

Question 1

In 1995, Representative Kenny introduced "The National Park Wilderness Area Protection Act of 1995." Representative Kenny argued that the act, which prohibited the operation of any vehicle in a wilderness area of a national park, was necessary to protect water quality, air quality, and the habitat of hundreds of animals and plants. As Representative Kenny asserted at a committee hearing on the bill, "Cars, trucks, and other vehicles spew pollution into the air and water, cause soil erosion, which leads to water pollution, and disturb the nesting, feeding, and breeding habits of many animals in wilderness areas. That is why we need to ban them from wilderness areas." The Kenny bill was never reported out of committee, and died in 1995.

In 1996, Representative Cartman introduced "The Clean Air Act Amendments of 1996," which included the language of Representative Kenny's 1995 proposal. Specifically, Section 201 of the bill provided that "no person may operate a car, truck, van, recreational vehicle, motorcycle, snowmobile, motorboat, jet ski, or any other vehicle in a wilderness area of a national park." When Representative Cartman introduced the bill, he pointed out, "Cars and other vehicles have contributed heavily to the smog problems and other air pollution problems that we are experiencing in our national parks. While it might be unrealistic to exclude vehicles from the parks entirely, at least we can exclude them from wilderness areas of the park."

Senator Kyle introduced an identical bill (entitled the Wilderness Protection and Public Safety Act of 1996) in the Senate, although he argued that the bill was necessary to protect public safety and limit government liability, rather than to protect air quality. Senator Kyle argued, "The nature of a wilderness area is that it is wild. The Park Service does not maintain wilderness areas. When tourists venture deep into wilderness areas, it is possible that they could get lost or injured in areas that are not easily accessible to Park rangers. If we prohibit vehicles in wilderness areas, it will be less likely that tourists will venture deep into inaccessible areas."

When the bill reached the Senate floor, Senator Garrison introduced an amendment that would prohibit rock climbing, cliff diving, whitewater rafting and "other hazardous activities" in wilderness areas of national parks. "If we're really concerned about public safety," he argued, "we need to ban these hazardous activities, as well as vehicles." However, recreational outfitting companies (i.e., companies that sell rock climbing, rafting, hiking, and other outdoor equipment and clothing) lobbied hard to prevent the Senate from adopting that amendment. In the end, several key Western Senators urged their colleagues to vote against the ban, in order to protect the interests of the recreational outfitters. In fact, the Senate adopted an exemption to the vehicle prohibition to authorize canoeing and other "traditional" activities in wilderness areas. Senator Southpark noted that, "the prohibition against vehicles in wilderness areas is broad enough to include

canoes and other traditional vehicles. Surely, we don't intend to prohibit canoeing or horseback riding in wilderness areas. We should make that clear on the face of the statute."

In addition, Senator Trek urged her colleagues to explicitly exempt mountain bikes from the bill's prohibition against vehicles in wilderness areas, but she withdrew her proposed amendment when Senator Huffy argued, on the Senate floor, that "we don't have to specifically exempt mountain bikes, because the term 'vehicle' in the bill only refers to motorized vehicles, and mountain bikes aren't motorized vehicles."

The Senate and House passed separate versions of the bill, and it was reconciled in a conference committee. Although the bill that was enacted was entitled "the Clean Air Act Amendments of 1996," the Conference Committee report discussed the air pollution, environmental, and public safety purposes of the legislation. The law, as enacted, included the following provisions:

Section 201. Public health and welfare protection in wilderness areas.

Except as provided in Sections 202 and 203, no person may operate a car, truck, van, recreational vehicle, motorcycle, snowmobile, motorboat, jet ski, or any other vehicle in a wilderness area of a national park.

Section 202. Exemptions for traditional activities

Notwithstanding Section 201, the National Park Service may, at its discretion, authorize horseback riding and canoeing in wilderness areas of national parks.

Section 203. Aircraft emergencies.

Notwithstanding Section 201, the National Park Service may authorize a plane or other aircraft to fly into a wilderness area of a national park in emergency circumstances.

Shortly after the law was enacted, Walt Gorge, the owner of High Flyers, a hang gliding business, came to your office to express his concerns about the law. In the past, High Flyers organized hang gliding trips to the Mercer National Park. The hang gliders traditionally launched off Mount Dessem and glided several miles into the wilderness area of the park in the valley below. Last week, however, park rangers at Mercer National Park informed Mr. Gorge that the Clean Air Act Amendments of 1996 prohibit hang gliders in the wilderness areas of the park. Mr. Gorge would like to continue to fly the hang gliders into the wilderness area, and you agree to look at the statute for him.

Your paralegal provides you with the legislative history outlined above, and he notes that the New Collegiate Dictionary defines "vehicle" as "a means of carrying or transporting something or someone."

Furthermore, he locates a technical guidance manual of the Society of Highway Construction Engineers, which defines "vehicle" as "any means of conveyance upon land. A vehicle can be motorized or non-motorized." Your paralegal notes that the U.S. Court of Appeals for your circuit relied on this definition of "vehicle" in *Ames DOT v. U.S. DOT*, when the court interpreted the 1995 Federal Highway Construction Law, which provides grants to state agencies for "vehicle transportation projects." In that case, the circuit court held that the state could not spend grant money under the statute on a ferry construction project, because a ferry does not travel on land, and is, therefore, not a "vehicle" under the definition adopted by the Society of Highway Construction Engineers.

Your paralegal has also done some research on hang gliding, and has discovered that hang gliders do not have motors or engines, and, therefore, do not discharge any air pollution. Admittedly, hang gliders could disrupt the habitat of animals and plants in wilderness areas, especially when landing, and hang gliders enable their passengers to venture deep into wilderness areas. High Flyers concedes that hang-gliding can be a hazardous activity, but Mr. Gorge argues that the law does not prohibit hazardous activities, in general. In fact, the Mercer National Park still allows rock climbing and whitewater rafting in the park.

On what bases can the National Park Service argue that the Clean Air Act Amendments of 1996 prohibit the operation of hang gliders in the wilderness areas of Mercer National Park, and on what bases can Mr. Gorge argue that the law does not prohibit that activity? Please make all reasonable arguments in support of, and against, each position. (Note: Assume that (1) the National Park Service concedes that a hang glider is not a "recreational vehicle" under Section 201 of the law; (2) all parties agree that the area that High Flyers jumps into is a "wilderness area of a national park" and that flying a hang glider is "operating" a hang glider; (3) Mr. Gorge is not claiming that the hang gliders should be allowed to fly into the wilderness area because there is an "emergency circumstance.") **(1 hour, 45 minutes suggested)**