

THE YELLOWSTONE LOOPHOLE

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When I wrote *The Perfect Crime*, 93 GEO. L.J. 675 (2005) ([available for download here](#)) I had almost a year before publication. I hoped that Congress would do the smart thing and close the loophole during that time. As I recounted in the follow-up article, *Tabloid Constitutionalism: How a Bill Doesn't Become a Law*, 96 GEO. L.J. 1971 (2008) ([available for download here](#)), Congress did not act and the Department of Justice showed only contempt for the 6th Amendment.

I probably should have expected that. But I could not have predicted in 2005 that thirteen years later, there would be numerous sensationalized, inaccurate clickbait videos posted about my theory on social media. These videos have gotten millions of views and hundreds of comments from people whose opinions are as vehement as their understanding of the legal issues is shallow. It's not all their fault—as I said, the videos are inaccurate. But I would still like people (1) to properly understand what the legal argument is; and (2) to prefer fixing the loophole to rolling the dice on a criminal possibly going free.

This document is my attempt to explain the theory to people who are actually interested in comprehending it, and to respond to some common sentiments and errors about it that I have observed online.

The Theory

1. The U.S. District Court for the District of Wyoming includes all of Yellowstone National Park, including the small portions that are in Idaho and Montana. The Districts of Idaho and Montana exclude those states' portions of the park. So **the Idaho portion of Yellowstone is in the state of Idaho, but is assigned to the judicial district of Wyoming.**

2. Under both federal and state statutes, the federal government has exclusive jurisdiction over Yellowstone National Park. Only a few federal lands have this feature; Yellowstone is one of them. The states can serve process and pursue fugitives in the park, but **the states are powerless to prosecute crimes that occur in Yellowstone.** See 16 U.S.C. § 21; Idaho Code § 58-701.

3. The 6th Amendment gives federal criminal defendants the right to trial by a jury “of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” For a crime committed in the Idaho portion of Yellowstone, that means **the jurors must be from the Idaho portion of Yellowstone.**

4. Nobody lives in the Idaho portion of Yellowstone. Therefore, any trial for a crime committed there would violate the defendant's 6th Amendment rights. **The defendant would need to be freed.**

That's the theory, anyway. As explained more below, it might not fly in court and, even if it does work, it has lots of limits and caveats.

**Replies to some common sentiments on social media
(quotes are from Facebook posts or comments)**

1. "There's a section of Yellowstone National Park called the 'Death Zone' where you can literally get away with murder."

No one has ever gotten away with murder there. It is an untested legal theory. Even if the theory did succeed in court, it would have important limits—the defendant could still face: (1) criminal liability for any offenses committed in other locations, like conspiring elsewhere to commit a crime in the Zone; (2) criminal liability for lesser crimes (Class B misdemeanors and below) that do not carry a right to a jury trial; and (3) civil liability.

2. "lets see how long it takes for someone to kill someone here now that it is broadcast over the entire world. why would you tell everyone this???? makes no sense!!!"

I agree with this criticism of overhyped, inaccurate, sensationalized accounts of the Zone (see last item). That said, the theory has been widely publicized since 2005, and nobody has committed a major crime in the Idaho portion. It is a remote area, cut off from the rest of the park and inaccessible by road. I regret that my initial message of "Hey, here's a problem; let's fix it" has been transformed on social media into a message of "Yee haw! Pow pow pow!" The point of publicizing the Zone—among responsible outlets anyway—should not be to encourage people to commit crimes but rather to get Congress to eliminate the risk by closing the loophole.

3. "Yeah right- like they are going to let someone get away with murder...go ahead someone try it out- see where it goes."

This is an understandable response to videos recklessly promoting an exaggerated version of the loophole. But the fact remains: there is a chance that a guilty person could benefit from this technicality (as guilty people sometimes do when the government violates its constitutional obligations). The point is not "try it, because it will work," it is "fix it, because it might work."

4. “yes you would definitely be able to form a trial. So your an idiot”

Hmmm. I don't *think* I'm an idiot. Then again, my experience in comments sections has taught me that people aren't always very self-aware about these things. Maybe I *am* an idiot and just don't realize it. Dunning-Kruger Effect and all that. Thank you for the heads up.

Replies to the most common skeptical questions

1. Wouldn't they just try you in federal court?

Yes, they would have to. That's the problem. The 6th Amendment applies to federal trials. For a crime in the Zone it clearly and plainly requires that the jurors be from the Zone (state of Idaho, district of Wyoming), which is impossible.

2. Wouldn't they just try you in state court?

No. The federal government has exclusive jurisdiction in a few federal lands, and Yellowstone is one of them. Idaho cannot prosecute crimes that occur in Yellowstone.

3. Wouldn't the court just order a change of venue?

Not an option. In federal criminal cases, venue can only be changed upon the defendant's motion, and this defendant obviously would not want to. Anyway, the issue is not the venue (where the trial takes place), it's the vicinage (where the jurors are from). Changing the venue would not fix that.

4. Wouldn't the court just have a bench trial, without a jury?

Not an option. Because the 6th Amendment guarantees criminal defendants the right to a jury trial, there cannot be a federal bench trial unless the defendant wants one—he would not consent to one here.

5. Wouldn't they just let you rot in jail “until” they figured something out?

Assuming the defendant would assert his rights under the 6th Amendment's “speedy trial” requirement, as implemented by the federal Speedy Trial Act, they would not be able to hold him for more than 100 days before starting the trial. They might be able to hold him while the case worked its way up through the appellate courts, which could take a while, but they would not be able to hold him indefinitely.

6. Couldn't Congress just redraw the district lines to follow state lines, so the court could get an Idaho jury?

Sure—that's what I want Congress to do!—but they could not do it retroactively. The 6th Amendment specifically requires that the district “shall have been previously ascertained by law,” so applying the fix retroactively would be unconstitutional. Passing a law in order to guarantee the conviction of a particular offender also might violate the Constitution's prohibition of ex post facto laws and bills of attainder.

7. They would find a way. They wouldn't just let you go.

That's not a legal argument. What exactly is this “way” of which you speak? If all you can say in response to a clear constitutional requirement is “They would find a way” then you are saying that the government does not need to follow the Constitution and that you are OK with that. I disagree and, more importantly, courts disagree with that when they do their jobs properly. The original article offers some arguments a court could use to reject my argument, but none of those arguments are as strong as the simple, clear, easy-to-comply-with requirement of the 6th Amendment. At any rate, the way is obvious: pass a statute redrawing the district lines to follow state lines. Problem solved (just not retroactively).

8. Wasn't this theory rejected in court in a real case?

Sort of, but it happened in a frustrating way that left the loophole open. A poacher in the Montana portion—not the Idaho portion—asserted his right under Article III to a trial in Montana, and his right under the 6th Amendment to a jury from the Montana portion of Yellowstone (where, unlike the Idaho portion, some people live). The trial judge ignored the Article III argument and brushed off the 6th Amendment, saying “To adopt a different position would create a virtual no man's land. Since there is no case law that states otherwise, this Court must dismiss Defendant's objection to a Wyoming jury panel.” That was it—no alternative interpretation of the vicinage requirement, and no explanation of why this isn't a 6th Amendment violation. The court's analysis (such as it was) thus followed the sentiment discussed in the last item: “I can't just let him go.”

This is a precedent, to be sure, but a weak one. If the 10th Circuit had gotten the case on appeal it would have actually engaged the legal issues and settled things in a more decisive way. But the prosecutors prevented the 10th Circuit from getting the case; they conditioned a plea deal on the defendant not appealing this issue (he was allowed to appeal others). So the prosecutors did show that they would fight to get a conviction, but they also telegraphed that they feared the court of appeals weighing in even on a low-stakes case (poaching, as opposed to murder). As a result, the loophole still looms for any defendant willing to take his chances on appeal.

9. [Various other legal arguments that seem promising to you after a few minutes of googling.]

Yeah, those don't fly either. Trust me. I've been going through this for 14 years now and I have encountered just two serious counterarguments. The first is the practical one discussed in the last item ("6th Amendment? What 6th Amendment? Heh.") which did get a conviction but did not close the loophole. The contempt that Congress and the Department of Justice have shown for the 6th Amendment will weaken their case on appeal if a case ever gets there.

The second counterargument is one that I offered in the original article. It looks to the purposes of the 6th Amendment rather than following its strict letter. As I also discuss in the article, though, there is good reason to doubt that the appellate courts would (or should) take that approach.

More importantly, none of these are reasons not to fix the problem. I have drafted the legislation. It's four lines long.

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If you have read this far and you have any questions or points you would like to discuss with me about this, please feel free to email me at kalt@law.msu.edu.