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# The New Frontier of Environmental Preservation: The Antiquities Act

Christopher Klapperich

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# THE NEW FRONTIER OF ENVIRONMENTAL PRESERVATION: THE ANTIQUITIES ACT

Christopher Klapperich\*

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## INTRODUCTION

The Antiquities Act of 1906<sup>1</sup> [the Antiquities Act, the Act] is a century-old law granting the President of the United States the power to designate national monuments by public proclamation. Under the Antiquities Act, a national monument may be designated “in the President’s discretion” for historic landmarks, structures or other objects of scientific interest.<sup>2</sup> Most importantly, the Act was designed to protect federal lands and resources quickly.<sup>3</sup>

The first national monuments protected historic structures such as the 600 year old Montezuma Castle in Arizona, a cliff-dwelling of the Sinagua people.<sup>4</sup> A more well-known national monument is the Grand Canyon, established in 1908 by President Theodore Roosevelt.<sup>5</sup> Similar to many national monuments designated under the Antiquities Act, the Grand Canyon would later be redesignated as a national park by Congress.<sup>6</sup> Roughly half of the existing national parks were first designated as national monuments.<sup>7</sup> The Antiquities Act established that the preservation of historic and archaeological sites was relative of twentieth century social and scientific values.<sup>8</sup>

Today, the Antiquities Act continues to thrive and protect scientific and cultural values. Over 151 national monuments have been proclaimed and more national monuments are likely to be designated.<sup>9</sup> Almost 100 years after the first national monuments were designated, President George W. Bush designated Papahānaumokuākea Marine National Monument which would later be extended by President Barack Obama to become the largest national monument ever created.<sup>10</sup> President

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1. Antiquities Act of 1906, 54 U.S.C. § 320301 (2016); *See also* Archeology Program, *About the Antiquities Act of 1906–2006*, NAT’L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/about.htm> (last visited Dec. 28th, 2016) [hereinafter *About the Antiquities Act*] (describing the Antiquities Act and national monuments from the perspective of a managing agency).

2. 54 U.S.C. § 320301.

3. Carol Hardy Vincent, *Nat’l Monuments and the Antiquities Act*, U.S. CONG. RES. SERV. (September 7th, 2016), <https://fas.org/sgp/crs/misc/R41330.pdf>.

4. *See Montezuma Castle*, NAT’L PARK SERV., <https://www.nps.gov/moca/learn/historyculture/index.htm> (last visited Dec. 28th, 2016).

5. *See* Archeology Program, *Antiquities Act of 1906–2006 Monuments List*, NAT’L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm> (last visited Dec. 28th, 2016) [hereinafter *Monuments List*] (listing existing national monuments with descriptions of designations, managing agencies, and relevant history).

6. *Id.*

7. Vincent, *supra* note 3, at 3.

8. *About the Antiquities Act*, *supra* note 1.

9. Vincent, *supra* note 3, at 2.

10. *Monuments List*, *supra* note 5 (Papahānaumokuākea was first designated as the

Obama has designated twenty-three national monuments, more than any other president, and continues to designate more national monuments as his term expires.<sup>11</sup> Unlike other designations of national monuments, President Obama has placed special emphasis on designating national monuments as part of his environmental protection legacy.<sup>12</sup>

The Antiquities Act is not without issue. In particular, President Obama's designations have received critical criticism by those opposed to land use restrictions.<sup>13</sup> National monuments have progressively implemented more comprehensive management provisions, particularly prohibiting or regulating industrial activity.<sup>14</sup> For instance, Papahānaumokuākea Marine National Monument in the Hawaiian archipelago sparked legal challenges claiming fishing rights had been lost due to restrictive management policies.<sup>15</sup> Papahānaumokuākea's management plan prohibits most commercial fishing activities, but still allows for cultural fishing.<sup>16</sup>

Another source of controversy is the size of a national monument in regards to the object to be protected.<sup>17</sup> The statutory language of the Antiquities Act provides that "the limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>18</sup> President Obama has proclaimed more national monument acreage than any other president.<sup>19</sup> Thus, critics have also contested the size and types of resources that have been protected pursuant to the Antiquities Act.<sup>20</sup>

As such, the legal battles raised over national monuments have often revolved around the impact that management restrictions will have on the economy or industry.<sup>21</sup> In particular, the Antiquities Act has

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Northwestern Hawaiian Islands national monument and later renamed by President Obama).

11. Vincent, *supra* note 3, at 11 (as of the time of this writing, President Obama was still declaring national monuments).

12. Darius Dixon, *Obama Creates New National Monuments in Utah, Nevada*, POLITICO (Dec. 28, 2016, 5:31 PM), <http://www.politico.com/story/2016/12/obama-national-monuments-utah-nevada-233016>.

13. Vincent, *supra* note 3, at 3.

14. See 81 Fed. Reg. 65; see 50 C.F.R. § 404.2 (Northeast Canyons and Seamounts Marine National Monument and Papahānaumokuākea Marine National Monument).

15. See *Detting v. United States*, 983 F. Supp. 2d 1184, 1190 (D. Haw. 2013) (describing the dispute between local fishermen and new commercial fishing restrictions after a national monument was designated).

16. 50 C.F.R. § 404.10 (2016).

17. Vincent, *supra* note 3, at 3.

18. 54 U.S.C. § 320301.

19. Vincent, *supra* note 3, at 2.

20. *Id.* at 3.

21. See *Cappaert v. United States*, 426 U.S. 128, 133–34 (1976).

garnered public opposition to the protection of resources from local operations, including mining, drilling, and cattle grazing. For example, in response to President Obama's designation of Bear's Ear National Monument in Utah, Congressman Rob Bishop stated "I'm going to do everything I can to . . . undo this monument designation."<sup>22</sup> Congressman Bishop also vowed to help repeal the Antiquities Act to prevent further designations of national monuments.<sup>23</sup> During the 2016 United States presidential election season, President-elect Donald Trump spoke against President Obama's designation of the Katahdin Woods and Waters National Monument during a campaign stop, accusing President Obama of ignoring local concerns when making national monument designations.<sup>24</sup>

This Note will address two potentially history-making legal disputes. First, whether the Antiquities Act, as a century-old law, is applicable to the twenty-first century. Second, whether the President may unilaterally revoke a national monument pursuant to the Antiquities Act.

Part I of this Note explores the political controversy concerning the Antiquities Act and describes modern use of the Antiquities Act under President Obama.<sup>25</sup> Part II identifies the anticipated legal disputes surrounding national monument designations and the possibility of revocations.<sup>26</sup> Part III overviews arguments in support of and in opposition to the Antiquities Act along with analyzing whether national monuments are revocable by a President.<sup>27</sup> Last, Part IV encourages continued preservation of federal land pursuant to the Antiquities Act as well as continued protection of existing national monuments.<sup>28</sup>

## I. BACKGROUND

### A. *Explanation of the Antiquities Act*

Under the Antiquities Act, the "President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific

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22. Dixon, *supra* note 12.

23. *Id.*

24. Kevin Miller, *Could Trump Undo the New Katahdin-Area National Monument?* POLITICS (Nov. 12, 2016), <http://www.pressherald.com/2016/11/12/trumps-election-puts-katahdin-area-national-monument-back-in-spotlight>.

25. *See infra* Part I.

26. *See infra* Part II.

27. *See infra* Part III.

28. *See infra* Part IV.

interest that are situated on land owned or controlled by the Federal Government to be national monuments.”<sup>29</sup> The Act was intended to protect resources quickly, including land, structures, and other objects.<sup>30</sup> A perceived threat to a resource is not a requirement for protection under the Act.<sup>31</sup> Courts have ruled that the Act may broadly protect different forms of the environment and environmental values, including ecosystems and scenic vistas.<sup>32</sup> Without doubt, the Antiquities Act grants significant authority to the President, as the statutory language begins by stating “in the President’s discretion.”<sup>33</sup> Furthermore, the Act does not require the President to make any specific investigation before designating a national monument.<sup>34</sup> Other statutes, however, have placed limits on the President’s discretion to designate national monuments.<sup>35</sup> Such statutes include the Federal Land Policy and Management Act,<sup>36</sup> the National Forest Management Act,<sup>37</sup> the National Environmental Policy Act,<sup>38</sup> the Endangered Species Act,<sup>39</sup> the Taylor Grazing Act,<sup>40</sup> and the Public Rangelands Improvement Act.<sup>41</sup>

As an example of the latitude afforded to the use of the Antiquities Act, on a challenge to President Clinton’s Proclamation of the Giant Sequoia National Monument in California, Tulare County claimed that the Antiquities Act required a President to include a certain level of detail within a national monument designation.<sup>42</sup> The court, in addressing this issue, stated that “by identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard.”<sup>43</sup> Thus, little more than the statutory requirements have been imposed on a President’s use of the Antiquities Act.<sup>44</sup>

Perhaps the most controversial aspect of the Antiquities Act is the

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29. 54 U.S.C. § 320301.

30. Vincent, *supra* note 3, at 2.

31. *See* 54 U.S.C. § 320301.

32. *See* Tulare County v. Bush, 306 F.3d 1138, 1142 (D.C. Cir. 2002).

33. 54 U.S.C. § 320301.

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

35. *See generally* W. Watersheds Project v. BLM, 629 F. Supp. 2d 951, 955 (D. Ariz. 2009).

36. 43 U.S.C. §§ 1701–1787 (2016).

37. 16 U.S.C. §§ 1600–1687 (2016).

38. 42 U.S.C. §§ 4321–4370 (2016).

39. 16 U.S.C. §§ 1531–1544 (2016).

40. 43 U.S.C. § 315 (2016).

41. 43 U.S.C. §§ 1901–1908 (2016).

42. *Tulare County*, 306 F.3d at 1141.

43. *Id.*

44. *Id.* at 1143–44.

restrictions national monuments impose on the use of federal lands.<sup>45</sup> With increasing detail, restrictions on the use of federal lands is implemented from within the monument's management plan.<sup>46</sup> Additionally, the President's traditional practice of issuing management plans in proclamations raises and perpetuates the presumption that Congress has given consent to such action and that the President has broad authority pursuant to the Antiquities Act.<sup>47</sup>

Another controlling component of the Antiquities Act is the size of a designated monument. Under the Antiquities Act, "the limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>48</sup> Opponents to national monuments have argued that designation changes the federal property from being land available for multiple uses to land with narrow uses.<sup>49</sup> Multiple uses includes residential and commercial development, as well being the basis of the exploitation of natural resources.<sup>50</sup> Nonetheless, courts have historically given deference to the size of monuments regardless of the restrictions on land use.<sup>51</sup>

### *B. Managing Agency*

The Antiquities Act does not require a specific federal agency to manage any particular national monument.<sup>52</sup> The United States National Park Service (NPS) has often managed national monuments, but the Bureau of Land Management (BLM) has also performed such duties.<sup>53</sup> Other agencies have also managed national monuments such as when President Obama established the Chimney Rock National Monument in Nebraska with the United States Forest Service as the managing agency.<sup>54</sup> Papahānaumokuākea National Marine Monument's regulations and management are jointly executed by the Secretary of the Interior, the U.S. Fish and Wildlife Service, and the National Oceanic

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45. See *Detting*, 983 F. Supp. 2d at 1190.

46. See 50 C.F.R. § 404.2 (2016).

47. *W. Watersheds Project*, 629 F. Supp. 2d at 964.

48. 54 U.S.C. § 320301.

49. Vincent, *supra* note 3, at 4.

50. *Id.* at 8–9.

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

52. See generally Mark Squillace, *The Antiquities Act and the Exercise of Presidential Power*, in *THE ANTIQUITIES ACT* (David Harmon et al. eds., 2006).

53. See generally Kelly Y. Fanizzo, *Separation of Powers and Federal Land Management: Enforcing the Direction of the President under the Antiquities Act*, 40 ENVTL. L. 765, 783–84 (2010).

54. *Monuments List*, *supra* note 5.

and Atmospheric Administration.<sup>55</sup> In addition the State of Hawaii, through the Department of Land and Natural Resources, has responsibility for the Northwestern Hawaiian Islands Marine Refuge and State Seabird Sanctuary at Kure Atoll.<sup>56</sup> In general, both state and federal agencies work together to manage and preserve national monuments. As monuments grow in size, multiple agencies work in concert to effect the monument's management plan.

A managing agency bears responsibility for a monument and is often a conduit for which opponents to a monument may seek legal remedy.<sup>57</sup> For instance, in 1996 President Clinton designated the Grand Staircase-Escalante National Monument in Utah and assigned its management to BLM; this was the first national monument administered by BLM.<sup>58</sup> In *W. Watersheds Project v. BLM*, plaintiff argued the managing agency, BLM, failed to act in accordance with President Clinton's proclamation directives regarding the Grand Staircase-Escalante National Monument.<sup>59</sup> As another example, in *Detting v. United States*, plaintiffs brought suit against Papahānaumokuākea Marine National Monument's managers, the United States Department of Commerce acting through the National Oceanic Atmospheric Administration, in response to new restrictions on fishing.<sup>60</sup> Thus, with the increasing restrictions placed on the use and management of national monuments,<sup>61</sup> managing agencies are playing an integral part in the legal challenges and in the political controversy regarding national monuments.

### *C. Examples of President Obama's Use of the Antiquities Act*

#### *1. Papahānaumokuākea Marine National Monument*

The largest national monument and largest ecologically protected area on the planet is Papahānaumokuākea Marine National Monument which spans 582,578 square miles of ocean and land in the Hawaiian Islands.<sup>62</sup> For reference, the state of California is approximately 163,695

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55. 50 C.F.R. § 404.1 (2016).

56. *Id.*

57. See generally *W. Watersheds Project*, 629 F. Supp. 2d at 955.

58. *Monuments List*, *supra* note 5.

59. *W. Watersheds Project*, 629 F. Supp. 2d at 955.

60. *Detting*, 983 F. Supp. 2d. at 1188–89.

61. See *Mgmt. Plan*, PAPAĀNAUMOKUĀKEA MARINE NAT'L MONUMENT, [http://www.papahanaumokuakea.gov/management/mp/vol1\\_mmp08.pdf](http://www.papahanaumokuakea.gov/management/mp/vol1_mmp08.pdf) (last visited Dec. 28, 2016) [hereinafter *Mgmt. Plan*].

62. See 50 C.F.R. § 404.2.

square miles.<sup>63</sup> In 2006, President George W. Bush designated the Northwestern Hawaiian Islands, later to be renamed Papahānaumokuākea, as a national monument by utilizing the Antiquities Act.<sup>64</sup> In 2016, President Obama tripled the size of Papahānaumokuākea by officially enlarging the national monument.<sup>65</sup> Papahānaumokuākea harbors thousands of marine species and their habitats, many of which are unique to the Hawaiian Archipelago.<sup>66</sup>

Papahānaumokuākea Marine National Monument is administered and managed by three co-trustees—the Department of Commerce, the Department of the Interior, and the State of Hawai‘i.<sup>67</sup> In Papahānaumokuākea’s management plan there is an unambiguous intent to protect the relatively undisturbed marine expanse from over fishing,<sup>68</sup> which has provoked the local fishing industry to take up legal challenges against the national monument.<sup>69</sup> Fishing is allowed, however, for scientific, religious, and cultural activities,<sup>70</sup> recognizing that Papahānaumokuākea holds sacred sites with cultural significance for native Hawaiians.<sup>71</sup> In addition, scientific research is allowed with a federal permit.<sup>72</sup> Under Papahānaumokuākea’s management plan, the exploring for, developing of, or producing of oil, gas, or other minerals within the monument is prohibited.<sup>73</sup> Likewise, the harvest of a monument resource is prohibited.<sup>74</sup> Overall, Papahānaumokuākea has been a prominent example of the Antiquities Act being used as a sweeping environmental preservation tool in the twenty-first century. National monument designations with restrictive management plans effectively preserve ecosystems, unique species, and the many incomprehensible aspects of the natural environment.

Papahānaumokuākea Marine National Monument’s restrictive management plan received intense criticism on both economic and political grounds.<sup>75</sup> For example, Fishermen brought legal action against

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63. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/state-area.html> (last visited Dec. 28th, 2016).

64. *Monuments List*, *supra* note 5.

65. *Id.*

66. *Mgmt. Plan*, *supra* note 61.

67. *Id.*

68. *See* 50 C.F.R. § 404.10.

69. *Dettling*, 983 F. Supp. 2d. at 1190.

70. *Mgmt. Plan*, *supra* note 61.

71. *Id.* at ES-1.

72. *See id.*

73. 50 C.F.R. § 404.6 (2016).

74. *Id.*

75. Juliet Eilperin, *Obama Creates the Largest Protected Place on the Planet, in Hawaii*,

the designation of Papahānaumokuākea—primarily because the fishermen had fished within the protected area before the monument was designated in 2006—and contested the new restrictions on commercial fishing.<sup>76</sup> Fishermen have also lobbied against new protections, arguing that their industry does not cause the environmental damage<sup>77</sup> envisioned in Papahānaumokuākea’s management plan.<sup>78</sup> Others have accused President Obama of overstepping his authority under the Antiquities Act,<sup>79</sup> which requires designations to “be confined to the smallest area compatible with proper care and management of the objects to be protected.”<sup>80</sup> Thus, President Obama’s designation of Papahānaumokuākea National Marine Monument has remarkably transformed how the federal government protects the environment and how local industries operate.

## 2. Northeast Canyons and Seamounts Marine National Monument

President Obama designated the first national monument in the Atlantic Ocean, the Northeast Canyons Seamounts Marine National Monument, in 2016.<sup>81</sup> The monument is home to deep sea coral reefs, whales, turtles, and a vast amount of fish.<sup>82</sup> Unique to the Northeast Canyons and Seamounts Marine National Monument are underwater canyons deeper than the Grand Canyon.<sup>83</sup>

Similar to the Papahānaumokuākea Marine National Monument, President Obama’s proclamation focused on the growing concern of global warming and on the preservation of marine ecosystems.<sup>84</sup> According to a study by the National Oceanic Atmospheric Administration, ocean temperatures in the Northeast United States are projected to warm tri-fold faster than the global average.<sup>85</sup> President Obama’s use of the Antiquities Act has signaled a shift in the motivation

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WASH. POST (Aug. 29, 2016) [https://www.washingtonpost.com/politics/obama-to-create-the-largest-protected-place-on-the-planet-off-hawaii/2016/08/25/54ecb632-6aec-11e6-99bf-f0cf3a6449a6\\_story.html](https://www.washingtonpost.com/politics/obama-to-create-the-largest-protected-place-on-the-planet-off-hawaii/2016/08/25/54ecb632-6aec-11e6-99bf-f0cf3a6449a6_story.html).

76. *Dettling*, 983 F. Supp. 2d. at 1190.

77. Eilperin, *supra* note 75.

78. *See generally* *Mgmt. Plan*, *supra* note 61.

79. Eilperin, *supra* note 75.

80. 54 U.S.C. § 320301.

81. *Monuments List*, *supra* note 5.

82. *President Obama to Continue Global Leadership in Combatting Climate Change*, THE WHITE HOUSE (Sept. 15, 2016), <https://www.whitehouse.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate> [hereinafter *Combatting Climate Change*].

83. *Id.*

84. *Id.*

85. *Id.*

behind designating national monuments, as many previous monuments focused on archaeological and cultural value of sites,<sup>86</sup> and current trends have focused on environmental preservation and protection.<sup>87</sup> President Obama's designations have focused on the allocation and conservation of limited resources, such as fishing.<sup>88</sup>

## II. IDENTIFICATION OF THE LEGAL PROBLEM

The Antiquities Act has instigated legal, economic, and political controversy.<sup>89</sup> Each instance of a monument designation bears its own problems, but underlying these problems are core questions of federalism and presidential power. For instance, President Clinton's designation of Grand Staircase-Escalante reignited resentment against broad presidential powers and interference with local customs.<sup>90</sup> The unrest around the Antiquities Act has led some national monuments to be deemed "fighting words."<sup>91</sup> At the core of the controversy concerning national monuments designated pursuant to the Antiquities Act is a clash of values.<sup>92</sup>

For example, the Bears Ears National Monument, designated in late December 2016 was welcomed by the Bears Ears Inter-Tribal Coalition, a partnership between the Hopi, Navajo, Ute Indian Tribe, Ute Mountain Tribe, and Zuni governments.<sup>93</sup> The Bears Ears National Monument was praised for protecting the history and culture of local tribes.<sup>94</sup> On the other hand, the monument's management plan restricted new mining, oil, and gas development on the federally owned land.<sup>95</sup>

The clash of values between industry and cultural values at Bears Ears is representative of most legal disputes raised over the Antiquities Act.<sup>96</sup> The focus has primarily revolved around the impact that

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86. See generally *Montezuma Castle*, *supra* note 4.

87. See *El Morro*, NAT'L PARK SERV., <https://www.nps.gov/elmo/index.htm> (last visited Dec. 28, 2016).

88. *Combatting Climate Change*, *supra* note 82.

89. See *W. Watersheds Project*, 629 F. Supp. 2d at 955; see Miller, *supra* note 35.

90. See Kirk Johnson, *In the West, 'Monument' is a Fighting Word*, N.Y. TIMES, Feb. 19, 2010, at A8.

91. *Id.*

92. Dixon, *supra* note 12.

93. *Id.*

94. *Id.*

95. *Presidential Proclamation of the Bears Ears Nat'l Monument*, THE WHITE HOUSE (Dec. 28th, 2016) <https://www.whitehouse.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>.

96. See *Cappaert*, 426 U.S. at 133.

management restrictions will have on the economy or industry.<sup>97</sup> President Obama's use of the Antiquities Act has surpassed any other President's use<sup>98</sup> which has provoked particular criticism by the Republican Party.<sup>99</sup> In response to President Obama's designation of Bear's Ear in Utah, Congressman Rob Bishop stated "I'm going to do everything I can to . . . undo this monument designation."<sup>100</sup> Likewise, Senator Mike Lee has led an effort to repeal the Antiquities Act to prevent further designations of national monuments.<sup>101</sup> At the expiration of President Obama's term, the Katahdin Woods and Waters National Monument designation was sharply criticized as disregarding local economies and industries.<sup>102</sup> Thus, two of the major legal questions of President Trump's term will be whether the Antiquities Act, as a century-old law, is applicable to the twenty-first century and whether national monuments are unilaterally revocable by the President pursuant to the Antiquities Act.

### III. ANALYSIS

The Antiquities Act poses legal issues in a variety of circumstances. An overarching criticism of the Antiquities Act is that it grants broad discretion to the President in designating national monuments on federal land.<sup>103</sup> Opponents to President Obama's use of the Antiquities Act questioned whether such broad discretion is still appropriate entering the twenty-first century.<sup>104</sup> The Antiquities Act has also raised legal issues regarding a violation of separation of powers and the non-delegation doctrine.<sup>105</sup> Likewise, critics have pointed to the unique nature of the Antiquities Act which resembles both presidential proclamations and executive orders.<sup>106</sup> Most controversially, there has been substantial uncertainty as to whether a President, pursuant to the Antiquities Act, may abolish or revoke a national monument designation.<sup>107</sup>

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97. *Id.*

98. *See Monuments List, supra* note 5.

99. Dixon, *supra* note 12.

100. *Id.*

101. *Id.*

102. Miller, *supra* note 24.

103. 54 U.S.C. § 320301.

104. Dixon, *supra* note 12.

105. *See* U.S. Const. arts. I, II, III.

106. *See* STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 85TH CONG., 1ST SESS., EXEC. ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRES'L POWERS (Comm. Print 1957) [hereinafter EXEC. ORDERS AND PROCLAMATIONS].

107. Vincent, *supra* note 3, at 2.

*A. Overview of the Controversy of the Antiquities Act*

The Antiquities Act was intended to grant the President the authority to protect resources quickly.<sup>108</sup> Historically, the Antiquities Act has been used as an archaeological, cultural, and scientific preservation tool.<sup>109</sup> Without the Antiquities Act, federal lands may be susceptible to looting, development, or other permanent changes.<sup>110</sup> President Obama's wide-spread use of the Antiquities Act has been partly motivated by protecting the environment from harmful effects—primarily global warming.<sup>111</sup> Therefore, President Obama's use of the Antiquities Act has essentially manifested a new environmental preservation tool.

Courts have overwhelmingly held that the President has broad power in designating national monuments pursuant to the Antiquities Act.<sup>112</sup> This is a reflection of the clear Congressional grant of authority to the President to designate national monuments for the protection of objects of historic or scientific interest.<sup>113</sup> In addition, federal and state agencies are afforded broad rights to protect the resources of national monuments.<sup>114</sup> The ongoing reaffirmation of the President's broad power to designate national monuments and the broad rights of agencies to protect and manage the resources of a national monument support the conclusion that the Antiquities Act continues to play an important role in twenty-first century preservation of historic, archaeological, scientific, and environmental objects. After all, in 2004 it was observed "every challenge [to the Antiquities Act] to date has been unsuccessful."<sup>115</sup>

Opponents to the Antiquities Act often point to the changes federal property undergoes when designated a national monument, specifically the restricted uses management plans provide.<sup>116</sup> Mining, oil, timber, and gas industries suffer from restrictions on natural resources.<sup>117</sup> As was the case at the Papahānaumokuākea Marine National Monument, where the local fishing industry brought legal action against Papahānaumokuākea's commercial fishing restrictions, retaliation

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108. *Id.*

109. See generally *Montezuma Castle*, *supra* note 4.

110. Vincent, *supra* note 3, at 4.

111. See *Combatting Climate Change*, *supra* note 82.

112. See *Wyoming v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945); See also *Tulare County*, 306 F.3d at 1141–42.

113. 54 U.S.C. § 320301.

114. See *Franke*, 58 F. Supp. at 890.

115. *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1179 (D. Utah 2004).

116. Vincent, *supra* note 3, at 4.

117. Dixon, *supra* note 12.

against national monuments are politicized and profit-oriented.<sup>118</sup> The loss of income, however, has been held not to be a legal basis to reject a monument designation.<sup>119</sup> As is evident from the statute's language, money is not a determinative factor in monument designation analysis.

The purpose of the Antiquities Act, preserving historic, cultural, archeological, and scientific objects, may be fulfilled in other capacities.<sup>120</sup> Under this theory, the Antiquities Act is an outdated and unwieldy authority. The Federal Land Policy and Management Act of 1976 (FLPMA)<sup>121</sup> authorizes the Secretary of the Interior to withdraw federal land.<sup>122</sup> In enacting FLPMA, Congress repealed much of the express and implied withdrawal authority previously granted to the President by several earlier laws.<sup>123</sup> Critics of the Antiquities Act maintain that the Act is inconsistent with FLPMA's intent of restoring control of public land withdrawals to Congress.<sup>124</sup> On the other hand, in enacting FLPMA, Congress did not explicitly repeal or amend the Antiquities Act.<sup>125</sup> The Secretary of the Interior has authority to make emergency withdrawals of federal lands, which are effective when made but expire at the end of three years.<sup>126</sup> In all, the Secretary of the Interior's authority does not compare in scope to the President's power to designate national monuments under the Antiquities Act and it was so intended by Congress, who expressly denied authority of the Secretary of the Interior to manage national monuments.<sup>127</sup>

Another criticism asserted against the Antiquities Act is that designations have exceeded an appropriate size relative to the statutory language requiring monuments to be "confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>128</sup> Opponents contend that some of the monument designations are far larger than needed to protect particular objects of value, and that the Antiquities Act was not intended to protect vast areas of land or ocean.<sup>129</sup> Yet, courts have continuously given deference to the

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118. See *Detting*, 983 F. Supp. 2d. at 1190.

119. *Franke*, 58 F. Supp. at 895.

120. See 43 U.S.C. § 1714 (allowing the Secretary of the Interior to make withdrawals of federal land that are not national monuments).

121. 43 U.S.C. §§ 1701–1787.

122. 43 U.S.C. § 1714.

123. See *Vincent*, *supra* note 3, at 4.

124. *Id.*

125. *Id.* at 9.

126. *Id.* at 4.

127. See 43 U.S.C. § 1714.

128. 54 U.S.C. § 320301.

129. *Vincent*, *supra* note 3, at 5.

size of national monuments.<sup>130</sup>

Congress has unsuccessfully attempted to reform the Antiquities Act.<sup>131</sup> In response to President Obama's use of the Antiquities Act, bills to restrict the President's authority have been introduced in the 114th Congress.<sup>132</sup> These proposals would prohibit the President from establishing or expanding national monuments without consent of particular states, counties, or local governments.<sup>133</sup> Moreover, proposed bills would make the President's authority to designate monuments subject to approval of Congress.<sup>134</sup> Another proposal would expressly permit the President to reduce the acreage of a national monument with the approval of local governments.<sup>135</sup>

### *B. Separation of Powers*

The Antiquities Act authorizes the President to unilaterally designate national monuments, an authority resembling legislative power, and thus raises a separation of powers issue.<sup>136</sup> The Constitution is divided into three separate categories that are confined to themselves and may not exceed their responsibilities.<sup>137</sup> The executive power, not legislative power, is vested in the President of the United States of America.<sup>138</sup> The United States Supreme Court has reaffirmed "the central judgment of the Framers of the Constitution, that . . . the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."<sup>139</sup>

The Constitution, however, does not require absolute distinctions between the coordinate branches, but instead permits a workable government with some shared powers.<sup>140</sup> The Court has stated that the boundaries between each branch should be fixed "according to common sense and the inherent necessities of the governmental coordination."<sup>141</sup>

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

131. *See* Nat'l Monument Designation Transparency and Accountability Act of 2015, H.R. 900, 114th Cong. (2015)(requiring congressional consent for a designation of a national monument).

132. *See* Marine Access and State Transparency Act, H.R. 330, 114th Cong. (2015).

133. *Id.*

134. *Id.*

135. *See* National Monument Creation and Protection Act, H.R. 3390, 115<sup>th</sup> Cong. (2017).

136. 54 U.S.C. §320301.

137. *See* U.S. Const. arts. I, II, III.

138. *See* U.S. Const. art. II, § 1.

139. *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

140. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring opinion).

141. *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

Nonetheless, when one branch has overstepped its power and assumed the role of another branch, the Court has vigorously enforced the separation doctrine.<sup>142</sup>

In the context of the Antiquities Act, the President's authority has been compared to Congress's power under the Property Clause.<sup>143</sup> Therefore, a separation of powers issue arises between the Property Clause and the Antiquities Act, or in other words, between Congress and the President.<sup>144</sup> Challenges to the Antiquities Act have failed because courts have refused to find that the Antiquities Act oversteps authority under the Property Clause.<sup>145</sup>

Most challenges to the Antiquities Act based on separation of powers arguments are self-contradicting because Congress enacted the Antiquities Act pursuant to constitutional authority.<sup>146</sup> A President's authority "is at its maximum" when a president "acts pursuant to an express or implied authorization of Congress."<sup>147</sup> Therefore, separation of powers arguments are rerouted into plans to reform the Antiquities Act pursuant to congressional authority.<sup>148</sup> Congress may of course amend the Antiquities Act<sup>149</sup> and has done so on several occasions. President Obama's use of the Antiquities Act provoked a bill that would limit the President's authority to designate monuments subject to approval of Congress.<sup>150</sup> A similar bill had already been proposed, and failed, which would have implemented a sunset provision on national monument proclamations that would expire after a period of time unless approved by Congress.<sup>151</sup> Under this proposal, the President would have maintained the ability to initiate national monument designations, but the permanency of the national monument would be for Congress to decide.<sup>152</sup> Overall, Courts have consistently upheld the exercise of the presidential authority to declare national monuments is not a violation of

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142. *Ins v. Chadha*, 462 U.S. 919, 962–63, (1983) (Powell, J, concurring).

143. U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

144. *See Tulare County*, 306 F.3d at 1142; *see Bush*, 316 F. Supp. 2d at 1179.

145. *Id.*

146. *See* 54 U.S.C. § 320301.

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

148. U.S. Const. art. I, § 8, cl. 18 ("[The Congress shall have Power] . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

149. *See id.*

150. H.R. 900.

151. *See, e.g., Nat'l Monument Accountability Act*, H.R. 4121, 106th Cong. (2000).

152. *Id.*

the separation of powers doctrine.<sup>153</sup>

### C. Non-Delegation Doctrine

Tied to the separation of powers aspect in the controversy over the Antiquities Act is the non-delegation doctrine.<sup>154</sup> The non-delegation doctrine proscribes certain grants of legislative authority from Congress to the executive branch.<sup>155</sup> Most prominently, Congress must lay down an “intelligible principle” when delegating legislative authority.<sup>156</sup> Fundamentally, Congress obtains the assistance of the other coordinate branches by laying down an “intelligible principle,” a standard by which another entity is guided.<sup>157</sup>

The Antiquities Act’s grant of authority to the President has overcome challenges that it is in violation of the non-delegation doctrine through the existence of the necessary “intelligible principle.”<sup>158</sup> In *Tulare County v. Bush*, plaintiff alleged that Congress ceded its Constitutional power under the Property Clause to the President via the Antiquities Act.<sup>159</sup> The court determined that Tulare County had mistaken a broad grant of Presidential authority to be synonymous with a lack of meaningful limitations and thus a violation of the non-delegation doctrine.<sup>160</sup> In *Tulare*, it was ultimately held that the Antiquities Act indeed gave a broad grant of authority to the President, but still retained an “intelligible principle” by specifying objects to be protected and their accompanying size.<sup>161</sup> Therefore, as established, the Antiquities Act is particularly resistant to legal challenges.

### D. Executive Orders, Presidential Memoranda, and Presidential Proclamations

A president may utilize an executive order, presidential memoranda, or presidential proclamation to affect the will of the executive branch.<sup>162</sup> In issuing an executive order the President is

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153. *Mountain States Legal Found v. Bush*, 306 F.3d 1132, 1135 (2002).

154. U.S. Const. art. I § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

155. *Id.*

156. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001).

157. *See Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 406).

158. *See Whitman*, 531 U.S. at 474–75.

159. *Tulare County*, 306 F.3d at 1143.

160. *Id.*

161. *Id.*

162. Vivian S. Chu & Todd Garvey, *Executive Orders: Issuance, Modification, and Revocation*, U.S. CONG. RES. SERV. (April 16, 2014), <https://fas.org/sgp/crs/misc/>

exercising certain legislative authority.<sup>163</sup> Under the Antiquities Act, a President makes a proclamation in designating a national monument.<sup>164</sup> The differences between executive orders, memoranda, and proclamations are not readily discernible, as the U.S. Constitution does not contain any provision referring to these terms or specific modes for the President to communicate directives to the executive branch.<sup>165</sup> In some cases, Presidential proclamations and executive orders have been treated as functionally the same.<sup>166</sup>

There are, however, notable distinctions between the President's actions with varying degrees of authority. As the name suggests, executive orders normally govern actions of executive agencies and officials.<sup>167</sup> On the other hand, proclamations mostly affect the activities of private individuals.<sup>168</sup> Presidential proclamations are not legally binding unless such power is granted by the U.S. Constitution or a statute.<sup>169</sup> A practical distinction is that an executive order must be published in the Federal Register, while presidential memoranda and proclamations are published only when the President determines that they have "general applicability and legal effect."<sup>170</sup> Essentially, the difference between these instruments relies more on their form rather than substance.<sup>171</sup>

The Antiquities Act is thus a unique law employed by the President which resembles multiple instruments. On one hand, national monuments are declared by a presidential proclamation.<sup>172</sup> On the other hand, national monuments and their details are published in the Code of Federal Regulations, which resembles an executive order meant to

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RS20846.pdf.

163. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring opinion) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

164. 54 U.S.C. § 320301.

165. Chu & Garvey, *supra* note 162.

166. See *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234 (1975) (using the terms "Presidential proclamation and order" in the context of describing an executive order).

167. See EXEC. ORDERS AND PROCLAMATIONS, *supra* note 106.

168. *Id.*

169. *Id.*

170. See 44 U.S.C. § 1505 (2016).

171. Chu & Garvey, *supra* note 162 at 2.

172. See, e.g., *Presidential Proclamation – Establishment of the Gold Butte National Monument*, THE WHITE HOUSE (Dec. 28th, 2016), <https://www.whitehouse.gov/the-press-office/2016/12/28/presidential-proclamation-establishment-gold-butte-national-monument> (President Obama's proclamation designating Gold Butte National Monument in late December of 2016).

govern the actions of executive agencies.<sup>173</sup> Also, the Antiquities Act, as a grant of power to the President by Congress, is legally binding.<sup>174</sup> Thus, despite the Antiquities Act being a rare law with multiple characteristics, it is most readily described as a Presidential proclamation which is not as easily revocable as an executive order. This is a meaningful distinction which supports the conclusion that a President may not revoke a national monument without raising some legal concerns.

#### *E. Revocation of a National Monument Designation*

The Antiquities Act does not provide express authority for a President to abolish a national monument established by a previous proclamation<sup>175</sup>, and no President has attempted to do so.<sup>176</sup> Congress decidedly withheld from the President the authority to abolish national monuments<sup>177</sup> and instead only delegated the power to designate national monuments.<sup>178</sup> Congress delegated this power in order to allow the President to protect resources quickly.<sup>179</sup> No court case has directly determined whether a President has authority to abolish national monuments.<sup>180</sup> Thus, lacking a statutory or judicial basis, the President's authority to abolish national monuments is seemingly unresolved. Nonetheless, analyzing a President's constitutional authority and tracing the history of the Antiquities Act reveals that the Antiquities Act is not a two-way delegation.<sup>181</sup>

In 1938, Attorney General Homer Cummings argued that President Roosevelt could not abolish the Castle-Pinckney National Monument.<sup>182</sup> Attorney General Cummings reasoned that the Congressional grant of authority to "execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed."<sup>183</sup> Therefore, because the Antiquities Act is indisputably silent on the issue of

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173. See 50 C.F.R. § 404.1 (2016).

174. 54 U.S.C. § 320301.

175. See *id.*

176. Vincent, *supra* note 3, at 3.

177. See 54 U.S.C. § 320301.

178. *Id.*

179. See Fanizzo, *supra* note 53 at 770; See also Alexandra M. Wyatt, *Antiquities Act: Scope of Authority for Modif'n of Nat'l Monuments*, U.S. CONG. RES. SERV. (November 14, 2016), [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf).

180. Wyatt, *supra* note 179.

181. See James R. Rasband, *Moving Forward: The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619 (2001).

182. 39 Op. Att'y Gen. 185, 187 (1938).

183. *Id.*

abolishing national monuments, a President's authority to abolish a national monument must be found in some other legislative sanction, which is missing.<sup>184</sup> It is true that a President may revoke or modify executive orders and proclamations<sup>185</sup>, but to do so pursuant to the Antiquities Act would lack a statutory basis and thus be inappropriate.<sup>186</sup>

If a President was to attempt to abolish a national monument, it would invite analysis of Presidential actions set forth in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>187</sup> In Justice Jackson's concurring opinion in *Youngstown*, it was observed that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>188</sup> Justice Jackson then outlined three categories of Presidential action, each with a corresponding level of authority.<sup>189</sup>

Justice Jackson's first category proposed that the President's authority to act is at a maximum when he acts pursuant to an express or implied authorization of Congress.<sup>190</sup> At an intermediate level, where Congress has neither granted nor denied authority to the President, Justice Jackson stated that the President could act in a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which distribution is uncertain."<sup>191</sup> In this "zone of twilight," Justice Jackson observed that congressional silence "may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."<sup>192</sup> Justice Jackson also mindfully noted that "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>193</sup> Justice Jackson's final category states that "when the President takes measures incompatible with the expressed or implied will of Congress, [the President's] power is at its lowest ebb."<sup>194</sup>

Under the Antiquities Act, the President's authority to designate a national monument is an express grant of power by Congress which undoubtedly confers to the President an action with maximum authority.<sup>195</sup> The Antiquities Act, however, does not expressly grant

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184. *Id.*

185. Wyatt, *supra* note 179.

186. *See* 54 U.S.C. § 320301.

187. *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring opinion).

188. *Id.*

189. *Id.* at 635–38.

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

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *See* 54 U.S.C. § 320301.

Presidential authority to abolish a national monument.<sup>196</sup> It would be unlikely for a court to find an implied authority to abolish a national monument issued pursuant to the Antiquities Act, which was a specific congressional directive.<sup>197</sup> Therefore, the authority of the President to abolish a national monument must fall under either Justice Jackson's "zone of twilight" or "lowest ebb" category.<sup>198</sup>

In the "zone of twilight,"<sup>199</sup> the President's authority to abolish a national monument could arguably be a concurrent authority of both the President and Congress. This argument, however, is not compelling because Congress, and not the President, has abolished national monuments on numerous occasions.<sup>200</sup> Therefore, the distribution of authority to abolish a national monument is not uncertain because Congress, by its actions, has not been silent.<sup>201</sup> This conclusion may be redirected, although unlikely, by "contemporary imponderables."<sup>202</sup> In a challenge to a national monument designated by President Obama, who designated more national monuments than any other President,<sup>203</sup> a reviewing court could conceivably entertain the notion that a subsequent President's authority to abolish national monuments should be expanded just as utilization of the Antiquities Act under President Obama had been unfounded.<sup>204</sup> Nonetheless, with Congress's longstanding practice of abolishing national monuments, it would be more functional and in-line with tradition, for Congress, and not a President, to address whether a monument should be abolished.<sup>205</sup>

Under Justice Jackson's final category of Presidential authority, the "lowest ebb" category,<sup>206</sup> a President must "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>207</sup> In neglecting to add Presidential authority to abolish national monuments in the Antiquities Act, Congress implied that the

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196. *See id.*

197. Rasband, *supra* note 181 at 625–27.

198. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring opinion).

199. *Id.*

200. *See, e.g.*, 16 U.S.C. 228b (2000) (abolishing Grand Canyon National Monument and adding lands to Grand Canyon National Park).

201. *See, e.g.*, 16 U.S.C. 272 (2000) (abolishing Arches National Monument and establishing Arches National Park).

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

203. *See Monuments List*, *supra* note 5.

204. *Id.* (President Obama designated more national monuments than any previous President).

205. *See Fanizzo*, *supra* note 53, at 821.

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

207. *Id.*

President does not have such authority.<sup>208</sup> Therefore, the President would be taking “measures incompatible . . . with the will of Congress.”<sup>209</sup> Furthermore, Congress has constitutional power under the Property Clause<sup>210</sup> to abolish national monuments. Thus, the President, under Jackson’s “lowest ebb” category, may not abolish national monuments pursuant to the Antiquities Act.

It is well-established that President’s may alter or modify a national monument in other respects besides revocation or abolishment.<sup>211</sup> Under the Antiquities Act, the size of a national monument is a primary component of a designation, as a national monument is to be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>212</sup> On many occasions, Presidents have changed the size of monuments. For instance, in 1962 President J. Kennedy re-contoured Natural Bridges National Monument in Utah to increase accessibility.<sup>213</sup> More recently, President Obama drastically enlarged the Papahānaumokuākea Marine National Monument to be the largest ecological preserve in the world.<sup>214</sup> It remains undetermined at what point of diminishing a monument’s acreage a President would effectively abolish a monument.<sup>215</sup> To diminish a national monument to a point the monument is no longer effective, however, would undermine the execution of the Antiquities Act.

Congress, on the other hand, may abolish or modify national monuments.<sup>216</sup> Congress can establish national monuments pursuant to its authority under the Property Clause of the U.S. Constitution, which states: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>217</sup> Congress has used such power on several occasions.<sup>218</sup> It has been argued that where the judgment of a

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208. See 54 U.S.C. § 320301.

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

210. U.S. Const. art. IV, § 3, cl. 2.

211. *Monuments List*, *supra* note 5 (listing how presidents have modified national monuments designated under previous administrations, by either enlarging or diminishing the size of a national monument).

212. 54 U.S.C. § 320301.

213. See John F. Kennedy, *Proclamation 3486 – Modifying the Natural Bridges National Monument, Utah*, THE AM. PRESIDENCY PROJECT (Aug. 14, 1962), <http://www.presidency.ucsb.edu/ws/?pid=24031>.

214. See 50 C.F.R. § 404.2.

215. Wyatt, *supra* note 179.

216. See U.S. Const. art. IV, § 3.

217. *Id.*

218. *Monuments List*, *supra* note 5.

previous president needs to be addressed, it is the legislature who should make that change through the lawmaking process, and not a subsequent President.<sup>219</sup> Thus, under the Property Clause, Congress has constitutional authority to modify or abolish national monuments as it sees fit.<sup>220</sup>

Moreover, Congress also can influence or even largely block national monument implementation through funding restrictions.<sup>221</sup> Congress has authority under Article I to spend money, and section 9 of Article I prohibits the expenditure of money without an appropriation.<sup>222</sup> For example, funding for Jackson Hole National Monument was throttled until Congress formally abolished the monument and redesignated it Grand Teton National Park.<sup>223</sup> The express and implied authority of Congress to revoke, change, and influence national monuments supports the conclusion that a President may not revoke a national monument pursuant to the Antiquities Act.

#### IV. PROPOSAL

The Antiquities Act is a promising tool to protect land with cultural, historical, or environmental value. Sometimes, as was the case in President Obama's redesignation of Papahānaumokuākea,<sup>224</sup> all three values were protected. The Antiquities Act is a manifestation of the United States' willingness to protect meaningful land within its boundaries.<sup>225</sup> Without the speed with which the Antiquities Act grants upon the President, federal land may be irreparably altered. Thus, the Antiquities Act remains an important preservation tool held by the executive branch that should not be discarded nor weakened. The Antiquities Act is integral to the uncertain future of environmental, scientific, historical, and cultural preservation.

The scope of the Antiquities Act, however, is a more difficult aspect to properly ascertain. A particularly difficult question to answer is whether a President may abolish a national monument. The Antiquities Act does not provide express authority for a President to abolish a national monument.<sup>226</sup> Moreover, a President has not attempted to unilaterally revoke a national monument pursuant to the Antiquities

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219. See Fanizzo, *supra* note 53, at 821.

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

221. See U.S. CONST. art. I, § 8, cl. 1; *id.* art. I, § 9, cl. 7.

222. *Id.*

223. 16 U.S.C. §§ 406(d-1)–(d-3).

224. *Monuments List*, *supra* note 5.

225. See *Montezuma Castle*, *supra* note 4.

226. 54 U.S.C. § 320301.

Act.<sup>227</sup> Yet, on the eve of President-elect Trump's term, critics of President Obama's use of the Antiquities Act have urged President-elect Trump to push the limits of presidential authority by revoking national monuments established by President Obama.<sup>228</sup> If President-elect Trump attempts such an action, it is likely to result in a remarkable legal dispute concerning whether a national monument designated pursuant to the Antiquities Act by a President may be revoked by a subsequent President. Based on the analysis set forth above, a President may not revoke a national monument pursuant to the Antiquities Act alone.

Congress, pursuant to its power under the Property Clause<sup>229</sup> and through the process of lawmaking, is the appropriate coordinate branch to address the judgment of a President's designation of a national monument.<sup>230</sup> Thus, Congress alone maintains the authority to abolish a national monument. Nonetheless, the President retains authority to modify the size of national monuments.<sup>231</sup> A President, however, does not have authority to diminish a monument's acreage to the point of effective abolishment.<sup>232</sup> Whether a monument has been effectively abolished, however, entirely depends on the situation.

A modification in size by a President should wholly preserve a national monument's purpose and scope as imagined in the designating Presidential Proclamation. If the protection of environmental, archaeological, or historical objects are significantly diminished in the process of modifying the size of a national monument, then the Antiquities Act is an inefficient executive function. It is unlikely that Congress intended for Presidents to have the ability to recoil protection of a national monument by decreasing a monument's size or funding. National monuments are by characteristic permanent sites of importance to the American people.<sup>233</sup> A system where national monuments wither away in size, funding, or other protection undermines the intention of the Antiquities Act. Enacting arbitrary limitations on the percentage of acreage that may permissibly be reduced does not adequately protect national monuments. Instead, it is a reviewing court's burden to ascertain the purpose and scope of a national monument, and protect that understanding from diminishment.

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227. Vincent, *supra* note 3, at 2.

228. See Miller, *supra* note 24.

229. U.S. CONST. art. IV, § 3, cl. 2.

230. See Fanizzo, *supra* note 53, at 821.

231. See *Monuments List*, *supra* note 5.

232. *Id.*

233. *About the Antiquities Act*, *supra* note 1 (a vast majority of the first national monuments continue to exist today as well-respected sites of importance).

## CONCLUSION

The Antiquities Act has evolved from a tool to protect specific historical and archaeological sites to a tool capable of preserving entire ecosystems and cultural territories. President Obama's use of the Antiquities Act has received sharp criticism by those opposed to restrictions on land uses,<sup>234</sup> as national monuments have gradually included more comprehensive management provisions, particularly prohibiting industry activity.<sup>235</sup> The Antiquities Act is likely to continue to garner political controversy whether it is put to use or whether existing national monuments' uses are contested. With the political controversy mounting in anticipation of the next Presidential administration, it is likely that the Antiquities Act will be the focus of several legal disputes.

No matter the disagreement concerning the designation of a national monument, a subsequent President may not abolish a national monument pursuant to the Antiquities Act nor may a President effectively diminish a national monument to the point of revocation. Despite the controversy concerning it, the Antiquities Act has continued to quickly protect the scientific, historic, cultural, and environmental wonders of the United States of America. In all, the Antiquities Act of 1906, under the wide spread use of President Obama, has manifested a new environmental preservation tool that has protected important cultural, environmental and scientific objects.

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234. Vincent, *supra* note 3, at 3.

235. See 50 C.F.R. § 404.2.