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***Dude, where's my Congress?
Presidential action on monuments highlights
Congressional abdication of responsibility***

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Presidential [revisions to Bears Ears and Grand Staircase/Escalante National Monuments](#) have spurred a heated debate about the extent of executive power under the Antiquities Act of 1906. The president stated, "The Antiquities Act does not give the Federal Government unlimited power to lock up millions of acres of land and water, and it's time we ended this abusive practice." Opponents of the presidential action blasted, "[The President Stole Your Land.](#)"

Intense debates over our public lands are not new, though the current debate shows that local stakeholders are tremendously important to settling the management of public lands. Without Congressional involvement, monuments are subject to change at presidential whim.

It starts with the Property Clause

The Constitution places plenary authority with Congress. [Article IV, § 3, cl. 2](#). The Property Clause states "[t]he 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.” By placing the public land power with Congress, the Constitution created a forum where competing claims could be debated and decided.

The Supreme Court has repeatedly declared Congress’ Property Clause power to be “without limitation.” [Kleppe v. New Mexico](#), 426 U.S. 529, 539 (1976). Therefore, “neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power.” [United States v. City and County of San Francisco](#), 310 U.S. 16, 29-30 (1940).

Madison proclaimed, in [The Federalist No. 43](#), “This is a power of very great importance,” and with foreshadowing, stated it “was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.” The idea of the Frontier is part of our founding national mythology, and part of that myth has always been the battle between competing claims.

When Congress uses its authority wisely, it can produce legislation to power decades of sustainable prosperity, such as with the [Oregon & California Grant Lands Act of 1937](#) (O&C Act), discussed below. 43 U.S.C. § 2601. (For further discussion of the O&C Act and the Antiquities Act, see L. Fite, *With Cascade-Siskiyou National Monument, the President’s Antiquities Act Authority Reaches a Limit*, ABA Public Land and Resources Committee Newsletter, [December 2017](#).)

A sweeping delegation

The [Antiquities Act of 1906](#), 54 U.S.C. § 320301, grants the president sweeping authority to declare “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” to be national monuments, provided that it be “the smallest area compatible” with care and management of the objects to be protected. Given Congress’ plenary authority over public land, the Antiquities Act is a significant transfer of power to the executive.

In keeping with the Antiquities Act’s breadth, presidents traditionally exercised broad authority. Presidential modification of monument boundaries is relatively common, happening [18 times in the 20th century](#). In 1915, President Wilson reduced Mount Olympus National Monument (now Olympic National Park) by over 300,000 acres. In 1940, President Franklin Roosevelt significantly reduced parts of the Grand Canyon National Monument. Before President Trump, the last president to reduce a monument, President John F. Kennedy, removed almost 4,000 acres from Bandelier National Monument in May 1963.

Judicial deference, congressional passivity

Litigation against presidential monument actions has a long record of failure—0-for-a hundred years. *Cameron v. United States*, 252 U.S. 450 (1920) upheld the designation of the Grand Canyon as an “object” to be protected. The D.C. Circuit rejected a slew of monument challenges in *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002). When statutes give the president broad discretion, courts have “highlighted the separation of powers concerns that inhere in such circumstances and ha[ve] cautioned that these concerns bar review for abuse of discretion altogether.” *Id.* at 1135 (D.C. Cir. 2002). Rejecting a challenge to the GS-ENM, the Utah District Court observed that it could not go beyond a “facial review” of whether the president “in fact invoked his powers under the Antiquities Act.” *Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1183–84 (D. Utah 2004). Further, no court has examined whether a presidential proclamation complies with the requirement that a monument cover the “smallest area compatible.” *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).

Meanwhile, Congress has only amended the Antiquities Act once, in 1950, to preclude “extension or establishment” of further monuments in Wyoming without an Act of Congress. The Federal Land Policy and Management Act of 1976 dances around the Antiquities Act, providing only that the Secretary of the Interior may not “make, modify, or revoke” withdrawals of lands—including for monuments—that are made by Act of Congress. [43 U.S.C. § 1712\(j\)](#). [Opponents](#) of the president’s Utah proclamations have made the implausible claim that this section contains a “drafting error” and that Congress really meant to restrict the president’s power. What it shows is continued deference, congressional and judicial, to the president.

Overruling local stakeholders

In 1996, President Clinton established the 1.7-million-acre Grand Staircase-Escalante NM in southeast Utah. He was followed 20 years later by President Obama, who designated 1.35 million acres as Bears Ears NM. The recent actions will modify Grand Staircase into three units encompassing about 1 million acres. [Proclamation](#). Bears Ears will be modified into two units totaling about 201,000 acres. [Proclamation](#). The modifications state that the initial designations were in excess of the “smallest area compatible” requirement and that congressional action taken in the interim to protect archaeological and paleontological resources had decreased the area needed to be withdrawn.

Many Utah stakeholders strongly opposed the actions by Presidents Obama and Clinton. A prominent U.S. congressional representative from Utah [remarked](#), “Compare

the public support for Bears Ears with the virtually unanimous opposition from the people's representatives in Utah and San Juan County: The county commission, the state legislature, the local chapter of the Navajo Nation, the governor, and every member of the state's congressional delegation strenuously opposed the designation."

The presidents who proclaimed Grand Staircase and Bears Ears may have supposed they were settling intractable disputes once and for all. But the same power that allowed them to proclaim these monuments surely allowed the president to make the recent revisions. In four or eight years, the next president may re-proclaim these monuments, only to have them revoked again after the next change of administrations. If management of these lands is to be settled, Congress will have to step in. The administration's actions have opened a window for discussion of the best way to manage these lands and meet the needs of a variety of stakeholders.

In Oregon, will the executive have the last word?

Oregon presents another example of presidential attempts to impose a solution on stakeholders without establishing a local consensus. President Clinton established the Cascade-Siskiyou National Monument in 2000, and President Obama [expanded](#) it in 2017. Interior Secretary Zinke has [recommended](#) changes to Cascade-Siskiyou, though no action has been taken as of June 2018. Most of the expansion consists of lands *already reserved for timber production* pursuant to the O&C Act of 1937. The O&C Act also explicitly repeals any prior acts that are in conflict. Pub. L. No. 75-405, 50 Stat. 874, 876 (1937). Accordingly, in 1940, Interior Secretary Ickes was advised that O&C Lands were beyond the scope of the Antiquities Act: "It is well settled that where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose inconsistent with that specified by Congress." [DOI Solicitor's Opinion M. 30506](#), March 9, 1940.

Because of these legal issues, three lawsuits were filed challenging the expansion as void *ab initio* – an issue not presented in any other monument case in the 112-year history of the Antiquities Act. In December 2017, Secretary of the Interior Zinke released his [final report and recommendations](#) which favored changes to the Cascade-Siskiyou. Specifically, Secretary Zinke recommended the president "address issues concerning the designation and reservation of O&C Lands as part of the monument and the impacts on commercial timber production." Despite these recommendations, the administration filed a legal brief defending President Obama's expansion. Consistent with the [last major round](#) of monument litigation in the early 2000s, the administration argues that presidential action under the Antiquities Act is not subject to judicial

review. In doing so, it claims that there is no limit on presidential action under the Antiquities Act because of the president's discretion under that Act.

In this situation, Congress may be forced to reassert itself after a ruling from the court. There may be an opportunity to reach a management solution that respects the O&C timber mandate while meeting the needs of other stakeholders. A Court decision upholding the O&C Act would appropriately limit the Antiquities Act authority, employing a narrowing construction to avoid separation of powers concerns and fulfill the purpose of the Property Clause.

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