MONUMENTAL CHANGE? RETHINKING THE ROLE OF THE COURTS IN THE ANTIQUITIES ACT

Catarina Conran[*]

In recent years, controversy has arisen surrounding claims that national monuments designated by presidents under the American Antiquities Preservation Act ("Antiquities Act") of 1906 have been much too large. While this argument has been presented several times over the past century, it has once again been brought sharply to the fore by the tug-of-war over the Bears Ears and Grand Staircase-Escalante National Monuments across the Obama, Trump, and Biden administrations. Recent arguments by critics of the Act and sentiments expressed by members of the current United States Supreme Court may be indicative of upheaval in Antiquities Act interpretation.

Under current Antiquities Act jurisprudence, there are insufficient grounds for courts to invalidate national monuments on the basis of size. The reasons for this are twofold. First, neither the text nor the legislative history of the Antiquities Act favors a narrowing of the scope of presidential discretion. Second, because Congress retains the exclusive power to overturn declarations of national monuments, the broad discretion granted to the President by Congress was designed to be exercised subject to congressional oversight. Therefore, the Act is functioning as Congress intended, and it is, accordingly, up to Congress rather than to the Court to address dissatisfaction with the Act. Nevertheless, the Supreme Court may be seeking to narrow the scope of the Act. This Note concludes by exploring the likelihood of such a restriction and the consequences for national monuments should it come to pass.

---

[*] University of Virginia School of Law, J.D. expected 2023. I am very grateful to Professor Leon Szeptycki for his invaluable guidance throughout the research process and for his advice on many of the foundational concepts explored in this Note. My sincere thanks to the members of the *Virginia Environmental Law Journal* for their hard work throughout the production process and to my family for their unwavering love and support.

INTRODUCTION

> *"Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, Ansh An Lashokdiwe, or 'Bears Ears.'"*[1]

These opening words to President Obama's proclamation establishing the Bears Ears National Monument in 2016 painted a picture of the area's significance to Native peoples, one of the primary grounds on which the 1.35-million-acre monument was designated. When a national monument is designated, certain objects located in or on monument lands become federally protected.[2] These protections can have significant consequences for both the local environment and economy. For example, the management plan imposed by the presidential proclamation establishing

[1] Proclamation No. 9558, 82 Fed. Reg. 1139, 1139 (Jan. 5, 2017).

[2] BENJAMIN HAYES, CONG. RSCH. SERV., R45718, THE ANTIQUITIES ACT: HISTORY, CURRENT LITIGATION, AND CONSIDERATIONS FOR THE 116TH CONGRESS 1 (2019), https://sgp.fas.org/crs/misc/R45718.pdf.

the Northeast Canyons and Seamounts Marine National Monument imposed a ban on almost all commercial fishing in the protected area.[3] In addition, it is a common practice for presidential proclamations creating national monuments to prohibit the establishment of new mines and oil and gas drilling sites on reserved lands.[4]

For more than six years, a coalition of five Native nations and their allies had advocated to obtain national monument status for the Bears Ears region due to its significant spiritual importance and the presence of over 100,000 archaeological sites and eighteen Wilderness Study Areas.[5] However, not long after this proclamation was issued—just one year before the end of the Obama administration—the Bears Ears National Monument became the center of a controversy that quickly escalated into a political fistfight across three presidential administrations.

Opponents were quick to express their displeasure with the newly designated monument. Critics argued that the designation of such a large monument was an abuse of the President's discretion under the 1906 American Antiquities Preservation Act ("Antiquities Act").[6] On December 4, 2017, with staunch support from his party, President Trump signed a proclamation decreasing the size of Bears Ears by approximately 85% and replacing it with two smaller, noncontiguous monument units of 201,876 and 11,200 acres, respectively.[7] The Native tribes in the area viewed this as a complete revocation of Bears Ears and a replacement by two new monuments.[8] The monument had existed in its full form for less than a year. On the same day, President Trump also signed a proclamation reducing another Utah national monument, the 1.87-million-acre Grand

---

[3] Proclamation No. 9496, 81 Fed. Reg. 65161, 65165 (Sept. 21, 2016).

[4] *See, e.g.*, Proclamation No. 9558, 82 Fed. Reg. at 1143 (establishing the Bears Ears National Monument and withdrawing protected lands from mining and mineral and geothermal leasing); Proclamation No. 6920, 61 Fed. Reg. 50223, 50225 (Sept. 24, 1996) (establishing the Grand Staircase-Escalante National Monument and withdrawing protected lands from disposition under the public land laws); Proclamation No. 9496, 81 Fed. Reg. at 65163–64 (establishing the Northeast Canyons and Seamounts Marine National Monument and withdrawing protected lands from mining and development of oil, gas, minerals, geothermal, or renewable energy); Proclamation No. 9476, 81 Fed. Reg. 59121, 59126 (Aug. 29, 2016) (establishing the Katahdin Woods and Waters National Monument and withdrawing protected lands from mining and mineral and geothermal leasing).

[5] Matthew L. Campbell, *Protecting Bears Ears National Monument*, NATIVE AM. RTS. FUND, https://www.narf.org/cases/bears-ears/ (last visited Aug. 9, 2022); *Proposal Overview*, BEARS EARS INTER-TRIBAL COAL., https://bearsearscoalition.org/proposal-overview/ (2021).

[6] CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 5 (2022), https://sgp.fas.org/crs/misc/R41330.pdf.

[7] Proclamation No. 9681, 82 Fed. Reg. 58081, 58082 (Dec. 8, 2017); *National Monument Facts and Figures*, NAT'L PARK SERV., https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm (last visited Aug. 9, 2022).

[8] Complaint at 3, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Dec. 4, 2017).

Staircase-Escalante, by nearly 50%, making this the largest rollback of public lands protections in history.[9]

The reduction of Bears Ears caused immediate outcry among conservationists, who expressed concerns that it left the land vulnerable to the harmful effects of uranium mining, oil and gas drilling, road construction, and the use of mechanized vehicles—all uses for which the land was now available.[10] The Grand Staircase-Escalante reduction sparked similar outrage among conservationists, given that the boundary changes corresponded almost identically to coal, oil, gas, and tar sand development potential and removed protections from 700 important fossil sites and 406,000 acres of high potential fossil yield lands.[11]

Within hours of President Trump's rollback of the two monuments, the Bears Ears Inter-Tribal Coalition filed a lawsuit in federal court challenging as unlawful the proclamation reducing Bears Ears.[12] On the same day, The Wilderness Society, joined by several other environmental groups, filed a lawsuit challenging the reduction of Grand Staircase-Escalante.[13] This action was quickly followed by a second lawsuit challenging the reduction of Bears Ears, filed by grassroots organization Utah Diné Bikéyah and others.[14] Finally, the Natural Resources Defense

---

[9] Proclamation No. 9682, 82 Fed. Reg. 58089, 58093 (Dec. 8, 2017); Proclamation No. 10286, 86 Fed. Reg. 57335, 57335 (Oct. 15, 2021); Andrea Alday, *New Maps Show Interior Department Ignored Risks to Fossils While Gutting Grand Staircase-Escalante National Monument*, WILDERNESS SOC'Y, (Oct. 31, 2018), https://www.wilderness.org/articles/press-release/new-maps-show-interior-department-ignored-risks-fossils-while-gutting-grand-staircase-escalante-national-monument-0.

[10] *NRDC et al. v. Trump (Bears Ears)*, NRDC (Oct. 8, 2021) [hereinafter *Bears Ears*], https://www.nrdc.org/court-battles/nrdc-et-v-trump-bears-ears. Indeed, in the years since this proclamation was issued, several uranium and vanadium mining claims have been staked on the newly available lands. Tommy Rock, *New Mining Claims in the Bears Ears Area Put Indigenous Communities at Risk*, ARIZ. REPUBLIC (June 2, 2021), https://www.azcentral.com/story/opinion/op-ed/2021/06/02/bears-ears-national-monument-needs-protection-uranium-mining/5253261001/. In addition, many important archaeological and paleontological sites were left open to vandalism and theft. This was especially concerning since many of the sites that were made available for increased visitor traffic by President Trump's proclamation had experienced significant vandalism in the past. *7 Big Questions: What's Happening with Bears Ears and Other National Monuments?*, WILDERNESS SOC'Y (Aug. 9, 2021), https://www.wilderness.org/articles/blog/7-big-questions-whats-happening-bears-ears-and-other-national-monuments; Max Greenberg, *5 Disastrous Consequences of Trump Admin's Final Bears Ears and Grand Staircase Plans*, WILDERNESS SOC'Y (Feb. 6, 2020), https://www.wilderness.org/articles/blog/5-disastrous-consequences-trump-admins-final-bears-ears-and-grand-staircase-plans.

[11] Alday, *supra* note 9.

[12] Complaint at 1, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Dec. 4, 2017); Campbell, *supra* note 5.

[13] Complaint at 1–2, Wilderness Society v. Trump, No. 17-cv-02587 (D.D.C. Dec. 4, 2017).

[14] Complaint at 1, Utah Diné Bikéyah v. Trump, No. 17-cv-02605 (D.D.C. Dec. 6, 2017); *Bears Ears*, *supra* note 10.

Council ("NRDC") filed a third lawsuit challenging the reduction of Bears Ears.[15] All four lawsuits claimed that President Trump did not have the authority under the Antiquities Act or under the Constitution to dismantle a national monument and were ultimately consolidated by the D.C. District Court in *Hopi Tribe v. Trump*.[16]

While these cases were still awaiting decision in the district court, President Trump's term ended, and President Biden took office.[17] Court proceedings were stayed when President Biden issued an executive order initiating a review of the monument rollbacks on his first day in office,[18] and were mooted entirely when President Biden issued two proclamations on October 8, 2021, that restored Bears Ears and Grand Staircase-Escalante to their original sizes and added another 11,200 acres to the range of Bears Ears.[19] Because of President Biden's swift restoration of these monuments, the questions raised by the lawsuits regarding the scope of executive discretion under the Antiquities Act were never litigated or decided.

In light of the recent resurgence in opposition, largely among conservatives,[20] to the unilateral declaration of large national monuments by presidents under the Antiquities Act—an ill feeling that likely has not subsided with President Biden's restoration of Bears Ears and Grand Staircase-Escalante[21]—it is worth re-examining the legal basis of the

---

[15] Complaint at 1–3, Nat. Res. Def. Council v. Trump, No. 17-cv-02606 (D.D.C. Dec. 7, 2017).

[16] *Bears Ears*, *supra* note 10; Hopi Tribe v. Trump, No. 17-cv-02590, 2019 BL 237854, at *4–*5 (D.D.C. Jan. 11, 2019).

[17] *Bears Ears*, *supra* note 10.

[18] Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7039 (Jan. 25, 2021); *Bears Ears*, *supra* note 10.

[19] Proclamation No. 10285, 86 Fed. Reg. 57321, 57331 (Oct. 15, 2021) (restoring and expanding the Bears Ears National Monument); Proclamation No. 10286, 86 Fed. Reg. 57335, 57344–45 (Oct. 15, 2021) (restoring the Grand Staircase-Escalante National Monument).

[20] In the wake of President Obama's declaration of the Bears Ears National Monument, a suite of Utah Republicans decried the monument as an "egregious abuse" of the Antiquities Act that amounted to "a blatant federal land grab" because it "overlook[ed] the unanimous opposition of Utah's statewide elected officials and Utah's entire congressional delegation." Ben Winslow & Rebecca Green, *Utah Republicans Outline Plans to Fight Bears Ears National Monument Designation*, FOX 13 (Dec. 28, 2016), https://www.fox13now.com/2016/12/28/utah-republicans-critical-of-bears-ears-national-monument-designation/.

[21] This is particularly likely in light of Utah Senator Mike Lee's efforts to exempt Utah from the Antiquities Act and to block presidential creation or expansion of national monuments in Utah. Lee Davidson, *Utah Senators Push Bill to Block Presidents from Creating or Enlarging National Monuments in Utah*, SALT LAKE TRIB. (Jan. 26, 2021), https://www.sltrib.com/news/politics/2021/01/26/utah-senators-push-bill/. Additionally, since President Biden's reestablishment and expansion of the Bears Ears and Grand Staircase-Escalante National Monuments in 2021, the Utah Attorney General's office has begun preparations to file a lawsuit challenging President Biden's proclamations. Brian Maffly, *Utah AG Mounting Legal Challenge to Biden's Order Restoring Bears Ears and Grand Staircase Monuments*, SALT LAKE TRIB. (Oct. 22, 2021), https://www.sltrib.com/news/environment/2021/10/21/utah-ag-mounting-legal/.

scope of presidential discretion under the Act. This re-examination is particularly important as the issue has arisen multiple times in the century since the passage of the Act and will likely continue to arise in the future.

This Note responds to recent critiques by arguing that, under current Antiquities Act jurisprudence, the courts are unable to address opposition to the Act founded on dissatisfaction with monument size. Not only does the text of the Antiquities Act clearly sanction broad presidential discretion, but the courts are the incorrect forum in which to challenge broad applications of the Act. Unless and until a new standard for interpreting the statutory language—particularly the "smallest area compatible" language of subsection (b) of the Act—is established by the Supreme Court, complaints regarding presidential use of the Act should properly be raised before Congress. However, although the current state of the law largely precludes challenges to monuments on these grounds, recent events suggest that the Supreme Court may be willing to narrow the scope of the Act—a move which could threaten some long-established national monuments.

Section I briefly introduces the Antiquities Act and discusses its history of use in presidential declarations of large national monuments. Section II conducts an analysis of the legislative history and text of the Act in order to determine the appropriate scope of the power that it grants to the President. In doing so, this section addresses modern opponents' arguments that the President has historically been afforded too much discretion under the Act and explains the strong Supreme Court precedent in favor of broad discretion. Section III argues that the Antiquities Act was designed to operate with congressional oversight and, therefore, that if critics feel that exercises of presidential power under the Act are too broad, then it is up to Congress to take action to shrink the monuments rather than the Court to interpret the Act more narrowly. Section IV concludes by discussing the potential future of the scope of presidential power under the Act, should it be raised in front of the modern Supreme Court. Through this discussion, this Note strives to determine both the correct scope of presidential discretion permissible under the Antiquities Act and what the future of the Act will be.

I. A BRIEF BACKGROUND ON THE ANTIQUITIES ACT

Passed by President Theodore Roosevelt's Congress in 1906, the Antiquities Act both crowned President Roosevelt as America's "conservationist President" and authorized a new presidential practice of designating some of the country's greatest natural treasures as "national

monuments."[22] The declaration of national monuments is a distinct procedure from the establishment of national parks. While national parks are established by an Act of Congress (a lengthy procedure),[23] national monuments are usually unilaterally declared by presidential proclamation (although they can also be declared by Congress under the Property Clause of the U.S. Constitution).[24] In fact, some presidents have used this executive power to declare monuments as a workaround for protecting lands without having to navigate the more complex congressional process for establishing a national park, a tactic that has drawn criticism.[25]

Once a national monument is established, the lands and resources within the boundaries of the monument are subject to increased protections specified by the presidential proclamation and other sources of law.[26] These sources of law include statutes (such as the Mineral Leasing Act, which prohibits establishing new mineral leases within national monuments) and management plans imposed by the agency responsible for overseeing the monument (typically either the National Park Service or the Bureau of Land Management).[27] Importantly, congressional authorization is not required for the establishment of these protections.[28] However, as this Note will argue, although congressional authorization is not *required* at any point, Congress *should* still be overseeing the process, because it alone retains the power to cancel the designation if it disagrees with the President's actions.

Soon after the Antiquities Act was adopted, President Roosevelt declared the over 800,000-acre Grand Canyon as a national monument—one of the largest of the twenty-eight national monuments declared during

---

[22] *Theodore Roosevelt and Conservation*, NAT'L PARK SERV., https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm (Nov. 16, 2017); *Theodore Roosevelt Makes Grand Canyon a National Monument*, HISTORY (Nov. 24, 2009), https://www.history.com/this-day-in-history/theodore-roosevelt-makes-grand-canyon-a-national-monument.

[23] 54 U.S.C. § 100101 *et seq.*

[24] U.S. CONST. art. IV, § 3, cl. 2; HAYES, *supra* note 2, at 28.

[25] *See, e.g.*, Jackie Skaggs, *Creation of Grand Teton National Park*, NAT'L PARK SERV. (Jan. 2000), https://www.nps.gov/grte/planyourvisit/upload/creation.pdf (discussing President Roosevelt's strategic use of the Antiquities Act to bypass the Wyoming delegation's opposition to the creation of a national park). Likely commenting on this strategic use of the Act, former Utah Governor Gary Herbert has described past presidential designations of national monuments as a "historical abuse of the Antiquities Act . . . for unworthy political purposes." Sara Weber, *Trump Demands Review of National Monuments, Including Bears Ears, Grand Staircase-Escalante*, KUTV (Apr. 26, 2017), https://kutv.com/news/local/trump-signs-antiquities-act-executive-order-demands-review-of-national-monuments.

[26] HAYES, *supra* note 2, at 1.

[27] *Id.* at 6–7.

[28] *Id.* at 1.

his presidency.[29] President Roosevelt's expansive designation began something of a tradition of monument declarations by American presidents. Over the last century, over 150 national monuments have been declared under the Act by nearly every U.S. President, regardless of political party.[30] These executively declared monuments range from less than one acre to nearly 11 million acres, and nearly half are 5,000 acres or more in size.[31]

II. THE SCOPE OF PRESIDENTIAL DISCRETION UNDER THE ACT

Although the trend of expansive monument designations has been ongoing for more than a hundred years, it does not lack opposition. Since the beginning, critics have argued—as opponents of the Act argue today—that the text of the Antiquities Act and its legislative history do not support such sweeping presidential discretion. However, although there is support for a narrow reading of the Act in the legislative history, the text of the Act is incredibly broad. Accordingly, courts have uniformly upheld equally broad monument declarations as proper exercises of presidential discretion under the Act—beginning with the Grand Canyon itself.

A. The Legislative History of the Antiquities Act Indicates That Congress Likely Intended for the Bounds of Presidential Discretion to Be Narrower

Modern opposition to reservations of large areas of land under the Antiquities Act is based on claims that the legislative history provides only for the designation of small monuments. For example, former Representative Rob Bishop (R-Utah) believes that "[The Antiquities Act] was created with noble intent and for limited purposes, but has been hijacked to set aside increasingly large and restricted areas of land without public input."[32]

The legislative history indeed strongly suggests that Congress intended to authorize the President to reserve only small portions of land. In fact, the Act was passed specifically to protect archaeological sites in the Southwest from destruction by a surge in unregulated and damaging excavations at the time.[33] From the 1880s to the 1890s, amateur

---

[29] RONALD F. LEE, NAT'L PARK SERV., THE ANTIQUITIES ACT OF 1906, at 90 (1970).

[30] *National Monument Facts and Figures*, *supra* note 7; HAYES, *supra* note 2, at 1.

[31] *National Monument Facts and Figures*, *supra* note 7; CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 585 (4th ed. 2018).

[32] Weber, *supra* note 25.

[33] LEE, *supra* note 29, at 31–32, 35–38. *See also* Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 562–63 (2019) ("Both amateur and professional antiquity hunters—'pot

excavators removed a significant number of artifacts from these delicate sites, often causing extensive damage.[34] At the time, there were no federal laws protecting historic sites on federal land[35] and the President was not yet authorized to make permanent and comprehensive reservations of land for purposes of conservation.[36] In passing the Antiquities Act, therefore, Congress sought to empower the President to take swift action to protect these historic sites from further harm.[37]

When the bill that would become the Antiquities Act was introduced in the 59th Congress, it seemed clear that legislators intended that the scope of presidential power would be narrow—despite the bill's broad language.[38] Notably, during the House debate, when Representative John Lacey (R-Iowa), Chairman of the House Committee on the Public Lands, was asked how much land would be taken off the market by the passage of the bill,[39] he replied, "[n]ot very much," since it would only remove "the smallest area necessary for the care and maintenance of the objects to be preserved."[40] In addition, when asked directly whether the amount of land reserved would "be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up,"[41] Chairman Lacey replied, "[c]ertainly not. The object is entirely

---

hunters'—were removing antiquities from the public lands and vandalizing the sites on which they were located."); H.R. REP. NO. 58-3704, at 2 (1905) ("These ruins have been frequently mutilated by people seeking the relics for the purpose of selling them. Such excavations destroy the valuable evidence contained in the ruins themselves, and prevent a careful and scientific investigation by representatives of public institutions interested in archaeology."); S. REP. NO. 59-3797, at 1 (1906) ("[T]he historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics.").

[34] HAYES, *supra* note 2, at 2.

[35] Ronald F. Lee, *The Origins of the Antiquities Act*, *in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 27 (David Harmon, Francis P. McManamon & Dwight T. Pitcaithley eds., 2006) ("Until the Antiquities Act was passed in 1906, the chief weapon available to the federal government for protecting antiquities on public land was the power to withdraw specific tracts from sale or entry for a temporary period."); Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (providing "[t]hat the President of the United States may, from time to time, set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations").

[36] HAYES, *supra* note 2, at 6.

[37] *Id.*

[38] H.R. 11016—which would become the Antiquities Act—included the phrase "other objects of historic or scientific interest" upon the suggestions of the Commissioner of the General Land Office and officials of the Department of the Interior that the legislation authorize the "preservation of scenic beauties and natural wonders and curiosities . . . ." LEE, *supra* note 29, at 52, 74, 76.

[39] 40 CONG. REC. 7888 (1906) (statement of Rep. John Stephens).

[40] *Id.* (statement of Rep. John Lacey).

[41] *Id.* (statement of Rep. John Stephens).

different."[42] Chairman Lacey also claimed that the Act would "merely make small reservations" in areas of cave and cliff dwellings.[43]

Indeed, the House Report on the bill mirrored Chairman Lacey's assurances, stating that the Antiquities Act was intended only to "create small reservations reserving only so much land as may be absolutely necessary for the preservation of . . . interesting relics of prehistoric times."[44] The relics referred to in the House Report are defined as "the large number of historic and prehistoric ruins" on public lands and Native reservations throughout the Southwest, such as cliff dwellings, prehistoric towers, communal houses, shrines, and burial mounds.[45] Persuaded by these arguments, on June 5, 1906, the House passed the bill unanimously and without amendment.[46]

B. Interpretations of the Text of the Act Support a Broader Reading

Although it seems clear from Chairman Lacey's remarks and the accompanying House Report that the primary purpose of the Antiquities Act was to preserve certain archaeological sites in the Southwestern United States,[47] this intent was not translated clearly into the text of the Act.[48] The House Report on the bill, for example, notes: "[S]ome of these [ruins] are sufficiently rich in historic and scientific interest and scenic beauty to warrant their organization into permanent national parks . . . [and g]eneral legislation providing for the creation and administration of such parks . . . is urgently needed."[49]

The language of the House Report indicates that the "historic and scientific interest[s]" mentioned are those found within archaeological ruins.[50] By contrast, subsection (a) of the Antiquities Act of 1906 succinctly states as follows:

> (a) PRESIDENTIAL DECLARATION. —
>
> The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric

---

[42] *Id.* (statement of Rep. John Lacey).

[43] *Id.*

[44] H.R. REP. NO. 59-2224, at 1 (1906).

[45] *Id.* at 2.

[46] 40 CONG. REC. 7888 (1906).

[47] *Id.* (statement of Rep. John Lacey); H.R. REP. NO. 59-2224, at 1 (1906).

[48] Courts look first to the text of a statute when interpreting its meaning and consider legislative history only if the text is ambiguous. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750 (2020) ("[L]egislative history can never defeat unambiguous statutory text . . . ."); Conn. Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

[49] H.R. REP. NO. 59-2224, at 3 (1906).

[50] *Id.*

> structures, *and* other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.[51]

The inclusion of the notorious Oxford comma and the word "and" before the "other objects" clause in subsection (a) of the Act clearly separates these "other objects" as something distinct from "historic and prehistoric structures."[52] In addition, these objects may include not only those of historic interest, but also those of scientific interest—a much broader category that is open to significant interpretation.[53] Therefore, while Congress may have contemplated that the Act would only apply to the preservation of "interesting relics of prehistoric times,"[54] the Act clearly does not restrict the application of presidential discretion to those subjects alone.[55]

In response, opponents have argued that the text of subsection (b) of the Act serves to limit the scope of executive discretion to reserve land:

> (b) RESERVATION OF LAND. —
>
> The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[56]

Thus, while subsection (a) of the Act initially grants the President the authority to declare national monuments "in [his] discretion," the "smallest area compatible" stipulation in subsection (b) does serve to limit that discretion.[57]

However, it is a well-recognized canon of statutory interpretation that words used in one part of a statute typically have the same meaning in every other part, especially when those two parts are intended to work in tandem—as subsections (a) and (b) clearly are.[58] Subsection (b) mandates

---

[51] 54 U.S.C. § 320301(a) (emphasis added).

[52] *Id.*

[53] *Id.*

[54] H.R. Rep. No. 59-2224, at 1 (1906).

[55] *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 141–42 (1976) ("[A]ccording to the Cappaert petitioners, the President may reserve federal lands only to protect archeologic sites. However, the language of the Act which authorizes the President to proclaim as national monuments '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' is not so limited. The pool in Devil's [sic] Hole and its rare inhabitants are 'objects of historic or scientific interest.'").

[56] 54 U.S.C. § 320301(b).

[57] *Id.* § 320301(a), (b).

[58] Sullivan v. Stroop, 496 U.S. 478, 483–84 (1990) (clarifying that when Congress intended for a later part of a statute to work in tandem with an earlier part, the same phrase must have the same meaning in both places).

that the declaration be confined to the "smallest area compatible with the proper care and management *of the objects to be protected*," which subsection (a) has already clearly established to be a very broad category with no necessary relation to archaeological sites.[59] Therefore, what qualifies as this "smallest area" depends entirely on what kinds of objects the President chooses to protect via a national monument declaration. As a result, the "smallest area compatible" with the protection of certain objects could, in fact, be extremely large—an interpretation which many presidents have embraced, and which the Supreme Court has upheld.[60] As Chief Justice Roberts recently noted in March of 2021 in a statement respecting the denial of certiorari, "this restriction has ceased to pose any meaningful restraint."[61]

C. The Supreme Court Has Read the Act to Permit Broad Presidential Discretion

The physical size of a national monument that a President may declare under the Antiquities Act depends entirely on the kinds of objects that the monument exists to protect. According to the Supreme Court, the broad scope of the phrase "objects of historic or scientific interest" and the conceptual separation between these objects and archaeological sites allow the President significant discretion in determining both the objects to be protected and the corresponding size of national monuments declared under the Act.

The Supreme Court has considered the Antiquities Act in only three cases, each time finding that the President's exercise of discretion was valid under a text-based reading of the Act.[62] The Act was first challenged in 1920 in *Cameron v. United States* in response to President Roosevelt's designation of the Grand Canyon National Monument. The minimal grounds upon which President Roosevelt's proclamation established this monument clearly exemplify the broad discretion afforded under the Act:

> [T]he Grand Canyon of the Colorado River . . . is an object of unusual scientific interest, being the greatest eroded canyon within the United States, and it appears that the public interests would be promoted by reserving it as a National Monument, with such other land as is necessary for its proper protection[.][63]

---

[59] 54 U.S.C. § 320301(a), (b) (emphasis added).

[60] *See infra* Section II.C.

[61] Mass. Lobstermen's Ass'n v. Raimondo, 945 F.3d 535 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

[62] *See generally* Cameron v. United States, 252 U.S. 450 (1920); Cappaert v. United States, 426 U.S. 128 (1976); United States v. California, 436 U.S. 32 (1978).

[63] Proclamation No. 794, *reprinted in* 35 Stat. 2175 (Jan. 11, 1908).

The designation was challenged on the grounds that it exceeded the authority granted to the President by the Antiquities Act and, therefore, there was no authority for its creation.[64] The Supreme Court disagreed, writing:

> The act under which the President proceeded empowered him to establish reserves embracing 'objects of historic or scientific interest.' The Grand Canyon, as stated in his proclamation, 'is an object of unusual scientific interest.' It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.[65]

This opinion revealed for the first time the true bounds of the President's power and discretion under the Act according to a plain reading of the text. As the Supreme Court in *Cameron* determined, the Grand Canyon qualified as an "object of unusual scientific interest" merely by way of its remarkable beauty, status as a tourist attraction, and geologic interest.[66] Nowhere in the opinion does the Court challenge the President's exercise of discretion in declaring a national monument over such a large swath of land.[67] In short, the Antiquities Act's broad definition of the objects to be protected necessarily requires flexibility in the size of each monument—the protection of natural wonders such as the Grand Canyon necessitates the reservation of far more land than does the protection of discrete archaeological sites.[68]

Subsequent Supreme Court cases addressing the bounds of presidential discretion continued to uphold a broad interpretation.[69] In response to a challenge to President Truman's 1952 designation of Devils Hole National Monument—established to preserve the unique geologic history and features of the pool and its role as a habitat for the endangered Devils Hole pupfish, which is found nowhere else in the world[70]—the Court in

---

[64] *Cameron*, 252 U.S. at 455.

[65] *Id.* at 455–56.

[66] *Id.*

[67] *See generally Cameron*, 252 U.S. 450.

[68] ROBERT ROSENBAUM ET AL., THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH OR MATERIALLY CHANGE A NATIONAL MONUMENT DESIGNATION UNDER THE ANTIQUITIES ACT OF 1906, at 3 (May 3, 2017), https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments.

[69] *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 141–42 (1976); United States v. California, 436 U.S. 32, 40 (1978).

[70] Proclamation No. 2961, 3 C.F.R. 147, 147 (1949–1953), *reprinted in* 66 Stat. c18 (Jan. 17, 1952); Pam Fuller & Matt Neilson, Cyprinodon diabolis *Wales, 1930*, U.S. GEOLOGICAL SURV. (Aug. 28, 2019), https://nas.er.usgs.gov/queries/FactSheet.aspx?speciesID=653.

Cappaert v. United States supported the protection of these two "objects" as being within the scope of the President's discretion.[71] Finally, the Supreme Court endorsed for a third time this broad executive discretion in 1978 in *United States v. California*.[72] There, the Court held that President Truman's proclamation enlarging the Channel Islands National Monument for the sole reason that the additional lands were required for "the proper care, management, and protection of the objects of geological and scientific interest located on lands within the said monument"[73] presented sufficient grounds to reserve the land under the Act.[74]

These three decisions made clear that the President's reasons for establishing a national monument need not be strictly bound by a requirement of archaeological or historic significance, as modern opponents would prefer. In the words of Chief Justice Roberts in a statement respecting the denial of certiorari, the Antiquities Act, which:

> [P]ermit[s] the President in his sole discretion to designate as monuments "landmarks," "structures," and "objects"—along with the smallest area of land compatible with their management—has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.[75]

The broad construction of the Act, bolstered by strong Supreme Court precedent, has since served as *carte blanche* for presidents to declare monuments for reasons that had little or nothing to do with a site's archaeological significance. After the Supreme Court's holding in *Cameron*, every court to consider this question has reached the same conclusion: monuments may be established to protect both natural wonders and archaeological objects, and monuments established for the protection of natural wonders may require the inclusion of far more land.[76]

One of the most apparent examples of the breadth of this discretion is President Roosevelt's 1943 proclamation declaring the Jackson Hole

---

[71] 426 U.S. at 141–42.

[72] 436 U.S. at 36 ("There can be no serious question, therefore, that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument, since they were then 'controlled by the Government of the United States.' Thus, whether Proclamation No. 2825 did in fact reserve these submerged lands and waters, or only the islets and protruding rocks, could be, at the time of the Proclamation, a question only of Presidential intent, not of Presidential power.").

[73] Proclamation No. 2825, 3 C.F.R. 3, 3 (1949–1953), *reprinted in* 63 Stat. 1258 (Feb. 9, 1949).

[74] *California*, 436 U.S. at 34–36.

[75] Mass. Lobstermen's Ass'n v. Raimondo, 945 F.3d 535 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

[76] ROSENBAUM ET AL., *supra* note 68, at 3.

National Monument in Wyoming, which gave no specific reasons for the creation of the monument beyond claiming that "the area . . . contains historic landmarks and other objects of historic and scientific interest . . . ."[77] In the ensuing case, *Wyoming v. Franke*, the defendant National Park Service claimed that these objects included trails and historic spots used by the early fur trading industry in the West, unique geological formations and plant life, and a "biological field for research of wild life in its particular habitat within the area . . . ."[78]

It is likely that these "objects" identified by the National Park Service can be found on almost any stretch of land in the United States. Despite this, the opinion of the court made clear that, whatever the President's reasons for declaring a national monument, "[i]f there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion."[79] In other words, as long as the President pointed to some objects that *could* qualify as being "of historic or scientific interest," the district court was unwilling to impose its own discretion over that of the President.[80]

III. THE POWER TO NARROW THE SCOPE OF THE ACT PROPERLY LIES WITH CONGRESS

Despite Wyoming's displeasure with President Roosevelt's fairly extreme use of discretion in 1943, this broad power, sanctioned by both the Supreme Court and the Wyoming District Court, is an appropriate and correct interpretation of the Antiquities Act and is consistent with congressional intent in passing the Act. But how could Congress possibly have intended to grant the President such an expansive power to unilaterally declare monuments for nearly any reason? The second major argument of this Note is that the Antiquities Act was, in fact, intended to function with congressional oversight that would counterbalance this broad discretion. The recently controversial Bears Ears National Monument presents a very fitting case study through which to address and respond to modern critiques of the Act and to illustrate Congress's intent to authorize the President to take swift action to preserve important sites subject to its oversight.

---

[77] Proclamation No. 2578, 3 C.F.R. 327, 327 (1938–1943), *reprinted in* 57 Stat. 731 (Mar. 15, 1943).

[78] State of Wyoming v. Franke, 58 F. Supp. 890, 895 (D. Wyo. 1945).

[79] *Id.*

[80] *Id.*

A. Critics' Opposition to the Use of the Act at Bears Ears Is Defeated by the Text of the Act

The designation of Bears Ears National Monument was prompted by a Native American inter-tribal coalition's proposal to President Obama to create the national monument, largely to protect Native archaeological and cultural sites from a rash of looting and grave robbing.[81] From 2011 to 2016, looters unearthed and scattered human remains in search of valuable burial artifacts, graffitied ancient art, and tore down prehistoric walls and ancient Navajo hogans.[82] Another significant motivation for the creation of Bears Ears was the prevention of oil and gas leasing in the area.[83] In 2015, the Utah legislature called for the establishment of an energy zone covering much of the Bears Ears area.[84] The Bears Ears Inter-Tribal Coalition viewed subsequently proposed mining claims for oil, gas, and potash (which are available in abundance in other areas besides Bears Ears) and uranium (past mining of which had already scarred the landscape and sickened Native peoples) as threats both to their health and to the wild and untouched landscape upon which they lived and relied.[85]

President Obama clearly agreed. His 2016 proclamation established Bears Ears National Monument for the protection of: the dense and significant archaeological and cultural record in the area, namely the abundant rock art, ancient cliff dwellings, ceremonial sites, and a wide variety of artifacts (including Clovis tools and projectile points, ancestral Puebloan pottery, baskets, and weapons, and roads carved by both Native tribes and early Euro-American settlers); the area's rich paleontological resources, which provide insight into the transition of vertebrate life from sea to land; a broad array of distinctive topographies, vegetation, and

---

[81] THE BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 34–35 (Oct. 15, 2015) [hereinafter BEARS EARS PROPOSAL], https://bearsearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf; Jenny Rowland-Shea, *Bears Ears Cultural Area: The Most Vulnerable U.S. Site for Looting, Vandalism, and Grave Robbing*, CTR. FOR AM. PROGRESS (June 13, 2016), https://www.americanprogress.org/article/bears-ears-cultural-area-the-most-vulnerable-u-s-site-for-looting-vandalism-and-grave-robbing/.

[82] Rowland-Shea, *supra* note 81.

[83] *Threats*, BEARS EARS INTER-TRIBAL COAL., https://bearsearscoalition.org/threats/ (2021).

[84] *Id.*; Concurrent Resolution Regarding the Creation of National Monuments, S.C.R. 4, 61st Leg., 2015 Sess., ¶ 50–88 (Utah 2015).

[85] BEARS EARS PROPOSAL, *supra* note 81, at 34–35. In the words of Tommy Rock, Ph.D., a Diné environmental scientist and uranium researcher from the Bears Ears area: "I have seen the impacts of past uranium mining to water. I witness elevated levels of uranium, vanadium and radium in soil as well. These are all harmful to the health of the community. Plants will take up uranium through their roots, and when an animal eats that plant, it will enter the food web. We use these animals for food and plants for medicines . . . our medicines could be poisoning us." Rock, *supra* note 10.

wildlife; and the profound sacredness of the land itself to many Native American tribes in the area, including the Ute Mountain Ute Tribe, the Navajo Nation, the Ute Indian Tribe of the Uintah Ouray, the Hopi Nation, and the Zuni Tribe.[86]

It is unquestionable that these "objects" identified by President Obama fall within the scope of presidential power as delineated by the Supreme Court and the Wyoming District Court in *Wyoming v. Franke*. Notwithstanding the strong precedent in favor of the designation, modern critics have opposed the scope of the Bears Ears monument on the grounds that 1.35 million acres is far too large an area under the "smallest area compatible" language of subsection (b) of the Act.[87] For instance, President Trump's proclamation shrinking the monument argued that the area designated by President Obama was not confined to this "smallest area" because some of the objects identified were not unique to the monument, were not of significant scientific or historic interest, and were not under sufficient threat of damage or destruction to require the protection of a national monument.[88]

President Trump's interpretation, however, was legally wrong with respect to the declaration of Bears Ears National Monument. First, as the judicially upheld declaration of Jackson Hole clearly showed,[89] features that are not unique to the monument can qualify as "objects of historic or scientific interest."[90] Second, the Antiquities Act clearly authorizes the President to designate *any* objects of "historic or scientific interest," with no textual limitation on the significance of that interest.[91] And third, despite the existence of laws, policies, and plans purporting to protect many of the objects listed in the proclamation establishing Bears Ears, these objects were, nevertheless, not actually successfully protected before the Monument was established in 2016.[92] Because the Act grants the President significant discretion in identifying objects to be protected, it stands to reason that the President should be able to include objects that are still at risk, despite the existence of a regulatory framework that purports to protect them. In short, the wide discretion granted to the

---

[86] *See generally* Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017).

[87] Proclamation No. 9681, 82 Fed. Reg. 58081, 58081 (Dec. 8, 2017); VINCENT, *supra* note 6, at 5–6; Brian Maffly & Bethany Rodgers, *Gov. Spencer Cox Says Utah is 'Likely' to Sue if Biden Unilaterally Enlarges Bears Ears, Grand Staircase Monuments*, SALT LAKE TRIB. (Apr. 17, 2021), https://www.sltrib.com/news/environment/2021/04/17/gov-spencer-cox-says-utah/.

[88] Proclamation No. 9681, 82 Fed. Reg. at 58082.

[89] Wyoming v. Franke, 58 F. Supp. 890, 895 (D. Wyo. 1945).

[90] 54 U.S.C. § 320301(a).

[91] *Id.*

[92] Proclamation No. 9681, 82 Fed. Reg. at 58081–82. *See also infra* Section III.B.

President in determining the objects that he wishes to protect is not limited by the conditions that President Trump attempted to impose.

Additionally, there is a great deal of discretion inherent in the "smallest area compatible" language of subsection (b) of the Act.[93] Because subsection (b) is read in light of the very discretionary subsection (a), and because the Supreme Court has embraced a text-based reading of the Act,[94] it seems very likely that the broad discretion afforded to the President in determining the objects to be protected extends to determining how much land is compatible with their protection. In other words, this phrase is not assessed under some reasonableness standard (as President Trump argued)[95] but rather can be interpreted to mean however much land the President deems necessary to protect *all* of the objects listed.[96] In that case, the lands designated by President Obama were certainly within the scope of the Act due to the nature of the listed objects.

Many of the objects listed for protection by the proclamation, most especially the Native American artifacts and paleontological resources, are scattered widely across the landscape. Native artifacts such as Clovis points used in hunting and roads carved through the area by tribes and early settlers are very likely found all across the lands surrounding the Bears Ears formation.[97] Moreover, while these remnants of past human activity might still be centered around the Bears Ears buttes, fossils and other scientifically significant geologic formations are likely to be dispersed throughout the surrounding lands rather than conforming to the borders of the National Monument.

In addition to the expansive distribution of artifacts and fossils, it is very significant that the proclamation identified the spiritual and cultural value of the land to the local Native American tribes as the "most notabl[e]" feature of the land worth protecting.[98] From the perspective of the local tribes, a large portion of the land surrounding the actual Bears Ears buttes is of significant cultural importance.[99] The proposal drafted by the Bears Ears Inter-Tribal Coalition explained that the lands within and around the Bears Ears plateaus are "traditional sacred lands . . . where tribal traditional leaders and medicine people go to conduct ceremonies, collect herbs for medicinal purposes, and practice healing rituals stemming from time immemorial, as demonstrated

---

[93] *See* 54 U.S.C. § 320301(a), (b).
[94] *See supra* Sections II.B–C.
[95] Proclamation No. 9681, 82 Fed. Reg. at 58081–82.
[96] *See* 54 U.S.C. § 320301(a), (b).
[97] BEARS EARS PROPOSAL, *supra* note 81, at 6, 8–10.
[98] Proclamation No. 9558, 82 Fed. Reg. 1139, 1139 (Jan. 5, 2017).
[99] BEARS EARS PROPOSAL, *supra* note 81, at 1–10.

through tribal creation stories," and described the protection of these lands as essential to preserving their practice of traditional medicine.[100] In fact, that same proposal identified their "ancestral land" as covering an area of 1.9 million acres—even larger than the area reserved by President Obama's proclamation.[101] Because the significance of the land to the local tribes was such a key reason for preserving the land comprising Bears Ears National Monument, it is likely that President Obama had the discretion to reserve all 1.9 million acres that the tribes themselves identified.[102]

B. The Antiquities Act Was Designed to Function with Congressional Oversight

While the Antiquities Act gives the President broad power to preserve artifacts and lands that are under threat, this power was not meant to be final or unchecked. Rather, the Act makes sense only if it was intended to function with congressional oversight. This Note makes the argument that Congress intended for the Act to operate with such oversight on three grounds: 1) the need for swift presidential action to protect antiquities, 2) the Act's omission of language establishing presidential power to revoke national monuments, and 3) the acquiescence of Congress to the President's current use of the Act as implied by its failure to revoke large presidentially declared monuments.

1. Legislative History Reveals That Congress Intended for the Act to Authorize "Swift" Action

As discussed in Section II.A, Congress passed the Antiquities Act for the express purpose of empowering the President to take *swift* action to protect valuable archaeological sites from looting and vandalism.[103] This was exactly the situation at Bears Ears. As the case study in Section III.A

---

[100] *Proposal Overview*, BEARS EARS INTER-TRIBAL COAL. (2015), https://bearsearscoalition.org/proposal-overview/.

[101] BEARS EARS PROPOSAL, *supra* note 81, at 1.

[102] Some may argue that because the spiritual and cultural significance of Bears Ears to the tribes is a present-day phenomenon, it does not qualify as an "object of historic interest" under the text of the Antiquities Act. However, as with many other Native cultural sites and ancestral lands, the Bears Ears area has played an integral role in the spiritual and cultural practices of the surrounding tribes since "time immemorial"—a term of art meaning so long past as to be indefinite in history or tradition. The present-day use of the site for spiritual and cultural purposes does not negate the long history of such practices at the site. Therefore, the spiritual and cultural value of the land as identified in President Obama's proclamation remains squarely within the scope of "objects of historic interest." *See supra* notes 99–101 and accompanying text.

[103] John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENV'T L. REV. 1, 25–26 (2019). See also sources cited *supra* note 33 and accompanying text.

revealed, the threats posed to that place of great cultural, historical, and natural significance by vandalism and mining were demonstrated by tribes and conservationists to warrant quick preservation action. Furthermore, political controversy and pushback from local communities and legislators can prevent Congress from declaring a national park.[104] Such resistance was evident in the Bears Ears area: the entire Utah congressional delegation opposed the creation of a national monument, as did then-Utah Senator Orrin Hatch, who favored multiple land uses that would boost the area's economy.[105]

In the face of this opposition, presidential action under the Antiquities Act was, therefore, warranted at Bears Ears, as any attempts by Congress to declare the area a national park would likely have been unsuccessful.[106] In fact, former Representative Jason Chaffetz (R-Utah)—an outspoken opponent of the Bears Ears monument—has said himself that "the Antiquities Act was meant to be reserved for emergency scenarios."[107] Given Congress's inability to conserve clearly-threatened but controversial land as a national park and evidence of the removal of more than 40,000 artifacts from cultural sites at Bears Ears, which sparked the largest investigation of artifact removal from Native American land in U.S. history, [108] the situation at Bears Ears represented such an emergency.

As the declaration of Bears Ears National Monument exemplified, presidential action to protect threatened objects is warranted when local or factional opposition would prevent Congress from doing so itself. Granting broad discretion to the President under the Antiquities Act was required to enable such swift action.

---

[104] *See, e.g.*, Skaggs, *supra* note 25 (discussing Congress's inability to expand Grand Teton National Park due to the vehement opposition posed by the local community and the Wyoming delegation).

[105] Weber, *supra* note 25; Orrin Hatch (@senorrinhatch), TWITTER (Apr. 20, 2017, 10:19 PM), https://twitter.com/senorrinhatch/status/855244593486495744?s=20.

[106] See *supra* Section I for a brief discussion of the difference between national parks and national monuments.

[107] Amy Joi O'Donoghue, *Chaffetz Demands White House Document Dump Over Bears Ears Designation*, DESERETNEWS (Dec. 29, 2016, 4:50 PM), https://www.deseret.com/2016/12/29/20603160/chaffetz-demands-white-house-document-dump-over-bears-ears-designation#file-rep-jason-chaffetz-r-utah-is-demanding-documents-and-correspondence-from-the-white-house-regarding-the-bears-ears-monument-designation.

[108] Rowland-Shea, *supra* note 81.

2. The President Does Not Have the Power to Revoke National Monuments by Proclamation

The Antiquities Act establishes no special procedures for declaring a national monument and imposes no real limitations on the discretion it grants to the President.[109] There is also no provision for judicial review of designated monuments.[110] Ostensibly, this leaves the President with no limitations whatsoever on his power to designate national monuments—an extremely expansive grant of power that can be found in no other Act of Congress.[111] However, one limitation on the President's power can be found in something else that the Act leaves out—the power to revoke national monuments. Because it is not delegated to the President by the Act, the power to revoke national monuments, therefore, remains solely vested in Congress under the Property Clause of the U.S. Constitution.

The fallout from President Trump's controversial rollback of national monument lands illustrates this point quite well. The complaint brought in *Hopi Tribe v. Trump* argued that President Trump's actions in shrinking Bears Ears (or, as the tribes argued, revoking it entirely and replacing it with two smaller monuments) were not authorized under the Antiquities Act, since that power is reserved to Congress alone under the Property Clause of the U.S. Constitution.[112] Similar arguments were brought by Utah Diné Bikéyah and NRDC with respect to Bears Ears, and by The Wilderness Society with respect to Grand Staircase-Escalante.[113] Notably, our system of government does not grant presidents any power other than the powers that are given to them by the U.S. Constitution or by an Act of Congress.[114] The Property Clause of the U.S. Constitution gives exclusively to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."[115] Therefore, any

---

[109] Megan E. Jenkins & Jordan Lofthouse, *Executive Discretion and the Antiquities Act*, CTR. FOR GROWTH & OPPORTUNITY (May 29, 2019), https://www.thecgo.org/research/executive-discretion-and-the-antiquities-act/.

[110] *Id.*

[111] *Id.* (explaining that "such deference, combined with the lack of clearly defined terms within the act, has allowed the chief executive to exercise wide discretion without clear checks and balances" and that "no clear consensus has emerged about what the act allows presidents to do and where that authority ends").

[112] Complaint at 3, 54, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Dec. 4, 2017).

[113] Complaint at 66, Utah Diné Bikéyah v. Trump, No. 17-cv-02605 (D.D.C. Dec. 6, 2017); Complaint at 22, 24, Nat. Res. Def. Council, Inc. v. Trump, No. 17-cv-02606 (D.D.C. Dec. 7, 2017); Complaint at 50–51, Wilderness Soc'y v. Trump, No. 17-cv-02587 (D.D.C. Dec. 4, 2017).

[114] ROSENBAUM ET AL., *supra* note 68, at 3.

[115] U.S. CONST. art. IV, § 3, cl. 2.

authority that the President has over federal lands must be delegated to the Executive Branch by a statute enacted by Congress.[116]

As discussed extensively above, the Antiquities Act authorized the President to "*declare*" and "*reserve*" national monuments on federally owned land, but contained no language explicitly empowering the President to diminish or revoke monuments previously established by proclamation.[117] One example of an explicit delegation of such a power can be found in the 1897 Forest Service Organic Administration Act, which provided that the "President is hereby authorized at any time 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 altogether any order creating such reserve."[118] Such language, notably, is absent from the Antiquities Act. In unilaterally diminishing or revoking a national monument, President Trump thus encroached on Congress's power under the Property Clause of the Constitution.[119]

One district court recently supported this argument in the closely analogous case *League of Conservation Voters v. Trump*. In that case, the Alaska District Court confronted the question of whether President Trump had the power to rescind President Obama's withdrawal of lands from availability for leasing under the Outer Continental Shelf Lands Act ("OCSLA").[120] The language of the relevant section of OCSLA is very similar to that of the Antiquities Act: "The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf."[121]

This language, the court held, authorized the President *only* to withdraw lands from disposition, not to revoke a prior withdrawal, because the authority to do so remained vested in Congress.[122] Additionally, the court was persuaded by plaintiffs' arguments that, when it has been the intention of Congress to grant the President the power to revoke protections, past statutes did so expressly and that "Congress is

---

[116] Complaint at 7, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Dec. 4, 2017).

[117] *Id.* at 10; 54 U.S.C. § 320301(a), (b) (emphasis added).

[118] Act of June 4, 1987, 30 Stat. 11, 36 (codified at 16 U.S.C. § 473). *See also* Pickett Act of 1910, 36 Stat. 847, 847, *repealed by* 90 Stat. 2792 (1976) (authorizing the President to make withdrawals of public lands which "shall remain in force until revoked by him or by an Act of Congress"); 49 Stat. 660, 661 (1935), *repealed by* 90 Stat. 2792 (1976) (providing that "any such withdrawal may subsequently be revoked by the President").

[119] Complaint at 54, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Dec. 4, 2017).

[120] League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013, 1016–17 (D. Alaska 2019), *vacated and remanded sub nom.* League of Conservation Voters v. Biden, 843 Fed. App'x 937 (9th Cir. 2021).

[121] Pub. L. No. 83-212, § 12(a), 67 Stat. 462, 469 (1953) (codified at 43 U.S.C. § 1341(a)).

[122] *League of Conservation Voters*, 363 F. Supp. 3d at 1020–21.

presumptively aware of Executive Branch interpretations of similar language in parallel statutes."[123] Defendants' arguments to the contrary—that the language of the statute imposed no limitations on the President's authority because no limitations were expressly stated—were unpersuasive.[124]

Numerous commentators agree with this assessment as it applies to the Antiquities Act.[125] However, some have argued that the power to reduce or revoke national monuments can be read into the Antiquities Act by implication.[126] For example, one such article argued that a grant of authority to execute a discretionary power implicitly included the authority to reverse it under traditional principles of constitutional, legislative, and administrative law.[127] This argument, however, is flawed for two reasons. First, this interpretation was based on an analysis of earlier versions of bills protecting antiquities that were not adopted—"a novel way of understanding a statute passed by Congress" that does not track with the history of judicial interpretation of the Act discussed above in Section II.C.[128] Second, both the Executive Branch and Congress itself have explicitly acknowledged on several occasions that revocation power cannot be read into the Antiquities Act by implication.

The official position of the Executive Branch was articulated in a 1938 Attorney General's Opinion by Attorney General Homer Cummings, which stated that the Antiquities Act "does not authorize [the President] to abolish [national monuments] after they have been established."[129] In fact, the Opinion stated directly that, under long-standing precedent, "if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation."[130] Rescinding a national

---

[123] *Id.* at 1026–27.

[124] *Id.*

[125] *See* Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 56 (2017), https://www.virginialawreview.org/articles/presidents-lack-authority-abolish-or-diminish-national-monuments/; Hope M. Babcock, *Rescission of a Previously Designated National Monument: A Bad Idea Whose Time Has Not Come*, 37 STAN. ENV'T L.J. 3, 52–65 (2017); Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENV'T L. 125, 141–48 (2018); Ruple, *supra* note 103, at 23–34.

[126] ROSENBAUM ET AL., *supra* note 68, at 3.

[127] John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REGUL. 617, 617 (2018). *But see generally* ROSENBAUM ET AL., *supra* note 68 for a more thorough refutation of Yoo and Gaziano's arguments.

[128] ROSENBAUM ET AL., *supra* note 68, at 6; Yoo & Gaziano, *supra* note 127, at 625.

[129] Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'ys Gen. 185, 185 (1938). *See also* Complaint at 11, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Dec. 4, 2017).

[130] Proposed Abolishment of Castle Pinckney Nat'l Monument, *supra* note 129, at 186–87.

monument, therefore, remains only within the power of Congress to accomplish by legislation.

In addition, since the passage of the Antiquities Act, Congress has expanded on the legislative scheme governing federally owned land—a scheme into which the Antiquities Act falls and under which it must, therefore, be interpreted.[131] One of the statutes comprising this scheme, the 1976 Federal Land Policy and Management Act ("FLPMA"), explicitly mandated that no revocation power be read into the Act by implication: "Nothing in this Act shall be deemed to repeal any existing law by implication."[132] The House Committee Report on FLPMA also clearly stated that FLPMA would "specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."[133] Lending further weight to this restriction, no President other than President Trump has attempted to revoke or otherwise reduce a national monument since the passage of FLPMA.[134] Most recently, Congress again indicated that the Antiquities Act does not imply presidential authority to revoke national monuments with the proposition of the National Monument Creation and Protection Act in 2017.[135] Had it passed, this bill would have authorized the President to reduce the size of national monuments—an explicit acknowledgement of the fact that he is not currently authorized to do so.[136]

If Congress does in fact retain the power to revoke presidential declarations of national monuments, why then would it grant such incredibly broad power to presidents to declare them? This choice only makes sense if Congress intended to critically review monuments declared by the President and, in the course of that review, determine whether it should revoke the declaration or not. Because the power to shrink or revoke national monuments was never delegated to the President, Congress still retains ultimate authority over U.S. monuments; if Congress believes that the President's declaration of a monument was inappropriate, then it alone has the power to shrink the monument or revoke it entirely. Thus, despite the widespread dissatisfaction with the Antiquities Act among modern critics, the Act is working exactly as

---

[131] ROSENBAUM ET AL., *supra* note 68, at 4.

[132] *Id.*; 43 U.S.C. § 1701 note (Savings Provision Concerning subsection (f) of FLPMA). *See also* 43 U.S.C. § 1714(j) (specifying that "[n]othing in [the] Act is intended to modify or change any provision of" FLPMA).

[133] H.R. Rep. No. 94-1163, at 9 (1976).

[134] ROSENBAUM ET AL., *supra* note 68, at 4.

[135] H.R. 3990, 115th Cong. § 2(j) (2017).

[136] Complaint at 12, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Dec. 4, 2017).

Congress intended. Rather, it is Congress that has failed to fulfill its role under the Act to review presidential declarations of national monuments.

3. By Not Overturning Any of the Large National Monument Designations in the Past Century, Congress Has Acquiesced to Presidential Use of the Act to Declare Large Monuments

It has been more than a century since the passage of the Antiquities Act established Congress's role as the overseer of presidential monument declarations. In that time, Congress has used its power to reverse national monument designations only eleven times.[137] Considering that a total of 158 national monuments have been declared over the last 115 years,[138] congressional revocation of national monuments is exceedingly rare. However, the fact that Congress has used this power on several occasions proves that it does know how to revoke national monuments and is capable of doing so. In taking no action to overturn the majority of monument declarations, Congress has chosen to exercise its power of revocation sparingly.

Congressional revocations have occurred for various reasons: 1) the objects that the monument was established to protect became diminished, such as at the Fossil Cycad National Monument in South Dakota, which suffered the destruction of the fossils that it was created to protect due to mismanagement; 2) the sites were less-significant examples of objects already protected in other national monuments, such as Castle Pinckney in South Carolina, or were of "questionable national significance," such as Father Millet Cross in New York; or 3) the sites were publicly inaccessible and unable to be developed into parks, such as Holy Cross in Colorado.[139] Notably, *none* of these monuments were revoked on the basis of their size.[140] Instead, these revocations all occurred under fairly limited and infrequent circumstances.

In declining to step in and overturn a presidentially declared national monument on the basis of its size, Congress has acquiesced to the long history of unilateral declarations of large monuments by presidents since Theodore Roosevelt. The Arizona District Court has, in fact, taken congressional silence on presidential proclamations declaring national monuments as evidence of acquiescence to the lands and objects they

---

[137] *Abolished National Monuments*, NAT'L PARK SERV., https://www.nps.gov/articles/000/abolished-national-monuments.htm (Feb. 17, 2021).

[138] HAYES, *supra* note 2, at 8.

[139] *Abolished National Monuments*, *supra* note 137; Vincent Santucci & Cassi Knight, *Fossil Cycad National Monument*, NAT'L PARK SERV., https://www.nps.gov/articles/fossil-cycad-national-monument.htm (Feb. 25, 2022).

[140] *Abolished National Monuments*, *supra* note 137.

encompass: "[T]he President's 'long-continued practice, known to and acquiesced in by Congress' of issuing management directives in proclamations issued pursuant to the Antiquities Act, arguably 'raise[s] a presumption that the [action] had been [taken] in pursuance of its consent . . . .'" [141] The Supreme Court has also historically taken congressional silence on both executive and judicial matters as acquiescence. The Supreme Court has long noted that Congress is presumed to be aware of consistently conducted executive actions with respect to the management of public lands (which are the property of the United States), and, therefore, is presumed to have acquiesced to those actions.[142] With respect to judicial precedent, the Supreme Court in one case noted that when "in 14 years Congress has taken no step to modify [our] holding, . . . this long congressional acquiescence 'has enhanced even the usual precedential force' we accord to our interpretations of statutes . . . ."[143]

More than half of the 158 national monuments that have been declared are 5,000 acres or more in size,[144] making the declaration of expansive national monuments very much a "long-continued practice"[145] of which Congress is certainly aware. Therefore, it seems very likely that, in standing silent as presidents from Roosevelt to Clinton to Obama reserved millions of acres of federally owned land as national monuments by presidential proclamation, Congress has long since acquiesced to the practice of designating large national monuments that only it had the power to revoke. Additionally, both the Bears Ears and Grand Staircase-Escalante National Monuments were much more limited applications of presidential discretion than, for example, President Jimmy Carter's

---

[141] W. Watersheds Project v. Bureau of Land Mgmt., 629 F. Supp. 2d 951, 964 (D. Ariz. 2009) (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)). *See also* Abourezk v. Reagan, 785 F.2d 1043, 1054–55 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) ("[E]vidence of congressional acquiescence (or the lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling."); Hawaii v. Trump, 878 F.3d 662, 688 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018) ("Historical practice confirms the breadth of, and deference owed to, the President's exercise of authority under Sections 1182(f) and 1185(a)(1).").

[142] *Midwest Oil Co.*, 236 U.S. at 474. *See also* AFL-CIO v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) (internal quotation marks omitted) ("[T]he President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is entitled to great respect.").

[143] Watson v. United States, 552 U.S. 74, 82–83 (2007) (quoting Shepard v. United States, 544 U.S. 13, 23 (2005)). *See also Abourezk*, 785 F.2d at 1051 n.6 ("To override the language of a statute, indirect evidence of congressional intent, such as acquiescence in judicial construction, must be strong."). Therefore, acquiescence to judicial construction can be powerful enough to override even the language of a statute, which is typically regarded as conclusive absent a clearly expressed legislative intent to the contrary. *See supra* note 48 and accompanying text.

[144] *National Monument Facts and Figures*, *supra* note 7; KLEIN ET AL., *supra* note 31.

[145] *Midwest Oil Co.*, 236 U.S. at 474.

designation of the nearly 11-million-acre Wrangell-St. Elias National Monument in 1978.[146] Therefore, despite recent opposition, the case for congressional acquiescence to the designations of large monuments like Bears Ears or Grand Staircase-Escalante is quite strong, as revoking such monuments on the basis of size would be inconsistent with Congress's past practice.

As a point of note, although no President has attempted to reduce the size of a national monument since the passage of FLPMA in 1976,[147] presidents did decrease the size of monuments on eighteen occasions between 1911 and 1963.[148] Although it may be possible to argue that Congress acquiesced during that time to the practice of presidential revocation—despite the conflicts that argument raises under the Property Clause—the Alaska District Court has found this argument insufficient. That court held in *League of Conservation Voters* (discussed above in analogy to the Antiquities Act) that "Congress's decisions not to challenge the small number of prior revocations [of land withdrawals under OCSLA] falls far short of the high bar required to constitute acquiescence [to the President's revocation authority]."[149]

IV. WHAT WILL THE FUTURE OF THE ANTIQUITIES ACT BE?

In determining the future of the Antiquities Act, it is worthwhile to consider how the modern Supreme Court might rule on the question of presidential discretion to declare large national monuments, particularly in the face of the modern resurgence of opposition to the Act's grant of broad presidential power. This consideration is especially worthwhile because such opposition has persisted for over a century and will likely continue to arise in the context of large monument declarations in the

---

[146] VINCENT, *supra* note 6, at 5, 12 (noting that Bears Ears was established as a 1.35-million-acre national monument, and Grand Staircase-Escalante was created with 1.7 million acres). Wrangell-St. Elias, and several other national monuments enacted by President Carter in Alaska at the same time, prompted the establishment of a statutory requirement that land withdrawals in Alaska greater than 5,000 acres receive congressional approval. *Id.* at 2. However, despite Alaska's clear displeasure with the size of Wrangell-St. Elias, Congress still did not act to revoke the monument. *See Abolished National Monuments*, *supra* note 137.

[147] ROSENBAUM ET AL., *supra* note 68, at 4.

[148] HAYES, *supra* note 2, at 9; Seamon, *supra* note 33, at 575. *See, e.g.*, Proclamation No. 1167, *reprinted in* 37 Stat. 1716 (Jul. 31, 1911) (reducing the size of the Petrified Forest National Monument on the grounds that it reserved more land than was necessary for the protection of the objects identified); Proclamation No. 3539, 3 C.F.R. 287, 287 (1959–1963), *reprinted in* 77 Stat. 1006 (May 27, 1963) (reducing the size of Bandelier National Monument on the grounds that the areas being excluded had "been fully researched and are not needed to complete the interpretive story of the Bandelier National Monument").

[149] League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013, 1030 (D. Alaska 2019).

future.[150] Although opponents' critiques of the Act fall short under current Antiquities Act jurisprudence, the Supreme Court retains the power to interpret the text of the Act more narrowly.

Recent events suggest that the Supreme Court may be willing to reconsider the scope of the Antiquities Act. For instance, Chief Justice John Roberts issued a statement in 2021 respecting the denial of certiorari in *Massachusetts Lobstermen's Ass'n v. Raimondo* that suggested that past presidents have gone overboard in their designations of national monuments on submerged lands.[151] In his statement, Chief Justice Roberts expressed his disapproval of the use of the Antiquities Act "to designate an area of submerged land about the size of Connecticut as a monument,"[152] describing this 3.2 million-acre monument as part of a recent trend of ever-greater monument designations: "Since 2006, Presidents have established five marine monuments alone whose total area exceeds that of all other American monuments combined."[153]

Beyond his condemnation of this recent trend, Chief Justice Roberts identified several other concerns with the Act that the Court may be willing to consider. First, Chief Justice Roberts made the textualist argument that using the Act to protect "5,000 square miles of land beneath the ocean" is not only inconsistent with the plain meaning and ordinary understanding of the words "monument" and "antiquity," but also a departure from the traditional understanding that such objects be classified as "land" (i.e., terrestrial).[154] He also alluded to a potential

---

[150] Recent developments at the time this Note was written—namely, the Supreme Court's reliance on an aspect of the non-delegation doctrine in *National Federation of Independent Business v. OSHA*—may have significant consequences for the Antiquities Act. At the moment, however, the issue of non-delegation as applied to the Antiquities Act raises more questions than answers, such as: Does the breadth of power delegated to the President by Congress violate the non-delegation doctrine? Does it matter that this power was delegated to the President rather than to an agency? Does the broad wording of the Property Clause give Congress more or less power to delegate? Because these potential implications lie beyond the scope of this Note, the non-delegation doctrine is not addressed in the following argument. However, it may soon prove to be a very important line of inquiry in the context of the future of the Antiquities Act. *See, e.g.*, Nat'l Fed'n Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022); Lee A. Steven, *Non-Delegation, Major Questions, and the OSHA Vaccine Mandate*, YALE J. ON REGUL. NOTICE & COMMENT BLOG (Nov. 8, 2021), https://www.yalejreg.com/nc/non-delegation-major-questions-and-the-osha-vaccine-mandate-by-lee-a-steven/.

[151] 945 F.3d 535 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

[152] *Id.*

[153] *Id.* at 980–81.

[154] *Id.* at 980. *See also* Marissa Grenon, *Are Marine National Monuments in Danger? Examining Chief Justice Roberts's Statement Denying Certiorari for Massachusetts Lobstermen's Association*, AM. BAR ASS'N: SECTION OF ENV'T, ENERGY, & RES. (Aug. 12, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/mr/20210812-are-marine-national-monuments-in-danger/.

separation of powers problem, noting that the "broad authority" vested in the President by the Act strongly contrasts with other, "more restrictive" tools available to the Executive Branch and to Congress for preserving areas of land and sea.[155] The National Marine Sanctuaries Act, for one, requires rigorous consultation and findings on twelve statutory criteria before an area can be designated as a marine sanctuary; national parks, for another, can only be established by an Act of Congress.[156] The contrast drawn by Chief Justice Roberts suggests a concern that the Act enables executive overreach.[157]

Chief Justice Roberts's statement identifies the "smallest area compatible" language of subsection (b) of the Act[158]—the only limitation on the President's power, and one which, historically, has not proven to restrict his designations[159]—as a potential avenue for narrowing the scope of the Antiquities Act.[160] Although prior Supreme Court jurisprudence has suggested that the objects listed for protection under the Antiquities Act may "under some circumstances"[161] include ecosystems,[162] Chief Justice Roberts notes that the Court has yet to determine how the "smallest area compatible" limitation might apply to "such an imprecisely demarcated concept as an ecosystem."[163] Because the establishment of national monument protections invariably spawns restrictions on public use, Chief Justice Roberts suggested that, with regards to monuments declared for purposes of ecosystem protection, "[t]he scope of the objects that can be designated under the Act, and how to measure the area necessary for their proper care and management, may warrant consideration . . . ."[164]

While it does not hold the same weight as a full Court opinion,[165] this statement suggests that the winds of the Supreme Court's attitude towards

---

[155] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari). *See also* Grenon, *supra* note 154.

[156] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting the denial of certiorari). *See also* 16 U.S.C. § 1433(b) (regarding marine sanctuaries); 54 U.S.C § 100101(b)(2) (regarding national parks).

[157] Grenon, *supra* note 154.

[158] 54 U.S.C. § 320301(b).

[159] *See supra* Section II.B. *See also National Monument Facts and Figures*, *supra* note 7.

[160] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980–81 (Roberts, C.J., statement respecting the denial of certiorari).

[161] *Id.* at 981.

[162] Alaska v. United States, 545 U.S. 75, 103 (2005). The D.C. Circuit has also held that ecosystems qualify as "objects" under the Act. Tulare Cnty. v. Bush, 306 F.3d 1138, 1142 (D.C. Cir. 2002).

[163] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

[164] *Id.*

[165] Missouri v. Jenkins, 515 U.S. 70, 85 (1995).

presidential discretion under the Antiquities Act might be shifting.[166] In fact, Chief Justice Roberts suggests quite strongly that the Court may be willing to consider imposing stricter "smallest area compatible" restrictions on the President's power to declare marine national monuments. Because the breadth of protectable objects under the Act has been well established, strengthening this restriction on presidential power is the most likely way for the Supreme Court to narrow the scope of the Act.

Ultimately, *Massachusetts Lobstermen's Ass'n* did not prove to be the case to establish such a restriction due to its failure to plead with sufficient detail that the objects for protection exceeded the "smallest area compatible" with the management of the ecosystem.[167] By refusing certiorari on the same grounds upon which the D.C. Circuit dismissed the complaint, the Supreme Court lent legitimacy to the standard articulated by the D.C. Circuit: "[T]o obtain judicial review of claims about a monument's size, plaintiffs must offer specific, nonconclusory factual allegations establishing a problem with its boundaries."[168] Accordingly, as one recent article suggested, a case that could successfully meet this standard (and, therefore, establish a new Supreme Court standard of *ultra vires* review of national monument boundaries) would need to raise non-conclusory factual allegations that identify "with sufficient particularity" specific parts of the monument that do not contain those objects that the President sought to protect.[169] If such a case does present itself, Chief Justice Roberts's statement indicates that the Supreme Court remains open to narrowing the scope of presidential discretion under the Act on these grounds.[170]

Despite Chief Justice Roberts's strongly worded statement, however, it is important to note that it was specifically directed at denying certiorari in a case challenging the declaration of a marine national monument for

---

[166] Other courts have also indicated that the President's authority under the Antiquities Act should be limited in some way. *See, e.g.*, Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853, 1855 (D. Alaska July 1, 1980) ("[T]here are limitations on the exercise of presidential authority on the Antiquities Act. The outer parameters have not yet been drawn by judicial decision."); Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (reaffirming courts' ability to review presidential proclamations under the Antiquities Act to ensure that the President has not exceeded statutory or constitutional authority).

[167] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

[168] Mass. Lobstermen's Ass'n v. Ross, 349 F. Supp. 3d 48, 67 (D.D.C. 2018), *aff'd as modified*, 945 F.3d 535 (D.C. Cir. 2019).

[169] Grenon, *supra* note 154 (quoting Tulare Cnty. v. Bush, 306 F.3d 1138, 1142 (D.C. Cir. 2002)).

[170] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

the protection of extremely general objects, namely "the natural resources and ecosystems in and around [the monument's primary features]."[171] In other words, the main thrust of Chief Justice Roberts's statement critiqued the extension of Antiquities Act protections to "submerged lands" and the imprecision of permitting vague concepts such as "ecosystems" to be objects for the purposes of the Act.[172] This, therefore, raises speculation as to whether a potential narrowing of the scope of the Act via the "smallest area compatible" limitation would also apply to terrestrial monuments established for the protection of objects other than "ecosystems."

Should the Supreme Court take steps to narrow the Act through the "smallest area compatible" limitation, the effects of such a restriction would apply equally to all monuments declared under the Act. First, Chief Justice Roberts's statement clearly contemplates that this limitation should apply to "any land" reserved under the Act, expressing disdain for the current failure of the Act to prevent the establishment of vast monuments both "above and below the sea."[173] Second, not only have terrestrial monuments already been established for the protection of "ecosystems," [174] but also "ecosystem" is certainly not the only "imprecisely demarcated concept"[175] that has been used as a basis for monument declarations. Likely due to the Supreme Court's endorsement of a broad reading of the term "objects" in subsection (a) of the Act, many monuments have been declared based on equally broad concepts, such as "cultural, prehistoric, and historic legacy and . . . diverse array of natural and scientific resources,"[176] "daytime scenery" and "night skies,"[177] and "vari[ations] . . . in elevation and topography." [178] Therefore, if the Supreme Court chooses to increase judicial scrutiny through the "smallest area compatible" language, there could be repercussions for many monuments declared on the basis of such "imprecise[]"[179] objects.

---

[171] *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 67–68.

[172] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

[173] *Id.* at 980–81.

[174] Proclamation No. 9476, 81 Fed. Reg. 59121, 59125 (Aug. 29, 2016) ("Of particular scientific significance are the number and quality of small and medium-sized patch ecosystems throughout the [Katahdin Woods and Waters National Monument].").

[175] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

[176] Proclamation No. 9558, 82 Fed. Reg. 1139, 1142 (Jan. 5, 2017).

[177] Proclamation No. 9476, 81 Fed. Reg. at 59125.

[178] Proclamation No. 6920, 61 Fed. Reg. 50223, 50224 (Sept. 24, 1996).

[179] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

As a counterpoint, however, the degree to which such a limitation could actually restrict the scope of discretion under the Act in practice may be less than Chief Justice Roberts suggests. After all, the restriction imposed by subsection (b) of the Antiquities Act is dependent on the "objects to be protected," as defined in subsection (a).[180] The scope of those objects, as the Supreme Court has established, can be extremely broad, as the Act grants the President significant discretion to determine what qualifies as "historic or scientific interest."[181] Under the pleading standard set out by the D.C. Circuit and endorsed by Chief Justice Roberts, in order to survive a motion to dismiss, a complaint will face the challenge of identifying particular features of a monument that are not compatible with the protection and management of increasingly broadly defined objects, such as an ecosystem.[182] How can a complaint successfully meet the requisite standard of particularity in such a case? The breadth of the term "objects" erects a high barrier to a complaint that purports to identify a violation of subsection (b)—a barrier which will be difficult for plaintiffs to surmount.

For example, a challenge to Bears Ears on "smallest compatible grounds" would face the hurdle of showing specific lands included in the monument that are not compatible with the protection and management of the fossils, Native artifacts, and places of spiritual and cultural importance listed as objects in President Obama's proclamation.[183] Such a challenge would prove to be quite difficult, since, as discussed above, these objects are scattered across a broad landscape.[184] As yet, no affirmative pleading attacking the size of Bears Ears on "smallest compatible grounds" has come before a court. However, the federal government has levied a variety of arguments in defense of President Trump's reduction of Bears Ears on "smallest area compatible" grounds. While these arguments cannot be equated to an affirmative pleading, they nevertheless present an example of arguments that would not have met the high standards for particularity laid out in *Massachusetts Lobstermen's Ass'n*.

First and foremost, President Trump's proclamation shrinking the monument failed to identify specific parts of the Bears Ears National Monument that were not compatible with the protection and management

---

[180] 54 U.S.C. § 320301(a), (b). *See also supra* notes 56–61 and accompanying text.

[181] *Id.* § 320301(a). *See also supra* Section II.C.

[182] Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 537, 544–45 (D.C. Cir. 2019) (finding a pleading challenging the Northeast Canyons and Seamounts Marine National Monument "insufficient" on the grounds that it "contain[ed] no factual allegations identifying a portion of the Monument that lacks the natural resources and ecosystems the President sought to protect").

[183] Proclamation No. 9558, 82 Fed. Reg. 1139, 1139–43 (Jan. 5, 2017).

[184] *Supra* notes 97–101 and accompanying text.

of the objects listed in President Obama's proclamation. Instead, President Trump justified the reduction of Bears Ears by claiming that the objects located in areas that his proclamation removed from the monument were not "of unique or distinctive significance," a standard which is not supported by prior case law or the text of the Act.[185] Likewise, a memorandum submitted by the federal defendants in *Hopi Tribe v. Trump* focused its efforts on arguing that the "smallest area compatible" clause granted the President the power to shrink national monuments, but failed to identify any specific lands that were not consistent with the protection and management of the listed objects.[186] These arguments, if they had been presented by a plaintiff rather than in a presidential proclamation or by the government as a defendant, would not have met the high standards for particularity required both by the D.C. Circuit (the court in which all four lawsuits challenging President Trump's monument rollbacks were brought)[187] and, as Chief Justice Roberts suggested, by the Supreme Court.[188]

If the "smallest area compatible" limitation were to become a meaningful requirement, what, then, is the future of the many national monuments that have been declared on the basis of the broad discretion previously approved by courts? Would the limitation in subsection (b) of the Act actually pose a threat to these monuments, since the burden on the plaintiffs to point to specific evidence that monument lands exceed the "smallest area compatible" requirement is so high? Ultimately, this will depend on the objects listed. For instance, it is much more difficult to identify lands within a monument that are not compatible with the "care and management" of an object like the ecosystem than an object like daytime scenery. Although both terms are equally vague, all the land within a monument is necessarily part of the ecosystem and, therefore, inherently related to its "care and management," whereas it is likely much easier to prove that a specific area (e.g., land below the canopy of a forest or a valley hidden from view) has nothing to do with the "care and management" of a subjective object like daytime scenery.

---

[185] *See supra* notes 87–96 and accompanying text; Memorandum in Support of Federal Defendants' Motion to Dismiss at 39, Wilderness Soc'y v. Trump, No. 17-cv-02587 (D.D.C. Oct. 1, 2018); Grenon, *supra* note 154.

[186] *See generally* Memorandum in Support of Federal Defendants' Motion to Dismiss, Hopi Tribe v. Trump, No. 17-cv-02590 (D.D.C. Oct. 1, 2018).

[187] *See, e.g.*, Tulare Cnty. v. Bush, 306 F.3d 1138, 1142 (D.C. Cir. 2002); Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136–37 (D.C. Cir. 2002); Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 544 (D.C. Cir. 2019).

[188] Mass. Lobstermen's Ass'n v. Raimondo, 945 F.3d 535 (D.C. Cir. 2019), *cert. denied*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

As a result, some national monuments may be more vulnerable to a challenge on "smallest area compatible" grounds than others. As a recent article published by the American Bar Association has argued, an evidence-based, scientific record demonstrating why all the land included in the monument is compatible with the protection of the objects identified may need to be generated for both existing and newly declared monuments.[189] Such specific evidence supporting the declaration may foreclose many challenges to monument size on "smallest area compatible" grounds. For instance, evidence that Native artifacts are being looted from locations across a broad landscape, as was the case at Bears Ears,[190] may prove to be one such safeguard.

As one final consideration, it is important to note that, despite Chief Justice Roberts's statement, the Supreme Court may ultimately be unwilling to strengthen the "smallest area compatible" limitation if doing so would require it to overturn a presidential proclamation. Historically, courts have been very unwilling to overturn a presidential exercise of discretion: "Presidential Proclamations designating national monuments have been challenged in only a handful of cases; in each the court has upheld the President's action."[191] This reluctance is likely due, once again, to the Act's broad language, which leaves significant room for interpretation. Additionally, the statute explicitly grants significant discretion to the President—a mandate which courts are generally extremely unwilling to defy.[192] In fact, in the history of our country,

---

[189] Grenon, *supra* note 154.

[190] Rowland-Shea, *supra* note 81.

[191] *Mountain States Legal Found.*, 306 F.3d at 1135. For examples of such presidential actions being upheld, see Cameron v. United States, 252 U.S. 450, 455–56 (1920) (upholding President Roosevelt's designation of the Grand Canyon National Monument); Cappaert v. United States, 426 U.S. 128, 141–42 (1976) (upholding President Truman's designation of Devils Hole National Monument); United States v. California, 436 U.S. 32, 35–36 (1978) (upholding President Truman's proclamation enlarging the Channel Islands National Monument); *Anaconda Copper Co. v. Andrus,* 14 Env't Rep. Cas. (BNA) 1853, 1855 (D. Alaska July 1, 1980) (upholding President Carter's creation of monuments in Alaska); Wyoming v. Franke, 58 F. Supp. 890, 894 (D. Wyo. 1945) ("In this respect, this Court feels that it has a limited jurisdiction to investigate and determine whether or not the Proclamation is an arbitrary and capricious exercise of power under the Antiquities Act so as to be outside of the scope and purpose of that Act by which the President in the exercise of its provisions has exceeded or violated a discretion thereby conferred."). Courts have also been unwilling to impose additional restrictions on presidential exercises of power under the Act. *See, e.g.*, Alaska v. Carter, 462 F. Supp. 1155, 1159–60 (D. Alaska 1978) (holding that the President is not subject to environmental impact statement requirements when proclaiming monuments under the Antiquities Act).

[192] Jessica M. Stricklin, Comment, *The Most Dangerous Directive: The Rise of Presidential Memoranda in the Twenty-First Century as a Legislative Shortcut*, 88 TUL. L. REV. 397, 408 (2013) ("Although Justice Jackson's *Youngstown* criteria remain applicable today to all presidential directives, in practice, federal courts are reluctant and generally unwilling to intervene in presidential lawmaking.").

federal courts have only ever overturned two executive orders.[193] Although it is still possible that a court could overturn a presidential declaration, doing so would be difficult, since there is no record to indicate the President's process or motivation for taking such action, as there typically is when reviewing agency action. Therefore, overturning a presidential action would require a close investigation of the President's reasoning, which courts are disinclined to pursue.[194]

However, "the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority."[195] Accordingly, the D.C. Circuit has held that "[c]ourts remain obligated to determine whether statutory restrictions have been violated" when reviewing challenges to discretionary presidential actions under the Antiquities Act.[196] This willingness to review discretionary presidential proclamations expressed by the D.C. Circuit and the Supreme Court indicates that the door remains open to judicial challenges of monuments on "smallest area compatible" grounds. Whether Chief Justice Roberts's statement accurately predicts the response of the Supreme Court to such a claim, however, remains to be seen.

CONCLUSION

Despite Representative Lacey's assurances to the 59th Congress that the scope of the Antiquities Act would be narrow, the text of the Act, as ultimately passed by Congress, proved to sanction extremely broad discretion, affording presidents what has proven to be nearly unlimited power to declare national monuments. This unusual scope of discretion stands in contrast to other conservation statutes, exceeding even the power afforded to Congress itself to establish national monuments. Such

---

[193] *Id.* at 409; WILLIAM J. OLSON & ALAN WOLL, EXECUTIVE ORDERS AND NATIONAL EMERGENCIES: HOW PRESIDENTS HAVE COME TO "RUN THE COUNTRY" BY USURPING LEGISLATIVE POWER 4, 17 (Oct. 28, 1999), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa358.pdf. It is worth distinguishing between executive orders and executive actions for clarity. For example, the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program enacted by President Obama, which was recently struck down by an equally divided Supreme Court, Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016), was introduced by an executive action, a presidential action that is similar to but distinct from an executive order. United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 782–83 (W.D. Pa. 2014) (noting the distinction between executive orders/proclamations and executive actions and mentioning the two previous occasions in which executive orders were struck down by courts).

[194] *See, e.g.*, *supra* notes 191–192 and accompanying text.

[195] *Mountain States Legal Found.*, 306 F.3d at 1136.

[196] *Id.*

sweeping power has, understandably, drawn criticism and opposition, even from the Supreme Court itself. Although a case properly presenting this question has yet to reach the Supreme Court, limitations on this historically broad Act may be looming.

In the meantime, however, controversial national monuments such as Bears Ears and Grand Staircase-Escalante are very unlikely to be overturned by the Court. Over the last century, there have been many significantly powerful exercises of presidential discretion under the Act (Jackson Hole, for one, and large, submerged monuments, for another). Compared to these designations—which mark the outer limits of presidential authority—the two national monuments currently in the public eye are quite reasonable and clearly do not exceed the bounds of authority granted to the President under the Act. Since the courts have insufficient grounds for overturning national monuments and since the President lacks the power to unilaterally reduce their size, the authority remains with Congress, as it has since the passage of the Act, to reduce or revoke monuments when it disagrees with the President's actions.

After a century of silence from Congress, it seems clear that, of all the national monuments that have been declared under the Antiquities Act in the United States—from Devils Tower[197] to Bears Ears and Grand Staircase-Escalante[198]—not one has exceeded the size permissible under the "smallest area compatible" limitation. Therefore, the large monument declarations that we see today, and have seen for the last 115 years, represent the correct scope of discretion under the Act; and, until either Congress or the Supreme Court takes action to indicate otherwise, the Antiquities Act will remain one of our most powerful tools for conserving the priceless natural and cultural treasures of our country.

[197] Established September 24, 1906. *See National Monument Facts and Figures*, *supra* note 7.

[198] Re-established to their original boundaries (and expanded slightly in the case of Bears Ears) on October 8, 2021. *Id.*