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# Presidents Lack the Authority to Abolish or Diminish National Monuments

Mark Squillace  
*University of Colorado*

Eric Biber  
*Berkeley Law*

Nicholas S. Bryner  
*UCLA*

Sean B. Hecht  
*UCLA*

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## *ESSAY*

### PRESIDENTS LACK THE AUTHORITY TO ABOLISH OR DIMINISH NATIONAL MONUMENTS.

#### INTRODUCTION

**B**Y any measure, the Antiquities Act of 1906 has a remarkable legacy. Under the Antiquities Act, 16 presidents have proclaimed 157 national monuments, protecting a diverse range of historic, archaeological, cultural, and geologic resources.<sup>1</sup> Many of these monuments, including such iconic places as the Grand Canyon, Zion, Olympic, and Acadia, have been expanded and redesignated by Congress as national parks.

While the designation of national monuments is often celebrated, it has on occasion sparked local opposition, and led to calls for a President to abolish or shrink a national monument that a predecessor proclaimed.<sup>2</sup>

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· Mark Squillace, Professor of Law, University of Colorado; Eric Biber, Professor of Law, University of California, Berkeley; Nicholas S. Bryner, Emmett/Frankel Fellow in Environmental Law and Policy, University of California, Los Angeles; Sean B. Hecht, Professor of Policy and Practice & Co-Executive Director, Emmett Institute on Climate Change and the Environment, University of California, Los Angeles. The authors express thanks to Emma Hamilton for research assistance.

<sup>1</sup> See Nat'l Parks Conservation Association, *Monuments Protected Under the Antiquities Act* (Jan. 13, 2017), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act>.

<sup>2</sup> On April 26, 2017, President Trump issued an Executive Order calling for the Secretary of the Interior to review certain national monument designations made since 1996. Exec. Order No. 13,792, *Review of Designations Under the Antiquities Act*, 82 Fed. Reg. 20,429 (2017), <https://perma.cc/CA3A-QEEQ>. The Order encompasses Antiquities Act designations since 1996 over 100,000 acres in size or “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders[.]” *Id.* at § 2(a). The Order asks the Secretary to make “recommendations for . . . Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy” described in the Order. *Id.* at

This article examines the Antiquities Act and other statutes, concluding that the President lacks the legal authority to abolish or diminish national monuments. Instead, these powers are reserved to Congress.

#### I. THE AUTHORITY TO ABOLISH NATIONAL MONUMENTS

The Property Clause of the Constitution vests in Congress the “[p]ower to dispose of and make all needful Rules and Regulations respecting [public property].”<sup>3</sup> The U.S. Supreme Court has frequently reviewed this power in the context of public lands management and found it to be “without limitations.”<sup>4</sup> Congress can, however, delegate power to the President or other members of the executive branch so long as it sets out an intelligible principle to guide the exercise of executive discretion.<sup>5</sup>

Congress did exactly this when it enacted the Antiquities Act and delegated to the President the power to “declare by public proclamation” national monuments.<sup>6</sup> At the same time, Congress did not, in the Antiquities Act or otherwise, delegate to the President the authority to modify or revoke the designation of monuments. Further, the Federal Land Policy and Management Act of 1976 (“FLPMA”) makes it clear that the President does not have any implied authority to do so, but rather that Congress reserved for itself the power to modify or revoke monument designations.<sup>7</sup>

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§ 2(d)-(e). The limits of presidential authority to abolish or diminish monuments has been the subject of prior analysis, including a report published by the Congressional Research Service in November 2016 and an analysis by the law firm Arnold & Porter Kaye Scholer. Alexandra M. Wyatt, Cong. Research Serv., R44687, *Antiquities Act: Scope of Authority for Modification of National Monuments* (2016), <https://perma.cc/RCT9-UJ8N>; Robert Rosenbaum et al., Arnold & Porter Kaye Scholer, *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>.

<sup>3</sup> U.S. Const. art. IV, § 3, cl. 2.

<sup>4</sup> See *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). See also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294–295 (1958).

<sup>5</sup> *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). The Supreme Court has also made clear that any delegation of legislative power must be construed narrowly to avoid constitutional problems. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

<sup>6</sup> 54 U.S.C. § 320301(a) (2012).

<sup>7</sup> See *infra* Section I.A.

*A. The Antiquities Act does not grant authority to revoke a monument designation*

The United States owns about one third of our nation's lands.<sup>8</sup> These lands, which exist throughout the country but are concentrated in the western United States, are managed by federal agencies for a wide range of purposes such as preservation, outdoor recreation, mineral and timber extraction, and ranching. Homestead, mining, and other laws transferred ownership rights over large areas of federal lands to private parties. At the same time, vast tracts of land remain in public ownership, and these lands contain a rich assortment of natural, historical, and cultural resources.

Over its long history, Congress has "withdrawn," or exempted, some federal public lands from statutes that allow for resource extraction and development, and "reserved" them for particular uses, including for preservation and resource conservation.<sup>9</sup> Congress has also, in several instances, delegated to the executive branch the authority to set aside lands for particular types of protection. The Antiquities Act of 1906 is one such delegation.

The core of the Antiquities Act is both simple and narrow. It reads, in part:

[T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . . .<sup>10</sup>

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<sup>8</sup> See Public Land Law Review Commission, *One Third of the Nation's Land* 19 (1970).

<sup>9</sup> See, e.g., The Wilderness Act, 16 U.S.C. § 1133(d)(3) (2012) ("[E]ffective January 1, 1984, the minerals in lands designated. . . as wilderness are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing. . . ."); The Wild and Scenic Rivers Act, 16 U.S.C. § 1280(b) (2012) ("The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank of any river which is listed [for study as wild and scenic] are hereby withdrawn from all forms of appropriation under the mining laws. . . .").

<sup>10</sup> Antiquities Act of 1906, 34 Stat. 225 (1906) (prior to 2014 amendment). The language of the Antiquities Act was edited and re-codified in 2014 at 54 U.S.C. § 320301(a)-(b) with the stated intent of "conform[ing] to the understood policy, intent, and purpose of Congress

The narrow authority granted to the President to *reserve* land<sup>11</sup> 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. For example, the Pickett Act of 1910 allowed the President to withdraw public lands from “settlement, location, sale, or entry” and reserve these lands for a wide range of specified purposes “*until revoked by him or an Act of Congress.*”<sup>12</sup> Likewise, the Forest Service Organic Act of 1897 authorized the President “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.*”<sup>13</sup>

Unlike the Pickett Act and the Forest Service Organic Administration Act, the Antiquities Act withholds authority from the President to change or revoke a national monument designation. That authority remains with Congress under the Property Clause.

This interpretation of the President’s authority finds support in the single authoritative executive branch source interpreting the scope of Presidential power to revoke monuments designated under the Antiquities Act: a 1938 opinion by Attorney General Homer Cummings.<sup>14</sup> President Franklin D. Roosevelt had specifically asked Cummings through the Secretary of the Interior whether the Antiquities Act authorized the President to revoke the Castle Pinckney National Monument. In his opinion, Cummings compared the language noted above from the Pickett Act and the Forest Service Organic Act with the language in the Antiquities Act, and concluded unequivocally that the Antiquities Act

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in the original enactments[.]” Pub. L. No. 113-287, §§ 2-3, 128 Stat. 3094, 3259 (2014) (codified at 54 U.S.C. § 320301(a)-(b)).

<sup>11</sup> In an opinion dated September 15, 2000, the Office of Legal Counsel in the Department of Justice found that the authority to reserve federal land under the Antiquities Act encompassed the authority to proclaim a national monument in the territorial sea—3-12 nautical miles from the shore—or the exclusive economic zone—12-200 nautical miles from the shore. Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 183–85 (Sept. 15, 2000), <https://perma.cc/E8J8-EDL3>.

<sup>12</sup> Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976) (emphasis added).

<sup>13</sup> Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. § 475 (2006)) (emphasis added).

<sup>14</sup> Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185 (1938).

“does not authorize [the President] to abolish [national monuments] after they have been established.”<sup>15</sup>

*B. FLPMA clarifies that only Congress can revoke or downsize a national monument*

In 1976, Congress enacted FLPMA.<sup>16</sup> FLPMA governs the management of federal public lands lacking any specific designation as a national park, national forest, national wildlife refuge, or other specialized unit. The text, structure, and legislative history of FLPMA confirm the conclusion of Attorney General Cummings that the President does not possess the authority to revoke or downsize a monument designation.

FLPMA codified federal policy to retain—rather than dispose of—the remaining federal public lands,<sup>17</sup> provided for specific procedures for land-use planning on those lands, and consolidated the wide-ranging legal authorities relating to the uses of those lands.<sup>18</sup> Prior to FLPMA’s enactment, delegations of executive authority to withdraw public lands from development or resource extraction were dispersed among federal statutes, including the Pickett Act and the Forest Service Organic Act. Moreover, in *United States v. Midwest Oil Co.*, the Supreme Court held that the President enjoyed an implied power to withdraw public lands as might be necessary to protect the public interest, at least in the absence of direct statutory authority or prohibition.<sup>19</sup>

FLPMA consolidated and streamlined the President’s withdrawal power. It repealed the Pickett Act, along with most other executive au-

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<sup>15</sup> Id. at 185–86 (1938).

<sup>16</sup> Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified primarily at 43 U.S.C. §§ 1701–1782 (2012)) [hereinafter “FLPMA”].

<sup>17</sup> See 43 U.S.C. § 1701 (2012).

<sup>18</sup> Land use planning is specifically provided for under § 202 of FLPMA. Id. at § 1712. Additional public land use management authority is found at § 302 of FLPMA, which, among other things, requires the Secretary of the Interior to “take any action necessary to prevent the unnecessary or undue degradation of the lands.” Id. at § 1732(b).

<sup>19</sup> 236 U.S. 459, 491 (1915). *Midwest Oil* involved withdrawals by President Taft of certain public lands from the operation of federal laws that allowed private parties to locate mining claims on public lands and thereby acquire vested rights to the minerals found there. The Secretary of the Interior recommended the withdrawals after receiving a report from the Director of the Geological Survey describing the alarming rate at which federal oil lands were being claimed by private parties. Noting the government’s own need for petroleum resources to support its military, the report lamented that “the Government will be obliged to repurchase the very oil that it has practically given away . . . .” Id. at 466–67 (quotation marks omitted).

thority for withdrawing lands—with the notable exception of the Antiquities Act.<sup>20</sup> In place of these prior withdrawal authorities, FLPMA included a new provision—section 204—that authorizes the Secretary of the Interior “to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section.”<sup>21</sup>

FLPMA left unchanged the President’s authority to create national monuments under the Antiquities Act, and included language confirming that Congress alone may modify or abolish monuments. Subsection 204(j) of FLPMA somewhat curiously states that “[t]he Secretary [of Interior] shall not . . . modify or revoke any withdrawal creating national monuments under [the Antiquities Act]. . . .”<sup>22</sup> Because only the *President*, and not the Secretary of the Interior, has authority to proclaim national monuments, Congress’s reference to the *Secretary’s* authority under the Antiquities Act is anomalous and, as explained further below, may be the result of a drafting error. Nonetheless, this language reinforces the most plausible reading of the text of the Antiquities Act: that it deliberately provides for one-way designation authority. The President may act to create a national monument, but only Congress can modify or revoke that action.

An examination of FLPMA’s legislative history removes any doubt that section 204(j) was intended to reserve to Congress the exclusive au-

<sup>20</sup> FLPMA, § 704(a), 90 Stat. 2792 (1976). The authority to create or modify forest reserves was repealed in 1907 for six specific states before its repeal was extended to all states in FLPMA Section 704(a). 34 Stat. 1269, 1271 (1907).

<sup>21</sup> 43 U.S.C. § 1714(a) (2012) (emphasis added).

<sup>22</sup> *Id.* at § 1714(j). The provision reads in its entirety as follows, with emphasis on the part relating to the Antiquities Act:

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; *modify or revoke any withdrawal creating national monuments under [the Antiquities Act]*; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976 (90 Stat. 199; 16 U.S.C. 668dd(a)).

*Id.* The reference in the first clause prohibiting the Secretary from “mak[ing]” a withdrawal “created by [an] Act of Congress” does not make sense because the Secretary cannot logically “make” a withdrawal already created by Congress. But it also is not relevant to the Antiquities Act since national monuments are created by the President, not Congress. *Id.* The second clause likewise addresses withdrawals made by Congress. The third clause is the only one that specifically addresses the Antiquities Act; it makes clear that the Secretary cannot modify or revoke national monuments. The final operative clause likewise prohibits the Secretary from revoking or modifying withdrawals, in that case involving National Wildlife Refuges.

thority to modify or revoke national monuments. FLPMA's restriction of executive withdrawal powers originated in the House version of the legislation.<sup>23</sup> Skepticism in the House towards executive withdrawal authority dated back to the 1970 report of the Public Lands Law Review Commission (PLLRC), a Congressionally-created special committee tasked with recommending a complete overhaul of the public land laws. The PLLRC report called on Congress to repeal all existing withdrawal powers, including the power to create national monuments under the Antiquities Act.<sup>24</sup> The Commission suggested replacing this authority with a comprehensive withdrawal process run by the Secretary of the Interior and closely supervised by Congress.<sup>25</sup>

The House Committee on Interior and Insular Affairs' Subcommittee on Public Lands largely followed this recommendation by including Section 204 in its draft of FLPMA.<sup>26</sup> Complementing this section, the bill presented to and passed by the House included a provision—ultimately enacted as Section 704(a) of FLPMA—that repealed the Pickett Act and other extant laws allowing executive withdrawals, as well as the implied executive authority to withdraw public lands that the Supreme Court had recognized in *Midwest Oil*.<sup>27</sup>

Consistent with this approach, the Subcommittee on Public Lands drafted Section 204(j) in order to constrain executive branch discretion in the context of national monuments. The Subcommittee frequently discussed the issue during its detailed markup sessions in 1975 and early 1976 on its version of the bill that would eventually become FLPMA.<sup>28</sup>

At an early markup session in May 1975, some subcommittee members, under the mistaken impression that the Secretary of the Interior created national monuments, expressed concerns that some future Secretary might modify or revoke them.<sup>29</sup> The Subcommittee therefore began

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<sup>23</sup> See H.R. 13777, 94th Cong. § 604(b) (1976). The Senate bill contained no restrictions on executive withdrawal power. See S. 577, 94th Cong. (1975).

<sup>24</sup> See Public Land Law Review Commission, *supra* note 8, at 2, 54–57.

<sup>25</sup> *Id.* at 56–57.

<sup>26</sup> H.R. 13777, 94th Cong. § 204 (1976).

<sup>27</sup> See *id.* at § 604(b) (1976). See also *Midwest Oil*, 236 U.S. at 491.

<sup>28</sup> The subcommittee's hearings and markups focused on H.R. 5224, which eventually passed the full Committee in April 1976. An amended version was reintroduced as a clean bill, H.R. 13777, which was approved by the House and sent to the conference committee. See H.R. Rep. No. 94-1163, at 33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6207 (1976) (describing replacement of H.R. 5224 with H.R. 13777 by committee).

<sup>29</sup> See H.R. 5224, et al., Public Land Policy and Management Act of 1975: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong.



shaping the bill to eliminate any possibility of unilateral executive power to modify or revoke monuments, while maintaining the existing power to create monuments.<sup>30</sup>

Once the Subcommittee's misunderstanding about Secretarial authority to designate monuments became apparent, the Subcommittee also proposed shifting the authority to create national monuments from the President to the Secretary, in the pattern of consolidating withdrawal authority in Section 204.<sup>31</sup> The first version of what later became Section 204(j) of FLPMA was drafted after this discussion, as was a provision that would have amended the Antiquities Act to transfer designation authority from the President to the Secretary of the Interior.<sup>32</sup> The Ford Administration appeared to object generally to constraining executive power to withdraw public lands.<sup>33</sup> As part of the subsequent changes to the draft legislation, the Subcommittee dropped the provision that would

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88–93 (May 6, 1975) [hereinafter May 6 Hearing]. Later statements by subcommittee members indicate that their understanding was that the Secretary had delegated authority to propose the creation of monuments, but that they were ultimately proclaimed by the President. H.R. 5224 & H.R. 5622: Hearing before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 184 (June 6, 1975) [hereinafter June 6 Hearing].

<sup>30</sup> May 6 Hearing, *supra* note 29, at 91 (statement of Rep. Melcher):

I would say that it would be better for us if, in presenting this bill to the House, for that matter in full committee, if we made it clear that the Secretary and perhaps also make it part of the bill somewhere, that he can not revoke a national monument.

See also *id.* at 93 (statement of committee staff member Irving Senzel: “So we could put in here that—we can put in the statement that he cannot revoke national monuments once created.”); H.R. 5224 & H.R. 5622: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 176 (June 6, 1975) (statement of committee staff member Irving Senzel: “In accordance with the decision made the last time, there is a section added in there that provides that no modification or revocation of national monuments can be made except by act of Congress.”).

<sup>31</sup> See June 6 Hearing, *supra* note 29, at 183–85.

<sup>32</sup> See Public Land Policy and Management Act of 1975 Print No. 2: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 23–24 (Sept. 8, 1975) (prohibiting the Secretary from modifying or revoking a national monument). *Id.* at 92 (amending the Antiquities Act by substituting “Secretary of the Interior” for “President of the United States”).

<sup>33</sup> See H.R. Rep. No. 94-1163, at 41–42, 52 (May 15, 1976). The comments from the Assistant Secretary of the Interior from November 21, 1975, on Subcommittee Print No. 2 listed the proposed changes to withdrawal authority as one of the reasons for the Administration's opposition to that version of the bill, noting that under it, “the proposed . . . Act would be the only basis for withdrawal authority.” *Id.* at 52.

have transferred monument designation authority from the President to the Secretary.<sup>34</sup>

Nonetheless, the Subcommittee retained Section 204(j). Pairing Section 204(j) with the proposed transfer of monument designation power strongly suggests that the language of Section 204(j) was not an effort to constrain (non-existent) Secretarial authority to modify or revoke national monuments while retaining Presidential authority to do so. Instead, it was part of an overall plan to constrain and systematize all executive branch withdrawal power, and reserve to Congress the powers to modify or rescind monument designations.<sup>35</sup> The House Committee's Report on the bill makes clear that this provision was designed to prevent *any* unilateral executive modification or revocation of national monuments. In describing Section 204 of the bill as it was presented for debate on the House floor, the Report explains:

With certain exceptions, [the bill] will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other "national" recreation units, such as National Recreation Areas and National Seashores. *It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System.* These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.<sup>36</sup>

Thus, notwithstanding the anomalous reference to the Secretary in Section 204(j), Congress explicitly stated its intention to reserve for it-

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<sup>34</sup> See See Public Land Policy and Management Act of 1975 Print No. 4: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs 94th Cong. (March 16, 1976).

<sup>35</sup> See *id.* at 30.

<sup>36</sup> H.R. Rep. No. 94-1163, at 9 (May 15, 1976) (emphasis added). Floor debates in the House do not contain any record of discussing this particular issue, and the Conference Report on FLPMA, later in 1976, did not specifically address it.

self the authority to modify or revoke national monuments.<sup>37</sup> The plain language of this report, combined with other statements in the legislative history and the process by which Congress created Section 204(j), make clear that Congress' intent was to constrain all executive branch power to modify or revoke national monuments, not just Secretarial authority.

In light of the text of the Antiquities Act, the contrasting language in other statutes at the turn of the 20th century, and the changes to federal land management law in FLPMA, the Antiquities Act must be construed to limit the President's authority to proclaiming national monuments on federal lands. Only Congress can modify or revoke such proclamations.

## II. AUTHORITY FOR SHRINKING NATIONAL MONUMENTS OR REMOVING RESTRICTIVE TERMS

If the President cannot abolish a national monument because Congress did not delegate that authority to the President, it follows that the President also lacks the power to downsize or loosen the protections afforded to a monument. This conclusion is reinforced by the use of the phrase "modify and revoke" in Section 204(j) of FLPMA to describe prohibited actions.<sup>38</sup> Moreover, while the Antiquities Act limits national monuments to "the smallest area compatible with the proper care and management of the objects to be protected,"<sup>39</sup> that language does not grant the President the authority to second-guess the judgments made by previous Presidents regarding the area or level of protection needed to protect the objects identified in an Antiquities Act proclamation.

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<sup>37</sup> The most plausible interpretation of the reference to the Secretary in the text is that there was a drafting error on the part of the Subcommittee in failing to update the reference in Section 204(j) when it dropped the parallel language transferring monument designation authority from the President to the Secretary. The only other plausible interpretation of Section 204(j) is that the provision was designed to make clear that Section 204(a), which authorizes the Secretary to modify or revoke withdrawals, was not intended to grant new authority to the Secretary over national monuments. Under this reading, the reference to the Secretary in Section 204(j) would not be anomalous but would serve the specific purpose of restricting the scope of Section 204(a). But whether the reference to the Secretary in Section 204(j) was a drafting error, or simply a clarification about the limits of the Secretary's power under Section 204(a) does not really matter because either interpretation is consistent with the conclusion that Congress intended to reserve for itself the power to modify or revoke national monuments. FLPMA's legislative history strongly reinforces this point. See *supra* notes 29–36.

<sup>38</sup> FLPMA, § 204(j), 90 Stat. 2743, 2754 (1976).

<sup>39</sup> 54 U.S.C. § 320301(b).

*A. Presidents lack legal authority to shrink national monuments*

Over the first several decades of the Antiquities Act's existence, various Presidents reduced the size of various monuments that their predecessors had designated. Most of these actions were relatively minor, although the decision by President Woodrow Wilson to dramatically reduce the size of the Mount Olympus National Monument, which is described briefly below, was both significant and controversial.<sup>40</sup> Importantly though, no Presidential decision to reduce the size of a national monument has ever been tested in court, and so no court has ever ruled on the legality of such an action. Moreover, all such actions occurred before 1976 when FLPMA became law. As the language and legislative history of FLPMA make clear, Congress has quite intentionally reserved to itself "the authority to *modify* and revoke withdrawals for national monuments created under the Antiquities Act."<sup>41</sup>

In his 1938 opinion, Attorney General Cummings acknowledged the history of modifications to national monuments, noting 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>42</sup> The opinion, however, does not directly address whether these actions were legal, and does not analyze this issue, other than to reference the language from the Antiquities Act that limits monuments to "the smallest area compatible with the proper care and management of the objects to be protected."<sup>43</sup>

The Interior Department's Solicitors did review several presidential attempts to shrink monuments, but reached inconsistent conclusions. In

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<sup>40</sup> See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 561–64 (2003).

<sup>41</sup> H.R. Rep. 94-1163, at 9 (emphasis added). 43 U.S.C. 1714(j) ("The Secretary shall not . . . *modify* or revoke any withdrawal creating national monuments under [the Antiquities Act].") (emphasis added).

<sup>42</sup> Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

<sup>43</sup> *Id.* at 188 (quoting 54 U.S.C. § 320301(b)). See also Wyatt, *supra* note 2, at 5. Much like the Attorney General's 1938 Opinion, the CRS report acknowledges that "there is precedent for Presidents to reduce the size of national monuments. . .", and that "[s]uch actions are presumably based on the determination that the areas to be excluded represent the President's judgment as to 'the smallest area compatible with the proper care and management of the objects to be protected.'" *Id.* But also like the Attorney General's Opinion, the report never actually analyzes the legal issue in depth and it does not address the particular question as to whether FLPMA might have resolved or clarified the issue against allowing presidential modifications. *Id.*

1915, the Solicitor examined President Woodrow Wilson's proposal to shrink the Mount Olympus National Monument, which President Theodore Roosevelt had designated in 1909.<sup>44</sup> Without addressing the core legal issue of whether the President had authority to change the monument status of lands designated by a prior President, the Solicitor expressed the opinion that lands removed from the monument would revert to national forest (rather than unreserved public domain) because they had previously been national forest lands.<sup>45</sup>

In the end, President Wilson did downsize the Mount Olympus National Monument by more than 313,000 acres, nearly cutting it in half.<sup>46</sup> Despite an outcry from the conservation community, Wilson's decision went unchallenged in court.<sup>47</sup>

In 1924, for the first time, the Solicitor squarely confronted the issue of whether a President has the authority to reduce the size of a national monument, concluding that the President lacked this authority. The Solicitor considered whether the President could reduce the size of the Gran Quivira<sup>48</sup> and Chaco Canyon National Monuments.<sup>49</sup> Relying on a 1921 Attorney General's opinion involving "public land reserved for lighthouse purposes," the Solicitor concluded that the President was not authorized to restore lands to the public domain that had been previously set aside as part of a national monument.<sup>50</sup> The Solicitor confirmed this position in a subsequent decision issued in 1932.<sup>51</sup>

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<sup>44</sup> Proclamation No. 869, 35 Stat. 2247 (1909) (creating Mount Olympus National Monument); see also Squillace, *supra* note 40, at 562–63 (discussing the review of President Wilson's proposal).

<sup>45</sup> U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of April 20, 1915, at 4–6. The University of Colorado Law Library has established a permanent, online database that includes the four unpublished Solicitor's Opinions cited in this article. That database is available at <http://scholar.law.colorado.edu/research-data/4/>.

<sup>46</sup> Proclamation No. 1293, 39 Stat. 1726 (1915); Squillace, *supra* note 40, at 562.

<sup>47</sup> See Squillace, *supra* note 40, at 563–64.

<sup>48</sup> Proclamation No. 959, 36 Stat. 2503 (1909) (creating Gran Quivira National Monument).

<sup>49</sup> Proclamation No. 740, 35 Stat. 2119 (1907) (creating Chaco Canyon National Monument).

<sup>50</sup> U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of June 3, 1924, M-12501 (citing 32 Op. Att'y Gen. 438 (1921)). In language that anticipated the later 1938 opinion, this 1921 Attorney General's opinion concluded that "[t]he power to thus reserve public lands and appropriate them . . . does not necessarily include the power to either restore them to the general public domain or transfer them to another department." *Disposition of Abandoned Lighthouse Sites*, 32 Op. Att'y Gen. 488, 488–91 (1921) (quoting *Camp Hancock—Transfer to Dept. of Agriculture*, 28 Op. Att'y Gen. 143, 144 (1921)). The Solicitor's 1924 opinion on Gran Quivira and Chaco Canyon might be distinguished from the 1915

Subsequently, in 1935, the Interior Solicitor reversed the agency's position, but this time on somewhat narrow grounds.<sup>52</sup> This opinion relied heavily on the implied authority of the President to make and modify withdrawals that the U.S. Supreme Court upheld in *United States v. Midwest Oil Co.*<sup>53</sup> The argument that *Midwest Oil* imbues the President with implied authority to modify or abolish national monuments is problematic, however, for at least three reasons. First, as described previously, Congress enjoys plenary authority over our public lands under the Constitution, and the President's authority to proclaim a national monument derives solely from the delegation of that power to the President under the Antiquities Act.<sup>54</sup> But the Antiquities Act grants the President only the power to reserve land, not to modify or revoke such reservations. Such actions, therefore, are beyond the scope of Congress' delegation. Second, the *Midwest Oil* decision relied heavily on the perception that Presidential action was necessary to protect the public interest by preventing public lands from exploitation for private gain. Construing the law to allow a President to open lands to private exploitation protects no such interest. Finally, and as noted previously, Congress expressly overruled *Midwest Oil* when it enacted FLPMA in 1976.<sup>55</sup> Thus, even if those earlier, pre-FLPMA monument modifications might arguably have been supported by implied presidential authority, that implied authority

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opinion on Mount Olympus National Monument, on the grounds that the earlier opinion had specifically supported the modification of the monument because the lands would not be restored to the public domain, but would rather be reclassified as national forests. Solicitor's Opinion of April 20, 1915, *supra* note 45, at 6. The legal argument against the modification of monument proclamations, however, has never rested on whether the lands would be restored to the public domain or revert to another reservation or designation.

<sup>51</sup> U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of May 16, 1932, M-27025 (opinion regarding Death Valley National Monument).

<sup>52</sup> U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, M-27657 (upholding the validity of the reduction of Mount Olympus National Monument since no interdepartmental transfer). See also National Monuments, 60 Interior Dec. 9, 9-10 (July 21, 1947) (solicitor opinion reaffirming the 1935 opinion).

<sup>53</sup> U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, M-27657; *United States v. Midwest Oil Co.*, 236 U.S. 459, 483 (1915).

<sup>54</sup> See , *supra* Part I.

<sup>55</sup> FLPMA, § 704(a), 90 Stat. 2792 (1976). While the text of Section 704(a) specifically mentions the power of the President "to make withdrawals," given the clear intent of Congress in FLPMA to reduce executive withdrawal power, the section is best understood as also repealing any inherent Presidential power recognized in *Midwest Oil* to modify or revoke withdrawals as well.

is no longer available to justify the shrinking of national monuments following the passage of FLPMA.<sup>56</sup>

Some critics of national monument designations have argued that a President can downsize a national monument by demonstrating that the area reserved does not represent the “smallest area compatible” with the protection of the resources and sites identified in the monument proclamation.<sup>57</sup> But allowing a President to second-guess the judgment of a predecessor as to the amount of land needed to protect the objects identified in a proclamation is fraught with peril because it essentially denies the first President the power that Congress granted to proclaim monuments. If that were the law, then nothing would stop a President from deciding that the objects identified by a prior President were themselves not worthy of protection. Congress clearly intended the one-way power to reserve lands as national monuments to avoid this danger. Moreover, the fact that national monuments often encompass large landscapes, which are themselves denoted as the objects warranting protection, is not a cause for concern because the courts, including the U.S. Supreme Court, have consistently upheld the use of the Antiquities Act to protect such landscapes as “objects of historic or scientific interest.”<sup>58</sup> Courts

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<sup>56</sup> This repeal removes any presumption of inherent Presidential authority to withdraw public lands or modify past withdrawals. As noted above, such authority, if any, must derive from an express delegation from the Congress. In this way, the power of the President or any executive branch agency over public lands is unlike the inherent power of the President to issue, amend, or repeal executive orders or the inherent power of the Congress to promulgate, amend or repeal laws. It is arguably akin to the power of administrative agencies to issue, amend, or repeal rules but, unlike the Antiquities Act, each of these powers has been expressly delegated to agencies by the Administrative Procedure Act. See 5 U.S.C. § 551(5) (2012) (definition of “rulemaking”).

<sup>57</sup> See, e.g., John Yoo & Todd Gaziano, *Am. Enter. Inst., Presidential Authority to Revoke or Reduce National Monument Designations 14–18* (2017), <https://perma.cc/PX7W-UD3E>. The Interior Solicitor’s 1935 opinion, and a subsequent one in 1947, addressed this issue in reviewing and supporting the validity of the decision by Woodrow Wilson to shrink the Mt. Olympus National Monument. Squillace, *supra* note 40, at 560–64. According to that opinion, both the Interior and Agriculture Departments thought the area was “larger than necessary.” U.S. Dep’t of the Interior, Office of the Solicitor, *Solicitor’s Opinion of Jan. 30, 1935, M-27657* (<http://scholar.law.colorado.edu/research-data/4/>). However, there is no legal basis for concluding that the opinions of cabinet officials should overturn a prior presidential determination as to the scope and management requirements of a protected monument. Squillace, *supra* note 40, at 560–64.

<sup>58</sup> See *Cameron v. United States*, 252 U.S. 450, 455–56 (1920). The Court dismissed the plaintiff’s objection to the establishment of the 808,120 acre Grand Canyon National Monument with these words:

The Grand Canyon, as stated in [President Roosevelt’s] proclamation, “is an object of unusual scientific interest.” It is the greatest eroded canyon in the United States, if not

have upheld two prominent examples of landscape level monuments under these broad interpretations: the Grand Canyon,<sup>59</sup> designated less than two years after the Antiquities Act's passage; and the Giant Sequoia National Monument, created in 2000.<sup>60</sup>

It is conceivable, of course, that a revised proclamation might be needed to correct a mistake or to clarify a legal description in the original proclamation, as occurred very early on when President Taft proclaimed the Navajo National Monument and subsequently issued a second proclamation clarifying what had been an extremely ambiguous legal description.<sup>61</sup> But the clear restriction on modifying or revoking a national monument designation—cemented by FLPMA—indicates that a President cannot simply revisit a predecessor's decision about how much public land should be protected.

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in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

*Id.* at 455–56. See also, *Tulare Cty. v. Bush*, 306 F.3d 1138, 1140–41 (D.C. Cir. 2002) (discussing Giant Sequoia National Monument). Additional Supreme Court cases that address Antiquities Act designations support this broad interpretation of what may constitute an “object of historic or scientific interest.” See *United States v. California*, 436 U.S. 32, 34 (1978) (Channel Islands); *Cappaert v. United States*, 426 U.S. 128, 131–32, 142 (1976) (Devil's Hole).

<sup>59</sup> *Cameron*, 252 U.S. at 455–56.

<sup>60</sup> *Tulare Cty.*, 306 F.3d at 1140–41.

<sup>61</sup> Taft's original proclamation for the Navajo National Monument in Arizona protected:

[A]ll prehistoric cliff dwellings, pueblo and other ruins and relics of prehistoric peoples, situated upon the Navajo Indian Reservation, Arizona between the parallels of latitude thirty-six degrees thirty minutes North, and thirty-seven degrees North, and between longitude one hundred and ten degrees West and one hundred and ten degrees forty-five minutes West . . . together with forty acres of land upon which each ruin is located, in square form, the side lines running north and south and east and west, equidistant from the respective centers of said ruins.

Proclamation No. 873, 36 Stat. 2491, 2491–92 (1909). The map accompanying the proclamation states that Navajo National Monument is “[e]mbracing all cliff-dwelling and pueblo ruins between the parallel of latitude 36°30' North and 37 North and longitude 110° West and 110° 45' West. . . with 40 acres of land in square form around each of said ruins.” *Id.* at 493 Thus, the original proclamation was ambiguous. It plainly was not intended to include all of the lands within the latitude and longitude description but only 40 acres around the ruins in that area. The map specifically identified at least 7 sites as “ruins” and appeared to denote a handful of other sites that might have been intended for protection under the original proclamation, although the map is a little unclear on this point. The revised proclamation issued three years later, also by Taft, clarified the ambiguous references in the original proclamation. It included a survey done after the original proclamation and protects two, 160-acre tracts of land and one, 40 acre tract. Proclamation No. 1186, 37 Stat. 1733, 1733–34, 1738 (1912).



*B. Removing protections that apply on national monuments would be an unlawful modification*

A related issue is whether a President can modify a national monument proclamation by removing some or all of the protections applied to the monument area, such as limitations on livestock grazing, mineral leasing, or mining claims location. Plainly, these are types of “modifications.” As discussed above, Congress’s use of the phrase “modify and revoke” to describe prohibited actions demonstrates that the same legal principles apply here as would apply to an attempt to abolish a monument.<sup>62</sup> More generally, if a President lacks the authority to abolish or downsize a monument, it would also suggest a lack of presidential authority to remove any restrictions imposed by a predecessor. Moreover, to the extent that a claim of presidential authority rests on an argument that the President can shrink a monument to conform to the “smallest area compatible” language of the Antiquities Act, that argument would be inapplicable to an effort to remove restrictive language from a predecessor’s national monument proclamation.<sup>63</sup>

Aside from these legal arguments, construing the Antiquities Act as providing one-way Presidential designation authority is consistent with the fundamental goal of the statute. Faced with a concern that historical, archaeological, and natural or scenic resources could be damaged or lost, Congress purposefully devised a delegation to the President to act quickly to ensure the preservation of objects of historic and scientific interest on public lands before they are looted or compromised by incompatible land uses, such as the location of mining claims. Once the President has determined that these objects are worthy of protection, no future President should be able to undermine that choice. That is a decision that Congress lawfully reserved for itself under the terms of the Antiquities Act, a point that Congress reinforced in the text and legislative history of FLPMA.

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<sup>62</sup> See *supra* Section II.A.

<sup>63</sup> In *National Monuments*, *supra* note 52, at 10, the Solicitor acknowledged that the Mineral Leasing Act does not apply to national monuments. Nonetheless, he held that “in the event of actual or threatened drainage of oil or gas under lands within the Jackson Hole National Monument by wells on non-federally-owned lands, the authority to take the necessary protective action, including the issuance of oil and gas leases, would impliedly exist.” *Id.* at 10–11. To be clear, however, the Solicitor was not sanctioning surface occupancy of national monument lands but only the issuance of leases that would allow the federal government and the lessee to share in the oil and gas production that was being extracted from a well on non-federal lands. For further discussion of this issue, see Squillace, *supra* note 40, at 566–68.

## CONCLUSION

Our conclusion, based on analysis of the text of the Antiquities Act and other statutes, legislative history, and prior legal opinions, is that the President lacks the authority to abolish or downsize a monument, or otherwise weaken the protections afforded by a national monument proclamation declared by a predecessor. Moreover, while we believe this to be the correct reading of the law from the time of enactment of the Antiquities Act in 1906, the enactment of FLPMA in 1976 removes any doubt as to whether Congress intended to reserve for itself the power to revoke or modify national monument proclamations, because Congress stated so explicitly.

Presidents may retain some authority to clarify a proclamation that contains an ambiguous legal description or a mistake of fact.<sup>64</sup> Where expert opinions differ, however, courts should defer to the choices made by the President proclaiming the monument and the relevant objects designated for protection. Otherwise, a future President could undermine the one-way conservation authority afforded the President under the Antiquities Act and the congressional decision to reserve for itself the authority to abolish or modify national monuments.

The remarkable success of the Antiquities Act in preserving many of our nation's most iconic places is perhaps best captured by the fact that Congress has never repealed any significant monument designation.<sup>65</sup> Instead, in many instances, Congress has expanded national monuments and redesignated them as national parks.<sup>66</sup> For more than 100 years, Presidents from Teddy Roosevelt to Barack Obama have used the Antiquities Act to protect our historical, scientific, and cultural heritage, often at the very moment when these resources were at risk of exploitation. That is the enduring legacy of this extraordinary law. And it remains our best hope for preserving our public land resources well into the future.

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<sup>64</sup> See *supra* note 61 and accompanying text.

<sup>65</sup> About a dozen monuments have been abolished by the Congress. None of these were larger than 10,000 acres, and no monument established by a president has been redesignated by Congress without redesignating the land as part of another national monument or other protected area since 1956. See Squillace, *supra* note 40, at 550, 585–610 (appendix). See also National Park Service, Archeology Program: Frequently Asked Questions (May 31, 2017), <https://perma.cc/BW3C-X52Z> (noting no parks as “abolished” since 1956 except for Misty Fjords, which was subsequently made part of Tongass National Park).

<sup>66</sup> See e.g., Proclamation No. 277, 40 Stat. 1175 (1919)(expanding size of Grand Canyon park).