AMERICA’S BIG LEAGUE NATIONAL MONUMENTS: CAN PRESIDENT TRUMP MAKE THEM SMALLER?

“If any administration thinks they’re going to start divesting us of a hundred-year history of lands that belong to every American, they’re going to have to do it over my dead body.”

- Sen. Martin Heinrich.1

INTRODUCTION..........................................................................................................154
I. BACKGROUND.........................................................................................................157
   A. Petrified Forest National Monument .................................................................158
   B. Navajo National Monument ..............................................................................160
   C. Natural Bridges National Monument ...............................................................161
   D. Mount Olympus National Monument ...............................................................161
   E. White Sands National Monument .....................................................................163
   F. Wupatki National Monument .........................................................................163
   G. Grand Canyon National Monument ...............................................................164
   H. Craters of the Moon National Monument .......................................................165
   I. Santa Rosa Island National Monument ............................................................166
   J. Glacier Bay National Monument .......................................................................167
   K. Great Sand Dunes National Monument .........................................................168
   L. Hovenweep National Monument .....................................................................169
   M. Colorado National Monument ........................................................................170
   N. Black Canyon of the Gunnison National Monument .......................................170
   O. Arches National Monument ............................................................................171
   P. Timpanogas Cave National Monument ............................................................171
   Q. Bandelier National Monument .........................................................................172
   R. Buck Island Reef National Monument .............................................................173
   S. The Trump Administration’s National Monument Review .............................173
      1. Grand Staircase-Escalante National Monument ...........................................176
      2. Bears Ears National Monument ....................................................................179
II. OVERVIEW OF EXISTING SCHOLARSHIP ON NATIONAL MONUMENTS...181
III. ANALYZING PRESIDENTIAL POWER.................................................................184
IV. WHY THE PAST PRACTICE OF PRESIDENTS REDUCING NATIONAL
    MONUMENTS IS IRRELEVANT .............................................................................186
    A. The Legislative History of the Federal Land Policy and Management
       Act Clarifies That the President Lacks the Authority to Reduce National
       Monuments .........................................................................................................187
    B. Congressional Ratification Would Prevent Presidents from Modifying

National Monuments, Even if Past Practice Demonstrates That Presidents Have Broad Authority to Reduce National Monuments...191

1. Grand Staircase-Escalante National Monument ..............................192
2. Management Strategies ..............................................................196

V. WHETHER PAST PRACTICE GIVES PRESIDENTS THE AUTHORITY TO SIGNIFICANTLY REDUCE NATIONAL MONUMENTS .................................................197

A. Past Practice Does Not Confirm That the President Has the Statutory Authority to Significantly Reduce National Monuments ..........................197

1. Bandelier ...............................................................208
2. Mount Olympus ..........................................................209
3. Great Sand Dunes .........................................................210
4. Petrified Forest ..........................................................210

B. Congress Has Not Acquiesced to Presidents Significantly Reducing National Monuments .................................................................212

CONCLUSION ........................................................................215

INTRODUCTION

In 1906, Congress passed the Antiquities Act,2 which gave the President broad authority to designate national monuments containing objects of historic or scientific interest.3 In 1943, acting pursuant to his authority under the Antiquities Act, President Franklin Delano Roosevelt (FDR) withdrew over 200,000 acres from the public domain to establish the Jackson Hole National Monument.4 At the time, many criticized FDR’s action. Wyoming Senator Edward Robertson referred to the Monument as a “foul, sneaking Pearl Harbor blow.”5 Armed local ranchers protested the Monument designation.6 Local leaders claimed the Monument would “forever debar home seekers and investors” and “impoverish [the] ranges.”7 The State of Wyoming claimed the designation was unconstitutional,

7. Molvar, supra note 5.
challenging it in federal court. Congress even passed a bill to abolish the Monument. Both of these efforts failed: FDR vetoed the bill and a district court upheld the designation.

A little over 20 years later, public opinion had changed drastically. Congress picked up where FDR left off and turned Jackson Hole into a National Park. In 1967, Senator Cliff Hanson—who previously testified against the Monument—acknowledged, “I’m glad I lost, because I now know I was wrong. Grand Teton National Park is one of the greatest natural heritages of Wyoming and the nation and one of our great assets.” A poll released in January 2018 found that 95% of Wyoming residents thought that national monuments were “important places to be conserved for future generations” and 88% believed they contribute to “the economy of nearby communities.”

President Donald J. Trump is continuing the controversial legacy of the Antiquities Act for a very different reason. Instead of using the Antiquities Act to designate national monuments, President Trump is attempting to use it to significantly reduce them. On December 4, 2017, standing on the steps of the Utah State Capitol building, President Trump proclaimed that

10. Molvar, supra note 5.
12. See infra text accompanying notes 14–16 (discussing Senator Cliff Hanson and Wyoming residents’ change of opinion).
13. Act of Sept. 14, 1950, Pub. L. No. 787, 64 Stat. 849, 849. Technically, re-designating a national monument as a national park involves abolishing the monument. E.g., Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241, 1241 (“[T]he Mount Olympus National Monument... is hereby abolished, and the tracts of land... are hereby reserved and withdrawn from settlement,... and dedicated and set apart as a public park... known as the Olympic National Park.”); Christine A. Klein, Preserving Monumental Landscapes Under the Antiquities Act, 87 CORNELL L. REV. 1333, 1356 (2002) (discussing the technical abolition of monuments when establishing a national park). However, because a national park designation provides further protection under federal law, it affirms a president’s former monument designation. 54 U.S.C. § 100101 (Supp. II 2015) (describing national parks as areas containing “superlative natural, historic, and recreation” qualities); Klein, supra.
14. Molvar, supra note 5.
15. Id.
“past administrations have severely abused the purpose, spirit, and intent of . . . the Antiquities Act.” To remedy this overreach, President Trump announced he intended to significantly reduce Grand Staircase-Escalante and Bears Ears National Monuments. In one day, President Trump eliminated almost four times the amount of land that all presidents before him had eliminated from national monuments in the 100-year history of the Antiquities Act. The clothing retailer Patagonia immediately proclaimed on its website that “The President Stole Your Land” and filed suit a few days later. Democratic Senator Tom Carper of Delaware also criticized the decision, exclaiming that “[p]rotecting these lands for the enjoyment and education of future generations was truly one of our country’s best ideas, and President Trump’s short-sighted decision threatens that bipartisan legacy.” Similarly, Tom Udall, Senator from New Mexico, called President Trump’s action “the largest attack on public lands . . . we have ever seen.”

While President Trump believes he has the authority to reduce national monuments, many disagree: several groups, in addition to Patagonia, have

19. Turkewitz, supra note 17.
24. See Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. at 58,085 (“I, Donald J. Trump, President of the United States of America, by the authority vested in me by [the Antiquities Act] hereby proclaim that the boundaries of the Bears Ears National Monument are hereby modified and reduced . . . .”).
filed lawsuits challenging President Trump’s proclamations. The litigation they have started may outlast President Trump’s time in the White House. Although the Antiquities Act does not explicitly grant the President the authority to reduce national monuments, those challenging President Trump’s actions face an undeniable reality: several presidents have reduced national monuments in the past. The Trump Administration is undoubtedly going to rely on this historical practice to argue that the President has the authority to reduce national monuments.

This Note discusses whether presidents can reduce national monuments based upon this historical practice. Part I outlines the various occasions that presidents have reduced national monuments. Part II briefly summarizes existing scholarship on the Antiquities Act. Part III introduces a framework for analyzing the President’s authority to reduce national monuments. Part IV provides two reasons why the past practice of presidents reducing national monuments may be irrelevant. Lastly, Part V argues that even if a court considers this past practice, most of this history does not support the claim that presidents can significantly reduce national monuments established by their predecessors.

I. BACKGROUND

On June 8, 1906—after more than a decade of debate in Congress President Theodore Roosevelt signed the Antiquities Act into law.

26. President Bill Clinton’s designation of Grand Staircase-Escalante National Monument sparked a series of lawsuits. Tulare County, one of the counties inside of Grand Staircase, filed a complaint against President Clinton in early 2000. Tulare County v. Bush, 306 F.3d 1138, 1138 (D.C. Cir. 2002). The district court dismissed their case and the Court of Appeals for the District of Columbia affirmed. Id. By the time the Supreme Court denied certiorari in October 2003, almost three full years had passed. Id. at 1139, cert. denied, 540 U.S. 813 (2003).
27. See infra Part I (discussing the previous instances that presidents have reduced national monuments).
28. See infra Part I.5 (discussing Secretary Zinke’s Final National Monument Report where he concludes that President Trump has the authority to reduce national monuments because several presidents have reduced monuments in the past).
29. See infra Part I (discussing past president reductions of national monuments).
30. See infra Part II (providing an overview of existing scholarship on the Antiquities Act).
31. See infra Part III (discussing framework for analyzing presidential power).
32. See infra Part IV (discussing why the past practice of presidents reducing national monuments may be irrelevant).
33. See infra Part V (alternatively arguing that past practice does not provide the President with the authority to significantly reduce national monuments).
thereafter, President Roosevelt designated Devil’s Tower in eastern Wyoming as the nation’s first national monument. 36 Throughout his presidency, President Roosevelt designated now iconic areas, such as the Grand Canyon, Muir Woods, and Mount Olympus, as national monuments. 37 As the first President to use the Antiquities Act, President Roosevelt set important precedents for how later presidents would use the law. 38

Following in Roosevelt’s footsteps, over the last 100 years, 15 presidents from both parties have used the Antiquities Act to designate 140 national monuments across the U.S. 39 The Antiquities Act has collectively protected more than 70 million acres—or 10% of all federal land—and about half of all national parks started as national monuments. 40 Many writers and scholars have documented this history well. 41 What is less well known and documented, however, is that several presidents have modified national monuments in a variety of settings. Each of these modifications is discussed below.

A. Petrified Forest National Monument

Throughout the 19th Century, the prehistoric petrified forests in Arizona were vandalized. 42 The General Land Office (GLO)—the precursor to the Bureau of Land Management—received reports that thieves were

35. HAL ROTHMAN, PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS 48 (1989) [hereinafter ROTHMAN, PRESERVING].
36. Id. at 55.
37. Id. at 69.
38. Id. at 55–71.
41. See generally Mark Squillace, The Monumental Legacy of the Antiquities Act of 1906, 37 GA. L. REV. 473, 475 (2003) [hereinafter Squillace, Monumental] (“This Article explores the Antiquities Act and its long and remarkable legacy.”); David Harmon et al., Introduction to THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 1, 7 (David Harmon et al. eds., 2006) (“While the creation of the national monuments occupies center stage [of this book], we also have made a conscious effort to highlight the Act’s other contributions to archaeology, conservation, and historic preservation.”); ROTHMAN, PRESERVING, supra note 35, at xii (“This is the story of the American national monuments and the way in which they became an important part of the American preservation movement.”).
42. ROTHMAN, PRESERVING, supra note 35, at 57.
using dynamite to break up and haul away the petrified trees. While Congress considered designating the petrified forests as a national park, the GLO temporarily protected several thousand acres of the forests. But Congress never voted on the proposal.

In response to this congressional inaction, on December 8, 1906—only a few months after the passage of the Antiquities Act—Theodore Roosevelt designated Petrified Forest as a national monument. President Roosevelt identified the Petrified Forest as an area of great scientific interest and determined that it would be in the public good to protect the forest as part of a national monument. Several years later, President William Howard Taft reduced the size of Petrified Forest National Monument by over 25,000 acres, or about half of the Monument. In his reducing proclamation, President Taft explained that a geologic survey identified that the original proclamation reserved a much larger area of land than was necessary “to protect the objects for which the Monument was created.”

Between 1930 and 1932, President Herbert Hoover enlarged the Monument on three occasions, collectively adding more than 60,000 acres. On each occasion, President Hoover simply claimed that it would be in the public interest to add lands to the Monument.

In 1930, Congress also authorized the Secretary of the Interior to acquire private land inside the Monument. Almost thirty years later,
Congress designated the Petrified Forest as a national park. Soon after, Congress designated over 50,000 acres within the National Park as a wilderness area. Finally, in 2004, President George W. Bush signed a bill authorizing the Secretary of the Interior to increase the size of the Park from 93,533 to 218,533 acres.

B. Navajo National Monument

On March 20, 1909, President Taft established the Navajo National Monument on the Navajo reservation in northeastern Arizona. President Taft found that the prehistoric cliff dwellings and pueblo ruins in the Monument were of the “greatest ethnological, scientific and educational interest.” Three years later, however, President Taft issued a proclamation clarifying the boundaries of the Monument, reducing it to 360 acres. In his proclamation—similar to his proclamation reducing the Petrified Forest National Monument—President Taft concluded that “after

54. Act of Oct. 23, 1970, Pub. L. No. 91-504, 84 Stat. 1104, 1106. Congress passed the Wilderness Act in 1964 to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness.” National Wilderness Preservation System, 16 U.S.C. § 1131(a) (1964). The Act allows Congress to designate areas as “wilderness” to ensure that they will remain “unimpaired for future use and enjoyment.” Id. The Act identifies the criteria for what makes an area wilderness, which includes, among other things, that an area “contain ecological, geological, or other features of scientific, educational, scenic or historical value.” Id. § 1131(c). This language is very similar to the Antiquities Act’s requirement that monuments contain “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.” National Monuments, 54 U.S.C. § 20301(a) (Supp. III 2016). Accordingly, when Congress designates lands within a national monument as wilderness, Congress affirms a president’s monument designation. Klein, supra note 13, at 1361 (describing the similarities between the Wilderness Act and the Antiquities Act).
58. Char Miller, Landmark Decision: The Antiquities Act, Big-Stick Conservation, and the Modern State, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 64, 75 (David Harmon et al. eds., 2006).
62. Proclamation Reducing Petrified Forest National Monument, 37 Stat. 1716 (1911) (concluding that the original proclamation reserved a much larger area of land than was necessary “to protect the objects for which the Monument was created”).
careful examination and survey,” the original designation reserved more land than was necessary to protect the objects in the Monument.  

C. Natural Bridges National Monument

In 1908, Theodore Roosevelt designated Utah’s first monument: the 120-acre Natural Bridges National Monument, naming it after three water-carved stone bridges. President Roosevelt claimed that the bridges were “of the greatest scientific interest” because they have “heights more lofty and spans far greater than any heretofore known to exist.”

Apparently agreeing with Roosevelt’s determination, President Taft expanded the Monument by more than 2,500 acres only a year later. In 1916, President Woodrow Wilson updated the survey information describing the Monument’s boundaries.

Several decades later, President John F. Kennedy adjusted the boundaries of the Monument. On August 14, 1962, President Kennedy issued a proclamation identifying 320 acres in the Monument that he claimed no longer contained “features of archeological value” and were therefore not needed for the Monument’s “proper care, management, protection, interpretation, and preservation.” But at the same time, President Kennedy added approximately 5,236 acres to the Monument, claiming it would be in the public interest to add the land, which contained “prehistoric Indian ruins and suitable space for construction of a visitor center.” As of 2017, the Monument had grown to 7,630 acres.

D. Mount Olympus National Monument

Days before his final term came to a close, President Roosevelt designated Mount Olympus National Monument. At over 600,000 acres,

---

66. Natural Bridges, First, supra note 64.
68. Proclamation No. 881, 36 Stat. 2502 (1909); Antiquities Act, NAT’L PARK SERV., supra note 48.
71. Id. at 1495–96.
73. Squillace, Monumental, supra note 41, at 492–93.
Mount Olympus was the second largest monument ever designated at that time.74 Interpreting the Antiquities Act’s “objects of . . . scientific interest” phrase broadly, President Roosevelt identified glaciers and elk as objects of scientific interest.75

Following President Roosevelt’s designation, several presidents both reduced and enlarged the Monument. First, President Taft reduced the Monument by 160 acres.76 Then, three years later, President Wilson reduced the Monument by half.77 Many have noted that President Wilson reduced the Monument to appease mining and logging companies that thought the Monument restricted access to large tracts of valuable land.78 At the time, conservationists criticized President Wilson’s reduction, calling it the “rape of 1915.”79 Following President Wilson’s reduction, President Calvin Coolidge further reduced the Monument by 640 acres80 so a dam could be built on the Elwha River.81

Less than ten years later, Congress designated Mount Olympus National Monument as a national park82 and put most of the land that earlier presidents had removed from the Monument into the National Park.83 In 1988, Congress designated 95% of Mount Olympus as a wilderness area.84 As of 2016, the Park contained 922,000 acres.85

74. ROTHMAN, PRESERVING, supra note 35, at 68. The largest national monument designated up to that point was the Grand Canyon National Monument. See id. (recognizing that when President Roosevelt designated Grand Canyon National Monument it was over 800,000 acres).


76. Antiquities Act, NAT’L PARK SERV., supra note 48.

77. Id.

78. Squillace, Monumental, supra note 41, at 563.

79. Id. at 563–64.


83. Squillace, Monumental, supra note 41, at 564.


85. Monument Profiles: Mount Olympus, supra note 84.
E. White Sands National Monument

The White Sands National Monument consists of a series of wave-like gypsum sand dunes located in New Mexico’s Tularosa Basin. In the early 1900s, prior to the Monument’s designation, several attempts to commercially mine the sands failed due to the unprocessed gypsum’s low market value. In the 1920s, local residents began to advocate for the dunes’ protection. Tom Charles, a local resident and businessman—referred to as the “father” of White Sands—wrote several congressmen and National Park Service (NPS) officials asking them to designate the White Sands area as a national park. Although Charles did not get the national park he had hoped for, in 1933, President Hoover designated 142,987 acres in New Mexico as White Sands National Monument.

A year later, FDR increased the Monument by 158 acres. In 1938, however, FDR removed 87 acres from the Monument that was on Route 70’s right-of-way, claiming it would be in the public interest to exclude the land from the Monument. Following this reduction, President Eisenhower enlarged the Monument by approximately 478 acres. Congress revised the boundaries of the Monument in 1978, adding 320 acres and eliminating 760 acres.

F. Wupatki National Monument

In 1924, President Coolidge established the Wupatki National Monument, identifying approximately 2,234 acres of ancestral ruins outside of Flagstaff, Arizona, that were worthy of protection. In 1937,

---

88. Id.
89. Id.
90. Id.; Proclamation No. 2025, 47 Stat. 2551 (1933); Antiquities Act, NAT’L PARK SERV., supra note 48.
96. Id.; Antiquities Act, NAT’L PARK SERV., supra note 48.
FDR expanded the Monument by 33,631 acres. But four years later, FDR reduced the Monument by 53 acres so a diversion dam, designed to facilitate irrigation on the neighboring Navajo Indian Reservation, could be built on the Little Colorado River. In 2014, the Monument was 35,422 acres.

G. Grand Canyon National Monument

In 1882, Senator Benjamin Harrison—concerned about development near the Grand Canyon—proposed turning the area into a national park. Unfortunately, this original effort failed. Senator Harrison overcame this legislative defeat when he became president by designating the area as a forest preserve under the now-repealed Forest Preserve Act of 1891, which allowed the President to set aside forest reserves from the public domain. By 1908, President Roosevelt was concerned that the Grand Canyon’s status as a forest preserve was insufficient to protect it from encroaching development. In response to these concerns, President Roosevelt designated the Grand Canyon as a national monument. At that time, the Monument was the largest ever designated, totaling over 800,000 acres. President Roosevelt identified the entire Grand Canyon as an object of scientific interest.

President Roosevelt’s designation initiated a bitter feud with a local entrepreneur named Ralph Henry Cameron, who ultimately challenged President Roosevelt’s authority to designate the Monument. In what would be a prelude to later cases upholding presidential authority under the Antiquities Act, the District of Arizona, the Ninth Circuit, and the Supreme Court all held in a conclusory manner that President Roosevelt acted within

100. ROTHMAN, PRESERVING, supra note 35, at 64.
101. Id.
102. Id.
103. Id. at 66–67.
104. Id. at 68.
105. Miller, supra note 58, at 72.
106. Proclamation No. 794, 35 Stat. 2175 (1908) [hereinafter Proclamation Establishing Grand Canyon National Monument] (“Whereas, the Grand Canyon of the Colorado River . . . is an object of unusual scientific interest, being the greatest eroded canyon within the United States . . .”); Miller, supra note 58, at 72.
107. Squillace, Monumental, supra note 41, at 491–92.
his authority when he designated the Monument.\textsuperscript{108} In 1919, Congress redesignated Grand Canyon National Monument as a national park.\textsuperscript{109}

Several years after Congress designated Grand Canyon National Park,\textsuperscript{110} President Hoover designated 270,000 acres on the west boundary of the Park as another national monument\textsuperscript{111}—sometimes referred to as Grand Canyon National Monument II.\textsuperscript{112} Like many other monuments, Grand Canyon II generated opposition from both ranchers and county officials.\textsuperscript{113} Congress responded by trying to abolish the Monument.\textsuperscript{114} To appease Congress and local ranchers, FDR reduced the Monument by 71,000 acres.\textsuperscript{115} In his reducing proclamation, FDR claimed that the deleted lands were not necessary for the proper care and management of the Monument.\textsuperscript{116} In 1975, Congress expanded Grand Canyon National Park in order to “further protect[] . . . the Grand Canyon in accordance with its true significance.”\textsuperscript{117} The 1975 Act incorporates the Grand Canyon National Monument II as defined by FDR in his reducing proclamation.\textsuperscript{118}

\section*{H. Craters of the Moon National Monument}

In 1924, President Coolidge established Craters of the Moon National Monument, identifying the area’s “volcanic cones, craters, rifts, lava flows, caves, natural bridges, and other phenomena characteristic of volcanic action” as objects of unusual scientific value.\textsuperscript{119} Four years later, President

\textsuperscript{108} Cameron v. United States, 252 U.S. 450, 455–56 (1920) (“The act under which the President proceeded empowered him to establish reserves embracing 'objects of historic or scientific interest.' The Grand Canyon, as stated in his proclamation, 'is an object of unusual scientific interest.'”); Cameron v. United States, 250 F. 943, 946 (9th Cir. 1918) (“We think there is no merit in any of the contentions referred to, or in the argument made in support of them.”).


\textsuperscript{110} Id.

\textsuperscript{111} Proclamation No. 2022, 47 Stat. 2547–48 (1932) [hereinafter Proclamation Establishing Grand Canyon National Monument II]; Squillace, \textit{Monumental, supra} note 41, at 564.

\textsuperscript{112} \textit{Antiquities Act, NAT’L PARK SERV., supra} note 48.

\textsuperscript{113} Squillace, \textit{Monumental, supra} note 41, at 564.

\textsuperscript{114} Id.

\textsuperscript{115} Proclamation No. 2393, 3 C.F.R. 32, 32 (1940), \textit{reprinted in} 54 Stat. 2692 (1941) [hereinafter Proclamation Reducing Grand Canyon National Monument II].

\textsuperscript{116} Id. (“[C]ertain lands within the Grand Canyon National Monument in the State of Arizona . . . are not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument . . . .” (citation omitted)).


Coolidge increased the Monument by 26,240 acres. In 1930, President Hoover also added an undefined amount of land to the Monument. But, in 1941, FDR reduced the Monument so that Idaho State Highway No. 22 could be built.

Following FDR’s reduction, several presidents and congressional acts significantly expanded the Monument. First, President Kennedy added an island surrounded by lava to the Monument, which increased it by about 5,360 acres. In 1996, Congress adjusted the size of the Monument and authorized the Secretary of the Interior to acquire private lands and interests within the Monument. In 1970, Congress designated part of the Monument as a wilderness area. Thirty years later, President Clinton added over 410,000 acres to the Monument to “assure protection of the entire Great Rift volcanic zone and associated lava features.” Congress proceeded to designate most of President Clinton’s expansion as a national preserve. In 2017, the Idaho Senate passed a non-binding resolution asking Congress to designate Craters of the Moon as a national park.

I. Santa Rosa Island National Monument

In 1939, FDR established the 9,500-acre Santa Rosa Island National Monument because the area contained “various objects of geological and scientific interest.” Six years later, however, President Harry Truman reduced the Monument by almost 5,000 acres, claiming that the land—

120. Proclamation No. 1843, 45 Stat. 2959 (1929); Antiquities Act, NAT’L PARK SERV., supra note 48 (indicating that President Hoover increased the Monument by 41 square miles, which is equivalent to 26,240 acres).
121. Proclamation No. 1916, 46 Stat. 3029 (1930); Antiquities Act, NAT’L PARK SERV., supra note 48.
124. Id.
129. Proclamation No. 2337, 3 C.F.R. 32, 32–33 (1939) [hereinafter Proclamation Establishing Santa Rosa Island National Monument].
which the Army was using for military purposes—was not necessary for the administration of the Monument.\textsuperscript{130} In 1971, Congress incorporated the Monument into the Gulf Islands National Seashore and specifically stated that, unless otherwise noted, the “Secretary shall administer the seashore in accordance with the [Antiquities Act].”\textsuperscript{131}

\textbf{J. Glacier Bay National Monument}

In 1925, President Coolidge established Glacier Bay National Monument.\textsuperscript{132} As a precursor to many of the large monuments created by later presidents, Glacier Bay was over a million acres in 1925.\textsuperscript{133} In 1939, FDR enlarged the Monument by 904,000 acres.\textsuperscript{134} In his proclamation increasing the Monument, FDR found that it would be in the public interest to add glaciers—which were already a part of the adjacent Tongass National Forest—to the Monument because of their geologic and scientific interest.\textsuperscript{135}

With the advent of World War II, Lieutenant General John Dewitt ordered the construction of an army-shipping base on Excursion Inlet, which was within the boundaries of the Monument.\textsuperscript{136} Several months later, the Army also began building an airfield inside the Monument near Point Gustavus.\textsuperscript{137} Eventually, the Army withdrew its forces and gave the airfield to the Civil Aeronautics Administration, creating a long debate about whether to eliminate the airfield from the Monument.\textsuperscript{138} The NPS initially recommended keeping the land in the Monument.\textsuperscript{139} Several years after this recommendation, President Eisenhower eliminated the 29,000 acres containing the military airfield from the Monument.\textsuperscript{140}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{130} Proclamation No. 2659, 3 C.F.R. 35, 35 (1946) [hereinafter Proclamation Reducing Santa Rosa Island National Monument].
  \item \textsuperscript{132} Proclamation No. 1733, 43 Stat. 1988–89 (1925) [hereinafter Proclamation Establishing Glacier Bay National Monument].
  \item \textsuperscript{133} \textit{Antiquities Act}, NAT’L PARK SERV., \textit{supra} note 48 (indicating that the Monument was 1,820 square miles, which is equivalent to 1,164,800 acres).
  \item \textsuperscript{134} Proclamation No. 2330, 3 C.F.R. 28, 28 (1939), \textit{reprinted in} 53 Stat. 2534 (1939).
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} Proclamation No. 3089, 3 C.F.R. 24, 36 (1955) [hereinafter Proclamation Reducing Glacier Bay National Monument]; \textit{Antiquities Act}, NAT’L PARK SERV., \textit{supra} note 48.
\end{itemize}
\end{footnotesize}
President Eisenhower eliminated private land that he claimed was not necessary for the management of the Monument.  

In 1978, President Jimmy Carter—as part of a larger effort to conserve lands about to lose their federally protected status—to the Monument, bringing its total size to almost 2.5 million acres. In response to President Carter’s actions, and as part of broader legislation dealing with public lands and Alaska native lands and mineral rights, Congress designated the area as a national park containing over 3 million acres. Congress also designated an additional 58,000 acres adjacent to the National Park as a National Preserve. Most of the land that President Eisenhower removed from the Monument is now firmly inside the boundaries of Glacier Bay National Park.

K. Great Sand Dunes National Monument

At the end of his presidency, President Hoover designated 44,000 acres in southern Colorado as the Great Sand Dunes National Monument. The Great Sand Dunes are the tallest sand dunes in North America. In 1946, President Truman issued a proclamation “redefining” the Monument’s boundaries based on the most recent geologic survey. Several years later,

142. In 1978, President Carter designated 56 million acres in Alaska as national monuments as part of an effort to protect federal lands that were about to lose federal protection under the Alaska Native Claims Settlement Act. For a full description of the controversy surrounding President Carter’s actions see Cecil D. Andrus & John C. Freemuth, President Carter’s Coup: An Inside View of the 1978 Alaska Monument Designations, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 93 (David Harmon et al. eds., 2006).
144. Antiquities Act, N.A.P. PARK SERV., supra note 48.
146. Id.; Kerr, supra note 20, at 6.
148. See Glacier Bay National Park & Preserve Alaska: Maps, N.A.P. PARK SERV., https://www.nps.gov/gbna/planyourvisit/maps.htm (last updated May 1, 2018) (depicting, on a map, Point Gustavus, the area President Eisenhower removed from Glacier Bay National Monument, within the boundaries of Glacier Bay National Park).
President Eisenhower reduced the Monument by about 20%, claiming that the lands were no longer necessary for the Monument’s purpose.

Starting in 1976, however, Congress began protecting the area. First, Congress designated most of the Monument as wilderness and then enlarged the Monument by 1,000 acres. In 2000, Congress turned the Monument into a national park and a separate national preserve. By 2014, the National Park contained 107,000 acres and the Preserve contained 41,000 acres.

L. Hovenweep National Monument

In 1923, President Warren Harding established the 285-acre Hovenweep National Monument. President Truman proceeded to enlarge the Monument by 80 acres, claiming that it would be in the public interest to add two prehistoric ruins to the Monument. Following both of these proclamations, in 1956, President Eisenhower removed 40 acres from the Monument that he claimed did not contain objects of historical or archeological value. President Eisenhower also claimed that President Harding “erroneously” included this land when he initially created the Monument. In the same proclamation, President Eisenhower added an undefined amount of acreage to the Monument, which resulted in a slight gain in the Monument’s size. While the original Monument contained only 285 acres, by 2014, the Monument was over 700 acres.

152. Kerr, supra note 20, at 7.
158. Proclamation No. 1654, 42 Stat. 2299–3000 (1923); Antiquities Act, NAT’L PARK SERV., supra note 48.
M. Colorado National Monument

In 1911, President Wilson designated Colorado National Monument.164 Fifty years later, President Eisenhower deleted 211 acres from the Monument, claiming, as some earlier presidents had, that the deleted lands were not necessary for the care and management of the Monument.165 At the same time, President Eisenhower added 120 acres to the monument that were needed for “administrative purposes and for the proper care, management, and protection of the objects of scientific interest” in the Monument.166

N. Black Canyon of the Gunnison National Monument

In 1933, President Hoover designated the 10,000-acre Black Canyon of the Gunnison National Monument.167 Several decades later, Congress authorized an exchange of federal and privately owned lands “to facilitate the administration of [the] monument.”168 In response to this Act, President Eisenhower reduced the Monument by 470 acres.169 President Eisenhower claimed that because of the exchange, the 470 acres were no longer necessary for the management of the Monument.170 After President Eisenhower’s reduction, Congress designated more than 11,000 acres inside of Black Canyon of the Gunnison National Monument as a wilderness area.171 Fifteen years later, Congress designated the Monument as a national park.172 As part of the Black Canyon National Park designation, Congress also designated 57,000 acres adjacent to the Park as a national conservation area.173

---

166. Proclamation Reducing Colorado National Monument, 3 C.F.R. at 56.
170. Id.
O. Arches National Monument

In 1968, Edward Abbey, the famous wilderness writer, recounting on his time as a park ranger in Arches National Park, called Arches “the most beautiful place on earth.” Several decades earlier, President Hoover established Arches National Monument. At the time, the Monument contained two pieces of land: the “Devils Garden” at 2,600 acres and the “Windows” at 1,920 acres. In 1938, FDR expanded the Monument by 29,000 acres, claiming that certain lands contiguous to the Monument were “necessary for the proper care, management, and protection of the . . . monument.”

In 1960, President Eisenhower issued a proclamation “modifying” the Monument. In this proclamation, President Eisenhower added about 480 acres to the Monument—which contained “outstanding geologic features of great scientific interest”—and eliminated about 720 acres—that were “used for grazing” and had “no known scenic or scientific value.” Several years later, President Lyndon B. Johnson enlarged the Monument by 48,000 acres. Congress responded by incorporating the enlarged Monument into a national park. By 2014, Arches National Park contained over 76,000 acres.

P. Timpanogas Cave National Monument

President Harding established the 250-acre Monument in 1924. In 1962, President Kennedy “redefine[d]” the Monument to more accurately

are some similarities between NCAs, the exact level of protection depends upon the enacting legislation. Ristroph & Hussein, supra. Generally speaking, NCAs are less protective than a wilderness designation. Kerr & Salvo, supra, at 68.

174. EDWARD ABBEY, DESERT SOLITAIRE 1 (1968).
177. Proclamation No. 2312, 3 C.F.R. 38, 38 (Supp. 1938); Antiquities Act, NAT’L PARK SERV., supra note 48.
179. Id. at 32; Antiquities Act, NAT’L PARK SERV., supra note 48.
183. Proclamation No. 1640, 42 Stat. 2285 (1922); Antiquities Act, NAT’L PARK SERV., supra note 48.
reflect the boundaries of the Monument based on the most recent geologic survey.\textsuperscript{184}

\textbf{Q. Bandelier National Monument}

At the time of its designation, Bandelier National Monument was a 22,400-acre tract in New Mexico containing archaeological ruins.\textsuperscript{185} Prior to its designation, more than 15 bills were introduced in Congress to designate the area as a national park.\textsuperscript{186} But none of them passed.\textsuperscript{187} As a result of this inaction, President Wilson designated the area as a monument.\textsuperscript{188}

Several years later, President Hoover enlarged the Monument by 3,626 acres.\textsuperscript{189} In 1961, President Eisenhower further enlarged the Monument by adding 3,600 acres of archeological ruins that the Atomic Energy Commission (AEC) had previously managed.\textsuperscript{190} Just a year later, however, President Kennedy revised the boundaries of the Monument.\textsuperscript{191} President Kennedy added 2,882 acres that the AEC also formerly administered.\textsuperscript{192} At the same time, President Kennedy excluded other land from the Monument, resulting in a 1,000-acre reduction.\textsuperscript{193} President Kennedy claimed that the excluded lands were not necessary to “complete the interpretive story” of the Monument because they contained limited archaeological value.\textsuperscript{194} But in 1976, Congress enlarged the Monument by almost 4,000 acres and


\textsuperscript{185} ROTHMAN, PRESERVING, \textit{supra} note 35, at 143.

\textsuperscript{186} Id. at 145.

\textsuperscript{187} Id.

\textsuperscript{188} Proclamation No. 1322, 39 Stat. 1764 (1916) [hereinafter Proclamation Establishing Bandelier National Monument]; ROTHMAN, PRESERVING, \textit{supra} note 35, at 145.

\textsuperscript{189} Proclamation No. 1990, 47 Stat. 2503–04 (1932); \textit{Antiquities Act}, NAT’L PARK SERV., \textit{supra} note 48.


\textsuperscript{192} \textit{Antiquities Act}, NAT’L PARK SERV., \textit{supra} note 48.

\textsuperscript{193} Id.

\textsuperscript{194} Proclamation Reducing Bandelier National Monument, 3 C.F.R. at 63.
designated 70% of it as wilderness two years later. Finally, in 1998, Congress increased the Monument by 935 acres.

R. Buck Island Reef National Monument

In 1961, President Kennedy established the 850-acre Buck Island Reef National Monument. In 1975, President Gerald Ford added 30 acres to the Monument to “insure the proper care and management of the shoals, rocks, undersea coral reef formations and other objects of scientific and historical interest.” A month later, President Ford issued a proclamation fixing a typographical error in his original proclamation, resulting in no change to the Monument’s size.

S. The Trump Administration’s National Monument Review

On April 26, 2017, President Trump issued Executive Order 13792, which directed Secretary of the Interior Ryan Zinke to review all national monument designations since 1996 that were greater than 100,000 acres. In late August, right before Secretary Zinke’s final recommendations were due, he announced that he was recommending that President Trump not abolish any monuments. A few days later, Secretary Zinke concluded that President Trump should not make any changes to out of the 22 national monuments under review.


After some initial delay—and an internal leak—Secretary Zinke formally released his Final National Monument Report, outlining his findings and recommendations to President Trump. In the Report, Secretary Zinke claims that previous presidents arbitrarily defined the objects protected in national monuments by listing broad geographic areas such as “viewsheds” and “ecosystems.” Moreover, the Report claims that it “circumvented the legislative process” when presidents designated monuments after Congress failed to pass legislation because only Congress can effectively balance the dueling interests of protecting public lands and making them available for economic development. The Report also suggests that presidents have failed to comply with the requirement that monuments be “the smallest area compatible with the proper care and management of the objects” in the monument. Finally, the Report claims that some monument designations were “likely politically motivated.”


205. ZINKE, supra note 203, at 6–20.
206. Id. at 6–7.
207. Id. at 7.
208. Id. at 7, 9.
209. Id. at 2. Secretary Zinke’s claims may be factually true, but they have no legal basis. Courts have been very deferential to a president’s determination that an object qualifies for protection under the Antiquities Act. Cappaert v. United States, 426 U.S. 128, 142 (1976) (upholding President Truman’s designation of Devil’s Hole National Monument because “[t]he pool in Devil’s Hole and its rare inhabitants are ‘objects of historic or scientific interest’”); Cameron v. United States, 252 U.S. 450, 455 (1920) (“The act under which the President proceeded empowered him to establish reserves embracing ‘objects of unusual scientific interest.’ The Grand Canyon, as stated in his proclamation, ‘is an object of historic or scientific interest.’”). Second, the claim that it is “unfortunate” when presidents designate monuments after Congress fails to pass legislation. Since Congress passed the Act, presidents have designated monuments when Congress fails to act. See supra Part I.A–Q (discussing the historical interaction between congressional attempts to designate areas as national parks and national monument designations). Third, courts are deferential to a president’s determination of when a monument is the smallest area compatible. Roberto Iroala, Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906, 29 WM. & MARY ENVTL. L. & POL’Y REV. 159, 185–86 (2004) (“With respect to the second substantive requirement, that the designation of the national
Based on these conclusions, the Report recommends that President Trump use his “lawful exercise of . . . discretion granted by the Act” to amend or revise the boundaries of ten national monuments, including Grand Staircase and Bears Ears.210

To provide a basis for presidential authority to reduce national monuments, Secretary Zinke emphasized that previous presidents have reduced national monuments on numerous occasions:

The Act has been used to designate or expand national monuments on Federal lands more than 150 times. It has also been used at least 18 times by Presidents to reduce the size of 16 national monuments, including 3 reductions of the Mount Olympus National Monument by Presidents Taft, Wilson, and Coolidge that cumulatively reduced the size of the 639,200-acre Monument by a total of approximately 314,080 acres, and a reduction of the Navajo National Monument by President Taft from its original 360 acres to 40 acres. President Franklin Roosevelt also modified the reservation of the Katmai National Monument to change management of the Monument.211

Following through on Secretary Zinke’s recommendations, on December 4, 2017, President Trump issued two proclamations modifying Grand Staircase-Escalante and Bears Ears National Monuments.212 While previous proclamations modifying national monuments were rather brief

monument ‘be confined to the smallest area compatible . . . [,]’ courts generally accord to the President’s factual determinations substantial judicial deference.” (second alteration in original) (quoting 54 U.S.C. § 320301(b) (Supp. III 2016)). Last, courts have consistently refused to question the reasons underlying a president’s decision to designate a national monument. Utah Ass’n of Cty’s v. Bush, 316 F. Supp. 2d 1172, 1185 (D. Utah 2004) (declining to consider the reasons why President Clinton designated Grand Staircase because “[f]or the judiciary to probe the reasoning which underlies [the Grand Staircase] Proclamation would amount to a clear invasion of the legislative and executive domains” (quoting United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940))); Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) (“Neither can the Court take any judicial interest in the motives which may have inspired the [Jackson Hole] Proclamation described as an attempt to circumvent the Congressional intent and authority in connection with such lands.”).


211. Id. at 4.

and provided limited reasoning for the reductions, President Trump thoroughly explained why he was reducing Grand Staircase-Escalante and Bears Ears National Monuments.

1. Grand Staircase-Escalante National Monument

President Trump’s reduction of Grand Staircase reignited controversy that has historically surrounded the region. In 1995, Utah legislators introduced joint bills in the U.S. House and Senate that would have designated 1.8 million acres in the Grand Staircase area as wilderness. The bills met staunch opposition from conservationists. While the bill passed the House, environmental organizations and the Clinton Administration helped to defeat the bill in the Senate. Later the same year, President Clinton spoke on the rim of the Grand Canyon in front of a crowd of 2,000 people: “Our parents and grandparents saved the Grand Canyon for us; today, we will save the grand Escalante Canyons . . . of Utah for our children.” Hopi elders shared President Clinton’s sentiment about the future: “This is a time of healing . . . [t]he healing must begin.” And then “with a stroke of [a] pen,” President Clinton designated the 1.7 million-acre Grand Staircase-Escalante National Monument—the largest monument ever designated in the continental United States.

President Clinton’s designation faced a series of legal challenges, which were all unsuccessful: several courts held that the Antiquities Act gives the President broad, discretionary authority to designate national monuments. President Clinton’s actions also provoked responses from

214. Id.
216. Id.
217. Id. at 115.
218. Id.
220. Id.
221. Id. at 5.
224. Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1138 (D.C. Cir. 2002) (“Mountain States’ contention that the Antiquities Act must be narrowly construed in accord with Mountain States’
several western lawmakers. Senator Orin Hatch exclaimed: “In all my 20 years in the U.S. Senate, I have never seen a clearer example of the arrogance of federal power.”

Over 50 years after a Wyoming senator compared FDR’s designation of Jackson Hole National Monument to Pearl Harbor, Senator Frank Murkowski, Republican of Alaska, exclaimed that the designation “had the feel of Pearl Harbor.” Speaking more pragmatically, Senator Jim Hansen, Republican of Utah, vowed to cripple the Monument by withholding its funding and also introduced legislation to abolish the Monument. Lawmakers introduced a series of bills throughout that year to reform the Antiquities Act, all of which failed. But in 1998, Congress passed two pieces of legislation that authorized land exchanges and increased the Monument by about 24,000 acres.

On December 4, 2017—in response to Secretary Zinke’s recommendations—President Trump issued his proclamation “modifying” the Monument. The Proclamation explains that the Antiquities Act requires that monuments be confined to the “smallest area compatible with the proper care and management of the objects . . . to be protected.” The Proclamation then claims, without providing any support, that “[d]etermining the appropriate protective area involves examination of a number of factors, including the uniqueness and nature of the objects, the opportunity for preservation, and the need for protection of such natural or historic resources.”

---

view of Congress’s original intent . . . misses the mark.”); Tulare County. v. Bush, 306 F.3d 1138, 1140 (D.C. Cir. 2002); Utah Ass’n of Cty’s. v. Bush, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) (“When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.”).


226. Molvar, supra note 5 (describing the designation of Jackson Hole National Monument as a “foul, sneaking Pearl Harbor blow”).

227. KLYZA & SOUSA, supra note 215, at 117. Other lawmakers had similar remarks. Bob Bennett, Republican Senator from Utah, called the Monument “an outrageous, arrogant approach to public policy.” Id. Helen Chenoweth, Republican Congresswoman of Idaho, called the Monument the “biggest land grab since the invasion of Poland.” Id. Craig Peterson—former majority leader of the Utah State Senate—rather unfortunately, compared the Monument designation to sexual assault, suggesting that this is “what a woman must feel like when she has been raped.” Id.

228. Larmer, Bold Stroke, supra note 219, at 6.


231. See infra Part IV.B.1 (describing these pieces of legislation in the context of congressional ratification).


233. Id. at 58,089.
nature of the needed protection, and the protection provided by other laws.\textsuperscript{234}

Applying this test, the Proclamation claims that portions of the Monument are not “unique or particularly scientifically significant” because similar geologic features and archeological objects are prevalent throughout the region.\textsuperscript{235} The Proclamation also claims that many of the objects in the original Monument do not actually need to be protected because they are already adequately protected.\textsuperscript{236} In light of this analysis, the Proclamation declares that Grand Staircase is not reserved to the smallest area compatible for the proper care and management of the Monument.\textsuperscript{237} The Proclamation excludes 861,974 acres from Grand Staircase and divides it into three separate monuments: Grand Staircase, Kaiparowits, and Escalante Canyons.\textsuperscript{238}

Several environmental groups—including the Wilderness Society and Grand Staircase Escalante Partners—filed complaints almost immediately.\textsuperscript{239} The complaints allege that the Antiquities Act does not give the President the authority to modify or revoke monuments.\textsuperscript{240} The groups also argue that President Trump cannot reduce Grand Staircase because Congress “ratified” the Monument through “legislative enactments.”\textsuperscript{241} On February 15, 2018, the District Court for the District of Columbia consolidated these two lawsuits.\textsuperscript{242}

\begin{footnotesigns}
\item[234] Id.
\item[235] \textit{Id.} at 58,089–90.
\item[236] \textit{Id.} at 58,090.
\item[237] \textit{Id.} at 58,091.
\item[238] \textit{Id.} at 58,091, 58,093.
\item[240] \textit{See} Grand Staircase Escalante Partners Complaint, supra note 239, ¶ 117 (“The Antiquities Act does not explicitly or implicitly grant authority to the President to subsequently decide that duly protected objects are no longer worthy of protection.”); Wilderness Soc’y Grand Staircase Complaint, \textit{supra} note 239, ¶ 164 (“The Trump Proclamation is based on considerations wholly outside the Antiquities Act and lacks legal or factual justification.”).
\item[241] \textit{See} Grand Staircase Escalante Partners Complaint, \textit{supra} note 239, ¶ 125 (“Congress has asserted its sole prerogative over the Monument by legislatively recognizing the protections and full boundaries of Grand Staircase-Escalante National Monument after its creation, ratifying its existence and dimensions.”); Wilderness Soc’y Grand Staircase Complaint, \textit{supra} note 239, ¶ 151 (“Congress has affirmed its sole jurisdiction to regulate the Monument through a series of legislative acts . . . .”).
\end{footnotesigns}
2. Bears Ears National Monument

Located in southeastern Utah—almost bordering Grand Staircase—Bears Ears National Monument contains numerous historical artifacts that chronicle the history of human settlement in the region. In the 1930s, tribal efforts to designate the area as a 4 million-acre national monument failed. Eighty years later, local tribes, as part of a larger coalition, proposed the Bears Ears National Monument. After extensive planning and negotiation, President Obama designated the Bears Ears National Monument.

Eric Descheenie, a former leader of the group that proposed the Monument, responded that the designation “actually brought tears to my face... It’s so significant.” On the other hand, Senator Orin Hatch criticized the designation as “an affront of epic proportions and an attack on an entire way of life.” San Juan County officials called the Monument the result of “outside special interest groups who used deception and collusion to drown out local voices” most affected by the decision. In response to this criticism, in October 2017, President Trump called Senator Hatch to announce his plans to reduce Bears Ears.

On December 4, 2017, the same day he “modified” Grand Staircase, President Trump issued a proclamation “modifying” Bears Ears. The “modifying” proclamation reduces the Monument by almost 85%—from

---


245. Id.


249. Id.


1.35 million to 201,876 acres. The Proclamation justifies this reduction by concluding that existing federal laws—like the Wilderness Act, the Federal Land Policy and Management Act of 1976 (FLPMA), and the National Forest Management Act—adequately protect many of the objects and areas identified in the original Monument.

Several groups filed suit in response. First, the Native American tribes that proposed the Monument—including the Hopi Tribe, Ute Indian Tribe, Ute Mountain Indian Tribe, Zuni Tribe, and the Navajo Nation—sued President Trump and Secretary Zinke. Several days later, another group—including Patagonia, the Access Fund, and Utah Diné Bikéyah—filed a complaint against the same defendants. Lastly, nine environmental organizations brought suit. All three complaints allege that the President lacks the authority to reduce or revoke national monuments. The complaints argue that President Trump’s proclamation essentially revoked Bears Ears and replaced it with two smaller monuments. On February 15, 2018, the District Court for the District of Columbia consolidated all three of these lawsuits.

252. Id. at 58,083.
253. Id. at 58,085.
257. NRDC Bears Ears Complaint, supra note 256, ¶ 189 (“Congress has not delegated to the President any authority to revoke or modify the monument designations of prior Presidents or of Congress.”); Utah Diné Bears Ears Complaint, supra note 255, ¶ 194 (“Congress has not delegated to the President the power to revoke the designation of ‘historic landmarks, historic and prehistoric structures’ . . . once they have been lawfully proclaimed national monuments.”); Hopi Bears Ears Complaint, supra note 254, ¶ 198 (“The Antiquities Act only empowers the President to declare national monuments. It does not delegate or authorize the power to revoke, replace, or diminish them once designated.”).
258. NRDC Bears Ears Complaint, supra note 256, ¶ 126 (“On December 4, 2017, President Trump issued a Presidential Proclamation revoking monument status from eighty-five percent of the Bears Ears National Monument and replacing the monument with two smaller, non-contiguous units . . . .”); Utah Diné Bears Ears Complaint, supra note 255, ¶ 196 (“Defendants’ attempt to revoke the designation of landmarks, structures, and objects comprising the Bears Ears National Monument is an ultra vires action . . . .”); Hopi Bears Ears Complaint, supra note 254, ¶ 199 (“[President Trump’s Proclamation] in effect revokes the Bears Ears National Monument and replaces it with two different, smaller ones . . . .”).
II. OVERVIEW OF EXISTING SCHOLARSHIP ON NATIONAL MONUMENTS

In 1906, Congress passed the Antiquities Act, delegating part of its plenary authority over public lands to the President. The Antiquities Act provides that:

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. 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.

In a series of challenges to monument designations over the past 100 years, courts have repeatedly held that the President’s authority to designate monuments is broad and discretionary.

The Antiquities Act is silent, however, on whether the President can abolish national monuments. In 1938, FDR asked Attorney General Homer Cummings to consider whether he could abolish Castle Pinckney National Monument. The Attorney General reasoned that since the Antiquities Act is silent on the President’s ability to abolish monuments, “[i]f the President has such authority . . . it exists by implication.” Nevertheless, Attorney General Cummings found that the President does not have the authority to abolish national monuments because monument designations are equivalent to acts of Congress. Furthermore, though

260. Iroala, supra note 209, at 170–71; Udall, supra note 3, at 12.
262. Cappaert v. United States, 426 U.S. 128, 141–42 (1976); Cameron v. United States, 252 U.S. 450, 455 (1920) (“The act under which the President proceeded empowered him to establish reserves embracing ‘objects of historic or scientific interest.’ The Grand Canyon, as stated in his proclamation, ‘is an object of unusual scientific interest.’”); Utah Ass’n of Cty’s. v. Bush, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) (“When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.”); Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) (“Whenever a statute gives a discretionary power . . . it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts” (quoting Martin v. Mott, 25 U.S. 19, 31–32 (1827))).
263. See 54 U.S.C. § 320301(a)–(b) (allowing presidents to designate National Monuments).
266. Id. at 187–88.
Attorney General Cummings acknowledged that earlier presidents had reduced monuments, he reasoned that these reductions do not give the President the authority to abolish monuments:

While the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments ‘in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected,’ it does not follow from his power so to confine that area that he has the power to abolish a monument entirely.

Many scholars have provided additional reasons why the President lacks the authority to abolish monuments. Professor Mark Squillace—who has written extensively on the Antiquities Act—compared the Antiquities Act to several other contemporaneous statutes that delegated authority to the President to withdraw lands from the public domain. Notably, these contemporaneous statutes explicitly authorized the President to revoke his withdrawals, which suggests that—by providing no textual authority in the Antiquities Act—Congress did not delegate to the President the authority to abolish national monuments. Instead, the Antiquities Act delegates the President “one-way” authority to designate monuments.

Additionally, allowing the President to abolish national monuments would be an improper delegation of power to the President. Even though the Constitution grants legislative powers to Congress, the Supreme Court has recognized that Congress can delegate its authority to the President as long as the delegation contains an intelligible principle. An intelligible principle provides “minimal standards” on how the delegated authority

267. Id. at 188.
268. Id.
269. See, e.g., Squillace, Monumental, supra note 41, at 552–54 (arguing that two other statutes authorize the President to make and revoke withdrawals, but only Congress has the authority to abolish monuments); see also Nicolas Bryner et. al., National Monuments: Presidents Can Create Them, But Only Congress Can Undo Them, CONVERSATION (Apr. 28, 2017), http://theconversation.com/national-monuments-presidents-can-create-them-but-only-congress-can-undo-them-76774 (explaining that presidents can create monuments, but only Congress can abolish them).
270. Squillace, Monumental, supra note 41, at 553.
271. Id.
272. Id.; Nicolas Bryner, supra note 269.
should be exercised.\footnote{274} Allowing the President to abolish national monuments would undermine any intelligible principle behind the Antiquities Act because it would result in a virtually limitless source of presidential authority that would have separation of powers implications.\footnote{275} For example, if presidents were to have the power to abolish national monuments, they could act in direct opposition to laws passed by Congress pursuant to a delegation from Congress.\footnote{276}

Although some dispute these conclusions\footnote{277}—and others affirmatively argue that the President has the authority to abolish national monuments\footnote{278}—this Note begins from the generally accepted, but legally untested, theory that the President lacks the authority to abolish national monuments.\footnote{279}

\footnote{274} Mistretta v. United States, 488 U.S. 361, 372 (1989) (“So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” (alteration in original) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928))).


\footnote{276} Congress has designated several dozen national monuments. Antiquities Act 1906-2006: Frequently Asked Questions, NAT’L PARK SERV., https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Nov. 25, 2018) [hereinafter Antiquities Act, Frequently]. Congress’s authority to designate national monuments does not originate in the Antiquities Act, but from Congress’s constitutional authority over public lands. U.S. CONST. art. IV, § 3, cl. 2 (“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”). If the President has the implied power to abolish national monuments, the President could abolish a congressionally designated national monument. Margherita, supra note 275, at 289 (“A delegation of this congressional power to the president, if implied would arguably grant the executive branch the authority to abolish national monuments designated by the legislative branch.”).

\footnote{277} Udall, supra note 3, at 14 (concluding that it is “[u]n]clear whether a President can use the authorities granted under the Act to completely eliminate a national monument created by a previous president’); Ranchod, supra note 264, at 554 (“The extent to which a national monument that was created by presidential proclamation can be changed by a subsequent president is unclear, since only expansions and small reductions of existing monuments have ever been attempted.”); James Rasband, The Future of the Antiquities Act, 21 J. LAND RESOURCES & ENVTL. L. 619, 624–29 (2001) [hereinafter Rasband, Future] (considering whether the President has the authority to abolish national monuments established by earlier presidents).

\footnote{278} See, e.g., John Yoo & Todd Gaziano, Presidential Authority to Revoke or Reduce National Monument Designations, 35 YALE J. ON REG. 617, 639 (2018) (“A background principle of American law . . . is that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation.”); Richard Seamon, Dismantling Monuments, 70 FLA. L. REV. 553, 584 (2018) (“The well-established existence of [the President’s power to modify monuments] supports the President’s power to abolish altogether a monument that the President determines was improperly established in the first place.”).

\footnote{279} Margherita, supra note 275, at 286 (“Although the issue is not addressed in the Antiquities Act or its associated caselaw, the evidence presented in this analysis suggests that an implied power to abolish monuments does not exist.”).
III. ANALYZING PRESIDENTIAL POWER

Though the President lacks the authority to abolish national monuments, there are two potential legal claims that would allow the President to reduce national monuments based on historical practice.\(^\text{280}\) First, the past practice of presidents reducing national monuments confirms that the Antiquities Act’s smallest area compatible requirement gives the President the statutory authority to reduce national monuments.\(^\text{281}\) Second, based on this history, Congress has acquiesced to presidents reducing national monuments.\(^\text{282}\) Before discussing these claims further, each must be placed within the framework for analyzing presidential power.

\(^{280}\) Another claim that some have proposed is also based on historical practice: the President has the power to reduce national monuments because past presidents have abused their authority under the Antiquities Act. Yoo & Gaziano, supra note 278, at 621 (arguing that a president’s authority to change monument boundaries is “at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances”); Seamon, supra note 278, at 574 (“In light of the President’s comparative advantages in abusing power . . . 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 claim that presidents have abused their powers under the Antiquities Act has long been a part of political discourse. Klein, supra note 13, at 1363 (“Overall, political criticism advances the notion that the presidents have created national monuments on a scale unintended by the 1906 Congress that passed the Antiquities Act.”); 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, 78 (2002) (highlighting Representative James Hansen’s response to the designation of Grand Canyon-Parashant National Monument, who called the designation a “flagrant abuse” of the Antiquities Act). But there was usually an acknowledgment—in the legal commentary at least—that the President was acting within his authority, even if the Act itself is abusive. See Rusnak, supra note 223, at 715–16 (“Although the [Antiquities Act] cannot be abused, according to the courts, the Act, in and of itself, is an abusive power.”); Mark C. Rutzick, Modern Remedies for Antiquated Laws: Challenging National Monument Designations Under the 1906 Antiquities Act, 11 J. FED. SOC’Y PRAC. GRPS. 29, 30–31 (2010) (noting the problems with the Antiquities Act, but acknowledging that statutory claims under the Antiquities Act would likely fail); see also Larmer, Lands Grabs, supra note 225, at 17 (responding to the designation of Grand Staircase-Escalante, Senator Hatch exclaimed, “[t]he President may have some statutory authority to take this action, but he certainly does not have the moral authority”). But the legal claim that presidential abuse creates the power to reduce monuments lacks any legal basis, as several courts have held: “When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.” Utah Ass’n of Cytis. v. Bush, 316 F. Supp. 2d 1172, 1183–84 (D. Utah 2004).

\(^{281}\) See, e.g., Yoo & Gaziano, supra note 278, at 659–60 (relying on the past practice of presidents reducing national monuments to conclude that the President can reduce national monuments based on the Antiquities Act’s smallest area compatible requirement); Seamon, supra note 278, at 578–79 (concluding that the “President [has] broad power to modify monuments” based on the past practice of President’s reducing national monuments using the Act’s smallest area compatible requirement).

\(^{282}\) E.g., Rasband, Stroke, supra note 81, at 21-25 (“[C]ongressional acquiescence in 18 Presidential reductions, and Congress’s subsequent amendments to the Antiquities Act without restricting reductions in monument size . . . creates a strong presumption that Congress has consented to presidential reductions in monument size.”); Seamon, supra note 278, at 582 (“The presidential practice
In the famous *Youngstown* steel seizure case, Justice Jackson laid out a tripartite framework for analyzing presidential power. Justice Jackson’s framework has become the test for considering the President’s legal authority under the Constitution. First, when the President is acting pursuant to statutory authorization, his constitutional power is at its maximum because it includes both inherent and statutory authority. The only limitation to presidential authority in this circumstance is where the “Federal Government as an undivided whole lacks power.” Second, when the President acts in absence of either a congressional grant or denial of authority, his only authority comes from his Article II constitutional powers. But Justice Jackson suggested that there may be a “zone of twilight” where the President has concurrent authority with Congress: “[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” Presidential authority in the second category depends upon the particular circumstances of the presidential action.

Third, when the President acts in defiance of Congress his power is at its lowest extent. In this circumstance, the President can only act when his power is exclusive. Justice Jackson emphasized that presidential action in this category “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” If the President has the authority to reduce national monuments, his power must be in the first or second categories of Justice Jackson’s framework. In Justice Jackson’s third category, presidents lack the and congressional acceptance of that practice powerfully support the conclusion that the Antiquities Act authorizes the President to modify monuments . . . .”

285. *Youngstown*, 343 U.S. at 635.
286. *Id.* at 636–37.
287. *Id.* at 637.
288. *Id.*
289. *Id.*
290. *Id.*; *e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076, 2085 (2015) (invalidating a law that infringed upon the President’s exclusive right of recognition).
291. *Youngstown*, 343 U.S. at 638.
292. *Id.* at 637.
authority to reduce national monuments because their authority to designate (or reduce) national monuments is not exclusive: the Constitution gives Congress plenary authority over public lands. 294

Accordingly, each potential claim of presidential power to reduce national monuments based on historical practice corresponds to the first two categories of Justice Jackson’s framework. The claim that historical practice confirms that the smallest area compatible requirement gives the President statutory authority to reduce national monuments places the President’s authority to reduce national monuments in Justice Jackson’s first category. 295 The congressional acquiescence claim places the President’s authority to reduce national monuments in Justice Jackson’s second category. 296 From this framework, claims of presidential power to reduce national monuments can be effectively considered.

IV. WHY THE PAST PRACTICE OF PRESIDENTS REDUCING NATIONAL MONUMENTS IS IRRELEVANT

While many presidents have reduced national monuments, there are two potential reasons why this past practice may be irrelevant. First, FLPMA may have clarified that presidents cannot reduce national monuments. 297 Second, congressional ratification of national monuments would prevent presidents from reducing national monuments. 298 In both of these contexts, presidents would be acting in opposition to the will of Congress—and in direct contravention of Congress’s enumerated Property

294. See U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”); e.g., Antiquities Act, Frequently, supra note 276 (listing the various times that Congress has designated national monuments).

295. Youngstown, 343 U.S. at 635–36. Others have considered whether the President has the power to reduce or abolish national monuments based on other Article II powers, such as the President’s obligation to make sure “that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. Compare Pamela Baldwin, Presidential Authority to Modify or Revoke National Monuments, SOC. SCI. RES. NETWORK, 17 (2017) [hereinafter Baldwin, Presidential], https://ssrn.com/abstract=3095744 (concluding that Article II’s Take Care Clause does not provide the President with the authority to modify national monuments), with Yoo & Gaziano, supra note 278, at 655 (arguing that presidents can “void” national monuments they believe are “illegally large” based on their “constitutional authority to take care that the laws are faithfully executed”), and Seamon, supra note 278, at 584 (“[I]nterpreting the Act to authorize abolition enables the President to carry out the constitutional duty to take care that the Antiquities Act is faithfully executed.”).

296. Youngstown, 343 U.S. at 637.


298. See infra notes 344–49 (explaining why the President lacks the authority to reduce monuments that Congress has ratified).
Clause authority—if they tried to reduce national monuments. Based on Justice Jackson’s framework, presidents would lack the authority to reduce national monuments in either of these situations.

A. The Legislative History of the Federal Land Policy and Management Act Clarifies That the President Lacks the Authority to Reduce National Monuments.

In 1976, Congress passed FLPMA. The Act dictates land management strategies for federal lands under the Bureau of Land Management (BLM) authority that lack any specific designation, such as a national park or national forest. The passage of FLPMA marked the end of the disposal era of federal lands policy. Prior to FLPMA, some of the original homesteading laws dispensing federal land to settlers in the American West were still on the books. When Congress passed FLPMA, it repealed almost all of these statutes, recognizing that federal policy would now be to retain and effectively manage federal lands. Accordingly, FLPMA repealed almost all presidential authority over public lands, including any implied powers. However, it left the Antiquities Act largely untouched.

While FLPMA left the Antiquities Act largely untouched, § 204(j) of FLPMA provides that the Secretary of the Interior shall not modify or revoke any national monuments created under the Antiquities Act. Given that the Secretary does not have any statutory authority to create national monuments, some have argued that § 204(j)’s reference to the Secretary is a

299. See infra notes 344–49 (outlining the rationale that if the President could reduce national monuments, the President would be able to undermine congressional authority).
300. See infra notes 344–49 (discussing Justice Jackson’s framework and its impact on the President’s authority to reduce monuments).
302. Mark Squillace et al., Presidents Lack the Authority to Abolish or Diminish National Monuments, 103 VA. L. REV. 55, 59 (2017) [hereinafter Squillace, Presidents].
303. Id.
305. Squillace, Presidents, supra note 302.
306. Id. at 59–60.
308. Squillace, Presidents, supra note 302, at 60.
309. 90 Stat. at 2754(j) (“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 . . . .”).
drafting error. According to this argument, the word “President” should be substituted for “Secretary” so the statute would read: “The [President] shall not . . . modify, or revoke any withdrawal . . . creating national monuments.” Under this reading, the President would clearly lack the authority to modify or reduce national monuments. 

The legislative history of FLPMA could be interpreted to support this reading. The House Committee Report on FLPMA explicitly states that the bill would “specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.” The “anomalous” reference to the Secretary and the legislative history of FLPMA create a strong inference that Congress meant to clarify that the President lacks the authority to modify national monuments. Assuming a court accepts this reasoning, the past practice of presidents reducing monuments would be irrelevant because they happened prior to the passage of FLPMA. Further, the 1938 Attorney General Opinion acknowledging that presidents have reduced national monuments in the past would be irrelevant for the same reason.

There is still the question of how to reconcile FLPMA with the language of the Antiquities Act, which requires national monuments to be the smallest area compatible for the proper care and management of the objects to be protected. While some argue that this language gives the President broad authority to reduce national monuments, FLPMA—

---

310. E.g., Squillace, Presidents, supra note 302, at 60 (“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 . . . may be the result of a drafting error.”); Michael C. Blumm & Oliver Jamin, The Trump Public Lands Revolution: Redefining “the Public” in Public Land Law, 48 Envtl. L. 311, 326–27 (2018) (explaining that the “legislative history makes quite clear that Congress intended to restrict presidential authority” and § 204(j)’s reference to the Secretary is a “drafting error”).

311. 90 Stat. at 2754 (emphasis added).

312. Id.

313. See Squillace, Presidents, supra note 302, at 58–64 (arguing that FLPMA’s legislative history clarifies that the reference to the Secretary in § 204(j) is a drafting error).


315. Squillace, Presidents, supra note 302, at 58–64.

316. Id. at 65 (noting that all “[p]residential decision[s] to reduce the size” of national monuments happened prior to FLPMA); 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 14 (2017), https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments (noting that no president has reduced a monument since the passage of FLPMA).


319. See infra notes 417–19 (discussing the various views on the President’s power to reduce monuments based on the Antiquities Act’s smallest area compatible requirement).
assuming a court lets the legislative history overcome the plain text of § 204(j)—would again clarify that the President cannot do so.320

This analysis is premised, however, on the assumption that a court accepts the reasoning that FLPMA prevents the President from reducing national monuments. But a court may not accept this reasoning. When courts interpret a statute, they always being with its plain text.321 The problem, then, is that the actual language of FLPMA does not explicitly limit the President’s ability to modify national monuments.322 Rather, FLPMA only provides that the Secretary of the Interior cannot modify national monuments.323 Since the plain language is clear, a court may be reluctant to let the legislative history of FLMPA overcome its plain text.324

In similar circumstances, where parties have claimed that a statute’s language is the result of a drafting error, courts have still been reluctant to overlook the plain text. For example, in Lamie v. United States, the Supreme Court was interpreting a section of the U.S. bankruptcy code that Congress had amended in 1994.325 In the process of amending the statute, Congress—probably by accident—deleted five words from the section at issue, which resulted in a grammatically incorrect sentence.326 The petitioner argued that “[t]here is no apparent reason, other than a drafting error, that Congress would have rewritten the statute to produce a grammatically incorrect provision” and argued that the legislative history clarified this mistake.327

Despite the drafting error, the Court found that the text was clear and refused to let this apparent “drafting error” overcome the plain language of the statute:328 “It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred

322. 90 Stat. at 2754.
323. Id. at 2754(j) (“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 . . . .” (emphasis added)).
324. Utah Ass’n of Ctsys. v. Bush, 316 F. Supp. 2d 1172, 1186–87 n.8 (D. Utah 2004) (“There is no occasion for this Court to determine whether the plaintiffs’ interpretation of the congressional debates they quote is correct, since a court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous.”).
326. Id. at 530–31.
327. Id. at 533 (alteration in original).
328. Id. at 530–34.
result." 329 The reasoning from Lamie suggests that even with an apparent drafting error, a court may not let legislative history overcome the plain language of a statute. 330 This one decision is by no means conclusive. In other circumstances, the Supreme Court has allowed context to overcome the plain language of a statute. 331

But there are several other potential explanations for why FLPMA would revoke the Secretary of the Interior’s authority to modify or revoke national monument designations, which could demonstrate the reference to the Secretary was not a drafting error. For example, in Utah Ass’n of Counties, one of the challenges to President Clinton’s designation of Grand Staircase, the court addressed the impact of FLPMA on the Antiquities Act. 332 In that case, the plaintiffs argued that President Clinton’s Grand Staircase designation was invalid because it violated Executive Order 10355. 333

In 1952, President Harry Truman issued Executive Order 10355, which delegated the President’s authority to withdraw, modify, or revoke reservations of the public domain to the Secretary of the Interior. 334 This delegation included the President’s authority under the Antiquities Act. 335 The plaintiffs in Utah Ass’n of Counties argued that because President Truman delegated the President’s authority to designate national monuments to the Secretary, President Clinton did not have the authority to designate Grand Staircase-Escalante National Monument, only the Secretary did. 336 Although the Court rejected this argument for numerous reasons, the Court noted that because FLPMA explicitly forbids the

---

329. Id. at 542 (alteration in original) (quoting United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)).

330. Id. at 536 (explaining that the plain meaning of a statute is preferred to “avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history”).

331. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (“In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product.”); see also King v. Burwell, 135 S. Ct. 2480, 2495 (2015) (“[T]he context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.”); Dep’t of Commerce v. U.S. House of Representatives, 525 U.S. 316, 360 (1999) (Stevens, J., dissenting) (“The plurality finds an omission in the legislative history of the 1976 enactment more probative of congressional intent than either the plain text of the statute itself or the pertinent comment in the Senate Report.”); Thompson v. Thompson, 484 U.S. 174, 179 (1988) (suggesting that in some circumstances a court may correct “drafting errors” if “Congress simply forgot to codify its evident intention”).


333. Id.


335. Id.

336. Utah Ass’n of Ctsys., 316 F. Supp. 2d at 1195.
Secretary from modifying national monuments, it repealed Executive Order 10355.\textsuperscript{337} The court’s analysis suggests that Congress’s intent under FLPMA was simply to prevent the President from delegating his authority under the Antiquities Act to the Secretary of the Interior.\textsuperscript{338}

Despite these potential explanations, the context and purpose of FLPMA, in coordination with its legislative history, suggest that the reference to the Secretary in § 204(j) was a drafting error.\textsuperscript{339} In line with the broader context of FLPMA, others have provided a host of additional reasons why FLPMA should be read to prevent the President from modifying national monuments.\textsuperscript{340} But a court may still hold, based on the plain text, that FLPMA only prevents the President from delegating his authority and does not explicitly limit the President’s authority to reduce national monuments.\textsuperscript{341} Based on that narrow reading, FLPMA does not render the past practice of presidents reducing national monuments irrelevant.\textsuperscript{342}

\textbf{B. Congressional Ratification Would Prevent Presidents from Modifying National Monuments, Even if Past Practice Demonstrates That Presidents Have Broad Authority to Reduce National Monuments.}

Congressional ratification may also make the past practice of presidents reducing monuments irrelevant. When presidents designate national monuments, they are acting pursuant to a congressional delegation of power under the Antiquities Act.\textsuperscript{343} According to Attorney General Cumming’s 1938 Opinion, a President’s monument designation is equivalent to an act of Congress.\textsuperscript{344} Based on Justice Jackson’s framework,

\begin{itemize}
\item \textsuperscript{337} Id. at 1195–1200.
\item \textsuperscript{338} Id.; see also Rasband, Stroke, supra note 81, at 21-25 (proving an alternative explanation for the reference to the Secretary in § 204(j) of FLPMA).
\item \textsuperscript{339} Squillace, Presidents, supra note 302, at 60.
\item \textsuperscript{340} E.g., Baldwin, Presidential, supra note 295, at 16 (“The comprehensive reassertion in FLPMA of congressional control over withdrawals and management of the federal lands directly and indirectly affects interpretation of the current authority of the President.”); Hope M. Babcock, \textit{Rescission of a Previously Designated National Monument: A Bad Idea Whose Time Has Not Come}, 37 \textit{Stan. Envtl. L.J.} 4, 55 (2017) (“Congress could have thought that preventing the Secretary from affecting any previously designated national monument would, in effect, control a President from doing the same thing.”).
\item \textsuperscript{341} Baldwin, Presidential, supra note 295, at 25.
\item \textsuperscript{342} \textit{Utah Ass'n of Cty's.}, 316 F. Supp. 2d at 1199.
\item \textsuperscript{343} 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).
\item \textsuperscript{344} 39 Op. Att'y Gen. 185, 187 (1938) (“To assert [a power to abolish] is to claim for the Executive the power to repeal or alter an act of Congress at will.”); Margherita, supra note 275, at 291–92 (“[I]f monument designations are equivalent to acts of Congress the power to diminish, abolish, or otherwise undo that designation is reserved to the legislative branch.”); Ranchod, supra note 264 (“[A]
the President lacks the authority to reduce national monuments if the monuments’ designation is equivalent to an act of Congress. But as discussed above, others dispute this conclusion.

If Congress ratifies a monument, however, the monument becomes an explicit act of Congress. Beginning in 1862, courts have found that Congress ratified presidential action, either expressly or impliedly. Express ratification occurs when “there is deliberate congressional action . . . that expressly validates the official action,” whereas implied ratification occurs “from a group of indirect congressional actions.”

Congressional ratification is usually relevant if it is unclear that the President has authority to act because ratification can “give the force of law to official action unauthorized when taken.” Courts have generally been reluctant to find ratification, requiring Congress to “recognize that the actions involved were unauthorized when taken and . . . expressly ratify those actions in clear and unequivocal language.” But ratification in the context of national monuments is slightly different because the President has the authority to designate monuments. Grand Staircase-Escalante National Monument provides a useful lens to explore congressional ratification in the context of national monuments.

1. Grand Staircase-Escalante National Monument

Congress potentially ratified Grand Staircase in two ways: land exchanges and management. First, Congress passed two pieces of legislation authorizing land exchanges in Grand Staircase. The Utah School and Land Exchange Act authorized the federal government to transfer federal land outside the Monument for state-owned land inside the

---

345. See supra notes 276–79 (discussing why presidents cannot reduce national monuments if they are an act of Congress).

346. See supra notes 280–81 (recognizing that some dispute the conclusion that the President cannot abolish national monuments).


351. EEOC v. CBS, Inc., 743 F.2d 969, 974 (2d Cir. 1984).

Monument. The Act identifies the existence of 24,000 acres of mineral rights that would be potentially incompatible with the Monument if the state of Utah attempted to develop them. The exchange of these mineral rights would “eliminate this potential incompatibility, and would enhance management of the Grand Staircase-Escalante National Monument.” The Automobile National Heritage Act corrected some minor errors in the Grand Staircase proclamation and added certain lands to the Monument. The Act explicitly provides that “[t]he boundaries of the Grand Staircase–Escalante National Monument . . . are hereby modified.” Both of these acts indicate that Congress ratified the Monument.

But one district court has disagreed. Towards the end of the Clinton Administration, several Utah Counties—concerned about the economic effects of President Clinton’s designation of Grand Staircase—filed suit, arguing that President Clinton exceeded his authority when he designated Grand Staircase. In response, the Clinton Administration filed a motion to dismiss, claiming that Congress ratified Grand Staircase when it passed the land exchange bills: “Congress must have intended to incorporate fully those provisions of Grand Staircase which it left undisturbed in Grand Staircase boundary adjustment legislation.” The court rejected this argument, finding that the land exchange bills “could just as logically be seen as an attempt to mitigate one of the many possible ‘severe impacts’ of the Monument rather than to validate its creation.”

The district court’s reasoning is questionable. While acknowledging that the Supreme Court has not adopted a standard of proof for congressional ratification, after reviewing existing case law, the district court applied a standard requiring a “distinctively clear intent,” which it placed above a preponderance of the evidence standard. But the cases the district court cited were instances where it was unclear whether the President had legal authority to engage in the action, and the question was whether Congress ratified that otherwise illegal act.

354. ld. at §§ 1, 3.
355. ld.
357. ld. at 3252.
359. ld. at *4.
360. ld. at *48.
361. Id. at *49.
362. Id. at *45–46.
363. Id. at *38–45.
But the President clearly has legal authority to designate national monuments: a statute allows the President to do so, and courts have upheld broad exercises of that authority. Although the plaintiffs in *Utah Ass’n of Counties* argued that this particular exercise was beyond the President’s authority, before this particular litigation, courts had upheld similarly large designations under the Antiquities Act. For example, the Supreme Court upheld the 800,000-acre Grand Canyon designation. And numerous presidents designated monuments on a similar scale as well. Based on this context, there is a strong presumption that Congress was aware that the Grand Staircase designation was a lawful exercise of President Clinton’s authority under the Antiquities Act when it passed these land exchange bills. The district court erred by relying on previous case law dealing with ratification of illegal presidential acts to create the “distinctively clear intent” standard. Under a regular preponderance of the evidence standard, Congress explicitly stating the Monument’s boundaries should be sufficient to demonstrate ratification.

Nevertheless, after the district court’s decision, Congress expressed even clearer intent to ratify Grand Staircase. In 2009, Congress established the “National Landscape Conservation System” (NLCS), which requires the BLM to “conserve, protect, and restore nationally significant landscapes . . . for the benefit of current and future generations.” The NLCS specifically requires the BLM to manage national monuments in a way “that protects the values for which the components of the system were designated.” By specifically dictating that the BLM should manage the

365. See supra note 209 (outlining the various instances that courts upheld national monument designations).
368. In 1918, President Wilson designated the 1 million-acre Katmai National Monument. *Antiquities Act, Nat’l PARK SERV.*, supra note 48. Several years later, President Coolidge established the 1.16 million-acre Glacier Bay National Monument. *Id.* Finally, President Carter established 12 monuments that were over a million acres. *Id.*
369. Between 2002 and 2004, several courts explicitly held that Grand Staircase was a valid exercise of presidential authority. See supra note 209 (discussing the legal challenges to President Clinton’s designation of Grand Staircase). After these decisions, it was clear that President Clinton had the authority to designate Grand Staircase.
371. *Id.*
373. *Id.* § 7202(1)(a), (c)(2) (emphasis added). Notice Congress’s use of the word designated, rather than modified or reduced. *Id.* § 7202(a).
Monument in accordance with why it was designated, Congress expressly ratified Grand Staircase.\textsuperscript{374} Under a regular preponderance of the evidence standard, the NLCS, in coordination with the land exchange bills, indicate that Congress ratified Grand Staircase-Escalante National Monument.\textsuperscript{375}

In the current litigation surrounding President Trump’s reduction of Grand Staircase, the plaintiffs argue that Congress ratified the Monument.\textsuperscript{376} They specifically point to funding for the Monument, the land exchange bills, and the NLCS.\textsuperscript{377} The Wilderness Society argues that Congress expressly ratified the Monument.\textsuperscript{378} But the Grand Staircase-Escalante Partners don’t explicitly say that Congress ratified the Monument.\textsuperscript{379} Instead, they argue that Congress has expressed “its sole prerogative over the monument,” and that the President cannot circumvent this statutory “superstructure.”\textsuperscript{380} Use of this phrase may be an attempt to distinguish between congressional ratification—which deals with circumstances where it is questionable that the President had the authority to act—and ratification of monuments—which deals with an area where the President already has lawful authority. Referring to Congress’s “sole prerogative,” instead of congressional ratification, distinguishes these two concepts.\textsuperscript{381} Therefore, this phrase makes the “distinctively clear intent” standard inapplicable and potentially lowers the burden of proof required to prove congressional ratification.\textsuperscript{382}

While Grand Staircase provides a useful example to illustrate the concept of congressional ratification, ratification could potentially apply to

\textsuperscript{374} Id.

\textsuperscript{375} Baldwin, \textit{Presidential}, supra note 295, at 25 (“[I]t appears that various congressional actions have ratified the current boundaries of the Grand Staircase-Escalante National Monument and the President is limited only to recommending changes to Congress with respect to it.”).

\textsuperscript{376} Wilderness Soc’y Grand Staircase Complaint, supra note 239, ¶¶ 86–90; Grand Staircase Escalante Partners Complaint, supra note 239, ¶¶ 123–28.

\textsuperscript{377} Wilderness Soc’y Grand Staircase Complaint, supra note 239, ¶¶ 86–90 (“Congress thereby expressly ratified the Grand Staircase-Escalante National Monument as defined in the 1996 Proclamation.”).

\textsuperscript{378} Grand Staircase Escalante Partners Complaint, supra note 239, ¶¶ 123–29.

\textsuperscript{379} Id. ¶¶ 126, 142–48.

\textsuperscript{380} Id. ¶¶ 126, 142 (“Congress has asserted its sole prerogative over the Monument by repeatedly adjusting the boundaries of Grand Staircase-Escalante National Monument through legislative enactments.”).

\textsuperscript{381} Id. ¶¶ 123–28.

a large percentage of current national monuments. Congress has dictated management strategies for a considerable number of monuments.\footnote{See infra Part IV.B.2 (discussing how the Organic Act directs the NPS to manage national monuments); see supra text accompanying notes 372–75 (discussing how the NLCS requires BLM to manage national monuments).}

2. Management Strategies

Congress has passed two statutes dealing with management of national monuments. First, as discussed above, the NLCS requires the Secretary of the Interior to manage BLM national monuments in a “manner that protects the values for which the components of the system were designated.”\footnote{Establishment of the Landscape Conservation System, 16 U.S.C. § 7202(c)(2) (2012) (emphasis added).}

A corollary statute exists for monuments that the NPS manages.\footnote{54 U.S.C. § 100101 (Supp. II 2015).} In 1916, Congress passed the Organic Act of 1916.\footnote{John Copeland Nagle, How National Park Law Really Works, 86 UNIV. COLO. L. REV. 861, 871 (2015).} The Organic Act created the NPS to manage the growing number of national parks throughout the U.S.\footnote{Id.} In 1978, Congress updated the Organic Act to include NPS-managed national monuments.\footnote{Id.} Congress specifically stated that the “administration of [national monuments] shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.”\footnote{54 U.S.C. § 100101 (emphasis added).}

Both of these statutes indicate that Congress ratified the monuments managed by the NPS and BLM.

The NPS and BLM manage 138 out of the 155 national monuments in the U.S.\footnote{See generally Antiquities Act, NAT’L PARK SERV., supra note 48 (listing all 155 national monuments and their names, land calculations, and proclamation dates).} Accordingly, even if the President has broad authority to reduce national monuments, these land management bills would prevent the President from reducing the vast majority of monuments in the U.S.
V. WHETHER PAST PRACTICE GIVES PRESIDENTS THE AUTHORITY TO SIGNIFICANTLY REDUCE NATIONAL MONUMENTS

Although congressional ratification may render any alleged presidential authority to reduce national monuments irrelevant in many situations, it probably does not render the question of presidential power to reduce national monuments categorically irrelevant.\(^{391}\) If a court does not rely on FLPMA,\(^{392}\) the question becomes whether past practice gives the President the authority to reduce national monuments. As discussed earlier, there are two potential legal claims as to why past practice gives the President the authority to reduce national monuments.\(^{393}\)

A. Past Practice Does Not Confirm That the President Has the Statutory Authority to Significantly Reduce National Monuments

The first way historical practice may allow the President to reduce national monuments is by confirming that the smallest area compatible requirement gives the President broad statutory authority to reduce national monuments.\(^{394}\) However, just because presidents have historically reduced national monuments does not mean that they actually have the legal authority to do so: past practice alone does not provide legal authority.\(^{395}\) No one challenged any of these past reductions in court.\(^{396}\) The history and context of the Antiquities Act also provide little support for presidential authority to reduce national monuments.\(^{397}\)

---

\(^{391}\) For one, a court may not accept the congressional ratification argument outlined in Part IV.B. Second, even if Congress did ratify all BLM and NPS managed monuments, that would still leave a dozen or so monuments that are managed by other agencies that presidents could potentially reduce.

\(^{392}\) See supra Part IV.A (discussing why courts may not rely on FLPMA to hold that the President lacks the authority to reduce national monuments).

\(^{393}\) See supra Part III (describing the two legal claims that scholars and politicians have used to support the President’s authority to reduce national monuments).

\(^{394}\) See infra notes 418–20 (outlining the argument that history confirms that the President has the statutory authority to reduce national monuments).


\(^{396}\) E.g., Squillace, Presidents, supra note 302, at 65 (“[N]o 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”); see also Rasband, Stroke, supra note 81, at 21-3 (observing that while “[s]everal presidents have diminished the size of monuments,” none of these decisions were ever challenged in court).

\(^{397}\) E.g., Babcock, supra note 340, at 57–58 (“[W]hen Congress specifically gave affirmative authority to the President under the Antiquities Act... but withheld any power to do more, like revoke a previously designated monument or change its boundaries, courts and Presidents should treat that authority as exclusive.”). In October 2017, Representative Bob Bishop, Republican of Utah, introduced H.R. 3990 in the House of Representatives. National Monument Creation and Protection Act, H.R.
However, a court—that does not accept the FLRMA argument—may not ignore the past practice of presidents reducing national monuments.\textsuperscript{398} While it is true that “[p]ast practice does not, by itself, create power,”\textsuperscript{399} courts often look to historical practice to determine the extent of presidential power.\textsuperscript{400} For example, in \textit{NLRB v. Canning}, the Court considered whether a presidential appointment was a valid use of the recess appointment clause—a constitutional provision allowing the President to make appointments of executive officers without the advice and consent of the Senate during congressional recesses.\textsuperscript{401} In conducting its analysis, the Court focused on how presidents had historically used the recess clause to make appointments: “this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”\textsuperscript{402} The Court emphasized that historical practice was important because it “must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”\textsuperscript{403} Importantly, the Court relied on historical practice in its analysis, but did not come to a conclusion completely consistent with historical practice.\textsuperscript{404} Accordingly, the Court relied on historical practice to hold that the recess appointment clause applies to both inter- and intra-session appointments.\textsuperscript{405} But the Court also held that an inter-session recess of 10 days was too short to trigger the clause despite a few historical examples of presidents doing so.\textsuperscript{406}

\textsuperscript{398} See \textit{NLRB v. Canning}, 134 S. Ct. 2550, 2559 (2014) (“[I]n interpreting the Clause, [the Court puts] significant weight upon historical practice.”) (emphasis omitted).

\textsuperscript{399} \textit{Dames & Moore}, 453 U.S. at 686.


\textsuperscript{401} \textit{NLRB}, 134 S. Ct. at 2556, 2560.

\textsuperscript{402} Id. at 2560.

\textsuperscript{403} Id.

\textsuperscript{404} Id. at 2559–60.

\textsuperscript{405} Id. at 2561.

\textsuperscript{406} Id. at 2567.
Although there is a difference between interpreting a provision of the Constitution and interpreting a statute, the underlying consideration in *Cannning* is simple: historical practice may determine the extent of presidential practice. 407 Further, courts in previous Antiquities Act decisions have emphasized the same separation of powers that *Cannning* cited to look to historical practice. 408 Accordingly, a court may rely on the history of presidents reducing monuments—again assuming they do not accept the FLPMA argument—to determine the meaning of the Antiquities Act’s smallest area compatible requirement. 409 Past practice is not viewed as conclusive, but rather as a guide in determining the meaning of the smallest area compatible language. 410

Before considering this past practice, the actual legal claim underlying the view that the smallest area compatible requirement gives the President broad authority to reduce national monuments should be further articulated. Textually, the Antiquities Act differentiates between designating monuments and the smallest area compatible requirement, suggesting that ensuring monuments are the smallest area compatible is a separate, continuing obligation or authority. 411 Presidents’ past practice of reducing monuments based on this language supports this view. 412 The 1938 Attorney General Opinion also supports this view because it acknowledges that presidents have reduced monuments in the past. 413

Most scholars agree—some implicitly—that the smallest area compatible requirement is a continuous obligation that gives the President some authority to modify monuments. For example, Professor Squillace has

407. Id. at 2560.
408. Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) (“[I]f the Congress presumes to delegate its inherent authority to Executive Departments [i.e., the Antiquities Act] which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice . . . .”); cf. Alaska v. Carter, 462 F. Supp. 1155, 1165 (D. Alaska 1978) (declining to issue an injunction against President Carter that would prevent him from closing the comment period on a draft environmental supplement concerning land withdrawals in Alaska because “[t]he ultimate decision on public lands has been delegated to the Congress by Article I of the Constitution . . . .”); see also Klein, supra note 13, at 1346 (highlighting that judicial decisions place the burden upon “Congress to correct executive excess” involving the Antiquities Act); Nishimoto, supra note 280, at 95 (“[J]udges will give broad deference to the President in his use of the Antiquities Act, and place much of the burdens of checks and balance on Congress. . . .”).
409. NLRB, 134 S. Ct. at 2559–60.
410. Id.
411. Rasband, *Future*, supra note 277, at 627–28 (“The act explicitly separates the power to designate ‘structures[,] and other objects’ from the power to ‘reserve’ the land necessary to protect the objects.” (alteration in original)); Yoo & Gaziano, supra note 278, at 660 (arguing that there is no “temporal limit” to the smallest area compatible requirement).
412. See infra Part I (outlining the previous instances that presidents have reduced national monuments).
consistently argued that the President cannot reduce national monuments. He dismisses the notion that the smallest area compatible requirement allows the President to reduce national monuments, but acknowledges that it may allow the President to fix a mistake or to define boundaries that are indeterminate. Professor Squillace thereby acknowledges that the smallest area compatible requirement is a continuing authority but concludes that the scope of the authority is very narrow.

What is in dispute, therefore, is the scope of the authority. Generally, there are three separate views on the scope of the President’s authority. Most narrowly, some argue that the smallest area compatible requirement only gives the President authority to correct mistakes in the original designation or to clarify indeterminate boundaries. Second, some have argued that the smallest area compatible requirement allows the President to slightly adjust the boundaries of monuments, but not make major reductions. Third, some argue the smallest area compatible requirement gives the President broad authority to reduce national monuments.

Those that support the third view often argue that history supports this broad view of the smallest area compatible requirement. The problem

414. Squillace, Presidents, supra note 302, at 51–71; Squillace, Monumental, supra note 41, at 561.
415. Squillace, Presidents, supra note 302, at 57, 68–69.
416. Id.; see also ARNOLD & PORTER KATE SCHOLER, supra note 316, at 3, 14 (concluding that the President cannot substantially alter a monument, but conceding that “[i]t is unclear whether a President could make non-material adjustments to monument boundaries without congressional authorization”). But see Rasband, Stroke, supra note 81, at 21-18 (“[I]t is unclear whether the ‘smallest area compatible’ language creates a continuing, as opposed to a one-time, duty to consider whether less acreage would be sufficient to fulfill the Antiquities Act’s protective purpose.”).
417. Squillace, Presidents, supra note 302, at 69 (“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 . . . .”); Squillace, Monumental, supra note 41, at 561 (explaining that smallest area compatible “language might support a President’s decision to fix boundaries that are found to be indeterminate, or to correct a mistake that might have been made in an original proclamation”).
418. Margherita, supra note 275, at 292 (“[T]here is at least a modicum of precedent for presidents to reduce the size of existing monuments and some evidence of discernable restrictions on the exercise of that power.”); ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 5 (2016) (“[D]espite some potential ambiguity in the phrasing of the Antiquities Act, there is precedent for Presidents to reduce the size of national monuments by proclamation.”); Udall, supra note 3, at 14 (highlighting that, “it seems fairly well established that presidents can modify existing national monuments” based on the “smallest area compatible” language).
419. Yoo & Gaziano, supra note 278, at 651 (“A presidential determination that an original designation was illegally or inappropriately large is a special case. It may provide a sound predicate for declaring a designation to be invalid or for significantly reducing the monument’s size.”); Seamon, supra note 278, at 584–85.
420. See ZINKE, supra note 203, at 2 (“Existing monuments have been modified by successive Presidents in the past, including 18 reductions in the size of monuments, and there is no doubt that [Presidents] have the authority to review and . . . modify . . . a monument.”); Seamon, supra note 278, at
with this argument is that not all of this historical practice supports the third view. For example, some scholars cite instances in which presidents have slightly reduced monuments to support the third view. But a President slightly reducing a monument would support the first view of the President’s authority to modify monuments, rather than the third one.

Consistent with Canning, it is important to critically analyze the past practice of presidents reducing national monuments to determine what it demonstrates about the President’s authority to modify national monuments based on the smallest area compatible requirement. Presidents have reduced national monuments in a number of different ways based on a variety of circumstances. First, on two occasions, presidents modified monuments they initially designated or expanded. In 1912, President Taft reduced Navajo National Monument—which he established three years earlier—from 360 to 40 acres. Additionally, in 1941, FDR reduced Wupatki National Monument by about 53 acres. Several years earlier, however, FDR expanded the Monument by over 30,000 acres. These reductions only suggest that the President who establishes or expands a national monument can slightly adjust boundaries on those same monuments. Arguably, the President that designates a monument should have more authority to modify that monument. The Antiquities Act gives the President “one-way authority” to designate national monuments.
When presidents modify monuments they created, they are exercising that same discretion.\textsuperscript{428} But either way, these reductions provide no support for the claim that presidents can reduce monuments established by their predecessors.

Second, in 1956, Eisenhower eliminated 40 acres from Hovenweep National Monument, but added an undefined amount of acreage at the same time, resulting in a slight gain to the Monument.\textsuperscript{429} This provides no support for the claim that the President can reduce national monuments; instead, it merely suggests that the President can slightly adjust the land contained within a monument.

Third, on two occasions, presidents excluded lands from national monuments that the Army was using for military purposes. In 1955, President Eisenhower eliminated 29,000 acres from Glacier Bay National Monument that the Army was using as an airfield after he determined that the land was no longer necessary for the Monument.\textsuperscript{430} Additionally, President Truman eliminated approximately 4,700 acres from the Santa Rosa Island National Monument that the Army was also using for “military purposes.”\textsuperscript{431}

At the time these reductions occurred, the President had judicially recognized implied powers to create military reservations.\textsuperscript{432} In \textit{Midwest Oil}, the Supreme Court recognized that the President has implied power over federal lands because of congressional acquiescence.\textsuperscript{433} Specifically, the Court recognized the longstanding practice of presidents designating military reservations without statutory authority.\textsuperscript{434} That authority no longer exists because FLPMA repealed \textit{Midwest Oil} and any implied executive authority to create military reservations.\textsuperscript{435} Presidents Eisenhower and Truman’s reductions essentially created military reservations and, therefore, fell within the implied presidential power to create military reservations that

\textsuperscript{428} Id. at 555.
\textsuperscript{429} Proclamation Reducing Hovenweep National Monument, 3 C.F.R. 70, 70 (1956); \textit{Antiquities Act}, NAT’L PARK SERV., supra note 48.
\textsuperscript{430} Proclamation Reducing Glacier Bay, 3 C.F.R. 24, 36 (1955).
\textsuperscript{431} Proclamation Reducing Santa Rosa Island National Monument, 3 C.F.R. 35, 35 (1946); \textit{Antiquities Act}, NAT’L PARK SERV., supra note 48.
\textsuperscript{432} United States v. Midwest Oil Co., 236 U.S. 459, 483 (1915).
\textsuperscript{433} Id.
\textsuperscript{434} Id. at 470–71 (“There was no law for the establishment of these Military Reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement or to reserve them for any of the purposes indicated.”).
\textsuperscript{435} Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2792 (“Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress . . . [is] repealed.”).
no longer exists. Accordingly, these reductions do not support the claim that the Antiquities Act alone gives the President the authority to reduce monuments.

Fourth, on four occasions, presidents corrected mistakes in the original proclamation or updated survey information that described the monument’s boundaries. In 1916, President Wilson updated the boundaries of Natural Bridges National Monument based on the most recent geologic survey. In 1946, President Truman updated the boundaries of Great Sand Dunes National Monument for the same reason. In 1962, President Kennedy also updated the boundaries of Timpanogas Cave National Monument based on geologic survey information. Finally, in 1975, President Ford issued a proclamation fixing a typographical error in his proclamation expanding Buck Reef National Monument. These instances suggest that presidents can correct mistakes or update survey information. They provide no support for the claim that presidents can significantly reduce monuments established by their predecessors.

Fifth, presidents have slightly reduced National Monuments on numerous occasions. Three of these reductions, however, are particularly interesting. FDR removed 87 acres from the White Sands National Monument that were on Route 70’s right-of-way. Similarly, FDR slightly reduced Craters of the Moon National Monument so Idaho State Highway No. 22 could be built. Additionally, when President Eisenhower removed the military airfield from Glacier Bay National Monument, he also removed a certain undefined amount of private land that was suitable for agricultural use.

First, these reductions only support the view that the smallest area compatible language gives the President the slight authority to adjust national monuments. But on a more critical analysis, the reasoning

436. Id.
441. Antiquities Act, NAT’L PARK SERV., supra note 48. FDR’s reduction of White Sands could also fall into the category of reductions where presidents reduced monuments they expanded. In 1934, FDR increased White Sands by 158 acres. Id. Four years later, FDR removed 87 acres from the Monument. Proclamation Reducing White Sands National Monument, 3 C.F.R. 46, 46 (1938).
underlying these reductions is questionable. All national monument designations are subject to valid existing rights.\textsuperscript{445} Private rights within national monument boundaries are largely unaffected.\textsuperscript{446} When FDR and President Eisenhower reduced monuments they did so to accommodate private property interests.\textsuperscript{447} FDR removed 87 acres because of a right-of-way.\textsuperscript{448} While FDR’s proclamation reducing Craters of the Moon for State Highway No. 22 does not say so,\textsuperscript{449} State Highway No. 22 also had a right-of-way.\textsuperscript{450} Since whoever was building these highways had a right-of-way, they had the legal right to build the road through the Monument whether or not FDR or President Eisenhower modified the boundaries.\textsuperscript{451} Similarly, President Eisenhower removed private land from Glacier Bay that was suitable for agricultural use.\textsuperscript{452}

All three of these reductions provide little support for the view that the President can significantly reduce federal land within monuments because they only deal with private land. But, even further, the actual effects of these reductions are slim: the landowners could have farmed and the highways could have been built regardless of whether the land was taken out of the Monuments.\textsuperscript{453} These reductions suggest that presidents misunderstood the effects of monument designations.\textsuperscript{454} This is a problem if these instances are supposed to demonstrate that previous presidents had a sound legal understanding that the Antiquities Act gave them the authority to reduce national monuments.

Additionally, one of the presidents may have lacked the authority to slightly reduce the monument for an entirely different reason than his alleged authority under the Antiquities Act. In 1960, President Eisenhower eliminated 470 acres from the 10,287-acre Black Canyon of the Gunnison

\begin{footnotes}
\textsuperscript{445} Ranchod, \textit{supra} note 264, at 572–73.
\textsuperscript{446} \textit{Cf. id.} at 573 (“Valid existing rights must be respected, but can be regulated in order to protect the purposes of the monument.”).
\textsuperscript{447} Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36; \textit{Antiquities Act}, Nat’l Park Serv., \textit{supra} note 48.
\textsuperscript{448} \textit{Antiquities Act}, Nat’l Park Serv., \textit{supra} note 48.
\textsuperscript{450} \textit{Antiquities Act}, Nat’l Park Serv., \textit{supra} note 48.
\textsuperscript{451} \textit{Right of way}, BLACK’S LAW DICTIONARY (5th ed. 2016) (“The right to build and operate a railway line or a highway on land belonging to another, or the land so used.”).
\textsuperscript{452} Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36.
\textsuperscript{453} \textit{Bear Ears National Monument Questions & Answers}, U.S. Forest Serv. (Sept. 10, 2018), https://www.fs.fed.us/sites/default/files/bear-ears-fact-sheet.pdf (“The national monument designation does not alter or affect valid existing rights of any party . . . as long as they are consistent with [its] care and management . . .”).
\textsuperscript{454} \textit{Id.}.
\end{footnotes}
National Monument, President Eisenhower reduced the Monument in response to a congressionally authorized land exchange that eliminated all the private inholdings to make all the land inside the Monument federal. Importantly, President Eisenhower eliminated 470 acres from the Monument after this land exchange. While the standard a court would apply in determining whether Congress ratified a monument is not clear, the land exchange would imply that Congress ratified Black Canyon. In the case of congressional ratification, President Eisenhower would have lacked the authority to reduce the Monument.

Presidents have slightly reduced national monuments on three other occasions. President Taft removed 160 acres from the 608,640-acre Mount Olympus National Monument. President Eisenhower reduced the 13,883-acre Colorado National Monument by about 90 acres and then reduced Arches National Monument by about 240 acres. Again, these reductions only support the view that the smallest area compatible language gives the President the authority to slightly reduce the size of national monuments.

Last, on five occasions, presidents have significantly reduced national monuments established by earlier presidents. This first occurred in 1911 when President Taft reduced Petrified Forest National Monument by about 50%. Similarly, President Wilson reduced Mount Olympus National Monument by about 300,000 acres or in half. FDR also reduced the Grand Canyon National Monument II by roughly 70,000 acres.

President Eisenhower reduced the Great Sand Dunes National Monument by about

458. See supra Part IV.B (arguing that the distinctively clear intent standard courts usually apply for congressional ratification is inappropriate in the context of national monuments).
459. 72 Stat. at 102.
460. See supra notes 343–67 (explaining why presidents lack the power to reduce national monuments in the case of congressional ratification).
464. The reductions of Glacier Bay and Santa Rosa Island National Monuments were also significant. Antiquities Act, NAT’L PARK SERV., supra note 48. But, as discussed above, these reductions are not relevant for considering the President’s authority under the Antiquities Act. See supra notes 430–36 (arguing that when presidents reduced Glacier Bay and Santa Rosa Island National Monuments, they had the implied power to create military reservations).
466. Id.
467. Id.
20% or 8,520 acres.\textsuperscript{468} Finally, President Kennedy reduced Bandelier National Monument by about 1,000 acres.\textsuperscript{469}

Although presidents have slightly reduced or clarified the boundaries of national monuments on several occasions, the practice of presidents significantly reducing national monuments established by their predecessors is uncommon. In the 100-year history of the Antiquities Act, presidents have significantly reduced monuments—using only the Antiquities Act—on five occasions.\textsuperscript{470} Consistent with \textit{Canning}, these five instances do not provide enough historical support to conclude that the President has the statutory authority to significantly reduce national monuments established by his predecessors.\textsuperscript{471} The standard for when a reduction becomes significant is not clear, and determining whether a reduction is significant may present a difficult question. But President Trump’s reductions of Grand Staircase and Bears Ears are clearly significant under any standard.\textsuperscript{472}

Moreover, there are additional reasons why these historical reductions do not support a claim that the current President can significantly reduce national monuments. First, modern proclamations establishing national monuments explicitly state that the area reserved for the monument is the smallest area compatible for the preservation and management of the monument.\textsuperscript{473} This practice of explicitly stating that monuments are the

\textsuperscript{468} Proclamation Reducing Great Sand Dunes National Monument, 3 C.F.R. 23, 23–24 (1956), \textit{reprinted in} 70 Stat. c31–32 (1957); \textit{Antiquities Act, Nat’l Park Serv.}, \textit{supra} note 48; Kerr, \textit{supra} note 20, at 70.

\textsuperscript{469} Proclamation Reducing Bandelier National Monument, 3 C.F.R. 62, 63–65 (1963), \textit{reprinted in} 77 Stat. 1006 (1963); \textit{Antiquities Act, Nat’l Park Serv.}, \textit{supra} note 48.

\textsuperscript{470} \textit{See supra} notes 461–69 and accompanying text (discussing that presidents have only significantly reduced monuments on five occasions).

\textsuperscript{471} \textit{Cf.} NLRB v. Canning, 134 S. Ct. 2550, 2567 (2014) (holding that an inter-session recess of less than ten days was too short to trigger the recess appointment clause, even though “[t]here are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days”).

\textsuperscript{472} Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,085 (Dec. 4, 2017) (reducing Bears Ears by 1,150,860 acres); Proclamation Modifying Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017) (reducing Grand Staircase by 861,974 acres). In the litigation surrounding President Trump’s reductions, a reviewing court may never even reach the question of whether a president can reduce monuments. If the court accepts the argument raised by some of the litigants that President Trump’s actions were equivalent to the revocation of a national monument designation, the court would only have to determine whether the President can abolish national monuments. While legally untested, there are compelling reasons why the President lacks this power. \textit{See supra} Part II (discussing why the President lacks the authority to abolish national monuments).

\textsuperscript{473} \textit{E.g.}, Proclamation Establishing Bears Ears National Monument, 3 C.F.R. 402, 407 (2016) (“The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.”); Proclamation Establishing Grand Staircase-Escalante National Monument, 3 C.F.R. 64, 67 (1997), \textit{reprinted in} 110 Stat. 4561 (1997)
smallest area compatible did not start until the Carter Administration.\textsuperscript{474} Each time presidents have significantly reduced national monuments—with the exception of President Trump—the original proclamation did not limit the area reserved to the smallest area compatible for the management of the monument.\textsuperscript{475}

Rather, on two occasions—Mount Olympus and Great Sand Dunes—the original proclamations made no reference to whether the monument was the smallest area compatible.\textsuperscript{476} On the other three occasions, the proclamations reserved as much land “as is” or “may be necessary” for the management of the monument.\textsuperscript{477} The question still remains whether a proclamation that does not declare that a monument is the smallest area compatible is illegal, and would therefore give a subsequent president the right to determine the smallest area compatible.\textsuperscript{478} Claiming that the

\begin{footnotesize}
\begin{itemize}
\item[474.] Squillace, \textit{Monumental}, supra note 41, at 555.
\item[475.] \textit{See infra} notes 476–77 (providing the text of the original proclamations).
\item[476.] Proclamation Establishing Great Sand Dunes National Monument, 47 Stat. 2506 (1932) (“\textit{I}t appears that the public interest would be promoted by including the lands hereinafter described within a national monument for the preservation of the great sand dunes . . . .”); Proclamation Establishing Mount Olympus National Monument, 35 Stat. 2247 (1909) (“\textit{T}he slopes of Mount Olympus . . . embrace certain objects of unusual scientific interest, including numerous glaciers, and the region which from time immemorial has formed the summer range and breeding grounds of the Olympic Elk . . . a species peculiar to these mountains and rapidly decreasing in numbers.”).
\item[477.] Proclamation Establishing Grand Canyon National Monument II, 47 Stat. 2547 (1932) (“\textit{I}t appears that the public interest would be promoted by reserving this portion of the Grand Canyon as a national monument, with such other land \textit{as is necessary} for its proper protection . . . .” (emphasis added)); Proclamation Establishing Bandelier National Monument, 39 Stat. 1764 (1916) (“\textit{I}t appears that the public interests would be promoted by reserving the [area] with as much land \textit{as may be necessary} for the proper protection thereof, as a National Monument.” (emphasis added)); Proclamation Establishing Petrified Forest National Monument, 34 Stat. 3266 (1906) (“\textit{I}t appears that the public good would be promoted by reserving these deposits of fossilized wood as [Petrified Forest] National monument with as much land \textit{as may be necessary} for the proper protection thereof . . . .” (emphasis added)). The reductions of Glacier Bay and Santa Rosa Island National Monuments were also significant reductions, but they are distinguishable from these other significant reductions because at the time they occurred the President had the implied power to create military reservations. \textit{See supra} notes 430–36 (describing the reductions of Glacier Bay and Santa Rosa Island National Monuments). Nevertheless, even if these reductions are considered evidence of the President’s authority under the Antiquities Act alone, the same considerations apply. Neither of the original proclamations establishing these Monuments stated that they were reserved to the smallest area compatible. Proclamation Establishing Santa Rosa Island National Monument, 3 C.F.R. 32, 33 (1939) (“Now, Therefore, I, Franklin D. Roosevelt . . . do proclaim that . . . the following-described lands in Florida are hereby reserved from all forms of appropriation under the public-land laws and set apart as the Santa Rosa Island National Monument.”); Proclamation Establishing Glacier Bay National Monument, 43 Stat. 1989 (1925) (“Now, Therefore, I, Calvin Coolidge . . . do proclaim that there is hereby reserved from all forms of appropriation under the public land laws, subject to all prior valid claims, and set apart as the Glacier Bay National Monument, the [following] tract of land.”).
\item[478.] Squillace, \textit{Monumental}, supra note 41, at 555.
\end{itemize}
\end{footnotesize}
monument reserves as much land as “may be necessary” invites a similar question: does “may be necessary” imply that the reserved area should or could change?\(^\text{479}\) But in the contemporary context, this issue is moot: designations over the last 20 years have explicitly stated they are reserved to the smallest area compatible.\(^\text{480}\)

But to the critical point: no President has significantly reduced a national monument when the initial proclamation stated that the original designation was the smallest area compatible.\(^\text{481}\) Given that courts have essentially held that a monument is the smallest area compatible when the President declares it to be, this is a critical distinction.\(^\text{482}\) In the history of the Antiquities Act, no president has ever overruled an earlier President’s discretionary judgment that a monument was the smallest area compatible by significantly reducing a national monument.\(^\text{483}\)

Additionally, Congress responded when presidents significantly reduced monuments by protecting the land those presidents removed from national monuments.\(^\text{484}\) This repeated response suggests that presidents should not have the authority to significantly reduce national monuments because it violates the protective purpose of the Antiquities Act.

1. Bandelier

In 1963, President Kennedy reduced Bandelier National Monument by about 1,000 acres.\(^\text{485}\) After President Kennedy’s reduction, Congress passed two pieces of legislation. First, in 1976, Congress designated 70% of the Monument as wilderness.\(^\text{486}\) Second, in 1998, Congress passed the Bandelier National Monument Administrative Improvement and Watershed

\(^{479}\) Id. (“[A]n original monument proclamation, by definition, represents the judgment of a president that the area protected is the ‘smallest area compatible with the proper care and management’ of the protected objects. Otherwise the proclamation would be invalid on its face.”).

\(^{480}\) Id.

\(^{481}\) See supra text accompanying notes 470–75 (explaining that the five times presidents significantly reduced monuments, the original proclamations did not limit monument to the smallest area compatible).

\(^{482}\) E.g., Utah Ass’n of Cys. v. Bush, 316 F. Supp. 2d 1172, 1186 (D. Utah 2004) (“The language of the Proclamation clearly indicates that the President considered the principles that Congress required him to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects.”).

\(^{483}\) Squillace, Monumental, supra note 41, at 567.

\(^{484}\) Id. at 564.


Protection Act. 487 The Act acknowledged that “[a]t various times since its establishment, the Congress and the President have adjusted the Monument’s boundaries.” 488 The Act noted that the Monument faced threats from “flooding, erosion, and water quality deterioration because of the mixed ownership of the upper watersheds.” 489 To correct this problem, Congress acquired an additional 935 acres of land to enhance and protect the Monument. 490 In both of these acts, Congress responded to President Kennedy’s reduction by significantly increasing the size of and further protecting the Monument. 491

2. Mount Olympus

In 1915, President Wilson reduced Mount Olympus National Monument by nearly 300,000 acres. 492 Several years after President Wilson reduced Mount Olympus, Congress designated the Monument as a national park 493 and put most of the land that Wilson had removed from the Monument into the National Park. 494 In the Act designating Mount Olympus National Park, Congress specifically allowed the President to expand the park. 495 In 1988, Congress further protected the Park by designating 95% of it as a wilderness area. 496 Once again, Congress responded to a president reducing a national monument by protecting lands that the President took out of the Monument. 497

488. Id.
489. Id. at 3389.
490. Id.
491. Id.
494. Squillace, Monumental, supra note 41, at 564.
495. 52 Stat. at 1242.
497. See Squillace, Monumental, supra note 41, at 564 (“When the Mount Olympus National Monument was transformed into the Olympic National Park in 1938, much of the land that President Wilson took out of the monument was put back into the park, suggesting that this land did indeed encompass objects worthy of preservation.”).
3. Great Sand Dunes

After President Eisenhower reduced Great Sand Dunes National Monument by about 20%,\(^{498}\) Congress had a similar reaction. In 1976, Congress designated most of the Monument as wilderness\(^{499}\) and then enlarged the Monument two years later.\(^{500}\) In 2000, Congress designated Great Sand Dunes as a national park and a separate national preserve.\(^{501}\) In 2014, the Park contained 107,000 acres and the Preserve contained 41,000 acres.\(^{502}\) While President Eisenhower reduced the Monument by 9,480 acres, by 2004, Congress had protected over 140,000 acres in what was once the Great Sand Dunes National Monument.\(^{503}\)

4. Petrified Forest

Finally, after President Taft reduced Petrified Forest National Monument by half,\(^{504}\) Congress passed multiple pieces of legislation protecting the Monument by designating the Monument as a national park\(^{505}\) and then significantly expanding the Park from 93,533 to 218,533 acres.\(^{506}\)

In the vast majority of circumstances,\(^ {507}\) Congress expressed its disapproval of presidents interpreting the smallest area compatible language


\(^{502}\) Kerr, supra note 20, at 7.

\(^{503}\) Proclamation Reducing Great Sand Dunes National Monument, 3 C.F.R. at 23–24; Antiquities Act, Nat’l Park Serv., supra note 48; Kerr, supra note 20, at 7.

\(^{504}\) Antiquities Act, Nat’l Park Serv., supra note 48.


\(^{507}\) The only outlier is FDR’s reduction of Grand Canyon National Monument II. Proclamation Reducing Grand Canyon National Monument II, 3 C.F.R. 32, 32 (1940), reprinted in 54 Stat. 2692 (1941). Though Congress expanded Grand Canyon National Park a few years after FDR’s reduction, the new boundary of the Park mirrored the boundary FDR created when he reduced the Monument. Ingram, supra note 118. This would suggest that Congress supported FDR’s decision. But see Squillace, Monumental, supra note 41, at 564–65 (arguing that FDR’s decision to reduce Grand Canyon National Monument II “was a concession to political concerns, and was not made on the basis of an assessment that the reduced area was the ‘smallest area compatible with the proper care and management of the objects to be protected.’” (quoting 16 U.S.C. § 431 (2000), recodified at 54 U.S.C. § 320301(b) (Supp. III 2016))). However, Congress responded to most instances that presidents significantly reduced monuments by protecting the land taken out of the monuments. This practice of Congress responding to
to significantly reduce national monuments by protecting land that presidents had taken out of those monuments. This congressional response, in addition to the fact that presidents have only significantly reduced national monuments on five occasions, indicates that presidents do not have the authority to significantly reduce national monuments established by their predecessors.

To recap, several general patterns emerge from the history of presidents using the smallest area compatible requirement to reduce national monuments. First, on two occasions, presidents reduced national monuments to exclude lands the army used for military purposes. Given that presidents had the implied power to create military reservations at the time, these reductions do not support a claim that the President has authority under the Antiquities Act alone to reduce monuments.

Second, on two occasions, presidents made slight adjustments to monuments they designated or expanded. These reductions at most suggest that presidents can reduce monuments they established or expanded. But no court has ever held that the President has the legal authority to make slight reductions. Nevertheless, they provide no support for the claim that subsequent presidents can modify monuments established by their predecessors. Third, on one occasion, a president eliminated some land from a monument while adding other land, resulting in a net increase. This reduction only suggests that the President can adjust the boundaries of monuments. Fourth, on four occasions, presidents

reductions is even more compelling when considering every time that presidents have reduced monuments. Andy Kerr analyzes every instance that presidents have reduced national monuments and argues that “most” of the land taken out of national monuments “was reproclaimed by a later president or otherwise protected by an act of Congress.” Kerr, supra note 20, at 3.

508. See supra Part V.A (documenting the congressional response to each instance that presidents significantly reduced national monuments).

509. See supra Part V.A.1 (discussing Congress’s response to President Kennedy’s reduction of Bandelier National Monument); see also supra Part V.A.2 (discussing Congress’s response to President Wilson’s reduction of Mount Olympus National Monument); supra Part V.A.3 (discussing Congress’s response to President Eisenhower’s reduction of Great Sand Dunes National Monument); supra Part V.A.4 (discussing Congress’s response to President Taft’s reduction of Petrified Forest National Monument).

510. See supra notes 430–36 (describing the reductions of Glacier Bay and Santa Rosa Island National Monuments).

511. See supra text accompanying notes 430–36 (describing presidential use of subsequently repealed implied powers to reduce national monuments for sake of military use of the excluded lands).

512. See supra notes 423–26 (describing the reductions of Navajo and Wupatki National Monuments).

513. Squillace, Monumental, supra note 41, at 555.

514. Squillace, Presidents, supra note 302, at 65.

515. See supra notes 160–62 (describing President Eisenhower’s adjustment of Hovenweep National Monument).
updated the boundaries of national monuments based on survey information or to correct typographical mistakes.\textsuperscript{516} These reductions only suggest that the President has the narrow authority to correct proclamations.

Fifth, a number of presidents have slightly reduced national monuments.\textsuperscript{517} On three of these occasions, the reasoning presidents provided for their reduction was based on a mistaken understanding of monument designations.\textsuperscript{518} On another one of those occasions, the President may have lacked the authority to reduce monuments because of congressional ratification.\textsuperscript{519} Last, in five instances, presidents have significantly reduced monuments established by their predecessors.\textsuperscript{520} Given the few times these reductions have occurred, and the subsequent congressional reactions, these instances do not support the claim that presidents have the legal authority to significantly reduce national monuments.

**B. Congress Has Not Acquiesced to Presidents Significantly Reducing National Monuments**

The other way that historical practice may allow the President to reduce national monuments is congressional acquiescence. Congressional acquiescence falls into the second category of Justice Jackson’s framework: the “zone of twilight.”\textsuperscript{521} If the President lacks the authority to engage in an action, but claims the authority for long enough and Congress fails to respond, the President may nevertheless have the authority.\textsuperscript{522} To prove congressional acquiescence, the President must show “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.”\textsuperscript{523} Advocates of congressional acquiescence argue that presidents have reduced monuments on numerous

\begin{itemize}
\item \textsuperscript{516} See supra notes 437–40 (describing the modifications of Natural Bridges, Great Sand Dunes, Timpanogas Cave, and Buck Island Reef National Monuments).
\item \textsuperscript{517} See supra notes 441–63 (describing the reductions of White Sands, Craters of the Moon, Glacier Bay, Black Canyon of the Gunnison, Mount Olympus, Colorado, and Arches National Monuments).
\item \textsuperscript{518} See supra notes 444–54 and accompanying text (describing the flawed reasoning behind the reductions of White Sands, Craters of the Moon, and Glacier Bay National Monuments).
\item \textsuperscript{519} See supra notes 455–60 (describing the reasons why President Eisenhower may have lacked the authority to reduce Black Canyon of the Gunnison National Monument).
\item \textsuperscript{520} See supra notes 464–69 (describing the reductions of Petrified Forest, Grand Canyon II, Great Sand Dunes, Mount Olympus, and Bandelier National Monuments).
\item \textsuperscript{521} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
\item \textsuperscript{522} Id.
\end{itemize}
occasions. And while Congress has amended the Antiquities Act twice, it has failed to expressly declare that the President lacks the authority to reduce national monuments.

First, this argument acknowledges that presidents lack the statutory authority to reduce monuments: if the President had the statutory authority to reduce monuments, Congress would not have to acquiesce to that authority. Second, advocates again point to every example of presidents reducing national monuments to show that Congress has acquiesced, but in many of those reductions, presidents only slightly reduced monuments. In Medellin, the Supreme Court addressed this issue.

Medellin involved the question of whether the President, by issuing a memorandum, could turn a non-binding decision of the International Court of Justice (ICJ) into binding domestic law. President Bush argued that presidents had historically used their constitutional authority to make treaties and resolve disputes with foreign nations to turn ICJ decisions into binding law. Therefore, Congress had acquiesced to presidents acting in this manner. In considering whether there had been congressional acquiescence, the Court looked for acquiescence to the particular kind of action in the present case: a presidential memorandum turning a non-binding ICJ decision into binding domestic law. Applying that narrow standard, the Court held that there was no evidence of congressional acquiescence to that particular activity. In the process, the Court rejected

---

524. E.g., Seamon, supra note 278, at 582 (“[P]residents 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.”).

525. E.g., Rasband, Stroke, supra note 81, at 21-25 (“[C]ongressional acquiescence in 18 presidential reductions, and Congress’s subsequent amendments to the Antiquities Act without restricting reductions . . . creates a strong presumption that Congress has consented to presidential reductions in monument size.”); but see supra Part IV.A (discussing the argument that Congress amended the Antiquities Act when it passed FLPMA).

526. See supra Part III (explaining that congressional acquiescence is only relevant when the Executive lacks the authority to act).

527. See, e.g., Rasband, supra note 81, at 21-25 (arguing that Congress has acquiesced to “18 presidential reductions”); see also supra notes 510–519 (outlining the various instances that presidents have reduced national monuments).

528. Turner, supra note 284, at 685.


530. Id. at 525.

531. Id.

532. Id. at 532.

533. Id. (“Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts . . . .”).
instances where Congress has acquiesced to other uses of the President’s
treaty and dispute resolution powers.\footnote{Id. (‘‘The Executive’s narrow and strictly limited authority to settle international claims
disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.’’); see also Turner, \textit{supra} note 284, at 689 (explaining that the \textit{Medellin} Court ‘‘insist[ed] that the specific actions taken by the President have a history of congressional acquiescence’’).}

\textit{Medellin} suggests that courts will define any claim of congressional
acquiescence in very narrow terms.\footnote{\textit{Medellin}, 552 U.S. at 501.} The President must show
acquiescence to the action in the particular situation and not a generalized
claim of congressional acquiescence in an entire field.\footnote{Id. at 532.} Consistent with
\textit{Medellin}, the question is whether Congress acquiesced to presidents
significantly reducing national monuments, not merely modifying
monuments in general.\footnote{Id.}

Although Congress may not have amended the Antiquities Act,\footnote{But see \textit{supra} Part IV.A (discussing the argument that Congress amended the Antiquities
Act when it passed FLPMA).} Congress has responded in other ways when presidents have significantly
reduced national monuments. For example, after President Wilson reduced
Mount Olympus National Monument,\footnote{\textit{Antiquities Act, NAT’L PARK SERV., supra} note 48.} Congress designated the area as a
national park that included most of the land President Wilson had taken out
of the Monument.\footnote{Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241; Squillace, \textit{Monumental, supra} note 41, at 564.} While the Monument was only 600,000 acres when
President Roosevelt designated it,\footnote{Dames & Moore v. Regan, 453 U.S. 654, 686 (1981).} by 2014 the Monument-turned-Park
contained over 900,000 acres.\footnote{See \textit{supra} Parts V.A.3–4 (discussing Congress’s response to the reduction of Great Sand
Dunes and Petrified Forest National Monuments).} Since the standard for congressional
acquiescence is whether the practice has never been questioned, one

But Congress responded every time that presidents have significantly
reduced monuments. After the reductions of Great Sand Dunes and
Petrified Forest National Monuments, Congress designated both the
of the lands within the Monument’s upper watershed.” These responses all demonstrate that Congress has not been indifferent or acquiesced.\footnote{546} \footnote{547}

CONCLUSION

In 1903, President Roosevelt, standing on the rim of the Grand Canyon, famously stated, “the great loneliness and beauty of the Canyon. You can not improve it. The ages have been at work on it and man can only mar it.”\footnote{548} But during the early 1900s, President Roosevelt was deeply concerned about development around the Grand Canyon.\footnote{549} The Atchinson, Topeka, and Santa Fe Railroad was planning on building a large hotel on the rim of the Grand Canyon.\footnote{550} Ralph Henry Cameron was seeking out mining claims and planning to build an electric railway for sightseeing tours on the rim of the canyon.\footnote{551} These concerns led Roosevelt to designate the Grand Canyon as a national monument in 1908.\footnote{552} While the Monument was controversial at its time, Grand Canyon National Park is now a beloved part of the American landscape.\footnote{553}

The designation of national monuments usually results in this typical chain of events. Designations create controversy that, more often than not, fades into widespread support.\footnote{554} The Antiquities Act serves the essential function of allowing the President to act quickly and protect parts of the American landscape until Congress decides to pass broader land-management legislation.\footnote{555}

President Trump’s proclamations modifying Grand Staircase and Bears Ears reflect another, albeit questionable, pattern in presidents’ use of the

\footnote{547} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
\footnote{548} ROTHMAN, PRESERVING, supra note 35, at 65.
\footnote{549} Id.
\footnote{550} Id.
\footnote{551} Id. at 66.
\footnote{552} Proclamation Establishing Grand Canyon National Monument, 35 Stat. 2175 (1908).
\footnote{553} Tom Kenworthy, Opinion, A Tribal Coalition Wins a Monument for Bears Ears, DENVER POST (Dec. 31, 2016), https://www.denverpost.com/2016/12/31/a-tribal-coalition-wins-a-monument-for-bears-ears/; Udall, supra note 3, at 15 (“Grand Canyon and Grand Teton National Parks, both of which were controversial at the time of their creation, are now widely viewed as national treasures that define this country.”).
\footnote{554} VINCENT & BALDWIN, supra note 40, at 3–4 (“About half of the current national parks were first designated as national monuments.”).
\footnote{555} On January 1, 1908, President Roosevelt designated Pinnacles National Monument. Antiquities Act, NAT’L PARK SERV., supra note 48. Over the course of the next 100 years, five presidents enlarged the Monument until Congress designated the Monument as a national park in 2013. Margherita, supra note 275, at 300.
Antiquities Act: presidents using the Act to reduce national monuments. While several presidents have reduced national monuments, this Note argues that those reductions do not provide the President with the authority to significantly reduce national monuments. In light of FLPMA and congressional ratification, those past reductions may be irrelevant. But even assuming a court takes past reductions into account, they do not support the claim that presidents can significantly reduce national monuments established by their predecessors. More than 100 years after the passage of the Antiquities Act, a court may soon provide a concrete answer to this much debated and controversial question.

—Noah Greenstein

---

556. See supra Part I (outlining the previous instances that presidents have reduced national monuments).
557. See supra Part IV (arguing that the past practice of presidents reducing monuments is irrelevant because of FLPMA and congressional ratification).
558. See supra Part V (concluding that presidents have only significantly reduced monuments on five occasions, and those five instances do not provide the President with the authority to significantly reduce monuments).
559. See supra notes 254–59 (describing the current litigation surrounding President Trump’s “modification” of Bears Ears National Monument); see also supra notes 239–42 (outlining the litigation over President Trump’s “modification” of Grand Staircase-Escalante National Monument).
* Juris Doctor Candidate 2018, Vermont Law School.
† I would like to express my sincere acknowledgments for everyone who helped me in writing this Note, including Professor Hillary Hoffmann, who provided insightful comments on my Note, as well as Jenny Leech and Liz Bower, who helped shape and guide the writing process. I would also like to thank those who have written on the Antiquities Act and provided the starting point from where my Note begins. My interest in national monuments was sparked from working as a photo kayaker on the Arkansas River near Buena Vista, Colorado my last summer before law school. Shortly before I started this job, former President Barack Obama designated this section of the Arkansas as Browns Canyon National Monument. During this summer, I spent extensive time in the Monument and saw the important cultures, landscapes, and economies that national monuments protect. So I’d be remiss not to thank everyone who allowed me to spend so much time in our nation’s monuments and public lands, and started me on the path that culminated in this Note. This includes, but is not limited to, my parents and the various guiding communities that have accepted me with open arms over the years, especially a town in Upstate New York called North Creek. Coincidentally, on September 14, 1901, President Theodore Roosevelt traveled through the night to arrive at the North Creek train station to the news of President William McKinley’s death. Five years later, President Roosevelt signed the Antiquities Act into law.