

Downsizing National Monuments: The Current Debate and Lessons From History

Grant Horton

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INTRODUCTION

Since the day he was sworn into office as the forty-fifth president of the United States, President Donald Trump has ignited fierce and daily controversy. Many of the president’s statements, such as his comments about undocumented immigrants and white supremacists, have alarmed people and enflamed passions across the country. Other statements made by President Trump, such as his twitter tirades about voter fraud, media bias, and the impeachment process, have threatened to undermine the public’s faith in our country’s democratic institutions. Yet, President Trump’s actions are likely to have even more significant and lasting impacts than his rhetoric. Some of the president’s most recent and controversial actions—like his declaration of a National Emergency to secure funds to build a wall on the country’s southern border—have revived longstanding debates about presidential power and federal management of public lands.¹

1. See Charlie Savage and Robert Pear, *16 States Sue to Stop Trump’s Use of Emergency Powers to Build Border Wall*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/>

One of the most publicized and controversial actions President Trump has taken with respect to federal public lands since assuming office involves the reduction of national monuments. During the 2016 presidential campaign, Trump promised repeatedly to undo various actions by President Barack Obama and to open up more federal lands to oil and gas production.² On April 26, 2017, President Trump took the first step toward fulfilling these promises by issuing Executive Order 13792, titled “Review of Designations Under the Antiquities Act.”³ The order directed the Secretary of the Interior to conduct a review of all national monuments designated since 1996 that covered at least 100,000 acres and to provide a report to the president with recommendations for reductions to any monuments the Secretary deemed as not “made in accordance with the requirements and original objectives” of the Antiquities Act.⁴ The order also empowered the Secretary of the Interior to review and make recommendations regarding any national monuments established since 1996 for which “the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.”⁵ The order singled out Bears Ears—a national monument established by President Obama covering about 1.35 million acres in Utah—as one of the first national monuments to be considered for reduction.⁶

On June 10, 2017, after holding a four-day listening tour in Utah to hear from community representatives, former Secretary of the Interior Ryan Zinke submitted an interim report to the president recommending that Trump declare significant reductions to Bears Ears National Monument.⁷ President Trump

us/politics/national-emergency-lawsuits-trump.html [https://perma.cc/9VUT-ACV9]. After President Trump declared a National Emergency on February 15, 2019 in an attempt to divert \$3.6 billion in military construction funds for his proposed border wall, a coalition of 16 states including California and New York challenged the president’s actions in court. *Id.* The states claim the president overstepped his constitutional authority by circumventing Congress. *Id.*; see also Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/us/politics/trump-veto-national-emergency.html> [https://perma.cc/JU4T-QTXA] (discussing President Trump’s veto of a Senate resolution which attempted to overturn the diversion of funds for the border wall).

2. See Noah Bierman, *Donald Trump Promises To “Lift The Restrictions on American Energy” in Appeal to Fracking Industry*, L.A. TIMES (Sept. 22, 2016), <https://www.latimes.com/politics/la-fi-trump-fracking-20160922-snap-story.html> [https://perma.cc/HU6N-YTD5].

3. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

4. *Id.*; see also 54 U.S.C. § 32030 *et seq.* (2012). The language used in the Antiquities Act describes the Act’s requirements and objectives broadly, allowing the president to designate “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” on public lands as national monuments, though facially requiring that these designations be limited in size to the “smallest area compatible” with proper management of the objects to be protected. See *infra* notes 27–28 and accompanying text.

5. Exec. Order No. 13,792, 82 Fed. Reg. 20,429.

6. *Id.*

7. Memorandum from Ryan K. Zinke, Sec’y of the Interior, to President Donald Trump, *Interim Report Pursuant to Executive Order 13,792* (June 10, 2017), <https://www.doi.gov>.

subsequently issued two proclamations on December 4, 2017, which downsized Bears Ears by 85 percent⁸ and Grand Staircase-Escalante by about 46 percent.⁹ The president justified the reductions in both proclamations by claiming that many of the protected objects at Bears Ears and Grand Staircase-Escalante are “not unique to the monument[s]” and are “not of significant scientific or historic interest.”¹⁰ Both proclamations also stated that many of the objects at Bears Ears and Grand Staircase-Escalante are “not under threat of damage or destruction such that they require a reservation of land to protect them.”¹¹ The reductions of both national monuments went into effect on February 2, 2018.¹²

Former Secretary Zinke issued his final report on December 5, 2017, the day after President Trump announced the reductions to Bears Ears and Grand Staircase-Escalante.¹³ In his report, Zinke reviewed a total of 27 national monuments designated under the Antiquities Act since 1996.¹⁴ Zinke solicited public comment during his review, and admitted in his report that “[c]omments received were overwhelmingly in favor of maintaining existing monuments.”¹⁵ The Secretary nevertheless recommended changes to a number of national monuments “to protect traditional multiple use” and dismissed the comments of those opposing the changes as merely “demonstrat[ing] a well-orchestrated national campaign organized by multiple organizations.”¹⁶ In addition to the

gov/sites/doi.gov/files/uploads/final_interim_report_about_monuments.pdf [https://perma.cc/B2L9-4P34]; see also Press Release, U.S. Dep’t of the Interior, Secretary Zinke Submits 45-Day Interim Report on Bears Ears National Monument and Extends Public Comment Period (June 12, 2017), <https://www.doi.gov/pressreleases/secretary-zinke-submits-45-day-interim-report-bears-ears-national-monument-and-extends> [https://perma.cc/JDE4-7HGE].

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

9. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017); see also Juliet Eilperin, *Zinke Backs Shrinking of More National Monuments and Shifting Management of 10*, WASH. POST (Dec. 5, 2017), https://www.washingtonpost.com/national/health-science/zinke-backs-shrinking-more-national-monuments-shifting-management-of-10-others/2017/12/05/e116344e-d9e5-11e7-b1a8-62589434a581_story.html?utm_term=.b430ddbc597f [https://perma.cc/WDE3-FPQ2].

10. Proclamation No. 9681, 82 Fed. Reg. 58,081; Proclamation No. 9682, 82 Fed. Reg. 58,089.

11. *Id.*

12. See Hannah Nordhaus, *What Trump’s Shrinking of National Monuments Actually Means*, NAT’L GEOGRAPHIC (Feb. 2, 2018), <https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments> [https://perma.cc/8V76-8BMK].

13. Memorandum from Ryan K. Zinke, Sec’y of the Interior, to President Donald Trump, *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act* (Dec. 5, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/revise_final_report.pdf [https://perma.cc/2DWQ-FRM3]. Zinke’s review included national monuments in Arizona, California, Colorado, Hawaii, Idaho, Maine, Montana, Nevada, New Mexico, Oregon, Utah, and Washington, as well as five marine monuments. *Id.*

14. *Id.*

15. *Id.* at 3.

16. *Id.*

reductions of Bears Ears and Grand Staircase-Escalante in Utah, Zinke's report recommended that President Trump downsize Nevada's Gold Butte and Oregon's Cascade-Siskiyou National Monuments. Zinke's report further suggested amending the proclamations of six other national monuments to ensure that activities such as grazing, hunting, fishing, and timber harvesting could continue.¹⁷

Former Secretary Zinke's report instantly became a topic of fierce debate in public discourse. Conservative lawmakers praised the Secretary's recommendations as a first step toward ending federal overreach¹⁸ while conservation advocates and tribal representatives protested that reducing national monuments and federal public lands protections via presidential proclamation was both unwise and unconstitutional.¹⁹ Critics of the proposed national monument reductions have also attacked Zinke's review process, arguing that the Secretary ignored or suppressed evidence of the benefits of national monuments, such as increased tourism revenues and decreased vandalism, while tailoring his analysis to emphasize the potential value of logging, ranching, and energy development at existing national monument sites.²⁰ Others have argued that Zinke's public review process was a sham in its entirety, intended only to legitimize the exclusion of areas rich in oil and natural gas from existing

17. See Juliet Eilperin, *Zinke Backs Shrinking of More National Monuments and Shifting Management of 10*, WASH. POST (Dec. 5, 2017), https://www.washingtonpost.com/national/health-science/zinke-backs-shrinking-more-national-monuments-shifting-management-of-10-others/2017/12/05/e116344e-d9e5-11e7-b1a8-62589434a581_story.html?utm_term=.723b4483b213 [<https://perma.cc/9JTN-ZSJ6>] (discussing former Secretary Zinke's recommended changes to the proclamations for the following national monuments: Northeast Canyons and Seamounts (Atlantic Ocean), Rose Atoll and the Pacific Remote Islands (Pacific Ocean), Organ Mountains-Desert Peaks and Rio Grande Del Norte (New Mexico), and Katahdin Woods and Waters (Maine)).

18. See Press Release, U.S. Dep't of the Interior, WTAS: President Trump and Secretary Zinke Praised for National Monument Report (Dec. 6, 2017), <https://www.doi.gov/pressreleases/wtas-president-trump-and-secretary-zinke-praised-national-monument-report> [<https://perma.cc/5WYR-5HCZ>] (noting a reference by Gov. Gary R. Herbert of Utah to the proposed national monument reductions as "an opportunity to push a reset button on these areas").

19. See Josh Dawsey & Juliet Eilperin, *Trump Shrinks Two Huge National Monuments in Utah, Drawing Praise and Protests*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581_story.html?utm_term=.ec81c20cf6b4 [<https://perma.cc/NSQ3-BZ3M>].

20. See Juliet Eilperin, *Trump Administration Officials Dismissed Benefits of National Monuments*, WASH. POST (July 23, 2018), https://www.washingtonpost.com/national/health-science/trump-administration-officials-dismissed-benefits-of-national-monuments/2018/07/23/5b8b1666-8b9a-11e8-a345-a1bf7847b375_story.html [<https://perma.cc/YT67-KCU9>]. The accusations were first made after the Interior Department inadvertently posted certain internal communications online in response to FOIA requests made by various journalists and advocacy groups. *Id.*

national monuments.²¹ Secretary Zinke resigned about one year after he issued his report, amid allegations of various unrelated scandals.²²

President Trump's December 4, 2017 proclamations reducing the Bears Ears and Grand Staircase-Escalante National Monuments have been met with a similar furor. On the same day that Trump announced the proposed reductions, Native American tribes and environmental groups filed lawsuits in the U.S. District Court for the District of Columbia challenging the president's actions with respect to both national monuments as outside the scope of his constitutional authority.²³ The plaintiffs in both cases have brought a number of claims against President Trump and his administration based on alleged violations of the Antiquities Act, the Administrative Procedure Act, and the separation-of-powers doctrine.²⁴ A number of U.S. states have filed amicus briefs in both cases, and the merits of each case have yet to be addressed by the courts.²⁵ Thus, the question of whether the Antiquities Act gives a president the authority to reduce or revoke national monument designations made by previous presidents remains a timely and highly controversial issue.

To more properly analyze this issue in the future, courts and legal scholars should closely examine past presidential and congressional actions regarding the management of federal public lands. Part I of this Comment includes a brief review of how courts have historically approached challenges to national monument designations, before turning to the existing legal and scholarly debate regarding a president's authority to reduce or revoke national monument protections under the Antiquities Act, paying special attention to the role of the Property Clause in the U.S. Constitution. Part II discusses the difficulties of examining a president's authority to reduce or revoke national monuments through Justice Jackson's popular framework for assessing executive power, established in his famous concurrence from *Youngstown Sheet & Tube Co. v. Sawyer*.²⁶ This Part argues that courts should broaden their view of the issue by

21. See Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html> [<https://perma.cc/YT67-KCU9>]. President Trump's December 2017 reductions of the Bears Ears National Monument closely mirror the reductions proposed by former Utah Senator Orrin Hatch's office to former Secretary Zinke in March 2017, before the Secretary publicly initiated his review. *Id.* Senator Hatch claimed that these proposed reductions would "resolve all known mineral conflicts" in the area by excluding certain coal and natural gas deposits from the monument. *Id.*

22. See Ben Lefebvre, *Zinke To Leave Interior Amid Scandals*, POLITICO (Dec. 15, 2018), <https://www.politico.com/story/2018/12/15/zinke-interior-secretary-leave-trump-1066653> [<https://perma.cc/D4LD-U5DX>].

23. See *Hopi Tribe v. Trump*, No. 17-cv-2590, 2017 WL 6033876 (D.D.C. filed Dec. 4, 2017); *Wilderness Soc'y. v. Trump*, No. 17-cv-2587, 2017 WL 6015958 (D.D.C. filed Dec. 4, 2017); see also Michael Nordskog, *Tribes, Environmental Groups Sue Trump Over National Monument Purge*, 38 No. 11 WJENV 1 (2017).

24. See *Hopi Tribe*, 2017 WL 6015958; *The Wilderness Society*, 2017 WL 6015958.

25. See *Hopi Tribe*, 2017 WL 6015958; *The Wilderness Society*, 2017 WL 6015958.

26. 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

examining how the Property Clause has historically been applied to Congress and the president. As demonstrated below, such an analysis reveals that Congress's powers in the Property Clause context have repeatedly been interpreted broadly, whereas the president's powers in this area have been more fiercely questioned and challenged. Finally, Part III touches on how this historical evidence interacts with existing legal precedent and the ways in which it can help inform the current debate about whether President Trump has the legal authority under the Antiquities Act to reduce preexisting national monuments.

I. CHALLENGES TO NATIONAL MONUMENT DESIGNATIONS AND THE CURRENT LEGAL DEBATE

The Property Clause of the U.S. Constitution states: "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."²⁷ In 1906, Congress delegated part of this authority to the president by passing the Antiquities Act, which granted the president unilateral authority 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."²⁸ The Act states that the president "may reserve parcels of land" in designating national monuments, but that the "limits of the parcels shall be confined to the smallest area compatible with proper care and management of the objects to be protected."²⁹ Part B, below, examines the relationship between the Property Clause and the Antiquities Act in greater detail.

A. *National Monument Designations: A History of Presidential Discretion*

The U.S. Supreme Court has only addressed a handful of cases that challenged the president's authority to declare national monuments under the Antiquities Act, but it has consistently afforded wide discretion to presidents' decisions to create and expand national monuments. In *Cameron v. United States*,³⁰ the Supreme Court considered a challenge to President Theodore Roosevelt's designation of the Grand Canyon National Monument in Arizona. Before President Roosevelt designated the monument, the defendant in

27. U.S. CONST. art. IV, § 3, cl. 2. Unlike most of Congress's legislative powers, the Property Clause is listed in Article IV rather than Article I of the U.S. Constitution. Legal scholars disagree on the reasons for this. Some have argued that the Property Clause makes logical sense in close proximity to the Admission Clause in Article IV, while at least one scholar has suggested that the authors of the U.S. Constitution considered federal public lands management to be more administrative than legislative in nature. See Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761, 778–84 (2018), <https://ssrn.com/abstract=3147937>.

28. 54 U.S.C. § 320301(a) (2012).

29. *Id.* § 320301(b).

30. 252 U.S. 450 (1920).

Cameron established a mining claim on the South Rim of the Grand Canyon near the trailhead for the popular Bright Angel Trail, used by tourists to access the canyon.³¹ The defendant occupied this tract of land and charged tourists a fee to cross it to access the Bright Angel Trail. The defendant continued to do so even after the Department of the Interior found his mining claim invalid and President Roosevelt declared the Grand Canyon a national monument.³² When the U.S. government filed a lawsuit to force the defendant off of the land, the defendant challenged the president's designation of the Grand Canyon as a national monument under the Antiquities Act, claiming that the Grand Canyon was not of sufficient historic or scientific interest.³³ The Supreme Court firmly rejected this argument and upheld the president's designation of the Grand Canyon National Monument as lawful under the Antiquities Act.³⁴ Although not explicitly addressed in the case, the Supreme Court gave the president wide discretion in meeting the Antiquities Act's requirement that reserved land be limited to the "smallest area compatible" with proper care and management by upholding President Roosevelt's designation of the entire Grand Canyon National Monument as a whole.³⁵

In a more recent decision, the Supreme Court analyzed the extent to which a president's designation of a national monument also implies a reservation of the groundwater that filters into and out of the monument's boundaries. The defendants in *Cappaert v. United States* were a family of ranchers who lived about two and a half miles from Devil's Hole, a deep, pool-filled limestone cavern within the borders of Death Valley National Monument in Nevada.³⁶ The defendants began pumping groundwater on their ranch in 1968. Three years later, the U.S. government sued to enjoin their groundwater pumping after discovering the defendants' actions were reducing the water levels in Devil's Hole; the government was concerned that this reduction posed a danger to the Devil's Hole "pupfish" that lived there.³⁷ The defendants argued in response that the president's designation of Death Valley National Monument did not include the groundwater which they pumped from outside the monument's boundaries.³⁸ The Supreme Court again sided with the U.S. government, affirming the lower court's ruling that "the President reserved appurtenant, unappropriated waters necessary to the purpose of

31. *Id.* at 456.

32. *Id.* at 458 n.1.

33. *Id.* at 455.

34. *Id.*

35. See Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—A Call For A New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 416–17 (1998). President Roosevelt's designation of the Grand Canyon National Monument covered about 800,000 acres—by far the largest reservation of land under the Antiquities Act up to that point in time. *Id.*

36. *Cappaert v. United States*, 426 U.S. 128, 131–33 (1976).

37. *Id.* at 133–35.

38. *Id.*

the reservation,” which was to preserve the pool and the pupfish in it.³⁹ While the court’s decision largely rested on President Truman’s inclusion of the Devil’s Hole pool and its pupfish as among the “objects of historic or scientific interest” to be protected, it also confirmed that the president’s authority under the Antiquities Act reached reservations of water which the president had not explicitly designated in his proclamation.⁴⁰

U.S. Federal District Courts have similarly given wide discretion to presidents when reviewing legal challenges to national monument designations under the Antiquities Act; however, one case in the Federal District Court of Alaska has raised questions about the limits of presidential designations. In *Anaconda Copper v. Andrus*, the court reviewed a challenge to President Carter’s withdrawal of over 56 million acres in Alaska under the Antiquities Act for the creation of 15 new national monuments and the expansion of two preexisting monuments.⁴¹ In a bench ruling on a motion for partial summary judgment, the court strongly criticized the size of President Carter’s designations, suggesting that he had exceeded his authority under the Antiquities Act by violating the Act’s requirement that national monument designations be limited to the “smallest area compatible” with proper care and management of the objects that the monument is intended to protect.⁴² However, before a final judgment was reached, the case became moot due to Congress’s passage of the Alaska National Interest Lands Conservation Act⁴³ (ANILCA) in 1980.⁴⁴

Subsequent decisions by U.S. Courts of Appeals have reaffirmed the president’s broad discretion when creating and expanding national monuments under the Antiquities Act. In *Tulare County v. Bush*, the D.C. Circuit dismissed a challenge to President Clinton’s designation of the Giant Sequoia National Monument, which encompasses 327,769 acres in south-central California.⁴⁵ The plaintiffs argued that President Clinton had not “made any meaningful investigation or determination of the smallest area necessary” to protect the objects listed in his proclamation, but the court rejected this reasoning and held that “the Antiquities Act does not impose upon the President an obligation to make any particular investigation” when determining the size of a new national monument.⁴⁶ The court instead reasoned that judicial review of a president’s decision to establish a national monument under the Antiquities Act

39. *Id.* at 136.

40. Harrison, *supra* note 35, at 418–19.

41. *Anaconda Copper v. Andrus*, 14 ERC 1853, No. A79-161 (D. Alaska 1980); see Harrison, *supra* note 35, at 430–31; see also Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 457 (1981).

42. Harrison, *supra* note 35, at 430 n.141. The court upheld the president’s designation of the monuments in Alaska as “areas of protected scientific interest” but questioned whether the size of the areas designated was appropriate under the Antiquities Act. *Id.*

43. 16 U.S.C. § 3209 (2012).

44. Harrison, *supra* note 35, at 431.

45. *Tulare County v. Bush*, 306 F.3d 1138, 1140–42 (D.C. Cir. 2002).

46. *Id.* at 1142.

must be approached narrowly, and that the district court had acted properly “in limiting its review to the face of the Proclamation rather than reviewing the President’s discretionary factual determinations,” such as the appropriate size of the monument.⁴⁷ On the same day that it decided *Tulare County v. Bush*, the D.C. Circuit rejected similar challenges to six other national monuments established by President Clinton near the end of his second term.⁴⁸

More recently, the Federal District Court for the District of Columbia grappled with a new type of challenge to President Obama’s designation of the Northeast Canyons and Seamounts Marine National Monument in the Atlantic Ocean.⁴⁹ The plaintiffs in *Massachusetts Lobstermen’s Association v. Ross* claimed that President Obama’s designation of the Northeast Canyons and Seamounts National Monument violated the Antiquities Act in three ways: (1) the submerged lands of the Canyons and Seamounts did not meet the proper definition of “lands” under the Act; (2) the federal government did not “control” the lands in question; and (3) the lands reserved by President Obama exceeded the “smallest area compatible” with proper management as required by the Act.⁵⁰ The court rejected all three of plaintiffs’ arguments, holding that the president’s designation of the Northeast Canyons and Seamounts as a marine national monument was lawful under the Antiquities Act.⁵¹ While the court noted that the legality of the president’s proclamation was judicially reviewable as a threshold matter, it cautioned that review of the president’s determination with respect to the monument’s proper size “stands on shakier ground [because] courts cannot adjudicate such claims without considering the facts underlying the President’s determination.”⁵² The court reasoned that judicial review of a national monument’s size would be available “only if the plaintiff were to offer plausible and detailed factual allegations” regarding the monument’s size, and determined that the plaintiffs had not done so in this case.⁵³ In holding that judicial review of presidential proclamations creating national monuments is limited and that it would have been inappropriate

47. *Id.* at 1140.

48. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (dismissing the plaintiffs’ claims that President Clinton’s proclamations designating the following national monuments lacked the requisite level of specificity under the Antiquities Act: Grand Canyon-Parashant, Ironwood Forest, and Sonoran Desert (Arizona), Canyons of the Ancients (Colorado), Cascade-Siskiyou (Oregon and California), and Hanford Reach (Washington)).

49. *See* Proclamation No. 9496, 81 Fed. Reg. 65,159 (Sep. 15, 2016). President Obama’s proclamation covered approximately 4,913 square miles of underwater canyons and mountains off the coast of New England. *Id.* The underwater ecosystem protected by the new national monument contains a diverse range of marine life and important ecological resources. *Id.*

50. *Massachusetts Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d 48, 51 (D.D.C. 2018).

51. *Id.*

52. *Id.* at 55.

53. *Id.*

in this case, the court further confirmed the expansive authority afforded to presidents under the Antiquities Act.⁵⁴

While the cases described above illustrate the broad discretion courts have given presidents when designating new national monuments under the Antiquities Act, these decisions offer little guidance with respect to a president's authority to reduce the size of existing national monuments. Those in favor of national monument reductions might point to the broad discretion afforded to previous presidents and argue courts should give similar deference to presidents who attempt to reduce existing national monuments using their power under the Antiquities Act. However, opponents of national monument reductions may just as readily rely on these same cases to argue the wide discretion given to previous presidents' designations of national monuments indicates that these designations should not be disturbed. Because the cases described above can undoubtedly cut in either direction when applied in this context, federal precedent regarding the president's discretion to designate new national monuments under the Antiquities Act is of limited utility to the debate on national monument reductions.

B. *National Monument Reductions: The Current Debate*

The crux of the current legal debate over whether a president has the constitutional authority to reduce national monuments hinges on the language of the Antiquities Act and the Act's relationship to the Property Clause. Opponents of national monument reductions argue that a plain reading of the text of the Antiquities Act indicates Congress intended the Act to serve as a one-way grant of specific and limited Property Clause authority to the president, delegating to him the power to "reserve . . . parcels of land"⁵⁵ that meet the Act's requirements.⁵⁶ The Antiquities Act is noticeably silent on whether a president has the authority to change or revoke national monument designations made by previous presidents, and opponents of monument reductions argue this authority lies solely with Congress under the Property Clause.⁵⁷

In support of this argument, critics of monument reductions contrast the Antiquities Act's silence on reducing or revoking national monuments against explicit revocation provisions included in other contemporaneous federal public lands laws. For example, the Pickett Act of 1910 delegated authority to the president to "withdraw" public lands (or to reserve them for certain

54. See *supra* notes 30–47 and accompanying text.

55. 54 U.S.C. § 320301(b).

56. See Mark Squillace, et al., *Presidents Lack The Authority To Abolish Or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 57–58 (2017).

57. *Id.*; see also Kelly Y. Fanizzo, *Separation of Powers and Federal Land Management: Enforcing the Direction Of the President Under the Antiquities Act*, 40 LEWIS & CLARK ENVTL. L. REV. 765, 822 (2010); Robert D. Rosenbaum, *No, President Trump Can't Revoke National Monuments*, WASH. POST (Mar. 29, 2017), https://www.washingtonpost.com/opinions/no-president-trump-cant-revoke-national-monuments/2017/03/29/35e53336-10cd-11e7-ab07-07d9f521f6b5_story.html [https://perma.cc/2C2V-N4CX].

purposes) “until revoked by him or an Act of Congress.”⁵⁸ Critics of monument reductions argue that this language in the Pickett Act demonstrates that Congress believed it needed to explicitly state the president’s authority to revoke withdrawals under the Act because the president did not otherwise have such powers, and that these same principles must apply to the Antiquities Act because it is likewise a limited delegation of Congress’s Property Clause powers to the president.⁵⁹

Similarly, the Forest Service Organic Act of 1897 makes Congress’s intention to provide the president with the power to change and revoke existing national forest designations explicit by stating so in two different places within the statute. The Act’s first substantive paragraph explains that “to remove any doubt⁶⁰ which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations” relating to national forests.⁶¹ The Act goes one step further by asserting that “[t]he 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.”⁶² Much like with the Pickett Act, opponents of monument reductions argue that Congress’s decision to include such clear statutory language in the Forest Service Organic Act authorizing the president to reduce or revoke national

58. Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976) (emphasis added); see Squillace et al., *supra* note 56, at 58; see also Marla E. Mansfield, *A Primer on Public Land Law*, 68 WASH. L. REV. 801, 825–26 (1993). Congress passed the Pickett Act in response to a request from President Howard Taft for more authority to address growing concerns about the rapid increase in private mining claims on public lands in the western states. *Id.* The president was primarily concerned with the increased competition between private mining claimants and the U.S. government over oil reserves in the west that he saw as essential to supporting the U.S. Navy. See David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 290 (1982).

59. See Squillace et al., *supra* note 56, at 58. Critics of this reasoning have argued that reliance on the Pickett Act is inapposite due to the Act’s focus on temporary withdrawals. See Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 591 (2018) (arguing that “[t]he Pickett Act sheds no light on the Antiquities Act [because it] addressed only the President’s power to withdraw public lands temporarily.”).

60. At least one scholar has argued that Congress’s choice to include the phrase “to remove any doubt” in the Forest Service Organic Act was intended only to address the concerns of President William McKinley, and that this language is not indicative of congressional intent. See Lance F. Sorenson, *supra* note 27, at 801. However, the absence of such clear language in the Antiquities Act undoubtedly contributes to the ongoing debate over a president’s authority to reduce or revoke national monuments under the Act.

61. Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. § 475 (2012)) (emphasis added).

62. *Id.* (emphasis added).

forest designations highlights the absence of such authorizing language in the Antiquities Act.⁶³

In further support of this argument, opponents of national monument reductions point to a 1938 opinion⁶⁴ by Attorney General Homer Cummings analyzing the statutory language of these same laws and arriving at the same conclusion.⁶⁵ Attorney General Cummings had been asked by the Secretary of the Interior whether the Antiquities Act authorized President Franklin D. Roosevelt to revoke Castle Pinckney National Monument in Charleston, South Carolina.⁶⁶ In his opinion, Cummings contrasted the revocation language described above in the Pickett Act and the Forest Service Organic Act against the lack of any such language in the Antiquities Act and concluded the Antiquities Act “does not in terms authorize the President to abolish national monuments, and no other statute containing such authority has been suggested.”⁶⁷ Critics have challenged Attorney General Cummings’s opinion on various grounds.⁶⁸

Proponents of national monument reductions have responded to the arguments described above with several arguments of their own, many of which focus on the broad powers of the presidency. For example, some supporters have contended that the “general rule that one president cannot bind a later president” forecloses any interpretation of the president’s authority under the Antiquities Act which does not include the power to reduce and revoke existing national monuments.⁶⁹ Others have similarly argued that the president’s authority under the Antiquities Act must be understood in relation to the broader “principle of American law . . . that the authority to execute a discretionary government power usually includes the power to revoke it.”⁷⁰

In support of such broad presidential revocation powers, some legal scholars have compared the president’s authority under the Antiquities Act to the president’s power to issue executive orders and to terminate international

63. See Squillace et al., *supra* note 56, at 58.

64. Proposed Abolishment of Castle Pinckney National Monument, 39 U.S. Op. Att’y Gen. 185 (1938).

65. See *id.* See also Fanizzo, *supra* note 57, at 822.

66. See Squillace et al., *supra* note 56, at 58.

67. Proposed Abolishment of Castle Pinckney National Monument, *supra* note 64, at 186 (emphasis added).

68. See, e.g., Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 595–97 (2018). Seamon argues that Attorney General Cummings’ 1938 opinion was “erroneous as a matter of law” and that “logic compels the conclusion that the President can abolish a monument.” *Id.* at 595. He attacks Cummings’ reliance on a prior attorney general’s opinion which stated that the president could not open lands to settlement that had already been reserved by him for the military. *Id.* Seamon also takes issue with the “general principles” relied upon by Cummings and argues that the attorney general’s opinion “relied on reasoning that merely begged the question of statutory interpretation.” *Id.* at 596.

69. *Id.* at 588.

70. John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617, 639 (2018).

agreements.⁷¹ These authors note that “presidents have always been understood to be able to revoke executive orders issued by their predecessors” and that “the president retains the traditional executive authority to unilaterally terminate treaties” with foreign countries.⁷² Those who support monument reductions argue the president must similarly be able to revoke national monument designations made by prior presidents and that any contrary interpretation of the Antiquities Act which limits presidential power would violate constitutional principles of equality among the three branches of government.⁷³

In addition to the arguments described above about the generally broad nature of presidential powers, those who believe that the president has the power to reduce or revoke national monuments contend that the Supreme Court explicitly recognized this type of implied presidential authority in *United States v. Midwest Oil Co.*⁷⁴ where Congress has acquiesced or otherwise failed to act. *Midwest Oil* involved a challenge to President Taft’s temporary withdrawal of over three million acres of public land in Wyoming and California from existing mining laws in an attempt to safeguard future oil reserves in the west for the U.S. Navy.⁷⁵ The Pickett Act⁷⁶ had not yet been passed at the time of President Taft’s withdrawal, and the plaintiffs in *Midwest Oil* challenged the president’s actions as outside the scope of his constitutional authority, claiming that the Property Clause authorized Congress, not the president, to regulate public lands.⁷⁷ The Supreme Court decisively rejected this argument, pointing to a long list of previous public land withdrawals by presidents in the absence of specific statutory authority.⁷⁸ The court noted that in these situations “Congress did not repudiate the power claimed [by the President]” but instead

71. See *id.* at 640–41; see also Seamon, *supra* note 68, at 588.

72. Seamon, *supra* note 68, at 588; Yoo & Gaziano, *supra* note 70, at 646.

73. See Yoo & Gaziano, *supra* note 70, at 641 (reasoning that an “operating principle of the Constitution is that any branch of government can reverse its earlier actions using the same process originally used”); see also Seamon, *supra* note 68, at 589 (arguing that “[i]f the President . . . could be bound by the acts of predecessors, the President would lose the coequality with Congress that the Constitution requires.”).

74. 236 U.S. 459 (1915).

75. *Id.* at 466–67. President Taft’s Secretary of the Interior recommended the withdrawals after the Director of the Geological Survey submitted a report in 1909 describing the rapid increase in private mining claims in the western states and emphasizing the Director’s fear that all of the remaining valuable oil reserves could fall into private ownership in a matter of months. Seamon, *supra* note 68, at 591 n.210.

76. Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976); see *supra* text accompanying notes 58–59.

77. *Midwest Oil Co.*, 236 U.S. at 468–69.

78. *Id.* at 469–71 (noting that, prior to the beginning of the case, previous presidents had issued a collective total of “99 Executive orders establishing or enlarging Indian reservations[,] 109 Executive orders establishing or enlarging military reservations [and] 44 Executive orders establishing bird reserves” despite lacking the specific statutory authority to take any of these actions).

“uniformly and repeatedly acquiesced” to the president’s actions.⁷⁹ The court went on to explain that Congress’s “acquiescence . . . operated as an implied grant of power” to the president, and upheld President Taft’s withdrawal.⁸⁰

Those in support of national monument reductions rely on *Midwest Oil* to argue that the president similarly has the implied power to reduce or revoke preexisting national monument designations because Congress has repeatedly acquiesced to presidents who have done so in the past.⁸¹ None of these decisions by previous presidents have ever been challenged in court, and proponents of monument reductions contend that Congress has implicitly recognized the president’s authority to reduce national monuments by refusing to challenge these powers when the president has chosen to exercise them.⁸²

In response, critics of monument reductions have pointed to Congress’s passage of the Federal Land Policy Management Act⁸³ (FLPMA) in 1976 to argue that Congress has in fact repudiated, rather than acquiesced to, the president’s implied authority to reduce preexisting national monuments under the Antiquities Act.⁸⁴ In passing FLPMA, Congress consolidated and codified the powers of the executive branch regarding the management of federal public lands.⁸⁵ FLPMA expressly stated that the Pickett Act and “the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress . . . are repealed.”⁸⁶ Section 204 of FLPMA required the Secretary of the Interior to follow new and specific withdrawal procedures when attempting to “make, modify, extend, or revoke withdrawals” of public lands.⁸⁷ While FLPMA explicitly addressed the Pickett Act and other

79. *Id.* at 471.

80. *Id.* at 475.

81. *See* Yoo & Gaziano, *supra* note 70, at 659–60. These scholars point to a number of national monument reductions by prior presidents, including those by presidents Eisenhower (reduced Great Sand Dunes National Monument in Colorado by 25 percent), Truman (reduced Santa Rosa Island National Monument in Florida by almost 50 percent), and Taft (reduced his own Navajo National Monument in Arizona by about 89 percent). *Id.* The authors also note that presidents Taft, Wilson, and Coolidge collectively reduced Mount Olympus in Washington by almost half. *Id.*

82. *See id.* At least one scholar has also argued that a president’s decision to reduce or revoke national monuments is not judicially reviewable as a threshold matter because such decisions are administrative rather than legislative in nature, and as a result do not raise separation of powers concerns. *See* Sorenson, *supra* note 27, at 35–36.

83. Federal Land Policy and Management Act of 1976, Pub. L. No. 94–579, 90 Stat. 2743 (1976) (codified primarily at 43 U.S.C. §§ 1701–1782 (2012 & Supp. V 2018)) [hereinafter FLPMA].

84. *See* Squillace et al., *supra* note 56, at 59–64.

85. *Id.* at 59.

86. FLPMA § 704(a). Section 704(a) of FLPMA explicitly states that Congress intended to overrule the congressional acquiescence endorsed by the court in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), though debate remains among legal scholars over the extent to which the broader doctrine of congressional acquiescence survives.

87. *Id.* at § 204(a). Section 204 of FLPMA affords the Secretary of the Interior discretion in making certain emergency and small-scale withdrawals, but any withdrawals aggregating

executive powers relating to the management of public lands, it was noticeably silent on the president's authority with respect to reducing or revoking national monuments under the Antiquities Act.

Those who argue that presidents do not have the authority to diminish preexisting national monuments stress that Congress used FLPMA to eliminate certain presidential withdrawal powers and to provide procedures for future executive withdrawals, but that in doing so Congress intentionally chose not to add language to the Antiquities Act that would give the president the power to reduce or revoke national monuments.⁸⁸ Critics of monument reductions maintain that Congress contemplated the issue of revocation authority in Section 204 of FLPMA,⁸⁹ and that the Act's silence on presidential authority under the Antiquities Act thus reflects a conscious choice on Congress's part not to provide the president with authority to reduce or revoke national monument designations, but to instead retain this authority for itself under the Property Clause.⁹⁰ Moreover, opponents of monument reductions note there have been no reductions to national monuments by presidents and thus no congressional acquiescence to such actions since FLPMA's passage in 1976.⁹¹ Additionally, those opposed to monument reductions argue that FLPMA "codified federal policy to retain—rather than dispose of . . . federal public lands" and that this broader policy goal weighs against an interpretation of the Antiquities Act that would allow the president to reduce preexisting national monument protections.⁹²

These issues have perhaps never been timelier than they are right now. As noted above, President Trump's recent reductions to the Bears Ears and Grand Staircase-Escalante national monuments in Utah represent the first attempt by a president to diminish a national monument since FLPMA was passed in 1976, overturning *Midwest Oil* and the doctrine of congressional acquiescence.⁹³ The lawsuits filed against President Trump's actions⁹⁴ similarly wade into uncharted legal territory; these cases could have profound implications on our country's national monuments for years to come.

five thousand acres or more must be published in the federal register and approved by both houses of Congress.

88. Squillace et al., *supra* note 56, at 59–61.

89. See *supra* note 87 and accompanying text.

90. See Squillace et al., *supra* note 56, at 59–60.

91. See *id.* at 65 (noting that President Trump's December 2017 reductions to the Bears Ears and Grand Staircase-Escalante national monuments represent the first attempt by a president to diminish preexisting national monuments since FLPMA was passed in 1976).

92. *Id.* at 59; see also Fanizzo, *supra* note 57, at 792.

93. See *supra* notes 8–12, 86 and accompanying text.

94. *Hopi Tribe v. Trump*, No. 17-cv-2590, 2017 WL 6033876 (D.D.C. filed Dec. 4, 2017); *Wilderness Soc'y v. Trump*, No. 17-cv-2587, 2017 WL 6015958 (D.D.C. filed Dec. 4, 2017).

II. EXPANDING JUDICIAL REVIEW: COURTS SHOULD LOOK TO HOW CONGRESS AND THE PRESIDENT HAVE BEEN TREATED HISTORICALLY IN THE PROPERTY CLAUSE CONTEXT

As illustrated above, legitimate arguments exist both for and against interpreting the Antiquities Act to give the president the implied authority to reduce or revoke a preexisting national monument designation. Where it is unclear whether the authority to take a certain action lies with the president or with Congress, courts and legal scholars have often turned to the approach taken in Justice Jackson's famous concurrence analyzing executive power in *Youngstown Sheet & Tube Co. v. Sawyer*.⁹⁵ However, as discussed below, this framework of analysis is of limited utility to the debate about reducing national monuments.

In *Youngstown*, the Supreme Court considered a constitutional challenge to President Harry Truman's Executive Order directing the Secretary of Commerce to seize a large portion of the country's private steel mills.⁹⁶ A divided court held that President Truman's seizure order was unconstitutional, with Justice Jackson authoring a concurring opinion that provided a useful framework for analyzing executive power.⁹⁷ Justice Jackson divided his analysis of presidential power into three categories: first, cases where "the President acts pursuant to an express or implied authorization from Congress [and] his authority is at its maximum"; second, instances where "the President acts in absence of either a congressional grant or denial of authority" (commonly referred to as the "zone of twilight"); and third, situations where the president "takes measures incompatible with the expressed or implied will of Congress, [and] his power is at its lowest ebb."⁹⁸ Justice Jackson concluded in *Youngstown* that President Truman's Executive Order fell into the third category because it was inconsistent with preexisting statutory policies regarding the seizure of private property and the government's power of eminent domain.⁹⁹

95. 343 U.S. 579, 634 (1952) (Jackson, J., concurring); see also Michael J. Turner, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamadan and Medellin*, 58 AM. U. L. REV. 665, 667 (2009) ("Although not initially adopted by the Court [in *Youngstown*,] Jackson's taxonomy is now recognized as the appropriate framework for analyzing nearly all executive action.").

96. *Youngstown*, 343 U.S. at 582.

97. *Id.* at 634–38 (Jackson, J., concurring).

98. *Id.* at 635–37.

99. *Id.* at 639–40.

Although some courts¹⁰⁰ and legal scholars¹⁰¹ have embraced Justice Jackson's tripartite analysis of presidential power, others have criticized this framework as vague, open to multiple interpretations, and difficult to apply in practice.¹⁰² In his opinion, Justice Jackson acknowledged that his categorical approach to assessing executive power was limited to "a somewhat oversimplified grouping of practical situations."¹⁰³ These limitations become apparent when one tries to analyze the national monuments issue described above using Justice Jackson's three-part taxonomy for presidential power, as a legitimate case may be made for placing the president's implied power to reduce national monuments into any of the three categories put forth by Justice Jackson. For example, some legal scholars have argued that the Antiquities Act operates as an implied authorization from Congress to reduce national monuments¹⁰⁴ (invoking the first category of Justice Jackson's taxonomy), while others have argued that a president's attempt to reduce national monuments is incompatible with Congress's choice not to provide the president with such authority when passing FLPMA¹⁰⁵ (and that the third category of Justice Jackson's approach thus applies). However, one could make a similarly strong case by appealing to the second of Justice Jackson's categories, the "zone of twilight," insofar as the Antiquities Act neither explicitly grants nor denies the power to reduce or revoke national monuments to the president.¹⁰⁶ Justice Jackson's three-part framework for analyzing executive power is thus ill-suited to address the question of whether the president has the power to reduce national monuments under the Antiquities Act because such an action does not fit cleanly into any of the three categories which Justice Jackson puts forth.

100. See *Dames & Moore v. Reagan*, 433 U.S. 654, 661, 669 (1981) (asserting that Justice Jackson's concurrence from *Youngstown* "brings together as much combination of analysis and common sense as there is in this area" and that the court considered his framework for analyzing executive power to be "analytically useful"); see also *Medellin v. Texas*, 552 U.S. 491, 497 (2008) (recognizing that "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action").

101. See *Turner*, *supra* note 95 at 667 (explaining that since *Youngstown* was decided, "Justice Jackson's classification of the strength of executive power based on congressional action or inaction, his tripartite taxonomy, [has] dominated subsequent separation of powers jurisprudence").

102. See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 272 (2010) (arguing that "it has long been obvious that [Justice Jackson's] *Youngstown* framework was open to manipulation").

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

104. See, e.g., *Seamon*, *supra* note 68, at 584 (arguing that "the [Antiquities] Act should be interpreted to impliedly authorize abolition" of national monuments, and that such an interpretation "enables the President to carry out the constitutional duty to take care that the Antiquities Act is faithfully executed").

105. Squillace et al., *supra* note 56, at 59–60.

106. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see also *supra* note 28, § 320301(b).

To obtain a properly holistic perspective on the issue of whether the president has the implied authority under the Antiquities Act to diminish pre-existing national monument designations, one must begin by recognizing the limited utility of Justice Jackson's analytical framework from *Youngstown*. Courts and legal scholars considering this issue in the future should then expand upon the analyses described in Part I, above, by examining how presidents and Congress have been treated differently throughout our country's history in the Property Clause context. As discussed below, courts have historically afforded Congress significantly more deference than the president when regulating public lands or otherwise acting in the Property Clause context. To preserve traditional understandings of the separation of powers between Congress and the president, courts should thus resolve these tensions over the authority to regulate public lands, such as the current debate over the power to diminish national monuments, in favor of Congress.

A. *Courts Have Consistently Interpreted Congress's Powers in the Property Clause Context Broadly*

Courts have typically understood the Property Clause, which grants Congress the “[p]ower to dispose of and make all needful [r]ules and [r]egulations,”¹⁰⁷ as giving immense power to Congress.¹⁰⁸ The Hetch Hetchy Valley controversy was one of the earliest and perhaps most well-publicized examples of Congress's plenary authority in this area.¹⁰⁹ The debate centered on Congress's passage of the Raker Act on December 3, 1913,¹¹⁰ which authorized building the O'Shaughnessy Dam on the Tuolumne River in Yosemite National Park to provide a reliable source of water for San Francisco's growing population.¹¹¹ The project fueled an intense public debate,¹¹² but the dam was ultimately built. Moreover, the Supreme Court determined that Congress had acted within its proper authority in requiring the dam be operated solely by the city of San Francisco and its municipal agencies, based on Congress's plenary authority over the disposition of the federal public domain.¹¹³ Although the

107. U.S. CONST. art. IV, § 3, cl. 2.

108. See Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001).

109. See, e.g., Brian E. Gray, *Hetch Hetchy and the Paradoxes of Restoration*, 13 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 211, 212–17 (2007); see also Symposium, *Hetch Hetchy: To Drain or Not to Drain*, 57 HASTINGS L.J. 1261 (2006).

110. Raker Act, Pub. L. No. 63–41, 38 Stat. 242 (1913).

111. See BW—Park Ranger, National Park Service, *Remember Hetch Hetchy: The Raker Act and the Evolution of the National Park Idea* (Dec. 20, 2013), <https://www.nps.gov/yose/blogs/remember-hetch-hetchy-the-raker-act-and-the-evolution-of-the-national-park-idea.htm> [<https://perma.cc/296V-YPHP>]; see also Symposium, *supra* note 109, at 1264.

112. See Gray, *supra* note 109, at 214–16. The Hetch Hetchy Valley controversy pitted Gifford Pinchot and those who supported his utilitarian approach to resource management against preservationists and environmental advocates such as John Muir. *Id.*

113. See *United States v. City of San Francisco*, 310 U.S. 16, 26–30 (1940) (prohibiting distribution of the dam's power through the privately held Pacific Gas & Electric Company

Hetch Hetchy controversy may now be known best for having “planted a seed from which blossomed the modern environmental era,”¹¹⁴ the ultimate resolution allowing Congress to dictate Hetch Hetchy Valley’s flooding and the city of San Francisco’s operation of the dam underscores Congress’s strong and well-established authority in the Property Clause context.

The Supreme Court further recognized Congress’s broad authority to regulate public lands in a number of other significant decisions around this time, the first of these being *Camfield v. United States*.¹¹⁵ In *Camfield*, a group of private property owners in Colorado engaged in a clever scheme wherein each property owner erected a fence on his own private land, functionally enclosing about 20,000 acres of public lands for the exclusive use and benefit of the property owners.¹¹⁶ Congress had sought to prevent these types of exclusive enclosures of public lands by passing a law prohibiting the enclosure of public lands where the individual who built the enclosure had “no claim or color of title made or acquired in good faith” to the enclosed lands.¹¹⁷ The defendants in *Camfield* contended that their fences were built solely on private lands which were beyond the reach of Congress, but the Supreme Court firmly rejected this view, holding instead that Congress has the power under the Property Clause to regulate activities on private lands that substantially interfere with the public’s ability to use and access public lands.¹¹⁸ In subsequent decisions, courts have continued to recognize Congress’s expansive authority under the Property Clause to regulate activities on private lands that affect federal public lands.¹¹⁹

One of the most recent and influential Supreme Court decisions further recognizing Congress’s plenary Property Clause authority is *Kleppe v.*

and holding that “Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy”).

114. Gray, *supra* note 109, at 216.

115. 167 U.S. 518 (1897).

116. *See id.* at 519–21. The individuals in *Camfield* owned and built fences upon all of the *odd*-numbered sections within the two townships in question in order to exclude public access to the *even*-numbered sections, which were owned by the United States. *See id.* at 521 for a helpful diagram of this enclosure scheme.

117. Act of Feb. 25, 1885, ch. 149, § 1, 23 Stat. 321 (codified at 43 U.S.C. § 1061 (2012)); *see also* Appel, *supra* note 108, at 63–64.

118. *Camfield*, 167 U.S. at 525 (reasoning that due to “the necessities of preventing the enclosure of public lands . . . the fence is clearly a nuisance, and . . . it is within the constitutional power of congress to order its abatement, notwithstanding [that removing the fence] may involve entry upon the lands of a private individual.”).

119. *See, e.g.*, *United States v. Alford*, 274 U.S. 264, 266–67 (1927) (upholding the constitutionality of a statute establishing criminal liability for those who set fires *near* public lands and fail to extinguish them); *Minnesota v. Block*, 660 F.2d 1240, 1249–50 (8th Cir. 1981) (finding that Congress acted within its authority under the Property Clause in restricting the use of motorboats and snowmobiles on nonfederal lands “that would threaten the designated purpose of federal lands.”); *see also* Appel, *supra* note 108, at 61–66.

New Mexico.¹²⁰ Kleppe involved a constitutional challenge by the State of New Mexico and others to Congress's passage and enforcement of the Wild Free-Roaming Horses and Burros Act,¹²¹ which "protected from capture, branding, harassment, or death . . . all unbranded and unclaimed horses and burros on public lands."¹²² New Mexico's state laws took a different approach, authorizing the impoundment and auctioning of any stray horses found roaming the state's public lands.¹²³ New Mexico and the other plaintiffs in Kleppe challenged the federal government's protections for the horses and burros on the grounds that the animals were not sufficiently involved in interstate commerce to fall within Congress's reach.¹²⁴ The Supreme Court rejected this argument and sided with Congress yet again, upholding the Wild Free-Roaming Horses and Burros Act as "a constitutional exercise of congressional power under the Property Clause."¹²⁵ In extending Congress's Property Clause authority from the public land itself to the horses and burros occupying the land, the Court reiterated that "determinations under the Property Clause are entrusted primarily to the judgment of Congress."¹²⁶

B. *Courts Have More Rigorously Questioned and Challenged the President's Powers in the Property Clause Context*

Unlike Congress, the president does not benefit from an established line of Supreme Court precedent expanding his authority in the Property Clause context.¹²⁷ In fact, a thorough review of federal caselaw involving public lands reveals that attempts by prior presidents to act unilaterally in the Property Clause context are comparatively rare in our country's history. As demonstrated below, these infrequent efforts by prior presidents have been met with strong opposition,¹²⁸ which stands in stark contrast to the broad authority that courts have traditionally afforded to Congress under the Property Clause.¹²⁹

One of the earliest and perhaps most interesting attempts by a president to assert his authority in the Property Clause context involved a dispute between President Thomas Jefferson and a prominent lawyer named Edward Livingston. The dispute concerned the ownership of a portion of a large

120. 426 U.S. 529 (1976).

121. *Id.* at 531–32.

122. Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92–195, 85 Stat. 649 (codified as amended at 16 U.S.C. §§ 1331–1340 (2012)).

123. *See Kleppe*, 426 U.S. at 533.

124. *See id.*

125. *Id.* at 546.

126. *Id.* at 536. The Court paid special attention to the low thresholds established by the Property Clause's reference to Congress's power to make all "needful" regulations "respecting" the public lands. *Id.*; *see supra* note 28, § 320301(b) (emphasis added).

127. *Cf. supra* notes 116–26 and accompanying text (discussing Supreme Court decisions which recognized Congress's broad authority under the Property Clause).

128. *See infra* notes 131–64 and accompanying text.

129. *See Appel, supra* note 108, at 58.

“batture,”¹³⁰ or sandbank, which had accumulated along the shores of the Mississippi River.¹³¹ The land in question had been used by the public as a mooring spot for boats and other vessels since before Louisiana became a state, and the local residents had long considered the batture to be public property.¹³² In 1805, Livingston assisted a local property owner who held land adjacent to the riverbank in acquiring exclusive ownership of part of the batture by filing suit in the Superior Court for the Territory of Orleans.¹³³ Livingston secured an ownership interest in a portion of the batture for himself from his client and began making improvements on his share of the land almost immediately, including the construction of a canal and a levee.¹³⁴

While local residents tried to protest Livingston’s privatization of his portion of the batture by harassing and obstructing the laborers whom he hired to work on the land, Governor Claiborne of the Territory of Orleans was left with little legal recourse other than to ask President Jefferson to step in.¹³⁵ After Governor Claiborne made this request, President Jefferson attempted to establish federal ownership of the batture by directing his Secretary of State to instruct the U.S. Marshal for the Territory of Orleans to expel Livingston from the batture and to assert federal title to the land “using whatever force was necessary.”¹³⁶ Livingston was removed from the batture but persisted, suing both President Jefferson personally in the federal circuit court in Richmond¹³⁷ as well as the federal marshal who removed him from the batture in the federal court in New Orleans.¹³⁸ Livingston ultimately prevailed against the federal marshal in the latter case, with the court declaring the marshal’s warrant invalid and returning title of the disputed land to Livingston.¹³⁹

Livingston’s other case against President Jefferson in Virginia, however, was eventually unsuccessful. The court in that case dismissed Livingston’s claims on purely jurisdictional grounds under the applicable local trespass action rule¹⁴⁰ and never explicitly ruled on whether President Jefferson had

130. The word “batture” is of French origin and has generally been understood to refer to certain areas where the riverbed has risen close to or above the water’s surface level, and where a sandbank has begun to form. John A. Lovett, Comment, *Batture, Ordinary High Water, and the Louisiana Levee Servitude*, 69 TUL. L. REV. 561, 568–70 (1994).

131. Ronan E. Degnan, *Livingston v. Jefferson—A Freestanding Footnote*, 75 CALIF. L. REV. 115, 116 (1987); see also JOHN B. BOLES, JEFFERSON: ARCHITECT OF AMERICAN LIBERTY 441–44 (2017).

132. Degnan, *supra* note 131, at 116.

133. *Id.*

134. *Id.*; 6 DUMAS MALONE, JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO 55–57 (1981).

135. See Degnan, *supra* note 131, at 117.

136. *Id.*

137. See *id.*; *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411).

138. See Degnan, *supra* note 131, at 117, 124.

139. See *id.* at 124 n.34.

140. See *id.* at 122; *Livingston*, 15 F. Cas. at 663.

exceeded his authority under the Property Clause.¹⁴¹ Interestingly, Jefferson and Livingston publicly continued their dispute even after the court dismissed the case; both published lengthy public pamphlets detailing why Jefferson did or did not have the authority as president to seize Livingston's portion of the bature as he had.¹⁴² The resulting lack of any binding legal decision on the substantive issue of whether President Jefferson had the authority to seize the bature, coupled with the fact that Livingston ultimately acquired title to the lands in question, highlights the way in which the president's authority in the Property Clause context is far less established than that of Congress.¹⁴³

Another dispute from the 19th century that further illustrates the president's weak and unsettled authority in the Property Clause context relative to Congress involved an attempt by President Zachary Taylor to remove groups of Native Americans from certain public lands in the Midwest and to prohibit them from continuing to use those public lands under preexisting treaties.¹⁴⁴ On February 6, 1850, in response to growing concerns over conflicts between Indian tribes and white settlers in the Lake Superior area in northern Wisconsin, President Taylor signed the controversial 1850 Removal Order.¹⁴⁵ The Order directed that the Chippewas Indians be physically removed from the lands in the Lake Superior area, which they had been granted the right to occupy by a treaty in 1842, and it revoked the tribe's usufructuary rights in the land acquired through a treaty in 1837 which included the tribe's rights to hunt, fish, and gather wild rice on the land.¹⁴⁶

Many years later, President Taylor's Removal Order was challenged in multiple cases, which were consolidated in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt* in the Seventh Circuit Court of Appeals.¹⁴⁷ In that case, the Seventh Circuit held President Taylor's Removal Order was invalid because the tribes had not violated the 1837 and 1842 treaties, despite the two treaties' favorable language granting the above rights to the Chippewa Indians "during the pleasure of the President" and "until required to remove

141. *Livingston*, 15 F. Cas. at 660–65.

142. See BOLES, *supra* note 131, at 443–44; see also MALONE, *supra* note 134, at 69–70. Jefferson published a ninety-one-page pamphlet summarizing his legal arguments for seizing the bature even after the case was dismissed in his favor, using the long title: "*The Proceedings of the Government of the United States, in Maintaining the Public Right to the Beach of the Mississippi, Adjacent to New-Orleans, Against the Intrusion of Edward Livingston.*" *Id.* Livingston responded with a lengthy public pamphlet of his own. See Degnan, *supra* note 131, at 117 n.10.

143. See *supra* note 127.

144. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344–45 (7th Cir. 1983).

145. See *id.* at 345–46; Colin Mustful, *Resisting Removal: The Removal Order of 1850*, COLIN MUSTFUL: HISTORY THROUGH FICTION (Sept. 12, 2018), <http://www.colinmustful.com/resisting-removal-the-removal-order-of-1850> [<https://perma.cc/ADF4-2W4G>].

146. See *Voigt*, 700 F.2d at 346.

147. See *id.* at 343.

by the President” respectively.¹⁴⁸ The court declined to view this language as support for the president’s discretion to regulate the tribe’s use and occupancy of the public lands, instead reasoning that the “language in the two treaties did not confer the unlimited discretion on the Executive that it appears to.”¹⁴⁹ The court also observed that the Indians were not “instrumental in causing disturbances with white settlers” as prohibited by the treaties and it reinstated the tribe’s rights under both treaties.¹⁵⁰ The court’s willingness to reverse President Taylor’s decisions regarding the Indians’ rights to the public lands in the Lake Superior area despite the language of the treaties affording the president significant discretion further demonstrates the historically limited nature of the president’s power in the Property Clause context.

The most recent and directly applicable example of the president’s narrow authority when acting in the Property Clause context involves a thus far unsuccessful attempt by President Trump to lift protections against offshore oil and gas development put in place by President Obama in 2015 and 2016 on about 124 million acres in the Arctic Ocean and parts of the North Atlantic Coast.¹⁵¹ To prevent future drilling in these ecologically sensitive areas, President Obama used his authority under Section 12(a) of the Outer Continental Shelf Lands Act (OCSLA),¹⁵² which provides the president with the power to “withdraw from disposition any of the unleased lands of the outer Continental Shelf.”¹⁵³ Just like the Antiquities Act,¹⁵⁴ Section 12(a) of OCSLA delegates a limited portion of Congress’s Property Clause authority to the president, granting him the power to withdraw public lands on the outer continental shelf from future disposal, but remaining silent on the authority to revoke such withdrawals.¹⁵⁵ President Trump nevertheless attempted to rescind President Obama’s withdrawals through an Executive Order on April 28, 2017, titled “Implementing an America-First Offshore Energy Strategy.”¹⁵⁶ Environmental groups sued,¹⁵⁷ challenging the president’s order and making many of the same legal

148. *Id.* at 351, 362.

149. *Id.* at 357 (emphasis added).

150. *Id.*

151. Coral Davenport, *Trump’s Order to Open Arctic Waters to Oil Drilling Was Unlawful, Federal Judge Finds*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/climate/trump-oil-drilling-arctic.html> [<https://perma.cc/SV5Z-5WTD>].

152. 43 U.S.C. §§ 1331–1356(b) (2012).

153. *Id.* § 1341(a). The Act defines the “outer Continental Shelf” as “all submerged lands . . . subsoil and seabed” within the federal government’s exclusive jurisdiction, which extends 200 miles off the coast to the edge of the United States’ exclusive economic zone. *Id.* § 1331; see also Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 LEWIS & CLARK ENVTL L. REV. 125, 133 (2018).

154. See *supra* note 28.

155. 43 U.S.C. § 1341(a) (2012).

156. Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017); see also Hein, *supra* note 153, at 128.

157. See *League of Conservation Voters v. Trump*, No. 3:17-cv-00101-SLG (D. Alaska

arguments discussed above relating to the president's authority to reduce or revoke national monuments.¹⁵⁸

On March 29, 2019, the U.S. Federal District Court of Alaska hearing the case issued an order granting summary judgment in favor of the plaintiffs and against President Trump in a decision that both reaffirmed the broad authority exercised by President Obama in the first instance while framing President Trump's authority to undo these actions narrowly in the absence of specific statutory authorization.¹⁵⁹ The court held that President Trump's Executive Order attempting to revoke President Obama's prior withdrawals under OSCLA was "unlawful, as it exceeded the president's authority under Section 12(a) of OSCLA."¹⁶⁰ The court further explained its reasoning in terms that apply with equal force to the Antiquities Act, asserting that "Congress's silence in Section 12(a) as to according the President revocation authority was likely purposeful; had Congress intended to grant the President revocation authority, it could have done so explicitly, as it had previously done."¹⁶¹ The court also noted its approval of several arguments described above¹⁶² which are shared by those opposed to national monument reductions, such as the significance of explicit revocation provisions in other federal public lands laws¹⁶³ and the Attorney General opinions interpreting their relevance.¹⁶⁴ While the decision is likely to be appealed to the Ninth Circuit,¹⁶⁵ the District Court's order lends strong support to the arguments described in Part I, above, regarding the significance of the Antiquities Act's silence on a president's authority to reduce or revoke national monuments.

III. APPLYING THE HISTORY OF THE PROPERTY CLAUSE TO REDUCING NATIONAL MONUMENTS

Where then, does this leave us? As explained in Part II, a thorough review of federal caselaw concerning the Property Clause demonstrates that courts have afforded Congress, rather than the president, significant discretion with

filed May 3, 2017).

158. *Id.*; see also *supra* notes 55–92 and accompanying text.

159. Order re Motions for Summary Judgment, *League of Conservation Voters v. Trump*, No. 3:17-cv-00101-SLG (D. Alaska filed May 3, 2017), ECF No. 80.

160. *Id.* at 30.

161. *Id.* at 23.

162. See *supra* notes 86–87 and accompanying text.

163. See *supra* note 159, at 20–22. The court was persuaded by the plaintiffs' arguments contrasting OSCLA Section 12(a)'s silence on revoking withdrawals under the Act with the unambiguous revocation provisions in the Pickett Act, the Forest Service Organic Act, and a 1935 Act regarding use of the Rio Grande river. *Id.* at 22.

164. See *id.* at 24–25 n.79. The court also recognized the importance of multiple opinions by Attorneys General which concluded that revocation authority must be made explicit, including Attorney General Cummings' 1938 opinion regarding the proposed abolishment of Castle Pinckney National Monument. See *supra* note 64.

165. See Davenport, *supra* note 151.

regard to managing federal public lands. Yet, there is a real tension between these cases and those specifically addressing a president's authority under the Antiquities Act, described above in Part I.A, in that courts have been much more willing to grant presidents wide discretion when designating new national monuments. How then, should a court approach President Trump's attempt to reduce the Bears Ears and Grand Staircase-Escalante national monuments?

The District Court of Alaska's recent opinion in *League of Conservation Voters v. Trump*, discussed above, helps to shed light on this issue. As previously noted, the court in that case found President Trump's attempted revocation of President Obama's withdrawals under OCSLA was beyond both his statutory and constitutional authority.¹⁶⁶ OCSLA and the Antiquities Act are remarkably similar; both statutes delegate to the president the power to withdraw public lands, but do not address a president's authority to undo such withdrawals. Unlike previous courts, which have granted prior presidents who designated new national monuments a wide margin of discretion, the court in this case did not interpret President Trump's authority broadly because "[OCSLA] does not expressly grant to the President the authority to revoke prior withdrawals" made under OCSLA.¹⁶⁷ The court's analysis embodied nearly identical arguments to those described above in Part I.B and advanced by those opposed to monument reductions. This decision ought to serve as a roadmap for the national monument reductions issue, since the Antiquities Act similarly does not expressly grant the president authority to revoke prior monument designations. Thus, courts reviewing the challenges to President Trump's reductions of the Bears Ears and Grand Staircase-Escalante national monuments should follow the lead of the District Court of Alaska and uphold the initial monument designations made by Presidents Obama and Clinton. This approach properly balances Congress's broad Property Clause authority with the tradition of affording discretion to presidents who initially designate national monuments by appropriately confining the president's powers to those expressly delegated in the Antiquities Act.

166. *See supra* note 159, at 11, 16.

167. *Id.* at 17.

