

The Battle Has Just Begun: Monumental Issues of Implied Powers Within the Antiquities Act of 1906

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Repository Citation

Laura Pousson, *The Battle Has Just Begun: Monumental Issues of Implied Powers Within the Antiquities Act of 1906*, 7 LSU J. of Energy L. & Resources (2019)
Available at: <https://digitalcommons.law.lsu.edu/jelr/vol7/iss1/9>

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The Battle Has Just Begun: Monumental Issues of Implied Powers Within the Antiquities Act of 1906

This land is your land, this land is my land
From the California to the New York Island,
From the Redwood Forest, to the Gulf stream waters,
This land was made for you and me.¹

INTRODUCTION: AN ACT OF GREAT ANTIQUITY

On April 26, 2017, President Trump passed Executive Order No. 13792 (“Executive Order”), igniting public outcry over the country’s national monuments.² This order directed the Secretary of Interior Ryan Zinke (“Secretary”) to “conduct a review of all presidential designations or expansions of designations under the Antiquities Act of 1906” (“Antiquities Act” or “Act”). The review specifically takes aim at designations made since January 1, 1996, where the designation covers more than 100,000 acres.³

The President ordered the Secretary to consider whether prior presidents appropriately designated the lands under the Antiquities Act. This consideration includes a focused inquiry into the size of the monument, the availability of uses and enjoyments of the federal lands, and the availability of federal resources needed to properly manage these designated areas.⁴ As part of the evaluation of twenty-seven national monuments reviewed by the Department of the Interior, the Secretary drafted an interim report consisting of recommendations for presidential actions, legislative proposals, or other actions consistent with the law.⁵

For the past century, presidents have used their congressionally authorized powers to set aside and protect federal lands as national monuments. The Antiquities Act provides that “[t]he President may, in the President’s discretion, declare by public proclamation historic landmarks . . . to be national monuments.”⁶ Since its enactment, presidents have used the Antiquities Act to create 157 national monuments located in twenty-

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1. WOODY GUTHRIE, *This Land is Your Land*, (1940).
2. Exec. Order No. 13792, *Review of Designations Under the Antiquities Act*, 82 FR 20429, 20430.
3. *Id.* The National Park System reserves approximately 3.4% of U.S. lands. See <https://perma.cc/8G2Q-SUGD>.
4. Exec. Order No. 13792. *Review of Designations Under the Antiquities Act*, 82 FR 20429, 20430.
5. *Id.*
6. Antiquities Act of 1906, Pub. L. No.113-287, 128 Stat. 3259 (1906) (codified at 54 U.S.C.A. § 320301 (2014)).

eight states, the District of Columbia, and one territory.⁷ National monuments' individual sizes vary from less than one acre to almost eleven million acres.⁸ It took nearly a century for our presidents—from Theodore Roosevelt to Bill Clinton—to designate a total of about 110,000 square miles as national monuments. Obama alone added 860,000 square miles, including a 583,000-square-mile marine monument in the northwestern Hawaiian Islands. The drafters of this modest, one-paragraph statute could not have anticipated a century of ongoing controversy surrounding its broad language.⁹

In the 1900s, when presidents began using the Act, national monuments' sizes averaged around 422 acres each.¹⁰ Consequently, size was not much of a concern with earlier monuments. In strong contrast, recent designations of national monuments have exceeded one million acres.¹¹ Two of the most controversial monuments, which the Secretary reviewed for their expansive sizes, are Grand Staircase-Escalante National Monument (“Grand Staircase-Escalante”) and Bears Ears National Monument (“Bears Ears”), both of which exceed 1.3 million acres.¹²

In December of 2017, President Trump sparked controversy when he decreased the size of two national monuments: Bears Ears, designated by President Obama in 2016, and Grand Staircase-Escalante, designated by President Clinton in 1996.¹³ The President explained his reasoning: “Past administrations have severely abused the purpose, spirit and intent of [the 1906 Antiquities law; these misapplications] give enormous power to faraway bureaucrats at the expense of the people who actually live here, work here and make this place their home.”¹⁴ The pivotal question of presidential authority to resize monuments under the Act remains unclear,

7. Mark Squillace, Eric Biber, Nicholas S. Bryner, Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017). The National Park System includes 417 areas covering more than 84 million acres across every state, the District of Columbia, American Samoa, Guam, Puerto Rico, and the Virgin Islands. These protected areas include national parks, monuments, battlefields, military parks, historical parks, historic sites, lakeshores, seashores, recreation areas, scenic rivers and trails, and the White House. See <https://perma.cc/8G2Q-SUGD>.

8. Christine A. Klien, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1343 (2002).

9. *Id.* at 1338.

10. *Finally, Rural America has a Voice Again*, Press Release, DEP'T OF INTERIOR, 2017 WL 1488443 (Apr. 26, 2017).

11. *Id.*

12. *Id.*

13. Jacqueline Toth, *Trump Slashes Size of Bears Ears, Grand Staircase-Escalante Monuments*, 2018 CONGRESSIONAL QUARTERLY, INC., 2017 WL 5987794.

14. *Id.*

making the President's recent actions all the more controversial and polarizing.

Because bordering communities often rely on the lands for a variety of needs, making such broad designations affecting the access and use of these lands may very well disrupt the livelihood of those that depend on it. For example, neighboring communities may need these lands for flood control and watershed management, rights of way, border security, ranching, or simple recreational use.¹⁵ When creating a national monument, it is common for the President to impose restrictions on the use and management of that federal land.¹⁶ But when a President unilaterally declares large areas of land as national monuments and imposes substantial restrictions without consulting with local or state officials, public outrage often ensues.¹⁷ President Trump has repeated the cries of these areas stating, "The Antiquities Act does not give the federal government unlimited power to lock up millions of acres of land and water, and it's time we ended this abusive practice."¹⁸

In 1943, the State of Wyoming petitioned against the designation of Jackson Hole National Monument. The new designation removed Wyoming's control over the land, allegedly resulting in increased problems of management of the fish and game in the area.¹⁹ Those in favor of state-controlled lands argue that presidents have used their designation power too broadly under the Act, thus abusing their power by violating the provision of the Act requiring designations to be confined to the smallest area necessary for protection.²⁰ Determining the appropriate protective area involves examination of a number of factors, including the uniqueness and nature of the objects, the nature of the needed protection, and the protection provided by other laws.²¹ The Judicial Branch can review presidential designations to ensure compliance with the Act, which it has done on

15. *WTAS: Zinke Praised for Recommendation on National Monuments*, Las Cruces Sun-News, Press Release, DEP'T OF THE INTERIOR, 2017 WL 3668887 (Aug. 25, 2017, D.O.I.).

16. *Western Watershed Project v. Bureau of Land Management*, 629 F.Supp. 2d 951, 964 (D. Ariz. 2009).

17. Carolyn Gramling, *Science and politics collide over Bears Ears and other national monuments*, SCIENCE MAG. (Apr. 27, 2017), <https://perma.cc/725T-AR4R>.

18. *Id.*

19. *See* State of Wyoming v. Franke, discussed *infra* in Part II(D)(3).

20. Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 159-60 (2004).

21. *Presidential Proclamation Modifying the Bears Ears National Monument*, 2017 WL 5988611, at *1.

multiple occasions regarding the issues of its substantive requirements but never on the size requirement.²²

The requirement provisions set forth de-designation guidelines that support the position that the President has the implied power to reduce or modify the size of national monuments under the Antiquities Act.²³ A seemingly different question from the President's power to resize a monument is the question of presidential power to eliminate a national monument altogether. While a president may not have authority to abolish an existing monumental designation, the President should be able to resize existing monuments in order to bring them into compliance with the Antiquities Act.

The President has a duty to faithfully execute the laws of this country.²⁴ To ensure a national monument satisfies the Antiquities Act, it must only encompass the "smallest area compatible with the proper care and management."²⁵ There are broad limits on the President's power; therefore, in applying the Antiquities Act, the President must also consider the constitutional obligations to faithfully comply with the congressional boundaries established in the Act. National monument designation must first include an object as described in accordance with the requirement and must secondly be confined in size as the language dictates.²⁶ The President must ensure that limitations on the area of monuments are consistent with the object and size requirements expressed in the Act. Any designation exceeding the limitations set forth in the Act's language should be viewed as nonconformity with the Act.

Part I of this Comment explores the background of the Antiquities Act, including the impetus for its formation, how presidents have enthusiastically used it over the past century, and the legacy it has left behind. Part II addresses the question of presidential power implied within the Act. Part II will also consider the ambiguity that surrounds this frequently-used Act, resulting from the failure of both the executive and

22. Michael Margherita, *The Antiquities Act & National Monuments: Analysis of Geological, Ecological, & Archaeological Resources of the Colorado Plateau*, 30 TUL. ENVTL. L.J. 273, 280 (2017).

23. Antiquities Act of 1906, *supra* note 6. The term "de-designate" simply means to undo a formal designation of an item or an area, returning it to its former status, whatever that may have been. No official definition exists.

24. U.S. CONST. art. II, § 3. "And although the Constitution is less specific about how the President shall exercise power, it is clear that he may carry out his duty to **take care** that the laws be faithfully executed with the aid of subordinates." See *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1241, 191 L.Ed.2d 153 (2015) (emphasis added); quoting, *Myers v. United States*, 272 U.S. 52, 117, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

25. Antiquities Act of 1906, *supra* note 6.

26. *Id.*

legislative branches to clarify the Act's broad language, and the shortcomings of current attempts to resolve this issue. Part III will propose a solution, explaining how the current uncertainty as to the scope of the president's authority can be resolved through a comprehensive reading of the language of the Act, specifically its confining guidelines. This solution section will provide support for a novel middle-ground approach by investigating different critics' opinions and their respective shortcomings. Part IV of this Comment will conclude that the Antiquities Act impliedly authorizes presidents to resize and de-designate national monuments so as to bring an improper designation into conformity with the requirements of the Act.

I. A MONUMENTAL ACT

A. I Love Thy Rocks and Rills²⁷ - Protecting Our Land

As settlers and scientists explored the uncharted United States they developed an awareness of the need to protect archaeological discoveries.²⁸ Archaeologists, historians, and scientists urgently sought protection of important areas of land facing loss, destruction, or exploitation, such as ancient American Indian ruins.²⁹ In response to the threats to archaeological and historic sites, Congress drafted the Antiquities Act broadly, using plain language to grant the President discretionary authority to protect land that may not otherwise have received timely congressional protection.³⁰ The original language provides:

That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected.³¹

27. SAMUEL FRANCIS SMITH, *America (My Country, 'Tis of Thee)*, (Edison 1831).

28. Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 413 (1998).

29. *Id.* at 414.

30. Harrison, *supra* note 28, at 279.

31. Antiquities Act of 1906, *supra* note 6.

Evidenced by its language, the Act was necessary to quickly address scientists' and politicians' fears that the artifacts of interest would be damaged or destroyed before Congress could pass legislation granting protection.³² Those who drafted the bill that later became the Antiquities Act designed it to protect naturally occurring objects under a swift and efficient conservation designation scheme.³³

The broad discretion Congress granted the President is only limited by two requirements. First, to be considered a national monument, the land in question must contain "historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest."³⁴ The lands may already be owned or controlled by the federal government or may be relinquished to the Secretary as "necessary for the proper care and management of the object" of interest.³⁵ The President announces a designation and soon after arranges restrictions and protections.³⁶ The second limitation the Act imposes is the requirement that designated parcels of land be "confined to the smallest area compatible with the proper care and management of the objects to be protected."³⁷ Over time, Presidents have seemingly declined to adhere to this second requirement, as they have increasingly created larger, flashier designations under the Act.

32. The behavior of these drafters demonstrate how real and serious the fear of destruction was at this time. The original language of the Antiquities Act also included the following first paragraph:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

§ 16 U.S.C. 431-433.

33. The Antiquities Act of 1906 was deemed necessary after two decades of looting, desecration, and destruction of Native American sites in the Southwest such as Chaco Canyon and Cliff Palace. The bill, named "The Act for the Preservation of Antiquities" (also called the Lacey Act) was the result of several years' work by, among others, Representative John F. Lacey and Senator Jonathan P. Dolliver of Iowa and Representative John F. Shafroth and Senator Thomas M. Patterson of Colorado. On June 8, 1906, President Theodore Roosevelt signed the bill, which had been finally sponsored by Patterson in the Senate and Lacey in the House. *Antiquities Act of 1906*, THEODORE ROOSEVELT CENTER AT DICKINSON STATE UNIVERSITY, <https://perma.cc/6VG3-P32X> (last visited 11/12/17).

34. Antiquities Act of 1906, *supra* note 6.

35. *Id.*

36. *Id.*

37. *Id.*

Under the Antiquities Act, the President can establish a national monument unilaterally by proclamation.³⁸ A national monument is a legal designation that can be created by an act of Congress or by presidential proclamation.³⁹ A proclamation is an official statement or announcement made by a person in power or by a government.⁴⁰ These proclamations are “of general applicability and legal effect.”⁴¹ The management authority of national monuments generally falls under the National Park Service, but Congress often grants management authority to other agencies such as the Forest Service and Bureau of Land Management.⁴²

These monuments are places owned and protected by the national government because of their historic, scenic, or scientific importance.⁴³ However, monument designations prohibit commercialization of these lands, including timber, oil, gas leases, grazing, and mining rights. As of 2017, federal lands comprised 63.1% of Utah, 53% of Oregon, 61.6% of Idaho, 61.3% of Alaska, 45.9% of California, and 79.6% of Nevada.⁴⁴ While Congress or the President has made federal lands available for a variety of commercial purposes, acreage designated as monuments reduces the availability of such land for commercial use.⁴⁵ In states with substantial federal land ownership, state government and business interests are focused on potential job losses and diminished tax revenues, making them more likely to oppose federal preservation interests.⁴⁶ It is

38. Iraola, *supra* note 20, at 159-60.

39. Carol Vincent, CONG. RES. SERV., R41330, *National Monuments and the Antiquities Act 1-2* (2016).

40. *Proclamation*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2016).

41. Iraola, *supra* note 20, at 159-60. According to 1 CFR 1.1 (Title 1, General Provisions; Chapter I, Administrative Committee Of The Federal Register; Subchapter A, General Part 1, Definitions) the term “Having General Applicability And Legal Effect” means “any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations.”

42. Iraola, *supra* note 20, at 159-60.

43. *National Monument*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2016). Pre-historical and historical monuments are designated to protect buildings or artifacts of historical importance, such as dinosaur remains or Native American Indian structures. Scientific monuments include pools containing endangered species of animals, *see infra* Cappaert, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976).

44. CONG. RES. SERV., Carol Hardy Vincent, Laura A. Hanson, and Carla N. Argueta, *Federal Land Ownership: Overview and Data*, pages 7-8, (Mar. 3, 2017).

45. Michael A. Valenza, *From the Editor-in-Chief*, 46 REAL EST. L.J. 123, 125 (2017).

46. *Id.*

these states and governments that petition the President to help them by reducing the amount of federal control over state lands.

B. Uses and Monumental Legacy of the Antiquities Act

The Antiquities Act has provided initial protection to American treasures like the Grand Canyon, Zion National Park, and Olympic National Park. Congress has since re-designated these monuments as national parks, which changes their funding, protection, and management regimes.⁴⁷ National parks have been key tourist attractions in the United States since their beginnings, generating millions for local economies.⁴⁸ During the twenty-first century alone, presidents designated approximately seventy million acres of land as national monuments.⁴⁹ Congress has the ability to declare national monuments as well, and has done so over seventy times.⁵⁰ Because national parks and national monuments are so valuable to the United States, both aesthetically and financially, the Act is a powerful tool for presidents and conservationists seeking speedy protection of important areas. It is difficult to imagine where the country would be without the Act; many incredible, rare artifacts and scientific regions might have been destroyed.

All of the designated monuments protect some sort of historic, archaeological, cultural, or geological landmark or resource.⁵¹ Consequently, the Act designates a system to identify each monument according to its purpose: historic, prehistoric, biologic, and geologic.⁵² The Secretary's review encompasses every type of national monument. One of the more controversial national monuments that the President reviewed and reduced in size by 40% is Grand Staircase-Escalante in Utah—a once-1.9-million-acre monument designated for its prehistoric and geologically austere landscape and archeological discoveries, such as dinosaur fossils.⁵³

47. Squillace, *supra* note 7.

48. Craig L. Shafer, *The Unspoken Option to Help Safeguard America's National Parks: An Examination of Expanding U.S. National Park Boundaries by Annexing Adjacent Federal Lands*, 35 COLUM. J. ENVTL. L. 57, 81 (2010). For instance, in 2005, Colorado saw around 2.8 million visitors, generating nearly 4794 jobs and \$200 million for its local economy.

49. Iraola, *supra* note 20, at 159-60.

50. Klien, *supra* note 8, at 1356. *See also* 54 U.S.C.S. § 320301 (LexisNexis, Lexis Advance through PL 115-64, approved 9/29/17).

51. *See* Nat'l Parks Conservation Association, *Monuments Protected Under the Antiquities Act*, (Jan. 13, 2017), <https://perma.cc/L7W3-XAME>.

52. Antiquities Act of 1906, *supra* note 6.

53. *Grand Staircase Escalante National Monument*, U.S. DEP'T OF INTERIOR: BUREAU OF LAND MANAGEMENT, <https://perma.cc/7SWN-LB83>; *see also* Toth, *supra* note 13.

Despite the language of the Act, presidents have seemingly designated larger monuments more frequently based on their scenery alone.⁵⁴ Preservation of incredible scenic beauty has undoubtedly led to expansive inclusions of land, despite the language of the original Act that identified “landmarks,” “structures,” and “objects,” to be protected in “the smallest area compatible.”⁵⁵ Such designations have merit, but the designations of such large monuments often result in changes in the land’s usage that disturb citizens.⁵⁶ What many critics of de-designation do not realize is that the acres removed from the national monuments can still be federally controlled public land.⁵⁷ Changes in land usage, including restrictions with respect to resources such as fishing, hunting, mining, and grazing, have resulted in turbulence among citizens living within and around these monuments.⁵⁸ The frustrations surrounding changes in land usage are a direct result of national monument designations that arguably are too expansive in size.

National monument size, meaning the area the designation encompasses, is significant and has contributed to frequent sources of controversy. The language of the Act clearly attempts to place a limit on size but does not say anything explicit about reducing or abolishing national monuments. No President has ever abolished a national monument, and the Act neither mentions nor implies powers to abolish.⁵⁹

Congress certainly has the authority to reduce or abolish monuments, as it maintains absolute power over federal lands;⁶⁰ but Congress did not necessarily delegate this power when it assigned the power to designate to the President in the Antiquities Act.⁶¹ Over the past 111 years, all but four presidents declared lands at risk of exploitation or ruination as national monuments, preserving their historical, scientific, and cultural heritage.⁶² The widespread and frequent use of the Act has made it into something far more powerful than the drafters likely intended.

54. Iraola, *supra* note 20, at 159-60.

55. Valenza, *supra* note 45, at 126.

56. Iraola, *supra* note 20, at 159-60.

57. Elvina Nawaguna, *Trump's Move on Monuments Sets Up Antiquities Act Showdown*, CQ ROLL CALL WASHINGTON ENERGY BRIEFING, 2017 WL 6031789.

58. Michael C. Blumm & James A. Fraser, “*Coordinating*” with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands, 38 PUB. LAND & RESOURCES L. REV. 1, 4 (2017).

59. Margherita, *supra* note 22, at 275.

60. U.S. CONST. art. IV, §3, cl. 2. The Property Clause gives the federal government plenary authority to act as both a proprietor and sovereign of its lands.

61. Margherita, *supra* note 22, at 275.

62. Squillace, *supra* note 7, at 71.

C. Courts Give the President Discretion

Constitutional challenges regarding the Act have surfaced throughout the years. Claimants asserted that Congress violated both the Nondelegation Doctrine⁶³ and the Property Clause⁶⁴ by giving the President power to make rules concerning federal property under the Act.⁶⁵ The court in *Utah Association of Counties v. Bush*, addressed the constitutional issue, ruling that, when Congress gave the President such a broad grant of discretion as in the Antiquities Act, courts do not have authority to determine whether the President abused his discretion.⁶⁶ Although judicial review is not available to assess particular exercises of presidential discretion, courts may ensure that the President is exercising authority conferred by the Act at issue.⁶⁷ Thus, none of the specific claims in *Utah Association of Counties v. Bush* succeeded.⁶⁸

Congress can delegate its legislative authority to regulate federal lands to the executive branch as long as it gives ample instructions and guidance.⁶⁹ Congress successfully set forth an “intelligible principle”⁷⁰ of the standards and limitations in the language of the Antiquities Act. While the language includes some limits, it is still broad enough to allow the President a great deal of discretion.

There have been other pieces of legislation that discuss designation of land and the restrictions on persons in powers regarding such designations,

63. Under the Nondelegation Doctrine, Congress cannot delegate its legislative powers to administrative agencies. When authorizing agencies to regulate, Congress must provide them with an “intelligible principle” upon which to base their regulations.

64. 220 U.S. 523, 536-37 (1911); The Property Clause gives the federal government plenary authority to act as both a proprietor and sovereign of its lands. For example, in *Light v. United States*, the Supreme Court ruled that its Property Clause authority enables Congress to withdraw lands in federal ownership from settlement without a state's consent, and to regulate those lands contrary to state law. Blumm, *supra* note 58, at 13.

65. Section 14:4. The National Park System-National Monuments, 2 PUB. NAT. RESOURCES L. § 14:4 (2nd ed.); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1185 (D. Utah 2004).

66. *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1185.

67. *Id.*

68. *Id.*

69. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624 (1928).

70. Antiquities Act, authorizing President, “in his discretion,” to establish national monuments upon government lands, did not violate nondelegation doctrine or property clause, since it set forth clear standards and limitations; Act described types of objects that could be included in national monuments and limited size of monuments. CONST. art. IV, § 3, cl. 2; Antiquities Act of 1906, *supra* note 6.

but none of them have successfully answered the question of de-designation. Congress passed the Federal Land Policy and Management Act (“FLPMA”) in 1976 to establish public land policies, creating guidelines for its administration.⁷¹ The section of FLPMA concerning federal land designations (referred to as “withdrawals”) does not directly address the presidential powers under the Antiquities Act and does not point to the Act by name.⁷² However, FLPMA prohibits the Interior Secretary from revoking a monument designated under the Antiquities Act.⁷³

Section 204 of FLPMA describes the Secretary’s role regarding designations of public lands administered by the Bureau of Land Management, the National Forest System, the National Park System, etc.⁷⁴ Subsection 204(2) specifically requires the Secretary of Interior to determine whether the withdrawal of state lands into federal lands is consistent with the statutory objectives for which the land was designated. The Secretary then reports his recommendations of what to do with the designated lands to the President, who takes appropriate actions after considering agency head statements of concurrence and opposition. Section 204(j) of FLPMA limited the authority available to the Secretary to make land use decisions, specifying that the Secretary “shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under the [Antiquities] Act of June 8, 1906.”⁷⁵ Secretary Zinke’s recommendations prepared for President Trump thus satisfied FLPMA’s requirements, since Zinke himself was not the one to withdraw more land or to reduce the size of national monuments. Zinke’s only role was to conduct a review and make suggestions as to how the President could respond.

FLMPA otherwise left the Antiquities Act intact and did not limit, alter, or revoke the President’s unilateral power to designate. Many critics of the Act argue that Congress’ intention was for FLPMA to replace the Antiquities Act and all land designation acts like it, thereby rendering the Act irrelevant and eliminating any presidential power to unilaterally designate national monuments, but there is not enough evidence to support

71. PL 94-579 (S 507), Oct. 21, 1976, 90 Stat. 2743.

72. The term “withdrawal” means withholding an area of federal land from settlement, sale, location, or entry under some or all of the general land laws for the purpose of limiting activities under those laws. In contrast, the word “reservation” as applied to a description of land has a definite, specific meaning. It is defined as a tract of public land reserved for some special use, like schools, forests, or for the use of Indians. 43 U.S.C.S. § 1702 (j).

73. §3:23. Executive discretion in statutory implementation, 1 PUB. NAT. RESOURCES L. § 3:23 (2nd ed.).

74. PL 94-579 (S 507), Oct. 21, 1976, 90 Stat. 2743.

75. *Id.* at §204(j).

such an assertion.⁷⁶ Presidents continued using the Act liberally after FLPMA. Congress' failure to make changes can be interpreted as acquiescence to presidential activities under the Act, as opposed to reading their silence as opposition, inability to agree, or a lack of concern about the authority.

The Department of Interior (DOI) acts as the steward of America's public lands and works with the President to determine the best course of action for the designated lands; whether that involves leaving them as they are, restricting land use, or de-designating land that is not necessary to properly care for monuments. The ambiguity Congress left in the law allows the President to step in and listen to the voice of the people. With the vast amount of resources available today, presidents and their teams can easily explore what best suits the needs of the country.

II. THE ISSUE WITH OVERREACHING

A. Public Controversy Regarding Overly-Broad Monuments

While presidents' actions under the Act are often praised and celebrated, these actions have not escaped criticism or controversy. States, neighbors, industries, and similarly situated parties have argued vehemently against national monuments proclamations of the lands that they use and control. This animosity only grows when the federal government places stringent restrictions upon the newly designated lands.

In particular, rural western communities have been dissatisfied with federal land management decisions, blaming environmental regulation, litigious advocacy groups, and recreational users of public lands for stifling local economies long dependent on ranching, logging, and mining.⁷⁷ In 2012, the Utah legislature showed its distaste for President Clinton's and President Obama's designations by passing the Utah Transfer of Public Lands Act, demanding that the federal government cede public lands in Utah to the State by 2014.⁷⁸

Even the most popular national landmarks, such as the Grand Canyon, faced hostility. In *Cameron v. United States*, the first case to appear before the Supreme Court regarding the Antiquities Act, miners of the area

76. Scholars argue that Congress used FLPMA to reserve for itself the powers to modify or revoke national monument designations. In the article, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, scholars devote an entire section of their law review paper to proving that Congress can modify and revoke. They fail to verify any reasons why this means that the President cannot also modify monuments. Squillace, *supra* note 7, at 60.

77. Blumm, *supra* note 58, at 4.

78. *Id.*

opposed President Roosevelt's expansive designation of the Grand Canyon.⁷⁹ The dispute revolved around the language of the Act, but the Court remained silent on the section of text requiring that the designation "be confined to the smallest area compatible with the proper care and management of the objects to be protected."⁸⁰ The Court's silence at the time, and the lack of clarity since, is especially concerning in light of the seventy million acres of land that presidents have designated over time. Presidents have used their designation power broadly, which some construe to be a violation of the size requirement of the Act.⁸¹ President Trump's executive order demonstrates the need for a definitive interpretation of the Antiquities Act's implied powers.

B. Addressing the Vagueness

In the first few decades of the Act, the Supreme Court continuously supported the presidents' executive authority to designate land under the Act.⁸² The Court upheld the constitutionality of President Roosevelt's designation of the Grand Canyon in *Cameron v. United States*, stating that a large-sized monument does not necessarily violate the Act's "smallest area compatible" requirement, as long as the proposed monument meets the "objects of historic or scientific interest" standard.⁸³ The Court's ruling in *Cameron* essentially left the door wide open for the sort of presidential discretion that resulted in massive monuments.

Although the Court has never explicitly answered whether a President could resize national monuments using the Antiquities Act, presidents have done so on occasion. President Woodrow Wilson controversially downsized the Mount Olympus National Monument by over 313,00 acres—nearly half—without any challengers.⁸⁴ Because the law lacks clarity as to how much power Congress delegated under the Antiquities Act, and because there is no clear legal solution to this ambiguity, great

79. See *Cameron v. United States*, 252 U.S. 450, 458 (1920). This case involved a miner named Ralph Cameron who wanted to charge Grand Canyon visitors an entrance fee to a popular hiking trail. Cameron alleged a mining claim allowed him to charge visitors of the Grand Canyon an entrance fee to a popular hiking trail. The United States filed suit to enjoin him, and others, from occupying, using for business, asserting a right to, or interfering with public use of the land. Cameron argued that the monument should be disregarded entirely due to the President's lack of authority. The Court used this opportunity to rule on the constitutionality of the Antiquities Act.

80. *Id.* Antiquities Act of 1906, *supra* note 6.

81. Iraola, *supra* note 20, at 159-60.

82. Margherita, *supra* note 22, at 278.

83. See, e.g., *Cameron*, 252 U.S. at 458.

84. Squillace, *supra* note 7, at 66.

controversy exists regarding these powers. A few critics of the large Antiquities Act designations imprudently suggest getting rid of the Antiquities Act in its entirety as their solution.⁸⁵ They forget that moderation exists.

After President Obama's proclamation of Bears Ears National Monument, Utah locals were dissatisfied, viewing the designation as a robbery of Utah land.⁸⁶ The only explanation President Obama provided for the monument's expansive size was: "The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected."⁸⁷ In conjunction with prior designations, Bears Ears left the state of Utah with less than 33% of its land to fund roads and schools and it prevented the state from mining, drilling, and using off-road vehicle for over two decades.⁸⁸ Within ten years of the monument designation, an Escalante school had to declare a state of emergency due to a 35% decrease in enrollment.⁸⁹ Utah locals feared for their valuable mineral resources, timber businesses, and livestock grazing rights, but they felt unheard until President Trump announced his Executive Order.⁹⁰

More problems that communities burdened by massive Antiquities Act designations face include a diminished local tax base, loss of revenue, lack of state and local control, problems managing the area's fish and game, and the disruptive nature of the monument itself.⁹¹ Lawmakers and state leaders in the western region of the United States have decried monument declarations, especially those by President Obama, as arbitrary actions that lock out local residents from managing public lands and economic development. During his two terms, President Obama designated 548 million acres of national monuments, which is more than double the acreage designated by any other president.⁹²

85. See generally Mark Laemmle, *Monumentally Inadequate: Conservation at any Cost Under the Antiquities Act*, 21 VILL. ENVTL. L.J. 111 (2010); Iraola, *supra* note 20, at 159-60; Klien, *supra* note 8, at 1338.

86. Blumm, *supra* note 58, at 4.

87. Proclamation – Establishment of the Bears Ears National Monument, 2016 WL 7448410, at *6.

88. Corey Buhay, *Bears Ears: Why not?*, (May 26, 2017), <https://perma.cc/75V3-WCMN>. See also Michael Nordskog, *Tribes, Environmental Groups Sue Trump Over National Monument Purge*, WESTLAW ENERGY AND ENVIRONMENT DAILY BRIEFING, 2017 WL 6121121.

89. *Id.*

90. Buhay, *supra* note 88.

91. David Getches, *Managing the Public Lands*, 22 NAT. RES. L.J. 279, 302 (1982).

92. Elvina Nawaguna, *Trump's Move on Monuments Sets Up Antiquities Act Showdown*, 2017 WL 6031789.

With Executive Order No. 13792 and President Trump's actions shrinking Bears Ears and Grand Staircase-Escalante in the news, concerned states, communities, and scholars are now questioning whether the President has the authority to reduce monuments as well. On the other hand, many viewed President Trump's actions not only as permissible, but praiseworthy: "President Trump's decision to resize these national monuments after historic federal land seizures is a huge victory for the state of Utah," said Americans for Prosperity-Utah State Director, Evelyn Everton. "We applaud the Trump administration's actions in ensuring local economies that depend on the land's resources will not be harmed and important historic objects and sites at national monuments will be protected."⁹³

The President purports that his actions neither created any new rights, nor impaired the authority granted by law. However, those opposed to an implied power within the Antiquities Act to reduce or modify national monuments claim that this sort of action is strictly reserved to Congress, thus President Trump's de-designation is an "illegal move."⁹⁴ These opponents have neither law nor history on their side, instead arguing based on contended repercussions. The majority of the two million newly de-designated acres are still public lands, subject to rigorous federal and state protections. The Trump Administration also increased Native American representation on the advisory Bears Ears Commission. Thus, the Trump Administration's order not only ends federal overreach, but restores power to local people.⁹⁵

C. No Answer or Insight from the Legislature

Since its beginning, the Act has been the source of heated discussions. Many scholars who studied the legislative history and provisions concluded that the Act was only meant to protect small parcels of land containing archaeological and historical items.⁹⁶ Regardless of its legislative intent, the Act has been used for much bigger and more expansive purposes. Presidents have, for the most part, survived judicial scrutiny under the statute because of its broad language.

93. Toth, *supra* note 13.

94. PATAGONIA, *The President Stole Your Land* (Dec. 4, 2017), https://www.patagonia.com/protect-public-lands.html?utm_source=instagram&utm_medium=social&utm_campaign=BearsEars&utm_term=&utm_content=.

95. WALL STREET JOURNAL, *The Right Move on Monuments* (Dec. 5, 2017), <https://perma.cc/VF95-STT6>; WTAS: *President Trump and Secretary Zinke Praised for National Monument Report*, 2017 WL 6033792.

96. Margherita, *supra* note 22, at 279.

Several past presidents, including William Howard Taft, Woodrow Wilson, and John F. Kennedy, modified their predecessor's designations by shrinking their sizes and changing their borders.⁹⁷ During President George W. Bush's campaign for office, he vowed to review national monuments that he believed violated the Antiquities Act's size requirement.⁹⁸ In response to this campaign promise, Congress asked the Congressional Research Service to look into the legality of whether presidents could resize monuments under the Act.⁹⁹ This question remains unresolved, however, because President Bush did not follow through on this part of his platform, and the Congressional Research Service never felt pressured to answer the question. This has proven to be problematic, because no one, not even Congress, has articulated the extent of the presidential powers under the Act.

1. Composition of the Act According to Civilian Interpretation

When the law is clear, it should be adhered to. For this reason, the composition of the act is an essential tool in determining intent. The first section of the Act describes the types of areas the President may declare as national monuments; the second section limits this declaratory power, requiring the area of the monument be confined to specified standards.¹⁰⁰ Over the past century, Congress has only amended the Act on two occasions, otherwise bypassing numerous opportunities to repeal or modify the statute.¹⁰¹ These amendments did not change or clarify the general powers designated under the Act.¹⁰² The law's lack of clarity has led to fearful concern from local communities bordering established national monuments and potential national monuments.¹⁰³

97. Nawaguna, *supra* note 92.

98. *Clinton Will Create Six More National Monuments in West*, ST. LOUIS POSE-DISPATCH, Jan. 17, 2001, at A7.

99. *Id.*

100. Antiquities Act of 1906, *supra* note 6; *See generally* Harrison, *supra* note 28, at 416.

101. Klien, *supra* note 8, at 1336.

102. In *State of Wyoming v. Franke*, 58 F.Supp. 890 (D. Wyo. 1945), the district court was sympathetic to Wyoming's claim that it would suffer "great hardship and a substantial amount of injustice" if the monument designation were upheld, but it still dismissed the plaintiff's cause of action. Congress accepted the court's invitation to act, and passed legislation that restrained the Executive from creating any new national monuments in the State of Wyoming. Klien, *supra* note 8, at 1349. The Antiquities Act now includes the following provision: "(d) Limitation on extension or establishment of national monuments in Wyoming. No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress." 54 U.S.C.A. § 320301.

103. Harrison, *supra* note 28, at 420.

2. FLPMA Fails to Formulate an Answer

The presidential authority to designate national monuments under the Antiquities Act was initially uninhibited by public participation, congressional review, or any other procedural prerequisites.¹⁰⁴ While this remains true, the FLPMA could have changed things by requiring congressional approval for designations of land by the Secretary in excess of 5,000 acres.¹⁰⁵ However, Section 1714 of the FLPMA only addresses the Secretary of Interior and other land management agencies.¹⁰⁶ Therefore, on its face, the FLPMA does not apply to presidential designations of national monuments.¹⁰⁷ In addition, Section 701(a) of FLPMA states that its provisions should not be interpreted to repeal any existing law by implication. Thus, it is not surprising that since 1976, presidents have continued to use the Antiquities Act in much the same way as their predecessors.¹⁰⁸ Despite scholars' attempts to interpret FLPMA's language, they have failed to find an answer to the enduring question of presidential power under the Antiquities Act in legislation.

D. Case Law Likewise Fails to Address the Problem

Courts may review whether a President properly exercised his or her delegated authority when proclaiming federal land designations under the Antiquities Act.¹⁰⁹ The section of the Act restricting designations to the "smallest area compatible" appears to be a limitation enabling court review of executive action. However, courts have routinely and uniformly deferred to the President's judgment, refraining from an independent review of what should be considered the smallest area compatible.¹¹⁰ Without clarification from Congress, those wanting an answer must look to the judicial branch. President Trump's recent controversial actions have resulted in numerous lawsuits, potentially rendering the silence of Congress and the courts short-lived.¹¹¹

104. Iraola, *supra* note 20, at 159-60.

105. PL 94-579 (S 507), October 21, 1976, 90 Stat. 2743 at § 704, (codified as amended at 43 U.S.C. §§ 1701-1785 (2002)).

106. Section 14:13. General Procedure: The Regulations, 2 PUB. NAT. RESOURCES L. § 14:13 (2nd ed.).

107. *Id.*

108. Margherita, *supra* note 22, at 280.

109. Antiquities Act of 1906, *supra* note 6.

110. Section 14:4. *The National Park System - National Monuments*, 2 PUB. NAT. RESOURCES L. § 14:4 (2nd ed.).

111. Native American tribes and environmental groups have filed suits challenging President Donald Trump's rollback of the Bears Ears and Grand Staircase-Escalante National Monuments in Utah through two recent proclamations: Hopi Tribe et al. v. Trump et al., No. 17-cv-2590, *complaint filed*,

With courts refusing to consider the consequences of an overly broad designation, the responsibility falls on the executive and legislative branches. While the Antiquities Act does direct the President to confine the designation “to the smallest area compatible with proper care and management of the objects to be protected,” there is no identified remedy available when the acreage is arguably excessive.¹¹² Perhaps the most appropriate remedy is congressional action reversing the presidential designation of national monuments. In the absence of new legislation, there is no guarantee that the courts would do anything other than defer to the actions of a President, regardless of what those actions entail.¹¹³ The Constitution unambiguously vested in Congress all power over federal lands; thus, Congress can indisputably designate, restrict, reduce, and abolish national monuments.¹¹⁴

1. *The Supreme Court’s Silence*

The Supreme Court cases, *Cameron v. United States* and *Cappaert v. United States*, both began with the United States government enjoining citizens from “adversely impacting” newly designated national monuments.¹¹⁵ In both instances, the Supreme Court chose to defer to the executive determinations of necessity for protection of the monuments.¹¹⁶ These decisions further demonstrate muteness on the size issue arising from the Act. Instead, the Court focused on unrelated issues, such as water rights and mining laws, avoiding the executive question of presidential authority to de-designate.¹¹⁷

The Supreme Court’s lack of clarity as to whether the President exceeded his authority has led to a legitimization of over a decade of executive practice in which extremely large landscapes were made national monuments under the Antiquities Act.¹¹⁸ Other courts ostensibly

2017 WL 6033876 (D.D.C. Dec. 4, 2017) and *Wilderness Society et al. v. Trump et al.*, No. 17-cv-2587, *complaint filed*, 2017 WL 6015958 (D.D.C. Dec. 4, 2017). The suits in the U.S. District Court for the District of Columbia say the unprecedented action by a U.S. President exceeds the authority granted under the Antiquities Act with respect to national monuments, among other arguments. *Tribes, Environmental Groups Sue Trump Over National Monument Purge*, 2017 WL 6121121.

112. Valenza, *supra* note 45, at 125.

113. *Id.*

114. U.S. CONST. art. IV, § 3, cl. 2.

115. *See generally Cameron*, 252 U.S. 450, 458 (1920); and *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976).

116. *Id.*

117. Harrison, *supra* note 28, at 419. *See generally Cameron*, 252 U.S. 450, 458 (1920), and *Cappaert*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed. 2d 523 (1976).

118. Klien, *supra* note 8, at 1348.

followed suit, avoiding the critical question of whether a President can reduce the size of a national monument. Due to this lack of clarity, no viable argument exists as to the illegality of President Trump's actions in decreasing a monument's size.

2. District Circuits Follow SCOTUS' Example

The D.C. Circuit has only reviewed the Act's language regarding presidential authority to declare national monuments as opposed to the question of size limitations. Claimants fighting designations asserted that the Act does not allow designations for environmental or scenic purposes alone since the language explicitly requires "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."¹¹⁹ Put simply, the court will only review claims of whether a national monument contains an item worthy of protection. The courts repeatedly rejected these arguments, insisting that the Act should not be interpreted so narrowly and giving deference to what a President deems worthy of national monument status.¹²⁰

Similarly, the Utah District Court in *Utah Ass'n of Counties v. Bush* said that it could only conduct a facial review¹²¹ of presidential actions under the Antiquities Act; meaning it could only reach a decision on whether the President acted in accordance with the Act.¹²² The court said it could not second-guess the President's reason for designations.¹²³ While a prior president's reasoning in designation cannot be disturbed, nothing prevents the assessment of a president's size constraints.

It is circular to assume that the President's designation is the proper size, so long as the President declares that it is necessary under the Act. One critic from Utah fervently argued this point stating, "Apparently believing that saying it makes it so; President Clinton's proclamation contained all the requisite words of the Antiquities Act . . . whether words on paper make up for what is not on the ground, remains to be seen."¹²⁴

119. *Supra* note 106.

120. Laemmle, *supra* note 85.

121. Facial challenge (1973): A claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally. Cf. *as-applied challenge*. BLACK'S LAW DICTIONARY (10th ed. 2014).

122. *Supra* note 106; *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1185 (D. Utah 2004) appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006).

123. *Id.*

124. William Perry Pendley, *Grand Staircase-Escalante National Monument: Protection of Antiquities or Preservationist Assault?*, UTAH B.J., Oct. 1997, at 8. See also Klien, *supra* note 8, at 1364: President Clinton created Grand Staircase-Escalante National Monument as a 1.7 million acre monument. The designation

The court did not see any challenges of presidential authority on this matter, but perhaps it should have. Presidential proclamations should not be treated as infallible or irrefutable, and it would be unwise to essentially allow a past President to render the current President powerless to act.

3. *Gimme Shelter—Courts Hiding Behind Congress*

State governments have tried to figure out the extent of authority granted under the Antiquities Act through legal action. In *State of Wyoming v. Franke*, a federal court looked directly at the question of the limiting provisions found within the Act. Before the President's proclamation of the land that is now Jackson Hole, people arguing for and against the designation were involved in heavy debate for more than eighteen years.¹²⁵ The Wyoming District Court, however, followed the example of other courts by refusing to rule on the latter requirement of size, finding it to be a question outside of the court's jurisdiction.¹²⁶

It has long been held that where Congress authorized a public officer to take some specified legislative action, when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.¹²⁷ Applied here, courts only perform a discretionary evaluation¹²⁸ of whether a President's designation was within the standards set forth in the Antiquities Act. Courts have repeatedly chosen not to review presidential determinations or findings of fact in this matter, hoping that the executive and legislative branches would solve the problem.¹²⁹

4. *Oh Congress, Where Art Thou?*

Congress attempted to rectify the situation in *Wyoming v. Franke* by passing legislation to abolish the Wyoming national monument, but President Roosevelt vetoed it.¹³⁰ Congress' ability to rein in perceived

led to allegations that President Clinton violated the size requirement of the Act and that his motives were improper.

125. Harrison, *supra* note 28, at 420.

126. *Id.* at 420-23.

127. *Franke*, 58 F.Supp. 890-92 (D. Wyo. 1945); *United States v. Bush*, 310 U.S. 371, 380 (1940).

128. Discretionary evaluations involve an exercise of judgment and choice, not an implementation of a hard-and-fast rule exercisable at one's own will or judgment. A court's discretionary act may be overturned only after a showing of abuse of discretion. BLACK'S LAW DICTIONARY (10th ed. 2014).

129. Antiquities Act of 1906, *supra* note 6.

130. Pendley, *supra* note 124, at 8.

presidential abuse of the Act is limited to a two-thirds vote of the Senate and the House, which is not always an easy threshold to meet.

Still, Congress has power. When in disagreement with President Carter's proclamation of fifteen new national monuments and expansion of two preexisting monuments, Congress passed the Alaska National Interest Lands Conservation Act. Congress' action rendered the pending federal court case, *State of Alaska v. Carter*, moot.¹³¹ Many United States citizens strongly opposed the attempted designation, which reserved more than fifty-six million acres of Alaskan lands, and disrupted ongoing negotiations between Congress and Alaskan native tribes.¹³² Having a congressional check is vital to the Act's function and constitutionality, but Congress has often remained silent. Neither Congress nor courts have solved the problem of whether the implied power to resize monuments exists in the Antiquities Act.

E. Other Approaches and Why They Fail

By contrasting the Antiquities Act with other contemporaneous laws that contained broad executive authority to designate, some argue that the Act only grants the President the narrow authority to reserve lands.¹³³ The Pickett Act of 1910 allowed the President to withdraw and reserve public lands for specific purposes "until revoked by him or an Act of Congress."¹³⁴ The Pickett Act sought to limit withdrawal authority of the President, yet the Pickett Act neither claims to, nor does supersede the Antiquities Act.¹³⁵ Importantly, though, the only thing the Pickett Act accomplished was regulation of temporary public land withdrawals to affect the use of petroleum deposits on public lands at the President's request.¹³⁶

Similarly, the Forest Service Organic Act of 1897 authorized the President "to modify any executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate

131. See generally *State of Alaska v. Carter*, 462 F.Supp. 1155 (D.Alaska 1978); *Anaconda Copper Co. v. Andrus*, 14 ERC 1853 (D.Alaska 1980); Harrison, *supra* note 28, at 431.

132. *Anaconda Copper*, 14 ERC 1853 (D.Alaska 1980); Harrison, *supra* note 28, at 429.

133. Squillace, *supra* note 7, at 58.

134. *Id.* at 71, citing Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976 by the FLPMA).

135. Richard H. Seamon, *Dismantling Monuments*, p. 41, (Sept. 2, 2017). Available at SSRN: <https://perma.cc/JA8C-BBWQ>.

136. *Id.*

altogether any order creating such reserve.”¹³⁷ However, Attorney General Cummings first compared the language of these acts and concluded that the Antiquities Act was not affected by any subsequent legislation.¹³⁸

Congress has the power to amend or repeal the Antiquities Act itself.¹³⁹ Shortly following President Trump’s executive order, some members of Congress proposed amendments to the Antiquities Act in May 2017 “to provide for congressional and state approval of national monuments and restriction on the use of national monuments,” calling the act the National Monument Designation Transparency and Accountability Act (NMDTA).¹⁴⁰

The amendment would require the President to comply with the National Environmental Policy Act of 1969 and obtain state approval before declaring a proposed national monument.¹⁴¹ It would also restrict the Secretary from implementing any restrictions on the public use of a national monument until an appropriate review period with public input and congressional approval has been performed.¹⁴² While NMDTA would place restrictions on the President’s designation power under the Antiquities Act, it would not limit his implied power to resize existing monuments or de-designate land. In fact, NMDTA is completely silent on the issue that the Executive Order and President Trump’s actions raise.

III. A NON-ANTIQUATED PROPOSAL

Perhaps continuing ambiguity regarding the Antiquities Act is a result of the polarizing approaches taken by scholars. While some argue there are absolutely no implied powers under the Act, others want to give unlimited powers under the Act. If given the opportunity, some would even do away with the Act in its entirety. Perhaps Congress and the courts have not addressed the issue in over 111 years because they feel torn between preserving the Antiquities Act’s monumental legacy and satisfying those who would have it annulled. While the extremes are certainly well-represented in the scholarship, seemingly no one has proposed any sort of middle-ground approach that balances the various values that are concerned. The following contemporary middle-ground analysis of the Antiquities Act seeks to equalize land preservation concerns with state autonomy values, all

137. Squillace, *supra* note 7, at 71, citing Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. § 457 (2006)).

138. *Id.*, citing *Proposed Abolishment of Castle Pinckney National Monument*, 39 Op. Att’y Fen. 185 (1938).

139. Margherita, *supra* note 22, at 280.

140. 115th Congress, 1st Session, 2017 CONG. U.S. H.R. 2284.

141. *Id.*

142. *Id.*

while maintaining the system of checks and balances. Under this approach, the President should be able to modify national monuments created by his or her predecessors within limitations—limitations that come directly from the Act itself.

A. Ain't No Monument High Enough

Although presidents have rarely attempted to reduce the size of national monuments, a comprehensive reading of the Antiquities Act supports a limited de-designation power. Congress itself has been ambivalent toward executive actions under the Antiquities Act. The issue is simple. If a previous administration designates national monuments encompassing more than the “smallest area” required, then it exceeds its executive power. A current president has the authority to order a review of past monuments and to reconsider past designations. It logically follows that the president has to the power to take additional action after such careful deliberations.

Within the first sixty years of the Act, seven presidents reduced the size of national monuments, presumably to keep the land within the “smallest area compatible” of the protected objects.¹⁴³ The reality of the broad discretion the President has, since he or she is not limited by the same constraints imposed on agencies, supports a broad reading of the Act. Unlike the Secretary, the President does not typically need the consent of another agency head to reduce lands subject to monument designation.¹⁴⁴ In other words, the President does not need another government body’s consent to de-designate or return sections of the land to their prior status.

B. Power to Resize Without Power to Abolish

Many critics, believing the President does not have the power to reduce monuments, claim that Attorney General Cummings’ Opinion in 1938 settled the matter.¹⁴⁵ This often-cited opinion explains why the President cannot abolish an established monument.¹⁴⁶ Essentially, Attorney General Cummings stated that abolishing a monument would be the executive branch attempting to “repeal or alter an act of Congress at will,” which the Act does not authorize.¹⁴⁷ Because Congress delegated to presidents the power to designate monuments and presidents otherwise do not have inherent power over public lands, any monument designation is

143. Margherita, *supra* note 22, at 292.

144. *Supra* note 102.

145. *See generally* Iraola, *supra* note 20, at 159-60; Squillace, *supra* note 7.

146. 39 U.S. Op. Atty. Gen. 185, 1938 WL 1497.

147. *Id.*

equivalent to an act of Congress and cannot constitutionally be undone by the executive branch, i.e. another President.¹⁴⁸ There is a concern that giving the President the implied power to abolish monuments would take away Congress' opportunity to review a monument's designation, thus undermining the purpose of the Antiquities Act.¹⁴⁹

Those who contend that Congress only intended to grant the President unilateral power to create but not to revoke or reduce existing national monuments, argue that this implied power would be inconsistent with the Act's impetus to protect lands of importance before they suffer harm.¹⁵⁰ The entirety of the Antiquities Act relies on presidential discretion of whether an object is worthy of federal protection. Perhaps the issue of reducing national monuments would be different if a President argued that his or her predecessor lacked the statutory authority to make an entire designation in the first place; however, given the history of courts referring to Presidents' reasons for designations, it seems unlikely that a president could abolish such a designation.

The language of the Act's requirements is unambiguous, and it supports the Attorney General's opinion. Once a president deems an object worthy of protection, a different president's opinion on the matter does not suffice to undo the designation entirely. The President does not have the power to abolish a monument. If a monument was entirely unjustified in the first place, then constitutionally, it is up to Congress to abolish the Act as the chief manager of federal lands. Nevertheless, a lack of power to abolish does not mean there is a lack of power to resize. The authority required and the consequences of such actions are inherently distinct.

C. Congress' Silence as Acquiescence

Commentators who favor expansive presidential authority cite to examples of "congressional acquiescence" to support implied presidential powers under the Antiquities Act.¹⁵¹ Congress has acted when it disagrees or agrees with a designation, but it has also remained silent on the majority of presidential national monument designations. Congress has abolished ten presidentially-established monuments in the past, leaving countless others in place.¹⁵² Congress has also never attempted to restrict the President's modification power through legislation, despite knowledge that presidents interpreted the Act to give them this authority.¹⁵³ Congress

148. Margherita, *supra* note 22, at 287.

149. *Id.*

150. *Id.*

151. Pendley, *supra* note 124, at 8; Getches, *supra* note 91, at 308.

152. Seamon, *supra* note 135, at 28.

153. *Id.*

has shown that it is willing to intervene when necessary, as they did when re-designating national monuments as national parks and in the Wyoming case previously discussed, so the idea of Congress consenting by its silence and inaction is a supported inference of presidential power.¹⁵⁴

D. The Language of the Act is the Answer

The second limitation found in the language of the Act distinguishes between a President abolishing a monument and a President modifying the size of a monument. In writing on the issue, many have ignored the key part of Attorney General Cummings' 1938 opinion. While the opinion explicitly states that a President cannot abolish a national monument, it implies that a President can reduce or modify the size of one. The opinion states: "A duty *properly performed* by the Executive under statutory authority has the validity and sanctity which belong to the statute itself"¹⁵⁵ The Act requires presidents to limit the national monument designation to "the smallest area compatible with the proper care and management of the objects to be protected."¹⁵⁶ Attorney General Cummings explained that the President is only limited when a duty has been *properly performed*. A designation under the Antiquities Act is not *properly performed* if it does not satisfy the Act's size requirement. An *improperly performed* act does not equate to "an act of Congress," and therefore a President is not bound by it; thus, he may reduce the size of a monument that has violated the Antiquities Act.

The precise language of the Act provides the explicit guidelines as to what national monuments should encompass, which the President must follow when both designating and de-designating lands. By explicitly saying he was not answering the question of presidential power to reduce monument size, Attorney General Cummings's opinion admits that "the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the Act which provides that the limits of the monuments [be confined]."¹⁵⁷ The presidents' actions, Congress' inaction, and courts' unwillingness to regulate throughout the years all support this straightforward interpretation of the Act.¹⁵⁸

154. See *State of Wyoming v. Franke*, discussed *supra* in Part II(D)(3).

155. 39 U.S. Op. Atty. Gen. 185, 1938 WL 1497.

156. Antiquities Act of 1906, *supra* note 6.

157. 39 U.S. Op. Atty. Gen. 185, 1938 WL 1497.

158. If challenged in court, *Chevron* deference may apply to the Presidential interpretations. Courts have proven to be unwilling to answer the question of presidential authority under the Antiquities Act, expressly stating that they defer to the President's discretion on the matter. See *generally Cameron*, 252 U.S. 450,

E. One Indivisible Nation

In 1976, the FLPMA expressly repealed the executive's authority to withdraw public land contained in twenty-nine statutes existing at the time. Importantly, the Antiquities Act was excluded from the list.¹⁵⁹ This shows Congress' choice to retain the executive withdrawal authority in the Act, in spite of the ambiguity over implied powers to rescind. Although presidents were not readily using the implied power to resize monuments, some were nevertheless concerned that they might. Perhaps more importantly, citizens and governments surrounding some of the larger monuments were perceptibly unhappy and were calling for presidential review of these monuments, hoping to have the borders reduced. When de-designating national monuments under the Antiquities Act, President Trump allegedly took into account the concerns of the people neighboring

458 (1920); *Cappaert*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1185 (D. Utah 2004); *Franke*, 58 F.Supp. 890 (D. Wyo. 1945); *United States v. Bush*, 310 U.S. 371, 380 (1940); *State of Alaska*, 462 F.Supp. 1155 (D. Alaska 1978); *Anaconda Copper*, 14 ERC 1853 (D.Alaska 1980). According to the Supreme Court in *Chevron v. Natural Resources Defense Council*, it has been "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Because there is ambiguity in the Act, and because Congress has not resolved the ambiguity surrounding the Antiquities Act, it would be appropriate for the courts to give *Chevron* deference to the President's construction of his implied powers within the Act.

The *Chevron* holding arguably applies to similar situations involving the President, although the Court in *Chevron* only held that agency interpretations of their power-granting, enabling statutes should be given deference when ambiguity exists, unless unreasonable. The courts only said the size challenges were unreviewable, while still giving deference to the requirement that the monument contain an item of interest. *Id.* Courts have routinely chosen to give deference to presidents' designations under the Act, though never referring to it as *Chevron* deference. *Id.*; see also *Cappaert*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1185 (D. Utah 2004); *Franke*, 58 F.Supp. 890 (D. Wyo.1945); *United States v. Bush*, 310 U.S. 371, 380 (1940); *State of Alaska*, 462 F.Supp. 1155 (D. Alaska 1978); *Anaconda Copper* 14 ERC 1853 (D.Alaska 1980). *Chevron* deference is a very high level of deference, nearly unquestionable, and, since there is no solid proof that courts have been giving this type of deference, one could argue that the posture here is more reminiscent of a lesser level of deference, such as *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140. 65 S.Ct. 161. 164. 89 L.Ed. 124 (1944). *Skidmore* deference is the administrative law principle that a federal agency's determination is entitled to judicial respect if the determination is authorized by statute and made based on the agency's experience and informed judgment. Regardless, it logically follows that courts should also give some deference to a President's interpretation that he may reduce the size of monuments designated by past presidents who were in violation of the Act.

159. *Supra* note 70; Klien, *supra* note 8, at 1359.

national monuments. The idea is for more than one person to be involved in the planning and management of the nation's protected lands.¹⁶⁰

While the language of the Antiquities Act does not require a President to obtain public input before acting, there is an increasing shift toward inclusion of the public in both designation and de-designation decisions.¹⁶¹ Monument designations, on occasion, allow preexisting land rights to continue for purposes such as grazing or mineral leases, and states want a say in how their lands are managed.¹⁶² There is an abundance of old mineral claims in national parks and wilderness areas, which are generally managed by the Bureau of Land Management at the President's or Congress' request.¹⁶³

Rarely are citizens with such rights willing to submit to more federal control or give up the rights completely. National monuments save money in the long run, because the government would otherwise have to spend money remediating damage to the land. If the defendants in *Cameron v. United States* had prevailed with their adverse mining uses of the newly designated Grand Canyon monument, one of the greatest American treasures could have suffered irreparable damage.¹⁶⁴ The motive for allowing a President to act quickly and to designate land before it is damaged or destroyed no longer exists when looking at de-designations. They are able to take their time and listen to the concerns and desires of the people.

1. Congress, Checkmate?

The presidential power under the Antiquities Act is quite broad but is still subject to separation of powers limitations. Congress maintains absolute power over land owned by the federal government under Article IV of the Constitution.¹⁶⁵ Thus, Congress can always abolish or modify the boundaries or land use rules of a national monument, which it has done numerous times.¹⁶⁶ When unhappy with a President's actions under an Act, Congress can retaliate in several ways. On occasion, Congress has

160. Shafer, *supra* note 48, at 118.

161. Antiquities Act of 1906, *supra* note 6.

162. UNITED STATES CODE ANNOTATED, Title 54, National Park Service and Related Programs, § 320301.

163. Shafer, *supra* note 48, at 57.

164. See *Cameron*, 252 U.S. 450, 458 (1920).

165. Margherita, *supra* note 22, at 280; see also, U.S. CONST. art. IV, § 3, cl. 2.: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

166. Margherita, *supra* note 22, at 280-86.

withheld funding for the administration of particular monuments of which it did not approve.¹⁶⁷

As discussed, Congress' inaction should be interpreted as acquiescence to the President's implied power to reduce and modify national monuments under the Antiquities Act. Congress pays close attention to what the President does under the Act, so the chances of the President getting out of control under the Act's authority are not great. If Congress disagrees with a decision for any reason, it has the power to reverse the decision once and for all through legislation or amendments to the Act; this may be easier said than done, since Congress would need supermajorities in each House in order to retaliate or reverse a presidential decision. Further, a President would likely veto any legislative effort to reverse his own determination. This simply points out another justification of finding presidential authority to modify national monuments, rather than watching Congress and the President play tug-of-war repeatedly.

Sometimes referred to as political "flashpoints," critics of national monuments see large designations as being a way for presidents to gain public popularity and support from conservationist groups.¹⁶⁸ While this political strategy may succeed, it simultaneously succeeds in infuriating other members of society who are greatly affected. Presidents of both the Republican and Democratic parties have added to, subtracted from, and altered monuments created under the Antiquities Act.¹⁶⁹ Presidents have also routinely revised or revoked their predecessors' executive orders for a variety of reasons.¹⁷⁰ President Trump's Executive Order 13792 introduced a public comment period for the review of monument designations under the Antiquities Act.¹⁷¹ Although this period was not required, both the President and the Secretary believe that "local input is a critical component of federal land management" and they received positive feedback from Utah communities following the recent de-designations.¹⁷² When reviewing national monuments that potentially exceed the size requirement of the Act, public input seems like it is here to stay, at least under this Administration.

167. Klien, *supra* note 8, at 1357.

168. *Id.* at 1338, quoting Shailagh Murray & Laurie McGinley, *Interior, HHS Nominees Lay Out Goals of Incoming Administration*, WALL ST. J., Jan. 19, 2001, at A4.

169. Seamon, *supra* note 135, at 27.

170. See Robert A. Shanley, *Presidential Influence and Environmental Policy*, 83 (1992).

171. *Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments*, Press Release, DEP'T OF THE INTERIOR, 2017 WL 1756375 (2017).

172. *Id.*

2. Now, For the People

Lands that presidents should de-designate include those safeguarded as national monuments exceeding the smallest area requirement in accordance with local communities' reasonable desires. Secretary Zinke stated, "No President should use the authority under the Antiquities Act to restrict public access, prevent hunting and fishing, burden private land, or eliminate traditional land uses, unless such action is needed to protect the object."¹⁷³ The communities, as well as the lands, need protection. Access and use of these lands are often essential to bordering communities who rely on the lands for necessities such as flood control and watershed management, rights of way, border security, ranching, and recreational use.¹⁷⁴

These concerns are what Secretary Zinke and President Trump focused on in their review and in the decision to de-designate certain monuments. The extensive review of national monuments included more than sixty meetings with hundreds of advocates and opponents of monument designations, and a thorough review of more than 2.4 million public comments.¹⁷⁵ The involvement of the people in decisions gave the country a voice, generating much-needed public support. This is necessary because the total size of national monuments land created exceeded 550 million acres and the overreaching of presidents cannot go on unexamined.¹⁷⁶

Those who oppose the implied power to resize monuments raise the argument that a past President's decision should be given due deference, as the courts have done; but there is a difference between a court second-guessing a President and a President second-guessing another President. It is the Office of the President's prerogative to designate national monuments and to ensure that no violations of the Antiquities Act exist. The size limitation is a factor that the President simply cannot step outside of or ignore. The boundaries of the national monuments declared under the Antiquities Act are subject to change, and the President has the ability to remedy such violations. Allowing the President to exercise his authority to modify and resize national monuments is necessary to the survival of the Act and of the bordering communities. Presidents have interpreted and acted under the Act in a certain way for a substantial period of time,

173. *Secretary Zinke Sends Monument Report to the White House*, Press Release, DEP'T OF INTERIOR, 2017 WL 3634796 (Aug. 24, 2017).

174. Press Release, DEP'T OF INTERIOR, *supra* note 15.

175. *Supra* note 173.

176. Seamon, *supra* note 135, at 18. President Obama designated 550 million acres of national monument land, more than twice President George W. Bush's then-record total of 214 million acres.

without eliciting Congressional reversal; and, although it is not necessarily controlling, presidential interpretation is entitled to great respect.¹⁷⁷

IV. THIS LAND IS YOUR LAND

The Antiquities Act gives the United States a conservation legacy that is the envy of other nations. While the Act is something the Nation should be proud of and work to preserve, future presidents should be able to review and modify the actions of past presidents under the Act. As the Congressional Research Service stated, “[t]he overriding management goal for all national monuments is protection of the objects described in the proclamations.”¹⁷⁸ Every branch of government and every citizen of the United States needs to have a voice in the protection of their historical, scientific, and scenic lands. It is not for a President to unilaterally overreach his or her authority at the expense of the land and the communities surrounding those lands.

The Antiquities Act allows the President to unilaterally protect important areas that are in potential danger. No one should argue to take that power away. Rather, there must be a solution for instances in which a President oversteps his or her authority. The presidential authority to resize and re-designate national monuments is supported by the language and history of the Antiquities Act. The Act permits a President to de-designate monuments, but only insofar as a de-designation decision is intended to "remediate" or "correct" a previous designation decision that itself ran afoul of the "smallest area compatible" requirement. The hypothetical discussion and avoidance of facing the issue needs to end. The country is alert and awaiting an answer. *This land is our land*, and, together with the people of this country, the President should be able to listen and make decisions to remedy past abuses.

*Laura Pousson**

177. *Dames & Moore v. Regan*, 453 U.S. 654, 686, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); *AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C.Cir.1979).

178. Margherita, *supra* note 22, at 295-96.

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