Distorting the Antiquities Act to Aggrandize Executive Power-New Wine in Old Bottles

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Introduction

The ceaseless lust for Empire in the form of aggrandizement of executive power at the expense of Congress and the judiciary takes many forms and knows no boundaries, not even the boundaries of public lands. President Donald Trump promised to undo much of the regulatory handiwork of his White House predecessors. On the heels of his inauguration, Mr. Trump tasked Secretary of Interior Ryan Zinke to review national monument declarations of previous presidents issued under the Antiquities Act of 1906[1]; and, to recommend monument modifications or revocations. According to an article by reporter Juliet Eilperin, *Shrink at Least 4 National Monuments and Modify a Half-Dozen Others, Zinke Tells Trump,* THE WASHINGTON POST, September 17, 2017, at A2, Secretary Zinke has recommended that President Trump shrink the boundaries of four national monuments without authorization from Congress: Utah's Bears Ears and Grand Staircase-Escalante, Nevada's Gold Butte, and Oregon's Cascade-Siskiyou. Secretary Zinke also recommended modifications to 10 targeted monuments to authorize activities currently restricted within their boundaries, including grazing, logging, coal mining and commercial fishing. According to reporter Eilperin, "These include 'active timber management' in Maine's Katahdin Woods and Waters; a broader set of activities in New Mexico's Organ Mountains-Desert Peaks and Rio Grande del Norte; and commercial fishing in the two Pacific Ocean marine monuments, as well as in one off the New England coast, Northeast Canyons and Seamounts."

The plain meaning of the Antiquities Act, however, does not delegate legislative power to the President to revoke or to materially disturb prior presidential national monument declarations.

Secretary Zinke's recommendations should have been submitted to Congress, which has never delegated its legislative power to presidents to abolish or materially disturb national monument declarations. Arguments to the contrary are characteristically frivolous. To the extent they have legal traction, they reflect the chronic aggrandizement of executive power at the expense of Congress and the judiciary since World War II, and should be summarily rejected.

Background

The Antiquities Act of 1906 authorizes the President to declare, by proclamation, that objects of historic or scientific interest on lands owned or controlled by the United States, national monuments. Over the course of a century, Presidents have relied on the Antiquities Act to protect as national monuments more than 150 land and marine areas that include collectively aggregate hundreds of millions of acres[2]. National monuments customarily prohibit certain uses that would impair the objects protected such as mineral leasing or mining. Particular management terms vary from monument to monument. Controversies are commonly provoked because restrictions often curtail lucrative commercial endeavors or opportunities.

The Antiquities Act of 1906 represents a constitutional separation of powers anomaly. Article I of the Constitution vests all of its legislative power in Congress, including the power to make rules and regulations for territory or land owned by the United States. The language is a model of clarity: "All legislative Powers herein granted shall be vested in a Congress of the United States….". Yet the 1906 Antiquities Act delegates to the President, i.e., the Executive Branch, the power to exercise this legislative function in proclaiming national monuments.

The non-delegation doctrine fashioned by the United States Supreme Court circumscribes the ability of Congress to create such anomalies by delegation either to the executive or judicial branches.[3] The legislative power granted by Article I is the power to declare whether or not there

shall be a law, to determine the general policy to be achieved by the law, and to fix the limits within which the law shall operate. Such power can be delegated only by statutes that include congressionally prescribed intelligible standards to restrain the executive or judiciary's exercise of the delegated powers.

The Antiquities Act of 1906 is textually unambiguous in its delegation of legislative power to the President according to intelligible standards to declare national monuments under the Property Clause of Article IV, section 3, clause 2 supplemented by congressional power under the Necessary and Proper Clause of Article I, section 8, clause 18. The 1906 Antiquities Act is equally unambiguous in its refusal to delegate additional legislative power to the President to revoke or to materially alter national monument declarations. And there are no intelligible standards for exercising such power even assumed it was granted.

Not a single syllable in the Act suggests such a constitutionally disfavored delegation. That omission was not inadvertent.[4]

Article I of the Constitution confers 100 percent of the legislative power it creates on the Congress of the United States, and zero percent on the President. Article IV, section 3, clause 2 empowers Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

A delegation of legislative power by Congress to the President is an exception to the Constitution's separation of powers—a structural bill of rights to protect the American people, among other things, from executive tyranny. James Madison, father of the Constitution, quoted Montesquieu's *Spirit of the Laws* with approval in *Federalist 47*: "When the legislative and executive powers are united in the same person or body there can be no liberty, because

apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner. " (Emphasis in original).[5]

Exceptions to the Constitution's entrustment of all legislative power to Congress should be narrowly construed to safeguard against executive tyranny. Accordingly, a statute should be interpreted to have delegated legislative power to the executive branch only when the text clearly compels that conclusion. The Antiquities Act fails this fundamental test of clarity regarding the abolition or material alteration of a national monument by a subsequent President. Contrary arguments, largely atextual, recently advanced by champions of an Imperial Presidency are unconvincing. They would be summarily dismissed as frivolous but for the nation's modern exaltation of the President and diminishment of Congress.

A statute, however, is to be interpreted according to the understanding of the enacting Congress. Justice Felix Frankfurter explained in *United States v. Rabinowitz*[6]: "Words must be read with the gloss of experience of those who framed them." A statute does not metamorphose with the rise and fall of political theories, evolving standards of good government, or the felt necessities of the times. And it is inconceivable that the Congress that enacted the Antiquities Act in 1906, when delegations of legislative power were a *rara avis*, intended to delegate its power to revoke or materially alter national monuments without explicit language of the type previously used by Congress in delegation delegate of authority to the President for the designation of forestry reserves[7].

I. Overview of Implementation of the Antiquities Act.

President Theodore Roosevelt designated Devil's Tower in Wyoming as the nation's first national monument.[8] He promptly proclaimed an additional seventeen (17) national monuments in three years.[9] The most noteworthy were the eight hundred thousand (800,000) acre Grand

Canyon National Monument[10], and the nearly six hundred forty thousand (640,000) acre Mount Olympus National Monument in Washington State[11].

Notwithstanding the delegation of legislative power to the President under the Antiquities Act, Congress has remained involved and vigilant in policing national monument proclamations through additional legislation which superseded what the President had done. The examples are legion.

The initial designations by President Theodore Roosevelt of Grand Canyon National Monument and Mount Olympus National Monument were subsequently abolished by Congress. The lands included within these initial National Monuments by statute became parts of Grand Canyon National Park[12], and Olympic National Park[13].

President William Howard Taft proclaimed ten national monuments, including the Mukuntuweap National Monument in southwestern Utah[14]. In 1918, it was enlarged and renamed Zion National Monument by President Woodrow Wilson[15]. On November 19, 1919, Congress abolished the Zion National Monument, enlarged, and renamed it as the Zion National Park[16].

President Wilson declared or modified seventeen (17) national monuments. He proclaimed Sieur de Monts National Monument in Maine in 1916[17], which was subsequently abolished and eventually became a part of Acadia National Park.[18]

President Warren G. Harding proclaimed eight (8) national monuments, including Bryce Canyon Monument in southern Utah[19]. Again, Congress repealed the Presidential designation under the 1906 Antiquities Act and legislatively established Bryce Canyon National Park.[20]

President Calvin Coolidge proclaimed thirteen (13) national monuments. They include Glacier Bay in Alaska[21], and the Statue of Liberty in New York[22]. Although the Statue of Liberty remains a National Monument, Glacier Bay was abolished and delisted as a National Monument

by Congress and subsequently became Glacier Bay National Park.[23]

President Herbert Hoover created nine (9) national monuments including Arches in southeastern Utah[24], the Great Sand Dunes in southern Colorado[25], Death Valley in California[26], and Saguaro in southern Arizona[27]. Congress subsequently abolished these Presidential designations and turned each of these monuments into National Parks[28].

President Hoover designated more than 53,000 acres as the Saguaro National Monument. *Id*. In 1994, Saguaro became a National Park encompassing more than 83,000 acres.[29]

President Franklin D. Roosevelt declared eleven (11) new national monuments including the Joshua Tree National Monument in California[30], and the infamous Jackson Hole National Monument in Wyoming[31]. The declaration of Joshua Tree National Monument was subsequently revoked by Congress and the property was made a National Park in 1994.[32] After a tortured and contentious history, Jackson Hole National Monument became part of Grand Teton National Park by legislation.[33]

The Jackson Hole National Monument designation was controversial and survived a rare legal challenge to the President's 1906 Antiquities Act authority, based upon a plain reading of the text of the Act.[34] The unpopularity of the Jackson Hole national monument nonetheless remained in controversy and provoked Congress into the enactment of legislation in 1944 that would have completely abolished the monument.[35] President Roosevelt famously pocket vetoed the bill.[36]

An infuriated Congress responded aptly with the power of the purse by refusing to appropriate money for the management of the Jackson Hole National Monument for the remainder of the decade.[37] The inter-branch rancor and controversy ended in 1950, when Congress negotiated a compromise with President Harry Truman. Congress revoked the national monument and added its lands to the Grand Teton National Park.[38] Leaving no question as to which branch has the

power in these matters, Congress additionally amended the Antiquities Act to prohibit any new presidentially declared national monuments in Wyoming.[39]

Few additional national monument declarations were made until the presidency of Jimmy Carter. He proclaimed seventeen (17) new or enlarged monuments in Alaska on December 1, 1978, covering fifty-six million acres. Again, as in the case of the Jackson Hole National Monument, President Carter's Alaska declarations sparked controversy. Congress responded on December 2, 1980, with the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96–487, 94 Stat. 2371 (Dec. 2, 1980), codified at 16 U.S.C. §3101, *et seq.*, which reduced unilateral Presidential power as regards designation of Alaskan land. It provides in pertinent part:

> "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 sub-section. To the extent authorized by existing law, the President or the Secretary [of Interior] may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice 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 notice of such withdrawal has been submitted to Congress." [40]

Presidents William Jefferson Clinton, George H.W. Bush, and Barack Obama together declared forty-eight (48) national monuments – nearly one-third (1/3) of all declarations under the 1906 Antiquities Act. President Clinton was especially profligate. He created a diverse array of national monuments including the Grand Staircase-Escalante[41], which Secretary Zinke has recommended shrinking. The monument encompasses a vast and predominantly undeveloped landscape of steep canyons and transfixing geologic features that borders on the Capitol Reef National Park and Glen Canyon National Recreation Area on its east side, and Bryce Canyon National Park on the west.

No president in history is within shouting distance of President Obama in creating and enlarging national monuments. He proclaimed thirty-four national monuments. They included the enlargement of the Papahanaumokuakea Marine National Monument by approximately 283.4 million acres, the enlargement of the Pacific Remote Islands Marine National Monument by approximately 261.3 million acres, and the creation of the Northeast Canyons and Seamounts Marine National Monument, which covers approximately 3.1 million acres.

In sum, Congress has abolished a near majority of the prior Presidential national monument designations and legislatively made them National Parks[42]. It has also outright abolished or delisted not less than ten (10) presidentially declared national monuments throughout the life of the 1906 Antiquities Act.[43]

This overview demonstrates, among other things, that Congress is quite capable of legislatively redressing, altering, or abolishing Presidential national monument proclamations which it believes are wrong-headed or beyond its delegated legislative power.

II. The Plain Language of the Antiquities Act

In pertinent part, Section 2 of the 1906 Antiquities Act, 54 U.S.C. §§320301-320303, provides:

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

Nothing in the text suggests Congress intended to crown the President with discretion to revoke or materially diminish or alter the management of an existing national monument. The sole congressional delegation consists of presidential discretion to "declare" but not to abolish national monuments situated on lands owned or controlled by the United States guided by a

twofold intelligible standard: the lands must satisfy a threshold of "historic or scientific interest;" and, monument boundaries must be "confined to the smallest area compatible with proper care and management of the objects to be protected."

Without the standards limiting presidential discretion to declare national monuments, the standard-less delegation would probably have been unconstitutional according to prevailing Supreme Court jurisprudence. In *Schechter Poultry v. United States*[44], the Court explained:

> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

The Court added in *Panama Refining v. Ryan*[45]:

> "The Constitution provides that '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.' Article 1, 1. And the Congress is empowered 'To make all Laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, 8, par. 18. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

Under the Supreme Court's non-delegation doctrine, Congress may not delegate its legislative power to the Executive Branch unless it provides intelligible standards for its exercise[46] The Supreme Court elaborated in *Mistretta v. United States*[47]:

> "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional. *See, e.g., Industrial Union Dept. v. American Petroleum Institute*, 448 U. S. 607, 448 U. S. 646 (1980); *National Cable Television Assn. v. United States*, 415 U. S. 336, 415 U. S. 342 (1974)."

In other words, a statutory delegation will not be implied if it would risk unconstitutionality because of the absence of congressionally prescribed intelligible standards. As regards proclaiming national monuments, the plain meaning of the1906 Antiquities Act does not create

that hazard. Courts have held that the Act articulates intelligible standards to restrain the Executive in exercising delegated legislative power. .[48]

And it is axiomatic that a statute should be interpreted according to its plain meaning unless the result would be absurd, odd, or manifestly contrary to congressional purpose.[49] The plain text of section 2 of the Antiquities Act refrains from delegating legislative power to the President to revoke or to alter materially national monument declarations. That result is neither absurd nor odd. It retains in Congress the legislative power to supersede a President's national monument declaration by enacting a new law. That retention is not a constitutional anomaly. It is the constitutional norm that Congress exercise the legislative powers granted by the Constitution. When Congress wishes to deviate from that norm, it does so expressly, as in the act of Congress of June 4, 1897, 30 Stat. 11, 36, which states in pertinent part:

> "The President is hereby authorized at any time to modify any Executive Order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve."

Thusly, the Act of Congress approved June 4, 1897, 30 Stat. 11, satisfies the demanding standard of clarity and expressiveness whenever it delegates legislative power regarding the reduction or abolition of forest reserves. Congress also knows how to expressly grant the President the authority to reduce the size of a national monument after the enactment of the 1906 Antiquities Act, i.e., by plain and express language. In creating the Colonial National Monument in Virginia, for example, Congress provided that the boundaries "may be enlarged or diminished by subsequent proclamations of the President upon the recommendation of the Secretary of the Interior."[50] One searches in vain for any corresponding language in the Antiquities Act.

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(j), is further indicative of the congressional custom of speaking in express and plain language in addressing

reductions in national monuments. FLPMA expressly denies from the Secretary of the Interior power to "modify or revoke any withdrawal creating national monuments under chapter 3203 of Title 54…".

Every relevant canon of statutory construction compels the conclusion that Congress had not delegated to the President its legislative power to reduce national monuments proclaimed under the 1906 Antiquities Act.

A presidential proclamation under the Act is constitutionally indistinguishable from congressional creation of a national monument by statute. In the latter case, the monument can be abolished or altered only by a superseding statute. A parity of reasoning compels the conclusion that presidential declarations of national monuments—surrogates for legislating national monuments—can only be abolished or materially changed by Congress.

Also militating against implying a presidential power to revoke or materially alter a national monument declaration is the doctrine of constitutional avoidance. As noted above, the Supreme Court gives narrow constructions to statutory delegations that might otherwise be thought unconstitutional.[51] No language in section 2 provides intelligible standards that would limit the president's discretion in exercising the legislative power to abolish or materially alter presidential declarations. The discretion would be limitless, which *Schechter Poultry*[52] and its progeny teach is constitutionally impermissible. To repeat the words of Chief Justice Charles Evans Hughes in that case:

> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

III. The Counterarguments

Arguments to the contrary are uniformly unpersuasive and generally frivolous. None pivot on the plain text of the Antiquities Act, which is what Members of Congress voted into law. The

counter-arguments commonly rely upon imputed congressional purposes or atextual public policy considerations. None of the exponents of limitless presidential power maintain that a plain meaning interpretation of the Act yields absurd, odd, or unworkable results.

The plain meaning canon does not speculate about the primary motivation or historical context of a statute. The canon teaches that the words that Congress enacted are the alpha and omega of the interpretive exercise. If they are unambiguous and their plain meaning does not lead to an absurd or quixotic result, the interpretive task ends.

Attorney General Homer Cummings advised President Franklin Roosevelt in 1938 with certainty that the Act did not delegate to the President the legislative power to revoke national monument declarations.[53] President Franklin Roosevelt, no shrinking violet when it came to clashing with Congress on, inter alia, issues relating to National Monuments, *see supra hereinabove*, backed down based upon Attorney General Cummings' sage and well-reasoned advice and did not attempt to abolish or delist any prior designated National Monument. While those on the side of presidential hegemony have criticized Attorney General Cummings' reasoning, none have been able to discredit his conclusion.

Indeed, no President has ever attempted to abolish a national monument in the one hundred and eleven (111) year existence of the 1906 Antiquities Act.[54]

Congressional delegations of legislative power to the President *may* include the power to abolish or alter the declarations or decrees of his predecessors. Thus, the act of Congress approved June 4, 1897, 30 Stat. 11, 36, clearly empowers the President to "to modify any Executive Order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve." But congressional delegations of legislative power to the President

may also, e.g., the Antiquities Act, withhold any power to abolish or disturb what previously was created by presidential proclamation.

While it may be an enjoyable parlor game to compare the Antiquities Act to other statutory grants of authority to the President, parlor games are no substitute for canons of statutory construction. The touchstone of statutory interpretation is the statutory text. Any alternative throws the interpreter into a Sargasso Sea of uncertainty. Even amateurish students of Congress know that the 535 Members of the House and Senate sport wildly different motivations or purposes in voting in favor or against a bill. A common motive is to create a public optic that strengthens chances for re-election and attracts campaign contributions.

Some proponents of limitless executive power maintain that congressional delegations of legislative power that authorize discretionary presidential acts usually include the power to revoke those same acts—unless the original grant expressly limits the power of revocation. Even assuming the assertion is accurate, general principles do not decide concrete cases. Usually does not mean always. And no overarching legal or philosophical principle guides Congress in legislating. Every statute is *sui generis* in (1) the political motivations or purposes of Members of Congress; and, (2) the political compromises between competing interests that gave birth to the statutory text. The plain language canon of interpretation understands that Members of Congress treat legislating as freestanding political exercises unconstrained by philosophical or intellectual consistency.

It is irrelevant and a *non sequitur* to the interpretation of the Antiquities Act to note that when Congress delegates its legislative power to executive agencies to issue regulations it is presumed to have delegated power to repeal them as well. The Antiquities Act does not delegate legislative power to the President to issue regulations, but to declare national monuments

according to intelligible standards. Additionally, the revocation of an agency rule under the Administrative Procedure Act[55], must not be arbitrary, capricious, or an abuse of discretion. Presidential actions are outside the scope of and not limited by the APA.[56] The Antiquities Act itself contains no language that would limit presidential discretion to abolish or materially alter national monument declarations similar to the APA.

The Constitution itself does not enshrine a principle that any branch of government can undo its earlier actions using the same process as originally used. A presidential pardon may not be reversed under any circumstances. President Gerald R. Ford's pardon of former President Richard M. Nixon tied the hands of President Jimmy Carter and his White House successors. President Jimmy Carter issued a Proclamation granting pardons for violations of the Military Selective Service Act during the Vietnam War.[57] The Proclamation was binding on future Presidents.

Congress may not reverse the expulsion of a Member under any circumstances. A treaty requires ratification by a two-thirds Senate majority, but it may be revoked by the President without any reference to the Senate.[58] The Appointments Clause of Article II requires Senate confirmation of officers of the United States appointed by the President. But there is no debate that the Senate is excluded from involvement in a Presidential decision to undo an appointment by removal.[59]

It is not now and has never been true that the processes for repealing statutes or constitutional amendments are implied rather than express. The Constitution is crystal clear that Congress is empowered to repeal a statute or a constitutional amendment by the same process that was used in the first instance. Article I, Section 7 describes the process by which a "Bill" becomes law. A bill that repeals an existing statute is every bit as much a "Bill" as a bill which creates a new statute. Article V sets forth the process for proposing and ratifying "Amendments" to this

Constitution. An amendment that repeals a constitutional amendment is no less an "Amendment" within the meaning of Article V than the amendment which augmented the Constitution.

An argument that likens the Supreme Court's overruling a precedent to a President's revoking a national monument declaration takes frivolity to a new level. An overruling does not nullify the overruled case's enforceable judgment. President Abraham Lincoln recognized in his first Inaugural Address that a Supreme Court decision overruling the principle of *Dred Scott v. Sandford*, 60 U.S. 393 (1857) - that black persons had no rights that the white race was bound to respect would not emancipate Dred Scott.[60]

In sum, interpreting the 1906 Antiquities Act to prohibit presidents from abolishing or materially altering prior presidential national monument declarations raises no constitutional concerns. The Act delegates legislative power to the President to declare national monuments according to congressionally prescribed standards. That delegation is a separation of powers irregularity that must be narrowly construed. No constitutional principle dictates that Congress must also delegate its legislative power to destroy if it delegates its legislative power to create. Indeed, as regards the Antiquities Act, a serious constitutional question would be raised if it were interpreted that way because the statute lacks any congressionally prescribed intelligible standards to restrain monument destructions or reductions.

Suppose a president disputes a predecessor's conclusion that an historic landmark, structure or other object that justified a national monument was historically or scientifically valuable, or that the monument's boundaries constituted the "smallest area compatible with proper care and management of the objects to be protected."[61] Detractors of the plain meaning interpretation of the Antiquities Act argue that Congress could not have intended that every presidentially declared national monument live undisturbed for the ages no matter how antiquated

or inconsistent with the statutory conditions for its creation. The argument wrongly assumes the President is the center of our constitutional universe. Congress may abolish or materially alter national monument declarations that it believes time has made obsolete or violate the standards of the Antiquities Act. A Congressional Research Service report relates:

> "Congress also has the power to revoke national monument proclamations by statute and has done so on occasion. In some instances of abolishment of national monuments, the land in question has been transferred to states. Congress has also expanded or reduced the acreage of some national monuments.… Congress has authority under Article I to spend money and section 9 of Article I prohibits expenditure of money without an appropriation. Appropriations bills could prohibit funding for the enforcement of monument proclamations or particular usage provisions in a national proclamation management plan. For instance, funding for Jackson Hole National Monument was limited for several years until Congress abolished the monument and made it Grant Teton National Park." [footnotes omitted].[62]

Article III courts are available to review monument declarations in excess of Antiquities Act authority at the behest of a party suffering environmental, commercial, or other concrete injury traceable to the declaration.[63] Indeed, Chief Justice John Marshall taught in *Marbury v. Madison*[64] that, "It is emphatically the province and duty of the judicial department to say what the law is." Statutory interpretation is a judicial, not an executive branch function.

Critics of President Obama's Bears Ears National Monument[65] and Gold Butte National Monument[66] declarations claim they were wrongful because they contradicted pending congressional legislation and were opposed by state officials and congressional leaders. The criticism is misplaced. Nothing President Obama did prevented Congress from superseding his national monument declarations by statute. That option remains with Congress today. Nothing in the Antiquities Act requires the President to obey political sentiments in Congress that fall short of legislation. And the Speech or Debate Clause of the Constitution forbids executive branch

interference with the legislative acts of Members of Congress, including debating and voting on pending legislation.[67]

It would mark an unconstitutional executive branch rewrite of the Antiquities Act if it were interpreted to empower a president to void a national monument by unilaterally declaring that he had made a credible determination, based on the facts, and a reasonable interpretation of the act, that the monument was too large relative to the original 'object' supposedly protected. That atextual interpretation is indistinguishable from limitless presidential power to revoke national monument declarations. No President will ever doubt his own credibility or the reasonableness of his own interpretation of the Antiquities Act for the same reason that a man cannot be a judge in his own case: self-interest.

Some have questioned whether the Antiquities Act authorizes marine monument declarations. The text references "lands owned or controlled by the Government of the United States." Applying the plain meaning canon of statutory construction, the interpretive question is substantial. But issues of law are authoritatively decided in Article III courts, not in the executive branch. It is entrusted with the faithful execution of the law under Article II. The President has no judicial authority.

If marine monument declarations of the President overstep the legislative power delegated by the Antiquities Act, there should be no difficulty finding private or state government plaintiffs with standing to sue to correct the violation. Alternatively, Congress may correct the putative legal error with a superseding statute. But the President cannot claim that authority under either Article II or the Act.

III. The Power to Materially Alter National Monument Reservations

The plain meaning of the Antiquities Act authorizes national monument declarations that increase the boundaries of a prior declaration if the expansion satisfies the congressionally prescribed standard, i.e., the new boundaries are be "confined to the smallest area compatible with proper care and management of the object…." But the text does not authorize presidential boundary reductions. The reason is simple. It would empower the President to shrivel a national monument beyond recognition tantamount to abolition. The statutory requirement that national monument boundaries be "confined to the smallest area compatible with proper care and management of the object…." is to be enforced by impartial Article III courts through adversary litigation, not behind closed White House doors by a politically charged President.

Presidents Truman, Eisenhower, and Kennedy each proclaimed a handful of national monument reductions. President Truman reduced Santa Rosa Island National Monument (FL) by 4,700 acres in 1945. President Eisenhower reduced the size of the following national monuments: Arches National Monument (UT) by 240 acres in 1960; Black Canyon of the Gunnison National Monument (CO) by 470 acres in 1960; Colorado National Monument (CO) by 91 acres in 1959; Glacier Bay National Monument (AK) by 24,925 acres in 1955, Great Sand Dunes National Monument (CO) by 8,805 acres in 1956. President Kennedy reduced Bandelier National Monument (NM) by 1,043 acres in 1963. None of these reductions were ever challenged in Article III courts. Moreover, a violation of law is not cured by repetition--even over long years.[68]

Tellingly, no President in history has ever abolished a previously declared National Monument.

Some detractors of a plain meaning interpretation of the Antiquities Act assert that "[s]ubsequent congressional land-management statutes…cut sharply against the policy argument

that the [Antiquities Act's] use is necessary to promptly secure land that is otherwise prone to looting or harmful development."[69] The assertion may be true. But none of these land-management statutes repealed the Antiquities Act in whole or in part or contradict it.

The contention that national monument declarations stop or inhibit ongoing congressional debate and potential compromise over the lands at issue is risible. Congress can always abolish or alter a president's Antiquities Act handiwork by statute for any reason or no reason. No statute of limitations time bars congressional legislation.

The Antiquities Act does not encroach on any Article II power of the President. Indeed, it is so marginal to executive branch operations that it remained dormant and no National Monuments were declared during the muscular presidencies of Richard Nixon, George H.W. Bush, and Ronald Reagan.[70] And if the national monument proclamations reflected inherent Article II power of the president, the Antiquities Act would be superfluous.

A final argument maintains that only a "tortured" interpretation of the Antiquities Act text can justify "minor" national monument boundary changes and large "additions" but forbid "significant" reductions. As elaborated above, the plain meaning canon of statutory construction yields precisely that demarcation line. Monument additions declared by the President that satisfy the congressionally prescribed standards of historic or scientific interest and lands confined to the smallest acreage consistent with proper management of the objects to be protected are authorized by the statutory text. On the other hand, not a single word in the 1906 Antiquities Act hints that executive branch reductions are authorized[71]. That explains the absence of constitutionally required intelligible standards for significant reductions of national monuments by the President.

Conclusion

Separation of powers is the crown jewel of the Constitution. It is a structural bill of rights that protects the American people from oppressive government. Article I of the Constitution, supplemented by Article IV, entrusts all legislative power created by the Constitution to Congress, including the creation of national monuments of historic or scientific interest on lands owned or controlled by the United States and their abolition or reduction. While Congress may delegate some of its legislative power to the executive, it may do so only if it concurrently provides intelligible standards to restrain executive discretion. [72]

The Antiquities Act of 1906 delegates the legislative power of Congress to the President to create national monuments pursuant to intelligible standards, i.e. the objects protected must be of historic or scientific interest; and, the boundaries of the monument must be no larger than necessary for their proper care and maintenance. But the plain meaning of the statute refrains from delegating legislative power to abolish or materially shrink the boundaries of national monuments or alter their management. That conclusion is fortified by the absence of intelligible standards for Presidential exercise of such discretion.

Every canon of statutory construction compels the conclusion that the President lacks authority under the Antiquities Act to either abolish national monuments or to materially alter their boundaries or management plans in ways that would compromise protection of their historic or scientific objects.

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1 54 U.S.C. §§320301-320303 (2017).

2 The National Park Service List of Monuments is at: https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm.

3 *See Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 1 (1825) (Marshall, C.J.).

[4] Under an Act of Congress approved June 4, 1897, 30 Stat 11, 36, the President is authorized to establish national-forest reserves, and is additionally authorized in express terms at any time to modify any Executive Order creating a forest reserve by reducing its area or by vacating it altogether. Comparable language authorizing presidential abolitions or material alterations of national monuments is conspicuously absent in the Antiquities Act. See page 11, *infra*.

[5] *The Federalist No. 47* (James Madison).

[6] 339 U.S. 56, 70 (1950) (dissenting).

[7] See note 4, *supra*.

[8] Proclamation No. 658, 34 Stat. 3236 (1908).

[9] *See* Mark Squillance, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 490 (2003).

[10] Proclamation No. 794, 35 Stat. 2175 (1908).

[11] Proclamation No. 809, 35 Stat. 2247 (1909).

[12] Act of Feb. 26, 1919, ch. 44, § 1, 40 Stat. 1175, 16 U.S.C. 221 (2017), *et seq.*

[13] Act of June 29, 1938, 52 Stat. 1241.

[14] Proclamation No. 877, 36 Stat. 2498 (1909).

[15] Proclamation No. 1435, 40 Stat. 1760 (1918).

[16] Act of Nov. 19, 1919, 16 U.S.C. § 344 (2017).

[17] Proclamation No. 1339, 39 Stat. 1785 (1916).

[18] Act of Jan. 19, 1929, ch. 77, 45 Stat. 1083, as amended at 16 U.S.C. § 342b (2017).

[19] Proclamation No. 1664, 43 Stat. 1914 (1923).

[20] Act of Feb. 25, 1928, ch. 102, 45 Stat. 147 (codified as amended at 16 U.S.C. § 401 (2017).

[21] Proclamation No. 1733, 43 Stat. 1988 (1925).

[22] Proclamation No. 1713, 43 Stat. 1968 (1924).

[23] Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3101-3233 (2017). *See* page 7, *supra*.

[24] Proclamation No. 1875, 46 Stat. 2988 (1929).

[25] Proclamation No. 1994, 47 Stat. 2506 (1932).

[26] Proclamation No. 2028, 47 Stat. 2554 (1933).
[27] Proclamation No. 2032, 47 Stat. 2557 (1933).

[28] The Arches became a National Park pursuant to 16 U.S.C. §445 (2017). In 2000, the Great Sand Dunes became a National Park. 16 U.S.C. § 410hhh (2017). In 1994, Death Valley was made into a National Park encompassing more than two million acres. 16 U.S.C. § 410aaa (2017).

[29] Pub. L. No. 103-364, 108 Stat. 3467, 16 U.S.C. 410zz (2017).

[30] Proclamation No. 2193, 50 Stat. 1760 (1937).

[31] Proclamation No. 2193, 50 Stat. 1760 (1937).

[32] 16 U.S.C. § 410aaa-22 (2017).

[33] 16 U.S.C. § 406d-1 (2017).

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

[35] H.R. 2241, 78th Cong. (1943); 90 Cong. Rec. 9196 (1944); 90 CONG. REC. 9082-9095, 9182-9196; 9769 (1944).

[36] 78th Cong., 2nd Sess., 90 CONG. REC. 9807 - 9808 (1944).

[37] S. Rep. No. 81-1938, at 4 (1950).

[38] 16 U.S.C. § 406d-1 (2017).

[39] 64 STAT. 849, 16 U.S.C. § 320301(d) (2017).

[40] 16 U.S.C.§ 3213(a) (2017).

[41] Proclamation No. 6920, 3 C.F.R. 64 (1996).

[42] *See* https://www.nps.gov/archeology/sites/antiquities/abolished.htm.

[43] The abolished or delisted Presidentially declared National Monuments are:

1. Lewis and Clark Cavern National Monument - declared 1908, abolished 1937 (MT);
2. Wheeler National Monument – declared 1908, abolished 1950 (CO);
3. Shoshone Cavern National Monument – declared 1909, abolished 1954 (WY);
4. Old Papago Saguaro National Monument – declared 1914, abolished 1930 (AZ);
5. Kasaan National Monument – declared 1916, abolished 1955 (AK);

6. Verendrye National Monument – declared 1917, abolished 1956 (ND);
7. Fossil Cycad National Monument - declared 1922, abolished 1957 (SD);
8. Castle Pinckney National Monument – declared 1924, abolished 1956 (SC);
9. Father Millet Cross National Monument - declared 1925, abolished 1949 (NY);
10. Holy Cross National Monument – declared 1929, abolished 1950 (CO).

See Alan K. Hogenauer, *Gone, But Not Forgotten: The Delisted Units of the U.S. National Park System*. George Wright Forum *7:4* (1991) 26-28, http://www.georgewright.org/074.pdf.

[44] 295 U.S. 495, 537 (1935).

[45] 293 U.S. 388, 421 (1935).

[46] *See e.g., Yakus v. United States*, 321 U.S. 414 (1944); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406-407 (1928); *Mistretta v. United States*, 488 U.S. 361, 373 (1989).

[47] 488 U.S. 361, n.7 (1989).

[48] *Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (DC Cir. 2002) (holding that the Antiquities Act "includes intelligible principles to guide the President's actions."); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1191 (DC Utah 2004) ("[t]he Antiquities Act sets forth clear standards and limitations" . . . [and] "the non-delegation doctrine is not violated.")

[49] *Caminetti v. United States*, 242 U.S. 470 (1917); *Sedima, S.P.R.L. v. Imrex Co*., 473 U.S. 479 (1985); *United States v. Granderson*, 511 U.S. 39 (1994); *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989).

[50] Act of July 3, 1930, Pub. L. No. 71-510, 46 Stat. 855, 16 U.S.C. § 81a (2000).

[51] *See, e.g., Industrial Union Dept. v. American Petroleum Institute*, 448 U. S. 607, 448 U. S. 646 (1980); *National Cable Television Assn. v. United States*, 415 U. S. 336, 415 U. S. 342 (1974).

[52] See note 43, *supra*.

[53] 39 Op. Att'y Gen. 185 (1938).

[54] *See National Monuments – All Federal Agencies, January 15, 2017, Question #11*, https://www.peer.org/assets/docs/nps/National_Monuments_FAQ.pdf.

[55] 5 U.S.C. § 706(2) (A) (2017).

[56] *Franklin v .Massachusetts*, 505 U.S. 788 (1992).

[57] Proclamation No.4483 of Jan. 21, 1977, 42 Fed. Reg. 4391, 3 CFR, 1977 Comp., p. 4.

[58] *Goldwater v. Carter,* 444 U.S. 996 (1979).

[59] *Myers v. United States,* 272 U.S. 52 (1926).

[60] *See* the text set forth at: http://avalon.law.yale.edu/19th_century/lincoln1.asp.

[61] 54 U.S.C. §§320301(b).

[62] Alexandra M. Wyatt, *Antiquities Act: Scope of Authority for Modification of National Monuments,* Congressional Research Service, November 14, 2016, at p. 7.

[63] *See, e.g., Carmeron v. United States,* 252 U.S. 450 (1920); *Cappaert v. United States,* 426 U.S. 128 (1976); *Wyoming v. Frank,* 58 F. Supp. 890 (D. Wyo. 1945).

[64] 1 Cranch 137, 5 U.S. 137 (1803).

[65] *https://www.blm.gov/sites/blm.gov/files/documents/files/2016bearsears.prc_.rel_.pdf*.

[66] *https://www.blm.gov/sites/blm.gov/files/documents/files/2016goldbutte.prc_.rel_.pdf.*

[67] See e.g., *Gravel v. United States,* 408 U.S. 606 (1972).

[68] *INS v. Chadha,* 462 U.S. 919 (1983) (legislative veto); *Elrod v. Burns,* 427 U.S. 347 (1976) (political patronage); *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938) (federal common law).

[69] John Yoo and Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations,* American Enterprise Institute (March 2017), at p.18; to be published at: Yale Journal on Regulation, Vol. 35, No. 2, 2018;

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004821.

[70] See note 4, *supra*.
https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm.

[71] 54 U.S.C. §§320301-320303 (2017).

[72] *See Loving v. U.S.,* 517 U.S. 748, 771 (1996); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).