

COMMENTS

An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power To Designate Monuments in the Outer Continental Shelf

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I. INTRODUCTION

In his last month in office, President George W. Bush designated three marine protection areas, ostensibly for the preservation of scientific

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interests, pursuant to the Antiquities Act.¹ Many commentators had encouraged just such a large-scale exercise of presidential power under the Antiquities Act to provide protection for marine resources in U.S. waters, such as depleted fisheries and rapidly disappearing coral reefs.² Alternatively, the President may issue executive orders to initiate marine protection areas under the National Marine Sanctuaries Act (NMSA).³ Commentators argued that proclamations under the Antiquities Act were the superior alternative because they carry the full force of law, whereas executive orders establishing marine sanctuaries do not.⁴ But executive action that bypasses notice and comment procedures and denies public access rights poses problems. Recreational fishermen who used the areas President Bush designated as monuments provide an important perspective in this debate.⁵ This Comment explores avenues to oppose such a designation. Courts should limit the President's power to designate massive national monuments in the oceans because the designations are inconsistent with the Antiquities Act's purpose and circumvent public participation in lawmaking. Moreover, the NMSA is the proper avenue to create marine protection areas.

II. BACKGROUND

A. *The Need for No-Take Zones*

The need to establish ocean areas with highly restrictive protection, or no-take zones, motivated the monuments created on January 6, 2008.⁶ The importance of marine resources is undeniable. Fisheries are dwindling and coral reefs are disappearing.⁷ Attempts to regulate through permissive use zones have failed to slow the deterioration of

1. Dan Vergano, *Huge Ocean Tract Protected*, U.S.A. TODAY, Jan. 6, 2009, at A1.

2. Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act To Establish Marine Reserves in America*, 29 ECOLOGY L.Q. 71, 123-26 (2002); Mary Gray Davidson, *Protecting the Coral Reefs: The Principal National and International Legal Instruments*, 26 HARV. ENVTL. L. REV. 499, 514 (2002).

3. See Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, Exec. Order No. 13,178, 65 Fed. Reg. 76,903, 76,905-06 (Dec. 8, 2000) (calling on the Secretary of the Interior, the Secretary of Commerce, and the Governor of Hawai'i to manage the creation of a sanctuary).

4. Brax, *supra* note 2, at 124.

5. *Public Needs To Have a Say in Proposals That Affect the Community*, GUAM PAC. DAILY NEWS, Jan. 10, 2009, available at <http://www.guampdn.com/article/20090110/OPINION/01/901100306/1014/OPINION>.

6. Juliet Eilperin, *Bush Ocean Plan Is Criticized*, WASH. POST, Nov. 4, 2008, at A13.

7. Brax, *supra* note 2, at 93-94.

coastal and ocean ecosystems.⁸ No-take zones, however, have slowed or reversed the negative impacts of human activity.⁹

In the last quarter century, the federal government has asserted greater control over the contiguous zone, which is the area between twelve and twenty-four miles from the mean high-tide mark, and the exclusive economic zone, which is the area within 200 miles of the mean high-tide mark.¹⁰ Presently, an estimated 43% of the United States' public land lies beyond the high water mark.¹¹ The marine ecosystems in these newly regulated zones provide fish to eat, shoreline protection, and recreation and tourism opportunities.¹² These benefits are disappearing at a calamitous rate.¹³

No-take zones are more effective than use-permissive programs in protecting these resources, particularly coral reefs and fish populations.¹⁴ Fish habitats have declined in part because the use-permissive marine protection programs in place do not adequately protect them.¹⁵ These use-permissive programs limit the size of catches, prohibit fishing during particular seasons, and regulate fishing gear,¹⁶ but fishermen have easily circumvented these regulations.¹⁷ No-take zones, alternatively, have been shown to effectively replenish fish populations.¹⁸

Coral reefs similarly need the protection of no-take zones. The reefs are the most biologically diverse ecosystems on the planet and protect shores from hurricanes and coastal erosion.¹⁹ The primary cause of coral reef death is thought to be climate change, particularly ocean temperature rises and El Niño.²⁰ Admittedly, these global effects are

8. *Id.*

9. *Id.* at 100.

10. *See* Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10,605, 10,605 (Mar. 10, 1983); Contiguous Zone of the United States, Proclamation No. 7219, 64 Fed. Reg. 48,701, 48,701 (Aug. 2, 1999); Territorial Sea of the United States of America, Proclamation No. 5928, 54 Fed. Reg. 777, 777 (Dec. 27, 1988).

11. Brax, *supra* note 2, at 74.

12. JOINT OCEAN COMM., ONE COAST ONE FUTURE: SECURING THE HEALTH OF WEST COAST ECONOMIES AND ECOSYSTEMS 7 (2009), available at http://www.jointoceancommission.org/resource-center/1-Reports/2009-01-15_One_Coast_One_Future.pdf.

13. *Id.*

14. Brax, *supra* note 2, at 96.

15. *Id.* at 93-94.

16. *Id.*

17. *Id.*

18. Callum M. Roberts et al., *Effects of Marine Reserves on Adjacent Fisheries*, SCIENCE, Nov. 30, 2001, at 1920, 1920 (reporting that no-take protection leads to "rapid increases in biomass, abundance, and average size of exploited organisms and to increased species diversity").

19. DIRK BRYANT ET AL., REEFS AT RISK: A MAP-BASED INDICATOR OF THREATS TO THE WORLD'S CORAL REEFS 9-10 (1998).

20. Davidson, *supra* note 2, at 508.

likely less susceptible to regulation by no-take zones. However, no-take zones can stop other detrimental effects such as overfishing, introduction of poisons, sedimentation, and offshore development.²¹ If no-take zones are not established, these marine resources will continue to disappear.

B. History of Monument Creation Under the Antiquities Act

The Antiquities Act provides that the President is “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.”²² Presidential pronouncements under the Antiquities Act have the force of law.²³ They can be subsequently amended by Congress.²⁴

Presidents have set aside monuments under the Antiquities Act since its inception during Theodore Roosevelt’s presidency.²⁵ Roosevelt designated several land monuments, most of which measured less than two square miles.²⁶ For seventy years, the power was exercised within the general ambit set by Roosevelt until Jimmy Carter’s presidency.²⁷ On December 1, 1978, President Carter designated over 54,000,000 acres in Alaska as national monuments.²⁸ President Clinton was the first President to use the Antiquities Act to protect ocean resources.²⁹ In the last days of his presidency, Clinton designated the U.S. Virgin Islands Coral Reef National Monument.³⁰ Following Clinton’s precedent, George W. Bush created the largest monument ever designated, the Papahānaumokuākea National Monument: 140,000 square miles.³¹

The Papahānaumokuākea National Monument is a model of how cooperating agencies administer marine monuments on a large scale.

21. BRYANT ET AL., *supra* note 19, at 12-15.

22. Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (2000)).

23. 39 OP. ATT’Y GEN. 185, 187 (1938).

24. James R. Rasband, *The Future of the Antiquities Act*, 21 LAND RESOURCES & ENVTL. L. 628, 629-30 (2001).

25. See Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 585-87 (2001) (providing a chronological listing of monuments under the Antiquities Act).

26. *Id.* at 585.

27. *Id.* at 585-86.

28. *Id.* at 587.

29. *Id.* at 567.

30. Virgin Islands Coral Reef National Monument, Proclamation No. 7399, 66 Fed. Reg. 7364, 7364 (Jan. 17, 2001).

31. Northwestern Hawaiian Islands Marine National Monument, Proclamation No. 8031, 71 Fed. Reg. 36,443, 36,443 (June 15, 2006).

The monument, which is located in Northwestern Hawai'i, is essentially a no-take zone—it prohibits any unauthorized use, bans resource extraction and waste dumping, and proposes to phase out commercial fishing over a five-year period.³² Much of the burden of administering the sanctuary has fallen to the National Oceanic and Atmospheric Administration (NOAA).³³ Like the January 6th Proclamations, discussed *infra* Part III, designation of the Papahānaumokuākea monument guaranteed no funding, because the President is not permitted to authorize spending under the United States Constitution.³⁴ However, the NOAA has asked for and received approximately \$8 million per year to administer the program.³⁵

III. THE ANTIQUITIES ACT AUTHORITY SPILLING INTO OCEANS

On January 6, 2009, President Bush set aside three monuments pursuant to his Antiquities Act authority: the Marianas Trench Marine National Monument, the Pacific Remote Islands Marine National Monument, and the Rose Atoll Marine National Monument (collectively January 6th Proclamations).³⁶ Together, the reserves measure over 200,000 square miles, approximately the size of Spain.³⁷ The January 6th Proclamations set forth broad prohibitions against activities within the protected areas, including commercial fishing.³⁸ The proclamations call upon the Secretary of the Interior, the Secretary of Commerce, the Secretary of Defense, and the NOAA to cooperate in carrying out the mandates.³⁹

32. AULANI WILHELM ET AL., NORTHWESTERN HAWAIIAN ISLANDS MARINE NATIONAL MONUMENT: A CITIZEN'S GUIDE 5 (2006), available at http://hawaiireef.noaa.gov/PDFs/Citizens_Guide_Web.pdf.

33. See, e.g., Rose Atoll Marine National Monument, Proclamation No. 8337, 74 Fed. Reg. 1577, 1578 (Jan. 6, 2009) (“[T]he Secretary of Commerce, through the National Oceanic and Atmospheric Administration, shall have the primary management responsibility regarding the management of the marine areas of the monument seaward of mean low water. . .”).

34. D. Kapua Sproat & Aarin F. Gross, *The NW Hawaiian Islands National Marine Monument*, 22 NAT. RES. & ENV'T 57, 57 (2008).

35. Press Release, Executive Office of the President, Council on Environmental Quality, Fulfilling the President's Vision for the Northwestern Hawaiian Islands National Monument (Mar. 2, 2007), available at http://www.commerce.gov/s/groups/public/@doc/@os/@opa/documents/content/prod01_002839.pdf.

36. Marianas Trench Marine National Monument, Proclamation No. 8335, 74 Fed. Reg. 1557, 1557 (Jan. 6, 2009); Pacific Remote Islands Marine National Monument, Proclamation No. 8336, 74 Fed. Reg. 1565, 1565 (Jan. 6, 2009); Rose Atoll Marine National Monument, Proclamation No. 8337, 74 Fed. Reg. 1577, 1577 (Jan. 6, 2009).

37. Alex Newman, *Bush Designates New Marine Sanctuaries*, NEW AM., Jan. 12, 2009, available at <http://www.thenewamerican.com/usnews/24-elections/669>.

38. See, e.g., Pacific Remote Islands Marine National Monument, 74 Fed. Reg. at 1568.

39. See, e.g., Rose Atoll Marine National Monument, 74 Fed. Reg. at 1578.

The United States Supreme Court has held that proclamations under the Antiquities Act are reviewable to ensure consistency with the Constitution and to determine whether the President has exceeded his or her statutory authority.⁴⁰ This Part will analyze why Congress and the judiciary have been reluctant to limit the Antiquities Act power through a century of land proclamations and discuss whether the new use of the Antiquities Act—protecting vast ocean areas—is vulnerable to challenge.

A. *Justifications for Designation of Monuments Under the Antiquities Act*

The reasons offered to justify broad power under the Antiquities Act probably do not overcome the resulting problems. One benefit to designating monuments under the Antiquities Act is that the President can declare monuments over the objections of influential interest groups.⁴¹ Additionally, the President can deliver protection to federal waters more quickly than Congress can.⁴² In a time of crisis and rapidly deteriorating resources these benefits are attractive.

Advocates of broad Antiquities Act authority point out that in negotiations to protect marine resources through the political process, recreational and commercial fisherman wield disproportionately strong power.⁴³ In any arrangement, fisherman must surrender some traditional usage rights.⁴⁴ Their typical course of action, therefore, is to refuse to adopt any solutions and perpetuate the status quo.⁴⁵ Mineral extraction companies use their influence in much the same way to defeat no-take zones.⁴⁶ To some, this self-interested political maneuvering justifies empowering the President to act unilaterally.⁴⁷

Presidential action also offers rapidity. Although it is easy to presume that the environment deteriorates gradually over decades or centuries, mere weeks or months can be crucial.⁴⁸ The President can make regulations for national monuments effective more quickly than

40. United States v. California, 436 U.S. 32, 35-36 (1978).

41. See Brax, *supra* note 2, at 124 (discussing use of executive authority to overcome commercial and recreational fishing groups' objections).

42. Robert A. Shanley, *Presidential Executive Orders and Environmental Policy*, 13 PRES. STUD. Q. 403, 405 (1983) (explaining the expedience of executive orders).

43. Brax, *supra* note 2, at 124.

44. *Id.*

45. *Id.*

46. Editorial, *Listen to the First Lady*, REG.-GUARD, Jan. 5, 2009, at A8, available at <http://www.registerguard.com/csp/cms/sites/web/opinion/5259925-47/story.csp>.

47. *Id.*

48. See, e.g., Davidson, *supra* note 2, at 504 (quoting Craig Quirolo, Director of Reef Relief) (noting nine centimeters of erosion around coral heads in just forty-eight days).

Congress and the NOAA under the NMSA.⁴⁹ For example, under the NMSA, the Florida Keys Marine Sanctuary regulations were in development for seven years.⁵⁰ Conversely, under the Antiquities Act, the NOAA issued final regulations on the Northwestern Hawaiian Islands Marine National Monument just two and a half months after the President's proclamation.⁵¹

Between these two justifications for expanding the power, the time-saving argument probably has more merit. Traditionally, executive orders have been used to forward short-term, pragmatic solutions when pushing legislation through Congress in time is not feasible.⁵² Furthermore, time-sensitive environmental protection is somewhat analogous to the President's emergency power in war time.⁵³ Ultimately, however, this justification is flawed because a presidential proclamation of a monument is not a temporary solution or a wartime exigency. On the contrary, many spoke of the January 6th Proclamations as establishing a lasting legacy of marine conservation for President George W. Bush.⁵⁴

B. Challenges to Antiquities Act Designation

The President's power to designate monuments is limited in three main ways.⁵⁵ The first two are political: Congress can attempt to curtail the President's power by denying funds or amending the Antiquities Act itself⁵⁶ or Congress can amend or reverse previous national monuments under the Antiquities Act.⁵⁷ The third way is through legal channels: courts have the power to declare that such proclamations are either unconstitutional or exceed what the statute authorizes.⁵⁸

1. Political Channels of Limiting Antiquities Act Power

Congressional inertia has frustrated attempts to curtail the Antiquities Act power. Traditionally, Republicans representing western

49. Shanley, *supra* note 42, at 405.

50. Brax, *supra* note 2, at 106.

51. Rules and Regulations, Northwestern Hawaiian Islands National Monument, 71 Fed. Reg. 51,134 (Aug. 29, 2006) (final rule) (to be codified at 50 C.F.R. pt. 404).

52. Shanley, *supra* note 42, at 405.

53. *See generally* The Brig Amy Warwick (The Prize Cases), 67 U.S. 635, 671 (1862) (holding that it was proper for President Lincoln to block the port during a rebellion although war had not yet been declared).

54. *See, e.g.*, Juliet Eilperin, *Bush To Protect Three Areas in Pacific: Marine Monuments Burnish an Environmental Record That Is Seen as Mixed*, WASH. POST, Jan. 6, 2009, at A01.

55. Rasband, *supra* note 24, at 629-30.

56. *Id.*

57. *Id.*

58. United States v. California, 436 U.S. 32, 35-36 (1978).

states have opposed large national monuments.⁵⁹ In 1950, Congress responded to President Franklin Delano Roosevelt's Wyoming monument by banning monuments in Wyoming altogether.⁶⁰ During Clinton's presidency, one attempt to defeat Clinton's national monuments by cutting all funding for them failed in the House of Representatives.⁶¹

Recently, Louisiana Senator Mary Landrieu proposed a bill to prevent the Antiquities Act from applying in the exclusive economic zone.⁶² Landrieu's proposal would largely nullify the effect of monuments such as Papahānaumokuākea and the January 6th Proclamations. Landrieu argued that the intent of the Antiquities Act was to "protect landmarks, not create the largest protected areas in the United States unilaterally without congressional assent."⁶³ While Landrieu did not succeed in curtailing the President's power, she reportedly defeated a monument proposed to protect submerged lands in the Gulf of Mexico.⁶⁴ That Antiquities Act authority has withstood these political attacks legitimizes its application to some extent.

Congress can also repeal particular monuments, but has exercised this power very infrequently.⁶⁵ When it has reversed monument status, it has done so for small monuments in unusual circumstances.⁶⁶ However, Congress's failure to use this power may be less indicative of its acquiescence, and more indicative of the peculiar staying power of "Executive Legislation."⁶⁷ The Presentment Clause tends to frustrate any attempt by Congress to reverse the action of a sitting President.⁶⁸ When the President designates the monument, Congress cannot then overcome the veto power during that President's term without a two-thirds majority from both houses.⁶⁹ Then, once the President who designated the

59. John Kincaid, *The State of U.S. Federalism, 2000-2001: Continuity in Crisis*, 31 PUBLIUS 1, 34 (2001); Eric Pianin, *House Protects Monument Funds*, WASH. POST, June 16, 2000, at A27.

60. Act of Sept. 14, 1950, Pub. L. No. 787, § 1, 64 Stat. 849 (codified as amended at 16 U.S.C. § 431a (2006)).

61. Pianin, *supra* note 59.

62. S. 3438, 110th Cong. (2008); Posting of Jim DiPeso to thedailygreenblog, <http://www.thedailygreen.com/environmental-news/blogs/repUBLICan/antiquities-act-47080801> (last visited Feb. 16, 2009).

63. Posting of Jim DiPeso, *supra* note 62.

64. *Id.*; see Terry Tomalin, "Grounds" Caught in the Middle, ST. PETERSBURG TIMES, Feb. 8, 2008, at 6C (discussing the proposed reserve in the Gulf of Mexico).

65. John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 297 (2001).

66. *Id.*

67. See generally Ranchod, *supra* note 25, at 541-42 (discussing the constitutional and statutory basis for the President's exercise of legislative powers); Brax, *supra* note 2, at 126-27.

68. U.S. CONST. art. I, § 7, cls. 2-3.

69. *Id.*

monument has left office, opposition to the monument may have subsided.⁷⁰ In this way Congress's check on the Antiquities Act power is somewhat limited.

2. A New Legal Challenge to Antiquities Act Power

Legal challenges to the Antiquities Act power to designate land monuments have consistently failed.⁷¹ Challengers have argued that a presidential proclamation exceeded the President's statutory authority, that it bypassed notice and comment requirements under the National Environmental Policy Act (NEPA), and that the power to designate the monument was an impermissible delegation of congressional authority.⁷² This Comment concludes that the jurisprudence upholding designations of land monuments against challenges under NEPA and the nondelegation doctrine should persist in the context of marine national monuments. The claim that the President exceeded his statutory authority, however, should succeed because the Antiquities Act granted the President no power to establish monuments in the exclusive economic zone.

NEPA mandates that federal agencies provide environmental impact statements for "major Federal actions significantly affecting the quality of the human environment."⁷³ This process allows the entity that is undertaking the program to make all necessary disclosures and consider all effects of the action.⁷⁴ It also provides the public with information on the proposed action and encourages participation by communities impacted by the program.⁷⁵

Designations of monuments under the Antiquities Act do not require the notice and comment procedure outlined in NEPA.⁷⁶ Courts have ruled the safeguards are not required even in instances when the proposed program unequivocally impacts the quality of the human environment.⁷⁷ The court in *Alaska v. Carter* applied the plain language

70. Brax, *supra* note 2, at 126-27.

71. Ranchod, *supra* note 25, at 549; *see, e.g.*, *Wyoming v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945) (allowing the President broad discretion to make Antiquities Act proclamations and denying challenge to Jackson Hole National Monument).

72. *Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1978); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

73. National Environmental Policy Act of 1969 (NEPA) § 102, 42 U.S.C.A. § 4332 (2006).

74. *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

75. *Or. Env'tl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987).

76. *Carter*, 462 F. Supp. at 1160.

77. *Id.*

of NEPA's mandate, which only applies to agencies.⁷⁸ The President is not an agency.⁷⁹ Therefore, the President need not even notify the public that a monument is planned until the proclamation is issued.⁸⁰

Further, legislative activity since *Carter* supports the interpretation that Congress did not intend NEPA to apply to the President.⁸¹ A bill proposed in 1999 that would have required the President to comply with NEPA's procedural requirements failed to pass both houses.⁸² Such post hoc legislative history does not prove what Congress intended when it passed NEPA, but it does validate the decision in *Carter* that notice and comment is not required for Antiquities Act proclamations.⁸³

This legal analysis suggests that national monument proclamations will resist challenge under NEPA no matter how secretive or arbitrary. In the process of making the January 6th proclamations, Bush kept the fact gathering process within his staff.⁸⁴ The President asked Chairman of White House Council on Environmental Quality James Connaughton to evaluate the monuments in August of 2008.⁸⁵ There was no proposal or scientific information available for public review and comment.⁸⁶ Although Bush's process was more private than the fact gathering in the *Carter* case, courts would likely still decline to challenge the President's authority.⁸⁷ The closest that the *Carter* decision got to suggesting a different outcome in circumstances such as these was its acknowledgment of section 101 of NEPA.⁸⁸ Section 101 broadly requires the federal government, not just federal agencies, to "use all practicable means" and fully consider various environmental goals.⁸⁹ It is unlikely that any court would intervene in a monument designation based on the policy statement in section 101, however. Nor would the fact that the monuments are located in marine environments change the application of NEPA. Whether the President acts in Wyoming or on the outer continental shelf, he does not act as an agency.

78. *Id.*

79. *Id.* at 1159.

80. *See id.* at 1160.

81. H.R. 1487, 106th Cong. (1999).

82. *Id.*

83. *Carter*, 462 F. Supp. at 1160.

84. Editorial, *supra* note 46.

85. *Id.*

86. Newman, *supra* note 37. The transparency of the January 6th monument-designation process contrasts sharply with the process of designating the Papahānaumokuākea National Monument in 2006. Over 50,000 public comments were submitted over a five-year period leading up to the designation of Papahānaumokuākea. WILHELM ET AL., *supra* note 32, at 5.

87. *Alaska v. Carter*, 462 F. Supp. 1155, 1157, 1160 (D. Alaska 1978).

88. *Id.* at 1159-60.

89. NEPA § 101, 42 U.S.C. § 4331 (2006).

The nondelegation principle requires that any delegation of authority by Congress to the executive branch must be guided by some intelligible principle.⁹⁰ This restriction on delegation of authority applies to powers delegated to the President as well.⁹¹ The Antiquities Act's delegation of authority is broad. It empowers the President to identify "objects of historic and scientific interest," and to take needful steps to preserve them.⁹² This authority is "essentially limitless since all federal land has some historic or scientific value."⁹³ However, courts have upheld broad directives to satisfy the intelligible principle standard.⁹⁴ Indeed, the United States Court of Appeals for the District of Columbia Circuit has held that the Antiquities Act does provide such an intelligible principle.⁹⁵ The nondelegation principle, therefore, is not a basis for challenge of monuments on land or in water.

The claim that the President exceeded his statutory authority might succeed in challenges of ocean monuments. There are two potential limits of the President's authority in the text of the Antiquities Act.⁹⁶ First, the reserved lands must encompass some object of historical or scientific interest.⁹⁷ Second, the underlying lands must be owned or controlled by the federal government.⁹⁸ In *Mountain States Legal Foundation v. Bush*, the court quickly dispatched of the plaintiff's claim that the President had run afoul of the first limit.⁹⁹ The court observed that the President's proclamation asserted that the reserved lands encompassed objects of historical or scientific interest.¹⁰⁰ That alone satisfied the court.¹⁰¹ The January 6th Proclamations contain statements similar to those made in the proclamations reviewed in *Mountain*

90. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

91. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

92. Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225, 16 U.S.C. § 431 (2006).

93. CAROL HARDY VINCENT & PAMELA BALDWIN, NATIONAL MONUMENTS: ISSUES AND BACKGROUND 16 (2004).

94. *Whitman*, 531 U.S. at 474.

95. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002).

96. 16 U.S.C. § 431.

97. *Id.*

98. *Id.*

99. *Mountain States*, 306 F.3d at 1137.

100. *Id.*

101. *See id.* (holding that the proclamations were valid without inquiring as to the President's underlying purposes).

States.¹⁰² Therefore, the January 6th Proclamations would likely survive a challenge on that basis.

The January 6th Proclamations arguably exceed the second limit, however. The second limit on the President's power under the Antiquities Act is that the lands underlying the monument must be owned or controlled by the federal government.¹⁰³ The submerged lands underlying the Pacific outer continental shelf are not owned or controlled by the federal government within the meaning of the Antiquities Act.¹⁰⁴ Much of the land reserved under the January 6th Proclamations lies beyond the territorial waters of the United States.¹⁰⁵ While the United States currently exercises limited regulatory authority over the continental shelf extending up to 200 miles from its shores, it did not extend its power over those submerged lands until 1945.¹⁰⁶

When the Antiquities Act was enacted in 1906, Congress would not have regarded submerged lands beyond the territorial seas as being under the control of the federal government.¹⁰⁷ Courts of that time drew a sharp distinction between the territorial seas, which were under the control of adjacent coastal states, and the high seas, over which no nation could exercise its sovereignty.¹⁰⁸ Consequently, Congress could not have considered the submerged lands designated in the January 6th Proclamations as "lands owned or controlled by the federal government."¹⁰⁹ As a result, the Antiquities Act alone did not authorize the President to designate national monuments in the outer continental shelf. Rather, there must be some independent source for that authority.¹¹⁰

102. See *Marianas Trench Marine National Monument*, Proclamation No. 8335, 74 Fed. Reg. 1557, 1557 (Jan. 6, 2009).

103. Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225, 16 U.S.C. § 431 (2006).

104. *Id.* (failing to mention Outer Continental Shelf and placing territorial limits on lands within the Antiquity Act's jurisdiction).

105. Press Release, The White House, Fact Sheet: Marine National Monuments (Jan. 6, 2009), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090106-12.html>.

106. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

107. *The Scotland*, 105 U.S. 24, 29 (1883); *United States v. Louisiana*, 363 U.S. 1, 33-34 (1960) ("The high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation. It is recognized, however, that a nation may extend its national authority into the adjacent sea to a limited distance for various purposes.").

108. *The Scotland*, 105 U.S. at 29; *Louisiana*, 363 U.S. at 22-23.

109. 16 U.S.C. § 431.

110. *United States v. California*, 436 U.S. 32, 35-36 (1978) (holding that the president may reserve lands that were not controlled by the federal government in 1906, but later came under its control).

The only act of Congress that plausibly extended the Antiquities Act to the outer continental shelf was the Outer Continental Shelf Lands Act (OCSLA).¹¹¹ Only one court has evaluated whether the OCSLA extends the jurisdiction of the Antiquities Act.¹¹² In *Treasure Salvors v. Unidentified Wrecked & Abandoned Sailing Vessel*, the United States Court of Appeals for the Fifth Circuit held that the OCSLA does not extend the jurisdiction of the Antiquities Act beyond the territorial seas.¹¹³ The Fifth Circuit reasoned that because the OCSLA's primary purpose was to regulate mineral extraction, it could not have been intended to apply in the context of the Antiquities Act.¹¹⁴ Following *Treasure Salvors*, the federal government does not "control" the submerged lands that lie more than twelve miles from the base line.¹¹⁵ Accordingly, the President exceeded his authority in the January 6th Proclamations.

In order to validate the January 6th Proclamations, courts would have to read the Antiquities Act's use of the word "control" expansively. For example, courts might read that lands controlled by the federal government includes any area where United States law applies. Such a reading could lead to absurd results. According to this reasoning, the President would have discretion to designate national monuments in foreign countries, because U.S. law is applied in foreign territories in some contexts.¹¹⁶ Congress likely did not intend to delegate such limitless power. Consequently, courts should give proper meaning to the language of the statute: the continental shelf beyond the territorial waters of the United States is not eligible for national monument status under the Antiquities Act.

Initially, this statutory interpretation suggests a disembowelment of the four national monuments President Bush established on the outer continental shelf. However, this analysis does not require such drastic action. Rather, the consequence is that the monuments simply do not have legally binding effect beyond twelve miles seaward of the mean

111. Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 (2006).

112. *Treasure Salvors v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 340 (5th Cir. 1978).

113. *Id.* at 339-40.

114. *Id.*

115. *See id.* *But see* *Alliance To Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 109 (1st Cir. 2005) (holding that the OCSLA does extend the Army Corps of Engineers' jurisdiction to issue or deny permits under the Rivers and Harbors Act whether or not the permitted activity relates to mineral extraction).

116. *See generally* *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 125 (8th Cir. 1990) (applying provision of Endangered Species Act extraterritorially), *rev'd on other grounds*, 504 U.S. 555, 557-58 (1992); *United States v. Aluminum Co.*, 148 F.2d 416, 445 (2d Cir. 1945) (Sherman Act); *Filartiga v. Pene-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (Alien Torts Statute).

high-tide mark. The remaining portions of the monument designations, in turn, should carry the effect of an executive order. Those designations would not be legally binding but could be followed in good faith by the responsible agencies.¹¹⁷ This result would restore the constitutional balance of powers, improve accountability, and allow Congress to administer the NMSA without undue interference by the executive.

IV. USING THE POLITICAL PROCESS TO ACCOMPLISH MARINE PROTECTION

The marine protection systems currently in place suffer from a jumbled and diffuse bureaucracy and a lack of political will, but they are viable. In the federal government there are “more than 140 laws, dozens of agencies, and divided authority.”¹¹⁸ These programs must coexist with equally unwieldy protection programs at the state level.¹¹⁹ This Part acknowledges the importance of marine protection areas administered at the state level, but focuses on the federal initiatives applying in United States territorial waters, the contiguous zone, and the exclusive economic zone. The NMSA establishes a framework for the designation of marine protection areas.¹²⁰ Over the years, the White House has streamlined the program and created initiatives for coordination among the myriad marine protection areas through nonbinding executive orders.¹²¹ Designation of marine resources as national monuments, as discussed above, undermines the development of these processes by usurping the purposes of the NMSA.

A. *The Utility of the National Marine Sanctuaries Act*

1. Congress Intended the National Marine Sanctuary Program To Manage Ocean Areas

Congress passed the Marine Protection, Research, and Sanctuaries Act of 1972 in response to a massive oil spill off the coast of Santa Barbara, California.¹²² The legislation gave the Secretary of Commerce the authority to designate marine sanctuaries based on certain

117. See, e.g., *Knowledge, Inc. v. United States*, 79 Fed. Cl. 750, 758 (2007) (“[C]ourts do not have a role in enforcing executive orders that are managerial tools for the executive branch.”); Shanley, *supra* note 42, at 405-06.

118. JOINT OCEAN COMM., *supra* note 12, at 7.

119. *Id.*

120. Marine Protection, Research, and Sanctuaries Act (MPRSA) § 303, 16 U.S.C. § 1433 (2006).

121. Brax, *supra* note 2, at 122-23.

122. *California v. Norton*, 311 F.3d 1162, 1176-77 (9th Cir. 2002).

enumerated factors and to promulgate regulations of the sanctuaries.¹²³ This first enactment of the legislation was primarily to stop waste dumping and catastrophes such as the Santa Barbara oil spill.¹²⁴ Subsequent amendments broadened the purpose to include a balance of protecting resources and permitting human use where appropriate.¹²⁵

The language in the NMSA indicates that Congress intended it as the federal government's main vehicle for marine resource protection.¹²⁶ Congress announced in the 1984 amendments that there was a lack of comprehensive protection of marine resources.¹²⁷ Specifically, it asserted that there was a lack of "coordinated and comprehensive approach to the conservation and management of special areas of the marine environment."¹²⁸ It emphasized "the primary objective of resource protection."¹²⁹ The statutory language intimates that the system of sanctuaries promulgated under the 1984 amendments was intended to fill this void.¹³⁰ Nevertheless, the NMSA is not meant as an exclusive regulatory system for the continental shelf and waters of the United States: the Clean Water Act and Magnuson-Stevens Act, for example, have meaningful application.¹³¹ It was, however, meant to be the mechanism for creating zones of protection in federally controlled marine environments.¹³²

Further, the NMSA has unique strengths in protecting marine ecosystems. First, the NMSA is more likely to create comprehensive sanctuaries that work because it involves all interested parties.¹³³ In designating a sanctuary, the NOAA must confer with congressional committees, executive agencies, state and local government officials likely to be affected, the Regional Fishery Management Council, and "all other interested persons."¹³⁴ Second, groups regulated by the NMSA are more likely to respect the regulations because they are able to participate in the process of creating the regulations. For example, after the NMSA put forth fishing restrictions for newly designated Atlantic sanctuaries in

123. 16 U.S.C. § 1433, 1439.

124. *Norton*, 311 F.3d at 1176-77.

125. MPRSA Amendments of 1980, Pub. L. No. 96-332, 98 Stat. 1057 (codified as amended at 16 U.S.C. § 1435).

126. MPRSA § 301, 16 U.S.C. § 1431.

127. MPRSA Amendments of 1984, Pub. L. No. 98-498, 98 Stat. 2296 (codified as amended at 16 U.S.C. § 1431(a)(3)).

128. *Id.*

129. 16 U.S.C. § 1431(b)(2).

130. *Id.* § 1431(a)(4).

131. Magnuson-Stevens Fishery Conservation and Management Act § 2(b)(1), 16 U.S.C. § 1801(b)(1); Clean Water Act § 403(a), 33 U.S.C. § 1343(a) (2006).

132. 16 U.S.C. § 1431(a)(4).

133. *Id.* § 1433(b)(2)(A)-(E).

134. *Id.*

January 2009, the president of the American Sportfishing Association publicly expressed appreciation for the process.¹³⁵ Third, courts have given strong effect to NMSA provisions and accompanying regulations.¹³⁶ For example, the United States Court of Appeals for the Eleventh Circuit has applied the NMSA as a strict liability statute.¹³⁷ The NMSA is more comprehensive and enforceable because it utilizes the political process.

Despite the strengths of the NMSA, supporters of broad Antiquities Act power would argue that the policy benefits of the NMSA do not have to work in isolation.¹³⁸ Often environmental regulations are not exclusive zones of protection, but rather, a series of overlapping protections which can be used in the alternative.¹³⁹ A classic example of this is cooperative federalism, where both the federal and state governments have authority.¹⁴⁰ Environmental citizen suits are another instance of overlapping regulation.¹⁴¹ They allow private citizens and interest groups to bring independent legal actions to supplement state and federal enforcement.¹⁴² This paradigm does not apply to the overlapping use of the NMSA and the Antiquities Act, however. The proposed national monument in the Gulf of Mexico caused bickering between Congress and the White House, and ultimately no marine protection was attained in this most at-risk ecosystem.¹⁴³ Now that the White House has undertaken the role of creating no-take zones and has, in the process, polarized Congress on the issue,¹⁴⁴ Congress and the NOAA are less likely to create no-take zones under the NMSA.

135. Press Release, NOAA To Establish Eight Federal Marine Protected Areas in the South Atlantic (Jan. 5, 2009), *available at* http://www.asafishing.org/asa/newsroom/newspr_090106.html (“Do we like restrictions on recreational fishing? Of course not: however, this was a deliberative and public process where all the known facts were laid on the table. In this case, the facts said that restricting access to the snapper/grouper fishery in certain designated areas was in the best interests of the fisheries and the communities and industries that depend on them and we support that . . .”).

136. *United States v. M/V Jacquelyn L.*, 100 F.3d 1520, 1521 (11th Cir. 1996).

137. *Id.*

138. Brax, *supra* note 2, at 127.

139. *See* Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (2006); Resource Conservation and Recovery Act, *id.* § 6901 (overlapping regulations governing hazardous waste).

140. *See, e.g.*, Patrick B. Sanders, Blanco v. Burton: *Louisiana's Struggle for Cooperative Federalism in Offshore Energy Development*, 69 La. L. Rev. 255, 275-76 (2008).

141. *Hallstrom v. Tillamook County*, 493 U.S. 20, 28-29 (1989).

142. *Id.*

143. S. 3438, 110th Cong. (2008); DiPeso, *supra* note 62.

144. DiPeso, *supra* note 62.

2. Difficulties in Balancing Preservation of Resources and Free Use

Regulation under the NMSA presents a challenge that does not exist under the Antiquities Act: gathering the political will to adequately protect marine resources. The NMSA's authorization has been described by its critics as "pitifully small."¹⁴⁵ One shortcoming of the NMSA is that it does not specifically provide for no-take zones, which are necessary for effective protection.¹⁴⁶ Nevertheless, the NMSA has been used to promulgate no-take zones.¹⁴⁷ As constituencies begin to understand the urgency of the degradation of marine ecosystems, more no-take zones will be created through the NMSA.

The political process can impede creation of sanctuaries. Groups advocating use and access of marine areas often defeat any true no-take zones.¹⁴⁸ In designating a sanctuary, the NOAA must consider negative impacts resulting from "management restrictions on income-generating activities such as living and nonliving resource development, and the socioeconomic effects of sanctuary designation."¹⁴⁹ In the Florida Keys, for example, public opinion flared up against a comprehensive system of proposed no-take zones.¹⁵⁰ After a series of hostile public demonstrations and a nonbinding referendum in which a majority voted against the plan, the NOAA could only muster a temporary no-take zone of nine nautical square miles.¹⁵¹

New developments suggest that the National Marine Sanctuary Program has gained momentum and is capable of establishing no-take zones through an open political process.¹⁵² In 2001, the NOAA established a 151-square-mile no-take zone in the Florida Keys.¹⁵³ The Tortugas Reserve was initiated at the state level and protects valuable coral reef formations.¹⁵⁴ In 2007, the NOAA extended no-take marine reserves and one "limited take" marine protection area in the Channel

145. John Balzar, *Shoring Up Little Slices of the Seas*, L.A. TIMES, Sept. 4, 2000, at A6 (quoting National Academy of Public Administration).

146. Brax, *supra* note 2, at 104; *see supra* notes 15-21 and accompanying text.

147. Kenneth R. Weiss, *Federal Fishing Ban Casts a Wider Net*, L.A. TIMES, Aug. 9, 2007, at B7.

148. Brax, *supra* note 2, at 106.

149. MPRSA § 303, 16 U.S.C. § 1433(b)(1)(H)-(I) (2006).

150. Brax, *supra* note 2, at 106.

151. *Id.* at 107.

152. *See* Weiss, *supra* note 147 (stating that the federal government's fishing bay on approximately 150 square miles around the Channel Islands ends over eight years of debate, scientific study, and bureaucratic resistance to enlarging a group of waters that are already protected).

153. Brax, *supra* note 2, at 111.

154. *Id.*

Islands National Marine Sanctuary out to six nautical miles.¹⁵⁵ This created the largest no-take area in the continental United States.¹⁵⁶ Although not a sea change in marine protection, these developments show there is growing confidence and political will in the National Marine Sanctuary Program.

B. Executive Orders

Presidents have used executive orders, as distinguished from proclamations, to streamline and enhance the National Marine Sanctuary Program.¹⁵⁷ Executive orders serve the regulatory framework in two substantial ways. First, Presidents can order agencies and interested parties to deliberate on the establishment of a sanctuary.¹⁵⁸ Such an order is not legally binding, but it stimulates the process, and is therefore in line with traditional executive powers.¹⁵⁹ Second, executive orders can streamline unity and oversight of the national system of marine protection areas.¹⁶⁰ Consequently, the President can aid in the protection of marine resources without overstepping his constitutional role.

In 2000, President Clinton issued an order to create the Northwest Hawaii Marine Sanctuary.¹⁶¹ Although it ultimately did not establish an enforceable sanctuary, it is a model for how an executive order can be used to overcome a lack of political will. The order stated that it did “not create any right or benefit, substantive or procedural, enforceable in law or equity by a party against the United States, its agencies, its officers, or any person.”¹⁶² Therefore, the order does not usurp Congress’s or the NOAA’s role under the NMSA. Nevertheless, such orders encourage the cooperation of agencies, which tend to respect the wishes of the President while he is in office.¹⁶³ By the same token, there is no

155. Weiss, *supra* note 147.

156. *Id.*

157. Brax, *supra* note 2, at 122.

158. See Exec. Order No. 13,178, 65 Fed. Reg. 76,903, 76,906 (Dec. 4, 2000) (“After considering input from the Secretary of the Interior and Governor of the State of Hawaii, the Secretary shall establish a Coral Reef Ecosystem Reserve Council pursuant to section 315 of the National Marine Sanctuaries Act (16 U.S.C. 1445a) to provide advice and recommendations on the Reserve Operations Plan and designation and management of any sanctuary.”).

159. See Shanley, *supra* note 42, at 405-06.

160. See Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000) (“This Executive Order will help protect the significant natural and cultural resources within the marine environment for the benefit of present and future generations by strengthening and expanding the Nation’s system of marine protected areas (MPAs).”).

161. Exec. Order No. 13,178, 65 Fed. Reg. 76,903, 76,901 (Dec. 4, 2000).

162. *Id.*

163. Brax, *supra* note 2, at 122.

guarantee that subsequent Presidents will continue its operations.¹⁶⁴ Notably, President Bush suspended the development of President Clinton's Northwest Hawaii Marine Sanctuary.¹⁶⁵

The program that Clinton outlined in the executive order has great potential in that it spurs marine protection through deliberative mechanisms. The order required the NOAA to consult with the Secretary of the Interior and Governor of Hawai'i, and to establish a "Coral Reef Ecosystem Reserve Council" (Council).¹⁶⁶ The Council was required to include "[t]hree Native Hawaiian representatives, including one Native Hawaiian elder, with experience or knowledge regarding Native Hawaiian subsistence, cultural, religious, or other activities in the Northwestern Hawaiian Islands."¹⁶⁷ The Council established use restrictions in the protected area and made plans for official designation as a sanctuary under the NMSA.¹⁶⁸ Although this grassroots, deliberative process was later obviated by President Bush's unilateral action under the Antiquities Act,¹⁶⁹ it is a useful model for kick-starting marine protection programs through executive power.

Second, the executive order can be used to streamline and unify marine protection areas throughout the United States. In 2000, President Clinton issued Executive Order 13,158 to establish a national system of marine protection areas.¹⁷⁰ The order directed the Department of the Interior and the Department of Commerce to coordinate and evaluate the diffuse network of marine protection areas at the federal and state level.¹⁷¹ As a result, the NOAA developed an inventory of all marine protection areas at the state and federal level—nearly 1700 in total.¹⁷² More recently, in November 2008, the Department of the Interior and the NOAA jointly launched the National Framework of Marine Protected

164. *Id.*

165. Kenneth R. Weiss, *Administration Backs Coast Refuges*, L.A. TIMES, June 5, 2001, at B1. Bush later designated it as a monument under the Antiquities Act. Presidential Proc. No. 8031, 71 Fed. Reg. 36,443, 36,446-47 (June 15, 2006).

166. Exec. Order No. 13,178, 65 Fed. Reg. 76,903, 76,906 (Dec. 4, 2000).

167. *Id.*

168. U.S. DEP'T OF COMMERCE, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NORTHWESTERN HAWAIIAN ISLANDS CORAL REEF ECOSYSTEM RESERVE DRAFT RESERVE OPERATIONS PLAN 26 (2002).

169. Presidential Proc. No. 8031, 71 Fed. Reg. 36,443, 36,446-47 (June 15, 2006).

170. Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000).

171. *Id.* at 34,909-10.

172. Nat'l Marine Protected Areas Ctr., *The National System of MPAs: Snapshot of United States MPAs 2*, http://www.mpa.gov/pdf/national-system/nat_sys_snapshot.pdf (last visited Feb. 10, 2009).

Areas.¹⁷³ The program will outline the national system, prioritize goals, and establish a voluntary nomination process for new areas to be included in the national system.¹⁷⁴ More importantly, it will help to identify areas that require better protection.¹⁷⁵ This development further elucidates how the President can achieve protection of marine resources with nonbinding executive orders.

V. CONCLUSION

Under the Antiquities Act, the President can provide rapid and decisive environmental protections which, admittedly, are attractive.¹⁷⁶ The need for no-take zones to protect marine resources is great. Those who resist environmental regulations in the oceans seem capable of defeating any meaningful no-take scheme. However, the advantages of unilateral action must be weighed against the considerable disadvantage—dispensing with public participation in lawmaking. Ultimately, a plan to protect natural resources must respect fundamental principles of democratic governance. When government action impacts the environment, people should have an opportunity to voice their opinions before the plan is implemented. In the long run, this dialogue should protect natural resources. Furthermore, because the Antiquities Act did not give the President authority to designate monuments in the outer continental shelf, it stretches the boundaries of constitutionally defined executive powers to do so.¹⁷⁷ There is an alternative: Congress has established a process to designate marine protection areas under the National Marine Sanctuaries Act, and all interested parties have input.¹⁷⁸ True, the program has not yet delivered as extensive protections as are necessary, but the program is gaining momentum. Consequently, the White House should not cast away our core democratic principles to protect the oceans.

173. Final Framework for the National System of Marine Protected Areas of the United States and Response to Comments, 73 Fed. Reg. 69,608, 69,608 (Nov. 19, 2008).

174. *Id.* at 69,609.

175. *Id.*

176. See discussion *supra* Part III.A.

177. See discussion *supra* Part III.B.2.

178. See discussion *supra* Parts III.A.1-2.