Note

A Monumental Task: How Should Courts Review Challenges to Presidential Actions Taken Pursuant to the Antiquities Act?

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INTRODUCTION

FOR THE BENEFIT AND ENJOYMENT OF THE PEOPLE.[1] This simple, yet powerful phrase adorning the Roosevelt Arch—the gateway to Yellowstone National Park, America's first national park[2]—embodies the country's beliefs about its public lands. This ideal springs from the notion that our public lands are owned in common by the people and for the people. Consequently, an integral part of our public lands' heritage is a focus on conserving their beauty and splendor for future generations. To aid the goals of conservation and protection of unique cultural, historic, scientific, and geographic sites throughout the nation,[3] Congress passed the Antiquities Act of 1906.[4] This law authorizes the President to designate certain sites on federally owned lands as national monuments, provided they meet specific statutory criteria.[5] Presidents have certainly taken advantage of

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1. *See* Courtney Holden, *Roosevelt Arch at Yellowstone's North Entrance*, YELLOWSTONEPARK.COM (Mar. 8, 2018), https://www.yellowstonepark.com/park/roosevelt-arch [https://perma.cc/X96J-V24K] (describing the arch and its inscription).

2. *Id.*

3. *See infra* Part I.A.2.

4. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225.

5. *Id.*

this power, designating more than 158 national monuments throughout every corner of the country.[6]

Despite our country's strong legacy of protecting priceless public lands, in late 2017, President Donald Trump significantly reduced the boundaries of national monuments designated by Presidents Bill Clinton and Barack Obama.[7] These monuments—both located in Utah—were Grand Staircase-Escalante[8] and Bears Ears.[9] Although some parties supported this action,[10] others rejected it and filed suit, claiming that by reducing previous monument designations, Trump exceeded his authority under the Antiquities Act.[11] The primary conflict between the two camps hinges on whether the Act's delegation of the authority to designate national monuments includes the power to reduce or revoke a prior monument designation.[12] The academic debate over this question is fierce.[13]

Although this Note focuses on determining how courts should review challenges to presidential monument actions generally, part of its inquiry necessarily includes how courts should

6. *See Monuments List*, NAT'L PARK SERV., https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm [https://perma.cc/57ZQ-FCH8].

7. Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html [https://perma.cc/SZT8-3K5U].

8. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

9. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

10. For example, the governor of Utah wrote an opinion piece backing the reduction of Bears Ears. Gary Herbert, *Gary Herbert: 5 Myths About Bears Ears*, DESERET NEWS (Dec. 4, 2017, 1:45 PM), https://www.deseretnews.com/article/865693641/Gary-Herbert-5-myths-about-Bears-Ears.html [https://perma.cc/E8D9-DUBV].

11. At least five suits were quickly filed in response to Trump's action. *See* Andrew M. Harris, *Patagonia Sues Trump over Bears Ears Monument*, BLOOMBERG (Dec. 7, 2017, 10:38 AM), https://www.bloomberg.com/news/articles/2017-12-07/apparel-maker-patagonia-sues-trump-over-bears-ears-monument [https://perma.cc/VE7P-C6FA].

12. For an overview of the arguments concerning whether the President lacks the power to reduce or revoke preexisting monuments, see Mark Squillace et al., *Presidents Lack the Authority To Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017). *But see* John Yoo & Todd Gaziano, *Presidential Authority To Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617 (2018) (arguing in favor of the position that the President's Antiquities Act powers also include the authority to reduce or revoke national monuments).

13. *See supra* note 12.

review monument reductions or revocations.[14] An important question thus arises: Is the same deference given to the reduction or revocation of a monument as is given to the President's discretion with regard to designations?[15] And if it is, should it be? This inquiry is particularly timely, not only because of the current litigation regarding Trump's actions,[16] but also because of the other national monuments potentially on the chopping block.[17]

Part I of this Note explores the history surrounding national monument designations, including background on the Antiquities Act and how various Presidents have utilized the law. Part I also examines the framework courts employ in reviewing executive actions that are allegedly at odds with Congress's will. Part II explores how some of the examples of presidential national monument designations discussed in Part I sparked litigation and how courts have failed to settle on a consistent standard of

14. *See infra* Part III.C.

15. *See* Dalton v. Specter, 511 U.S. 462, 474 (1994) (finding that it is improper for the judiciary to review an action exercised by another branch when discretion has been committed to that branch in regard to that action).

16. Thomas Burr, *Judge Consolidates Lawsuits over Bears Ears, Grand Staircase Monument Changes*, SALT LAKE TRIB. (Jan. 31, 2018), https://www.sltrib.com/news/politics/2018/01/31/judge-consolidates-lawsuits-over-bears-ears-grand-staircase-monument-changes/ [https://perma.cc/K5U8-FF32] (noting that several lawsuits were filed in response to Trump's reduction of Bears Ears and Grand Staircase-Escalante).

17. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017) (requiring the Interior Secretary to "conduct a review of all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation covers more than 100,000 acres, where the designation after expansion covers more than 100,000 acres, or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders"). This directive resulted in Secretary Ryan K. Zinke reviewing twenty-two national monuments and five marine national monuments. *See* RYAN K. ZINKE, FINAL REPORT SUMMARIZING FINDINGS OF THE REVIEW OF DESIGNATIONS UNDER THE ANTIQUITIES ACT 5–6 (2017), https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf [https://perma.cc/NPX8-3TW8]. Besides the Bears Ears and Grand Staircase-Escalante reductions, Zinke expressed support for reducing other national monuments including Gold Butte in Nevada and Cascade-Siskiyou along the Oregon-California border. Valerie Volcovici, *Interior Secretary Urges Size Cuts, Management Changes to More Monuments*, REUTERS (Dec. 5, 2017, 1:12 PM), https://www.reuters.com/article/us-usa-trump-monuments/interior-secretary-urges-size-cuts-management-changes-to-more-monuments-idUSKBN1DZ2SV [https://perma.cc/24XJ-J4RG]. Zinke also raised the prospect of altering the boundaries of two marine national monuments located in the Pacific Ocean: the Pacific Remote Islands and Rose Atoll. *Id.*

review in these challenges. Part III concludes by proposing that Congress should pass a statutory remedy to guide courts on how to review a President's discretionary action taken pursuant to the Antiquities Act.

I. EXPLORING THE HISTORY OF NATIONAL MONUMENT DESIGNATIONS

Beginning with the passage of the Antiquities Act, this Part traces the evolution of the President's designation power under the Act by examining some of the most famous (and contentious) presidential monument designations. This exercise demonstrates how various administrations, through increasingly bold actions that tested the limits of Congress's delegation, altered conceptions of presidential power pursuant to the Act. It then examines several cases—generally expounding upon presidential authority—that are relevant to the issues of executive power arising under the Act.

A. OVERVIEW OF THE ANTIQUITIES ACT

This Section begins by providing a brief background on federal public lands law, including its constitutional underpinnings. It also includes a description of what prompted the need for the Antiquities Act. It then transitions to a brief discussion of the legislative history and text of the Act.

1. The Property Clause

As a bedrock principle, the Framers imbued the Constitution with the separation of powers.[18] A necessary component of this ideal is that the three branches of government—the executive,[19] judicial,[20] and legislative[21]—are each assigned powers to exercise. Among the multitude of powers granted to the various

18. *See, e.g.*, THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny.").

19. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1–2 (granting the President the power, among others, to act as commander in chief of the nation's armed forces, make treaties, and appoint Supreme Court justices).

20. *See, e.g.*, *id.* art. III, § 2, cl. 1 (authorizing the Supreme Court to hear cases and controversies involving the United States, ambassadors, and disputes between states).

21. *See, e.g.*, *id.* art. I, § 8 (granting Congress powers, including to impose taxes, regulate interstate commerce, and establish post offices).

branches, the Constitution authorized Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[22] This power—enumerated in what is colloquially called the Property Clause—has been described as one "without limitations."[23] And from this power flows Congress's authority to pass laws relating to lands the federal government owns and how those lands should be administered.[24]

Initially, the impetus for assigning this power to the federal government was borne out of debates occurring around the formation of the Constitution. Due to land-boundary disputes among the original states and inadequacies for land disposition present in the Articles of Confederation,[25] the Framers intended to grant Congress a broad power to set the rules for federally owned public lands.[26] Using this power, Congress has passed laws dealing with various aspects of public lands for purposes commonly associated with federal land policy, such as designating wilderness areas and national parks,[27] formulating rules for timber sales in national forests,[28] and even protecting wild horses and burros.[29] As these examples demonstrate, the scope

22. *Id.* art. IV, § 3, cl. 2.

23. United States v. City and County of San Francisco, 310 U.S. 16, 29 (1940).

24. *See id.* at 29–30.

25. *See* Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 18–19 (2001); *see also id.* at 27 ("Madison argued that a chief weakness of the Articles stemmed from the lack of a power analogous to that conferred by the Property Clause.").

26. *See id.* at 26 (noting that the records of the Constitutional Convention are unclear as to the extent of the power the Framers intended to bequeath to Congress but that they likely intended for Congress to exercise "broad authority" in federal land policy and "not simply the power to dispose of federal property").

27. *See, e.g.*, Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2012) (allowing for the designation of wilderness areas); Act of Mar. 1, 1872, ch. 24, 42 Stat. 32 (codified as amended at 16 U.S.C. § 21 (2012)) (establishing Yellowstone National Park).

28. *See* 16 U.S.C. § 472a(a).

29. *See* Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331–1340. Notably, a challenge to this act led the U.S. Supreme Court to reiterate once more that "[t]he power over the public land thus entrusted to Congress is without limitations." Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (quoting United States v. City and County of San Francisco, 310 U.S. at 29).

of Congress's public-lands power is wide-ranging. It is within this authority that Congress relied on its broad powers under the Property Clause to pass the Antiquities Act of 1906.[30]

2. The Need for the Antiquities Act

Prior to passage of the Antiquities Act, the looting, vandalism, and destruction of unique and important archaeological sites was an acute problem—particularly in the southwestern United States.[31] Various proposals were put forth to protect precious national artifacts on federal lands.[32] One such proposal, authored by Congressman Jonathan Dolliver of Iowa in 1900, authorized the President to withdraw public lands containing culturally significant manmade artifacts, such as cave dwellings and burial mounds, as well as "any natural formation of scientific or scenic value of interest, or natural wonder or curiosity."[33] Although this sweeping language was not adopted, it provided the foundation for a bill proposed by Representative John Lacey of Iowa later that year. It was this bill that included language that was eventually incorporated into the Antiquities Act.[34] In particular, this language authorized the President to withdraw lands to protect "objects of scientific or historic interest."[35]

Several years later, on June 8, 1906, Congress passed this language, along with a broad grant of authority to the President to designate national monuments, in the Antiquities Act.[36] Despite its sweeping language and large delegation of authority from Congress to the President, the Act itself was surprisingly short. Comprised of four sections, the Act laid out a scheme for protecting public lands that contained unique cultural, historic, and scientific objects.[37] The first section provided for criminal penalties applicable to any person found to "appropriate, exca-

30. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225.

31. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 477 (2003) (recounting how archaeologists wanted to protect native artifacts by preventing the looting of these items from sites in the Southwest United States). For example, Squillace notes that sites like Chaco Canyon in northwest New Mexico and Mesa Verde (now a national park) in southwest Colorado were threatened by private collectors of cultural artifacts. *Id.*

32. *Id.* at 478–79.

33. *Id.* (quoting H.R. 8066, 56th Cong. (1900)).

34. *See id.* at 480 (citing H.R. 11,021, 58th Cong. § 1 (1900)).

35. *Id.* (quoting H.R. 11,021, 58th Cong. § 1 (1900)).

36. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225.

37. *Id.*

vate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States."[38] The third section included a provision permitting the excavation of withdrawn sites for educational or scientific purposes if authorized by the agency in charge of managing the monument.[39] The fourth section authorized the agency head in charge of administering a national monument to engage in administrative rulemaking "for the purpose of carrying out the provisions of the Act."[40]

However, it is the Act's second section—providing the substantive delegation of power from Congress to the President—that features prominently in this Note. In authorizing the President to withdraw federal lands, that section stated:

> That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . . .[41]

It is this seemingly innocuous language that sparked litigation as well as a robust academic debate regarding how Presidents have exercised their monument-designation power under the Antiquities Act and what the limitations (if any) on that power are.

3. Scope of the Antiquities Act

Congress passed the Antiquities Act in response to calls for the protection of unique archaeological artifacts.[42] And there is good evidence that this was its primary purpose. During a debate in the House of Representatives on the bill that became the Antiquities Act, its sponsor—Representative Lacey—responded to questioning from a Texas Congressman who was concerned about large land withdrawals akin to previous vast withdrawals for forest reserves:

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See* Squillace, *supra* note 31, at 477–78.

> Representative Lacey: There has been an effort made to have national parks in some of these regions, but this will merely make small reservations where the objects are of sufficient interest to preserve them.
>
> Representative Stephens: Will that take this land off the market, or can they still be settled on as part of the public domain?
>
> Representative Lacey: It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.
>
> Representative Stephens: How much land will be taken off the market in the Western States by the passage of the bill?
>
> Representative Lacey: Not very much. The bill provides that it shall be the smallest area necesstry [sic] for the care and maintenance of the objects to be preserved.[43]

The exchange between the two seems to have enunciated that the legislation was limited in scope in two ways: (1) in the types of sites it was intended to protect and (2) in the size of national monuments themselves. Considering that the assurances of restraint came from the bill's sponsor, the House exchange certainly provides ammunition for critics of presidential monument designations[44] that the Act was never intended to provide a basis for the wholesale withdrawal of millions of acres of federal lands. Instead, they argue, it was intended to be used in a targeted fashion to protect discrete parcels of land.[45]

Notwithstanding this legislative history, the Act's text must be considered as well.[46] Indeed, some members of the federal judiciary eschew legislative history in analyzing a statute due to a

43. 40 CONG. REC. 7888 (June 5, 1906). Titles of the representatives have been modified to improve readability.

44. CAROL HARDY VINCENT, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 5 (2016) ("[Critics] charge that Congress intended the act to protect specific items of interest, especially archaeological sites and the small areas surrounding them."). *But see id.* ("Defenders observe that by not specifically capping the size of monument designations, the Antiquities Act gives the President discretion to determine the acreage necessary to ensure protection of the resources in question, which can be a particular archaeological site or larger features or resources.").

45. *See* Yoo & Gaziano, *supra* note 12, at 625 ("[T]he Antiquities Act's title, drafting history, and historical context provide powerful additional evidence that the Act was not intended to allow vast scenic or geological monuments."); *cf.* NICOLAS D. LORIS, HERITAGE FOUND., THE ANTIQUATED ACT: TIME TO REPEAL THE ANTIQUITIES ACT 2 (2015) (calling for the repeal of the Antiquities Act and noting that Presidents have withdrawn millions of acres for national monuments despite language in the Act calling for designations to be limited to the "smallest area compatible with the proper care and management of the objects to be protected").

46. As Justice Kagan has remarked, "I think we're all textualists now." Harvard Law Sch., *The Scalia Lecture: A Dialogue with Justice Kagan on the*

purported lack of reliability.[47] It is notable that the enacted law did not include discrete limitations on monument size despite calls for such restrictions.[48] Rather than limit the Act's scope to the withdrawal of small parcels of land to protect particular archaeological artifacts, the Act's actual text is an open-ended grant of authority reflective of Congress's desire to provide the President the flexibility needed to protect our national treasures—whether they be historic or scientific, man-made or natural.[49] Scholars who have studied this law in great detail have come to a similar conclusion.[50]

B. HOW HAVE PRESIDENTS ACTUALLY UTILIZED THEIR DESIGNATION POWERS UNDER THE ANTIQUITIES ACT?

Regardless of what Congress's original conception of the Antiquities Act was, it is clear that Presidents have utilized this law to designate national monuments on a grand scale. Except for Richard Nixon, Ronald Reagan, and George H.W. Bush, every President since Theodore Roosevelt (who signed the original bill into law) has utilized the Act to designate monuments of varying sizes with differing rationales for their designations.[51]

Reading of Statutes, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

47. *See* Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1342 n.45 (2002) (noting that some Supreme Court justices, like Justice Thomas and the late Justice Scalia, have been skeptical of using legislative history in interpreting a statute).

48. *See* Squillace, *supra* note 31, at 483. Although earlier bills contained explicit size limits (such as 320 or 640 acres) on national monument designations, the Act did not hem in the President's authority to withdraw lands but instead included more general language that introduced an element of discretion in the scope of withdrawals. That language required withdrawals to be "the smallest area compatible with the proper care and management of the objects to be protected." *Id.*

49. *See id.* at 486 ("Legislative history and congressional intent aside, the plain language of the Antiquities Act supports a broad construction of the President's authority to protect large tracts of land. The plain language of the Act, more than any legislative history, is likely to ensure judicial support for Antiquities Act proclamations that protect large landscapes arguably relevant to science and history.").

50. *Id.*

51. VINCENT, *supra* note 44, at 2 n.11. In 2018, Trump designated his first national monument. Proclamation No. 9811, 83 Fed. Reg. 54,845 (Oct. 31, 2018) (Camp Nelson National Monument).

As the President who signed the Antiquities Act into law, Theodore Roosevelt quickly imprinted his larger-than-life personality[52] onto the process for designating national monuments. Roosevelt designated America's first national monument on September 24, 1906—Devil's Tower National Monument in Crook County, Wyoming.[53] The proclamation announcing this new monument was relatively short. It began with a brief recitation of section two of the Act as well as the rationale for designation.[54] This rationale described how Devil's Tower had unique geological features, which consequently made it "an object of historic and great scientific interest."[55] The proclamation then demarcated the site's boundaries and barred unauthorized persons from looting or otherwise destroying any natural feature of the monument and settling on the land.[56] The monument was slightly smaller than 1,200 acres.[57]

Including Devil's Tower, Roosevelt established eighteen national monuments in total, with Congress eventually incorporating several into national parks.[58] However, it was the designation of one monument in particular that redefined the scope of

52. Overcome with grief after the death of his wife and mother on the same day, Roosevelt subsequently took up ranching in the Badlands of western North Dakota. *Theodore Roosevelt the Rancher*, NAT'L PARK SERV., https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-the-rancher.htm [https://perma.cc/JM7L-KT62]. Battling the harsh environment of this country, he founded two ranches and lived out his idea of the "strenuous life." *Id.* For an account of Roosevelt's vision of the strenuous life, see THEODORE ROOSEVELT, The Strenuous Life: Speech Before the Hamilton Club, Chicago, April 10, 1899, *in* THE STRENUOUS LIFE 3, 21–22 (1901), https://www.bartleby.com/58/1.html [https://perma.cc/3T8T-EHX3] ("I preach to you, then, my countrymen, that our country calls not for the life of ease but for the life of strenuous endeavor . . . . Above all, let us shrink from no strife, moral or physical, within or without the nation, provided we are certain that the strife is justified, for it is only through strife, through hard and dangerous endeavor, that we shall ultimately win the goal of true national greatness."). The area where his ranches once stood is now home to Theodore Roosevelt National Park, *Elkhorn Ranch Unit*, NAT'L PARK SERV., https://nps.gov/thro/planyourvisit/elkhorn-ranch-unit.htm [https://perma.cc/5SPY-7A2P], a fitting tribute to a great champion of public lands in America.

53. Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906).

54. *Id.*

55. *Id.*

56. *Id.* at 3237.

57. *Monuments List*, *supra* note 6.

58. The national monuments established by Roosevelt that were incorporated into national parks include: Petrified Forest and Grand Canyon in Ari-

presidential powers under the Antiquities Act and eventually instigated litigation challenging that power.[59]

1. Grand Canyon National Monument

Whatever size limitations Congress may have had in mind with the Antiquities Act were tossed aside when Roosevelt made his revolutionary designation of Grand Canyon National Monument on January 11, 1908[60]—a monument that encompassed almost 810,000 acres in Arizona.[61]

Like his first designation, the proclamation establishing the monument was relatively brief, merely consisting of a few paragraphs in the Statutes at Large.[62] In justifying the withdrawal, the proclamation remarked that the Grand Canyon was an "object of unusual scientific interest" because it was the "greatest eroded canyon within the United States."[63] The withdrawal prohibited utilizing the monument for any uses permitted by "public land laws" and barred settlement within the monument's boundaries.[64] Notably, the proclamation stated the designation included the Grand Canyon as well as "such other land as is necessary for its proper protection."[65] This language suggests that Roosevelt's designation of lands outside the canyon was a nod to compliance with the Act's "smallest area compatible" requirement for protected sites.[66]

Notwithstanding his protection of the Grand Canyon, Roosevelt's designation brought forth litigation challenging his authority to reserve such a large tract of land. Although there were a number of issues in that case, the U.S. Supreme Court, in a brief analysis, concluded the withdrawal was within the purview of the President's powers under the Antiquities Act.[67]

zona; Cinder Cone, Lassen Peak, and Pinnacles in California; and Mount Olympus in Washington. *Id.*

59. See *infra* Part II.B.1 for a discussion of the litigation sparked by the Grand Canyon designation.

60. Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908).

61. *Monuments List*, *supra* note 6.

62. Proclamation No. 794, 35 Stat. 2175.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225.

67. *See* Cameron v. United States, 252 U.S. 450, 455–56 (1920). This case is discussed further in Part II.

2. Jackson Hole National Monument

Another national monument designation that spurred controversy[68] was President Franklin Delano Roosevelt's (FDR) withdrawal of lands to create Jackson Hole National Monument.[69] The monument, located in Wyoming, covered 221,610 acres in the Teton Country.[70] The presidential proclamation was, like its predecessors, limited in its justification for creating the monument: in seventy-eight words, the proclamation merely recited a portion of the language from section two of the Act, declaring that the Jackson Hole country "contain[ed] historic landmarks and other objects of historic and scientific interest."[71] Although the lands that encompassed Jackson Hole National Monument were eventually incorporated into Grand Teton National Park[72]—one of the most visited and popular national parks in the country[73]—support for federal protection of this land at the time of designation was fractured. Wyoming politicians in particular opposed FDR's Jackson Hole withdrawal.[74] Opposition from Wyomingites was strong enough that Congress eventually passed one of the few restrictions on the President's power to withdraw lands under the Antiquities Act.[75] That restriction, part of a larger bill to incorporate Jackson Hole National Monument into Grand Teton National Park, required "[t]hat no further extension or establishment of national parks

68. *See* Squillace, *supra* note 31, at 498.

69. Proclamation No. 2578, 57 Stat. 731 (Mar. 15, 1943).

70. Squillace, *supra* note 31, at 495.

71. Proclamation No. 2578, 57 Stat. 731 (Mar. 15, 1943).

72. 16 U.S.C. § 406d-1 (2012) (incorporating Jackson Hole National Monument into Grand Teton National Park).

73. In 2018, Grand Teton National Park was the eighth most visited park, receiving nearly 3.5 million visitors. *See These Are the 10 Most Popular National Parks*, NAT'L GEOGRAPHIC (Mar. 8, 2019), https://www.nationalgeographic.com/travel/national-parks/most-visited-parks-photos/ [https://perma.cc/Y4BE-2J9B].

74. *See generally A Bill To Abolish the Jackson Hole National Monument as Created by Presidential Proclamation Numbered 2578, Dated March 15, 1943, and to Restore the Area Embraced Within and Constituting Said Monument to Its Status as Part of the Teton National Forest: Hearings on H.R. 2241 Before the H. Comm. on the Pub. Lands*, 78th Cong. (1943) (featuring Wyoming Congressman Frank Barrett criticizing the monument).

75. 54 U.S.C. § 320301(d) (2012). The other restriction on the President's power to withdraw lands occurred in response to Jimmy Carter's reservation of millions of acres in Alaska. *See infra* notes 97–103 and accompanying text.

or monuments in Wyoming may be undertaken except by express authorization of the Congress."[76]

This reassertion of Congress's plenary power under the Property Clause to "make all needful rules and regulations respecting . . . property belonging to the United States"[77] provides evidence for the notion that Congress is capable and willing to cabin the President's designation power when that body believes the Executive Branch has misused it. It is notable, however, that Congress, in its rejoinder to the Jackson Hole monument, did not grant new executive powers to revoke or diminish an existing designation. Perhaps Congress did not want to wade into a dispute that was already well worn: a 1938 opinion by then-Attorney General Homer Cummings maintained that the President lacked the power to outright abolish a previously designated national monument.[78] In addition to the legislative response it aroused, the Jackson Hole withdrawal also prompted a lawsuit challenging the President's authority to designate the site.[79]

3. Alaskan National Monuments

Except for one day midway through his presidency, Jimmy Carter refrained from using his authority to designate national monuments.[80] But his actions on that day, declaring a number of new and enlarged national monuments, dramatically altered the scope of the President's authority under the Antiquities Act—especially in regard to its "smallest area" requirement.[81] On December 1, 1978, Carter established or enlarged seventeen national monuments[82] in Alaska covering more than fifty-six

76. An Act to Establish a New Grand Teton National Park in the State of Wyoming, and for Other Purposes, Pub. L. No. 81-787, § 1, 64 Stat. 849, 849 (1950) (codified as amended at 54 U.S.C. § 320301(d) (2012)).

77. U.S. CONST. art. IV, § 3, cl. 2.

78. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 186 (1938). Interestingly, this opinion acknowledges that Presidents had "from time to time" diminished national monuments in accordance with the "smallest area" requirement of the Antiquities Act but nonetheless held that any power to confine did not create a power to revoke. *Id.* at 188. *But see* Yoo & Gaziano, *supra* note 12, at 633–39 (arguing the Cummings opinion was flawed and legally incorrect).

79. Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945). This case is discussed in Part II.

80. *See Monuments List*, *supra* note 6 (listing the national monuments Carter created and their size).

81. 54 U.S.C. § 320301(b) (2012).

82. *See Monuments List*, *supra* note 6.

million acres.[83] With the stroke of a pen, he revolutionized presidential authority pursuant to the Act much like his predecessor Theodore Roosevelt had done seventy years before.[84] By redefining the scope of a monument's size and the objects that a monument could protect,[85] Carter essentially transformed the Act into a tool to accomplish general land and ecosystem conservation.[86] Ranging in size from the 350,000-acre designation of Aniakchak National Monument[87] to the enormous 10,950,000-acre designation of Wrangell-St. Elias National Monument,[88] these new national monuments in Alaska were stunning not only for their sheer scale but also for the objects that they protected. The aims of these designations included the preservation of various species of wildlife, such as brown bears and bald eagles on Admiralty Island in southeast Alaska,[89] a unique fish species in Kobuk Valley,[90] and a major caribou herd residing north of the Arctic Circle.[91] Additionally, these monuments aimed to protect large-scale ecosystems, such as boreal forests, riparian lands, and tundra in the Gates of the Arctic National Monument.[92]

83. Squillace, *supra* note 31, at 502.

84. *See* Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 39 (1982) (noting that Carter's national monument designations exceeded in scale the designations of past Presidents under the Antiquities Act); Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 455 (1981) (noting that "President Carter withdrew over four and a half times as much public land as the total land withdrawn under the Antiquities Act by all prior Presidents in seventy-two years"); *see also supra* Part I.B.1 (discussing Roosevelt's significant designation of the Grand Canyon National Monument).

85. *See* 54 U.S.C. § 320301 (requiring monuments to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" in the "smallest area compatible with the proper care and management of the objects to be protected"). The monuments that Carter created also represented the largest land-based designations in the Antiquities Act's history. *See* Squillace, *supra* note 31, at 502.

86. *See* Johannsen, *supra* note 84 ("There is little doubt that President Carter was acting outside the spirit of the Antiquities Act; the pattern of political events indicates that the President used the Act as a general conservation measure rather than to protect particular 'objects of historic or scientific interest' as required by the Act." (quoting 54 U.S.C. § 320301(a) (2012)).

87. Proclamation No. 4612, 43 Fed. Reg. 57,013, 57,013 (Dec. 1, 1978).

88. Proclamation No. 4625, 43 Fed. Reg. 57,101, 57,102 (Dec. 1, 1978).

89. *See* Proclamation No. 4611, 43 Fed. Reg. 57,009, 57,009 (Dec. 1, 1978).

90. *See* Proclamation No. 4621, 43 Fed. Reg. 57,073, 57,073 (Dec. 1, 1978) (noting the rare presence of the Alaskan sheefish).

91. *See* Proclamation No. 4617, 43 Fed. Reg. 57,043, 57,043 (Dec. 1, 1978).

92. *See, e.g.*, *id.*

These designations, however, were again not without controversy. Many in Alaska vehemently opposed the new monuments, claiming that Carter's actions constituted an encroachment by the federal government on locals' rights.[93] Tensions ran high among Alaskans, with several members of Alaska's congressional delegation declaring that the federal government was at war with the state.[94] In response to Carter's actions, many Alaskans engaged in acts of protest. Sportsmen's groups coordinated a gathering near Denali National Monument that aimed to violate a number of federal land regulations.[95] One protestor in Fairbanks even burned an effigy of Carter.[96]

Despite this opposition, Congress ultimately sanctioned Carter's actions in the Alaska National Interest Lands Conservation Act (ANILCA) of 1980[97] by adding his monument designations to the National Park Service,[98] National Forest System,[99] and National Wildlife Refuge System.[100] However, ANILCA also codified another restriction on the President's power to withdraw lands for national monuments.[101] The relevant language held that: "No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection."[102]

93. *See* Dermont Cole, *Thirty-Five Years Ago, Carter Drew Wrath of Many Alaskans*, ANCHORAGE DAILY NEWS (Nov. 30, 2013), https://www.adn.com/commentary/article/thirty-five-years-ago-carter-drew-wrath-many-alaskans/2013/12/01/ [https://perma.cc/U3J6-UJXX].

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371.

98. *See id.* § 201.

99. *See id.* § 503.

100. *Id.* § 302.

101. *See supra* notes 75–76 and accompanying text (describing the restriction on creating new national monuments in Wyoming by presidential proclamation).

102. 16 U.S.C. § 3213(a) (2012) (emphasis added). This statute goes on to permit the President to create Alaskan withdrawals of more than five thousand acres but holds that the "withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress." *Id.* This provision—granting Congress the ultimate authority to sanction such a withdrawal—may constitute an unconstitutional legislative veto. *Cf.* INS

Akin to the revocation of the President's power to designate national monuments in Wyoming, Congress limited the President's authority under the Act to designate national monuments in Alaska larger than five thousand acres without congressional approval.[103] This law provides another example of Congress restricting the President's designation power while failing to address his or her authority to revoke or reduce a monument designation.

In designating the Alaskan national monuments, Carter protected large swaths of uniquely precious wilderness, preserved these lands, and prevented their degradation by mining, development, and other forms of landscape alteration. Yet, in doing so, Carter used the Antiquities Act to a degree which dwarfed the monument designations of prior administrations.[104] These monuments redefined the scope of the President's withdrawal authority in terms of both monument size as well as the objects of scientific or historic interest which justified protection.[105] As Part II demonstrates, federal courts would ultimately bless Carter's expansion of presidential authority. Those decisions, along with precedent regarding judicial review of discretionary executive actions discussed below, validate the notion that courts are willing to defer (perhaps absolutely) to the President when a statute—like the Antiquities Act in its current form—commits a decision to his or her discretion.

C. CASE LAW ON THE SCOPE OF PRESIDENTIAL POWERS AND ITS IMPLICATIONS FOR THE ANTIQUITIES ACT

To understand the monumental designation power delegated to the President and how courts should review challenges to the use of that power, it is helpful to engage in an abbreviated overview of how courts review challenges to presidential actions taken pursuant to executive powers. Among other cases, this Section delves into one of the most influential cases regarding

v. Chadha, 462 U.S. 919, 954–55 (1983) (ruling that a legislative veto violates the Constitution's Presentment Clause).

103. *See supra* notes 75–76 and accompanying text.

104. *See supra* note 84.

105. *See supra* note 84.

presidential powers—*Youngstown Sheet & Tube Co. v. Sawyer*[106]—and, in particular, focuses on Justice Jackson's concurrence.[107] This Section then discusses federal jurisprudence regarding the relationship between presidential discretion and judicial review of challenges to the exercise of that discretion.

1. *Youngstown Sheet & Tube Co. v. Sawyer*

In 1952, President Truman responded to a threatened nationwide strike of steelworkers by ordering the Secretary of Commerce to commandeer and operate all U.S. steel mills.[108] Relying on his powers as Commander in Chief, Truman argued his order was necessary because a disruption in steel production threatened national security.[109] In response, the owners of the affected steel mills brought suit and requested an injunction barring the Secretary from seizing the mills.[110] These companies claimed that Truman overstepped the powers of the presidency by unconstitutionally entering the realm of Congress's lawmaking power.[111] In an opinion penned by Justice Black, the Court agreed with the companies and determined that Truman exceeded his executive powers by treading upon Congress's power to legislate.[112] According to the Court, a presidential power "must stem either from an act of Congress or from the Constitution itself,"[113] and because no law or constitutionally-granted executive power authorized the President to seize the mills, Truman's order was unconstitutional.[114]

In addition to Justice Black's opinion, each member of the majority penned a separate concurring opinion.[115] Among these was Justice Jackson's concurrence, where he laid out his view of

106. 343 U.S. 579 (1952).

107. *Id.* at 634–55 (Jackson, J., concurring).

108. *Id.* at 582–83.

109. *Id.* at 583–84.

110. *Id.* at 583.

111. *Id.* at 583–84.

112. *Id.* at 589. In support of its decision, the Court remarked that "[t]he Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." *Id.* at 588.

113. *Id.* at 585.

114. *See id.* at 587–89.

115. *Id.* at 593 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 634 (Jackson, J., concurring); *id.* at 655 (Burton, J., concurring). Unlike the other concurrences, Justice Clark only concurred in the judgment of the Court. *Id.* at 660 (Clark, J., concurring in the judgment).

the three scenarios under which a President could engage in executive action and how a court should go about reviewing a challenge to such an action.[116] According to the Court and scholars, this tripartite framework has become the dominant test for evaluating a challenge to an executive action.[117]

Under the first scenario, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[118] According to Justice Jackson, in situations where Congress has authorized the President to take an action, the authorization is presumptively valid and should be given "the widest latitude of judicial interpretation."[119] Under this prong of Justice Jackson's three-part test, a challenge would be successful only if the federal government lacked the constitutional authority to undertake such an action in the first place.[120] Accordingly, judicial review of such a challenge would seemingly be limited to a constitutional inquiry supported by the federal judiciary's authority "to say what the law is"[121] and void unconstitutional actions.[122]

The second prong of Justice Jackson's test applies to instances where "the President acts in absence of either a congressional grant or denial of authority."[123] Under such a scenario, the President can only rely upon her independent executive powers as justification for an executive action.[124] However, Justice Jackson noted that there may be "a zone of twilight in which [the President] and Congress may have concurrent authority" and in which "congressional inertia, indifference or quiescence" may enable a President's action.[125]

116. *Id.* at 635–38.

117. Laura A. Cisneros, Youngstown Sheet *to* Boumediene*: A Story of Judicial Ethos and the (Un)fastidious Use of Language*, 115 W. VA. L. REV. 577, 578 n.2 (2012) (summarizing the breadth of case law, statements by current Supreme Court justices, and academic literature that exalt Justice Jackson's *Youngstown* concurrence as the standard for evaluating executive actions).

118. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

119. *Id.* at 637.

120. *Id.* at 636–37.

121. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

122. *Cf. id.* at 180 ("[A] law repugnant to the constitution is void.").

123. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

124. *Id.*

125. *Id.*

Under the third prong, the President's power is at its "lowest ebb" when it conflicts with "the express or implied will of Congress" because the President is only acting "upon his own constitutional powers minus any constitutional powers of Congress over the matter."[126] It is in these types of scenarios that courts must engage in a judicial review which scrutinizes a President's action in order to uphold the separation of powers and preserve the constitutional equilibrium among the three branches of the federal government.[127]

2. Presidential Discretion and Judicial Review

Under the Administrative Procedure Act (APA), federal courts may hear challenges to agency actions that injure a party.[128] Per the statute, when reviewing an agency action, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[129] Notably, however, an organic statute precludes judicial review of an agency action when it commits discretion to an agency in undertaking that action.[130] Similarly, when Congress "commits [a] decision to the discretion of the President," the Supreme Court has held that challenges to the exercise of that discretion are outside the purview of the judiciary.[131] Moreover, the Supreme Court has also held that the President is not an agency as defined by the APA, finding that:

> The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress

126. *Id.*

127. *See id.* at 638.

128. *See* 5 U.S.C. §§ 701–702 (2012).

129. 5 U.S.C. § 706.

130. 5 U.S.C. § 701(a)(2); *see also* Consumer Fed'n of Am. v. FTC, 515 F.2d 367, 369 (D.C. Cir. 1975) ("Under the APA, judicial review of administrative action is the rule, unless there is a statutory prohibition of judicial review or unless agency action is committed to agency discretion by law." (citation omitted)); Sugarman v. Forbragd, 405 F.2d 1189, 1190 (9th Cir. 1968) ("By the terms of [the Administrative Procedure] Act, § 701(a)(2) . . . is not to apply where 'agency action is committed to agency discretion by law.'").

131. *See* Dalton v. Specter, 511 U.S. 462, 474 (1994); *see also id.* at 476 ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review.").

> before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.[132]

Taken as a whole, the Supreme Court's jurisprudence seems to suggest that discretionary actions that the President executes pursuant to a statute are beyond the scope of judicial review. However, this assertion of absolute deference to the Executive Branch is a point of disagreement among courts.[133] Some courts forbid judicial review of a discretionary presidential action.[134] In contrast, the D.C. Circuit has moved away, at least in part, from complete deference to a President's exercise of discretion, noting that there are certain instances where the assumption that such an action is non-justiciable is misguided.[135] For example, in *Chamber of Commerce v. Reich*, the D.C. Circuit held that the Supreme Court's holding in *Dalton v. Specter*—precluding judicial review of an executive action when Congress authorizes the President to exercise discretion[136]—was limited to instances "when a statute entrusts a discrete specific decision to the President and contains *no limitations* on the President's exercise of that authority."[137] Thus, the natural corollary to this position is that when a statute cabins in the President's discretion with at least some limitations on a delegated power, courts may review

132. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

133. *See, e.g.*, Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1331–32 (D.C. Cir. 1996) (favoring, based on the circumstances, judicial review of the President's discretionary decision); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 1172, 1183 (D. Utah 2004) ("Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go. When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion." (citations omitted)).

134. *See, e.g.*, *Utah Ass'n of Ctys.*, 316 F. Supp. at 1183.

135. *See Chamber of Commerce*, 74 F.3d at 1331–32 (finding that *Dalton v. Specter*'s reasoning that judicial review is barred when a statute authorizes the President to exercise discretion is limited to instances when the statute places "no limitations on the President's exercise of that authority"); Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 159, 171 n.51 (2004).

136. *Dalton*, 511 U.S. at 477 ("Where a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.").

137. *Chamber of Commerce*, 74 F.3d at 1331 (emphasis added).

claims that allege an executive action violates those limitations.[138] In essence, these courts argue for the position that absolute deference to a President's discretionary action only occurs when there are no discernible limitations on the exercise of discretion.[139]

As Part II demonstrates, all of this preceding authority is relevant to a discussion of judicial review in Antiquities Act challenges because the statute itself entrusts the decision to designate national monuments to the President's discretion.[140] Yet the Act also places limitations on the exercise of that discretion by enumerating that (1) only certain objects can be predicates for a national monument designation by the President,[141] and (2) those monuments constitute the "smallest area compatible" with the protection of those objects.[142]

Additionally, as Part III highlights, Congress's implied disagreement with a presidentially backed monument reduction or revocation—based on a provision tucked into the Federal Land Policy and Management Act of 1976—implicates the third prong of Justice Jackson's tripartite framework.[143]

138. *See id.* at 1332 (concluding that there are "judicially enforceable limitations on presidential actions").

139. *Dalton*, 511 U.S. at 477; *Chamber of Commerce*, 74 F.3d at 1331.

140. 54 U.S.C. § 320301(a) (2012).

141. The Act authorizes the President to exercise his or her discretion to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" that are worthy of monument status. *Id.* Accordingly, precedent suggests that decisions about which landmarks, structures, and objects to protect may be non-reviewable. *See Dalton*, 511 U.S. at 4770. *But see* Cappaert v. United States, 426 U.S. 128 (1976); Cameron v. United States, 252 U.S. 450 (1920). Although the Court in *Cappaert* and *Cameron* was incredibly deferential to the President's decision, it implicitly adopted the view that it could review challenges to the President's use of discretion by analyzing whether the monument complied with the statute, rather than wholesale deferring to the President without any review. *Cappaert*, 426 U.S. at 142; *Cameron*, 252 U.S. at 455–56. However, it is important to note that these decisions predated *Dalton v. Specter*, which called for judicial deference to the President's exercise of discretion.

142. 54 U.S.C. § 320301(b).

143. *See infra* notes 292–94 and accompanying text.

II. JUDICIAL REVIEW OF PRESIDENTIAL NATIONAL MONUMENT DESIGNATIONS

Since Theodore Roosevelt's administration, various Presidents have utilized the Antiquities Act to designate new monuments or expand existing ones to protect objects of historic, scientific, and cultural significance.[144] But many of these monument designations were controversial and generated legal challenges by aggrieved parties.[145] With an eye towards identifying the proper standard of judicial review for these challenges, this Part examines the types of claims that plaintiffs commonly make in cases predicated on alleged violations of the Antiquities Act and how courts have addressed them. It also demonstrates how federal courts have differed in reviewing challenges to national monument designations, which provides the impetus for the proposed solution in Part III to bring uniformity to judicial review in these cases.

Section A begins by applying the principles of judicial review of presidential exercises of discretion generally to the Antiquities Act. Sections B through D explore cases from each level of the federal judiciary that involved challenges to national monuments arising from controversial presidential monument designations—including several of the monuments discussed in Part I.

A. JUDICIAL REVIEW IN ANTIQUITIES ACT CHALLENGES

According to Professor Mark Squillace, a key process question in Antiquities Act cases remains unresolved.[146] He notes that courts have struggled with the proper standard of review to employ when hearing challenges to national monument designations made pursuant to the Antiquities Act.[147] Without guidance from the statute itself[148] or the Supreme Court, a clear answer

144. *See, e.g.*, *Monuments List*, *supra* note 6.

145. *See, e.g.*, Cole, *supra* note 93.

146. Mark Squillace, *The Looming Battle over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), https://blog.harvardlawreview.org/the-looming-battle-over-the-antiquities-act/ [https://perma.cc/V2FX-95H3].

147. *See id.*

148. *See* 54 U.S.C. § 320301 (2012); Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 37 (1982) (noting the Antiquities Act "contains no provision for judicial review").

to this question has eluded lower federal courts.[149] This is significant because, outside of two Supreme Court cases,[150] disputes over national monument designations have occurred solely at the circuit and district court levels.[151] Consequently, enunciating a standard of review may help to diminish the amount of litigation over national monument designations.

Further complicating this inquiry, it is unclear whether a court even possesses the authority to review a challenged monument designation in the first place. The D.C. Circuit noted that it has had "no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority" vis-à-vis Antiquities Act cases.[152] More recently, in a challenge to Obama's designation of Northeast Canyons and Seamounts Marine National Monument, a D.C. federal district court also declined to rule on the "availability and scope of review" for certain claims based on the Antiquities Act statutory requirements.[153]

As Section I.C.2 demonstrated, to address the question of judicial review, we must answer whether the Antiquities Act grants the President unconstrained discretion in designating national monuments, or whether there are discernible limitations on his or her discretion under the monument-designation power.[154] Parties interested in the subject are split. In the anti-review camp are those who argue that the Supreme Court has clearly articulated that a President's discretionary action cannot be reviewed by the courts and thus a President's decision to designate national monument is unreviewable.[155] This was the po-

149. *See* Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1135 (D.C. Cir. 2002) ("[T]he Supreme Court has never expressly discussed the scope of judicial review under the Antiquities Act.").

150. Cappaert v. United States, 426 U.S. 128 (1976); Cameron v. United States, 252 U.S. 450 (1920).

151. *See infra* Parts II.C–D.

152. *See infra* Parts II.C–D.

153. *See* Mass. Lobstermen's Ass'n v. Ross, 349 F. Supp. 3d 48, 55 (D.D.C. 2018).

154. *See* Squillace, *supra* note 31, at 534–36 (describing several approaches to reviewing presidential monument designations); Squillace, *supra* note 146 (describing the standard of review); *see also* Iraola, *supra* note 135, at 171 n.52 (noting the approaches courts have used to review Antiquities Act challenges).

155. Brief for Federal Defendants at 8, Mass. Lobstermen's Ass'n. v. Ross, No. 17-406 (D.D.C. Apr. 16, 2018) (asserting that "the President's exercise of discretion under the Antiquities Act is not subject to judicial review"); *id.* at 1

sition taken by the federal government in its defense to the lawsuit challenging Obama's designation of Northeast Canyons and Seamounts Marine National Monument.[156]

In opposition to the absolute deference position are those who claim that such unrestrained executive power only exists when a statute places no limitations on the exercise of a President's discretion.[157] For example, one commentator argued that, "while [the Antiquities Act] grants the President broad discretion, and separation of powers concerns are present, the statute also contains some restrictions. Judicial review 'is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.'"[158]

Which position should win the day? Unfortunately for advocates of restraints on executive power, it seems more probable than not that the Supreme Court would withhold judicial review of a President's exercise of discretion in designating a national monument, especially in regards to the first requirement concerning objects eligible for protection.[159] The language of this statutory provision is written in broad terms: landmarks, structures, and historic or scientific interest.[160] These last two terms in particular—historic and scientific—are not amenable to bright line determinations about what objects fall under these categories. It seems appropriate that the President, with all the power that comes with leading and managing the vast resources of the U.S. government, is in a better position than the courts to understand which objects are worthy of protection. It also bears recognizing that the President, unlike federal judges, is directly accountable to the will of the people by virtue of the ballot box. Thus, he or she is undoubtedly better equipped to evaluate the political considerations, make the political decisions, and accept

("This Court cannot review how the President exercised the discretion that Congress granted him to designate and define national monuments in the Antiquities Act." (citing Dalton v. Specter, 511 U.S. 462 (1994); Tulare County v. Bush, 306 F.3d 1138 (D.C. Cir. 2002))).

156. *See id.*

157. *See* Iraola, *supra* note 135, at 171; *supra* notes 135–37 and accompanying text.

158. Iraola, *supra* note 135, at 171 (quoting Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002)).

159. *See* 54 U.S.C. § 320301(a) (2012).

160. *Id.*

the political consequences which so often arise in national monument designations.[161]

B. SUPREME COURT CASES INTERPRETING THE ANTIQUITIES ACT

United States Supreme Court case law involving the President's authority under the Antiquities Act is surprisingly thin. The Court has decided cases involving challenges to this authority only twice[162] since the Act was signed into law.[163] In both cases, the Court upheld the monument designation as a valid exercise of presidential power under the Act.[164] In neither case did the Supreme Court explicitly address the applicable standard of review.[165]

1. *Cameron v. United States*

The first case was *Cameron v. United States*.[166] In *Cameron*, the bulk of the Court's opinion focused on evaluating the appellant's mining claim affected by the Grand Canyon National Monument designation.[167] Before it addressed this issue however, it conducted a cursory review of the president's authority to designate the monument in the first place.[168] It disagreed with the appellant's argument that Theodore Roosevelt had exceeded his

161. For example, see *supra* notes 93–96 and accompanying text, which describes the backlash that Carter's national monument designations in Alaska sparked in that state's citizens. Additionally, see Squillace, *supra* note 31, at 495–99, which details the controversy that followed FDR's creation of Jackson Hole National Monument.

162. *See* Iraola, *supra* note 135, at 172–74.

163. The Court also considered a case involving the Antiquities Act in *United States v. California*, 436 U.S. 32 (1978). However, that case did not involve a challenge to a presidential national monument designation on the grounds that the designation exceeded the President's authority under the Antiquities Act. Rather, that case involved the question of who owned the submerged lands and waters within Channel Islands National Monument—California or the United States. *Id.* at 33. The court found in favor of California. *Id.*

164. *See* Cappaert v. United States, 426 U.S. 128 (1976); Cameron v. United States, 252 U.S. 450 (1920).

165. *See Cappaert*, 426 U.S. 128; *Cameron*, 252 U.S. 450.

166. 252 U.S. 450.

167. *Id.* at 456–65.

168. *Id.* at 455–56.

authority under the Act.[169] For support, it cited the Act's language regarding "objects of historic or scientific interest"[170] and then parroted the President's assertion that the Grand Canyon was "an object of unusual scientific interest."[171] It also briefly described some of the Canyon's characteristics to support its conclusion.[172]

As it relates to the President's authority under the Antiquities Act, the Court's opinion in *Cameron* is notably brief. It is also notable for what it failed to explicitly discuss. The Court did not directly address whether it possessed the authority to review the President's use of discretion in designating a monument.[173] Nor did it touch upon the standard of review it applied to appellant's challenge of the designation. It bears acknowledging that by evaluating whether the Grand Canyon was an object of scientific interest, the Court implicitly assumed at least a limited authority to review whether the President's use of discretion in designating a monument comported with the Act's requirement that a protected object be of "historic or scientific interest."[174] But its analysis of this issue was shallow and merely deferred to President Roosevelt's assertion that the Grand Canyon qualified as the type of object contemplated by the Act.[175] Thus, *Cameron* represents the first example of the Court granting considerable deference to the President's discretion to designate a national monument—particularly in regards to whether an object qualifies for protection.

2. *Cappaert v. United States*

Besides *Cameron*, the most consequential Supreme Court case involving a challenge to the President's use of the Antiquities Act occurred in *Cappaert v. United States*.[176] The appellants

169. *Id.*

170. 54 U.S.C. § 320301(a) (2012).

171. *Cameron*, 252 U.S. at 455–56 (quoting Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908)).

172. *Id.* at 456 ("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.").

173. Whether this issue of review was briefed or discussed at oral argument is unclear.

174. 54 U.S.C. § 320301.

175. *Cameron*, 252 U.S. at 455–56.

176. 426 U.S. 128 (1976).

in *Cappaert* challenged Truman's addition of Devil's Hole, "a deep limestone cavern in Nevada,"[177] to the preexisting Death Valley National Monument.[178] The crux of the case dealt with whether the addition of Devil's Hole to the existing national monument reserved federal water rights in unappropriated water within the site.[179] But a minor issue in the case hinged on whether the President's action violated the Antiquities Act. Specifically, the appellants challenged the President's authority to designate pools like Devil's Hole under the Act and argued that the designation power was limited to "archeologic sites."[180] In essence, the appellants were challenging President Truman's discretionary determination that the monument contained "objects of historic or scientific interest," which came within the purview of the statute.[181]

Like *Cameron*, the Court's analysis of the appellant's Antiquities Act claim was brief and relied on *Cameron* as justification for rejecting the argument that the Act did not apply to sites like Devil's Hole.[182] But, unlike *Cameron*, the Court did not incorporate language from the presidential proclamation to justify its finding that the monument designation fell within the confines of the statute.[183] Instead the Court engaged in simple statutory interpretation to conclude that "[t]he pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'"[184]

Due to the brevity of the portion of the opinion addressing the Antiquities Act claim, the Court failed to explicitly address its authority to review the claim.[185] But by analyzing whether the Act was limited to protecting archaeological sites, the Court seemingly implied at least a limited review power to determine

177. *Id.* at 131.

178. President Herbert Hoover first designated this monument on February 11, 1933. Proclamation No. 2028, 47 Stat. 2554 (1933). Truman enlarged it to include Devil's Hole in 1952. Proclamation No. 2961, 3 C.F.R § 147 (1949–1953).

179. *See Cappaert*, 426 U.S. at 131.

180. *Id.*

181. 54 U.S.C. § 320301(a) (2012).

182. *Cappaert*, 426 U.S. at 142 (citing Cameron v. United States, 252 U.S. 450, 451–56 (1920)).

183. *See supra* notes 170–71 and accompanying text (summarizing the Court's utilization of assertions from Theodore Roosevelt's 1908 Proclamation to justify its finding that the Grand Canyon National Monument complied with the statute).

184. *Cappaert*, 426 U.S. at 142.

185. *See id.* at 141–42.

whether a monument designation contained the sorts of protectable objects encompassed by the statute—much like it did in *Cameron*.[186] This further suggests that courts might have the authority to determine whether a President's exercise of discretion comports with the Act's requirements, notwithstanding other Supreme Court precedent that bars courts from reviewing a discretionary executive action.[187] However, *Cameron* and *Cappaert* may no longer be good law given that they predate that precedent, including the Court's 1994 decision in *Dalton v. Specter*, which held that courts cannot review challenges to a President's discretionary action made pursuant to a congressional grant of authority.[188]

Simply put, the question of review remains unanswered. Even assuming that the power of federal courts encompasses the authority to review a presidential monument designation, the waters remain muddy because the Court has also failed to explicitly define the appropriate standard of review.[189] As a result, lower federal courts have been left without clear guidance about which standard of review to apply.

3. Takeaways from the Supreme Court's Antiquities Act Jurisprudence

To summarize, the minimal Supreme Court case law dealing with presidential power and discretion under the Antiquities Act imparts several lessons.

First, it is unclear whether the Court would sanction judicial review of a President's decision to designate a national monument because the statute grants the Executive Branch discretion in making this determination.[190] On one hand, the Court's willingness to engage in a limited review in *Cameron* and *Cappaert* to ensure that the challenged monuments complied with the

186. *See supra* note 174 and accompanying text (asserting that the Court made the same type of implicit assumption).

187. *See* Dalton v. Specter, 511 U.S. 462, 476 (1994); United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940) ("[N]o question of law is raised when the exercise of the President's discretion is challenged."); Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 184 (1919) (explaining that a claim is beyond the scope of judicial power when it is premised on an abuse of discretion by the Legislative or Executive Branch).

188. *Dalton*, 511 U.S. at 476.

189. *See Cappaert*, 252 U.S. at 141–42; Cameron v. United States, 252 U.S. 450, 455–56 (1920).

190. *See* 54 U.S.C. § 320301 (2012).

Act's requirement signals it would sanction some degree of review. The fact that it ruled unanimously in both cases bolsters this position further.[191] However, critics can point to more recent case law that forecloses judicial review of a discretionary executive action.[192] Given this jurisprudence and the Court's current makeup, it ultimately seems more likely that the Court would defer to the President's discretion and foreclose judicial review of his monument designations. But as it currently stands, whether by the Court or Congress, further clarification of this issue is certainly needed.

Second, even assuming that judicial review is possible, the Court has left parties to guess what the proper standard of review is. Because of this, Part III proposes a standard of review for the courts to apply in Antiquities Act cases.

Finally, because the Court has not had the opportunity to hear a challenge to a designation on the grounds that it did not comply with the Act's "smallest area" requirement, it is unsettled whether the Act commits compliance with this limitation solely to the President's discretion. And, even if this requirement does lend itself to judicially manageable standards, it is unclear whether the Act affords a challenge based on this provision the same standard of review that an "objects of historic or scientific interest" claim would receive.

C. CIRCUIT COURT CASES INTERPRETING THE ANTIQUITIES ACT

Both circuit court cases confronting challenges to the President's authority to designate national monuments were decided by the D.C. Circuit on the same day. These cases are: *Mountain States Legal Foundation v. Bush*[193] and *Tulare County v. Bush*.[194]

1. *Mountain States Legal Foundation v. Bush*

In *Mountain States*, the court addressed a challenge to six of Clinton's national monument designations.[195] The appellants argued that the district court erred in not engaging in a more thorough review beyond mere facial consideration of whether the

191. *See Cappaert*, 426 U.S. 128; *Cameron*, 252 U.S. 450. Interestingly, two seemingly conflicting cases—*Cameron* and *Dakota Central*—were decided in the same year.

192. *See, e.g.*, *Dalton*, 511 U.S. at 476.

193. 306 F.3d 1132 (D.C. Cir. 2002).

194. 306 F.3d 1138 (D.C. Cir. 2002).

195. *Mountain States*, 306 F.3d at 1133–34.

monument designations exceeded the President's authority under the Antiquities Act.[196] But the circuit court declined the opportunity to address "the availability or scope of judicial review of a Presidential Proclamation designating federal lands as a national monument under the Antiquities Act."[197] It did so on the grounds that the appellants had "failed to present any factual allegation sufficient to warrant review of its *ultra vires* claim."[198] Put another way, the court held that it could not reach the question of the scope of judicial review because the appellant's complaint did not allege facts suggesting Clinton exceeded his statutory authority. Instead, the court found the plaintiffs' complaint only contained "legal conclusion[s] couched as factual allegation[s]."[199]

Despite noting that the Supreme Court has never proclaimed the standard of review applicable to Antiquities Act challenges,[200] the court did find that "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."[201] Additionally, the D.C. Circuit carved out an exception to the general rule of deference to a President's discretion based on separation of powers principles when an "authorizing statute or another statute places discernible limits on the President's discretion."[202] There, the court found that, "[j]udicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did not at all limit the discretion of the President."[203]

Coupled together, these two statements indicate that the D.C. Circuit might be willing to entertain a claim that an executive monument designation exceeded the limits of the President's authority because it violated the statute's limitations on his or her discretion. Here, that would mean the designation either did not (1) contain protectable objects or (2) comply with the

196. *Id.* at 1133.
197. *Id.*
198. *Id.*
199. *Id.* at 1137.
200. *Id.* at 1135.
201. *Id.* at 1136.
202. *Id.*
203. *Id.* (internal quotation marks and citation omitted).

"smallest area compatible" requirement.[204] But in order to proceed, a party would need to include factual allegations in its complaint that satisfied the court. Given the deference courts afford to executive actions made pursuant to a statute, this presents an acute burden for a plaintiff to overcome.

Finally, on a related note, the Court found that the Antiquities Act did not violate the non-delegation doctrine because it included "intelligible principles to guide the President's actions."[205] These same principles—the objects of historic/scientific interest and "smallest area compatible" requirements—could be used to cabin in the President's discretion and allow for judicial review when alleged violations occur.

2. *Tulare County v. Bush*

The other circuit court case implicating a question of presidential authority under the Antiquities Act was *Tulare County v. Bush*.[206] This case, which involved a challenge of Clinton's designation of Grand Sequoia National Monument, had a disposition similar to *Mountain States*.[207] Relying on the same principles it espoused in *Mountain States*, the court held that the appellant failed to plead a basis for "*ultra vires*" review of the Proclamation."[208] It did address several points, however, that did not arise in *Mountain States*.

First, the court dismissed the appellant's claim that the Antiquities Act requires a "certain level of detail" in presidential monument designations.[209] Second, pursuant to the Supreme Court's decision in *Cappaert v. United States*,[210] the court found that "ecosystems and scenic vistas" fall within the boundaries of protectable objects under the Antiquities Act.[211] This suggests a rather broad conception of what constitutes an object of interest under the Act.

204. 54 U.S.C. § 320301(b) (2012).

205. *Mountain States*, 306 F.3d. at 1137.

206. 306 F.3d 1138 (D.C. Cir. 2002).

207. *Id.* at 1140.

208. *Id.* at 1144 (quoting *Mountain States*, 306 F.3d at 1136–37).

209. *Id.* at 1141.

210. 426 U.S. 128 (1976).

211. *Tulare County*, 306 F.3d at 1142. This also aligns with the types of objects that the President sought to protect in his monument designations. For example, enlarging Glacier Bay National Monument protected two of "the oldest plant communities in southeast Alaska." Proclamation No. 4618, 43 Fed. Reg. 57,073, 57,073 (Dec. 1, 1978).

Third, while the court dismissed the appellant's argument that the monument was not the smallest area compatible to protect the objects of interest, it did so on the grounds that the appellants failed to make factual allegations to support its claim—namely that it failed to identify "the improperly designated lands with sufficient particularity to state a claim."[212] Notably, the court could have resolved the "smallest area compatible" claim by rejecting the appellant's argument that the President abused his discretion on the grounds that the President's application of discretion was non-reviewable. Stated differently, the court could have found that the Act committed the "smallest area compatible" requirement to the President's discretion. This alternative basis could have implicated the Supreme Court's previous ruling that unconstrained discretion committed to the legislative or Executive Branch is not reviewable.[213] By not doing so, the court left open the possibility that compliance with the Act's size requirement may be subject to judicial review.[214] Finally, the court determined that presidential actions are not subject to review under the Administrative Procedure Act (APA).[215] As a result, Congress should explicitly provide for a standard of judicial review under the Antiquities Act to quell confusion among the courts.[216]

D. DISTRICT COURT CASES INTERPRETING THE ANTIQUITIES ACT

Among the suits involving challenges to national monument designations by the President, many have been decided in federal district courts. An examination of these cases provides a greater understanding of how courts have grappled with these challenges and what contributions they have made to the discourse about judicial review in Antiquities Act cases.

212. *Tulare County*, 306 F.3d at 1142.

213. *See* Dalton v. Specter, 511 U.S. 462, 476 (1994).

214. It remains an open question if that review is limited to facial considerations.

215. *Tulare County*, 306 F.3d at 1143 (citing Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992)); *see Franklin*, 505 U.S. at 800–01 ("The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.").

216. *See infra* Part III.

1. *Wyoming v. Franke*

Wyoming v. Franke[217] concerned a challenge to FDR's creation of Jackson Hole National Monument. Among other claims, the State of Wyoming argued that the monument violated the Antiquities Act because it did not contain "objects of an [sic] historic or scientific interest" and was "not confined to the smallest area compatible with the proper care and management of a National Monument."[218] In its defense, the federal government responded that (1) the executive action was not subject to judicial review, and (2) that it nonetheless complied with the "scope and purpose" of the Act.[219] Notwithstanding the government's first assertion, the court found that it possessed "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 . . . has exceeded or violated a discretion thereby conferred."[220]

To that end, the court heard extensive evidence from both parties on the issue of whether the withdrawn land constituting the monument contained "historic landmarks, historic or prehistoric structures, and other objects of historic or scientific interest."[221] After considering the evidence, the court determined that the federal government satisfied its burden of showing that the President's exercise of discretion was not arbitrary and capricious.[222] This was despite the court's declaration that it would have found that the objects requirement was not fulfilled if preponderance of the evidence was the standard of review.[223] It continued by remarking that this lower burden was due to the "limited scope" that it elucidated earlier.[224] In concluding its decision, the court explained that this dispute was essentially a

217. 58 F. Supp. 890 (D. Wyo. 1945).

218. *Id.* at 892. The state also claimed that FDR's action was "an attempt . . . to substitute, through the Antiquities Act, a National Monument for a National Park, the creation of which is within the sole province of the Congress, thereby becoming an evasion of the law governing the segregation of such areas." *Id.*

219. *Id.*

220. *Id.* at 894 (emphasis added).

221. *Id.* at 895.

222. *See id.* at 895–96.

223. *Id.*

224. *Id.* at 896.

controversy between Congress and the President and it was incumbent on Congress to pass "remedial legislation" if it disagreed with how the Executive Branch was utilizing the Antiquities Act.[225]

Franke is significant in Antiquities Act jurisprudence for several reasons. One, it was the first instance of a court articulating a standard of review for challenges to national monument designations made by the President. Here, the court determined that arbitrary and capricious review applied.[226]

Two, despite articulating this standard, its process of reasoning suggests that plaintiffs would find difficulty in charging a violation of the Act. Short of turning a barren field[227] into a monument, Presidents will always win lawsuits under this standard of review. This hands-off approach by the courts mimics (to a degree) the jurisprudence of complete deference set forth in cases such as *Dalton v. Specter*[228] and *United States v. George S. Bush & Co.*[229] But it does stop just short of that absolute rule.

Finally, and perhaps the most important takeaway, the court noted the judicial review analysis applies equally to the "smallest area compatible"[230] requirement.[231] Here, that means courts will give near-absolute deference to presidential discretion regarding what amount of land is necessary to effectuate the protection of landmarks, structures, and other historical or scientific objects. However, under the *Franke* court's formulation, courts would still possess a limited ability to ensure that a President was not acting arbitrarily or capriciously when demarcating a monument's boundaries.[232]

225. *Id.*

226. *Id.*

227. The court here referenced "a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest" as an example of a monument which would violate the objects requirement of the Act. *Id.* at 895.

228. 511 U.S. 462, 477 (1994).

229. 310 U.S. 371, 380 (1940).

230. 54 U.S.C. § 320301(b) (2012).

231. *Franke*, 58 F. Supp. at 896.

232. *Id.* at 894.

2. *Anaconda Copper Co. v. Andrus*

Anaconda Copper Co. v. Andrus[233] involved a challenge to Carter's controversial Alaskan monument designations. Once again, the District Court of Alaska, like all other courts that have confronted Antiquities Act claims, found in favor of the federal government.[234] In finding for the defendants, the court explained that Carter's designations complied with the Act's requirements and that the text of the statute, legislative history, and the President's evolving use of the monument designation power over the more than seventy years since the Antiquities Act was passed supported this conclusion.[235] The court was also persuaded by Congress's failure to rein in the President's expanding monument designation power in the Federal Land Management and Policy Act of 1976, which left the President's Antiquities Act powers conspicuously untouched.[236]

Despite finding for the government, the court in *Anaconda Copper* also elucidated some principles that hemmed in executive authority.[237] For example, the court determined that the Act instituted limitations on the types of objects which the President could protect with a national monument.[238] Likewise, the court determined that the President did not possess the authority to designate unlimited amounts of land because the Act placed limitations on his or her power through the "smallest area compatible" requirement.[239] It is unclear, however, how the court conceived of meaningfully constraining a legally questionable monument designation given its reluctance "to determine the standard of judicial review which shall apply in many factual determinations by the President."[240] Presumably, the amount of

233. No. A79-161, 1980 U.S. Dist. LEXIS 17861, at *2 (D. Alaska June 26, 1980).

234. *Id.* at *9–10.

235. *Id.* at *10.

236. *Id.* at *6; *see* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743. This bill overhauled the executive authority in the sphere of public lands law but failed to amend the Antiquities Act.

237. 1980 U.S. Dist. LEXIS 17861, at *2.

238. *See id.* ("I believe that there are limits on the authority granted to the President by Section 2 of the Act; that those limitations I think, arise by reason of the definition of the objects which may be made or for which Proclamations may issue to preserve and protect such objects found on government land.").

239. *Id.*

240. *Id.* at *9.

land necessary to effectuate the purposes of a monument protection falls with the factual determinations accorded to the President.

In the end, *Anaconda Copper*'s impact is similar to that of *Franke*. It recognized limitations on the President's monument designation power, but, like *Franke*, its practical implications for restraining executive overreach in violation of those limitations are underwhelming. And, unlike *Franke*, the *Anaconda Copper* court failed to even define the relevant standard of review.[241] Ultimately, the case does little in the way of demystifying for parties how courts would review a challenge to a presidentially-designated national monument; except for demonstrating that a court would defer heavily to the Executive Branch.

3. *Massachusetts Lobstermen's Ass'n v. Ross*

In *Massachusetts Lobstermen's Ass'n v. Ross*,[242] the plaintiffs challenged Obama's designation of Northeast Canyons and Seamounts Marine National Monument.[243] Before reaching the merits, the court engaged in a robust discussion about the various aspects of reviewability pertinent to the case's disposition.[244] On this issue, the court began by disagreeing with the government's assertion that presidential monument designations are non-reviewable because "sole discretion" is entrusted to the President.[245] Citing the Supreme Court's decisions in *United States v. California*, *Cappaert v. United States*, and *Cameron v. United States*, the court explained that monument designations are generally reviewable "[b]ecause Plaintiffs' claims assert that the President exceeded his statutory authority under the Antiquities Act — *i.e.*, that the Proclamation was *ultra vires*."[246] The court's assertion thus provides ammunition for the proposition that there is at least a baseline authority for courts to review monument challenges and that such review does not improperly intrude upon the powers of the presidency.

But the court continued on to differentiate between the question of whether review exists and what the appropriate

241. *Id.*

242. 349 F. Supp. 3d 48 (D.D.C. 2018).

243. Proclamation No. 9496, 81 Fed. Reg. 65,159 (Sept. 15, 2016). This monument lies approximately 130 miles southeast off the coast of Cape Cod. *Id.* at 65,161.

244. *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 54–55.

245. *Id.* at 54.

246. *Id.*

scope of review is.[247] It is in this latter question which the court confronted uncertainty. First, it noted that some inquiries can be adjudicated on the face of the claim "resembl[ing] the sort of statutory interpretation with which courts are familiar."[248] By way of example, it explained that considering whether an archaeological site qualifies as an "object of historic or scientific interest"—as the *Cappaert* Court did—qualified as such an inquiry.[249]

On the other hand, the court explained that other inquiries, like whether an object was historic or scientific, or whether the "smallest area compatible" requirement was satisfied, required factual determinations which may be beyond the authority of the court to review.[250] The court specifically noted that it was questionable whether it could even engage in review of the claim that Obama's designation failed to comply with the Act's mandate that a monument "be confined to the smallest area compatible with the proper care and management of the objects to be protected."[251] The court explained that its ability to review such a claim would involve "considering the facts underlying the President's determination" and that such an inquiry may be barred by precedent, thus suggesting that discretionary executive actions are not reviewable.[252] Moreover, the court determined that it was unnecessary to decide whether judicial review was available for the "smallest area" requirement because the plaintiffs had failed to offer "sufficient factual allegations to succeed" on the merits of their claim.[253] The court did find, however, that review could be possible, but "only if the plaintiff were to offer plausible and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set."[254]

The primary takeaways from *Massachusetts Lobstermen's Ass'n* are twofold. One, judicial review in Antiquities Act cases is itself available.[255] But two, the scope of such review is uncertain

247. *Id.* at 54–55.

248. *Id.*

249. *Id.* at 54.

250. *Id.* at 55.

251. *Id.*; *see* 54 U.S.C. § 320301(b) (2012).

252. *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 55; *see also* Dalton v. Specter, 511 U.S. 462, 474 (1994).

253. *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 55.

254. *Id.*

255. *Id.* at 54.

for the Act's twin requirements.[256] Nevertheless, the court found that it was unnecessary to determine the appropriate standard of review because the plaintiffs failed to make specific factual allegations that Northeast Canyons and Seamounts Marine National Monument was not confined to the smallest area possible.[257]

To answer the uncertainties noted in the preceding analysis of Antiquities Act jurisprudence—namely whether judicial review is available and, if so, what the standard of review should be—this Note now turns to Part III. Part III describes a proposed legislative solution which clarifies the courts' power to review Antiquities Act challenges as well as the appropriate standard of review—depending on the type of challenge—to apply.

III. THE SOLUTION TO A MONUMENTAL PROBLEM: A LEGISLATIVE REMEDY

As it currently stands, there are two overarching issues in Antiquities Act jurisprudence that remain open for debate: (1) whether federal courts are authorized to review challenges to national monument designations made by the President pursuant to his or her powers under the Act and, (2) assuming federal courts do possess this authority, what is the appropriate standard of review that courts should employ.

This Part addresses these issues in order—first, by answering in the affirmative that federal courts should be definitively authorized to review challenges to national monument designations, and second, by proposing that Congress should amend the Act to include a standard of review which reinforces the statute's role as a preservation tool while still adhering to the limitations that Congress placed on the President's use of that power.

Finally, this Part differentiates actions taken by the President which result in the reduction or revocation of national monuments. These actions, such as those initiated by Trump,[258] implicate separation of powers principles generally, and the third prong of Justice Jackson's tripartite framework specifically.[259] When reviewing challenges to monument reductions or revocations, courts should be especially skeptical of the President's use

256. *Id.* at 54–55; *see* 54 U.S.C. § 320301(a)–(b).

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

258. *See supra* notes 11, 16–17.

259. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

of the Antiquities Act in this manner because, as we will see, Congress has arguably signaled its disagreement with such a practice. Accordingly, Congress should also clarify that the President may not reduce or revoke a prior national monument designation.

A. JUDICIAL REVIEW IN ANTIQUITIES ACT CHALLENGES

Although some lower courts have held that the Supreme Court implicitly adopted the position that judicial review is available in Antiquities Act challenges,[260] the Court has never explicitly answered this question in the affirmative. Moreover, cases—decided subsequent to the most recent case involving the Act—such as *Dalton v. Specter* have set forth the principle that when a statute grants the President discretion, courts lack the power to review challenges to the exercise of that discretion.[261] Because the Antiquities Act undoubtedly grants the President discretion in creating or enlarging national monuments, the Court's most recent precedent suggests that these decisions are non-reviewable.[262] Even taken in the light most favorable to the pro-review camp, the answer is ambiguous at best. Therefore, it would behoove Congress to bring clarity to this corner of the law by enunciating that federal courts do indeed have the power to review Antiquities Act challenges.[263] Doing so would reinforce the separation of powers by providing a check on executive authority.

To achieve this, Congress should look to the reasoning in cases like *Mountain States Legal Foundation v. Bush*[264] and *Chamber of Commerce of the United States v. Reich*.[265] In those cases, the D.C. Circuit qualified the deference afforded to the President by limiting *Dalton* to statutes that place no "discernible limits on the President's discretion."[266] The corollary is that if a statute does place limitations on the President's discretion, then a court can engage in review to ensure constitutional and statutory provisions are met. And the Antiquities Act certainly contains such limitations—namely the protectable objects and

260. *See supra* notes 243–46 and accompanying text.

261. 511 U.S. 462, 476 (1994).

262. *Id.*

263. The degree to which the courts should be able to review these cases is discussed in Part III.B.

264. 306 F.3d 1132 (D.C. Cir. 2002).

265. 74 F.3d 1322 (D.C. Cir. 1996).

266. *Mountain States*, 306 F.3d at 1136; *see supra* Part II.C.1.

"smallest area compatible" requirements.[267] Congress should clarify that these twin requirements bestow the power of review upon the courts.

It is also important for Congress to clarify that courts may review Antiquities Act challenges in order to enforce the separation of powers between Congress and the President. Because Congress delegated a portion of its plenary power under the Property Clause[268] to designate national monuments, and it did so while also instituting restrictions on that power, allowing courts to review challenges alleging violations of those restrictions helps to insulate Congress's plenary authority.

B. SCOPE OF JUDICIAL REVIEW

Answering the question of whether judicial review is available, however, only addresses a threshold matter. To truly diminish the current ambiguity, it is imperative for Congress to also clarify the appropriate standard of review in Antiquities Act cases. This Note proposes that Congress adopt different standards of review, as described in the following three sections, depending on the type of challenge brought.

1. Broad Categorizations

The *Massachusetts Lobstermen's Ass'n* court made a helpful distinction between the types of claims a party could bring in an Antiquities Act lawsuit. It distinguished between claims that involve typical statutory interpretation and those that challenged the President's exercise of discretion.[269] The former type can most aptly be described as broad categorizations, e.g., archaeological sites, ecosystems, animal species, etc. These categorizations are tied to the first requirement of the Act that limits protectable objects to "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."[270] Congress should amend the Antiquities Act to clarify that courts have the power to determine whether a categorization like those listed above comports with the protectable objects requirement. However, courts should defer to the President's determination regarding whether a particular object itself falls within the taxonomy of a categorization, i.e., whether it is an archaeological

267. 54 U.S.C. § 320301(b) (2012).

268. U.S. CONST. art. IV, § 3, cl. 2.

269. *See supra* notes 248–49 and accompanying text.

270. 54 U.S.C. § 320301(a).

site, ecosystem, etc. Admittedly, this may be a distinction without a difference that will merely incentivize Presidents to shoehorn objects into a category which courts have already found constitutes a landmark, structure, or historic/scientific object. But this would at least force the President to rationalize his or her use of discretion and explain why the Antiquities Act covers the object to be protected.

In addition to engaging in typical statutory interpretation for these types of challenges, courts should also acknowledge and incorporate the evolving use of the Antiquities Act by Presidents since its passage to inform their decisions. For example, courts should heed signs of congressional acquiescence to monuments created by Presidents to protect objects like ecosystems. Although some courts have found objects falling within this categorization are covered by the Antiquities Act,[271] to prevent backsliding, courts should appreciate the fact that Congress has acquiesced to the evolution of the Act through legislation like ANILCA (which codified Carter's Alaska monument designations).[272] Essentially, a reviewing court's analysis should utilize the framework from the second prong of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* which determined that congressional acquiescence is grounds for "independent presidential responsibility."[273] As applied, this would call for judicial deference to the President's determination that a broad categorization like ecosystems or animal species qualifies for the protections a national monument affords.

2. Landmarks, Structures, and Objects of Historic or Scientific Interest

Massachusetts Lobstermen's Ass'n also provides a useful framework for evaluating whether, rather than a broad categorization, a particular object in a proposed national monument qualifies as a landmark, structure, or is of historic or scientific interest. In this instance, that court found that it was beyond the purview of the judiciary's expertise to determine whether, for ex-

271. *See, e.g.*, Anaconda Copper Co. v. Andrus, No. A79-161, 1980 U.S. Dist. LEXIS 17861 (D. Alaska June 26, 1980).

272. *See* Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371.

273. 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also supra* notes 123–25 and accompanying text.

ample, an object was historic or scientific enough to justify protection via a national monument.[274] This approach is sensible. Therefore, in amending the Antiquities Act to clarify judicial review, Congress should also direct courts to afford near-absolute deference to a President's determination that an object is historic or scientific enough to warrant protection. This aligns with the purpose of the Act to preserve national treasures before they are permanently destroyed.[275] In addition, Congress should also clarify that a good faith effort to justify protection of the object in a presidential proclamation is sufficient to invoke deference by the courts.

Congress should institute this standard of review because the President is better equipped than the judiciary to gather and evaluate the facts required to make these monument designations as well as analyze the political considerations which accompany them.[276] Although some might claim that using near-absolute deference eviscerates the practicality of judicial review and freezes in place illegitimate monuments, Congress still possesses the authority to regulate public lands.[277] Its constitutional powers would allow it to revoke a designation,[278] or even defund a monument,[279] to nullify an unpopular designation.[280]

3. Smallest Area Compatible

Effectuating the purposes of the Antiquities Act requires balancing the need to protect national treasures and the land required to accomplish this task with the policy of productively using federal lands. To help control this balance, the Act's "smallest area compatible" requirement[281] ensures that just enough land is withdrawn to protect landmarks, structures, or objects of historic or scientific interest—no more, no less. In pass-

274. *See* Mass. Lobstermen's Ass'n v. Ross, 349 F. Supp. 3d 48, 55 (D.D.C. 2018).

275. *See supra* Part I.A.3.

276. *See supra* note 161 and accompanying text.

277. *See* U.S. CONST. art. IV, § 3, cl. 2.

278. Admittedly, this has a higher bar to meet given that it would require either the President's approval or a successful vote to override his or her veto.

279. *See* U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause).

280. In fact, this is exactly what Congress did to express its disagreement with FDR's designation of Jackson Hole National Monument. *See* Squillace, *supra* note 31, at 498.

281. *See* 54 U.S.C. § 320301(b) (2012).

ing the Act, Congress granted the President discretion to determine how much land was necessary to fulfill this policy of preservation. Yet there may be instances in which a President makes a determination about the amount of lands necessary to preserve our national treasures that conflicts with the purposes of the Act. It is for this reason that courts should have greater authority to review claims that the smallest area requirement was violated. Accordingly, with regards to the "smallest area compatible" requirement, Congress should amend the Act to institute arbitrary and capricious review for this class of claims. Following the lead of the *Franke* and *Mountain States* courts, this standard of review would allow courts to engage in a limited review that allows parties to plead factual allegations suggesting that the President could have protected designated objects with a smaller footprint (or even that the protection of objects required more lands than were designated). Using this standard of review would balance the need to defer to the President's discretion while also giving parties with legitimate grievances a chance to make their case. Employing this standard of review would also incentivize the President to gather facts, thoughtfully consider them, and integrate them into the process of setting the monument's boundaries. Moreover, it would induce the President to compile a record capable of withstanding judicial scrutiny of a monument's size.

C. SPECIAL CASES—WHEN PRESIDENTS REDUCE OR REVOKE AN EXISTING MONUMENT

Since passage of the Antiquities Act, several Presidents reduced the size of national monuments designated by their predecessors.[282] Although many of these actions were controversial, they went unchallenged.[283] Presently, Trump's reduction of Grand Staircase-Escalante[284] and Bears Ears[285] National Monuments revitalized a thorny legal issue touching upon separation of powers principles: whether the President acts ultra vires[286]

282. *See* Squillace, *supra* note 31, at 563–66 (noting the reduction of Mount Olympus National Monument and Grand Canyon National Monuments by Presidents Woodrow Wilson and FDR, respectively).

283. *See, e.g.*, Squillace et al., *supra* note 12, at 66 (noting Wilson's reduction of Mount Olympus National Monument went unchallenged).

284. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

285. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

286. This is a Latin phrase meaning "beyond the powers of." It is also defined as "unauthorized" or "beyond the scope of power allowed or granted by a corporate charter or by law." *Ultra Vires*, BLACK'S LAW DICTIONARY (11th ed. 2019).

when he or she reduces or revokes an existing monument. Although courts have yet to rule on this question,[287] they are currently considering it.[288]

Answering this question affirmatively would mean that the President's monument reduction would unconstitutionally intrude upon Congress's plenary power under the Property Clause.[289] Indeed, scholars argue that the answer to this question is yes, grounding their analysis in a discussion of the Antiquities Act's differing language from other contemporary laws authorizing the President to revoke or modify previous withdrawals of federal lands.[290] In other words, they believe that a lack of explicit reduction or revocation authority in the Antiquities Act, compared to other laws with such language, is fatal to executive assertions of that power. These scholars also argue convincingly that language in the Federal Land Policy and Management Act (FLPMA) of 1976 barring the Secretary of the Interior from modifying or revoking any national monument designated pursuant to the Antiquities Act was a drafting error that was instead intended to preclude the President from taking those actions.[291]

Because the power to reduce or revoke prior monument designations raises separation of powers issues, specifically exclusive legislative power under the Property Clause, Congress's bar against executive reductions or revocations seemingly implicates the third prong of Justice Jackson's tripartite framework for analyzing challenges to executive actions.[292] That framework suggests that when the President takes an action "incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over

287. *See* Squillace et al., *supra* note 12, at 65 ("Importantly though, no Presidential decision to reduce the size of a national monument has ever been tested in court, and so no court has ever ruled on the legality of such an action.").

288. *See supra* note 11 and accompanying text.

289. *See supra* notes 22–24 and accompanying text (describing Congress's powers under the Property Clause).

290. *See* Squillace et al., *supra* note 12, at 58–59 (noting, for example, that the Pickett Act of 1910 permitted the President to revoke a previous withdrawal).

291. *Id.* at 59–64 (referencing the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 204(j), 90 Stat. 2743).

292. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

the matter."[293] Here, the President enjoys no independent executive power to designate, modify, reduce, or revoke national monuments. He or she may only act within the bounds of Congress's delegation of its powers to regulate federal lands. Thus, there is a strong argument that courts should afford no deference to monument reductions or revocations because Congress intended to prohibit the President from taking such actions under Section 204(j) of the FLPMA.[294]

Admittedly, however, this language is ambiguous because it bars the Interior Secretary, rather than the President, from revoking or reducing a monument. Therefore, this Note suggests that Congress, concurrent with the recommended statutory changes discussed above, should also clarify that the President may not reduce or revoke prior national monument designations. This could be accomplished by updating the statute containing the bar against monument reductions or revocations[295] to reflect the following language: "The President shall not modify or revoke any withdrawal creating national monuments under chapter 3203 of Title 54, United States Code." Adding in this language would support the original purpose of the Antiquities Act to create protections for our national treasures rather than eliminating them. Moreover, it would broadly advance Congress's stated policy declaring that our "public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values."[296]

CONCLUSION

Protecting our national treasures, whether they are man-made or natural, is vitally important, and the Antiquities Act helps accomplish this goal by giving the President the ability to respond quickly when these treasures are threatened. By designating more than 160 national monuments since the early 20th century, numerous administrations have preserved our country's beauty, historic artifacts and places, and scientific wonders for future generations. Since the Act's passage, Presidents from Roosevelt to Carter to Obama have contributed to the evolution

293. *Id.* at 637.
294. Federal Land Policy and Management Act § 204(j).
295. 43 U.S.C. § 1714(j) (2012).
296. 43 U.S.C. § 1701(a)(8).

of presidential power under the statute by designating increasingly larger monuments that protect a wider swath of places and things. But this evolution has been controversial and has spurred litigation. In a number of cases, courts have wrestled with two primary issues: whether challenges to presidential national monument designations are reviewable, and if they are, what standard of review should be used. Because the Supreme Court's lack of guidance in this corner of the law has puzzled lower courts confronting these questions, Congress should amend the Act to affirm the judiciary's power to review challenges of national monuments designated by the President. Congress should also clarify the standards of review of the requirements which cabin in the President's discretion. Finally, it should clarify that the President may not reduce or revoke an existing national monument. Hopefully, the solutions proposed herein will help accomplish the goals of conservation and preservation while also ensuring that the President stays within the boundaries Congress instituted as the regulator of our shared public lands.