the attention of the viral media must be addressed.²⁴⁸ Viral websites have quickly dubbed the zone a land where all crime is illegal.²⁴⁹ However, numerous things must be mentioned in order to provide context to help dispel the fears of would be readers.

Firstly, as the discover of the zone notes, this could be a quick fix by Congress provided someone gets them to listen.²⁵⁰ Secondly, the prosecutorial capabilities of the government give attorneys leeway in charging defendants in different locations based on where certain elements of the crime were committed.²⁵¹ This significantly narrows the defendant’s actions to having to all take place within the alleged “zone of death” adding to the improbableness of a failed prosecution.²⁵² Finally, the fact that no case or crime has ever been reported here strongly suggests that it is unlikely that this rare vicinage issue will come to fruition.²⁵³ Opponents may cite the recent Belderrain case in which a man committed a crime in the Montana portion of Yellowstone. However, this portion has enough people for a jury, thus making it not the same as the Idaho portion of the park.²⁵⁴ Even if it did, the judges paid no mind to the defendant’s argument. Under legal realism in which the law is considered what judges actually decide in a court of law, it appears that the zone would always be ignored anyways.²⁵⁵

246. *See supra* notes 168-69 and accompanying text.

247. *See generally* Kalt, *supra* note 16, at 677.

248. *See* Matthews, *supra* note 180; *see Rogers*, *supra* note 13.

249. *See* Matthews, *supra* note 180.

250. *Id.*

251. *See generally* Kalt, *supra* note 16 at, 682-83.

252. *See id.*

253. *Id.*

254. *See generally* Kalt, *supra* note 16 at, 683-64.

255. *See supra* note 233.