

June 10, 2016

MEMORANDUM

To: House Committee on Natural Resources

From: David J. Hayes
Former Deputy Secretary, U.S. Department of the Interior
1999-2001; 2009-2013.

Re: Forum – Countering Extremism on America’s Public Lands

I am pleased to provide input on the Committee’s Forum regarding the need to counter extremism on America’s Public Lands.

As the former Deputy Secretary of the U.S. Department of the Interior in the Clinton and Obama Administrations, I have had the honor of helping to manage our nation’s public lands. It was my role – and the role of thousands of other employees in the Department of the Interior and our other federal land management agencies – to be good stewards of these remarkable public assets and manage them with care, in accordance with the law of the land.

In my experience, Americans are deeply respectful and appreciative of the many benefits that our public lands provide. Our public lands are a key part of our heritage. We collectively hold them in trust for the benefit of all Americans, and for the generations that will follow.

In recent years, we have witnessed the emergence of a small minority of citizens who question the public’s right to own our public lands, and who are aggressively disrespectful of the public servants who are managing our lands. In some cases, as recently exhibited in the criminal activity that occurred at Gold Butte and Malheur, they have engaged in reckless, dangerous, and unlawful activities that put many lives at risk. These extremists also have caused millions of dollars in damages to property and other response costs.

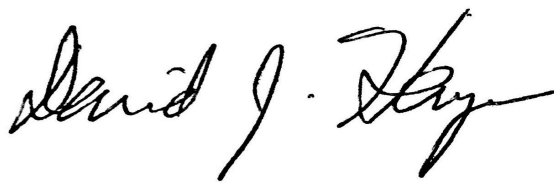
My most significant personal concerns regarding these extremist activities are twofold.

First, I am concerned about a rising number of incidents in which our public employees are being subjected to physical and psychological abuse. This behavior has no place in our society, and must not be tolerated. Our federal employees have pride in their work, and they take their responsibilities seriously. It is important that Congress stand up for, and celebrate, the work of our public employees. And the Congress should provide unqualified support for whatever actions are necessary to protect our public servants from extremist activity.

Second, I am concerned that extremist behavior is eroding respect for the rule of law – a fundamental bedrock of our democracy. Self-appointed “constitutional sheriffs” and other extremists are peddling baseless assertions questioning our nation’s authority over public lands, ignoring clear language in our Constitution, in the many public lands laws passed by the Congress, and in an unbroken line of Supreme Court cases (with the ignominious exception of the *Dred Scott* decision¹).

It is this lack of respect for the rule of law that is emboldening disgruntled individuals to threaten and debase public employees, ignore rules that protect sensitive lands, and take up arms against authorities. This is not how America works. In our representative democracy, if citizens are unhappy with the law, they ask you, the United States Congress, to change the law, as discussed in my guest commentary that appeared earlier this year in the *National Law Journal*, below.

Thank you for holding this Forum, and providing the opportunity to submit these comments.



Oregon Standoff Is Legally Untenable – National Law Journal

OPINION: In order to preserve the rule of law, our government must enforce it against those who flout it.

David J. Hayes
January 18, 2016

The Bundy story is remarkable, and disturbing. In the latest chapter, Ammon Bundy and his followers have taken over the Malheur National Wildlife Refuge in southeastern Oregon. Heavily armed men are patrolling the now closed refuge, removing its welcome sign in favor of a new banner proclaiming the establishment of the "Harney County Resource Center." Some occupiers reportedly have been sifting through government files looking for some sort of

¹ See John Leshy op-ed, “Lands Transfer to States; It Would Take Another Dred Scott Decision,” *Salt Lake Tribune* (Jan. 30, 2016), <http://www.sltrib.com/opinion/3463803-155/op-ed-lands-transfer-to-states-it>

government malfeasance, while others have been operating heavy government-owned equipment and ripping out fencing that divides the refuge from neighboring private ranch land.

Bundy and his gang claim that they have the Constitution on their side. They assert that the federal government has no legal right to own and manage the refuge — or any other public lands. They are claiming a legal justification for acting out the views of other sympathizers who would like to see the federal government turn over the national parks, national forests, national wildlife refuges, and Bureau of Land Management range lands to states and private parties. With the feds out of the way, they reason, such lands can then be sold off and freed of any restrictions on their use.

*Unfortunately, for Bundy and company, the law is not on their side. A unanimous U.S. Supreme Court ruled in 1917 in *Utah Power & Light Co. v. United States* that the U.S. Constitution's property clause — which explicitly grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" — vests the United States with "full power ... to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them."*

THE MALHEUR IRONY

It is particularly ironic, and perhaps unfortunate for him, that Bundy chose to make his stand in the Malheur National Wildlife Refuge. President Teddy Roosevelt dedicated Malheur in 1908 to protect and help sustain migratory bird populations from the millinery industry's thirst for then-fashionable hat feathers.

It was in a similar context of protecting wildlife that the Supreme Court in 1976 reinforced the federal government's authority to manage public lands for the public good.

*Specifically, in *Kleppe v. New Mexico*, the court noted that it has "repeatedly observed that 'the power of the public land thus entrusted to Congress is without limitations,' " concluding that the "complete power" that "Congress has over public lands necessarily includes the power to regulate the wildlife living there." It also does not help Bundy and his ilk that Congress has reinforced, and codified into law, the important role that our nation's 600-plus million acres of public lands play for the benefit of all Americans. Congress explicitly established the national wildlife refuge system, for example, "to administer a national network of lands and waters for the conservation, management and where appropriate, restoration of the fish wildlife, and plant resources and their habitats ... for the benefit of present and future generations of Americans."*

Consistent with this charge, the law requires that the United States generously allow use of the refuge for purposes that are "compatible" with its primary purposes, including hiking, bird watching and, where appropriate, hunting and fishing. Even some grazing and haying can be allowed where, as in Malheur, such activities provide accessible food for the hundreds of thousand of migratory birds and other wildlife that rely on the Refuge. Use and access

decisions are subject to public review and input through a comprehensive planning process that, for Malheur, produced a new plan in 2013 that was broadly endorsed by local community leaders who participated in the process.

The point is that the Constitution, our representative Congress and our federal land managers are all operating within a system of laws that seeks to manage our public lands for the benefit of all Americans. It's our representative democracy at work.

When laws governing our public lands need to be retuned to ensure fairness and accountability — as some are suggesting for the long, mandatory prison sentences recently imposed on ranchers whose arson damaged public lands — Congress can, and should, change the law. But laws are not meant to be broken.

That's why the armed takeover of Malheur needs to end with prosecutions for the perpetrators. The law here is clear. Americans are on notice that trespassing and engaging in unauthorized activities on national refuges can trigger civil and criminal penalties. Our laws also prohibit the destruction of public property and the type of over-the-top stalking and harassment of public officials that is happening in southeastern Oregon.

The Oregon situation also reminds us of the unfinished business in Nevada, where Ammon's father, Cliven Bundy, continues to defy a 2013 court order telling him to stop running his cattle on sensitive public lands without a permit. In that case, efforts to enforce the court order and complete a roundup were abandoned when Cliven Bundy and armed comrades confronted law enforcement officers.

The decision to disengage from a volatile physical confrontation in Nevada may have been a prudent one, but there is no excuse for the long delay in bringing a prosecution against Bundy for his blatant defiance of a court order. In order to preserve the rule of law, we must not hesitate to enforce it against those who refuse to abide by it — particularly when they incite others to do the same.

<http://www.nationallawjournal.com/commentary/id=1202747232238/Oregon-Standoff-Is-Legally-Untenable?slreturn=20160018084432>