Congress Back Then: An Antiquated Law?



by K. Daniel Glover
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Comments: 18 posts

Ask just about anyone whether consensus is a good thing, and you will hear an unqualified "yes." And who could argue with such a response? Harmony and agreement seem far better than the alternatives of division, gridlock and stalemate marked by petty bickering.

Yet consensus has a down side, especially in the governmental realm. When all parties agree that a particular idea, at least on its face, is a good one, or when once-vocal opponents cower in the wake of a perceived mandate, they too often are quick to pass laws without substantive debate. In their rush to legislate, they leave their successors to guess at and squabble about their intent.

Such is the case with the 1906 American Antiquities Act, an obscure law once again under attack after President Clinton's April 15 decision to dedicate 328,000 acres of the Sierra Nevada in California as the Giant Sequoia National Monument. The statute, enacted after little debate during America's most noteworthy conservation era, periodically has been a lightning rod for controversy, as policymakers have debated exactly how much power to protect public lands Congress intended to give the president.

A consensus on conservation

For much of the United States' first century as a nation, the impetus for the federal government's land policy was westward expansion. As it added huge expanses of territory to its holdings, including 1.6 billion acres alone with the Louisiana Purchase, the government encouraged settlement of those lands by giving it away to railroads, economic interests and its people.

That policy had its advantages and disadvantages. "These land policies did hasten westward expansion," says *The Encyclopedia of the United States Congress*. "But congressional oversight of public land management, negligent or indifferent at best, also permitted profligate waste, corruption and disregard of land laws." Land mismanagement reached the level of national scandal by the 1870s.

The devastation eventually led to reforms. In 1872, Congress designated the headwaters of the Yellowstone River as the first national park. Later, it enacted sweeping laws like the Forestry Reserves Act of 1891, which gave the president the power to "set apart and reserve ... public lands, wholly or in part covered with timber or undergrowth ... as public reservations." In its first two years on the books, President Benjamin Harrison used the law to create 15 forest reserves totaling more than 13 million acres.

Beginning a decade later, President Theodore Roosevelt's obsession with conservation would prove to be even more significant. The acreage of the national forests more than quadrupled under Roosevelt's administration. And during Roosevelt's tenure Congress enacted the antiquities law.

The statute, which occupies a mere two paragraphs in the U.S. code, authorizes the president, without an act of Congress, to prevent development on lands that are home to historic ruins, monuments and artifacts. Roosevelt used it to create 18 national monuments -- Devils Tower in Wyoming was the first -- and presidents since have used it to proclaim more than 100 monuments covering nearly 80 million acres.

What exactly is an antiquity?

The question that still plagues policymakers is whether Congress intended the Antiquities Act to be used to protect so much land. Unfortunately, history provides few clues. The law merits nary a mention

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in most recent Roosevelt biographies, in newspapers of the day or even in the *Congressional Record*.

Roosevelt, a man who saw and used the presidency as a "bully pulpit," arguably envisioned a law that would give him and future presidents as much unchecked conservationist power as possible. An overwhelmingly Republican Congress -- margins of 222-164 in the House and 61-29 in the Senate -- also may have wanted to bestow sweeping powers on its party's popular president.

The Senate Public Lands Committee's report on the bill indicates the strong consensus in its favor. "This measure," it said, "has the hearty support of the Archaeological Institute of America, the American Anthropological Association, the Smithsonian Institution and numerous museums throughout the country. ... The bill is carefully drawn, and the committee are unanimously in favor of its passage."

So acceptable was the measure that neither the House nor the Senate took recorded votes on its passage. The Senate passed the bill by voice vote May 24, 1906, after the Public Lands Committee chairman briefly summarized its provisions, and the House followed suit June 5. Roosevelt signed the measure June 8.

At the same time, though, there is reason to believe that Congress imagined a limited use of the act. The committee report speaks only of the need to "protect historic and prehistoric ruins." The law itself says the parameters of national monuments created under it "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

Advocates of a narrow interpretation of the statute, furthermore, are quick to recount the only floor debate on the subject. On the House floor, Rep. John Hall Stephens (TX) said the bill would be "preferable if it covered a particular spot." He questioned House Public Lands Committee Chairman John F. Lacey (R-IA) about the scope of the bill and whether it would be "abused" as he said the forest-reserves law had been.

Lacey answered Stephens' concerns by noting that the aim of the Antiquities Act was "entirely different" than that of the forest-reserves law. He said the new actwas designed to protect "small reservations" and objects of "sufficient interest" like "the Indian remains in the pueblos in the Southwest." Lacey added that the law was "meant to cover the cave dwellers and cliff dwellers."

Open to presidential interpretation

Some presidents have interpreted the Antiquities Act more broadly, however. Franklin D. Roosevelt angered some lawmakers on March 5, 1943, when he used it to protect land just outside Grand Teton National Park in Wyoming. *These American Lands* author Dyan Zaslowsky said FDR's decision led to "a certain presidential hesitancy about invoking the Antiquities Act" that lasted until the 1970s.

Lyndon Johnson caused an uproar in 1969 when he contemplated antiquities protection for millions of acres of land in Alaska. And Jimmy Carter went Johnson one better on Dec. 1, 1978, by actually using the law to protect Alaskan lands -- 56 million acres worth. In one fell swoop, he created 17 new monuments and more than doubled the size of the national park system.

Actions like Carter's clearly go beyond the "small reservations" Lacey imagined and approach the "abuse" Stephens feared. But the 1906 Congress was virtually silent on the definition of an "antiquity," the result of an apparent consensus at the time. That silence has left lawmakers of today with little recourse when presidents like Carter and Clinton, whose use of the Antiquities Act has been questioned since his election-year designation of the Grand Staircase-Escalante National Monument in Utah in 1996, want to create a legacy.

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The Library of Congress' *American Memory* series includes a section dedicated to "The Evolution of the Conservation Movement, 1850-1920". Rep. James Hansen (R-UT) is among the leaders in the fight against the Antiquities Act. The Sierra Club has a Sequoia Task Force that advocated the designation of the Giant Sequoia National Monument. Read a Congressional Research Service report on the Grand Staircase-Escalante National Monument and a GOP congressional report titled "Behind Closed Doors: The Abuse of Trust And Discretion In The Establishment Of The Grand Staircase-Escalante National Monument."

Should the Antiquities Act be amended or repealed, and if so, how? Would national treasures like the Grand Canyon have been preserved without it? Has President Clinton abused the powers granted to him through the law? Has he used it for purely political purposes? Is his most recent effort to protect the Sequoia trees justified and a legitimate use of the Antiquities Act?

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5/2/00 12:16:11 AM Damien Mitchell
AlanH: Well thank you, we usually don't agree. I believe this is a first.

5/2/00 1:43:51 AM Damien Mitchell
I just wanted to add that we should not have to abuse the Antiquities Act in order to get Progressive Legislation passed or Acts enacted. Instead, we should get broader legislation passed. Now, I do see the arguable need to not give the President this kind of power with broader legislation, but I do I also see the arguable need to do so. I guess whether or not we want to deal with the environment on a state level or a national one, we must remember that the people of this country need to feel empowered enough to have a say in their own destiny as they do with any political decision. That is after all, what America is all about.

5/2/00 9:25:15 AM alanH
Damien: Had to happen sometime...

5/2/00 12:18:31 PM Mark Wilson
Why am I not surprised that alanh likes the idea of having the govt take other people's land and preserve for his enjoyment?

5/2/00 11:52:43 PM ky
alan h: your question of who's land the pres can sanctify is VERY important. While I approve of the govt (any) setting aside part of its land, I cannot approve the Pres doing so without consent of Congress on every acre, or any govt doing so with anyone else's land. The consensus ideal begged for so often today is both unrealistic and worse, detrimental. No group considering an issue is going to agree, unless they are not seriously considering or they are the ones to benefit most from the proposal. Dissent is necessary, if only to raise questions.

5/2/00 11:56:29 PM ky
And before anyone brings up an issue "we can all agree on" like pedophilia: At least some pedophiles think there is nothing wrong with their sexual orientaion and several non-pedophiles have recently written essays supporting pedophilia as harmless and even beneficial. There is no issue we all agree on.

5/3/00 8:06:39 AM alanH
Ky: well, it is effective, you gotta admit that. Right now, the state of MD is trying to figure out what to do with 58,000 acres of woodland they just bought on the Eastern Shore. Unfortunately, these are not contiguous acres and everyone from hunters to hikers to neighbors is putting their 2 cents in regarding how the land should be managed. It's very difficult indeed to reach consensus on these things.

5/4/00 12:25:30 AM Young Noggin
ky: I get where you're going with your comment. But are there non-pedohiles who believe this? I don't think pedophilia is considered a sexual orientation, even by the most "open-minded" psychology professionals. I believe it remains a diagnosis in the DSM. Of course, we can certainly argue all day long where the line between childhood and adulthood lies, making the definition of pedophilia a source of probable disagreement.

5/4/00 7:43:14 AM alanH
Noggin: there's an interesting piece in this week's Standard about the normalization of deviant sex practices. I think the piece was called "Culture war" something.

5/4/00 11:20:59 AM Young Noggin
alanH: Thanks.

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