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## Dismantling Monuments

Richard H. Seamon

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## DISMANTLING MONUMENTS

*Richard H. Seamon*\*

## Abstract

The Antiquities Act of 1906 authorizes the President to “declare” certain objects “to be national monuments,” and to “reserve parcels of land” to protect those national monuments. The Act does not expressly authorize the President to reduce or rescind a monument established by a prior President under the Act, and recent actions by President Donald Trump raise the question whether the Act impliedly authorizes such reductions or rescissions. The majority of legal scholars who have studied this question have said no, the Act does not grant such implied authority. This Article takes the contrary position. The President’s authority under the Antiquities Act to reduce a monument previously established under the Act is established by (1) past presidential practice; (2) congressional acquiescence; and (3) official opinions of the Attorney General and the Solicitor of the U.S. Department of the Interior. Further, the President’s authority to rescind such a monument (1) follows logically from the President’s power to reduce a monument; (2) reflects the President’s constitutional duty to take care that the Antiquities Act is faithfully executed; and (3) accords with the general rule that prevents the current President from being bound by the acts of predecessors in that office.

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INTRODUCTION

By the time President Barack Obama left office, he had set aside more than half a billion acres of federal land as national monuments under the Antiquities Act of 1906.<sup>1</sup> Soon after assuming office, President Donald Trump announced that he was “committed to rolling back the egregious abuse of the Antiquities Act.”<sup>2</sup> To that end, Trump ordered a review of twenty-seven monuments that had been created or expanded since

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1. 54 U.S.C. §§ 320301–320303 (2012); Coral Davenport, *Obama Designates Monuments in Nevada and Utah*, N.Y. TIMES, Dec. 29, 2016, at A14 (reporting that as of that date Obama had designated 553 million acres in monuments); Juliet Eilperin & Brady Dennis, *With New Monuments in Nevada, Utah, Obama Adds to His Environmental Legacy*, WASH. POST, Dec. 28, 2016, at A2.

2. Dan Merica & Kevin Liptak, *Trump Order Could Roll Back Public Lands Protections from 3 Presidents*, CNN POLITICS, <http://www.cnn.com/2017/04/25/politics/donald-trump-federal-lands-antiquities/index.html> (containing video clip of President Trump’s remarks at the Interior Department) (last updated Apr. 26, 2017).

President Bill Clinton took office in 1996.<sup>3</sup> The review led Trump to slash the size of two huge monuments in Utah: the Grand Staircase Escalante and the Bears National Monuments.<sup>4</sup> That move immediately prompted lawsuits by environmental organizations and Native American tribes, among other plaintiffs.<sup>5</sup> The plaintiffs in those suits will emphasize that the Antiquities Act does not expressly authorize the President to reduce or abolish national monuments.<sup>6</sup> The question those lawsuits pose is thus whether the Act *impliedly* authorizes the President to do so.

No court has ever addressed that question, but the academic community almost unanimously says no, the Antiquities Act does not impliedly authorize the President to reduce or abolish a monument created under that Act.<sup>7</sup> This Article takes the contrary position. Part I

3. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017); Press Release, U.S. Dep't of the Interior, Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments (May 5, 2017), <https://www.doi.gov/pressreleases/interior-department-releases-list-monuments-under-review-announces-first-ever-formal>; see Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016) (creating Bears Ears National Monument).

4. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017) (modifying Grand Escalante); Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017) (modifying Bears Ears); 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=.576b908d40b1](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=.576b908d40b1) (reporting that Trump reduced Bears Ears by about 85%, cutting about 1.1 million acres, and reduced Grand Staircase by almost 46%, cutting more than 800,000 acres).

5. Complaint for Injunctive and Declaratory Relief, *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017); Complaint for Injunctive and Declaratory Relief, *The Wilderness Soc'y v. Trump*, No. 1:17-cv-02587 (D.D.C. Dec. 4, 2017); Complaint for Injunctive and Declaratory Relief, *Grand Staircase Escalante Partners v. Trump*, No. 1:17-cv-02591-EGS (D.D.C. Dec. 4, 2017); Complaint for Injunctive and Declaratory Relief, *Utah Diné Bikéyah v. Trump*, No. 1:17-cv-02605-TSC (D.D.C. Dec. 6, 2017); Complaint for Injunctive and Declaratory Relief, *Nat. Res. Def. Council, Inc. v. Trump*, No. 1:17-cv-02606 (D.D.C. Dec. 7, 2017).

6. 54 U.S.C. § 320301(a) (authorizing President to “declare by public proclamation” certain objects on federal land “to be national monuments”); *id.* § 320301(b) (authorizing President to “reserve parcels of land as a part of the national monuments”); see also *infra* notes 10–32 and accompanying text (discussing text of Antiquities Act).

7. Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 56 (2017) (concluding that “the President lacks the legal authority to abolish or diminish national monuments”); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 553 (2003) [hereinafter Squillace, *Monumental Legacy*] (“The idea that Congress granted the President ‘one-way’ authority to create, but not revoke or modify, national monuments is compelling . . . .”); Letter from 121 Law Professors to Sec’y of Interior Ryan Zinke and Sec’y of Commerce Wilbur Ross (July 6, 2017), [http://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors\\_as-filed.pdf](http://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf) (commenting, in response to executive order requiring review of certain past monuments, that Antiquities Act “gives the President authority only to identify and reserve a monument, not to diminish or abolish one”); see also Memorandum from Robert Rosenbaum et

introduces the Antiquities Act and shows that it does not authorize million-acre designations such as Bears Ears. This showing, if accepted, sharpens the current dispute by posing the issue of whether a President can reduce or abolish a monument created by a prior President in violation of the Antiquities Act. Part II shows that the President can *modify* a monument created under the Act, a power demonstrated most forcefully by the repeated instances in which presidents have done so. Part III shows that the President also can *abolish* a monument altogether. Finally, Part IV responds to arguments against this Article's position.

### I. BACKGROUND ON THE ANTIQUITIES ACT

As its name suggests, the Antiquities Act is designed to protect specific objects—"historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest"—that is, antiquities.<sup>8</sup>

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al., Arnold & Porter Kaye Scholer LLP, *The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906* (May 3, 2017), <https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments#sm.0001jmr0m11wcf13w0b1mn08jo4t2>. Some scholars have argued that the President cannot abolish monuments created under the Antiquities Act, while expressing uncertainty about, or even support for, the President's power to reduce the size of such monuments. See Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 *ECOLOGY L.Q.* 707, 711–12 (2002) ("Once the President establishes a monument, he is without power to revoke or rescind the reservation, although it remains uncertain whether the President may reduce a monument in size."); Michael Margherita, *The Antiquities Act & National Monuments: Analysis of Geological, Ecological, & Archaeological Resources of the Colorado Plateau*, 30 *TUL. ENVTL. L.J.* 273, 286, 291 (2017) (stating that "the evidence . . . suggests that an implied power to abolish monuments does not exist" but that "[i]t is unclear whether the Antiquities Act grants the president the implied power to diminish an existing national monument"); James R. Rasband, *The Future of the Antiquities Act*, 21 *J. LAND RESOURCES & ENVTL. L.* 619, 626, 628 (2001) (stating that "it seems likely that a court would deny a president the power to revoke a prior national monument designation" but that the courts might uphold presidential reductions of monuments); see also Robert B. Keiter, *The Monument, the Plan, and Beyond*, 21 *J. LAND RESOURCES & ENVTL. L.* 521, 533 (2001) ("[T]here is no explicit or implicit authority in the Antiquities Act to rescind a national monument designation, and no precedent for such a presidential action."); cf. Scott Y. Nishimoto, *President Clinton's Designation of the Grand Canyon-Parashant National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act*, 17 *J. ENVTL. L. & LITIG.* 51, 55 (2002) ("[T]he Antiquities Act . . . authorizes the President to reduce the size of existing national monuments to conform with the 'smallest area compatible with the proper care and management of the objects to be protected' clause."). But see John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, AM. ENTERPRISE INST., Mar. 2017, at 6; see also Joseph M. Feller, *Recent Developments in Public Land Law: National Monuments, National Forest Roadless Areas, and BLM Rangeland Management*, in ALI-ABA COURSE OF STUDY: ENVIRONMENTAL LAW 179, 183 (2001) ("The Antiquities Act contains no authorization for revocation of national monuments, but it is arguable that the power to revoke is implicit in the power to create.").

8. 54 U.S.C. § 320301(a).

To protect antiquities, the Act authorizes the President to reserve small “parcels” of public land surrounding them.<sup>9</sup> Soon after the Act became law in 1906, however, presidents began using it sometimes to protect entire landscapes, and not just discrete antiquities. That use violates the Act’s original intent. The frequent violations of the Act make it particularly important to determine whether the President can reduce or abolish monuments to remedy those violations.

#### A. *The Text of the Antiquities Act*

The Antiquities Act has two main provisions. The first provision allows the President to “declare” certain objects “to be national monuments”:

(a) *Presidential Declaration.* The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.<sup>10</sup>

The second provision allows the President to “reserve parcels of land as a part of the national monuments,” stating in full:

(b) *Reservation of land.* The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>11</sup>

The President can declare monuments and reserve parcels of land to protect them without consulting state and local officials in the monument area or considering impacts on people in the area.<sup>12</sup> Nor does the

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9. *Id.* § 320301(b).

10. *Id.* § 320301(a).

11. *Id.* § 320301(b).

12. James R. Rasband, *Antiquities Act Monuments: The Elgin Marbles of Our Public Lands?*, in *THE ANTIQUITIES ACT* 137, 137 (David Harmon et al. eds., 2006) (“Over and over in its 100-year history, the Antiquities Act has been wielded by presidents without any regard for the local rural communities and the state and county governments most impacted by the monument’s designation.”); *see also, e.g.*, S. REP. NO. 106-250, at 2 (2000) (“Since the passage of the Antiquities Act in 1906 many laws have been enacted which provide for increased public participation in the management of federal lands. While the Antiquities Act confers presidential authority to designate new monuments, it contains no requirements for public participation prior to any such designation.”).

President need Congress's advice or consent to create a monument.<sup>13</sup> Unlike other decisions affecting public land, the President's establishment of a national monument is not subject to the National Environmental Policy Act.<sup>14</sup> More generally, the Act is distinctive in giving the President unilateral power to withdraw land from the public domain.<sup>15</sup>

While the Antiquities Act allows the President to create a monument with the stroke of a pen, the Act also has a sharp focus. The Act limits national monuments to three types of objects: (1) historic landmarks; (2) historic and prehistoric structures; and (3) "other objects of historic or scientific interest."<sup>16</sup> And it requires that land reserved for a monument "be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>17</sup> Thus, the Act expressly contemplates that the President will use it when determining that a particular landmark, structure, or other antiquity has historic or scientific

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13. RONALD A. FORESTA, *AMERICA'S NATIONAL PARKS AND THEIR KEEPERS* 74–75 (1984) (stating that, in period when Presidents used Antiquities Act authority expansively, "agency leadership had at their disposal a means of expansion which circumvented Congress entirely"); Eric C. Rusnak, *The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 672 (2003) ("[U]nder the terms of the Act, the president is not required to consult with local and state authorities. Neither is the president obligated to seek congressional advice and consent prior to declaring lands national monuments."); John F. Shepherd, *Up the Grand Staircase: Executive Withdrawals and the Future of the Antiquities Act*, 43 ROCKY MTN. MIN. L. INST. 4–1, 4–9 (1997) (stating that Antiquities Act does not "require the President to follow any particular procedures, such as a public hearing or consultation with Congress, before designating a national monument").

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

15. HAL ROTHMAN, *PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS* xi–xii (1989) (stating that the Act is so significant because, as it came to be interpreted, it "created a mechanism through which federal officials, interested professionals, and other special-interest groups could achieve preservation goals without waiting on popular or congressional consensus"); John D. Leshy, *Putting the Antiquities Act in Perspective*, in *VISIONS OF THE GRAND STAIRCASE-ESCALANTE: EXAMINING UTAH'S NEWEST NATIONAL MONUMENT* 84 (Robert B. Keiter et al. eds., 1998) (describing Antiquities Act as "somewhat unusual statute" because "[b]y its terms, Congress has vested in the president a broad power to act, unilaterally, unencumbered by process or any legal duty to consult"). The term "public domain" historically referred to government-owned lands that were open to entry and settlement by private persons for use as homesteads or for other uses such as grazing and mining. *Public Domain*, BLACK'S LAW DICTIONARY 1424 (10th ed. 2014). When land is "withdrawn" from the public domain, that means it is no longer open to entry and settlement by private persons. *See, e.g.*, 43 U.S.C. § 1702(j) (2012) (defining "withdrawal" for purposes of the Federal Land Policy and Management Act). When land in the public domain is "reserved," that means it is earmarked for a particular purpose, to the exclusion of others. *See* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 285 (1982). *See generally* 1 CHARLES F. WHEATLEY, JR., *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* (1969).

16. 54 U.S.C. § 320301(a).

17. *Id.* § 320301(b).

value; in that event, the President may reserve the land necessary to protect it.

By specifying types of objects that can be protected as “national monuments,” the Act implies that its purpose is to protect discrete, identifiable antiquities. This purpose is reinforced by Section 1 of the original Act, which imposed criminal penalties for the unauthorized removal, damage or destruction of discrete archeological objects or sites:

[A]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.<sup>18</sup>

In addition to Section 1’s punishment for stealing or harming antiquities, Section 3 authorizes the government to grant permits “for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity on land” within a monument.<sup>19</sup> These provisions confirm that the Act’s purpose is to protect discrete antiquities and the specific land (“parcels”) around them.<sup>20</sup>

The text of the Act does not comprehensively address the legal effect of declaring a monument and reserving land for it. In recent practice, the use of land reserved as a national monument is severely restricted. The proclamation establishing Bears Ears, similar to other recent monument proclamations, contains the following restrictive language:

All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws or laws applicable to the U.S. Forest Service, from location, entry, and patent

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18. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (current version at 18 U.S.C. § 1866(b) (2012)).

19. *Id.* § 3 (current version at 54 U.S.C. § 320302 (2012)).

20. See Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 449 n.75 (1981) (“Consideration of the three sections of the Antiquities Act *in pari materia* compels the conclusion that the purpose of the Act was to protect objects of antiquity.”); see also *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452–53 (1892) (holding that State couldn’t constitutionally grant entire lakebed under Lake Michigan to railroad company in fee simple but could instead only convey “parcels” of the lakebed for public improvements like piers and wharves).

under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.<sup>21</sup>

Through such language, the proclamation “changes the property from being federal land available for multiple uses” to land the uses of which can be restricted to serve the “overriding management goal” of protecting the designated antiquities.<sup>22</sup>

The Bears Ears proclamation and other recent ones make the monument’s establishment “subject to valid existing rights.”<sup>23</sup> But “the extent to which [monument] designations may affect existing rights is not always clear.”<sup>24</sup> That is because—as is true of the proclamation creating Bears Ears—recent proclamations direct the agencies charged with administering the monuments to adopt management plans. These management plans may impose restrictions that restrict the exercise of existing rights if the agency deems the restrictions necessary to protect the designated antiquities.<sup>25</sup> As the Bureau of Land Management (BLM) and the Forest Service say in a “fact sheet” on Bears Ears, the exercise of valid existing rights and conduct of other previously approved activities may continue only “as long as they are consistent with the care and management of the objects identified in the national monument proclamation.”<sup>26</sup>

The potential restrictions are illustrated by the management plan for Utah’s Grand Staircase-Escalante National Monument, perhaps the most

21. Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016). The proclamation further provides that laws governing grazing permits or leases on lands under the jurisdiction of the U.S. Forest Service or the Bureau of Land Management “shall continue to apply with regard to the lands in the monument to ensure the ongoing consistency with the care and management of the objects identified above.” *Id.* at 1145. The proclamation also makes the monument’s establishment “subject to valid existing rights, including valid existing water rights.” *Id.* at 1143; see ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 3 (2016) (quoting restrictive language, similar to that quoted in the text, found in “[r]ecent proclamations under the Antiquities Act”), [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf).

22. See NAME REDACTED, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 7–8 (2017), [https://www.everycrsreport.com/files/20170130\\_R41330\\_e313e8a36511852dca4cb3687edf27c4ef3aab0.pdf](https://www.everycrsreport.com/files/20170130_R41330_e313e8a36511852dca4cb3687edf27c4ef3aab0.pdf).

23. Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

24. NAME REDACTED, *supra* note 22, at 7, 8.

25. *Id.* at 7–9; James R. Rasband, *Utah’s Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 520–21 (1999) (noting that monument designations preserving existing rights still “allow[] a variety of restrictions to avoid degradation or impairment of the lands within the Monument”).

26. U.S. FOREST SERV. & BLM, BEARS EARS NATIONAL MONUMENT: QUESTIONS AND ANSWERS 2 (2016), <https://www.fs.fed.us/sites/default/files/bear-ears-fact-sheet.pdf>.

controversial monument established by President Clinton.<sup>27</sup> Two “precepts” drive that Plan’s “overall vision”: (1) “[s]afeguarding the remote and undeveloped frontier character of the Monument,” and (2) supporting “the study of scientific and historic resources.”<sup>28</sup> To achieve those goals, the Plan restricts visitor facilities and motorized access to monument lands and curtails any activities unrelated to land preservation and scientific study.<sup>29</sup> Indeed, even proposed scientific research “will be carefully reviewed” if it has “potentially intrusive or destructive” effects.<sup>30</sup> For all “valid existing rights,” which the Plan calls “VERs,” the “adjudication process” entails continual, close scrutiny “for the life of each VER” to ensure “full compliance with the law.”<sup>31</sup> For existing mining claims and mill sites, moreover, the Plan announces that “the BLM will initiate a validity examination process to verify the VERs of claimants before such claimants conduct surface disturbing activities greater than casual use.”<sup>32</sup> Overall, the Plan leaves no doubt that VER holders can anticipate a new regime of regulatory scrutiny and restrictions.

### B. *The Legislative History of the Antiquities Act*

As discussed above, the text of the Antiquities Act shows that Congress intended to protect discrete antiquities—historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest located on public land—by protecting the antiquities themselves and small areas of land around them. That intention also emerges plainly from the history of the Act.

The quarter-century before the 1906 enactment of the Antiquities Act saw renewed and growing interest in American antiquities.<sup>33</sup> American

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27. See generally Rasband, *supra* note 25 (discussing controversies arising from creation of Grand Staircase-Escalante National Monument).

28. U.S. DEP’T OF THE INTERIOR: BUREAU OF LAND MGMT., GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT MANAGEMENT PLAN 5 (1999), [https://eplanning.blm.gov/epl-front-office/projects/lup/65870/79803/92581/GSENM\\_MP.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/65870/79803/92581/GSENM_MP.pdf).

29. *Id.* at 3–5.

30. *Id.* at 5.

31. *Id.* at 51.

32. *Id.*

33. Ronald Freeman Lee, *The Antiquities Act of 1906*, 42 J. SW. 198, 198–213 (2000). Ronald Lee was the Chief Historian of the National Park Service from 1938 to 1951; he wrote his history of the Act for publication in celebration of the centennial of Yellowstone National Park in 1972. Raymond Harris Thompson, “An Old and Reliable Authority”: *Introduction*, 42 J. SW. 191, 191 (2000). Lee’s history is reproduced, with minor edits, in volume 42 of the *Journal of the Southwest*; it also is available on the National Park Service’s website. See Ronald F. Lee, *The Story of the Antiquities Act*, NAT’L PARK SERV., <https://www.nps.gov/archeology/pubs/Lee/index.htm> (last updated Mar. 15, 2016, 5:20 PM).

interest in these objects rekindled as the embers of the Civil War cooled.<sup>34</sup> According to a leading historian of the Act, the year 1879 was particularly significant. Several events occurred in that year, including this one:

In [1879] Congress authorized establishment of the Bureau of Ethnology, later renamed the Bureau of American Ethnology, in the Smithsonian Institution to increase and diffuse knowledge of the American Indian. Major John Wesley Powell, who had lost his right arm in the Battle of Shiloh and who in 1869 had led his remarkable boat expedition through the Grand Canyon of the Colorado River, was appointed its first director. He headed the Bureau until his death in 1902. During this long period, he and his colleagues became a major force for the protection of antiquities on federal lands.<sup>35</sup>

The Smithsonian hosted a gathering of archeologists and anthropologists who formed an organization that evolved into the American Anthropological Association.<sup>36</sup> That organization, “in turn, provided crucial support for the American Antiquities Act in 1906.”<sup>37</sup>

Interest in antiquities on public land first produced federal legislation in 1889.<sup>38</sup> In that year, Congress enacted a law to protect the Casa Grande structure in Arizona.<sup>39</sup> The law authorized the President to reserve the land around the structure from settlement and sale.<sup>40</sup> In 1892, President Benjamin Harrison exercised that authority: He issued an executive order reserving the Casa Grande Ruin and 480 acres around it for “protection because of its archaeological value.”<sup>41</sup>

The growing American interest in antiquities on public land led to a greater need to protect them.<sup>42</sup> Both amateur and professional antiquity hunters—“pot hunters”—were removing antiquities from the public

34. ROTHMAN, *supra* note 15, at 6–7.

35. Lee, *supra* note 33, at 198 (citations omitted). The other 1879 events that historian Lee cites as significant include the publication of “a superbly illustrated book” showing antiquities in the American Southwest, the election for the first time of an anthropologist to be president of the American Association for the Advancement of Science, and the founding of the Archaeological Institute of America. *Id.* at 198–200.

36. *Id.* at 199.

37. *Id.*

38. *Id.* at 209.

39. Act of Mar. 2, 1889, ch. 411, 25 Stat. 939.

40. *Id.* at 961.

41. Lee, *supra* note 33, at 209. Casa Grande was re-designated a national monument by President Woodrow Wilson on August 3, 1918. Proclamation No. 1470, 40 Stat. 1818 (1918).

42. ROTHMAN, *supra* note 15, at 6–30; Lee, *supra* note 33, at 213.

lands and vandalizing the sites on which they were located.<sup>43</sup> A commercial market arose to meet public demand.<sup>44</sup> The need for legal protection of these American antiquities became apparent.<sup>45</sup>

Bills to provide that protection were introduced beginning in early 1900.<sup>46</sup> One bill, proposed by the Department of Interior, would have given the President broad authority to withdraw unlimited amounts of public land as national parks—all to be administered exclusively by the Secretary of Interior—for a wide variety of purposes, including their scenic beauty:

The President of the United States may, from time to time, set apart and reserve tracts of public land, which for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest, or springs of medicinal or other properties it is desirable to protect and utilize in the interest of the public; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.<sup>47</sup>

This and the other bills were referred to the House Committee on the Public Lands, whose chairman was Representative John F. Lacey of Iowa.<sup>48</sup> As historian Ronald Lee wrote, the Interior Department's bill met with a cool reception.<sup>49</sup> Representative Lacey told the Interior Secretary that the committee

seemed to be unanimously of the opinion that it would not be wise to grant authority in the Department of the Interior to create National parks generally, but that it would be desirable to give the authority to set apart small reservations,

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43. 33 CONG. REC. 4872 (1900) (statement of Rep. Lacey, primary sponsor of the Antiquities Act, that bill then under consideration would penalize “pot hunter[s]”); see H.R. REP. NO. 56-1104, at 1 (1900) ([T]he destruction of [ruins in Southwest United States] is taking place more and more each year.”); *Preservation of Historic and Prehistoric Ruins, Etc.: Hearing on S. 4127 Before the S. Subcomm. of Comm. on Public Lands*, 58th Cong. 4 (1904) (testimony of Dr. Francis W. Kelsey, Sec’y of Archeological Institute of America) (stating that public lands were being looted of valuable archeological objects and that sites from which they were being taken were “so completely disfigured in the process that the remains become valueless for scientific purposes”); JOHN ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* 144–46 (1961).

44. See Lee, *supra* note 33, at 218.

45. ISE, *supra* note 43, at 147; Lee, *supra* note 33, at 223–30.

46. ISE, *supra* note 43, at 149–50; Lee, *supra* note 33, at 223–30.

47. Lee, *supra* note 33, at 227–28 (quoting H.R. 11021, 56th Cong. (1900)).

48. *Id.* at 227.

49. *Id.* at 228; Shepherd, *supra* note 13, at 4–10 (“The House committee was not pleased with this request for a broad grant of executive authority.”); see also Johannsen, *supra* note 20, at 449–50 (stating that in years leading up to enactment of Act, “the Department of Interior repeatedly proposed adding scenic and scientific resources as objects worthy of protection”).

not exceeding 320 acres each, where the same contained cliff dwellings and other prehistoric remains.<sup>50</sup>

Historian Lee explains that the committee opposed Interior's broad proposal because of the huge withdrawals of public lands that had been made by presidents under the Forest Reserve Act of 1891.<sup>51</sup> The Committee eventually reported out a much narrower bill in spring 1900 that allowed the Interior Secretary to

set apart and reserve from sale, entry, and settlement any public lands in Colorado, Wyoming, Arizona, and New Mexico containing monuments, cliff dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric, primitive, or aboriginal man, each such reservation not to exceed 320 acres.<sup>52</sup>

By limiting each reservation to 320 acres, the bill contemplated that its authority would be used to “creat[e] reservations of the land surrounding each ruin.”<sup>53</sup>

Only four years later, beginning in 1904, did Congress again consider proposed legislation to protect antiquities. The Senate passed legislation known for its chief sponsor, Henry Cabot Lodge.<sup>54</sup> The Lodge Bill passed the Senate in April 1904, and, as amended, was reported favorably out on the House side, but Congress adjourned without passage in the House.<sup>55</sup> The Lodge Bill would have authorized the Secretary of Interior to withdraw public lands of up to 640 acres to protect historic and prehistoric ruins, monuments, archaeological objects, and antiquities.<sup>56</sup> But the Lodge Bill was not enacted.<sup>57</sup>

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50. Lee, *supra* note 33, at 228 (quoting ROBERT CLAUSE, INFORMATION ABOUT THE BACKGROUND OF THE ANTIQUITIES ACT OF 1906 (1945) (Department of the Interior Internal Report, May 10, 1945) (NPS-W-H) (on deposit with Office of Archeology and Historic Preservation of the National Park Service)) (citation omitted); *see also* ISE, *supra* note 43, at 150 (“Lacey . . . wrote . . . that the Public Lands Committee did not favor the provision authorizing the Department of the interior to create national parks and thought the areas reserved should be restricted to 320 acres.”).

51. Lee, *supra* note 33, at 228–29.

52. *Id.* at 229 (paraphrasing H.R. 10451, 58th Cong., (1900)) (citation omitted).

53. H.R. REP. NO. 56-1104, at 1, 2 (1900).

54. *See* H.R. REP. NO. 58-3704, at 1–2 (1905) (editing the Lodge Bill, S. 5603, 58th Cong. (1904)); ROTHMAN, *supra* note 15, at 38, 40; Lee, *supra* note 33, at 232.

55. *See* Lee, *supra* note 33, at 235.

56. H.R. REP. NO. 58-3704, at 1 (1905) (editing the Lodge Bill, S. 5603, 58th Cong. § 2 (1904)).

57. *See* Lee, *supra* note 33, at 235.

Instead, the bill that was ultimately enacted as the Antiquities Act was introduced in Congress in early 1906.<sup>58</sup> The bill had been drafted by Edgar Lee Hewett, an influential archeologist, with input from Representative Lacey, Chairman of the House Committee on Public Lands.<sup>59</sup> Lacey's role in its enactment was so important that the Antiquities Act was often called the Lacey Act.<sup>60</sup> The 1906 bill drafted by Archeologist Hewett, unlike some earlier bills, vested power to withdraw lands to protect antiquities in the President, rather than the Secretary of Interior.<sup>61</sup> This change stemmed from the transfer in 1905 of much public land containing antiquities to the Department of Agriculture, largely through the efforts of Gifford Pinchot, Chief of the Agriculture Department's Bureau of Forestry.<sup>62</sup> The 1906 bill further differed from some of its predecessors by not containing numerical limits on the amount of land that could be reserved to protect antiquities.<sup>63</sup> Instead, the bill provided, in language that was ultimately enacted, that the President could reserve only "the smallest area compatible with the proper care and management of the objects to be protected."<sup>64</sup> The 1906 bill included, as items entitled to protection, "objects of historic or scientific interest," a phrase possibly taken from the bill that had been introduced in 1900 and supported by the Department of Interior.<sup>65</sup> The House report, however,

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58. *Id.* at 238–39, 242; *see also* ROTHMAN, *supra* note 15, at 46–48 (discussing the passage of the bill that became the Antiquities Act); Raymond Harris Thompson, *Edgar Lee Hewett and the Politics of Archeology*, in *THE ANTIQUITIES ACT*, *supra* note 12, at 35, 43.

59. Thompson, *supra* note 58, at 39–40. Edgar Lee Hewett drafted the bill that was ultimately enacted as the Antiquities Act while serving as secretary of a joint committee of the American Anthropological Association and the Archeological Institute of America. *Id.* at 39. In developing the draft bill, Hewett worked with William Afton Richards, Commissioner of the General Land Office in the Department of Interior, and Congressman Lacey. *Id.* at 38–40. The two organizations approved Hewett's draft bill at a meeting in December 1905. *Id.* at 42–43. Hewett presented the draft to Congressman Lacey, who introduced it in the House in January 1906, and it passed both houses of Congress in the spring of that year. *Id.* at 43; *see also* ROTHMAN, *supra* note 15, at 43–47 (same); Lee, *supra* note 33, at 237–38, 241 (similar description of Hewett's role in drafting the bill enacted as the Antiquities Act); *cf.* ISE, *supra* note 43, at 152 (stating that the ultimately successful bill was "drafted in the office of Commissioner Richards with the co-operation of [Representative] Lacey and Dr. Hewett").

60. Lee, *supra* note 33, at 242; Rebecca Conrad, *John F. Lacey: Conservation's Public Servant*, in *THE ANTIQUITIES ACT*, *supra* note 12, at 48, 51. Congressman Lacey also gave his name to another statute, also known as the Lacey Act, that was enacted in 1900 and that protects certain wildlife. Lacey Act of 1900, ch. 553, 31 Stat. 187 (codified as amended at 18 U.S.C. §§ 42–43 (2012) and 16 U.S.C. §§ 3371–78 (2012)).

61. *See* H.R. REP. NO. 58-3704, at 1–2 (1905); Lee, *supra* note 33, at 235, 238–39.

62. Lee, *supra* note 33, at 236.

63. *Id.* at 240–41.

64. *Id.* (quoting the 1906 bill that became the Antiquities Act).

65. *Id.* at 240 ("At some point in his discussions with government departments, [Edgar Lee] Hewett was persuaded, probably by officials of the Interior Department, to broaden his draft to

confirmed that the bill “proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.”<sup>66</sup>

The Act’s intended narrow focus was reaffirmed in a colloquy on the floor of the House between Representative Lacey and Congressman John H. Stephens of Texas:

Mr. LACEY: . . . [T]his [bill] will merely make small reservations where the objects are of sufficient interest to preserve them. . . .

Mr. STEPHENS of Texas: How much land will be taken off the market in the Western States by the passage of the bill?

Mr. LACEY: Not very much. The bill provides that it shall be the smallest area necessary [sic] for the care and maintenance of the objects to be preserved.

Mr. STEPHENS of Texas: Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

Mr. LACEY: Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other [the forest-reserve bill] reserves the forests and the water courses.<sup>67</sup>

The “forest-reserve bill” to which the colloquy refers was the Forest Reserve Act of 1891, which President Theodore Roosevelt and his predecessors had used to reserve millions of acres of public lands as national forests.<sup>68</sup> The colloquy shows that Congress enacted the

include the phrase ‘other objects of historic or scientific interest.’ This language may have come from the old Interior Department bill, H.R.11021.”)

66. H.R. REP. NO. 59-2224, at 1 (1906), <https://coast.noaa.gov/data/Documents/OceanLawSearch/House%20Report%20No.%2059-2224.pdf?redirect=301ocm>.

67. 40 CONG. REC. 7888 (1906). As noted above, Congressman Lacey, whose explanation of the Act is quoted above in the text, played such an important role in the Act’s passage that for many years the legislation was known as the Lacey Act. Lee, *supra* note 33, at 242. Congressman Lacey’s views therefore deserve great weight in interpreting the Act. See, e.g., FCC v. League of Women Voters, 468 U.S. 364, 387 n.18 (1984) (citing chief sponsor’s view in interpreting federal statute); *McElroy v. United States*, 455 U.S. 642, 651–52 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

68. President Roosevelt had withdrawn from the public domain about 150 million acres of land as forest reserves under the Forest Reserve Act of 1891, which was also called the General Revision or Creative Act of 1891. Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1095, 1103, *repealed by* Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2792; PAUL W.

Antiquities Act with the understanding that it would not allow million-acre reservations of the sort that had occurred under the 1891 law. Instead, the 1906 Act was designed to allow the President to designate discrete objects as national monuments and, for each such object, to reserve only the smallest amount of land “necess[a]ry” to protect that object.<sup>69</sup>

### C. *Presidential Practice Under the Antiquities Act*

Although the text and history of the Antiquities Act evince an intent to allow the President to set apart fairly small parcels of land to protect discrete antiquities, from the very beginning presidents have sometimes used it to create massive monuments. These large-scale designations typically rely on language in the Act authorizing protection of “other objects of historic or scientific interest.”<sup>70</sup> But that language must be read in the context of the statutory provision in which it appears and the history of the Act described above. For that reason, scholars have recognized that excessive designations made by some presidents violate the Act’s original intent. Moreover, Congress’s repeated efforts to curb such abuses preclude an argument that Congress has acquiesced in the abuse.

The relevant history begins with President Theodore Roosevelt, who signed the Antiquities Act and was the first President to use it.<sup>71</sup> Although Congress was assured that the Antiquities Act would “certainly not” allow large-scale reservations of the sort that had occurred under the

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GATES & ROBERT W. SWENSON, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 580 (1968) (stating that Roosevelt reserved about 148 million acres of forest land); Getches, *supra* note 15, at 288 (stating that Roosevelt withdrew 150 million acres of forest land). Largely because of President Roosevelt’s perceived misuse of the 1891 law, Congress amended that law in 1907 to require congressional approval for the creation of national forests in six western states. Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1269, 1271; see ROTHMAN, *supra* note 15, at 48; see also 16 U.S.C. § 1609(a) (2012). It was not until 1916 that President Roosevelt’s successor, Woodrow Wilson, signed legislation creating the National Park Service to manage the national park system. Act of Aug. 25, 1916, ch. 408, 39 Stat. 535, 535.

69. 40 CONG. REC. 7888 (1906) (statement of Rep. Lacey). As one scholar has explained, Congress’s intention to allow a monument to consist only of the land immediately surrounding a specific antiquity—rather than monuments, such as Bears Ears, which encompass vast expanses of land across which various antiquities are purportedly scattered—is made clear in the House report accompanying the bill that became the Antiquities Act. Rusnak, *supra* note 13, at 675. The House report incorporated a memorandum by Edgar Lee Hewett, the archeologist who drafted the bill ultimately enacted, “that inventoried, grouped, and described the specific Indian ruins for which Hewett sought protection by the Act.” *Id.* at 675–76; see H.R. REP. NO. 59-2224, at 3–7 (1906).

70. 54 U.S.C. § 320301(a) (2012).

71. Rusnak, *supra* note 13, at 677 (stating that Theodore Roosevelt signed the Antiquities Act into law and used it to create the Devils Tower National Monument four months later).

Forest Reserve Act of 1891,<sup>72</sup> President Roosevelt's conduct proved otherwise. After Congress, in 1907, restricted the President's authority to withdraw land under the Forest Reserve Act of 1891, President Roosevelt responded by using the Antiquities Act "in ways that closely resembled uses of the Forest Reserve Act."<sup>73</sup> Although most monuments created by President Roosevelt were small,<sup>74</sup> some covered "[a]reas far larger than ever conceived" by the Congress that passed the Antiquities Act.<sup>75</sup>

The best known example of Roosevelt's large-scale monuments is the Grand Canyon. Roosevelt created it as a national monument in 1908.<sup>76</sup> The original monument covered more than 800,000 acres.<sup>77</sup> The U.S. Supreme Court held in *Cameron v. United States*<sup>78</sup> that Roosevelt's creation of this monument fell within his authority under the Antiquities Act.<sup>79</sup> The Court determined that the Grand Canyon was, as Roosevelt's proclamation said, "an object of unusual scientific interest" as "the greatest eroded canyon in the United States, if not in the world."<sup>80</sup>

Some presidents after Teddy Roosevelt also created massive monuments. In December 1978, for example, President Jimmy Carter created thirteen national monuments in Alaska that exceeded 1 million acres each.<sup>81</sup> Carter's action provoked so much controversy that eventually Congress stepped in, passing the Alaska National Interest

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72. 40 CONG. REC. 7888 (1906) (statement of Rep. Lacey).

73. ROTHMAN, *supra* note 15, at 48.

74. As the text accompanying this note says, most of President Roosevelt's monuments were small. Examples include Devils Tower, WY (1,193.91 acres), El Morro, NM (160 acres), Montezuma Castle, AZ (161.39 acres), Lassen Peak (1,280 acres), Gila Cliff Dwellings, NM (160 acres), Tonto, AZ (640 acres), Muir Woods, CA (295 acres), Pinnacles, CA (1,320 acres), Jewel Cave, SD (1,274.56 acres), Natural Bridges, UT (120 acres), Lewis and Clark Cavern, MT (160 acres), Tumacacori, AZ (10 acres), and Wheeler, CO (300 acres). *Antiquities Act, 1906-2006: Maps, Facts, and Figures*, NAT'L PARK SERV. (May 8, 2017, 9:53 AM), <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm>.

75. ROTHMAN, *supra* note 15, at 48.

76. Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908).

77. NAT'L PARK SERV., *supra* note 74.

78. 252 U.S. 450 (1920).

79. *Id.* at 455-56.

80. *Id.*

81. Proclamation Nos. 4611, 4613-14, 4616-17, 4619, 4621-27, 3 C.F.R. 69-71, 74-77, 80-83, 86-87, 89-103 (1979); see Cecil D. Andrus & John C. Freemuth, *President Carter's Coup: An Insider's View of the 1978 Alaska Monument Designations*, in *THE ANTIQUITIES ACT*, *supra* note 12, at 93, 98-100 (discussing how Carter's Secretary of Interior, Cecil D. Andrus, believed the Antiquities Act provided the best protection "against threats to the conservation of lands").

Lands Conservation Act of 1980 (ANICLA).<sup>82</sup> ANILCA, among other things, rescinded Carter’s designations.<sup>83</sup>

More recently, President Bill Clinton embraced the theory—engineered by Bruce Babbitt, Clinton’s Interior Secretary—that the Antiquities Act authorizes “national landscape monuments.”<sup>84</sup> President Clinton tested this landscape-monument concept for the first time in creating the Grand Staircase–Escalante National Monument.<sup>85</sup> Grand Staircase encompassed 1.7 million acres, which made it the largest national monument ever designated in the continental United States.<sup>86</sup> The landscape-monument concept underlying Grand Staircase represented a “paradigm shift,” as “[n]ational monument designations ha[d] traditionally been used to protect specific objects of unusual historical or scientific value that stand out from the landscape.”<sup>87</sup> Under the new paradigm, President Clinton used the landscape-monument concept primarily to protect natural ecosystems.<sup>88</sup>

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82. Alaska National Interest Lands Conservation Act (ANICLA), Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C.).

83. 16 U.S.C. § 3209(a) (2012); *Sturgeon v. Frost*, 136 S. Ct. 1061, 1066 (2016).

84. CAROL HARDY VINCENT & PAMELA BALDWIN, CONG. RESEARCH SERV., RL30528, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: RECENT DESIGNATIONS AND ISSUES (2001) (discussing view of Bruce Babbitt, President Clinton’s Secretary of Interior, that the Antiquities Act protects “national landscape monuments” as well as geographic and historical “curiosities”); James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 85, 85–86 n.418 (2001) (crediting Babbitt with devising the “landscape monument” concept); Sanjay Ranchod, Note, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 538 n.33, 576 (2001) (crediting Babbitt with first use of term “landscape monument” and with persuading President Clinton that the Antiquities Act would be a powerful political tool); see also Squillace, *supra* note 12, at 106, 114 (stating that Babbitt had “penchant . . . for monuments that would protect large landscapes and unique ecosystems”); Bruce Babbitt, *From Grand Staircase to Grand Canyon Parashant: Is There a Monumental Future for the BLM?*, 3 U. DENV. WATER L. REV. 223, 227–28 (2000) (arguing the Antiquities Act should be used to protect “cultural landscape[s]” and that “we can do better than to protect five or six Indian ruins out on that land and say that there is room in this culture for a quarter million acres from which we honor the past and, more importantly, from which we learn and take inspiration”).

85. Proclamation No. 6920, 3 C.F.R. 64 (1996); Ranchod, *supra* note 84, at 556 (stating that Grand Staircase “was the first test of the ‘national landscape monument’ concept”).

86. Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L.J. 477, 477–78 (1998).

87. Ranchod, *supra* note 84, at 569; see Rasband, *supra* note 84, at 86 n.418 (stating that Secretary Babbitt “himself was quite clear that [the national landscape monument concept] was a departure from the purposes of the Antiquities Act”).

88. Ranchod, *supra* note 84, at 569. Consistent with President Clinton’s use of the Antiquities Act to preserve ecosystems, BLM under President Obama considered the Act an important tool in its “Treasured Landscapes” proposal. BLM, Discussion Paper, *Treasured Landscapes: Our Vision, Our Values* (undated “Internal Draft”), at 5, <https://robbishop.house.gov/sites/robbishop.house.gov/files/migrated/UploadedPhotos/Treasure>

Before President Obama, President George W. Bush held the record for creating the largest presidentially designated national monument: the Papahānaumokuākea Marine National Monument, at a size of 89.6 million acres.<sup>89</sup> But President Obama made President Bush and other predecessors look like pikers. President Obama's largest monument designation—which expanded the Pacific Remote Islands National Monument—exceeds 261 million acres.<sup>90</sup> The total size of national monument land created by President Obama exceeded 550 million acres,<sup>91</sup> more than twice President George W. Bush's then-record total of 218.8 million acres.<sup>92</sup> To put these numbers in perspective, Alaska, the largest state, comprises about 426 million acres; Texas, the second largest state, spans about 172 million acres.<sup>93</sup>

President Obama carried forward President Clinton's landscape-monument concept. For example, Obama's proclamation creating Bears Ears calls it a "cultural landscape."<sup>94</sup> The proclamation specifically cites

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d\_Landscapes\_doc.pdf; *Bishop Uncovers Additional DOI Documents, Secret Strategizing*, U.S. HOUSE REPRESENTATIVES: U.S. CONGRESSMAN ROB BISHOP (Aug. 17, 2010), <https://robbishop.house.gov/media/press-releases/bishop-uncovers-additional-doi-documents-secret-strategizing?DocumentID=203312> (stating that this document was leaked in February 2009). That proposal would manage 130 to 140 million acres of BLM land—"roughly equivalent in size to Colorado and Wyoming combined . . . not as individual parcels, but as components of larger landscapes, ecosystems, airsheds, and watersheds." BLM, *supra*, at 1. The proposal would have the President use the Antiquities Act to preserve these treasured landscapes "[s]hould the legislative process not prove fruitful." *Id.* at 5.

89. NAT'L PARK SERV., *supra* note 74.

90. *Id.*

91. See Davenport, *supra* note 1, at 2.

92. Keith Collins, *Map: Obama Established More National Monuments than Any Other President*, QUARTZ (Jan. 12, 2017), <https://qz.com/881165/map-obama-established-more-national-monuments-than-any-other-president/>; see Juliet Eilperin & Brady Dennis, *Obama Names Five New National Monuments, Including Southern Civil Rights Sites*, WASH. POST (Jan. 12, 2017), [https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e\\_story.html?utm\\_term=.9d98aa8eaf65](https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html?utm_term=.9d98aa8eaf65). All told, presidents have created 154 monuments totaling more than 840 million acres. Collins, *supra*.

93. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/state-area.html> (last updated Dec. 5, 2012).

94. Proclamation No. 9558, 82 Fed. Reg. 1139, 1139 (Dec. 28, 2016); see also Babbitt, *supra* note 84 (arguing that the Antiquities Act should be used to protect "cultural landscape[s]"). Overall, the proclamation refers to the Bears Ears monument as a "landscape" at least eight times. See, e.g., Proclamation No. 9558, 82 Fed. Reg. at 1140 (stating that traditional knowledge "is, itself, a resource to be protected and used in understanding and managing this *landscape* sustainably for generations to come" (emphasis added)); *id.* at 1142 ("The alcove columbine and cave primrose, also regionally endemic, grow in seeps and hanging gardens in the Bears Ears *landscape*." (emphasis added)).

“[t]he area’s cultural importance to Native American tribes.”<sup>95</sup> The proclamation identifies “[t]he traditional ecological knowledge” developed by the tribes as “itself, a resource to be protected,” apparently as an “object[]” protectable under the Antiquities Act.<sup>96</sup> These portions of the proclamation appear to reflect the view that the Antiquities Act’s protection of “objects of historic or scientific interest”<sup>97</sup> includes million-acre landscapes possessing cultural significance.

It is indeed the phrase “objects of historic or scientific interest”<sup>98</sup> that President Roosevelt and later presidents have often relied upon to create massive monuments.<sup>99</sup> No doubt the term “object” can, in the abstract, refer to almost any natural or manmade creation of almost any size.<sup>100</sup> The entire earth is an “object,” from one perspective. And few objects utterly lack “historic or scientific interest.” But the text and history of the Act compel a narrower understanding. By referring to “*other* objects of historic and scientific interest,” the Act restricts protectable objects to those closely akin to “historic landmarks [and] historic and prehistoric structures.”<sup>101</sup> At a minimum, an object should possess “extraordinary” or “the greatest” historic or scientific value to fall within the Act,

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95. Proclamation No. 9558, 82 Fed. Reg. 1140; *see also id.* at 1139 (“[T]he land is profoundly sacred to many Native American tribes.”).

96. *Id.* at 1140; 54 U.S.C. § 320301(a) (2012).

97. 54 U.S.C. § 320301(a).

98. *Id.*

99. *See, e.g.,* Cappaert v. United States, 426 U.S. 128, 142 (1976) (finding that a pool in the Devils Hole geologic formation and its fish were “objects of historic and scientific interest”); Cameron v. United States, 252 U.S. 450, 455–56 (1920) (concluding that the Grand Canyon “is an object of unusual scientific interest”).

100. *See, e.g.,* *Object*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/object> (last updated June 3, 2018) (giving as primary definition “something material that may be perceived by the senses”).

101. 54 U.S.C. § 320301(a) (emphasis added). In *Yates v. United States*, the Court interpreted the federal statute that makes it a crime to destroy, conceal, or alter “any record, document, or tangible object with the intent to impede, obstruct, or influence” a federal investigation. 18 U.S.C. § 1519 (2012) (emphasis added); 135 S. Ct. 1074, 1085 (2015). Relying on the *noscitur a sociis* and *eiusdem generis* canons of statutory interpretation, the Court refused to interpret the term “tangible object” to include the undersized fish that Mr. Yates ordered his crew to destroy after illegally catching them. *See Yates*, 135 S. Ct. at 1085–87 (“‘Tangible object’ is the last in a list of terms that begins ‘any record [or] document.’ The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information.”); *cf.* Circuit City Stores v. Adams, 532 U.S. 105, 112, 114–19 (2001) (interpreting phrase in Federal Arbitration Act—which excluded “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”—to exclude only employment contracts involving transportation workers, applying *eiusdem generis* canon of statutory interpretation).

considering the Act's original objectives.<sup>102</sup> Otherwise, a common arrowhead or an intriguing rock formation could be designated a national monument.<sup>103</sup> This plainly is not what Congress intended.<sup>104</sup>

Scholars agree that large-scale landscape-monument designations violate the Antiquities Act's original intent. Historian Lee wrote that as early as 1908 the executive branch interpreted the Act to authorize the "establishment of a much wider range of national monuments than the framers of the act appear originally to have had in mind, judging from the record of the hearings and related legislative history."<sup>105</sup> Another leading historian of the Act, Hal Rothman, agreed that certain presidents, beginning with Theodore Roosevelt, used the Act to establish monuments covering "[a]reas far larger than ever conceived" by the framers of the Act.<sup>106</sup> Even Professor Mark Squillace, who has defended large-scale monument designations, admits that the Act "was not necessarily designed as a vehicle for public land preservation."<sup>107</sup> More than that, Professor Squillace admits that "[m]ost commentators who have

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102. See Proclamation No. 658, 34 Stat. 3236, 3236 (1906) (finding that Devils Tower is "such an *extraordinary* example of the effect of erosion in the higher mountains as to be a natural wonder and an object of historic and great scientific interest," and "the public good would be promoted" by designating it a monument (emphasis added)); Proclamation No. 695, 34 Stat. 3264, 3264 (1906) ("[T]he rocks known as El Morro and Inscription rock . . . are of the *greatest historical value* and it appears that the public good would be promoted by setting aside said rocks . . . ." (emphasis added)); Proclamation No. 696, 34 Stat. 3265, 3265 (1906) (finding that Montezuma castle was a prehistoric structure "of the *greatest ethnological value* and scientific interest" (emphasis added)); Proclamation No. 740, 35 Stat. 2119, 2119 (1907) (finding that "the extensive prehistoric communal or pueblo ruins in San Juan and McKinley Counties, Territory of New Mexico" were of "*extraordinary* interest because of their number and their great size and because of the innumerable and valuable relics of a prehistoric people which they contain, and . . . that the public good would be promoted by reserving these prehistoric remains" (emphasis added)).

103. Cf. ISE, *supra* note 43, at 153 (suggesting that by including "other objects of scientific interest," the Act encompassed fossils and other objects of paleontological value).

104. Lee, *supra* note 33, at 250 (stating that broad interpretation of the Act led to "a much wider range of national monuments than the framers of the act appear originally to have in mind judging from the record of the hearings and related legislative history").

105. *Id.*

106. ROTHMAN, *supra* note 15, at 48; see also 1 WHEATLEY, JR., *supra* note 15, at 464–65, 509 (study of executive withdrawals prepared for Public Land Review Commission established by Act of Sept. 19, 1964, Pub. L. No. 88-606, 78 Stat. 982; discussing "consistent complaint" that Antiquities Act had been used to make withdrawals "far in excess of the amount needed to properly administer the reserved site").

107. Squillace, *Monumental Legacy*, *supra* note 7, at 488. Professor Squillace notes that during the Clinton Administration, he worked with Interior Secretary Bruce Babbitt "in the development of a myriad of monument proposals that were pending before the Administration." *Id.* at 473 n.\*. Professor Squillace "is generally supportive of the expansive monument proclamations" made by President Clinton and other presidents. Harmon et al., *Introduction: The Importance of the Antiquities Act*, in THE ANTIQUITIES ACT, *supra* note 12, at 1, 9.

considered the Act and its legislative history have concluded that it was designed to protect only very small tracts of land around archeological sites.”<sup>108</sup> Indeed, that view appears to be nearly unanimous among commentators.<sup>109</sup>

Given certain presidents’ disregard of the Act’s original intent, it is no wonder Congress has repeatedly considered bills amending the Act.<sup>110</sup>

108. Squillace, *Monumental Legacy*, *supra* note 7, at 477.

109. Getches, *supra* note 15, at 301–02 (stating that, despite Jimmy Carter’s designations of multi-million-acre national monuments, “Congress did not have in mind authorizing withdrawals of vast areas for designation as national monuments when it passed the Antiquities Act”); Johannsen, *supra* note 20, at 450 (“Congress . . . intended to limit the creation of national monuments to small reservations surrounding specific ‘objects.’”); Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1334 (2002) (stating that “Congress intended [in the Antiquities Act] simply to protect the nation’s archaeological treasures from looting in order to preserve relics such as prehistoric pottery shards, burial mounds, and cliff dwellings,” but some presidents, including Theodore Roosevelt, “had a more grandiose view” of the Act); John Copeland Nagle, *Wilderness Exceptions*, 44 ENVTL. L. 373, 377 (2014) (“The original intent of the enactors of the Antiquities Act was . . . [t]o preserve the relics of the ancient tribes of the Southwest.”); Rasband, *supra* note 7, at 628 (“Everyone who has studied the legislative history of the Antiquities Act concedes that Congress did not intend the Act to authorize broad landscape-level withdrawals.”); Rasband, *supra* note 25, at 501 (“[T]he Antiquities Act, as initially enacted, was intended to allow the President to make only small withdrawals of public lands in order to protect prehistoric ruins and Indian artifacts.”); Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 W. HIST. Q. 281, 284 (1989) (stating that President Carter’s establishment of seventeen national monuments in Alaska totaling 56 million acres was “certainly not what the critics or framers of the Antiquities Act had in mind”); Rusnak, *supra* note 13, at 675 (“[T]he purpose of the proposed bill [that became the Antiquities Act] was to protect American Indian ruins in the western United States by creating small reservations of the least amount of land necessary to preserve certain ‘relics of prehistoric times.’”); Shepherd, *supra* 13, at 4–9 (“[T]he legislative history [of the Antiquities Act] reveals that Congress had a limited purpose in mind: protection of small areas in the southwest United States containing prehistoric ruins and Indian artifacts.”); *id.* at 4–41 (“[T]he Antiquities Act, as it has been applied and interpreted over the years, has gone far beyond its original intent.”).

110. *E.g.*, Marine Access and State Transparency Act, H.R. 1489, 115th Cong. § 2 (introduced Mar. 9, 2017) (proposing to amend Antiquities Act to require congressional approval and NEPA compliance before President can create a national monument); Ensuring Public Involvement in the Creation of National Monuments Act, H.R. 1459, 113th Cong. § 2 (engrossed in House Mar. 27, 2014) (proposing to amend the Act to provide: “No more than one declaration shall be made in a State during any presidential four-year term of office without an express Act of Congress”); H.R. 250, 113th Cong. § 1 (introduced Jan. 15, 2013) (proposing to amend the Antiquities Act to require congressional approval of national monuments designated by President); H.R. 817, 112th Cong. § 1 (introduced Feb. 18, 2011) (similar proposal); National Monument Fairness Act, H.R. 2386, 108th Cong. § 2 (introduced June 5, 2003) (proposing to amend the Antiquities Act to make President’s designation of any national monument exceeding 50,000 acres effective for only two years unless approved by Act of Congress); National Monument Fairness Act, H.R. 2114, 107th Cong. § 2 (introduced June 7, 2001) (similar); National Monument Accountability Act, H.R. 4121, 106th Cong. § 2 (introduced Mar. 29, 2000) (proposing to amend the Antiquities Act to make President’s designation of national monuments

Though these efforts have failed, they preclude any argument that Congress has acquiesced in presidential violations of the Act.<sup>111</sup> What is more, their failure shows that, regarding congressional efforts to address certain presidents' abuses of the Antiquities Act, presidents have a decided advantage. The President can operate unilaterally under the Act. The President need not consult anyone. The President need not follow any procedures whatsoever.<sup>112</sup> The President is as free as a cowboy. Congress, in contrast, suffers under the deliberative majoritarian process that defines representative democracy. In light of the President's comparative advantages in abusing power, compared to Congress's ability to curb those abuses, there is a strong argument that the appropriate remedy for one President's abuse of power under the Antiquities Act lies in the hands of the President's successor. The next two Parts of this Article discuss the legal authority supporting such a remedy and respectively address the President's power to reduce and to abolish monuments created under the Antiquities Act.<sup>113</sup>

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effective for only two years unless approved by Congress); National Monument Fairness Act of 1997, H.R. 1127, 105th Cong. § 2 (engrossed in House Oct. 7, 1997) (proposing to amend the Antiquities Act to provide for expiration after two years, in the absence of congressional approval, of any proclamation "that results in the designation of a total acreage in excess of 50,000 acres in a single State in a single calendar year"); National Monument Fairness Act of 1997, S. 477, 105th Cong. § 2 (introduced Mar. 19, 1997) (proposing to amend the Antiquities Act to require Act of Congress for creation of any national monument of more than 5,000 acres); H.R. 4118, 104th Cong. § 1 (introduced Sept. 19, 1996) (similar proposal).

111. See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (relying partly on congressional acquiescence to uphold president's power to make executive agreements to settle claims against foreign entities).

112. See *Shepherd*, *supra* note 13, at 4–9.

113. Besides Congress, courts have reviewed actions claiming that the President's creation of a monument violated the Antiquities Act. The courts have rejected those challenges, emphasizing the President's broad discretion under the Act. See, e.g., *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003); *Tulare Cty. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003); *Anaconda Copper Co. v. Andrus*, No. A79-161, 1980 U.S. Dist. LEXIS 17861, at \*5–6 (D. Alaska June 26, 1980); *Wyoming v. Franke*, 58 F. Supp. 890, 895–97 (D. Wyo. 1945); see also *Cameron v. United States*, 252 U.S. 450, 454, 455–56 (1920) (discussing an action by the United States to enjoin defendant from use of land within Grand Canyon National Monument, rejecting defendant's argument that President lacked authority to create the monument, and agreeing with President's determination that Grand Canyon "is an object of unusual scientific interest"); *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) (finding in favor of the monument creation because the President acted under and in compliance with the Antiquities Act). As discussed in Part III, the "discretion" that the Antiquities Act confers on the President should vest in the current President, so that the Act accords with the general rule preventing the President from being bound by the acts of his predecessors. Per this interpretation, the President can modify or abolish a monument established under the Act regardless of whether a judicial challenge to the monument would have succeeded.

## II. THE PRESIDENT'S POWER TO MODIFY A MONUMENT CREATED UNDER THE ANTIQUITIES ACT

The President's power to modify a monument previously established under the Antiquities Act is established by (A) presidential practice; (B) Congress's acquiescence in presidential modifications; and (C) official executive-branch opinions endorsing the president's modification power. Each is discussed below.

### A. *Presidential Practice Under the Antiquities Act*

Presidents began modifying national monuments created by prior presidents soon after passage of the Antiquities Act, and the practice has continued into modern times. These modifications have included (1) the exclusion of land originally reserved for the monuments and (2) the relaxation of restrictions imposed in the original proclamation.

Presidents have excluded land originally included in a monument eighteen times over fifty years.<sup>114</sup> The earliest exclusion occurred in 1911, when President William H. Taft reduced (by more than 40%) the Petrified Forest National Monument established by President Theodore Roosevelt five years earlier.<sup>115</sup> The most recent exclusion occurred in 1963, when President John F. Kennedy modified the boundaries of Bandelier National Monument.<sup>116</sup> It does not appear that any of these modifications has ever been judicially challenged. Their number and regularity led a Congressional Research Service Report to conclude:

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114. Proclamation No. 1167, 37 Stat. 1716 (1911) (regarding Petrified Forest Nat'l Monument); Proclamation No. 1186, 37 Stat. 1733 (1912) (regarding Navajo Nat'l Monument); Proclamation No. 1191, 37 Stat. 1737 (1912) (regarding Mount Olympus Nat'l Monument); Proclamation No. 1293, 39 Stat. 1726 (1915) (regarding Mount Olympus Nat'l Monument); Proclamation No. 1862, 45 Stat. 2984 (1929) (regarding Mount Olympus Nat'l Monument); Proclamation No. 2295, 3 C.F.R. 46 (1938–1943) (regarding White Sands Nat'l Monument); Proclamation No. 2393, 3 C.F.R. 150 (1938–1943) (regarding Grand Canyon Nat'l Monument); Proclamation No. 2454, 3 C.F.R. 208 (1938–1943) (regarding Wupatki Nat'l Monument); Proclamation No. 2499, 3 C.F.R. 243 (1938–1943) (regarding Craters of the Moon Nat'l Monument); Proclamation No. 2659, 3 C.F.R. 63 (1943–1948) (regarding Santa Rosa Island Nat'l Monument); Proclamation No. 3089, 3 C.F.R. 36 (1954–1958) (regarding Glacier Bay Nat'l Monument); Proclamation No. 3132, 3 C.F.R. 70 (1954–1958) (regarding Hovenweep Nat'l Monument); Proclamation No. 3138, 3 C.F.R. 73 (1954–1958) (regarding Great Sand Dunes Nat'l Monument); Proclamation No. 3307, 3 C.F.R. 44 (1959–1963) (regarding Colorado Nat'l Monument); Proclamation No. 3344, 3 C.F.R. 74 (1959–1963) (regarding Black Canyon of the Gunnison Nat'l Monument); Proclamation No. 3360, 3 C.F.R. 83 (1959–1963) (regarding Arches Nat'l Monument); Proclamation No. 3486, 3 C.F.R. 213 (1959–1963) (regarding Natural Bridges Nat'l Monument); Proclamation No. 3539, 3 C.F.R. 287 (1959–1963) (regarding Bandelier Nat'l Monument).

115. Proclamation No. 1167, 37 Stat. 1716 (1911); NAT'L PARK SERV., *supra* note 74.

116. Proclamation No. 3539, 3 C.F.R. 287, 288 (1959–1963).

“That a President can modify a previous Presidentially-created monument seems clear.”<sup>117</sup>

The proclamations excluding lands that were originally included within monument boundaries reflect the breadth of the President’s modification power. Several exclusions rested on a later President’s determination that the original proclamations reserved more land than necessary, and therefore violated the Antiquities Act’s requirement that land reserved for monuments “be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>118</sup> At least two proclamations excluded lands that, a later President determined, contained no objects of historical or scientific interest and had therefore been erroneously included in the original proclamation.<sup>119</sup> Still other exclusions reflected changed circumstances. For example, one proclamation excluded monument land that had been included in the original proclamation but was later made into an airfield.<sup>120</sup> Other proclamations excluded lands that no longer contained

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117. PAMELA BALDWIN, CONG. RESEARCH SERV., RS20647, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT 5 (2000), <http://congressionalresearch.com/RS20647/document.php?study=Authority+of+a+President+to+Modify+or+Eliminate+a+National+Monument>.

118. 54 U.S.C. § 320301(b) (2012). For example, President William H. Taft reduced the Petrified Forest National Monument in 1911 because the original proclamation “has been found, through a careful geological survey of its deposits of mineralized forest remains, to reserve a much larger area of land than is necessary to protect the objects for which the Monument was created.” Proclamation No. 1167, 37 Stat. 1716, 1716 (1911). Similarly, President Taft reduced the Navajo National Monument in 1912 because, “after careful examination and survey of the prehistoric cliff dwelling pueblo ruins, [the original proclamation] has been found to reserve a much larger tract of land than is necessary for the protection of such of the ruins as should be reserved.” Proclamation No. 1186, 37 Stat. 1733, 1733 (1912). In 1940, President Franklin D. Roosevelt reduced the second Grand Canyon National Monument finding that certain lands originally reserved “are not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument.” Proclamation No. 2393, 3 C.F.R. 150, 151 (1938–1943). President Dwight D. Eisenhower altered the boundaries of the Colorado National Monument in 1959 to exclude “certain lands which are not necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands within the monument.” Proclamation No. 3307, 3 C.F.R. 44, 44 (1959–1963).

119. In 1956, President Eisenhower altered the boundaries of Hovenweep National Monument to exclude certain lands that, he determined, “contain no objects of historic or scientific interest [and] were erroneously included in” the original proclamation. Proclamation No. 3132, 3 C.F.R. 70, 70 (1954–1958). Similarly, President Eisenhower modified Arches National Monument in 1960 to exclude “certain lands in the southeast section thereof, contiguous to the Salt Wash escarpment, which are used for grazing and which have no known scenic or scientific value.” Proclamation No. 3360, 3 C.F.R. 83, 83 (1951–1963).

120. President Eisenhower reduced Glacier Bay National Park in 1955 because certain lands were “now being used as an airfield for national-defense purposes and are no longer suitable for national-monument purposes” and other lands were “suitable for a limited type of agricultural use

antiquities or that were no longer needed to protect the antiquity that the monument was created to protect.<sup>121</sup> Others rested on a later President's determination that it was in the public interest to remove land from a monument so it could be put to different uses.<sup>122</sup> Perhaps most significantly, some proclamations reducing monuments contained no justification whatsoever.<sup>123</sup> Together, the many proclamations excluding lands from monuments reflect that a president can reduce the size of a monument established under the Antiquities Act.

Although some scholars argue the President can expand monuments but not reduce them,<sup>124</sup> that argument ignores real-world practice: Some proclamations *excluding* lands from prior presidentially established

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and are no longer necessary for the proper care and management of the objects of scientific interest on the lands within the monument." Proclamation No. 3089, 3 C.F.R. 36, 36 (1954–1958).

121. President Eisenhower excluded certain land from the Great Sand Dunes National Monument in 1956, concluding that the land was no longer necessary for "the preservation of the great sand dunes and additional features of scenic, scientific, and educational interests," and that it was "in the public interest to exclude such lands from the monument." Proclamation No. 3138, 3 C.F.R. 73, 73 (1954–1958). President Eisenhower modified the Black Canyon of the Gunnison National Monument in 1960 to exclude lands that, he found, were "no longer required for the proper care, protection, and management of the objects of scientific interest situated on lands within the monument." Proclamation No. 3344, 3 C.F.R. 74, 74 (1959–1963). President John F. Kennedy modified the Natural Bridges National Monument in 1962 to "exclude from the monument approximately three hundred and twenty acres of land, known as Snow Flat Spring Cave and Cigarette Spring Cave, which no longer contain features of archeological value and are not needed for the proper care, management, protection, interpretation, and preservation of the monument." Proclamation No. 3486, 3 C.F.R. 213, 213 (1959–1963). In 1963, President Kennedy diminished Bandelier National Monument in 1963 to "exclude . . . approximately 3,925 acres of land containing limited archeological values which have been fully researched." Proclamation No. 3539, 3 C.F.R. 287, 288 (1959–1963).

122. In 1938, President Franklin D. Roosevelt excluded land originally reserved in the White Sands National Monument that was on the United States Highway Route 70 right of way, finding the exclusion to be "in the public interest." Proclamation No. 2295, 3 C.F.R. 46, 46 (1938–1943). President Roosevelt similarly, in 1941, reduced the Craters of the Moon National Monument finding that the excluded land was "needed for the construction of Idaho State Highway No. 22." Proclamation No. 2499, 3 C.F.R. 243, 243 (1938–1943). Also in 1941, President Roosevelt reduced the Wupatki National Monument to exclude land "needed in the construction and operation of a diversion dam in Little Colorado River to facilitate the irrigation of lands on the Navajo Indian Reservation." Proclamation No. 2454, 3 C.F.R. 208, 208 (1938–1943). President Harry Truman diminished the Santa Rosa Island National Monument based on his determination that the land was "needed by the War Department for military purposes" and that "elimination of such lands from the national monument would not seriously interfere with its administration." Proclamation No. 2659, 3 C.F.R. 63, 63 (1943–1948).

123. In 1915, President Woodrow Wilson reduced the Mount Olympus National Monument by about 50% of its original size, without any explanation. Proclamation No. 1293, 39 Stat. 1726, 1726 (1915); NAT'L PARK SERV., *supra* note 74. President Calvin Coolidge further reduced the monument in 1929, again without explanation. Proclamation No. 1862, 45 Stat. 2984, 2985 (1929).

124. *See supra* note 7 and accompanying text.

monuments have, at the same time, *added* other lands to the monument. For example, President Dwight D. Eisenhower altered the boundaries of the Colorado National Monument in 1959 to exclude “certain lands which are not necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands within the monument.”<sup>125</sup> In the same proclamation, President Eisenhower added other lands to the monument, finding that they were “needed . . . for the proper care, management, and protection of the objects of scientific interest situated on lands now within the monument.”<sup>126</sup> Likewise, President Eisenhower altered the boundaries of the Glacier Bay National Monument to exclude some land while adding other land.<sup>127</sup> In 1963, President Kennedy modified the Bandelier National Monument in New Mexico, finding that it “would be in the public interest to exclude” 3,925 acres “containing limited archeological values which have been fully researched and are not needed to complete the interpretive story of the . . . Monument.”<sup>128</sup> At the same time, President Kennedy found that it “would be in the public interest to add” 2,882 other acres, “the preservation of which would implement the purposes of such monument.”<sup>129</sup> These examples show the need for, and the common sense of, the President’s ability to adjust monument boundaries to reflect his or her determination of what is proper under the Antiquities Act.

Presidential modifications have included not only changes to the size of monuments, but also changes in their management and relaxation of restrictions in the original proclamation. In 1929, for example, President Herbert Hoover transferred responsibility for managing the Bandelier National Monument from the Forest Service to the Park Service.<sup>130</sup> Only later did Congress pass a Reorganization Act expressly authorizing such transfers.<sup>131</sup> In 1936, President Franklin D. Roosevelt relaxed restrictions on the Katmai National Monument to make the original reservation of land for the monument “subject to valid claims under the public-land laws.”<sup>132</sup> Presidents have also modified prior presidentially established monument to exclude land covered by a right of way within the monuments.<sup>133</sup>

In short, presidents of both parties have added land, subtracted land, and made other changes to monuments established under the Antiquities

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125. Proclamation No. 3307, 3 C.F.R. 56, 56 (1959–1963).

126. *Id.*

127. Proclamation No. 3089, 3 C.F.R. 36, 36 (1954–1958).

128. Proclamation No. 3539, 3 C.F.R. 287, 288 (1959–1963).

129. *Id.* at 287–88.

130. Proclamation No. 1990, 47 Stat. 2503, 2504 (1932).

131. Act of Mar. 3, 1933, ch. 212, tit. IV, § 401, 47 Stat. 1489, 1517.

132. Proclamation No. 2176, 49 Stat. 3523, 3523 (1936).

133. Proclamation No. 2295, 3 C.F.R. 46, 46 (1938–1943) (White Sands Nat’l Monument); Proclamation No. 2499, 3 C.F.R. 243, 243 (1938–1943) (Craters of the Moon Nat’l Monument).

Act. Presidential practice thus strongly suggests that the Act gives the President broad power to modify monuments established under it, including by reducing their size.

### B. *Congressional Acquiescence*

Because presidents have repeatedly diminished monuments established under the Antiquities Act and also relaxed original restrictions on their use, it is clear that presidents have interpreted the Act to impliedly grant them this modification power. In this situation, it is significant that Congress has never restricted the President's modification power.<sup>134</sup> To be sure, the U.S. Supreme Court has often warned against drawing inferences from mere congressional inaction.<sup>135</sup> But that warning does not apply here.

Here we have more than "mere congressional silence and passivity."<sup>136</sup> While Congress has been silent about presidential *modification* of prior presidentially established monuments, Congress has regularly addressed presidents' *creation* of national monuments.<sup>137</sup> For example, Congress has abolished ten presidentially established monuments.<sup>138</sup> In addition, after Congress was unsuccessful in abolishing

134. See *infra* note 144 and accompanying text.

135. *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (stating that "[n]onaction by Congress is not often a useful guide" to statutory interpretation). Compare *SEC v. Sloan*, 436 U.S. 103, 121 (1978) (rejecting congressional acquiescence argument), with *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (accepting congressional acquiescence argument).

136. *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

137. Three scholars have referred to "the controversy that has swirled around the [Antiquities] Act throughout its history: whether the scope of discretionary proclamations as exercised by various presidents has far exceeded what was intended by Congress." Harmon et al., *supra* note 107, at 1.

138. Squillace, *Monumental Legacy*, *supra* note 7, at 550 n.453 (stating that Congress has abolished ten national monuments established under Antiquities Act); see Act of Dec. 19, 1980, Pub. L. No. 96-550, § 601, 94 Stat. 3221, 3231 (abolishing Gran Quivira National Monument and including its land in statutorily created Salinas National Monument); Act of Aug. 1, 1956, Pub. L. No. 84-891, ch. 846, 70 Stat. 898 (abolishing Fossil Cycad National Monument); Act of July 30, 1956, Pub. L. No. 84-846, ch. 790, § 1, 70 Stat. 730 (abolishing Verendrye National Monument and conveying its lands to North Dakota for state historic site); Act of July 26, 1955, Pub. L. No. 84-179, ch. 387, 69 Stat. 380 (abolishing Old Kasaan National Monument and incorporating it into Tongass National Forest); Act of May 17, 1954, Pub. L. No. 83-360, ch. 203, 68 Stat. 98 (abolishing Shoshone Cavern National Monument and conveying land to Cody, Wyoming, "for public recreational use"); Act of Aug. 3, 1950, Pub. L. No. 81-652, ch. 534, 64 Stat. 405 (abolishing Wheeler National Monument and providing that its lands were to be administered as part of national forest in which it was located); Act of Aug. 3, 1950, Pub. L. No. 81-648, ch. 530, 64 Stat. 404 (abolishing Holy Cross National Monument and providing that its lands were to be administered as part of national forest in which it was located); Act of Sept. 7, 1949, Pub. L. No. 81-292, ch. 542, 63 Stat. 691 (abolishing Fort Niagara National Monument and conveying it to New York State for use as state park); Act of July 30, 1946, Pub. L. No. 79-564,

the Jackson Hole National Monument—because of President Franklin D. Roosevelt’s veto of the bill abolishing it—Congress refused to appropriate funds for administering the monument and ultimately amended the Antiquities Act to prohibit the President from designating additional monuments in Wyoming.<sup>139</sup> More recently, Congress rescinded massive monument designations that President Jimmy Carter made in Alaska.<sup>140</sup> At the same time, Congress restricted future presidential withdrawals of land in Alaska.<sup>141</sup> Besides such legislation, many bills have been proposed in Congress to limit the President’s power to create national monuments.<sup>142</sup>

Of course, Congress has also effectively ratified some presidentially established monuments by adding to them or converting them into national parks.<sup>143</sup> But this is just to say that Congress has paid careful, continuing attention to the President’s exercise of power under the Antiquities Act. For this reason, it is significant that Congress has never restricted or proposed to restrict the President’s power to modify prior presidentially established monuments.<sup>144</sup>

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ch. 699, 60 Stat 712 (abolishing Santa Rosa Island National Monument and conveying it to Escambia County, Florida); Act of Apr. 7, 1930, Pub. L. No. 71-92, ch. 107, 46 Stat. 142, 142 (abolishing Papago Saguaro National Monument and reserving some of its lands for military purposes while transferring remainder to City of Tempe and State of Arizona); *see also* Act of Aug. 24, 1937, Pub. L. No. 75-343, ch. 741, 50 Stat. 746, 746–47 (transferring land in Lewis and Clark Cavern National Monument to Montana); NAT’L PARK SERV., *supra* note 74 (showing Congress abolishing a national monument at item thirteen on monument list).

139. 16 U.S.C. § 431a (2012); *see* Rasband, *supra* note 25, at 502 n.90 (discussing President Roosevelt vetoing the bill abolishing the monument and Congress’s subsequent defiance); Righter, *supra* note 109, at 295–96 (discussing Congress’s reaction to President Roosevelt creating the Jackson Hole National Monument).

140. 16 U.S.C. § 3209 (2012); *Sturgeon v. Frost*, 136 S. Ct. 1061, 1065–66 (2016); Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C.) (rescinding President Carter’s monument designations by statutorily reserving substantially the same land that had been covered by President Carter’s designations). *But cf.* John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 299 (2001) (characterizing the Alaska National Interest Lands Conservation Act as ratifying and endorsing President Carter’s designations).

141. 16 U.S.C. § 3213(a) (2012).

142. *See* Rusnak, *supra* note 13, at 691.

143. *E.g.*, Act of Dec. 19, 1980, Pub. L. No. 96-550, § 502(a), 94 Stat. 3221, 3227 (abolishing Chaco Canyon National Monument and creating Chaco Culture National Historical Park); Act of Mar. 28, 1958, Pub. L. No. 85-358, 72 Stat. 69 (establishing Petrified Forest National Monument as national park); Act of Feb. 26, 1919, Pub. L. No. 65-277, § 9, 40 Stat. 1175, 1178 (designating Grand Canyon National Monument as a national park).

144. Several Congressional Research Service reports have discussed the President’s modification power. *See, e.g.*, ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 4–6 (2016), [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf); CAROL HARDY VINCENT, CONG. RESEARCH SERV., R44687, NATIONAL MONUMENTS AND

This is not a situation of congressional acquiescence in a mere “administrative practice,”<sup>145</sup> for it does not involve merely a federal agency’s view of its statutory powers. Instead, it involves the views of multiple presidents. This matters because the President, alone in the Executive Branch, has the duty to “take [c]are that the [l]aws be faithfully executed.”<sup>146</sup> Moreover, the official actions of a President, unlike those of an administrative agency, cannot fly under the radar screen.<sup>147</sup> Finally, the President, unlike the federal agencies, is Congress’s co-equal, a status that makes it appropriate to presume congressional awareness of the President’s view of his power under Acts of Congress.<sup>148</sup> These differences between the President and the federal bureaucracy supply strong reasons to believe that Congress is aware of, and has acquiesced in, presidents’ repeated exercise of power to modify prior presidentially created monuments, including by reducing their size.<sup>149</sup>

The significance of congressional acquiescence in the present situation is supported by *United States v. Jackson*.<sup>150</sup> In *Jackson*, the U.S. Supreme Court addressed whether a 1906 Act of Congress authorized the President, by executive order, to restrict the sale or other alienation of lands held by Native Americans under the homestead laws.<sup>151</sup> The 1906 Act expressly authorized the President to restrict the alienation rights of Native American “allottees”—meaning, the Chief Justice explained, Native Americans “who received [land] patents under the General Allotment Act of February 8, 1887.”<sup>152</sup> But the 1906 Act did *not*

THE ANTIQUITIES ACT (Sept. 7, 2016); CAROL HARDY VINCENT & PAMELA BALDWIN, CONG. RESEARCH SERV., RL30528, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: RECENT DESIGNATIONS AND ISSUES 20 (2001), [https://digital.library.unt.edu/ark:/67531/metacrs1462/m1/1/high\\_res\\_d/RL30528\\_2001Jan15.pdf](https://digital.library.unt.edu/ark:/67531/metacrs1462/m1/1/high_res_d/RL30528_2001Jan15.pdf).

145. *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (“True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.”).

146. U.S. CONST. art. II, § 3.

147. *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 752–53 (1982) (relying in part on “the sheer prominence of the President’s office” in holding that the President has absolute immunity from civil actions based on his official actions).

148. *Id.* at 750 (“The President’s unique status under the Constitution distinguishes him from other executive officials.”).

149. *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

150. 280 U.S. 183 (1930).

151. *Id.* at 186.

152. *Id.* at 185.

expressly authorize alienation restrictions on Native American *homesteaders*.<sup>153</sup> The lower federal court had held that “since the language of the [1906 Act] refers only to Indian *allottees*, it cannot be considered as authorizing the President to continue restrictions on alienation in patents issued to Indian *homesteaders*.”<sup>154</sup> The Court rejected that interpretation, however, based on the longstanding view of the executive branch—undisturbed by Congress—that, for purposes of the 1906 Act and similar statutes, the term “allottees” included homesteaders.<sup>155</sup>

So too here, presidents have long exercised power to modify monuments established under the Antiquities Act. Congress has not disturbed that power, despite continuing close attention to presidential exercises of power under the Act. The presidential practice and congressional acceptance of that practice powerfully support the conclusion that the Antiquities Act authorizes the President to modify monuments established under the Act.

### C. *Official Executive Opinions*

Official opinions in the executive branch confirm that the President can modify monuments established under the Antiquities Act, including by reducing them. These opinions come from the Attorney General of the United States and the Solicitor of the U.S. Department of the Interior.<sup>156</sup>

In a 1938 opinion, Attorney General Homer Cummings recognized that “the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom.”<sup>157</sup> General Cummings tied the President’s assertion of diminution power to the Antiquities Act’s requirement that land reserved for a national monument “be confined to the smallest area compatible with the proper care and management of the objects to be

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153. Act of June 21, 1906, Pub. L. No. 59-258, ch. 3504, 34 Stat. 325, 326 (quoted in relevant part in *Jackson*, 280 U.S. at 190).

154. *Jackson*, 280 U.S. at 191 (paraphrasing district court’s holding).

155. *Id.* at 196–97 (“If there were any doubt on the question, the silence of Congress in the face of the long continued practice of the Department of the Interior . . . must be considered as ‘equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.’”).

156. See 28 U.S.C. § 511 (2012) (“The Attorney General shall give his advice and opinion on questions of law when required by the President.”); 43 U.S.C. § 1455 (2012) (“The legal work of the Department of the Interior shall be performed under the supervision and direction of the Solicitor of the Department of the Interior, who shall be appointed by the President with the advice and consent of the Senate.”).

157. 39 Op. Att’y Gen. 185, 188 (1938).

protected.”<sup>158</sup> Although General Cummings did not endorse the President’s diminution power, nor did he deny it.<sup>159</sup>

But Solicitors of the Interior have affirmed that the President does have power to diminish monuments established under the Antiquities Act. In 1948, Solicitor Mastin White advised that the Jackson Hole National Monument “may be reduced by Executive action.”<sup>160</sup> In so advising, he relied on a 1935 Solicitor’s opinion to the same effect.<sup>161</sup> Like Attorney General Cummings’s 1938 opinion, these Solicitors’ opinions tied the President’s power to reduce monuments to the Antiquities Act’s requirement that land reserved for a monument “in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>162</sup>

#### D. Summary

The Antiquities Act does not expressly authorize the President to reduce a national monument established by a prior President. But it is hard to imagine stronger circumstances supporting the conclusion that it impliedly does so. Presidents began relying on the Act to reduce monuments established by their predecessors soon after the Act became law, and continued to do so for the next fifty years. These presidential reductions never once prompted a legal challenge, and Congress apparently knew of them yet did nothing to disturb them. An Attorney General recognized, without reservation, the President’s exercise of

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158. *Id.*

159. *Id.*; see 54 U.S.C. § 320301(b) (2012). While not addressing the president’s power to *diminish* a national monument created under the Antiquities Act, General Cummings did conclude that the President could not *abolish* a monument under the Act. 39 Op. Att’y Gen. 185, 189 (1938).

160. National Monuments, 60 Interior Dec. 9, 10 (July 21, 1947).

161. *Id.*

162. *Id.* at 9, 10 (reaffirming 1935 opinion concluding that the “President was authorized to reduce the area of a national monument”); see also Squillace, *The Monumental Legacy*, *supra* note 7, at 559–60 (discussing 1924 Solicitor opinion that concluded President could not reduce national monument but that was reversed by later Solicitor opinions of 1935 and 1947). Professor Squillace admits that a President can correct “mistake[s]” in monument designations made by predecessors. See Squillace, *Monumental Legacy*, *supra* note 7, at 567; see also Proclamation No. 1322, 39 Stat. 1764 (1916) (revising boundaries in light of resurvey); ISE, *supra* note 43, at 157 (explaining that President Wilson issued a proclamation to replace earlier one establishing Natural Bridges National Monument because of errors in original survey). Professor Squillace does not explain, however, why the Antiquities Act should be interpreted implicitly to allow the President to correct “mistakes” of his predecessors but not to allow the President to correct other erroneous determinations made in establishing a monument under the Act. For example, Professor Squillace does not explain why a President cannot modify a prior monument designation if the President determines that the prior designation is “confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301(b). This would seem to be a “mistake” that the Act impliedly authorizes the President to correct.

reduction power. Solicitors of the Interior squarely upheld that power. Collectively, these circumstances compel the conclusion that the Antiquities Act authorizes the President to reduce national monuments.<sup>163</sup>

### III. THE PRESIDENT'S POWER TO ABOLISH A MONUMENT CREATED UNDER THE ANTIQUITIES ACT

The Antiquities Act authorizes the President to “declare” national monuments and “reserve” public land as a part of those monuments.<sup>164</sup> The Act neither expressly authorizes nor expressly bars the President from abolishing a previously established monument. Even so, for three reasons the Act should be interpreted to impliedly authorize abolition. First, the President’s power under the Act to abolish an improperly established monument flows logically from the President’s well-established power under the Act to modify a monument to exclude, for example, land that was improperly included within the original monument boundaries. Second, interpreting the Act to authorize abolition enables the President to carry out the constitutional duty to take care that the Antiquities Act is faithfully executed. That is because an improperly established monument constitutes an ongoing violation of the Act; by rescinding that monument, the President stops the violation. Third, interpreting the Antiquities Act to confer abolition power accords with the general rule that a prior president cannot tie the hands of the current President.<sup>165</sup>

#### A. *The Power to Reduce Implies the Power to Rescind*

As described above, presidents have regularly modified monuments previously established under the Antiquities Act to exclude land originally included within monument boundaries.<sup>166</sup> The well-established existence of this modification power supports the President’s power to abolish altogether a monument that the President determines was improperly established in the first place. This follows as a matter of logic.

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163. *Cf.* United States v. New Mexico, 438 U.S. 696, 699–700 (1978) (referring to the Court’s prior decisions holding that “Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve ‘appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.’” (emphasis omitted)).

164. 54 U.S.C. §§ 320301(a)–(b).

165. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 300 (“Article II of the Constitution vests significant discretionary authority in the President . . . . By ‘the President’ the Constitution of course means the incumbent; the powers of the office cannot be exercised by former holders of the office.”); Yoo & Gaziano, *supra* note 7, at 8–9.

166. *Supra* note 114 and accompanying text.

Take the instances in which presidents have modified monuments to exclude land that they determined was improperly included in the first place—for example, because it neither contained protectable objects nor was necessary to protect them.<sup>167</sup> If the President can *reduce* a monument to exclude lands that the President determines were not properly included in the first place, logic compels the conclusion that the President can *abolish* a monument that the President determines was not properly created in the first place—say, because it did not contain antiquities entitled to protection under the Act. Whether diminishing a monument or abolishing it, the President exercises discretion to revisit—and, by his or her lights, *correct*—a determination made by a predecessor. It is hard to conceive of a basis for distinguishing a current President’s power to make a correction that affects part of a monument from the President’s power to make a correction affecting the monument as a whole.<sup>168</sup>

As discussed above, presidents have revised the boundaries of national monuments established under the Antiquities Act not only to correct errors in the original proclamations but also to reflect changed circumstances.<sup>169</sup> To recall one example, President Kennedy excluded almost 4,000 acres from Bandelier National Monument in 1963 because that land’s archeological values “have been fully researched.”<sup>170</sup> If President Kennedy’s action was warranted with respect to a portion of the monument, logically the President should be able to eliminate an entire monument if all of its archeological values have been exhausted.

Indeed, this was the view of Edgar Lee Hewett, the archeologist who drafted the bill that Congress enacted as the Antiquities Act “without changing a word.”<sup>171</sup> In the memorandum that Hewett gave Congress cataloging specific archeological ruins in the Southwest, he wrote that while some should be incorporated into permanent national parks,

[m]any others should be temporarily withdrawn and allowed to revert to the public domain after the ruins thereon have been examined by competent authority, the collections therefrom properly cared for, and all data that can be secured made a matter of permanent record.<sup>172</sup>

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167. See *supra* notes 118–19119 and accompanying text.

168. Squillace, *Monumental Legacy*, *supra* note 7, at 551 (“Whether a future President has the authority to abolish a national monument arguably resolves the question as to whether a President may reduce the size of a national monument or eliminate restrictions or conditions included in the proclamation, since the legal issues are essentially the same.”).

169. See *supra* notes 120–21 and accompanying text.

170. Proclamation No. 3539, 3 C.F.R. 287, 288 (1959–1963).

171. Thompson, *supra* note 58, at 43.

172. EDGAR LEE HEWETT, MEMORANDUM CONCERNING THE HISTORIC AND PREHISTORIC RUINS OF ARIZONA, NEW MEXICO, COLORADO, AND UTAH, AND THEIR PRESERVATION, *reproduced*

Thus, Hewett, the architect of the Antiquities Act, believed that some national monuments should be abolished in their entirety, and undoubtedly drafted the Act to authorize the President to do so.

Hewett's view is eminently rational. Indeed, one commentator has said that Hewett's recognition that "once a site has given up its information, it no longer needs to be preserved" has been "of inestimable value to archeology ever since."<sup>173</sup> This commentator explained:

[Hewett's view] has enabled archeologists to relate in a rational way to economic and political realities, because they do not have to insist on saving "everything." They can focus instead on recovering the information that makes the ruins valuable in the first place.<sup>174</sup>

In short, the same considerations that support the President's power to diminish a monument established under the Antiquities Act support the President's power to abolish it.

#### B. *The President's Duty to Take Care that the Antiquities Act Be Faithfully Executed*

When a president establishes a national monument in violation of the Antiquities Act, that violation continues as long as the monument exists. The Constitution's Take Care Clause gives the President a duty to ensure that federal law is being faithfully executed during his or her watch.<sup>175</sup> Consistent with that duty, the Antiquities Act should be interpreted to allow the President to revise or abolish national monuments to stop the ongoing violation of that Act.

The Take Care Clause says that the President "shall take Care that the Laws be faithfully executed."<sup>176</sup> The Clause does not just require the President him- or herself to execute the laws faithfully but also to "take care" that they "be faithfully executed" by everyone responsible for their execution.<sup>177</sup> Thus, the Clause makes the President responsible for ongoing violations of federal law by executive officials even if the President did not cause them.<sup>178</sup> In this way, the Take Care Clause gives

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and incorporated in H.R. REP. NO. 59-2224, at 3 (1906). Hewett prepared this memorandum in 1904, at the request of William Afton Richards, then Commissioner of the General Land Office in the Department of Interior. ROTHMAN, *supra* note 15, at 43; Thompson, *supra* note 58, at 39.

173. Thompson, *supra* note 58, at 45.

174. *Id.*

175. U.S. CONST. art. II, § 3.

176. *Id.*

177. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010).

178. *Id.*

constitutional underpinning for the plaque that President Truman famously displayed on his desk and that said, “The buck stops here.”<sup>179</sup>

U.S. Supreme Court decisions reflect this constitutional (and political) truth. The Court has relied on the Take Care Clause to strike down or narrowly interpret laws that impair the President’s power to ensure the faithful execution of federal law. Specifically, in *Myers v. United States*<sup>180</sup> and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,<sup>181</sup> the Court relied on the Take Care Clause to strike down laws restricting the President’s power to remove subordinates.<sup>182</sup> In *Printz v. United States*,<sup>183</sup> the Court relied on the Take Care Clause to strike down a law that shifted responsibility for executing federal law to state and local law enforcement agents, whom the President could not control.<sup>184</sup> In *Lujan v. Defenders of Wildlife*,<sup>185</sup> the Court refused to interpret a federal law in a way that would allow private plaintiffs who lacked any concrete injury to sue federal agencies for violations of federal law.<sup>186</sup> The *Lujan* Court explained that such an interpretation would unconstitutionally “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”<sup>187</sup>

179. DONALD R. MCCOY, *THE PRESIDENCY OF HARRY S. TRUMAN* 315 (1984).

180. 272 U.S. 52 (1926).

181. 561 U.S. 477 (2010).

182. *Free Enter. Fund*, 561 U.S. at 484 (striking down law that gave executive official multiple layers of “good-cause” protection from presidential removal, and stating that “[t]he President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them”); *Myers*, 272 U.S. at 122, 176 (striking down Act of Congress restricting President’s power to remove a postmaster and stating that “when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal”). *But cf.* *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631 (1935) (reading *Myers* narrowly to give President constitutionally irreducible power of removal only over officials with “purely executive” duties).

183. 521 U.S. 898 (1997).

184. *Id.* at 902, 922, 935 (striking down provision in federal Brady Act that required state and local law enforcement officers to conduct background checks on would-be handgun buyers, holding that law unconstitutionally sought to transfer President’s responsibility for faithful execution of federal laws under Take Care Clause “to thousands of [chief law enforcement officers] in the 50 States, who are left to implement the program without meaningful Presidential control”).

185. 504 U.S. 555 (1992).

186. *Id.* at 571–77 (construing “citizen suit” provision of Endangered Species Act, 16 U.S.C. § 1540(g) (2012)).

187. *Id.* at 577; *see also* *Allen v. Wright*, 468 U.S. 737, 761 (1984) (“The Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to ‘take Care that the Laws be faithfully executed.’ We could not recognize respondents’ standing in this case without running afoul of that structural principle.” (citation omitted)).

These decisions require interpreting the Antiquities Act to allow the President to modify or abolish a monument established by a prior president in violation of the Act.<sup>188</sup> The decisions show that the Take Care Clause makes the President responsible for faithful execution of federal law during the President's watch. The responsibility extends to ongoing violations of federal law even if they were put into motion before that president took office. The Antiquities Act does not expressly prevent the President from revising or abolishing a national monument. And the Act *should* not be interpreted that way, or else it would prevent the President from taking care that the Act is faithfully executed during his or her term in office.

### C. *The General Rule Preventing a President from Tying the Hands of His or Her Successors*

If the Antiquities Act were interpreted implicitly to bar the President from abolishing a previously established monument, the Act would violate the general rule that one president cannot bind a later president.<sup>189</sup> That rule reflects longstanding presidential practices and the President's co-equality with Congress, as well as both branches' accountability to the people who elect them.

Longstanding presidential practices show that one president generally cannot bind a later president. Specifically, presidents have always been understood to be able to revoke executive orders issued by their predecessors.<sup>190</sup> This understanding applies to presidential proclamations as well, because "[t]he difference between Executive orders and proclamations is more one of form than of substance."<sup>191</sup> Likewise, Presidents have consistently asserted the power to terminate international agreements made by prior presidents.<sup>192</sup> Of course, a President's action

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188. As explained in the text, *Lujan* is precedent for interpreting a federal statute to avoid an interpretation that would violate the Take Care Clause. 504 U.S. at 577. Indeed, the Court has relied on the Clause to uphold acts by the President that lack *any* express statutory support. *In re Neagle*, 135 U.S. 1, 64–65, 67–68 (1890) (relying on the Take Care Clause to conclude that President could have a federal marshal protect Justice Field even without express statutory authority).

189. McConnell, *supra* note 165, at 300 ("Article II of the Constitution vests significant discretionary authority in the President . . . By 'the President' the Constitution of course means the incumbent; the powers of the office cannot be exercised by former holders of the office."); Yoo & Gaziano, *supra* note 7, at 8–9.

190. VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 7–8 (2014), <https://fas.org/sgp/crs/misc/RS20846.pdf>.

191. H.R. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957).

192. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 339 (AM.

may have legal consequences—when, for example, it implicates individual rights—that a later President cannot undo.<sup>193</sup> But that is not the same as saying the prior presidential act disables a later President from undoing that action.<sup>194</sup>

Moreover, the principle that the President cannot be bound by predecessors' acts reflects the President's equality with Congress. The U.S. Supreme Court has recognized that Congress cannot be bound by the actions of prior Congresses.<sup>195</sup> If the President, in contrast, could be bound by the acts of predecessors, the President would lose the coequality with Congress that the Constitution requires.<sup>196</sup>

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LAW INST. 1987) (“Under the law of the United States, the President has the power . . . to suspend or terminate an [international] agreement in accordance with its terms” and “to terminate or suspend the agreement on behalf of the United States” upon determining that it has been violated by another party or because of supervening events); *Goldwater v. Carter*, 444 U.S. 996, 1006–07 (1979) (Brennan, J., dissenting from majority ruling that case was nonjusticiable and concluding, on the merits, that President had power to abrogate defense treaty with Taiwan); *see also* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 211–12 (2d ed. 1996) (“Presidents have claimed authority . . . to act for the United States to terminate treaties . . . .”); *id.* at 496 n.159 (stating that President’s power to terminate congressional-executive agreements “seems no weaker than in regard to treaties”); STEPHEN P. MULLIGAN, *CONG. RESEARCH SERV.*, R44761, *WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT* 7 (2018) (“In most cases, . . . the President has unilaterally terminated executive agreements, and the Executive’s authority has not been questioned by Members of Congress, or in judicial challenges . . . .”); *id.* at 10 (“In most cases,” President’s unilateral withdrawal from, or termination of, treaties “has not generated significant opposition in either chamber of Congress”). *But cf.* Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1324 (2008) (arguing that Restatement (Third)’s view that President can withdraw from a treaty “has never been formally upheld by the courts and remains controversial”).

193. For example, once the President grants a pardon, a future President cannot prosecute the recipient for the pardoned conduct. *See* U.S. CONST. art. II, § 2, cl. 1; McConnell, *supra* note 165, at 303.

194. Recognizing that the President’s actions may implicate individual rights that a later President cannot undo merely puts the President on par with Congress, which likewise may take actions implicating individual rights that a later Congress cannot undo. *See, e.g.,* *Perry v. United States*, 294 U.S. 330, 350, 353–54, 358 (1935) (one of the Gold Clause Cases; Court held that Congress exceeded its authority in enacting a joint resolution renegeing on payment terms of a government bond issued under prior statute; Court rejected government’s argument that earlier Congress could not restrict power of later Congress, but ultimately dismissed the case because plaintiff had not shown damages).

195. *See* *Dorsey v. United States*, 567 U.S. 260, 274 (2012) (“[S]tatutes enacted by one Congress cannot bind a later Congress . . . .”); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) (“[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years.”); *see also* *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (referring to “the centuries-old concept that one legislature may not bind the legislative authority of its successors”).

196. *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 751 n.31 (1982) (relying partly on the equality and independence of the three branches of federal government to justify recognizing presidential immunity analogous to immunity that members of Congress enjoy under Speech and

The same reason supports each branch's freedom from restrictions imposed by its predecessors: the electoral processes built into the Constitution.<sup>197</sup> Elections ensure that "[t]he conduct of the executive branch, no less than the legislative, is . . . politically accountable."<sup>198</sup> In particular, elections enable the people of today to reject the policies of the past by electing candidates who pledge to undo them.<sup>199</sup>

Because it would be inconsistent with the electoral process for the Antiquities Act to bar the President from abolishing a monument established by his predecessor, the Act should not be interpreted to do so. Instead, the Act's express grant of "discretion" should be interpreted to allow the current President to abolish a monument established by a prior president.<sup>200</sup>

#### IV. ARGUMENTS AGAINST THE PRESIDENT'S REDUCTION AND RESCISSION AUTHORITY

A recent article by Professor Mark Squillace and others argues that the President cannot reduce or rescind national monuments established under the Antiquities Act of 1906.<sup>201</sup> These arguments are reiterated in a letter that 121 law professors submitted for the Interior Secretary's 2017 review of twenty-seven national monuments.<sup>202</sup> The Squillace article relies mainly on three sources: (1) "contemporaneous laws" (from around the time of the Antiquities Act of 1906) that expressly authorized the President to modify or vacate prior presidential withdrawals of land;<sup>203</sup> (2) a 1938 opinion in which Attorney General Homer Cummings concluded that President Franklin D. Roosevelt could not abolish the Castle Pinckney National Monument;<sup>204</sup> and (3) the Federal Land Policy

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Debate Clause, despite absence of similarly express constitutional language conferring presidential immunity).

197. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2–3, at 125 n.1 (3d ed. 2000) ("[T]he Constitution limits trans-temporal commandeering of a branch by its current occupants through the device of generally preventing any branch from making the meta-law necessary to tie the hands of the future officeholders in that branch.").

198. McConnell, *supra* note 165, at 300.

199. *Id.* ("When voters elect a new President, they expect that he will have authority to change those policies that, under the Constitution and laws, are left to the discretion of the executive.").

200. *Cf. id.* (arguing that Article II vests discretionary power in the current President, not his predecessors).

201. See Squillace et al., *supra* note 7, at 58 (arguing against the President's power to reduce and rescind national monuments).

202. See Letter from 121 Law Professors to Sec'y of Interior Ryan Zinke and Sec'y of Commerce Wilbur Ross, *supra* note 7, at 1–2.

203. See Squillace et al., *supra* note 7, at 58.

204. *Id.* at 58–59; see generally 39 Op. Att'y Gen. 185 (1938) (stating the Antiquities Act does not authorize the president to abolish established monuments).

and Management Act of 1976 (FLPMA).<sup>205</sup> Those sources, however, at best weakly support their argument.<sup>206</sup>

### A. “Contemporaneous Laws”

The Squillace article’s authors contend that the “narrow authority granted to the President to reserve land under the Antiquities Act stands in marked contrast to contemporaneous laws that delegated much broader executive authority to designate, repeal, or modify other types of federal reservations of public lands.”<sup>207</sup> They cite two such “contemporaneous laws”: the Pickett Act of 1910<sup>208</sup> and the Forest Service Organic Administration Act of 1897.<sup>209</sup>

The Pickett Act sheds no light on the Antiquities Act. The Pickett Act addressed only the President’s power to withdraw public lands temporarily.<sup>210</sup> Temporary withdrawals inherently must end. Thus, Congress had to address in the Pickett Act how those withdrawals would end. Congress ultimately rejected an automatic termination date in favor of authorizing either the President or Congress to revoke withdrawals under the Act.<sup>211</sup> While authorizing the President only to make temporary withdrawals, the Pickett Act allowed the President to reserve land

205. Pub. L. No. 94-579, 90 Stat. 2792 (codified as amended in scattered sections of 43 U.S.C.); see Squillace et al., *supra* note 7, at 59–64.

206. Attorney General Cummings’s 1938 opinion and FLPMA are also relied on by the law firm memorandum prepared for the National Parks Conservation Association opposing the President’s power to reduce or rescind national monuments. Memorandum from Robert Rosenbaum et al., Arnold & Porter Kaye Scholer LLP, *supra* note 7, at 9–14.

207. Squillace et al., *supra* note 7, at 58 (emphasis omitted) (footnote omitted).

208. Pub. L. No. 61-303, ch. 421, 36 Stat. 847 (1910), *repealed* by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2792 (codified as amended in scattered sections of 43 U.S.C.).

209. Ch. 2, 30 Stat. at 11, 36 (codified as amended in scattered sections of 16 U.S.C.).

210. Ch. 421, 36 Stat. at 847. The Pickett Act was prompted by an urgent situation in 1909: Public land in California thought to contain oil was falling into private hands under the existing mining laws so quickly that officials predicted all of those public oil lands would become private within “a few months,” and then the government would have to repurchase the land to obtain oil for use by the Navy. *United States v. Midwest Oil Co.*, 236 U.S. 459, 466–67 (1915). To halt the rapid privatization of public oil lands, President Taft issued a “Temporary Petroleum Withdrawal” order withdrawing more than 3 million acres of public land from private development under the mining laws. *Id.* at 467. President Taft’s temporary withdrawal order said that it was “[in] aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain.” *Id.* (quoting Temporary Petroleum Withdrawal No. 5). After issuing the order, President Taft asked Congress to give him specific authority to make temporary withdrawals of land for the purpose of submitting legislation to Congress. 1 WHEATLEY, JR., *supra* note 15, at 88–89. Congress enacted the Pickett Act in response to the President’s request for authority to make temporary withdrawals. Getches, *supra* note 15, at 290.

211. Getches, *supra* note 15, at 294 n.82.

withdrawn under the Act for any “public purposes.”<sup>212</sup> Thus, the power the Pickett Act granted to the President was broad in scope but limited in duration.<sup>213</sup>

In contrast, the power granted to the President by the Antiquities Act is narrow in scope but indefinite in duration. Most importantly, in the Antiquities Act, Congress did not need to expressly address the duration of monuments and whether the President could modify or terminate them. In contrast, Congress *did* need to address these issues in the Pickett Act because the subject of that Act was temporary withdrawals. Given this necessity, Congress’s addressing them in the Pickett Act sheds no light on Congress’s failure to do so in the Antiquities Act, where there was no such necessity.

Also unilluminating is the Forest Service Organic Administration Act of 1897. That Act stemmed from what one Senator called an “extraordinary emergency.”<sup>214</sup> The emergency arose under an 1891 federal law that authorized the President to set aside public land as forest reserves.<sup>215</sup> On February 22, 1897, President Grover Cleveland relied on the 1891 law to set aside about 20 million acres of public land in the West as forest reserves.<sup>216</sup> Cleveland’s reservations mistakenly included entire towns, mining camps, and other settlements where, because of the reservations, people could no longer legally cut firewood for cooking and staying warm.<sup>217</sup> Western legislators urgently lobbied Cleveland’s successor, President William McKinley, to vacate or modify Cleveland’s executive orders establishing the reservations.<sup>218</sup> McKinley reportedly felt some “timidity” about modifying or revoking Cleveland’s reservations.<sup>219</sup> In addition, some legislators doubted McKinley’s power

212. Ch. 421, 36 Stat. at 847.

213. See 40 Op. Att’y Gen. 73, 73–74 (1941) (opinion of then-Attorney General Robert H. Jackson, concluding that Pickett Act did not affect President’s authority to make permanent withdrawals); see also 1 WHEATLEY, JR., *supra* note 15, at 108–20 (discussing background of Jackson’s 1941 opinion on the Pickett Act).

214. 30 CONG. REC. 920 (1897) (statement of Sen. Gorman).

215. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103.

216. Proclamation Nos. 19–31, 29 Stat. 893–912; 29 CONG. REC. 2677 (1897) (statement of Rep. Lacey, incorrectly citing the law on which President Cleveland relied as having been enacted in “1890,” rather than 1891); see also PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 569 (1968) (stating that the President issued executive orders pursuant to the law enacted in 1891).

217. *E.g.*, 29 CONG. REC. 2513 (1897) (statement of Sen. Clark that reservations in effect provide that “the settler . . . shall not burn a stick of timber in all that land to light his hearth”); *id.* at 2678 (statement of Rep. Gamble).

218. 30 CONG. REC. 1007 (1897) (statement of Rep. Knowles) (“We have already tried for two months to have this order [i.e., President Cleveland’s executive orders creating the forest reserves] revoked.”).

219. *Id.* (statement of Rep. Ellis).

to do so, though others had no such doubts.<sup>220</sup> The President's power to alter or undo Cleveland's forest reservations became particularly problematic after the Senate approved provisions nullifying or suspending those reservations.<sup>221</sup> Given this congressional action, could the President also take action?

The bill ultimately enacted in the wake of this emergency had two, essentially duplicative, provisions addressing the President's power to modify or vacate forest reservations. One provision immediately preceded the provision that suspended Cleveland's reservations, and said that its purpose was "to remove any doubt which may exist pertaining to the authority of the President" to vacate or modify forest reservations under the 1891 law.<sup>222</sup> The second provision authorizing the President to

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220. 29 CONG. REC. 2677 (1897) (statement of Rep. Pickler that President has "always" had power to revoke or modify forest reservations, in response to which Rep. Lacey denies it); *id.* at 2973 (statement of Rep. Mondell) ("It seems to be an open question whether the President has the power after he has once established these reservations to restore it to the public domain or change its boundaries."); 30 CONG. REC. 914 (1897) (statement of Sen. Gray that President Cleveland, like himself, doubted whether President could modify orders establishing forest reservations under the 1891 law); *id.* at 1400 (statement of Rep. Cannon) ("The better opinion is that the President of the United States has no power to take any one acre out of that [i.e., President Cleveland's] reservation[s].").

221. The Senate first passed a provision nullifying the Cleveland reservations at the end of the 54th Congress, but it was defeated. 29 CONG. REC. 2677 (1897) (reproducing Senate amendment No. 72 to House budget bill); *id.* at 2680 (reporting House vote rejecting Senate amendment No. 72 by approving Rep. Lacey's amendment to that amendment); *id.* at 2970 (reporting result of conference, in which Senate receded from provision nullifying Cleveland's reservation); *id.* at 2971–73 (statement of Rep. Mondell explaining background of nullification provision). In the 55th Congress, the Senate passed a provision that suspended the Cleveland reservations, rather than vacating them entirely. *See* 30 CONG. REC. 909 (1897) (reproducing amendment to appropriation bill proposed by Sen. Pettigrew, which suspended Cleveland's reservations); *id.* at 925 (Senate approval of the amendment). In the House, Rep. Clark asked, "If these Cleveland reservations are knocked in the head, then is-there [sic] any provision in the law by which the present President can make a forest reservation?" *Id.* at 1012. Rep. Cannon responded that no, it would not be "in the power of any President . . . to put any one acre of this 20,000,000 acres in a forest reservation." *Id.*; *see also id.* at 909 (statement of Sen. Pettigrew) ("[I]f we should simply suspend the order [i.e., the Cleveland reservations] without saying that the President is authorized to renew the order after the survey is made the executive department might not feel authorized to again establish forest reservations within the areas to be vacated by this amendment."). The House–Senate conference eventually agreed to a provision that suspended Cleveland's reservations while authorizing the President to vacate or modify forest reservations that, like Cleveland's, were made under the 1891 law. *Id.* at 1397 (reproducing conference report).

222. 30 CONG. REC. 980 (1897) ("[T]o remove any doubt 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 [creating Forest reserves under the 1891 law], or any part thereof, from time to time, as he shall deem best for the public interests: *Provided*, That the Executive orders and proclamations dated February 22, 1897, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby,

vacate or modify forest reservations was not limited to forest reservations under the 1891 law.<sup>223</sup>

Thus, the Forest Service Organic Administration Act of 1897 addressed the President's power to modify or vacate land reservations made by a prior president under an earlier law because a doubt arose about that power, and immediate action was necessary. The 1897 Act shows that Congress may expressly address the modification and vacation power to "remove any doubt" about their existence.<sup>224</sup> The 1897 Act does not show, however, that the modification and revocation powers do not exist *unless* Congress expressly grants them. Rather, the specific mention of these powers in the 1897 law reflects a desire to include arguably superfluous language to remove doubt that might otherwise arise, enabling immediate action to address the life-threatening situation caused by a prior president's action.<sup>225</sup>

suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued . . .").

223. 30 CONG. REC. 912 (1897) ("The 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."). This provision appears to have originated from a conference held at the end of the 54th Congress. *See* 29 CONG. REC. 2973 (1897) (statement of Rep. Mondell); *see also* 30 Cong. Rec. 911 (1897) (statement of Sen. Allison) ("Therefore it was that . . . by unanimous consent there was placed upon the [appropriations] bill as it passed the two Houses before the 4th of March [i.e., the end of the 54th Congress] a provision to enable the President of the United States, Mr. McKinley, to change, vacate, or modify this order [i.e., the Cleveland reservations]"). The other provision expressly authorizing the President to vacate or modify forest reservations made under the 1891 law emerged from the conference held in the 55th Congress. *See id.* at 1397 (reproducing conference report).

224. 30 CONG. REC. 980 (1897).

225. *Cf. Kawashima v. Holder*, 565 U.S. 478, 487 (2012) (concluding that Congress's inclusion of a provision expressly addressing tax evasion offenses did not prevent interpreting a more generally worded provision also to encompass tax evasion offenses). In addition to the Pickett Act and the Forest Service Organic Administration Act of 1897, Professor Rasband cites the Carey Act of 1894 and the Reclamation Act of 1902 as laws expressly granting to the executive power to revoke a prior withdrawal. Rasband, *supra* note 7, at 626–27. These laws differ too much from the Antiquities Act to illuminate its meaning. As originally enacted, the Carey Act authorized the Interior Secretary to contract with states to give them federally owned desert lands if they reclaimed the land through irrigation within ten years. Carey Act of 1894, ch. 301, § 4, 28 Stat. 372, 422. The original Act did not, however, say what would happen if the state did not meet the ten-year deadline. Congress amended the Act in 1901 to clarify that the Secretary could, in his discretion, extend the deadline by five years or "restore such lands to the public domain." Act of Mar. 3, 1901, ch. 853, § 3, 31 Stat. 1133, 1188. Thus, the Carey Act does not expressly use the terms "withdrawal" or "revocation" in describing the Secretary's powers. More fundamentally, it does not bear on the Antiquities Act's meaning because, like the Pickett Act, it deals with a time-limited setting aside of public land, and, like the Forest Service Organic Administration Act of 1897, it expressly addresses the Secretary's power to restore land to the public domain undoubtedly because a question arose concerning the existence of that power. The Reclamation

### B. Attorney General Homer Cummings's 1938 Opinion

As discussed above, Attorney General Cummings recognized in his 1938 opinion that “the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom.”<sup>226</sup> In his view, however, “it does not follow from [the President’s] power so to confine [i.e., reduce] th[e] area [covered by a monument] that he has the power to abolish a monument entirely.”<sup>227</sup> But it *does* follow from the President’s power to reduce the size of a monument that the President can abolish it altogether. Indeed, it is illogical to conclude otherwise. It makes no sense to conclude that the President could reduce a monument by 50%, or by 95%—because, for example, the President determines that the excluded land never contained or no longer contains antiquities—but cannot abolish a monument altogether if, for example, the President concludes that the land contains no protectable objects whatsoever (or no longer does so). If one acknowledges the President’s power to reduce a monument, as so many presidents have done, logic compels the conclusion that the President can abolish a monument.

Furthermore, as discussed in a recent white paper, General Cummings’s 1938 opinion is “erroneous as a matter of law,” for three reasons.<sup>228</sup>

First, the 1938 opinion mistakenly relies on an 1862 opinion by Attorney General Bates. General Bates concluded in 1862 that, having reserved land for military purposes, the President could not unilaterally open those lands to settlement under the Preemption Act of 1841.<sup>229</sup> General Cummings read General Bates’s opinion to stand for the broad principle that once the President reserves land under an Act of Congress, the President can never rescind the reservation.<sup>230</sup> That reading is dubious to the extent that General Bates’s opinion rested on the particular statute governing the particular reservation and the President’s undoing of that

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Act of 1902 allowed the Secretary of Interior to make temporary withdrawals of land pending a determination of whether the withdrawn land was suitable for irrigation works, and, if not, to restore the land to the public domain. Act of June 17, 1902, Pub. L. No. 57-161, ch. 1093, § 3, 32 Stat. 388, 388 (codified as amended at 43 U.S.C. § 416 (2012)). This 1902 Act does not illuminate the Antiquities Act’s meaning for the same reason that the Pickett Act does not: Because Congress knew it was authorizing temporary withdrawals, it knew that it had to specify how they would end.

226. 39 Op. Att’y Gen. 185, 188 (1938).

227. *Id.*

228. Yoo & Gaziano, *supra* note 7, at 5.

229. 10 Op. Att’y Gen. 359, 367–68 (1862).

230. 39 Op. Att’y Gen. at 186–87 (“My predecessors have held that if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation.”).

reservation.<sup>231</sup> General Bates also relied on “the almost uniform practice of the Government in the disposition of *military reservations*.”<sup>232</sup> These bases for General Bates’s 1862 opinion had no bearing on the entirely different situation before General Cummings in 1938.

Second, insofar as General Bates and Cummings relied on general principles, their reliance was unfounded. For instance, General Cummings quoted Bates’s statement that “[t]he grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed.”<sup>233</sup> Even assuming trust law is apt, it does not indicate the President lacks authority to abolish a monument:

Under general trust principles, at least in the 20th and 21st centuries, the power to create a trust includes the power to revoke it when the settler retains an interest in it, unless the trust is expressly irrevocable under the original grant of authority.<sup>234</sup>

Those principles apply to monument designations under the Act because the federal government claims ownership and control of land before and after the designation. And that circumstance distinguishes the abolition of monuments from the situation addressed by General Bates in 1862, which concerned opening public land to *private* sale and settlement.<sup>235</sup>

Third, General Cummings’s 1938 opinion relied on reasoning that merely begged the ultimate question of statutory interpretation. Quoting General Bates, Cummings wrote:

A duty properly performed by the Executive under statutory authority has the validity and sanctity which belongs to the statute itself, and, *unless it be within the terms of the power conferred by that statute*, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.<sup>236</sup>

This begs the question of whether the President’s abolition of a

231. 10 Op. Att’y Gen. at 363 (“[N]o such power [to abolish the reservation] is conferred on the President in the act under which the selection of a site for Fort Armstrong was made.”).

232. *Id.* at 366 (emphasis added); *see also id.* at 367 (referring to “the vigilance with which Congress exercised its power of control over military sites”); *id.* at 368 (“[C]ertain facts disclosed in the papers you have submitted, which show that the theory that the Rock Island reservation had been [abolished] . . . was never accepted by either the legislative or executive departments of the Government.”).

233. 39 Op. Att’y Gen. at 187 (quoting 10 Op. Att’y Gen. at 364).

234. Yoo & Gaziano, *supra* note 7, at 6.

235. 10 Op. Att’y Gen. at 367.

236. 39 Op. Att’y Gen. at 187 (quoting 10 Op. Att’y Gen. at 364) (emphasis added).

monument is “within the terms of the power conferred by” the Antiquities Act. General Cummings did not squarely address that question; he apparently assumed that since the Act did not expressly authorize abolition, it did not confer such authority even implicitly. Yet Cummings recognized that presidents had *reduced* monuments even though the Act does not expressly sanction their reduction. Ultimately, then, his reasoning rested on the unexamined assumption that, although the Act may impliedly *authorize* the President to *reduce* a monument, it impliedly *forbids* the President from *abolishing* it. Nothing in logic or law supports that assumption.

### C. FLPMA

A heading in the recent Squillace article argues: “FLPMA clarifies that only Congress can revoke or downsize a national monument.”<sup>237</sup> In the text underneath this heading, it turns out that the authors actually rely more on the FLPMA’s legislative history than on the Act itself. In particular, they rely on a House committee report stating that FLPMA “would . . . specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.”<sup>238</sup> Their reliance on FLPMA’s legislative history has three problems.

First, the quoted statement from the House committee report has no support in the text of FLPMA. In stating that FLPMA would “specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments,”<sup>239</sup> the report was referring to Section 204(j) of FLPMA, which was (and remains) the only FLPMA provision that specifically mentions monuments. Section 204(j) said (and says) in relevant part, “The Secretary shall not . . . modify or revoke any withdrawal creating national monuments under [the Antiquities Act] . . . .”<sup>240</sup> Thus, contrary to the statement in the House committee report, Section 204(j) does not reserve to Congress the power to modify or abolish national monuments; it merely denies that power to the Secretary. Thus, the authors rely on legislative history that lacks a foundation in statutory text.

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237. Squillace et al., *supra* note 7, at 59.

238. *Id.* at 63 (quoting H.R. REP. NO. 94-1163, at 9 (1976)); *see also* John Freemuth, *A Closer Look at Trump’s Antiquities Act Order*, LAW360 (May 10, 2017, 12:34 PM), <https://www.law360.com/articles/922159/a-closer-look-at-trump-s-antiquities-act-order> (quoting same House committee report language and stating that “[o]ne interpretation of this House report would suggest that Congress reserved the revocation power in terms of national monuments to itself”).

239. H.R. REP. NO. 94-1163, at 9.

240. 43 U.S.C. § 1714(j) (2012).

Second, not only does their argument lack support in the text of FLPMA, it also lacks a foundation in the very House committee report statement that they quote. That committee report statement, quoted in the paragraph above, indicates that Section 204(j) reserves to Congress the power to modify or revoke monuments. The authors do not, however, actually argue that Section 204(j) has this effect. Rather, they argue that “FLPMA”—the statute as a whole—“clarifies” that the Antiquities Act had that effect.<sup>241</sup> But that is not what the committee report says. The text of the report indicates that Section 204(j) reserves to Congress the power to modify and revoke monuments, and it does not use the term “clarifies” (or a synonymous term like “confirms”) in describing Section 204(j). In short, the House committee report attributes to Section 204(j), not the Antiquities Act as a whole, the supposed restriction on executive power to reduce or abolish monuments.

And third, when the authors finally grapple with the text of Section 204(j), they offer a dubious account. In their view, members of the House subcommittee that drafted FLPMA had the “mistaken impression” that the Secretary of Interior, rather than the President, “created national monuments” under the Antiquities Act.<sup>242</sup> Although the authors say that this misunderstanding was cleared up, it led the subcommittee to conclude that the President’s authority to create national monuments *should* be transferred to the Secretary of Interior.<sup>243</sup> So the subcommittee drafted a provision amending the Antiquities Act to transfer the President’s power to create monuments to the Secretary.<sup>244</sup> But the subcommittee did not want the Secretary to be able to modify or abolish monuments. To prevent this, they drafted Section 204(j).<sup>245</sup> The subcommittee later dropped the provision transferring the President’s monument-creating authority to the Secretary, while retaining (for eventual enactment) Section 204(j)’s denial of secretarial authority to modify or revoke a monument.<sup>246</sup> In the final analysis, then, the authors contend that, by denying to the *Secretary* power to modify or abolish a national monument, Congress in the 1976 FLPMA “clarified” that Congress in the 1906 Antiquities Act meant to deny that authority to the *President*.<sup>247</sup>

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241. Squillace et al., *supra* note 7, at 59.

242. *Id.* at 61.

243. *Id.* at 62.

244. *Id.*

245. *Id.* at 62 & n.32.

246. *Id.* at 62–63.

247. *Id.* at 71.

Maybe so.<sup>248</sup> In all events, this example shows why even members of the U.S. Supreme Court who consider legislative history when interpreting a statute are “wary” of relying on the legislative history of later statutes.<sup>249</sup> Wariness is particularly warranted when, as in the Squillace article, the argument based on subsequent legislative history rests on key members of Congress’s purported misunderstanding of the earlier statute.<sup>250</sup>

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248. It is at least equally likely that Section 204(j) of FLPMA was meant to confirm the President’s power—as distinguished from that of the Secretary of Interior—to reduce or abolish, as well as create, national monuments under the Antiquities Act. Section 204 as a whole authorizes the Secretary of Interior to “make, modify, extend, or revoke withdrawals” of public land. 43 U.S.C. § 1714(a) (2012). Thus, that Section gives the Secretary withdrawal authority that might otherwise be exercised by the President. Section 204(j), however, restricts the Secretary’s withdrawal authority in several ways, including by barring the Secretary from modifying or revoking withdrawals creating national monuments under the Antiquities Act. *Id.* § 1714(j). In this way, Section 204(j) prevents Section 204 as a whole from being read to transfer the President’s powers under the Act to the Secretary.

249. *Doe v. Chao*, 540 U.S. 614, 626–27 (2004).

250. Besides the three sources cited in the article by Professors Squillace et al. in support of their argument that the President lacks power to reduce or rescind a national monument, the Law Professors’ Letter, *supra* note 7, at 3, cites the oral argument in *Alaska v. United States*, 545 U.S. 75 (2005). This additional source provides exceptionally weak support for the argument that the President lacks authority to abolish a monument.

One issue in *Alaska* was whether, when Alaska became a State, the United States intended to retain title to the submerged land under Glacier Bay. *Id.* at 99–100. When Alaska became a State, Glacier Bay was in the Glacier Bay National Monument. *Id.* at 101–02. The Court held that, when creating the monument in 1925, the United States reserved title to the submerged lands and, when Alaska became a State in 1959, Congress expressed an intention to retain title to those lands in the Alaska Statehood Act. *Id.* at 100–10.

At oral argument in the case, the government’s attorney said:

[U]nder the Antiquities Act, the President is given authority to create national monuments, but *they cannot be disestablished except by Act of Congress*. Now, Congress could have disestablished this monument if it had meant to give up the land. It could have disestablished some part of it, and it chose not to do so. And yet, that’s another indication that Congress was intending to retain those lands.

Transcript of Oral Argument at 46, *Alaska*, 545 U.S. 75 (No. 128) (emphasis added). Three points about the government attorney’s italicized statement warrant attention. First, his assertion that the President cannot disestablish a monument was irrelevant to his main point, which was that “Congress could have disestablished this monument if it had meant to give up the land.” *Id.* Whatever the President’s power, Congress indisputably has the power to disestablish—i.e., abolish—a national monument, including ones established by the President under the Antiquities Act, and Congress has done so several times. See *supra* note 138 and accompanying text. Thus, the attorney’s statement about the President’s power is lawyer’s dicta, unnecessary to his actual rationale. Second, the Court did not accept the attorney’s argument that Congress showed its intent to retain title to the submerged land by not disestablishing the monument at the time of statehood. See *Alaska*, 545 U.S. at 103. Instead, the Court relied on the Alaska Statehood Act as expressing Congress’s intent to retain title. See *id.* at 103–04 (declining reliance on Antiquities Act in favor

## CONCLUSION

Controversy has long surrounded presidents' creation of national monuments under the Antiquities Act. The controversy has come to a head because of President Trump's massive reduction of the Grand Escalante and Bears Ears monuments. This Article has argued that the Antiquities Act authorized Trump's action.

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of Alaska Statehood Act); *see also id.* at 113 (Scalia, J., dissenting) (“Though the Court makes a dictal feint toward the Antiquities Act . . . its holding relies on . . . the Alaska Statehood Act.” (citation omitted)). Third, when discussing the history of the Glacier Bay National Monument, the Court cites President Eisenhower’s proclamation excluding certain land from the monument (while adding other land to it). *Id.* at 101 (citing Proclamation No. 3089, 3 C.F.R. 36 (1954–1958)). The Court plainly recognized that this proclamation excluded certain land from the monument, because the Court observed that, while the proclamation “alter[ed] the monument’s boundaries,” it “le[ft] the bay’s waters within them.” *Id.* at 101. The Court thus implied that the proclamation was effective in excluding certain land that had originally been included. If anything, therefore, the Court’s decision in *Alaska* supports the President’s power to reduce the size of national monuments.