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## THE PRESIDENTIAL AUTHORITY TO RESERVE AND MODIFY NATIONAL MONUMENTS UNDER THE ANTIQUITIES ACT

*Jesse Knowlden*

### INTRODUCTION

The Antiquities Act of 1906, or “An Act For the preservation of American antiquities,” gives the President of the United States authority to unilaterally designate federally-owned land as national monuments.<sup>1</sup> These designations are to be made for “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.”<sup>2</sup> The reservations are to be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>3</sup> In total, sixteen presidents have used the act to designate 157 national monuments.<sup>4</sup> The Act does not explicitly designate to the president any power to enlarge, diminish, or revoke national monument designations, however presidents have used the Act to unilaterally diminish the size of national monuments at least nineteen times.<sup>5</sup> Also, presidents have used the Act to enlarge the size of national monuments at least seventy-eight times.<sup>6</sup> To this day, no president has ever abolished a national monument.

In December 2017, President Donald Trump used the Antiquities Act to vastly reduce the size of two national monuments in Utah: Bears Ears and Grand Staircase.<sup>7</sup> This move, viewed as an attempt to undermine designations of previous Democratic presidents, sparked lawsuits and pushed the Antiquities Act into the public spotlight.<sup>8</sup> Currently, these lawsuits are challenging the president’s authority to diminish national monuments. This article will address the purpose of the Act and the legality of presidents’ actions.

Part I of this article discusses the legislative history of the Act, including the events leading up to its passage. Part II recounts the history of the Act’s usage by past presidents and reviews the

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1. *American Antiquities Act of 1906*, <https://www.nps.gov/history/local-law/anti1906.htm> (last visited March 29, 2018).

2. *Id.*

3. *Id.*

4. *Monuments List*, <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (last visited March 29, 2018).

5. *Id.*

6. *Id.*

7. Julie Terkowitz, *Trump Slashes Sizes of Bears Ears and Grand Staircase Monuments*, <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html> (last visited March 29, 2018).

8. *Id.*

congressional and judicial responses. Part III outlines the recent usage of the Act that has led to the current debate over presidential powers. Part IV re-examines the legislative history of the Act and analyzes how monument designations comport with the intent of Congress. Finally, Part V posits that regardless of the legislative intent in enacting the Antiquities Act, over a century of the Act's usage supports President Trump's actions in shrinking national monuments. Nonetheless, this essay concludes that a century of abuse of the Antiquities Act illustrates the need for change in the form of either an overhaul or rescission of the Act.

### *I. The Drafting and Signing of the Antiquities Act*

The Antiquities Act was signed by President Theodore Roosevelt on June 8, 1906.<sup>9</sup> Section 2 of the Act 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 on the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>10</sup>

The Property Clause of the United States Constitution vests in Congress the authority to manage federal land.<sup>11</sup> Therefore, Congress possesses authority to designate federal land as national monuments through the federal process. Congress realized that legislation was needed to protect resources of archaeological and scientific value, and in February 1900, the first bill relating to the preservation of American antiquities was introduced into Congress.<sup>12</sup> Congress developed and modified various versions of the bill until the Act finally passed in 1906.<sup>13</sup>

To completely understand the purpose and intention of the Act, it is

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9. *About the Antiquities Act*, <https://www.nps.gov/archeology/sites/antiquities/about.htm> (last visited March 29, 2018).

10. 16 U.S.C. 431.

11. U.S. Const. art. IV, §3, cl. 2, "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 . . ."

12. Ronald F. Lee, *The Antiquities Act of 1906*, 50 (2001).

13. *About the Antiquities Act*, <https://www.nps.gov/archeology/sites/antiquities/about.htm> (last visited March 29, 2018).

necessary to examine the history of the Act's drafting. The Antiquities Act was a congressional response to the concerns of vandalism and removal of artifacts from prehistoric Native American ruins.<sup>14</sup> In the late nineteenth and early twentieth century, large numbers of artifacts, such as pottery and tools, were being taken from prehistoric ruins and sold to museums or private collections.<sup>15</sup> This practice, known as "pot-hunting," was responsible for the unauthorized amateur excavation of dozens of historical sites, and ancient artifacts were being sought for collection as far away as Europe.<sup>16</sup>

In the early 1900's, members of Congress introduced multiple versions of the bill to the House and Senate. By 1904, there were two competing Senate bills. Senator Collum introduced Senate Bill 4127 "[f]or the preservation of aboriginal monuments, ruins, and other antiquities, and for other purposes."<sup>17</sup> Meanwhile, Senator Lodge introduced Senate Bill 5603 "[f]or the preservation of historic and prehistoric ruins, monuments, archaeological objects, and other antiquities, and to prevent their counterfeiting."<sup>18</sup> While the titles speak for themselves, the Lodge Bill declared the exact purpose of the legislation: "preserving and protecting from wanton despoliation the historic and prehistoric ruins, monuments, archaeological objects, and other antiquities, and the work of the American aborigines on the public lands of the United States . . . ."<sup>19</sup> Both were similar in scope and each was much longer than the finalized Act, which is only four sections. However, the two differed in that the Collum Bill granted the power of delegation to the president, while the Lodge Bill did not grant any delegation power to the Executive and instead directed the Secretary of the Interior to make recommendations to Congress for national reservations. Moreover, while the Lodge Bill placed the responsibility for the care and excavation of the relics with the Secretary of the Interior, the Collum Bill vested this responsibility with the Smithsonian Institution.

On April 28, 1904, a hearing on both bills was held before the Senate Subcommittee of the Committee on Public Lands.<sup>20</sup> Besides the subcommittee members, those present included: Henry Mason Baum, the President of the Records of the Past Exploration Society; Dr. Francis

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14. Ronald F. Lee, *The Antiquities Act of 1906* 29 (2001).

15. *Id.* at 30.

16. *Id.* at 35.

17. S. 4127, 58th Cong. (1904).

18. S. 5603, 58th Cong. (1904).

19. *Id.* §1.

20. Preservation of Historic and Prehistoric Ruins, etc.: Hearing Before the Subcomm. of the Comm. on Public Lands of the U.S. Senate, 58th Cong. (1904).

W. Kelsey, the secretary of the Archaeological Institute of America; William A. Jones, Commissioner of Indian Affairs; Dennis J. O'Connell, rector of the Catholic University of America; Dr. Charles W. Needham, President of the Columbian University;<sup>21</sup> Mitchell Carroll, Associate Secretary of the Archaeological Institute of America, and; Frederick B. Wright, secretary of Records of the Past Exploration Society.<sup>22</sup>

Dr. Kelsey spoke for the archaeology professionals in attendance and expressed the general consensus that there was an immediate need to protect monuments and relics. Notably, Dr. Kelsey stated that the legislation should be “preservative rather than administrative. It should not attempt to deal with the things that may arise in the future, but should meet immediate contingencies in order to preserve what we have.”<sup>23</sup> Dr. Kelsey then recounted a recent visit to Denver when he saw two boxcars passing through containing archaeological relics taken from sites in the southwest to be distributed among private collections.<sup>24</sup> Dr. Kelsey was asked to comment on the differences between the Collum and Lodge Bills, and expressed his belief that the issue of responsibility for the care and excavation of the sites was secondary to the fundamental issue of the immediate preservation of these areas.<sup>25</sup>

Dr. Henry Baum<sup>26</sup> was the next to address the subcommittee regarding the importance of protecting historic relics. He traced the history of private excavation of southwestern sites including the Pueblo and Cliff Palace sites in Colorado. He also noted that more than 50,000 relics had been taken from Chaco Canyon, and that some private excavators had collected over \$100,000 from selling these relics.<sup>27</sup> He then differentiated between legislation for national parks and legislation for protecting these relics: “[n]o legislation for the creation of national parks only will serve this purpose. I have no personal interest in the matter other than that of an archaeologist.”<sup>28</sup>

Dr. Baum emphasized the importance of presenting this legislation to educational institutions, because he saw the importance of these relics as educational tools.<sup>29</sup> He stated that he sent a copy of the Lodge Bill to

21. Now George Washington University.

22. Preservation of Historic and Prehistoric Ruins, etc.: Hearing Before the Subcomm. of the Comm. on Public Lands of the U.S. Senate, at 3.

23. *Id.* at 5.

24. *Id.*

25. *Id.* at 7.

26. Mr. Baum was the President of the “Records of the Past Exploration Society” of Washington, D.C. (*See Id.* at 3).

27. *Id.* at 8-9.

28. *Id.* at 9.

29. *Id.* at 10.

every college and museum in the country. Dr. Baum then read into the record numerous statements of University Presidents and historical society officers in support of the protection of archaeological sites.<sup>30</sup> The remaining professionals who spoke at the meeting were in universal agreement that the Lodge Bill was preferable to the Collum Bill. The Lodge Bill placed the responsibility for excavation in the Secretary of the Interior, and notably did not vest any power in the Executive to designate land as national monuments, instead leaving this authority with Congress.

But, because there was a pressing need for immediate protection of archeological sites, some early versions of the bill focused on circumventing Congress and granting authority to the Executive to designate land as national monuments.<sup>31</sup> Western Congressmen, however, were reluctant to grant unilateral delegation power to the Executive.<sup>32</sup> By 1907, more than 150 million acres of forest reserves had been protected through Executive action on federal public land in the west.<sup>33</sup> This meant that the individual states were prohibited from using the land as they pleased, and there was clear hostility between representatives of western states and the Executive branch of the government. As Representative Rodey of New Mexico stated in 1905;

We have now almost everything withdrawn. New Mexico is covered with land grants that take all the good land. Then we have forest reserves and Pueblo Indian reserves and Nomadic Indian reserves and all sorts of things; and the danger is that if . . . these good scientific gentlemen see ruins here and there and everywhere, they will practically have the whole continental divide withdrawn from entry, and that will be a detriment to the country.<sup>34</sup>

As a result of this hostility, early versions of the Antiquities Act called for limits of 320 acres for any national monument delegation.<sup>35</sup> In a 1904 hearing before the Subcommittee of the Senate Committee of Public Lands, Dr. Baum in stating that the reservations should remain as small as possible, opined that “when it comes to setting aside from 50,000 to 200,000 acres of land it would have to go before Congress.”<sup>36</sup>

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30. *Id.* at 10-22.

31. Ronald F. Lee, *The Antiquities Act of 1906*, 55 (2001).

32. *Id.*

33. *Id.* at 56.

34. *Preservation of Prehistoric Ruins on the Public Lands: Hearings Before the Comm. on the Public Lands*, 58th Cong. 13 (1905).

35. Ronald F. Lee, *The Antiquities Act of 1906*, 29 (2001).

36. *Preservation of Historic and Prehistoric Ruins, Etc.: Hearing before the Subcomm. of the Comm. on Public Lands of the U.S. Senate*, 58th Cong. 10 (1904).

On January 11, 1905, the House Committee on the Public Lands held a hearing on the “Preservation of Prehistoric Ruins on the Public Lands.” The topics of discussion were the Senate Lodge Bill, an identical House Bill (H.R. 13349), and House Bill 13478 “[t]o establish and administer national parks, and for other purposes.”<sup>37</sup> Among those also present were: Thomas D. Seymour, Professor at Yale; Dr. Frances Kelsey; Mitchell Carroll; Dr. G.B. Gordon, Professor at the University of Pennsylvania; M.H. Saville, Professor at Columbia University; William Henry Holmes of the Smithsonian Institution, and; Dr. Henry Baum.

Among the notable views expressed at this hearing came from Charles P. Bowditch, Chairman of the Committee of the Archaeological Institute of America on American Archaeology.<sup>38</sup> In referencing the national parks bill, Mr. Bowditch voiced his displeasure with the provision allowing for the president to create a national park because of “scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest.”<sup>39</sup> Mr. Bowditch stated that there was a consensus among scientists to remove archaeology from this bill because there was no need to set aside large tracts of land for this purpose.<sup>40</sup> Instead, the consensus was to vest the authority to protect sites of archaeological interest in the Secretary of the Interior.<sup>41</sup>

Committee Chairman John F. Lacey and Dr. Baum discussed the amount of land that could be withdrawn under the Act. Chairman Lacey noted that the necessary land for protection of the relics would be “a very small amount,” and Dr. Baum expressed his belief that the Senate proposal would not pass without specific language limiting the size of the withdrawals.<sup>42</sup> Representative Rodey of New Mexico interjected: “I have more interest in this bill than almost anybody else; and while the Secretary of the Interior, if clothed with power to withdraw these lands, will probably exercise pretty good discretion, yet there ought to be some limit upon the amount of withdrawals that he could make.”<sup>43</sup> After a discussion of loopholes to any specific limiting language, Representative Rodey concluded: “the only thing I want to prevent is the possibility of a tremendous reservation.”<sup>44</sup>

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37. *Preservation of Prehistoric Ruins on the Public Lands: Hearings Before the Committee on the Public Lands*, 58th Cong. (1905).

38. Yes, that was actually its name.

39. *Preservation of Prehistoric Ruins on the Public Lands: Hearings Before the Committee on the Public Lands* at 8.

40. *Id.*

41. *Id.*

42. *Id.* at 11.

43. *Id.* at 13.

44. *Id.* at 14.

Thus, in an attempt to remedy the potential problem of large land withdrawals, the Committee on Public Lands amended the Senate Bill and reported to the House a Bill that provided for the Secretary of the Interior to make:

temporary withdrawals of the land on which such historic or prehistoric ruins, monuments, archaeological objects, and other antiquities are located, including only the land necessary for the preservation of such ruins and antiquities, and may make permanent withdrawals of tracts of land on which are ruins and antiquities of special importance, not exceeding six hundred and forty acres in any one place.<sup>45</sup>

Mr. Lacey also included in his report the necessity of the legislation: “[t]hese ruins have been frequently mutilated by people seeking the relics for the purpose of selling them. Such excavations destroy the valuable evidence contained in the ruins themselves, and prevent a careful and scientific investigation by representatives of public institutions interested in archaeology.”<sup>46</sup> An appendix to the report, authored by Edgar L. Hewett, Commissioner of the General Land Office, outlined some specific ruins which were in need of protection, including cliff and pueblo ruins in the Rio Grande Basin and the Little Colorado Basin.<sup>47</sup>

In early 1906, both the Senate and House had identical bills “For the preservation of American antiquities.”<sup>48</sup> It is unclear what caused the shift, but these versions delegated power to the President of the United States instead of the Secretary of the Interior, 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.”<sup>49</sup> Interestingly, the bills were without any language specifically limiting the area that could be delegated, and instead commanded that the reservations must be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>50</sup> Section 3 of the bills also vested the Secretaries of the Interior, Agriculture, and War with the responsibility

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45. S. Rep. No. 3704, 58th Cong. 2 (1904).

46. *Id.* at 2.

47. *Id.* at 3-4.

48. House Bill 11016 was proposed by House Chairman for the Committee on the Public Lands John F. Lacey. Senate Bill 4698 was proposed by Colorado Senator Thomas M. Patterson.

49. H. 11016, 59th Cong. 2 (1906).

50. *Id.*



of overseeing excavation, providing they be undertaken in the interest of scientific or educational institutions.<sup>51</sup> Bill 4698 passed the Senate on May 24, 1906.<sup>52</sup>

It is plausible that the modifications in the Act's language—transferring reservation authority to the president and eliminating the area limitations—were the result of a compromise between western legislators concerned with excessive land reservation and eastern legislators focused on the scientific value of certain artifacts and landmarks. The updated language in the Act ostensibly imposes a greater political accountability on the Executive while allowing for more discretion to achieve the scientific goals of the Act.

The Bill's final journey through the House illustrates the tensions between western lawmakers and the Executive branch. Chairman Lacey's final report to the House contains some language that seems to be directed towards worrisome legislators:

There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times. Practically every civilized government in the world has enacted laws for the preservation of the remains of the historic past, and has provided that excavations and explorations shall be conducted in some systematic and practical way so as not to needlessly destroy buildings and other objects of interest. The United States should adopt some method of protecting these remains that are still upon the public domain or in Indian reservations.<sup>53</sup>

On June 5, 1906, the House voted on Senate Bill 4698. Chairman Lacey read the bill on the floor, and Texas Representative John Hall Stephens rose to speak. Representative Stephens voiced his concerns about potential abuse, and Chairman Lacey assured him that the Bill was only “meant to cover the cave dwellers and cliff dwellers” and that it would not “result in locking up other lands.”<sup>54</sup> After this exchange, the

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51. *Id.*

52. S. 4698, 59th Cong. (1906).

53. H. Rep. No. 2224, 59th Cong. 1-2 (1906).

54. H. Cong. Rec. 59th Cong. 7888 (1906). The full exchange that took place is as follows:

Mr. Stephens: I desire to ask the gentlemen whether this applies to all the public lands or only certain reservations made in the bill?

Mr. Lacey: There is no reservation made in the bill of any specific spot.

House unanimously approved the Bill and it was passed. The Antiquities Act was presented to President Theodore Roosevelt and signed on June 8, 1906.<sup>55</sup>

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Mr. Stephens: I think the bill would be preferable if it covered a particular spot and did not cover the entire public domain.

Mr. Lacey: There has been an effort made to have national parks in some of these regions, but this will merely make small reservations where the objects are of sufficient interest to reserve them.

Mr. Stephens: Will that take this land off the market, or can they still be settled on as part of the public domain?

Mr. Lacey: It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.

Mr. Stephens: How much land will be taken off the market in the Western States by the passage of the bill?

Mr. Lacey: Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved.

Mr. Stephens: Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

Mr. Lacey: Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses.

Mr. Stephens: I will say that the bill was abused. I know of one place where in 5 miles square you could not get a cord of wood, and they call it a forest, and by such means they have locked up a very large area in this country.

Mr. Lacey: The next bill I desire to call up is a bill on which there is a conference report now on the Speaker's table, which permits the opening up of specified tracts of agricultural lands where they can be used, by which the very evil that my friend is protesting against can be remedied. It is House Bill 17576, which has passed both bodies, and there is a conference report for concurrence as to one of the details upon the Speaker's table.

Mr. Stephens: I hope the gentlemen will succeed in passing that bill, and this bill will not result in locking up other lands. I have no objection to its consideration.

55. *American Antiquities Act of 1906*, <https://www.nps.gov/history/local-law/anti1906.htm>. (last visited March 29, 2018). The full text of the Antiquities Act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Sec. 2. 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: Provided, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby

## II. Usage of the Antiquities Act and the Judicial Response

The Congress that enacted the Antiquities Act clearly did not intend to create large national monuments. Further, early presidential designations made under the Antiquities Act illustrate presidential intentions to limit the size of parcels that were being “locked up.” President Theodore Roosevelt, a consummate environmentalist and outdoorsman, first utilized the Antiquities Act when he proclaimed Devil’s Tower National Monument in 1906.<sup>56</sup> This first reservation constituted 1,193 acres.<sup>57</sup> President Roosevelt designated eighteen national monuments in total during his time in office.<sup>58</sup> Most of these designations ranged from ten acres to a few hundred, and just six were over 2,000 acres when designated.<sup>59</sup> The average size of monument designations has gradually increased over time, but this is not to say that every designation is colossal. For example, President Barack Obama is responsible for both the smallest monument designation to date at twelve acres,<sup>60</sup> and the largest at 283 million acres.<sup>61</sup> It is worth noting, however, that President Obama also reserved more acreage under the Antiquities Act than any other president, at 549 million acres.<sup>62</sup>

The act of creating a national monument is not the same as modifying

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authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

Sec. 3. That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulation as they may prescribe: Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

Sec. 4. That the Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act.

56. *Monuments List*, <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (last visited March 29, 2018).

57. *Id.*

58. *Id.*

59. Petrified Forest National Monument, Chacos Canyon National Monument, Cinder Cone National Monument, Grand Canyon National Monument, Grand Canyon II National Monument, Mount Olympus National Monument.

60. President Barack Obama designation The Stonewall National Monument in 2014.

61. President Barack Obama enlarged Papahānaumokuākea Marine National Monument by approximately 283.4 million acres. The national monument was initially designated by President as 89.5 million acres by President George W. Bush in 2006.

62. Carol Hardy Vincent, Congressional Research Service, *National Monuments and the Antiquities Act 2* (2016).

an existing monument. To reiterate, the Antiquities Act does not explicitly allow the president to modify national monuments; it expressly allows for the president to “declare” and “reserve.” While the meaning of these two terms is not clear, the absence of the express authority to modify existing monuments has not been a barrier in the past. In fact, presidents have easily hurdled over this issue eighty times through either enlargements or diminishment. Notably, the practices of enlarging and diminishing monuments can be traced to within a decade of the Act’s passage.

For example, just two years after the Act was signed into law, President William Howard Taft enlarged Natural Bridges National Monument, adding 2,620 acres to the initial reservation of 120 made by President Roosevelt.<sup>63</sup> Three years later in 1911, President Taft diminished the Petrified Forest National Monument, reducing the size from over 60,000 acres by nearly one-half.<sup>64</sup> President Hoover subsequently added 11,000 acres back to the monument in 1930.<sup>65</sup>

Of the more noteworthy examples, three separate presidents diminished the Mount Olympus National Monument, losing nearly half of its original size, before Congress redesignated it as a national park.<sup>66</sup> Another example is Arches National Monument, which President Herbert Hoover originally designated as 4,520 acres. Since the initial reservation, subsequent presidents have enlarged the monument three times and diminished it once, now totaling over 82,000 acres.<sup>67</sup> Again, in 1978 President Jimmy Carter became the fourth president to modify Katmai National Monument when he added over 1.3 million acres, more than doubling the existing size.<sup>68</sup>

The practice of presidential modification of National Monuments under the Antiquities Act is more than a century old. As is evident from the history of the Act, numerous presidents have interpreted the Act as granting them unconstrained discretion to create, diminish, or enlarge protected areas. Despite the modifications, no president has ever utilized the Act to completely abolish a National Monument. This is not to say that modification of existing national monuments under the Antiquities Act is not controversial. President Trump’s actions in diminishing the sizes of Bears Ears and Grand Staircase National Monuments certainly caused an uproar, but the history of presidential action under the

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63. *Monuments List*, <https://www.nps.gov/archeology/sites/Antiquities/MonumentsList.htm> (last visited March 29, 2016).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

Antiquities Act is replete with controversy.

Consider President Franklin D. Roosevelt's designation of Jackson Hole National Monument in 1943.<sup>69</sup> This action led to the creation of a law prohibiting national monuments in Wyoming unless so delegated by Congress.<sup>70</sup> President Jimmy Carter also caused controversy when he used the Antiquities Act to delegate fifty-six million acres of Alaskan wilderness as national monuments.<sup>71</sup> As a result of this action, Congress signed a law that now requires congressional approval for any Alaskan land withdraw over 5,000 acres.<sup>72</sup> President Barack Obama likewise stirred debate by using the Antiquities Act to delegate twenty-three new national monuments and enlarge three others, including the creation of Bears Ears National Monument in the final weeks of his presidency.<sup>73</sup> While the dispute over presidential powers under the Antiquities Act has continued nearly since its inception, the United States Supreme Court has never reversed a president's actions under the Act.<sup>74</sup> In fact, the Supreme Court has only addressed presidential powers under the Act three times.

The Supreme Court's first time addressing the Antiquities Act was in *Cameron v. United States*.<sup>75</sup> The Court dismissed a claim by a mining company who claimed mining rights in a portion of the Grand Canyon.<sup>76</sup> The mining company argued that the president had no authority to designate such land as a national monument.<sup>77</sup> The Court upheld the president's actions in designating the Grand Canyon a national monument under the Antiquities Act because the area was "an object of scientific interest."<sup>78</sup>

In *United States v. California*,<sup>79</sup> the Supreme Court once again upheld presidential authority to reserve land under the Antiquities Act. In this case, the Supreme Court addressed a 1949 reservation of submerged lands and waters surrounding the Channel Islands National Monument

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69. Carol Hardy Vincent, Congressional Research Service, National Monuments and the Antiquities Act 1 (2016).

70. *Id.*

71. *Designation of National Monuments in Alaska Statement by the President*, www.presidency.ucsb.edu/ws/?pid=30228 (last visited March 29, 2018).

72. Carol Hardy Vincent, Congressional Research Service, *National Monuments and the Antiquities Act* 2 (2016).

73. *Id.*

74. *Id.*

75. *Cameron v. United States*, 252 U.S. 450 (1920).

76. At this point, the Grand Canyon was not yet part of the National Park System and had been delegated a national monument under the Antiquities Act.

77. *Cameron* at 455.

78. *Id.*

79. *United States v. California*, 436 U.S. 32 (1978).

in California.<sup>80</sup> The Court held that “there can be no serious question . . . that the President in 1949 had the power under the Antiquities Act to reserve the submerged lands and waters.”<sup>81</sup> The Court noted the unquestionable power of the president, noting that whether the president “did in fact reserve these submerged lands and waters, or only the inlets and protruding rocks, could be, at the time of the Proclamation, a question only of Presidential intent, not of Presidential power.”<sup>82</sup>

The Supreme Court upheld one presidential modification of a monument in *Cappaert v. United States*.<sup>83</sup> In *Cappaert*, the president had used the Antiquities Act to enlarge a portion of Death Valley National Monument<sup>84</sup> to include an underwater cavern inhabited by a rare species of fish.<sup>85</sup> Subsequently, a rancher began pumping groundwater that originated at the same source of water.<sup>86</sup> The Nevada state engineer allowed the pumping to continue, and the federal government sued the ranchers.<sup>87</sup> The Supreme Court unanimously upheld the president’s actions, holding that the caverns included “objects of historic or scientific interest” pursuant to the Antiquities Act.<sup>88</sup> The Court did not specifically address the authority to modify monuments under the Act. Rather, the Court implicitly viewed the addition of the underwater cavern to the monument as a reservation under the Act.

Thus, even though presidential authority under the Antiquities Act has been questioned numerous times, the Supreme Court has only bothered to address this question thrice. Each time, the Court decidedly upheld the president’s authority to designate or expand national monuments of scientific or historical interest.

### *III. The Antiquities Act Under Barack Obama and Donald Trump*

President Barack Obama used the Antiquities Act to reserve more acreage than any other president before him.<sup>89</sup> Shortly after President

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80. *California* at 32.

81. *Id.* at 35.

82. *Id.* at 36.

83. *Cappaert v. United States*, 426 U.S. 128 (1976).

84. Death Valley was designated by Congress as a National Park in 1994.

85. *Cappaert* at 131.

86. *Id.*

87. *Id.*

88. *Id.* at 141-142.

89. President Obama reserved about 553 million acres under the Act. See Juliet Eilperin, *With new monuments in Nevada, Utah, Obama adds to his environmental legacy.* [https://www.washingtonpost.com/national/health-science/with-new-monuments-in-nevada-utah-obama-adds-to-his-environmental-legacy/2016/12/28/e9833f62-c471-11e6-8422-eac61c0ef74d\\_story.html?utm\\_term=.9a26314f99fc](https://www.washingtonpost.com/national/health-science/with-new-monuments-in-nevada-utah-obama-adds-to-his-environmental-legacy/2016/12/28/e9833f62-c471-11e6-8422-eac61c0ef74d_story.html?utm_term=.9a26314f99fc) (last visited March 29, 2018).

Donald Trump took office, he directed Secretary of the Interior Ryan Zinke to review recent national monument designations of over 100,000 acres.<sup>90</sup> After Secretary Zinke's review was complete, President Trump used the Antiquities Act to shrink Bears Ears National Monument by eighty five percent and Grand Staircase National Monument by almost half.<sup>91</sup> Notably, President Obama designated Bears Ears in the final days of his presidency, while President Bill Clinton designated Grand Staircase in 1996.<sup>92</sup>

President Trump ostensibly based his decision on the language of the Antiquities Act limiting reservations to the "smallest area" possible, stating that a monument could be diminished if it did not abide by this requirement.<sup>93</sup> President Trump stated that "[n]o one values the splendor of Utah more than the people of Utah – and no one knows better how to use it. Families will hike and hunt on land they have known for generations, and they will preserve it for generations to come."<sup>94</sup> The decision drew praise from some and the ire of others. Governor Gary Herbert of Utah was "pleased that Utahans once again have a voice in the process of determining appropriate uses of these public lands that we love."<sup>95</sup> Utah Senator Orrin Hatch remarked "the President's proclamation represents a balanced solution and a win for everyone on all sides of this issue."<sup>96</sup> At the same time, popular outdoor apparel company Patagonia filed a lawsuit against President Trump, claiming that he abused his authority under the Act when he removed acreage from the monuments. The company promulgated the motto "The President Stole Your Land" in response to what was perceived as a theft of public lands from the American people.<sup>97</sup>

While President Trump's modification of existing national monuments is not expressly authorized by the Antiquities Act, it is far from the first time that a national monument has been altered. Due to the

90. Tatiana Schlossberg, *What is the Antiquities Act and why does President Trump Want to Change it?*, <https://www.nytimes.com/2017/04/26/climate/antiquities-act-federal-lands-donald-trump.html> (last visited March 29, 2018).

91. Julie Terkowitz, *Trump Slashes Sizes of Bears Ears and Grand Staircase Monuments*, <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html> (last visited March 29, 2018).

92. President Obama expanded Grand Staircase in 2016.

93. *President Trump and Secretary Zinke Announce Modification to Utah Monuments, Resulting in 5 Unique National Monument Units Totaling More Than 1.2 Million Acres*, <https://www.doi.gov/pressreleases/president-trump-and-secretary-zinke-announce-modification-utah-monumentsresulting-5> (last visited March 29, 2018).

94. *Id.*

95. *Id.*

96. *Id.*

97. Rachel Layne, *Patagonia vows to sue Trump over national monuments*, <https://www.cbsnews.com/news/patagonia-vows-to-sue-trump-over-national-monuments/> (last visited March 29, 2018).

current political climate, however, President Trump's actions may be receiving more attention than past actions. But, in the face of the current challenges to President Trump's actions, the question of the extent of the president's authority under the Antiquities Act remains unanswered by courts and is as important as ever.

#### *IV. The Congress that Enacted the Antiquities Act did not Expect Large Tracts of Land to be Reserved*

Some have criticized legislative history as an unreliable indicator of the legislature's intent in drafting a law.<sup>98</sup> It is beyond question, however, that the Congress that enacted the Antiquities Act had no intention of allowing for the reservation of large tracts of land.

At the beginning of the twentieth century, tensions were high surrounding the debate over government control of western lands. This was partially due to a new law; The Forest Reserve Act of 1891. The Act allowed for the president to reserve forests from the public domain and declare them as national forests.<sup>99</sup> The purpose of the Act was to prevent forest lands from destruction by placing them in the hands of the federal government, however this was immediately seen as a federal "land grab." Benjamin Harrison, the president who signed the Act, issued proclamations reserving thirteen million acres of forest, removing the land from the control of the state.<sup>100</sup> This issue persisted through the time of the signing of the Antiquities Act, as President Theodore Roosevelt proclaimed thirty-two forest reserves totaling one hundred fifty million acres in 1907.<sup>101</sup>

With full awareness of the problems caused by the Forest Reserve Act, the drafters of the Antiquities Act clearly intended to protect objects on a much more limited scale.<sup>102</sup> An early version of the bill proposed limiting any monuments to 320 acres.<sup>103</sup> This was later amended to a maximum limit of 640 acres.<sup>104</sup> The Act was even

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98. The late Supreme Court Justice Antonin Scalia in particular was an opponent of the theory, and many like-minded individuals adhered to his philosophy. See Antonin Scalia, *A Matter of Interpretation* 18 (1997) ("[Y]our best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant; and that will surely bring you to the conclusion that the law means what you think it ought to mean.").

99. 5-12 *Treatise on Environmental Law* § 12.03 (2017).

100. <http://presidentbenjaminharrison.org/learn/benjamin-harrison-1>

101. SYMPOSIUM:PUBLIC LANDS MANAGEMENT AT THE CROSSROADS: BALANCING INTERESTS IN THE 21st CENTURY:SYMPOSIUM ARTICLE:A PRESERVATION PARADOX: POLITICAL PRESTIDIGITATION AND AN ENDURING RESOURCE OF WILDNESS, 34 ENVTL. L. 1015, 1060.

102. S. Bill 4127, Feb 5, 1904.

103. *Supra* note 18.

104. House of Representatives, *Preservation of American Antiquities*, March 12, 1906 Report.



intended to target specifically delegated regions and monuments. These included ruins in the Rio Grande Basin and the Little Colorado Basin.<sup>105</sup> Conversations of the drafters of the Act illustrate the clear desire to limit the delegations to small areas of scientific interest and those containing Native American ruins and artifacts.<sup>106</sup> Moreover, the record is unambiguous that western representatives were hesitant to sign onto the Act in fear that it would result in the land grabs that occurred under the Forest Reserve Act, and much like those that occur today under the Antiquities Act.<sup>107</sup> And, while the exact limiting language of a maximum number of acres was ultimately dropped from the Act and replaced with “the smallest area compatible with the proper care and management of the objects to be protected,” this was only after repeated assurances that the “smallest area” actually meant the “smallest area.”<sup>108</sup>

The fears expressed by archaeologists, environmentalists, and congressmen in the years before the Act’s passage have certainly been realized.

#### CONCLUSION

A study of the Antiquities Act poses difficult questions. Does over a century of accepted usage of the Act justify actions not expressly authorized by Congress? Can a president take action to remedy a designation, the size of which is clearly outside the scope of what the legislature intended? Has President Trump abused his authority in modifying existing national monuments, or is the outraged public crying wolf? And, is the Antiquities Act even necessary in 2018?

It is clear that the hundreds of millions of acres reserved under the Antiquities Act far exceed what Congress intended. Also, there is no evidence that by using the words “declare” and “reserve,” Congress intended to grant modification authority to the president. It is equally clear, however, that the modification of existing national monuments is a well-settled use of Antiquities Act authority, with an average of almost one modification per year since the Act’s passage. Setting aside any partisanship, this historical trend cannot be ignored. The author desires to tread lightly lest he appear to condone a controversial action taken by President Trump. But, regardless of whatever subjective personal motivations may have been behind these decisions, deference must be given to this longstanding practice over the intentions of the legislature not written into law.

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105. *Id.*

106. *Supra* note 24.

107. *Id.*

108. *Id.*

Nonetheless, President Trump's actions have illustrated the longstanding abuses of the Antiquities Act and propelled the legislation back into the public spotlight. Congress should strike while the iron is hot to prevent future misuse of the Act.

The debate over public lands is a complicated topic with no clear answers. But, a century of abuse of the Antiquities Act warrants action from Congress. Continuing to allow the president to reserve large tracts of acreage for national monuments does not serve the purpose of the Act. The need for immediate action and the rationale behind this grant of authority to the president no longer exists today, especially in the context of the massive reservations that have been made. Most unprotected scientific and historical sites do not face the same dangers of "pot hunting" that they did a century ago, largely due to the protection of these lands by early reservations made under the Act. What was once a resounding success has now overstayed its welcome.

One viable option is to revise the Act to affect its original purpose. This could be accomplished by adding clear limiting language, as was contemplated by the original drafters to offset the fear of large reservations. This language could be in the form of a limit on the size of a monument, or the number of allowable reservations. This would serve to minimize any future abuse of the Act, yet still vest the president with the authority to protect an area in need with an immediacy that Congress cannot guarantee. If Congress amends the Act, a step should be taken to address the modification question by explicitly delineating the Executive powers under the Act and authorizing a modification authority, if so desired.

Or, in the alternative, Congress could eliminate the Antiquities Act and return the exclusive constitutionally vested authority to manage federal lands to the legislative branch, giving Congress alone the authority to reserve national monuments and eliminating the possibility of any Executive overreach.

The Antiquities Act was a carefully drafted piece of legislation aimed at protecting vulnerable scientific and historical resources. It served this purpose well for a short period of time. The Act was not designed to perpetually allow sitting presidents to unilaterally decide which public lands are or are not deserving of protection. It has been abused for years and is well past the point of needing to be amended or completely retired. Whichever the case, the time to act is now. Congress should modify the Act to ensure that its penchant for abuse is not preserved for future presidents. Or, perhaps the Antiquities Act is one ancient relic that is not worth protecting.