Updates
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# Chief Justice Roberts' Statement Questions Broad Presidential Authority Under the Antiquities Act of 1906

On March 22, 2021, the U.S. Supreme Court denied certiorari in a case that upheld President Obama's designation under the Antiquities Act of the Northeast Canyons and Seamounts Marine National Monument in the northern Atlantic Ocean. In *Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019), the U.S. Court of Appeals for the District of Columbia Circuit rejected the claim that the designation, which covered roughly 5,000 square miles of ocean, was overly broad and improperly interfered with commercial fishing operations. The Supreme Court declined to hear the case, but Chief Justice Roberts issued a statement with important implications for future designations. *Massachusetts Lobstermen's Ass'n v. Raimondo*, 592 U.S. ___ (No. 20-97) (Mar. 22, 2021).

The Chief Justice's statement, which is unusual for its length and directness, calls into question the broad use of Presidential authority under the Antiquities Act. The statement begins with the following query: "Which of the following is not like the others: (a) a monument, (b) an antiquity (defined as a "relic or monument of ancient times" …), or (c) 5,000 square miles of land beneath the ocean? If you answered (c), you are not only correct but also a speaker of ordinary English. In this case, however, the Government has relied on the Antiquities Act of 1906 to designate an area of submerged land about the size of Connecticut as a monument."

The Chief Justice agreed with the other Justices that the petition did not meet the Court's criteria for certiorari. But his statement criticized the contemporary notions about the scope of the Act, which provides for conservation of federal land "confined to the smallest area compatible with the proper care and management of the objects to be protected." Although enacted in 1906 primarily to protect archaeological artifacts "and other objects of historic or scientific interest" (described in the legislative history as "interesting relics"), the Act in modern proclamations has been interpreted more broadly by Presidents, and courts, to protect entire ecosystems. For instance, President George W. Bush invoked the Act to create the Hawaiian Islands Marine National Monument (later renamed the Papah?naumoku?kea Marine National Monument) to protect nearly 140,000 square miles of ocean off the Hawaiian coast. President Obama similarly invoked the Act to enlarge the boundaries for the Cascade-Siskiyou National Monument. *See* Proclamation 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017) (noting that expansion will "create a … landscape that provides vital habitat connectivity, watershed protection, and landscape-scale resilience for the area's critically important natural resources" and will protect "historic resources.").

According to Justice Roberts, the designation in the *Massachusetts Lobstermen's Ass'n* case "demonstrated how far we have come from indigenous pottery," thus questioning the Act's application to landscapes or ecosystems. He emphasized the Act's requirement that "[a]ny land reserved under the Act must be limited to the smallest area compatible with the care and management of the objects to be protected," then observed that "[s]omewhere along the line, however, this restriction has ceased." Although denying the lobstermen's petition because it did not squarely present the issue, Roberts' statement strongly suggests that at least he is receptive to challenges that will give the Court the opportunity to define and enforce the scope of the "smallest area compatible" limitation, which has not substantially constrained the President's authority since Teddy Roosevelt used the Act to protect the Grand Canyon. *Cameron v. United States*, 252 U.S. 450 (1920).

The petitioners in *Massachusetts Lobstermen's Ass'n* had argued below that the designation would have devastating economic impacts for them, and Justice Robert's statement is significant to groups whose interests may be affected by broad designations. Opponents of development projects, for instance, have in some cases sought national monument designations for sites where such projects are proposed, effectively preempting them (e.g., a petition for a designation during the Obama administration that would have prevented the government from approving the Resolution Copper mine in Arizona). Justice Roberts' statement suggests that there may be an opening for parties aggrieved by designations to obtain closer judicial scrutiny of the "objects to be protected" in any future designations to ensure their consistency with the Act's scope.

Notably, the D.C. Circuit has rejected attempts to cabin the reach of Presidential authority under the Act. For example, in *Mountain States Legal Foundation v. Bush*, the court rejected the claim that the Act covered only "rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts," citing "Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." 306 F.3d 1132, 1137 (D.C. Cir. 2002).

But in different legal contexts, some courts have showed skepticism towards the use of federal authorities to place broad swaths of public lands off-limits to multiple use dictates. For example, in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988), decided before passage of the Religious Freedom Restoration Act, the Supreme Court rejected a challenge based on the First Amendment's Free Exercise clause to road construction and timber harvesting in a national forest brought by tribes who claimed the project would limit their access to sites they considered sacred. The Court found that "such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." Further, in *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1232 (9th Cir. 1999), the U.S. Court of Appeals for the Ninth Circuit rejected a challenge by the Sitka Tribe under the National Historic Preservation Act to a timber sale in the Tongass National Forest, stating:

That a general unbounded and imprecisely located area has important cultural significance is not enough: Abraham's tomb is an identifiable site, but the wanderings of the Jews in the Sinai Desert after the Exodus did not leave any accurately identifiable path that could be a 'site.'

Justice Robert's statement in *Massachusetts Lobstermen's Ass'n* signals that courts may be wary of designations under the Antiquities Act they do not view as being sufficiently circumscribed. It also highlights that future Presidential proclamations to designate or enlarge (or to undo or reduce) national monuments are likely to be controversial and the subject of litigation. Indeed, legal challenges may yet be filed against existing monuments. Any such litigation will need to take heed of Chief Justice Roberts' statement and the hard questions he asks about the proper scope of the Antiquities Act, more than a century after its enactment.



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