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**Tabloid Constitutionalism: How a Bill Doesn't Become a Law**

*Brian C. Kalt*

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# Tabloid Constitutionalism: How a Bill Doesn't Become a Law

BRIAN C. KALT\*

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## INTRODUCTION

What does it take to get Congress to pass a law? To get a judge to declare a statute unconstitutional? To get your law review article featured in the *National Enquirer*?

Based on my single data point, I can say that two of those three things are difficult:

*Starting premises:* Find a legal loophole that would allow murderers to go free. Publish an article about it in the *Georgetown Law Journal*. Publicize the article to millions of people, probably encouraging someone to put your theory into practice. Encounter no direct refutations of your legal premise.

1. Write to Congress with all of this information, and point out how easy it would be to close the loophole.

*Result:* [crickets chirping].

2. Find a case on point in which a federal judge is forced to rule on the loophole.

*Result:* judge pointedly avoids analyzing the loophole, because there is no case law interpreting it, and he'd like to keep it that way.

3. Answer a phone call from a *National Enquirer* reporter and chat for a few minutes about the theory.

*Result:* the *Enquirer* runs a fairly accurate article, just below a pictorial on Tommy Lee's latest infection.

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\* Associate Professor of Law, Michigan State University College of Law.

In other words, it is easy to get your constitutional theory discussed in the *National Enquirer*, but hard to get Congress or the judiciary to address it—let alone to agree with it.

This Article is a follow-up to my 2005 piece in this journal, *The Perfect Crime*.<sup>1</sup> Back then, I argued that there is a fifty-square-mile swath of Idaho—a so-called “zone of death”—where one can commit crimes with impunity.

In Part I of this Article, I discuss the attention that *The Perfect Crime* generated: it was covered not just by the *Enquirer* but by mainstream media, and it inspired a best-selling novel. In Part II, I discuss my efforts to lobby Congress. I initially tried to get Congress to change the law. When that failed, I tried to get Congress to acknowledge my existence. That effort essentially failed as well, at least until a senator read the aforementioned novel. In Part III, I discuss the treatment of my theory in a criminal case where the defendant invoked it. The handling of the theory there was almost as lax as Congress’s.

In *The Perfect Crime* I discussed several limitations and counterarguments to my theory. Thus, it is not my intention here to criticize people for having the audacity to disagree with my theory. Rather, my intention is just to recount one case study—amusing in some parts, infuriating in others—of the American system of government and law.

#### I. “PEOPLE CAN BE INTERESTED IN OBSCURE CONSTITUTIONAL LAW ARGUMENTS . . . IF IT MEANS THAT THEY HAVE A WAY TO OFF SOMEONE”

When I received a publication offer for *The Perfect Crime* from Georgetown in early 2004, I was glad to hear that the article would not be published for several months. That gave me time to try to get the loophole closed before anyone would be inspired to use it.

In brief, my legal theory was this: Yellowstone National Park is mostly in Wyoming, but small parts of it are in Montana (where you can commit the almost-perfect crime) and Idaho. Oddly, though, Congress placed all of the park in the District Court for the District of Wyoming. If you were to commit a serious crime in the Idaho portion of the park, state authorities could not prosecute you; the feds have exclusive jurisdiction in the park. So you would be tried in faraway Cheyenne, Wyoming before a federal jury drawn from the Cheyenne area. But this violates Article III of the U.S. Constitution, which requires criminal trials to be held in the state where the crime was committed (that is, Idaho).

More problematically, it violates the Sixth Amendment, which requires that jurors live in the state *and* district where the crime was committed. Every other district in the country sits in just one state, so this is easy: get the district right, and you automatically get the state right. For a crime committed in the Idaho portion, however, the jurors would have to be from the right state (Idaho) *and* the right district (Wyoming)—in other words, they would have to reside in the Idaho portion of Yellowstone. But nobody lives there. Congress needlessly colored outside the lines, making it impossible for your constitutional rights to be vindicated. Because Congress has no valid justification for this clear constitutional violation, you should go free.

As described in Part II below, my pre-publication attempt to fix the loophole—by asking Congress to enact a simple legislative fix—failed miserably. As the publication date drew near, I decided that my best bet was to publicize the article, in the hope that some public attention might motivate Congress to act.

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<sup>1</sup> Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675 (2005).

I posted the article on the Social Science Research Network (SSRN) one day in March 2005.<sup>2</sup> The next day, Orin Kerr made some favorable comments about it on *The Volokh Conspiracy* blog.<sup>3</sup> That touched off a cascade of downloads, further media and blogger attention, and more downloads. For a while, *The Perfect Crime* was the most downloaded constitutional law paper in SSRN history.<sup>4</sup>

My theory was written up in the *Washington Post*.<sup>5</sup> I was interviewed on NPR's *All Things Considered*<sup>6</sup> and a similar Canadian program, *As It Happens*.<sup>7</sup> The BBC website ran a story,<sup>8</sup> as did a Japanese newspaper.<sup>9</sup> Local media in Idaho and Wyoming followed suit.<sup>10</sup> John Hodgman (soon to be of the *Daily Show*) invited me to give a public lecture on my article in Brooklyn.<sup>11</sup> The crowning moment, though, was the article in the *National Enquirer*.<sup>12</sup>

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<sup>2</sup> <http://ssrn.com/abstract=691642>.

<sup>3</sup> See Posting of Orin Kerr to The Volokh Conspiracy, [http://volokh.com/archives/archive\\_2005\\_03\\_20-2005\\_03\\_26.shtml](http://volokh.com/archives/archive_2005_03_20-2005_03_26.shtml) (Mar. 26, 2005, 11:11 EST).

<sup>4</sup> It now ranks third, after a 2006 article by Christopher Fairman and a 2007 article by Daniel Solove. See <http://papers.ssrn.com/sol3/topTen/topTenResults.cfm?groupingId=202052&netorjrn=jrn> (last visited Dec. 6, 2007) (ranking constitutional-law papers posted from 2000 to 2006);

<http://papers.ssrn.com/sol3/topTen/topTenResults.cfm?groupingId=945710&netorjrn=jrn> (last visited Dec. 6, 2007) (ranking constitutional rights and liberties papers posted since 2006, including Solove article).

<sup>5</sup> See Richard Morin, *Where Lawlessness May Roam*, WASH. POST, May 8, 2005, at B5.

<sup>6</sup> See Robert Siegel, *Is Yellowstone Ripe for a Crime Spree?*, *All Things Considered* (NPR radio broadcast, May 10, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4647041>.

<sup>7</sup> See *As It Happens* (CBC radio broadcast May 10, 2005), available at [http://www.cbc.ca/insite/AS\\_IT\\_HAPPENS\\_TORONTO/2005/5/10.html](http://www.cbc.ca/insite/AS_IT_HAPPENS_TORONTO/2005/5/10.html).

<sup>8</sup> See Matthew Davis, *Loophole May Allow US Crime Spree*, BBC NEWS, May 9, 2005, <http://news.bbc.co.uk/2/hi/americas/4529829.stm>.

<sup>9</sup> The paper, an English language publication called the *Daily Yomiuri*, reprinted the *Washington Post* article cited above in note 5. See DAILY YOMIURI, May 11, 2005, at A19.

<sup>10</sup> See Milan Gagnon, *Yellowstone Irrational Park*, POST REGISTER (Idaho Falls), June 26, 2005, at F1; *The Perfect Crime?* (Wyoming Public Radio Broadcast Jan. 27, 2006), available at [http://www.publicbroadcasting.net/wpr/news.newsmain?action=article&ARTICLE\\_ID=871698](http://www.publicbroadcasting.net/wpr/news.newsmain?action=article&ARTICLE_ID=871698).

<sup>11</sup> E-mail from John Hodgman to author (May 13, 2005, 11:08:51 EDT) (on file with author). Hodgman staged his "Little Gray Book Lectures" at a cavernous bar (formerly a mayonnaise factory) in Brooklyn. They featured four people doing lighthearted presentations on a single theme—in this case, "How to Commit the Perfect Crime." At this point, I was still hopeful that Congress might take action, and my opening lines reflected this:

I've concluded that there are two kinds of people who think about how to commit the perfect crime. There are sociopaths, who worry about how to do it, and there are neurotics, who worry about the sociopaths. . . . I come at this subject from the neurotic's point of view. . . . [P]lease ask Congress to fix this, and don't try to put my theory into practice.

To further dissuade people, I mentioned some limitations and counterarguments, including this practical one that resulted from the thousands of downloads I had gotten:

As the Internet has taught us, whatever kind of freak you are, there's always another one of you out there somewhere. So if you get it in your mind to go to Idaho and start strangling people, chances are there's someone else thinking the same thing, and he's bigger than you.

Brian C. Kalt, Presentation at Little Gray Book Lecture No. 31 (June 16, 2005).

<sup>12</sup> Michael Glynn, *Yellowstone's Perfect Crime Spot*, NAT'L ENQUIRER, Aug. 15, 2005, at 14. It ran just below a story (and accompanying disgusting photo) about Tommy Lee's infected tongue.

From all of this publicity, I got a lot of feedback. For the most part, people offered praise, or raised questions or counterarguments that I could answer by referring to some passage in the article. But there were two criticisms for which I had no good answer.

The first was that regardless of what the Constitution said and how it said it, as a practical matter there was no way that a criminal in this situation would go free. My response was always “why not?” After all, criminals go free on technicalities all the time. At least my technicality is clearly presented in the Constitution and is easily patched up. The reply was generally the same: “They just won’t allow it.” This “practical” argument usually irritated me, in part because it offended my sense of the rule of law, in part because it contemptuously ignored all of my carefully crafted arguments, and in part because I sort of agreed with it. I definitely had to agree with it after my theory was finally tested in court (as detailed in Part III below).

The second criticism I could not turn back was that the Idaho portion of Yellowstone was so remote that the risk of crime there was negligible. This sentiment was expressed best by James Taranto of *OpinionJournal* who, commenting on my article, wrote:

Going on a killing spree in the Idaho portion of Yellowstone may be easier said than done, though. After all, the population is zero, so who would you kill? This rules out lots of other crimes, too. There are no houses to burgle, and we’re pretty sure there are no liquor stores to rob.

If your ambition is to commit the perfect crime, then, best to set your sights lower. How about this: Load your pickup truck full of mattresses and drive to the Idaho corner of Yellowstone, where you can rip the tags off and the feds can never touch you.<sup>13</sup>

I could not answer this criticism because I truly did not know how real the threat was. As it turned out, though, someone else did, and he raised the publicity surrounding my article to a new level.

In January 2006, author C.J. Box notified me that he was using my Zone of Death theory as a plot device in his next book, the seventh in his popular Joe Pickett series.<sup>14</sup> The Pickett novels take place in Wyoming, an area that Box knows intimately. Having found out about my article, Box discussed it with a few federal officials. Some agreed with my theory, but even those who did not were worried—as I was—that the article might inspire someone to commit a heinous crime.<sup>15</sup> Even if such a criminal was prosecuted successfully, the damage would be done. Most importantly, Box told me that while the Idaho portion of Yellowstone was remote, some people—like him—did go there, and serious crimes were not out of the question. The novel, *Free Fire*,<sup>16</sup> reflected that understanding, and suggested how it all might play out.

*Free Fire* was released in May 2007 and made it up to #29 on the *New York Times* extended best-seller list.<sup>17</sup> In the process, it introduced a new horde of people to my theory. Perhaps if *Free Fire* had made it all the way up to the main *New York Times* best-seller list (that is, the top 15), or had been made into a Movie of the Week, Congress would have taken action. Given my experiences over the last three years, though, I’m guessing not.

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<sup>13</sup> James Taranto, *Best of the Web Today*, OPINIONJOURNAL, Apr. 5, 2005, <http://www.opinionjournal.com/best/?id=110006518>.

<sup>14</sup> E-mail from C.J. Box to author (Jan. 30, 2006, 17:12:41 EST) (on file with author).

<sup>15</sup> *Id.*

<sup>16</sup> C.J. BOX, *FREE FIRE* (2007).

<sup>17</sup> The *Times*’s extended best-seller list appears only online, and old lists are not available there.

## II. YOU CAN LEAD A HORSE TO WATER . . . BUT NOT A CONGRESSMAN

I was naïve. I used to practice law in Washington, and I teach administrative and constitutional law, so I know how “the system” works. Still, in the back of my mind, I remembered the anthropomorphic bill from *Schoolhouse Rock* explaining his origins: “Some folks back home decided they wanted a law passed, so they called their local Congressman, and he said, ‘You’re right, there oughta be a law.’ Then he sat down and wrote me out and introduced me to Congress.”<sup>18</sup>

### A. STEP ONE: QUIETLY NOTIFY THE AUTHORITIES

In April 2004, I wanted a law passed. Having just written an article that could inspire people to commit crimes, I wanted to preempt them—ideally before the article came out (originally scheduled for late 2004, it would eventually get pushed back to March 2005). I quietly sent drafts to the Department of Justice’s Office of Legislative Affairs, the U.S. Attorney in Wyoming, and the majority and minority counsels for the House and Senate Judiciary Committees. In a cover letter, I summarized my argument; explained my twin fears that someone might be inspired by the article to commit a crime and that he might go free; urged a simple statutory repair; and offered my assistance.<sup>19</sup>

The U.S. Attorney responded that he had no power to amend the law.<sup>20</sup> The Department of Justice did not respond at all. Neither did the Senate Judiciary Committee. I did get one bite, though, two months later—the House committee’s majority counsel referred my letter to an employee who e-mailed me with some questions.<sup>21</sup> After writing back and forth a couple of times, though, it became apparent that she was only looking for counterarguments—reasons why the committee should not take action.<sup>22</sup> Then her e-mail address became invalid, and I discovered she had been just a summer intern.<sup>23</sup> That explained why I had not heard from her until June, and why I did not hear from her ever again. It also confirmed what I had thought before her first e-mail: that nobody on the Hill cared much about my request. That was that.

### B. STEP TWO: LOUDLY NOTIFY THE AUTHORITIES

By spring 2005, the article had gotten the heavy attention detailed in Part I. My plan had backfired. The Zone of Death loophole was still open, and with all of the publicity, I had

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<sup>18</sup> *I’m Just a Bill*, Schoolhouse Rock, <http://www.schoolhouserock.tv/Bill.html> (last visited Feb. 8, 2008).

<sup>19</sup> See, e.g., Letter from author to Office of Legislative Affairs, U.S. Dep’t of Justice (Apr. 27, 2004) (on file with author).

<sup>20</sup> Letter from Matthew H. Mead, U.S. Att’y, Dist. of Wyo., to author (May 24, 2004) (on file with author).

<sup>21</sup> See e-mail from Jennifer Goodlatte, House Judiciary Comm., to author (June 15, 2004, 12:50:50 EDT) (on file with author).

<sup>22</sup> See, e.g., *id.*; e-mail from Jennifer Goodlatte to author (June 24, 2004, 15:19:51 EDT) (on file with author) (asking permission to send article to University of Virginia professor, “hoping that he might be able to come up with a legal counterargument”).

<sup>23</sup> Legistorm.com provides information about congressional staff salaries and titles. It lists Jennifer Goodlatte as a paid intern from May 24 to August 6, 2004. See [http://www.legistorm.com/office/Judiciary\\_Committee/1536/28.html](http://www.legistorm.com/office/Judiciary_Committee/1536/28.html) (second quarter 2004); [http://www.legistorm.com/office/Judiciary\\_Committee/1536/25.html](http://www.legistorm.com/office/Judiciary_Committee/1536/25.html) (third quarter 2004).

encouraged the nation's sociopaths to travel to Idaho and strangle people. I decided to approach Congress again, this time more aggressively.

This time I wrote to the majority and minority counsel and all of the members of the two relevant Judiciary subcommittees: Courts, the Internet, and Intellectual Property on the House side, and Administrative Oversight and the Courts on the Senate side. That was twenty-two representatives, seven senators, and four staff lawyers.<sup>24</sup> Reproduced here is the entirety of the response I got:

It is not as though I expected immediate congressional action and a front-row seat at the signing ceremony. I knew that this was a relatively small loophole that might never be exploited. I knew that few ideas become bills, and few bills become laws. I also knew, however, that most congressional offices are pretty good about replying to correspondence from the general public. I was 0 for 29. The only explanation I can imagine is that all of them had put me in the "crackpot" file. I had not thought that I was a crackpot, but a unanimous and bipartisan group of twenty-nine representatives and senators apparently disagreed.<sup>25</sup> (Of course, if I had written an equally "kooky" letter to McDonald's about the Sixth Amendment, I probably would have gotten at least a letter back from them, and maybe some coupons.)

Recalling that the people in *Schoolhouse Rock* had written to their *local* congressman, I decided to call mine. I left a detailed message, but never got a reply. The high point of my campaign came when I called one of my senators, Carl Levin (D-MI), and got a call back from his legislative correspondent. He told me that Senator Craig (R-ID) was looking into my issue, and that Senator Levin's office was content to leave it to Senator Craig's. This was great news—I finally existed! Of course, as with everybody else, Senator Craig did nothing and I never heard from his office.

A reporter at a local paper in Idaho did manage to get comments from the congressman representing the Idaho portion of Yellowstone. After getting the silent treatment from dozens of his colleagues, I was happy to hear what the congressman thought of my argument. The reporter wrote:

Rep. Mike Simpson, R-Idaho, believes the judicial system would prevail in this type of situation and has no plans to look into redistricting, says Nikki Watts, his communications director.

....

Still, the government officials are high on faith when brushing off the story but short on specifics. Simpson counts on "checks and balances" to remedy the issue, should a murder be committed.<sup>26</sup>

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<sup>24</sup> This was the conventional portion of my legislative quest. Sometimes, though, fate throws you another opportunity: to make a fool of yourself. In my case, it was an invitation to hear a senator on the Judiciary Committee speak to a small audience an hour away from my home. I went and, after the talk, I handed the senator a copy of the article and muttered something about people getting killed and downloads on the Internet. I never heard back from his office.

<sup>25</sup> Or thirty of them, if you count the senator I accosted in note 24, *supra*.

<sup>26</sup> Gagnon, *supra* note 10.

Did I say I was happy? I really wasn't. I was unsure how the "judicial system" would "prevail" by defeating the Sixth Amendment. I was even less sure what "checks and balances" had to do with any of this (one might just as well rely on the Duty of Tonnage Clause<sup>27</sup>). What concerned me most, though, was the congressman's notion that one could "remedy the issue, should a murder be committed."

How does one "remedy" a murder? I understood that if a defendant tried my theory but lost all the way up the appeals process, it would end the matter. I further understood that if the defendant won the argument, Congress might take action at that point, which also would end the matter. But I did not agree with Representative Simpson that it could be worth sacrificing the life of a murder victim to reach either end point. The loophole is not just a potential get-out-of-jail-free card, it is a beacon that could inspire a criminal to act in the first place. Even if only one person relies on the loophole to commit a crime, that is one person too many.

In any case, I had learned my lesson. A person with just an idea—a person who is not a lobbyist, who makes no campaign contributions, and who relies simply on the force of his arguments—should not count on members of Congress acknowledging his letters or phone calls. If someone in Congress does notice his idea, he should not count on being in the loop, let alone being consulted. He should not expect to get a serious legal reply to his legal arguments. Rather, he should expect an assessment that turns on a harsh cost-benefit analysis—one that will readily lowball the chances of new disasters, and will just as readily overrate the costs of legislative action.

To be fair, Congress has had plenty of more important things to worry about over the last four years. Then again, it hasn't done much about those things either.

### C. STEP THREE: HAVE A BEST-SELLING AUTHOR NOTIFY THE AUTHORITIES

Everything changed and nothing changed after novelist C.J. Box wrote *Free Fire*, a best-selling thriller based on my theory. Among Box's many fans is U.S. Senator Mike Enzi (R-WY). Upon reading about the Yellowstone issue in the novel, Senator Enzi made some inquiries within the Department of Justice (DOJ).<sup>28</sup> Perhaps more satisfying for me, I was contacted by e-mail and phone by the senator's legislative assistant—a far cry from a summer intern or a legislative correspondent. The assistant kept me informed about the DOJ's practical and legal arguments and gave me an opportunity to respond.

Among the DOJ's arguments was one weakness in my proposed reform that I had not yet considered: splitting Yellowstone into the district courts for Wyoming, Idaho, and Montana would also split it between the Ninth and Tenth Circuits. Senator Enzi and others were wary of this because it would create a new and unwelcome burden if environmentalists could use this foothold to challenge the Park Service's management decisions in the liberal and quirky Ninth Circuit. This was a valid concern from the government's point of view, even if it wasn't obvious that it outweighed the potential risk of criminals going free, and even if it would be easy to fix

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<sup>27</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>28</sup> See Letter from Michael B. Enzi, U.S. Senator, to Alberto Gonzales, U.S. Att'y General (Feb. 5, 2007) (on file with author).

legislatively.<sup>29</sup> My new knowledge was just the sort of helpful development that you get when the two sides in a disagreement actually communicate.

The DOJ's *legal* argument, by contrast, was singularly unimpressive. As the senator's assistant explained it, the DOJ "has suggested that, were such a case to come before the court, a court would likely perform a harmless error analysis and would allow the case to move forward."<sup>30</sup> Senator Enzi and I shared the same dim view of this argument.<sup>31</sup>

A "harmless error" is an error that does not call the result of a trial into question; courts therefore do not need to overturn the verdict to rectify it. But what errors are harmless? The Supreme Court has wrestled with that question for decades, and it has classified some errors as "structural" and thus inherently "harmful." Structural errors are defects in the criminal "trial mechanism" that alter the "framework within which the trial proceeds."<sup>32</sup> They stand in contrast to a single blunder in the heat of a complicated trial—say, a judge's improper admission of a piece of evidence—that can "be quantitatively assessed in the context of other evidence presented" to see whether it actually made a difference in the case.<sup>33</sup>

Notwithstanding the DOJ's confident disregard for the Sixth Amendment, there is good reason to believe that the Court would consider the Zone of Death a structural problem. Consider an analogous case: If I committed a crime in East Lansing, Michigan, but was tried before a jury of Iowans, under the DOJ's argument the court would say: "Well, that's not right, but what's the difference? These people aren't biased against you, and the judge is impartial, so who cares?" If the court of appeals were to rule that way, though, then it would essentially be reading the Sixth Amendment's local-jury requirement out of the Constitution. And for what?

In the recent case of *United States v. Gonzalez-Lopez*, the Supreme Court took an encouraging view (to me) of another important Sixth Amendment right. Writing for a majority comprising himself and Justices Stevens, Souter, Ginsburg, and Breyer, Justice Scalia wrote that depriving a defendant of his choice of counsel was a structural error.<sup>34</sup> The government tried to argue that the defendant needed to demonstrate that his preferred lawyer would have done things better, or at least differently, than his actual lawyer.<sup>35</sup> Rejecting this argument, Justice Scalia wrote:

[T]he Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details. It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. . . .

So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the

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<sup>29</sup> There is nothing to preclude Congress from designating the Tenth Circuit as the proper venue for all administrative appeals concerning Yellowstone National Park.

<sup>30</sup> E-mail from Chris Tomassi to author (Jan. 24, 2007, 15:19:59 EST) (on file with author).

<sup>31</sup> See Letter from Michael B. Enzi, U.S. Senator, to C.J. Box (Feb. 5, 2007) (on file with author) ("I don't agree on the 'harmless error' and am pressing for a better answer.").

<sup>32</sup> *Arizona v. Fulminante*, 499 U.S. 279, 307–11 (1991) (distinguishing between "trial errors" and "structural errors").

<sup>33</sup> *Id.* at 308.

<sup>34</sup> See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006).

<sup>35</sup> See *id.* at 2561–62.

accused be defended by the counsel he believes to be best. The Constitution guarantees a fair trial through the Due Process Clauses, but it *defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment*, including the Counsel Clause. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation complete.<sup>36</sup>

Justice Scalia's arguments for the Court apply with equal force to our case. The right to a trial in the proper state, before a jury from the proper state and district, might be intended to guarantee a fair trial, but the right is violated when it is violated, and not just when the trial is rendered unfair. Just as it was impossible in *Gonzalez-Lopez* to assess what course the case would take in an "alternate universe" where the defendant was allowed to use the lawyer he wanted, it would be impossible in our case to gauge how a trial would proceed before a different, proper, Sixth Amendment jury—and so a defendant should not have to do so.<sup>37</sup>

Even if the DOJ's disrespect for the Sixth Amendment and the decision in *Gonzalez-Lopez* somehow held up in court, trying someone in the wrong state before jurors from the wrong state would still be an *error*. The DOJ admitted as much by pushing the harmless-error argument, in advance of any actual case. Why change the law to respect the Constitution, the DOJ was apparently wondering, if we can violate the Sixth Amendment—completely intentionally—and still get a conviction? Hardly a reassuring approach to constitutional rights, even if it were true. But regardless of what this says about the DOJ, it does not excuse Congress from simply repairing the error.

Excused or not, Congress's fecklessness is at least explainable. In an e-mail to me, responding to my characterization of the legislative fix as "simple," Senator Enzi's assistant provided some helpful perspective on the legislative process:

As for the difficulty of redrawing the lines, no law change is ever easy when it goes through the Congress. Senator Enzi says that, at the very least, it takes about 6 years from when the idea is introduced as a bill until the day the President signs the bill into law . . . if it even gets to that stage. Even if the idea seems to be completely non-controversial, you would be amazed about how many people will come out of the woodwork in opposition, and any opposition makes passage difficult.<sup>38</sup>

There still has been no progress on getting a bill introduced, but at least someone talked to me. I can now revise my harsh assessment of members of Congress—at the very least, Senator Enzi is a counterexample. I can also update my *Schoolhouse Rock* notions of legislative creation: "Some folks back home decided they wanted a law passed, so they called their local congressman, and he [did not acknowledge their calls. But then, an author wrote a best seller

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<sup>36</sup> *Id.* at 2562 (quotation marks and citations omitted) (emphasis added). Violations of other Sixth Amendment "fair trial" rights have been classified as structural errors too. *See, e.g.,* *Waller v. Georgia*, 467 U.S. 39, 49–50 & n.9 (1984) (public trial); *Strunk v. United States*, 412 U.S. 434, 440 (1973) (speedy trial); 3B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 855 (3d ed. 2004) (classifying public- and speedy-trial rights as structural, based on *Waller* and *Strunk*).

<sup>37</sup> *See Gonzalez-Lopez*, 126 S.Ct. at 2564–65 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.") (quotation marks and citation omitted).

<sup>38</sup> E-mail from Chris Tomassi to author (Jan. 24, 2007, 16:41:57 EST) (on file with author).

about the subject, and a different congressman] said, ‘[Maybe y]ou’re right [that] there oughta be a law[, but maybe not].’” That’s not as gratifying as the old cartoon, but it’s better than nothing.

### III. JUDICIAL INACTIVISM

While I was unhappy that Congress was more concerned about the inconvenience of legislating than it was about the risk of a Zone of Death, there was one sure way to satisfy both of us: a real case. Not only would it disprove the notion that the Idaho portion of Yellowstone was too remote to worry about, it would either spur Congress to close the loophole (if the court accepted my theory) or render my article irrelevant (if the court rejected it). Either way would have been fine with me. But then a real case occurred,<sup>39</sup> and nothing got resolved; the prosecutor and the judge squandered a golden opportunity to resolve the issue safely. I only found out about the case from a reporter, after the decision was rendered, but given my track record on this issue, I’m not sure my participation would have made a difference.<sup>40</sup>

In December 2005, Michael Belderrain illegally shot an elk in Montana.<sup>41</sup> Because he was standing in Yellowstone National Park when he did it, and because he dragged the animal’s head to his truck parked in Yellowstone, he was indicted in the U.S. District Court for the District of Wyoming.<sup>42</sup> In July 2007, citing my article, he objected to being tried in Wyoming by Wyoming jurors: Article III of the Constitution gave him a right to be tried in Montana, and the Sixth Amendment gave him a right to be tried by jurors from the Montana portion of the park.<sup>43</sup>

Unlike the Idaho portion of Yellowstone, the Montana portion actually has a few residents—enough that a proper Sixth Amendment jury trial is technically possible there, if not overly practical. Belderrain’s main goal was to go free, of course; as his motion put it:

While Mr. Belderrain acknowledges that standing on his Constitutional right to Montana vicinage makes it inconvenient to prosecute him, so do his other rights of criminal procedure . . . . If the only practical solution is for the Court to dismiss the charges, so it must be, because neither the statute creating the District of Wyoming, nor the criminal statutes involved may trump the Constitution.<sup>44</sup>

Still, the court had several options. It could respect Article III and order a Montana trial. It could respect the Sixth Amendment and order that the jury be drawn from the Montana portion of the park. It could respect both provisions. Or it could declare that a Wyoming trial before a Wyoming jury somehow did not offend either provision. Whichever of these options it chose, though, the court (and the appellate court, if the decision was appealed) could resolve the issue decisively, either spurring Congress to act or spurring would-be felons to give up on committing the perfect crime.

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<sup>39</sup> See *United States v. Belderrain*, No. 07-CR-66-D (D. Wyo. Aug. 8, 2007) (order dismissing objection to jury panel).

<sup>40</sup> Had I known about *Belderrain* earlier, I would have been happy to write a brief, either on behalf of the defense or as an amicus. After I found out about the case, I contacted the public defender’s office and left a message offering my services—pro bono—in this or any future case that arose in the non-Wyoming parts of the District of Wyoming.

<sup>41</sup> See *Belderrain*, No. 07-CR-66-D, at 1.

<sup>42</sup> *Id.* at 1–3 & n.1.

<sup>43</sup> Objection to Wyoming Jury Panel, *Belderrain*, No. 07-CR-66-D (D. Wyo. Jul. 2, 2007). The record does not indicate whether Belderrain had my theory in mind when he committed his crime.

<sup>44</sup> *Id.* at 3.

Unfortunately, the court chose a fifth option: rejecting the theory without any analysis. The judge's opinion referred to my article as "interesting" and "esoteric," but of "little practical value."<sup>45</sup> Here is the sum of the judge's analysis of the issue, after noting my argument:

For practical purposes, any cause of action occurring within Yellowstone National Park, whether in Wyoming, Idaho, or Montana, must result in a jury trial in the District of Wyoming, and jurors selected from a pool of Wyoming citizens. 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.<sup>46</sup>

The court's interpretation of the Sixth Amendment had one thing going for it—it put Belderrain behind bars. But the point of the Constitution is not to put people in prison, it is to put limits on the government. The judge's job is to protect the Constitution from statutes that violate it, not to protect prosecutors from the Constitution. My article did not create a No Man's Land; Congress did when it put these parts of Montana and Idaho into the District of Wyoming. There is nothing impractical or "esoteric" about the plain text of the Sixth Amendment. Congress could easily fix its mistake.<sup>47</sup>

The problem was not that the judge rejected my interpretation of these constitutional clauses. It was that he offered no other interpretation to support his decision. In my article, I had sketched out some possible ways that a judge might interpret the Sixth Amendment to allow a criminal in the Zone of Death to be prosecuted. It can be done.<sup>48</sup> But this judge didn't do it. Besides saying that my "literal" reading would have bad results, the only other point he made was that there was no case law accepting my theory.<sup>49</sup> As a result, he said, he "must dismiss" Belderrain's argument.<sup>50</sup> But there was no case law *rejecting* my theory either. Courts consider new legal arguments all the time, and when they do, they are supposed to take a crack at them, not automatically rule for the government.

As already mentioned, moreover, the judge's "practical" concern was misplaced. The Zone of Death is in the *Idaho* portion of Yellowstone, because nobody lives there. The Montana portion of Yellowstone has some residents, and so is not necessarily a No Man's Land. In other words, even if the judge had agreed with my theory, he would not necessarily have had to free Belderrain.

Moreover, in his haste to protect the prosecutor from the Sixth Amendment, the judge neglected Article III. Just because he refused to apply the Sixth Amendment did not mean he also had to ignore Article III's requirement that the trial be held in Montana. The State of

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<sup>45</sup> *Belderrain*, No. 07-CR-66-D, at 5 n.2.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> I drafted some legislation to do it: it was three lines long. It simply made the district court boundaries in Wyoming, Montana, and Idaho track the respective state borders. There are some potential complications, but nothing insurmountable. *See, e.g., supra* note 29 and accompanying text (discussing Ninth Circuit conundrum).

<sup>48</sup> The main possibility I raised was that judges could focus on the purpose of the Sixth Amendment: preventing prosecutors from shopping for a favorable venue; and allowing communities to govern themselves, presiding over criminal trials that affect them. The Zone of Death problem doesn't conflict with these purposes. Trying the case in Cheyenne would be a pre-existing bureaucratic requirement, not "a calculated, manipulative act by the prosecution that blindsides the defendant." Kalt, *supra* note 1, at 685. And because nobody lives in the Idaho portion of the park, there is no "community" whose power of self-government is being stripped. *Id.*

<sup>49</sup> *Belderrain*, No. 07-CR-66-D, at 5–6.

<sup>50</sup> *Id.* at 5.

Montana is definitely not a No Man's Land, and respecting just this constitutional requirement clearly would not have freed Belderrain.

Interestingly, in a newspaper interview, the U.S. Attorney in Idaho had suggested something similar for cases in the Idaho portion of the park. Specifically, he surmised that Article III would “trump[] the statute that put the chunk of Idaho in the District of Wyoming.”<sup>51</sup> In other words, he believed that holding a trial in Idaho, before an Idaho jury—following Article III and respecting state lines, but ignoring the Sixth Amendment and district lines—would suffice and would allow a prosecution to go forward. At the time, I snidely characterized his argument as saying that the Sixth Amendment violates Article III and is unconstitutional. But this is at least better than the *Belderrain* decision, which held (if I might again be snide) that both Article III and the Sixth Amendment are illegal because they violate both the district-line statute and the prosecution's interest in getting a conviction.

Because the judge's opinion was devoid of any analysis and turned on the lack of precedent, it cried out for the court of appeals to resolve the issue. Until the court of appeals acts, the *Belderrain* decision provides no disincentive to a criminal contemplating using the Zone of Death defense.

This is where the prosecutor's strategy came into play and made the situation worse. After Belderrain's argument failed, the prosecutor conditioned a plea deal on Belderrain not appealing the Zone of Death issue to the Tenth Circuit. The deal allowed Belderrain to appeal some of the issues in his case, but not this one. Not only, then, is the only precedent against the Zone of Death argument an ultra-thin trial-court opinion, the prosecution has sent a message (accurate or not) that it wants to avoid Tenth Circuit review. This broadcasts to would-be criminals that the government is worried that the Tenth Circuit will free the defendant if and when it gets a Zone of Death case.<sup>52</sup>

Maybe the Tenth Circuit would agree with me, and maybe it wouldn't. But what better case to get an answer than one like Belderrain's? He killed an elk, not a person. If the U.S. Attorney in Wyoming continues to condition plea deals on keeping the Zone of Death issue out of the Tenth Circuit, then the first person to actually appeal it will be someone who has nothing to lose—like a murderer. If the Tenth Circuit agrees that the Zone of Death exists, the cost will be too high. A person, not an elk, will have been killed, and a killer, not a poacher, will have gone free. Even if the Tenth Circuit rejects the theory, thereby closing the loophole, it would only be after someone has been killed, possibly by someone inspired to commit his crime by the loophole. It would be much better to let the court of appeals resolve the question at lower cost, sooner rather than later.

As I mentioned in Part I, when I wrote my article some people responded that the courts would never allow a criminal in this situation to go free. My response was, why not? “Shut up,” they explained. “The court just wouldn't.” It turned out that these critics were right. But as

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<sup>51</sup> Gagnon, *supra* note 10.

<sup>52</sup> The Assistant U.S. Attorney on the case did not—and, in fairness, possibly could not—tell me on the record why his office conditioned Belderrain's plea deal on him not appealing on the Zone of Death issue. Neither could Belderrain's new public defender (sadly, Belderrain's original lawyer, who negotiated the plea deal, died shortly thereafter). I would like to assume that Belderrain's lawyer didn't give up an appealable issue for nothing, but it is certainly possible that he did so. Even if he did, though, I still fault the U.S. Attorney's office for not making it a priority to resolve the issue.

frustrated as I was at the prospect of such a result, I had no idea that the prosecutor and judge would reach it in a way that would keep the loophole open so dangerously.

#### CONCLUSION

When I wrote *The Perfect Crime*, I did not expect Congress to read it, nod its collective head, and enact the legislation I had suggested. On the other hand, I did not expect members of Congress to ignore my communications to them quite so thoroughly. It was only C.J. Box's fictional case that got the government's attention, and even then only to a point. It was just as well, since the one real Zone of Death case that arose managed to elude the attention of the court that actually ruled on it.

As the old saw goes, laws are like sausages: it is better not to see them being made. I have spent four distasteful years seeing a law *not* being made. I can only imagine how unappetizing the scene will be if they ever do make it. But it's a chance I'm still willing to take.