

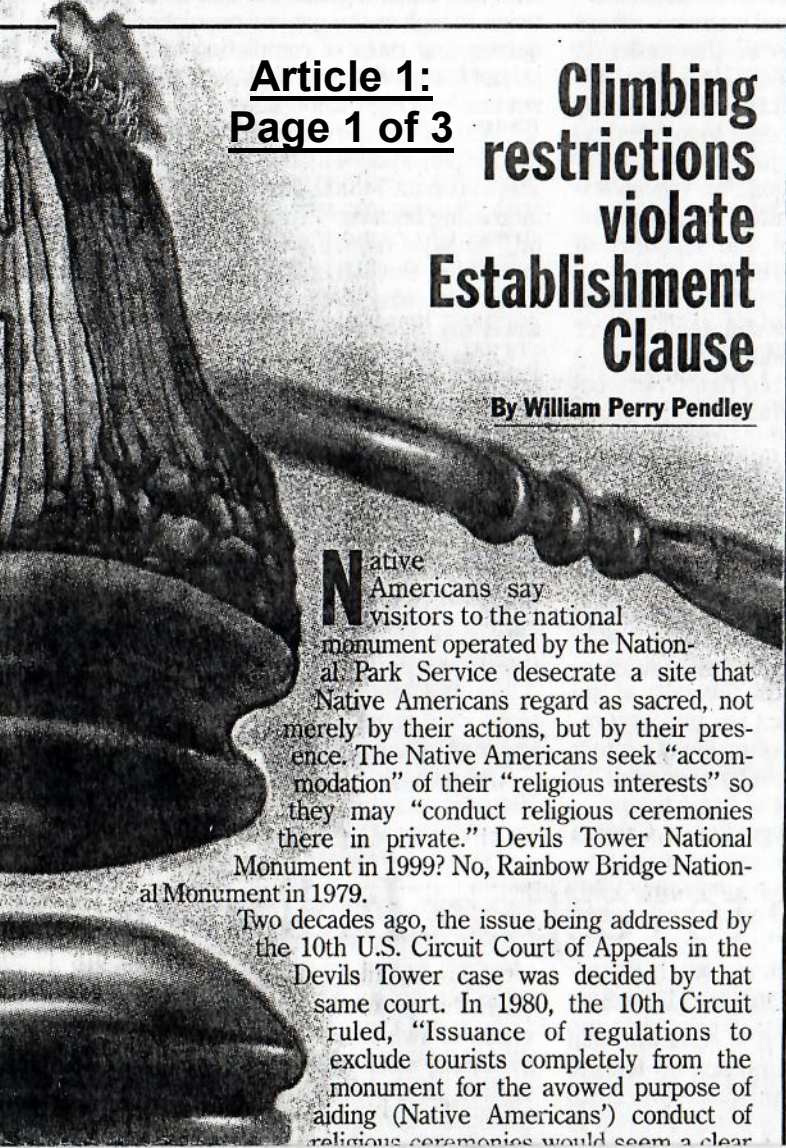
Commentary

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Climbing restrictions violate Establishment Clause

By William Perry Pendley



Native Americans say visitors to the national monument operated by the National Park Service desecrate a site that Native Americans regard as sacred, not merely by their actions, but by their presence. The Native Americans seek "accommodation" of their "religious interests" so they may "conduct religious ceremonies there in private." Devils Tower National Monument in 1999? No, Rainbow Bridge National Monument in 1979.

Two decades ago, the issue being addressed by the 10th U.S. Circuit Court of Appeals in the Devils Tower case was decided by that same court. In 1980, the 10th Circuit ruled, "Issuance of regulations to exclude tourists completely from the monument for the avowed purpose of aiding (Native Americans') conduct of religious ceremonies would seem a clear



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"We find no basis in law for ordering the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights," it continued.

Eight years later, the U.S. Supreme Court addressed the issue. Justice Sandra Day O'Connor, writing for the court, anticipated the Devils Tower case: "Nothing . . . would distinguish this case from another lawsuit in which (Native Americans) might seek to exclude all human activity but their own from sacred areas of the public lands." She continued: "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief."

Nothing distinguishes the Devils Tower case from these rulings except the fact that, as to Devils Tower, the NPS acceded to Native Americans' demands that others be kept off Devils Tower every June. Thus, the First Amendment's Establishment Clause, which provides "Congress shall make no law respecting an establishment of religion," still controls.

The U.S. Supreme Court says the Establishment Clause bars government from "advancing or endorsing religion," from conveying the view that "a religion or a particular religious belief is favored or preferred," and from communicating "a message of government endorsement or approval." Thus, as Chief Justice William Rehnquist has put it, government may not "take sides."

COUNTERPOINT

At Devils Tower, the NPS has taken sides. Every monument visitor has a view as to what role, if any, Devils Tower plays in his or her religion. But in June, says the NPS, the view that Devils Tower is sacred controls and climbers must stay away. While climbers do not have a constitutional right

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Climbing ban violates NPS policy as well

COUNTERPOINT from 1B

to climb, they do have a right not to be prevented from climbing due to their religion.

The NPS's objective is clear: "Climbers will show respect for American Indian (religion)." While "respect" is a fuzzy, politically correct word, government-mandated "respect" is a whole different matter. Imagine if the NPS were to ban visitors from national monuments to ensure that "tourists will show respect for (the Christian/Jewish/Moslem) religion." We would all be outraged if the NPS were to adopt such a policy; indeed, it would be the American Civil Liberties Union at the 10th Circuit, not Mountain States Legal Foundation.

The NPS climbing ban doesn't just violate the Constitution, it violates NPS policy: "Performance of a traditional ceremony or the conduct of a religious activity at a particular place shall not form the basis for prohibiting others from using such areas." This policy compelled the NPS, in issuing a permit to the pope to celebrate Mass on the National Mall in Washington, D.C., to condition the permit on an express prohibition against excluding non-Catholics from the event. It has long been NPS policy that visitors may be asked to be respectful of the activities of others on federal land, whether burying their dead or worshipping their God, but visitors were never denied

access to ensure that result; that is, until Devils Tower.

Much of this debate is theoretical. The Wyoming federal district court barred the NPS from banning commercial climbing at Devils Tower as contrary to the Constitution, but upheld the current NPS ban on recreational climbing as "voluntary." The "voluntary" issue is before the 10th Circuit. The NPS program is "voluntary" to the same extent that paying federal income taxes is "voluntary." When federal agencies, whether the IRS or the NPS, threaten citizens with adverse consequences for noncompliance, a citizen's adherence to agencies' demands is not voluntary.

Not surprisingly, several climbers testified that they took the NPS at its word and were "coerced" into not climbing. Whether the climbers were "coerced" by the threats of the NPS or by the rebuke accorded climbers by the media and others for being "insensitive" to Native American religion is irrelevant. The U.S. Supreme Court has held: "The government may no more use social pressure to enforce (religious) orthodoxy than it may use more direct means."

Clearly, the NPS ban is coercive and unconstitutional; Devils Tower should be reopened to all visitors.

William Perry Pendley is president of the Mountain States Legal Foundation.

Article 2:

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Source: County17.com (online newspaper)

Author: Kevin Killough

Date: June 25, 2018

URL: <https://county17.com/2018/06/25/should-climbers-honor-voluntary-june-ban-on-climbing-devils-tower/>

(Gillette, Wyo.) This week marks the last week of an annual month-long voluntary closure of climbing on Devils Tower. While the policy has many adherents, there are lots of climbers who disagree with its reasoning.

The mountain is considered sacred to a large number of Native Americans, including members of about six tribes native to the region. They have their own creation stories and oral histories associated with the tower.

They perform a variety of rituals at the tower, including sweat lodges, sun dances, and prayer offerings. It's fairly easy to spot the colorful cloths tied to tree branches and bundles left by the paved tower trail. To a Native American, touching or disturbing these items would be a lot like blowing out prayer candles in a church.

Devils Tower is a hugely popular rock-climbing destination, drawing about 5,000 to 6,000 climbers every year. Modern climbing techniques leave few lasting traces of the activity on the mountain, but for many Native Americans, the activity itself is offensive.

In the early 1990s, a policy was developed between the tribes and climbing organizations, both sides agreeing that a complete ban was not favorable. Instead, they opted for a voluntary ban throughout the month of June, and this was added as part of the final 1995 Monument Climbing Management Plan. It was last updated in 2006.

June was chosen due to its connection with the **Summer Solstice**.

According to data from the National Park Service, a lot of climbers honor the policy. After it was adopted, the number of people climbing the tower in June fell from 1,200 to 167. The number stayed at about that level every June but began to rise steadily since 2011. In 2016, 373 people climbed the tower in June.

The trend reversed in 2017, with only 269 people climbing the tower in June.

"It's important to recognize the needs of the Native American community," said Erik Murdoch, policy director for the Access Fund, a climbing advocacy and conservation organization based in Colorado.

The organization fully supports the voluntary ban, and they encourage climbers to honor it. Murdoch said they want to keep it voluntary, as there's benefit in climbers personally choosing

not to climb in June. But if too many climbers ignored the policy, it could lead to more restrictive enforcement.

“The Park Service could escalate it to a non-voluntary closure,” Murdoch warned.

Leigh Lassle is among the hundreds of climbers every June who ignore the ban. He has summited Devils Tower monthly and aims to complete his one-hundredth consecutive monthly climb in January. He is part Native American and feels a personal relationship with the mountain.

“It’s spiritual to everyone who goes there,” Lassle said.

He said the policy is overreaching and more political in nature than spiritual.

He also points out climbers have a deep respect for the places where they climb, especially on such a popular spot. Lassle said he and his fellow climbers regularly help maintain trails and climbing routes to ensure sustainability of the popular climbing destination.

There’s nothing climbers do that prevent or impede any Native American rituals on the mountain, he said.

Murdoch said the uptick in climbers in June is in line with education efforts. Over the time the decades-old policy was in place, another generation of climbers are heading for the tower without understanding the policy.

“Many climbers weren’t around when the issue was brought to the fore,” he said.

The Access Fund, which is part of a network of climbing organizations, has been providing more education, and Murdoch said it’s resulted in a reversal of the trend toward more climbers in June, as was seen in last year. He expects the number to continue to decline in the years to come.