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Sacramento, CA

A commentary article reprinted from the May 2024 issue of Mealey's Fracking Report

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Commentary

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[Editor's Note: All authors are attorneys with the Pacific Legal Foundation's PLF's Separation of Powers practice group. Any commentary or opinions do not reflect the opinions of LexisNexis® Mealey Publications™. *Responses are welcome.]*

I. Introduction

After several Native American artifacts were looted in the early 1900s, Congress passed the Antiquities Act of 1906 to allow presidents to establish "national monuments" and protect historic landmarks, structures, and similar objects on federal lands.

This delegation of authority was modest. Indeed, not only did Congress specifically limit presidential authority under the Act by requiring that any monument be made up of specific objects located only on federal lands, but the Act also mandated that any land that is made part of a national monument be "the smallest area compatible" with protecting the landmark, structure, or object.

But modern presidents have not seen their authority as so limited. Nearly 90% of all areas designated as national monuments under the Act have come since the beginning of the 21st century, many larger than entire U.S. States. And when a president establishes a national monument, there are severe consequences for the millions of Americans who depend on public lands for their livelihoods, including cattle grazers, energy producers, and commercial fishermen. If a person violates the Act, they are subject to criminal sanctions, and presidents often restrict how public lands are used, creating severe economic consequences for individuals, industry, and even the states where a monument is located.

Because of these consequences, the modern expansion of national monuments has triggered various lawsuits that raise fundamental questions of legislative, executive, and judicial power. For example, litigants have challenged monument designations as ultra vires executive action because the monuments include things that are not "objects" under the Act, are not on "land," and include vast areas that are not "the smallest area compatible" with protecting a monument. Challenges have also raised constitutional claims and other doctrines designed to protect the Constitution's separation of powers—including the nondelegation doctrine and major questions doctrine.

These issues will not go away anytime soon. Presidents, including the current president, have continued to designate large monuments, and members of the Supreme Court have stated that they are willing to review the limits on the executive branch's authority under the Antiquities Act.

This article proceeds in three parts. First, it addresses the Antiquities Act's text and history. Second, it summarizes the legal issues in litigation over the scope of presidential authority under the Act. Finally, it introduces several ongoing litigation matters chal-

lenging the President's executive authority pending in the federal courts.

II. The Antiquities Act

Congress intended the Antiquities Act to be a quick way to protect archaeological artifacts on public lands from vandalism and looting.[1] To do so, the Act delegates to the President the authority to establish national monuments through public proclamation.[2] While this power may seem broad, Congress restricted the President's power by limiting monuments to "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on federal land."[3] Under the Act, the President may also reserve "parcels of land" to be part of a monument, but Congress similarly limited the President's power by confining what land may be included to "the smallest area compatible with the proper care and management of the objects to be protected."[4]

Since the Act's inception, presidents have used their authority to designate 163 monuments. For the first 90 years or so, these monuments were relatively small,[5] and typically had boundaries carefully tailored to preserve specific objects of historic and scientific interest. President Theodore Roosevelt, for example, used this to declare Devil's Tower in Wyoming as the first national monument. Roosevelt set aside 1,153 acres, which he thought would "be sufficiently large to provide for the proper care and management of the monument."[6]

But modern presidents, beginning with President Bill Clinton, dramatically expanded presidential authority under the Antiquities Act. For example, President Clinton broadened his authority under the Act from protecting specific "objects" to regulating nebulous "ecosystems." According to the Clinton administration, these unnamed ecosystems were "objects" the President could designate as a "monument."[7]

And the expansion of the President's power under the Antiquities Act is not a partisan affair. President George W. Bush expanded on his predecessor's innovation in executive authority by taking ecosystem monuments to the sea by establishing the 89-million-acre Northwestern Hawaiian Islands Marine National Monument in the Pacific Ocean—a national monument twice the size of Texas.[8] Under President Bush's interpretation of "land" that is "owned or controlled" by the federal government, the President's authority extends to the Oceans' seabed in the "exclusive economic zone"—an area between the territorial sea and 200 miles from the Nation's coast, over which nations exercise concurrent authority that falls far short of sovereign dominion.

Not to be outdone, President Obama continued broadening presidential authority under the Act. He expanded three of President Bush's marine monuments and created the Northeast Canyons and Seamounts National Monument—which designated millions of acres of the Atlantic Ocean as a national monument and banned commercial fishing within its boundaries.[9]

Under more recent administrations, the Antiquities Act has been a political seesaw. After President Obama left office, President Trump reduced the size of several monument designations and lifted some restrictions on public land use within monument areas. For example, the Grand Staircase-Escalante National Monument was established on September 18, 1997, and comprised around 1.7 million acres of public land. President Trump reduced its size to around 1 million acres. President Trump also issued a presidential proclamation lifting the ban on commercial fishing within the Northeast Canyons and Seamounts National Monument. Yet upon taking office, President Biden expanded the Grand Staircase monument to around 1.9 million acres.[10] President Biden also reestablished the commercial fishing ban within the Seamounts monument.

III. Legal Issues'

A. Statutory Issues.

The seemingly broad delegation of power to the President under the Antiquities Act and the Act's sparse language raises several legal questions about the Act's scope. The Act requires that national monuments remain limited to (1) historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest; (2) that those objects be on land owned or controlled by the Federal Government; and (3) any other reserved land be the smallest area compatible with the proper care and management of the objects to be protected.[11] This section addresses each limit in turn.

1. Presidents can only declare landmarks, structures, and other objects of historic or scientific interest as national monuments.

The Act first limits monument designations to (a) historic landmarks, (b) historic and prehistoric struc-

tures, or (c) other objects of historic or scientific interest. The primary statutory issue concerns what constitutes "other objects of historic and scientific interest." The statutory terms "landmarks" and "structures" are discrete, tangible objects. But in recent years, Presidents have expanded beyond this plain meaning to designate million-plus acre landscapes, ecosystems, and everything within them as "objects." As Chief Justice Roberts has noted, "a speaker of ordinary English" would not think "5,000 square miles of land beneath the ocean" was an "object" or "monument."[12]

2. Presidents can only declare national monuments on land owned or controlled by the Federal Government.

The Act also requires that national monuments be "situated on land owned or controlled by the Federal Government." This statutory issue mainly concerns whether a president may establish a national monument within an Ocean and how far into the sea a monument may occur. As noted above, in recent years, Presidents have designated large Atlantic and Pacific Oceans areas as national monuments. These include five vast ocean monuments encompassing around 700 million acres of ocean.[13] There is a seeming circuit split over this question. The Fifth and Eleventh Circuits have held that "land owned or controlled by the Federal Government" under the Antiquities Act excludes the ocean beyond the territorial seas.[14] Yet the D.C. Circuit has held that the ocean bed within the Exclusive Economic Zone are "lands" owned or controlled by the federal government.[15]

3. Presidents must limit any parcel of land reserved for a national monument to the smallest area compatible with the proper care and management of the monument.

The Act further requires that any land reserved for a national monument must remain confined to the smallest area of land compatible with the proper care and management of the monument. Early designations drew monument boundaries tightly around the designated monument. Yet recent designations have paid only lip service to this requirement. As Chief Justice Roberts recently observed, the Court has never considered how large areas—like 3.2 million acres of ocean—comply with the Act's "corresponding 'smallest area compatible' limitation" or how that limitation "interacts with the protection of such an imprecisely demarcated concept as an ecosystem."[16]

B. Constitutional Issues (Major Questions and Nondelegation Doctrine).

Presidential exercises of authority under the Antiquities Act also raise constitutional concerns. Presidents' expansive assertions of power under the modest language of the Antiquities Act triggers (1) the major questions doctrine's limit on reading broad executive authority into arguably vague statutes and (2) the nondelegation doctrine's limit on delegating power to the President with no limiting principle. This section will address each issue in turn.

1. Major Questions Doctrine

The major questions doctrine requires the Executive to show "clear congressional authorization" when it claims highly consequential regulatory authority over politically and economically significant issues.[17] Monument designations often raise such significant issues. Monuments restrict land use, impact industries, including ranching, fishing, and mining, and advance the special-interest agenda of environmental groups. Monuments are also often designated after Congress has tried and failed to withdraw the ability of Americans to use certain public lands for their natural resources. And it is questionable whether "clear congressional authorization" for million-acre designations of ecosystems and landscapes can be found in the President's authority to designate "objects" as monuments. Indeed, Chief Justice Roberts pointed out this point of contention when he noted the textual incongruity of calling 5,000 square miles of land beneath the ocean an "object."[18]

2. Nondelegation Doctrine

Finally, presidential assertions of authority under the Antiquities Act raise nondelegation concerns. Under the nondelegation doctrine, Congress must provide an "intelligible principle" in any delegation of authority to the President to cabin and guide the exercise of executive discretion. And those intelligible standards must have definitive meaning that enables courts and the public to determine whether the Executive Branch adhered to Congress's guidelines for executing rather than making the law. Accordingly, congressional statutes may not leave the President unfettered discretion and no judicially enforceable limits to determine a law's meaning.

The Constitution's Property Clause vests Congress with the exclusive power to make laws regulating federal lands. *See* U.S. Const. art. IV, § 3, cl. 2. The Antiquities Act delegates the President the power to

determine what "objects" should be protected and how much land to include within monument designations. In other words, the President may fill in the details. But national monuments must still fall within the statute's textual limits and the limits on reservations to the smallest area compatible with protecting those textually limited objects.[19] But if Congress has delegated to the President unlimited discretion to declare all objects or nonobjects, such as landscapes, as national monuments with no limiting or intelligible principle—despite the Act's limitations—then it has unlawfully delegated its power under the Property Clause.

C. Judicial Review

There is also a question of whether the courts can even review exercises of presidential power under the Antiquities Act. Under *Franklin v. Massachusetts*[20] and *Dalton v. Specter*,[21] the President is exempt from review under the Administrative Procedure Act (APA) and is often closed off from *any* meaningful judicial review. Under these precedents (and others), courts have held that "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for [a court's] review."[22] Instead, a court can only review presidential action under a statute if Congress provides for review by waiving sovereign immunity. And the Antiquities Act does not waive sovereign immunity. Even so, judicial review can still proceed for constitutional and ultra vires challenges, but courts have been wary of statutory challenges repackaged as constitutional or ultra vires challenges. Thus, litigants are faced with arguing that their challenges are constitutional or ultra vires rather than statutory to subject presidential action to judicial review.

IV. Ongoing Litigation

1. Bears Ears and Grand Staircase-Escalante National Monuments, Sovereign Immunity, and Judicial Review.

The Grand Staircase National Monument was established September 18, 1997, and consisted of around 1.7 million acres of public land. President Trump reduced its size to around 1 million acres, but President Biden then expanded the Monument to around 1.9 million acres. Like the Grand Staircase, Bears Ears was established in 2016 and comprised around 1.3 million acres of public land. President Trump reduced its size to around 200 thousand acres, but President Biden then expanded the Monument to 1.36 million acres.

In 2022, Utah and several other plaintiffs sued President Biden alleging his expansions of the Grand Staircase-Escalante and Bears Ears National Monuments were illegal and ultra vires under the Antiquities Act. The government and several intervening environmental groups moved to dismiss the case.

The district court determined that the president and federal government could be sued only when Congress has waived "sovereign immunity."[23] The court recognized that there are equitable exceptions when the president or federal government acts "ultra vires" or violates the Constitution but found that what the plaintiffs were alleging was a statutory violation and not an ultra vires claim—despite the plaintiffs repeated allegations that the president was acting outside of his delegated authority in their complaint.[24] In other words, the district court held allegations a president is acting outside of his delegated authority under the Antiquities Act are allegations that he "misused" his authority and not that he "lacked it."

But the Constitution requires meaningful judicial review as a check on presidential power. It is the judiciary's job to decide on individuals' rights and determine the law's meaning in the process, ensuring the government acts under law.[25] In the context of executive overreach, the federal courts must look to "the compatibility of [executive] actions with enabling statutes."[26] Indeed, every exercise of presidential authority under a statute is an exercise of the President's constitutional power to execute the laws. The courts can review to determine whether the laws have been "faithfully executed."[27]

2. Northeast Canyons and Seamounts Marine National Monuments, Ecosystems, and ''Land.''

In 2016, President Obama issued a Presidential Proclamation establishing the Northeast Canyons and Seamounts Marine National Monument. The Proclamation designated as a national monument around 5,000 square miles (3.2 million acres) of Atlantic Ocean and submerged land situated 130 miles off Cape Cod, Massachusetts. At the behest of several environmental organizations, the Proclamation banned some commercial fishing and directed the agencies responsible for the Monument's management to phase

out, or in some cases ban, other commercial fishing within the designated area.[28]

In 2017, Massachusetts Lobstermen's Association and other fishing groups harmed by the commercial fishing ban sued to invalidate the Proclamation. The U.S. District Court for the District of Columbia and the D.C. Circuit rejected the challenge.[29] The Supreme Court denied the plaintiffs' subsequent petition for writ of certiorari. Still, Chief Justice Roberts wrote a "statement respecting denial of certiorari," in which he questioned the Monument Designation's legality. Although the Chief Justice agreed that the Antiquities Act has been abused to incorporate large swaths of land that are not "confined to the smallest area compatible," the Chief noted that the case did not warrant review because no court of appeals has addressed how to interpret the Antiquities Act's "smallest area compatible" requirement nor did the petitioners "suggest[e] what this critical statutory phrase means or what standard might guide [the Court's] review of the President's actions in this area."[30]

In 2020, President Trump issued a Proclamation removing President Obama's ban on commercial fishing within the Monument.[31] In 2021, President Biden issued the current Proclamation, restoring the commercial fishing ban.[32] And on February 16, 2024, NOAA, asserting that President Biden's proclamation gave it no choice or discretion, issued a final rule banning commercial fishing under the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006.[33] If fishermen violate the Proclamation, they are subject to criminal fines and a maximum of ninety days of jail time.[34] And under NOAA's new regulation, fishermen could also be subject to civil fines of up to $100,000 a day, liens on their boats, and loss of fishing permits.[35]

New England area fishermen have renewed their challenge to the ban on commercial fishing.[36] They raise the four main arguments noted above. First, they argue the Proclamation is unlawful because it designates an area as a national monument that is not "owned or controlled by the government." The proclamation includes parts of the Exclusive Economic Zone ("EEZ"), which are beyond the "territorial seas" and not within lands owned or controlled by the Federal Government. Second, they argue the President could not declare the Seamounts and Canyons a Monument because the "ecosystems" and "biodiversity" in the Monument area are not "objects" under the Act. Third, they argue the Proclamation is unlawful because the land within the Monument Designation is not the "smallest area compatible with the proper care and management of the objects to be protected." President Biden designated 3.2 million acres of ocean for the Monument because, in the main, it was required to protect the "ecosystem" surrounding various underwater canyons on the ocean floor. Finally, the case raises the separation of powers question of whether the President my ban commercial fishing or any other public "land" use under the Antiquities Act. The Executive Branch does not possess a general, free-standing authority to issue binding legal rules.

3. Ancestral Footprints of the Grand Canyons National Monument, Landscapes, and Pretext.

On August 8, 2023, President Biden reserved 917,618 acres to establish the Ancestral Footprints National Monument in northern Arizona. The Proclamation designates the nearly 1-million-acre landscape and everything in it as a historically and scientifically important landmark, structure, or object. Included in that monument designation is the Y-Cross Ranch.

Chris Heaton owns the Y-Cross Ranch. He is a sixth-generation landowner and rancher in Utah with proof of title going back to the 1800s. His grandfather put together the current core of the ranch lands in the 1930s, before BLM existed. Heaton has 50,000 acres of private land, land leased from Arizona, and land leased from the Bureau of Land Management ("BLM"). He currently has both grazing and water rights threatened by the new monument. His family originally owned the water rights on the land and retain private water rights under the existing regulatory program. On the monument, he owns several stock ponds, wells, and springs. His cows graze on the monument every day, all year. And he and his ranchers are on the monument multiple days a week.

The Proclamation threatens to restrict Heaton's use of his land. It subjects him to criminal penalties for disrupting any part of the monument and burden's the use of his family's ranch. The designation also threatens the value and future use of his grazing and water rights.

Heaton challenges the President's Proclamation as ultra vires and unconstitutional for four reasons

like those raised in the Green v. Biden, including whether the President exceeded his statutory authority under the Antiquities Act by declaring the entire 1-million-acre Ancestral Footprints landscape an "object"; whether the President exceeded his statutory authority under the Antiquities Act by designating a million acres for the Ancestral Footprints National Monument, which is not the smallest area compatible with the proper care and management of the Monument; whether the President's Proclamation violates the Major Questions Doctrine because the President lacks "clear congressional authorization" for issuing the Proclamation, which concerns an exercise of regulatory power on an issue of political and economic significance; and finally whether Congress violated the nondelegation doctrine. Congress cannot delegate power to the President to declare anything on federal land an "object" with no intelligible limiting principle.

V. Conclusion

The modern expansion of Presidential power under the Antiquities Act, legal issues raised by that expansion, and current litigation, demonstrates the need for judicially manageable standards for reviewing presidential monument designations. The Antiquities Act was originally passed to protect Native American archeological sites from looting, not as a presidential proxy for national parks. Now it's used to lock up and regulate millions of acres, often not for historic preservation but for environmental special interests. Chief Justice Roberts recognized the need to restrain presidential power under the Antiquities Act, which "has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea."[37] The pending litigation will present these issues to the federal courts and provide an opportunity to develop judicial standards of review under the Antiquities Act.

Endnotes

1. *See* Richard H. Seamon, Dismantling Monuments, 70 Fla. L. Rev. 553, 561–67 (2018) (discussing the Antiquities Act's legislative purpose).
2. 54 U.S.C. § 320301.
3. *Id.* § 320301(a).
4. *Id.* § 320301(b).
5. To be sure, there were exceptions. For example, Grand Canyon National Park was originally established by President Theodore Roosevelt as a national monument. Shortly after the Antiquities Act was passed, Roosevelt established Grand Canyon National Monument in 1908, setting aside 818,560 acres. https://www.nps.gov/articles/lee-story-proclamation.htm.
6. National Park Service. "Early Conservationists." Death Valley National Park, U.S. Department of the Interior. Accessed March 22, 2024. www.nps.gov/deto/learn/historyculture/early-conservationists.htm.
7. *See Tulare Cnty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) (explaining the president's reasoning). All told, President Clinton established 19 monuments and expanded three others, totaling 5.9 million acres.
8. Pew Trusts. "New Ocean Monuments Give President Bush a Blue Legacy; Pew Applauds Historic Action." Press Releases and Statements, January 5, 2009. Accessed April 9, 2024. https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2009/01/05/new-ocean-monuments-give-president-bush-a-blue-legacy-pew-applauds-historic-action.
9. *See Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 538–39 (D.C. Cir. 2019).
10. Like the Grand Staircase seesaw, the Bears Ears National Monument was established in 2016 and consisted of around 1.3 million acres of public land. President Trump reduced its size to around 200 thousand acres, but President Biden then expanded the Monument back to 1.36 million acres.
11. 54 U.S. § 320301.
12. *Massachusetts Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021).
13. *See* Press Release, Department of Interior, Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments (May 5, 2017). https://www.doi.gov/pressreleases/interior-departmentreleases-list-monuments-under-review-announces-first-everformal.

14. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 340 (5th Cir. 1978); s*ee also Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 636 F.3d 1338, 1341 (11th Cir. 2011) (holding that Treasure Salvors is binding in the Eleventh Circuit).

15. *Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 540–41 (D.C. Cir. 2019).

16. *Massachusetts Lobstermen's Ass'n*, 141 S. Ct. at 981.

17. *See W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 732 (2022).

18. *Massachusetts Lobstermen's Ass'n*, 141 S. Ct. at 980–81 (2021).

19. *See* 54 U.S.C. § 320301(a)–(b).

20. 505 U.S. 788 (1992).

21. 511 U.S. 462 (1994).

22. *Id.* at 476.

23. *Garfield County, Utah v. Biden*, 2023 U.S. Dist. LEXIS 142044, 2023 WL 5180375, at *6 (D. Utah Aug. 11, 2023).

24. *Id.* at *8.

25. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 166 (1803) ("But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

26. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 125 (2015) (Thomas, J., concurring) (citing Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 313–16 (2014)).

27. U.S. Const. art. II, section 3.

28. Presidential Proclamation No. 9496, 3 CFR 262 (2016).

29. *Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019), *cert. denied sub nom. Massachusetts Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979 (2021).

30. *Massachusetts Lobstermen's Ass'n*, 141 S. Ct. at 979–81.

31. Presidential Proclamation No. 10049, 85 Fed. Reg. 35,793 (June 11, 2020).

32. Presidential Proclamation 10287, 86 Fed. Reg. 57,349 (Oct. 15, 2021).

33. Magnuson-Stevens Act Provisions; Prohibition of Commercial Fishing in the Northeast Canyons and Seamounts Marine National Monument, 89 Fed. Reg. 12282 (Feb. 16, 2024).

34. *See* 18 U.S.C. § 1866.

35. 16 U.S.C. § 1858(a), (d), (g).

36. *Green, et al. v. Biden, et al.*, Case No. 1:24-CV-1975 (E.D.N.Y. March 18, 2024).

37. Massachusetts Lobstermen's Ass'n, 141 S. Ct. at 981. ■

MEALEY'S FRACKING REPORT
edited by James Cordrey
The Report is produced monthly by

11600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 2372-9457