

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

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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,

2. National Monuments, 54 U.S.C. § 320301 (Supp. III 2016).

3. Mark Udall, *Scaling New Heights or Retreating From Progress: How Will the Environment Fare Under the Administration of President George W. Bush?*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 12, 15 (2001).

4. Proclamation No. 2578, 3 C.F.R. 327 (1943); Hal Rothman, *America's National Monuments: The Politics of Preservation*, NAT'L PARK SERV., https://www.nps.gov/parkhistory/online_books/rothman/ (last visited Nov. 25, 2018).

5. Erik Molvar, *What Utah and Trump Can Learn from Wyoming About the Value of National Monuments*, DESERT NEWS (May 22, 2017), <https://www.deseretnews.com/article/865680497/Op-ed-What-Utah-and-Trump-can-learn-from-Wyoming-about-the-value-of-national-monuments.html>.

6. Hal Rothman, *Showdown at Jackson Hole: A Monumental Backlash Against the Antiquities Act*, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 81, 83 (David Harmon et al. eds., 2006).

7. Molvar, *supra* note 5.

challenging it in federal court.⁸ Congress even passed a bill to abolish the Monument.⁹ Both of these efforts failed: FDR vetoed the bill¹⁰ and a district court upheld the designation.¹¹

A little over 20 years later, public opinion had changed drastically.¹² Congress picked up where FDR left off and turned Jackson Hole into a National Park.¹³ In 1967, Senator Cliff Hanson—who previously testified against the Monument¹⁴—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.”¹⁵ 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.”¹⁶

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.¹⁷ On December 4, 2017, standing on the steps of the Utah State Capitol building, President Trump proclaimed that

8. Wyoming v. Franke, 58 F. Supp. 890, 893 (D. Wyo. 1945).

9. George Wuerthner, *Some People Have Always Hated National Monuments—Until They Love Them*, SIERRA (May 4, 2017), <http://www.sierraclub.org/sierra/some-people-have-always-hated-national-monuments-until-they-love-them>; Lisa Raffensperger, *The Highs and Lows of the Antiquities Act*, NAT’L PUB. RADIO (May 23, 2008), <http://www.npr.org/templates/story/story.php?storyId=90631198>.

10. Molvar, *supra* note 5.

11. Franke, 58 F. Supp. at 897.

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.*

16. Arno Rosenfeld, *Poll: Wyoming Voters Still Support Trump but Disagree with Many of His Environmental Policies*, CASPER STAR TRIB. (Jan. 25, 2018), http://trib.com/news/state-and-regional/govt-and-politics/poll-wyoming-voters-still-support-trump-but-disagree-with-many/article_aedc68e4-2c5f-56ae-8a85-96152ce39803.html.

17. Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>.

“past administrations have severely abused the purpose, spirit, and intent of . . . the Antiquities Act.”¹⁸ To remedy this overreach, President Trump announced he intended to significantly reduce Grand Staircase-Escalante and Bears Ears National Monuments.¹⁹ 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.²⁰ The clothing retailer Patagonia immediately proclaimed on its website that “The President Stole Your Land” and filed suit a few days later.²¹ 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.”²² Similarly, Tom Udall, Senator from New Mexico, called President Trump’s action “the largest attack on public lands . . . we have ever seen.”²³

While President Trump believes he has the authority to reduce national monuments,²⁴ many disagree: several groups, in addition to Patagonia, have

18. Remarks by President Trump on Antiquities Act Designations (Dec. 4, 2017), <https://www.whitehouse.gov/the-press-office/2017/12/04/remarks-president-trump-antiquities-act-designations>.

19. Turkewitz, *supra* note 17.

20. Andy Kerr estimates that previous presidents have removed approximately 462,573 acres from national monuments over the past 100 years. Andy Kerr, *Precedent for Secretary Zinke’s Gut-Job on the National Monuments*, ANDY KERR’S PUB. LANDS BLOG (Sept. 22, 2017), <http://www.andykerr.net/kerr-public-lands-blog/2017/9/22/precedent-for-secretary-zinkes-gut-job-on-the-national-monuments/>. But in one day, President Trump removed almost 2 million acres. Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,085 (Dec. 4, 2017) [hereinafter Proclamation Modifying Bears Ears National Monument] (reducing Bears Ears by 1,150,860 acres); Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017) [hereinafter Proclamation Modifying Grand Staircase-Escalante National Monument] (reducing Grand Staircase by 861,974 acres).

21. Maya Oppenheim, *Donald Trump Faces Lawsuit From Clothing Brand Patagonia Over National Monument Rollback*, INDEPENDENT (Dec. 5, 2017), <http://www.independent.co.uk/news/world/americas/donald-trump-patagonia-lawsuit-national-monuments-outdoor-brand-utah-federal-land-protection-a8092606.html>.

22. Press Release, Sen. Carper (D-Del.), U.S. SENATE COMM. ON ENV’T AND PUB. WORKS, Carper Statement on President Trump’s Unprecedented Move to Strip Protections from Existing National Monuments (Dec. 4, 2017), <https://www.epw.senate.gov/public/index.cfm/2017/12/carper-statement-on-president-trump-s-unprecedented-move-to-strip-protections-from-existing-national-monuments>.

23. Katy Steinmetz, *Donald Trump’s Move to Shrink Two National Monuments Sets Stage for Battle Over 111-Year-Old Law*, TIME (Dec. 5, 2017), <http://time.com/5047904/bears-ears-grand-staircase-trump-shrinks/>.

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.²⁵ The litigation they have started may outlast President Trump's time in the White House.²⁶ 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.²⁷ The Trump Administration is undoubtedly going to rely on this historical practice to argue that the President has the authority to reduce national monuments.²⁸

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.²⁹ Part II briefly summarizes existing scholarship on the Antiquities Act.³⁰ Part III introduces a framework for analyzing the President's authority to reduce national monuments.³¹ Part IV provides two reasons why the past practice of presidents reducing national monuments may be irrelevant.³² 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.³³

I. BACKGROUND

On June 8, 1906—after more than a decade of debate in Congress³⁴—President Theodore Roosevelt signed the Antiquities Act into law.³⁵ Soon

25. Oppenheim, *supra* note 21.

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.S (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).

34. Ronald F. Lee, *The Origins of the Antiquities Act*, in *THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORY PRESERVATION, AND NATURE CONSERVATION* 15, 27–33 (David Harmon et al. eds., 2006).

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.

39. *Monuments Protected Under the Antiquities Act*, NAT’L PARKS CONSERVATION ASS’N (Jan. 13, 2017), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquitiesact>. Richard Nixon, Ronald Reagan, and George H.W. Bush were the only presidents that did not use the Antiquities Act. *National Monuments Designated by Presidents 1906-2009*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/hisnps/NPSHistory/national_monuments.pdf (last visited Nov. 25, 2018).

40. CAROL HARDY VINCENT & PAMELA BALDWIN, CONG. RESEARCH SERV., RL 30528, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: RECENT DESIGNATIONS AND ISSUES 3, 4 (2001).

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 xi (“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.⁴³ While Congress considered designating the petrified forests as a national park, the GLO temporarily protected several thousand acres of the forests.⁴⁴ But Congress never voted on the proposal.⁴⁵

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.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.”⁴⁹ Between 1930 and 1932, President Herbert Hoover enlarged the Monument on three occasions, collectively adding more than 60,000 acres.⁵⁰ On each occasion, President Hoover simply claimed that it would be in the public interest to add lands to the Monument.⁵¹

In 1930, Congress also authorized the Secretary of the Interior to acquire private land inside the Monument.⁵² Almost thirty years later,

43. *Id.*

44. *Id.*

45. *Id.* at 57–58.

46. Proclamation No. 697, 34 Stat. 3266 (1906) [hereinafter Proclamation Establishing Petrified Forest National Monument]; President Theodore Roosevelt, Sixth Annual Message to the Senate and House of Representatives (Dec. 3, 1906) (transcript available in the Collection of Messages and Papers of the Presidents, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/sixth-annual-message-4>).

47. *Monument Profiles: Petrified Forest National Park, Arizona*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/profilePetrified.htm> (last visited Nov. 25, 2018) [hereinafter Monument Profiles: Petrified Forest National Park].

48. *Antiquities Act 1906-2006 Maps, Facts, & Figures*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (last visited Nov. 25, 2018) [hereinafter *Antiquities Act*, NAT'L PARK SERV.] (indicating that President Taft reduced the Monument by 40.04 square miles, which is equivalent to 25,625 acres).

49. Proclamation No. 62, 37 Stat. 1716 (1911) [hereinafter Proclamation Reducing Petrified Forest National Monument].

50. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

51. HERBERT HOOVER: PROCLAMATIONS AND EXECUTIVE ORDERS, MARCH 4, 1929 TO MARCH 4, 1933, at 87, 171, 235 (1974), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112005184806;view=1up;seq=179> (“[I]t appears that the public interest would be promoted by adding to the Petrified Forest National Monument . . .”).

52. Act of May 14, 1930, Pub. L. No. 215, 46 Stat. 278.

Congress designated the Petrified Forest as a national park.⁵³ Soon after, Congress designated over 50,000 acres within the National Park as a wilderness area.⁵⁴ Finally, in 2004, President George W. Bush signed a bill authorizing the Secretary of the Interior to increase the size of the Park⁵⁵ from 93,533 to 218,533 acres.⁵⁶

B. Navajo National Monument

On March 20, 1909, President Taft established the Navajo National Monument⁵⁷ on the Navajo reservation in northeastern Arizona.⁵⁸ President Taft found that the prehistoric cliff dwellings and pueblo ruins in the Monument were of the “greatest ethnological, scientific and educational interest.”⁵⁹ Three years later, however, President Taft issued a proclamation⁶⁰ clarifying the boundaries of the Monument, reducing it to 360 acres.⁶¹ In his proclamation—similar to his proclamation reducing the Petrified Forest National Monument⁶²—President Taft concluded that “after

53. Act of Mar. 28, 1958, Pub. L. No. 85-358, 72 Stat. 69.

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. § 320301(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).

55. Petrified Forest National Park Expansion Act of 2004, Pub. L. 108-430, 118 Stat. 2606.

56. *Petrified Forest National Park Arizona: Brief Administrative History*, NAT’L PARK. SERV., <https://www.nps.gov/pefo/planyourvisit/brief-administrative-history.htm> (last updated Mar. 16, 2018) [hereinafter Petrified Forest National Park].

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

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).

59. Proclamation No. 873, 36 Stat. 2491 (1909).

60. Proclamation No. 1186, 37 Stat. 1733–34 (1912) [hereinafter Proclamation Reducing Navajo National Monument].

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

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.⁶³

C. *Natural Bridges National Monument*

In 1908, Theodore Roosevelt designated Utah’s first monument:⁶⁴ the 120-acre Natural Bridges National Monument,⁶⁵ naming it after three water-carved stone bridges.⁶⁶ 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.”⁶⁷ Apparently agreeing with Roosevelt’s determination, President Taft expanded the Monument by more than 2,500 acres only a year later.⁶⁸ In 1916, President Woodrow Wilson updated the survey information describing the Monument’s boundaries.⁶⁹

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.”⁷⁰ 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.”⁷¹ As of 2017, the Monument had grown to 7,630 acres.⁷²

D. *Mount Olympus National Monument*

Days before his final term came to a close, President Roosevelt designated Mount Olympus National Monument.⁷³ At over 600,000 acres,

63. Proclamation Reducing Navajo National Monument, 37 Stat. at 1733–34.

64. *Natural Bridges National Monument Utah: Utah’s First National Monument*, NAT’L PARK SERV., <https://www.nps.gov/nabr/index.htm> (last visited Nov. 25, 2018) [hereinafter *Natural Bridges, First*].

65. Proclamation No. 804, 35 Stat. 2183–84 (1908) [hereinafter Proclamation Establishing Natural Bridges National Monument]; *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

66. *Natural Bridges, First, supra* note 64.

67. Proclamation Establishing Natural Bridges National Monument, 35 Stat. at 2183.

68. Proclamation No. 881, 36 Stat. 2502 (1909); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

69. Proclamation No. 1323, 39 Stat. 1764 (1916).

70. Proclamation No. 3486, 3 C.F.R. 82, 82 (1962), *reprinted in* 76 Stat. 1495–97 (1963).

71. *Id.* at 1495–96.

72. Kerr, *supra* note 20, at 9.

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).

75. Proclamation No. 2247, 35 Stat. 2247 (1909) [hereinafter Proclamation Establishing Mount Olympus National Monument].

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.

80. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

81. James Rasband, *Stroke of the Pen, Law of the Land?*, 63 ROCKY MT. MIN. L. INST. 21-1, 21-21 (2017) [hereinafter Rasband, *Stroke*].

82. Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241.

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

84. Washington Park Wilderness Act of 1998, Pub. L. No. 100-668, 102 Stat. 3961–62; *Monument Profiles: Mount Olympus National Monument (now Olympic National Park)*, WASHINGTON, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/profileOlympic.htm> (last visited Nov. 25, 2018) [hereinafter *Monument Profiles: Mount Olympus*]. The National Park Service (NPS) is required to manage national parks to promote both recreation and conservation. Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 851, 862 (2009). Unfortunately, these two values can create "inherent conflicts." *Id.* Creating a wilderness designation inside a national park prioritizes conservation over recreation and creates an additional layer of legal protection for federal lands. *Id.* at 868.

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.⁸⁶ 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.⁸⁷ In the 1920s, local residents began to advocate for the dunes' protection.⁸⁸ 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.⁸⁹ 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.⁹⁰

A year later, FDR increased the Monument by 158 acres.⁹¹ 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.⁹² Following this reduction, President Eisenhower enlarged the Monument by approximately 478 acres.⁹³ Congress revised the boundaries of the Monument in 1978, adding 320 acres and eliminating 760 acres.⁹⁴

F. Wupatki National Monument

In 1924, President Coolidge established the Wupatki National Monument,⁹⁵ identifying approximately 2,234 acres of ancestral ruins outside of Flagstaff, Arizona, that were worthy of protection.⁹⁶ In 1937,

86. *White Sands National Monument New Mexico: Like No Place Else on Earth*, NAT'L PARK SERV., <https://www.nps.gov/whsa/index.htm> (last visited Nov. 25, 2018).

87. *White Sands National Monument New Mexico: White Sands National Monument History*, NAT'L PARK SERV., <https://www.nps.gov/whsa/learn/historyculture/white-sands-national-monument-history.htm> (last updated Nov. 12, 2016).

88. *Id.*

89. *Id.*

90. *Id.*; Proclamation No. 2025, 47 Stat. 2551 (1933); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

91. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

92. Proclamation No. 2295, 3 C.F.R. 46, 46 (1938) [hereinafter Proclamation Reducing White Sands National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 4.

93. Proclamation No. 3024, 3 C.F.R. 33, 33 (1953), *reprinted in* 67 Stat. c53 (1953); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

94. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3475.

95. Proclamation No. 1721, 43 Stat. 1977 (1924).

96. *Id.*; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

FDR expanded the Monument by 33,631 acres.⁹⁷ 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.⁹⁸ In 2014, the Monument was 35,422 acres.⁹⁹

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.¹⁰⁰ Unfortunately, this original effort failed.¹⁰¹ 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.¹⁰² By 1908, President Roosevelt was concerned that the Grand Canyon’s status as a forest preserve was insufficient to protect it from encroaching development.¹⁰³ In response to these concerns, President Roosevelt designated the Grand Canyon as a national monument.¹⁰⁴ At that time, the Monument was the largest ever designated, totaling over 800,000 acres.¹⁰⁵ President Roosevelt identified the entire Grand Canyon as an object of scientific interest.¹⁰⁶

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.¹⁰⁷ 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

97. Proclamation No. 2243, 3 C.F.R. 90, 90 (1937), *reprinted in* 50 Stat. 1841 (1937).

98. Proclamation No. 2454, 3 C.F.R. 52, 52 (1941) [hereinafter Proclamation Reducing Wupatki National Monument]; *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

99. Kerr, *supra* note 20, at 11.

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.¹⁰⁸ In 1919, Congress re-designated Grand Canyon National Monument as a national park.¹⁰⁹

Several years after Congress designated Grand Canyon National Park,¹¹⁰ President Hoover designated 270,000 acres on the west boundary of the Park as another national monument¹¹¹—sometimes referred to as Grand Canyon National Monument II.¹¹² Like many other monuments, Grand Canyon II generated opposition from both ranchers and county officials.¹¹³ Congress responded by trying to abolish the Monument.¹¹⁴ To appease Congress and local ranchers, FDR reduced the Monument by 71,000 acres.¹¹⁵ In his reducing proclamation, FDR claimed that the deleted lands were not necessary for the proper care and management of the Monument.¹¹⁶ In 1975, Congress expanded Grand Canyon National Park in order to “further protect[] . . . the Grand Canyon in accordance with its true significance.”¹¹⁷ The 1975 Act incorporates the Grand Canyon National Monument II as defined by FDR in his reducing proclamation.¹¹⁸

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.¹¹⁹ Four years later, President

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.”).

109. Act of Feb. 26, 1919, Pub. L. No. 277, 40 Stat. 1175.

110. *Id.*

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

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

113. Squillace, *Monumental*, *supra* note 41, at 564.

114. *Id.*

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

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)).

117. Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975).

118. Jeff Ingram, *GCNP Boundary K: A Haunted Monument*, CELEBRATING THE GRAND CANYON (Sept. 16, 2010, 5:39 PM), <http://gcfutures.blogspot.com/2010/09/gcnp-boundary-k-haunted-monument.html>.

119. Proclamation No. 1694, 43 Stat. 1947–48 (1924).

Coolidge increased the Monument by 26,240 acres.¹²⁰ In 1930, President Hoover also added an undefined amount of land to the Monument.¹²¹ But, in 1941, FDR reduced the Monument so that Idaho State Highway No. 22 could be built.¹²²

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.¹²³ 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.¹²⁴ In 1970, Congress designated part of the Monument as a wilderness area.¹²⁵ 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."¹²⁶ Congress proceeded to designate most of President Clinton's expansion as a national preserve.¹²⁷ In 2017, the Idaho Senate passed a non-binding resolution asking Congress to designate Craters of the Moon as a national park.¹²⁸

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."¹²⁹ 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.

122. Proclamation No. 2499, 3 C.F.R. 87, 87–88 (1941), *reprinted in* 55 Stat. 1660 (1942) [hereinafter Proclamation Reducing Craters of the Moon National Monument].

123. Proclamation No. 3506, 3 C.F.R. 104, 104–05 (1962), *reprinted in* 77 Stat. 960 (1964); *Craters of the Moon National Monument & Preserve Idaho: History and Culture*, NAT'L PARK SERV., <https://www.nps.gov/crmo/learn/historyculture/index.htm> (last updated Dec. 19, 2017).

124. *Id.*

125. Act of Oct. 23, 1970, Pub. L. No. 91-504, 84 Stat. 1104, 1105–06.

126. Proclamation No. 7373, 3 C.F.R. 194, 195 (2001), *reprinted in* 114 Stat. 3419 (2001); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

127. Act of Aug. 21, 2002, Pub. L. No. 107-213, 116 Stat. 1052. A national preserve closely resembles a national park. Steven C. Forrest, *Creating New Opportunities for Ecosystem Restoration on Public Lands: An Analysis of the Potential for Bureau of Land Management Lands*, 23 PUB. LAND & RES. L. REV. 21, 57 (2002). The only difference is that national preserves allow "hunting, trapping, and limited oil and gas" activity. *Id.*

128. S.J. Memorial 101, 64th Leg., 1st Reg. Sess. (Idaho 2017).

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.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].”¹³¹

J. Glacier Bay National Monument

In 1925, President Coolidge established Glacier Bay National Monument.¹³² As a precursor to many of the large monuments created by later presidents, Glacier Bay was over a million acres in 1925.¹³³ In 1939, FDR enlarged the Monument by 904,000 acres.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.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.¹³⁶ Several months later, the Army also began building an airfield inside the Monument near Point Gustavus.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.¹³⁸ The NPS initially recommended keeping the land in the Monument.¹³⁹ Several years after this recommendation, President Eisenhower eliminated the 29,000 acres containing the military airfield from the Monument.¹⁴⁰ At the same time,

130. Proclamation No. 2659, 3 C.F.R. 35, 35 (1946) [hereinafter Proclamation Reducing Santa Rosa Island National Monument].

131. Act of Jan. 8, 1971, Pub. L. No. 91-669, 84 Stat. 1967, 1968.

132. Proclamation No. 1733, 43 Stat. 1988–89 (1925) [hereinafter Proclamation Establishing Glacier Bay National Monument].

133. *Antiquities Act*, NAT’L PARK SERV., *supra* note 48 (indicating that the Monument was 1,820 square miles, which is equivalent to 1,164,800 acres).

134. Proclamation No. 2330, 3 C.F.R. 28, 28 (1939), *reprinted in* 53 Stat. 2534 (1939).

135. *Id.*

136. THEODORE CATTON, LAND REBORN: A HISTORY OF ADMINISTRATION AND VISITOR USE IN GLACIER BAY NATIONAL PARK AND PRESERVE CH. 5 (1995), https://www.nps.gov/parkhistory/online_books/glba/adhi/chap5.htm.

137. *Id.*

138. *Id.*

139. *Id.*

140. Proclamation No. 3089, 3 C.F.R. 24, 36 (1955) [hereinafter Proclamation Reducing Glacier Bay National Monument]; *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

President Eisenhower eliminated private land that he claimed was not necessary for the management of the Monument.¹⁴¹

In 1978, President Jimmy Carter—as part of a larger effort to conserve lands about to lose their federally protected status¹⁴²—added 550,000 acres to the Monument,¹⁴³ bringing its total size to almost 2.5 million acres.¹⁴⁴ In response to President Carter’s actions, and as part of broader legislation dealing with public lands and Alaska native lands and mineral rights,¹⁴⁵ Congress designated the area as a national park containing over 3 million acres.¹⁴⁶ Congress also designated an additional 58,000 acres adjacent to the National Park as a National Preserve.¹⁴⁷ Most of the land that President Eisenhower removed from the Monument is now firmly inside the boundaries of Glacier Bay National Park.¹⁴⁸

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.¹⁴⁹ The Great Sand Dunes are the tallest sand dunes in North America.¹⁵⁰ In 1946, President Truman issued a proclamation “redefining” the Monument’s boundaries based on the most recent geologic survey.¹⁵¹ Several years later,

141. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36.

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).

143. Proclamation No. 4618, 3 C.F.R. 84, 85 (1978), *reprinted in* 93 Stat. 1458 (1981).

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

145. Andrus & Freemuth, *supra* note 142, at 98–102.

146. *Id.*; Kerr, *supra* note 20, at 6.

147. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, 2382 (1980).

148. See *Glacier Bay National Park & Preserve Alaska: Maps*, NAT’L PARK SERV., <https://www.nps.gov/glba/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).

149. Proclamation No. 1993, 47 Stat. 2506–07 (1932) [hereinafter Proclamation Establishing Great Sand Dunes National Monument]; *Antiquities Act*, NAT’L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 7.

150. *Great Sand Dunes National Park & Preserve Colorado: Dunes Among Diversity*, NAT’L PARK SERV., <https://www.nps.gov/grsa/index.htm> (last updated Dec. 31, 2017).

151. Proclamation No. 2681, 3 C.F.R. 55, 55 (1946) [hereinafter Proclamation Updating Great Sand Dunes National Monument].

President Eisenhower reduced the Monument by about 20%,¹⁵² claiming that the lands were no longer necessary for the Monument's purpose.¹⁵³

Starting in 1976, however, Congress began protecting the area. First, Congress designated most of the Monument as wilderness¹⁵⁴ and then enlarged the Monument by 1,000 acres.¹⁵⁵ In 2000, Congress turned the Monument into a national park and a separate national preserve.¹⁵⁶ By 2014, the National Park contained 107,000 acres and the Preserve contained 41,000 acres.¹⁵⁷

L. Hovenweep National Monument

In 1923, President Warren Harding established the 285-acre Hovenweep National Monument.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ President Eisenhower also claimed that President Harding "erroneously" included this land when he initially created the Monument.¹⁶¹ 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.¹⁶² While the original Monument contained only 285 acres, by 2014, the Monument was over 700 acres.¹⁶³

152. Kerr, *supra* note 20, at 7.

153. Proclamation No. 3138, 3 C.F.R. 23, 23–24 (1956), *reprinted in* 70 Stat. c31–32 (1957) [hereinafter Proclamation Reducing Great Sand Dunes National Monument].

154. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

155. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3474.

156. Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, 114 Stat. 2527, 2529.

157. Kerr, *supra* note 20, at 7.

158. Proclamation No. 1654, 42 Stat. 2299–3000 (1923); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

159. Proclamation No. 2924, 3 C.F.R. 25, 25 (1951), *reprinted in* 65 Stat. c8 (1952); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

160. Proclamation No. 3132, 3 C.F.R. 70, 70 (1956), *reprinted in* 70 Stat. 26 (1957) [hereinafter Proclamation Reducing Hovenweep National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

161. Proclamation Reducing Hovenweep National Monument, 3 C.F.R. at 70; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

162. Proclamation Reducing Hovenweep National Monument, 3 C.F.R. at 70; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

163. Kerr, *supra* note 20, at 7–8.

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

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

165. Proclamation No. 3307, 3 C.F.R. 56, 56 (1959), *reprinted in* 73 Stat. c69 (1959) [hereinafter Proclamation Reducing Colorado National Monument]; *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

166. Proclamation Reducing Colorado National Monument, 3 C.F.R. at 56.

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

168. Act of May 1, 1958, Pub. L. No. 85-391, 72 Stat. 102.

169. Proclamation No. 3344, 3 C.F.R. 23, 23 (1960), *reprinted in* 74 Stat. c56 (1960) [hereinafter Proclamation Reducing Black Canyon National Monument].

170. *Id.*

171. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.

172. Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, Pub. L. No. 106-76, 113 Stat. 1126–27.

173. *Id.* at 1129. A National Conservation Area (NCA) is another type of public land designation. E. Barrett Ristroph & Anwar Hussein, *Wilderness: Good for Alaska*, 4 WA. J. ENVTL. L. & POL’Y 424, 432 (2015). Unlike national parks, there are no uniform standards for establishing NCAs. Andy Kerr & Mark Salvo, *Bureau of Land Management National Conservation Areas: Legitimate Conservation or Satan’s Spawn?*, 20 UCLA J. ENVTL. L. & POL’Y 67, 67 (2001–2002). Although there

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.”¹⁷⁴ Several decades earlier, President Hoover established Arches National Monument.¹⁷⁵ At the time, the Monument contained two pieces of land: the “Devils Garden” at 2,600 acres and the “Windows” at 1,920 acres.¹⁷⁶ 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.”¹⁷⁷

In 1960, President Eisenhower issued a proclamation “modifying” the Monument.¹⁷⁸ 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.”¹⁷⁹ Several years later, President Lyndon B. Johnson enlarged the Monument by 48,000 acres.¹⁸⁰ Congress responded by incorporating the enlarged Monument into a national park.¹⁸¹ By 2014, Arches National Park contained over 76,000 acres.¹⁸²

P. Timpanogas Cave National Monument

President Harding established the 250-acre Monument in 1924.¹⁸³ 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 I* (1968).

175. Proclamation No. 71, 46 Stat. 2988–89 (1929).

176. *Arches National Park Utah: Park Founders*, NAT’L PARK SERV., <https://www.nps.gov/arch/learn/historyculture/founders.htm> (last updated Aug. 15, 2017).

177. Proclamation No. 2312, 3 C.F.R. 38, 38 (Supp. 1938); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

178. Proclamation No. 3360, 3 C.F.R. 32, 32–33 (1960), *reprinted in* 74 Stat. c79 (1961) [hereinafter Proclamation Reducing Arches National Monument].

179. *Id.* at 32; *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

180. Proclamation No. 3887, 3 C.F.R. 385, 385 (1969), *reprinted in* 83 Stat. 920 (1970); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

181. Act of Nov. 12, 1971, Pub. L. No. 92-155, 85 Stat. 422.

182. Kerr, *supra* note 20, at 4.

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.¹⁸⁴

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.¹⁸⁵ Prior to its designation, more than 15 bills were introduced in Congress to designate the area as a national park.¹⁸⁶ But none of them passed.¹⁸⁷ As a result of this inaction, President Wilson designated the area as a monument.¹⁸⁸

Several years later, President Hoover enlarged the Monument by 3,626 acres.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.¹⁹⁰ Just a year later, however, President Kennedy revised the boundaries of the Monument.¹⁹¹ President Kennedy added 2,882 acres that the AEC also formerly administered.¹⁹² At the same time, President Kennedy excluded other land from the Monument, resulting in a 1,000-acre reduction.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.¹⁹⁴ But in 1976, Congress enlarged the Monument by almost 4,000 acres and

184. Proclamation No. 3457, 3 C.F.R. 39, 39 (1962), *reprinted in* 76 Stat. 1457 (1963) [hereinafter Proclamation Updating Timpanogas Cave National Monument].

185. ROTHMAN, PRESERVING, *supra* note 35, at 143.

186. *Id.* at 145.

187. *Id.*

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

189. Proclamation No. 1990, 47 Stat. 2503–04 (1932); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

190. Proclamation No. 3388, 3 C.F.R. 21, 21–23 (Supp. 1961), *reprinted in* 75 Stat. 1014 (1961).

191. Proclamation No. 3539, 3 C.F.R. 62, 63–65 (1963), *reprinted in* 77 Stat. 1006 (1963) [hereinafter Proclamation Reducing Bandelier National Monument]; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

192. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

193. *Id.*

194. Proclamation Reducing Bandelier National Monument, 3 C.F.R. at 63.

designated 70% of it as wilderness two years later.¹⁹⁵ Finally, in 1998, Congress increased the Monument by 935 acres.¹⁹⁶

R. *Buck Island Reef National Monument*

In 1961, President Kennedy established the 850-acre Buck Island Reef National Monument.¹⁹⁷ 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.”¹⁹⁸ 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.¹⁹⁹

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.²⁰⁰ 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.²⁰¹ A few days later, Secretary Zinke concluded that President Trump should not make any changes to 6²⁰² out of the 22²⁰³ national monuments under review.

195. BANDELIER NATIONAL MONUMENT: GEOLOGIC RESOURCES INVENTORY REPORT, NAT’L PARK SERV. 2 (2015) (providing that 70% of the Monument’s area was designated as wilderness). Act of Oct. 20, 1976, Pub. L. No. 94–567, 90 Stat. 2692; *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

196. Bandolier National Monument Administrative Improvement and Watershed Protection Act of 1998, Pub. L. No. 105–376, 112 Stat. 3388.

197. Proclamation No. 3443, 3 C.F.R. 21, 21–23 (1963), *reprinted in* 77 Stat. 1441–43 (1962) [hereinafter Proclamation Updating Buck Island Reef National Monument].

198. Proclamation No. 4346, 3 C.F.R. 444, 444–45 (1975), *reprinted in* 89 Stat. 1231 (1977).

199. Proclamation No. 4359, 3 C.F.R. 461, 461 (1975), *reprinted in* 89 Stat. 1254 (1975).

200. Executive Order 13792, 82 Fed. Reg. 20,429, 20,429–30 (Apr. 26, 2017).

201. Josh Siegel, *Ryan Zinke Recommends Shrinking, Not Eliminating, Some National Monuments*, WASH. EXAM’R (Aug. 24, 2017), <http://www.washingtonexaminer.com/ryan-zinke-recommends-shrinking-not-eliminating-some-national-monuments/article/2632453>.

202. Sammy Roth, *One California Desert National Monument is Safe – But Another is Still in Jeopardy*, DESERT SUN (Aug. 16, 2017), <http://www.desertsun.com/story/news/environment/2017/08/16/no-changes-sand-snow-national-monument-california-desert-ryan-zinke-says/573573001/>. The six monuments Secretary Zinke removed from review included: Craters of the National Monument and Preserve in Idaho, Hanford Reach National Monument in Washington, Canyons of the Ancients National Monument in Colorado, Upper Missouri River Breaks National Monument in Montana, Grand Canyon-Parashant National Monument in Arizona, and Sand to Snow National Monument in California. *Id.*

After some initial delay—and an internal leak²⁰⁴—Secretary Zinke formally released his Final National Monument Report, outlining his findings and recommendations to President Trump.²⁰⁵ 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.”²⁰⁶ 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.²⁰⁷ 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.²⁰⁸ Finally, the Report claims that some monument designations were “likely politically motivated.”²⁰⁹

203. RYAN ZINKE, MEMORANDUM FOR THE PRESIDENT: FINAL REPORT SUMMARIZING FINDINGS OF THE REVIEW OF DESIGNATIONS UNDER THE ANTIQUITIES ACT 5–6 (2017); Roth, *supra* note 202.

204. On August 24, 2017, Secretary Zinke, in accordance with Executive Order 13792, sent his Final National Monument Report to President Trump. Press Release, U.S. Dep’t of Interior, Sec’y Zinke Sends Monument Report to the White House (Aug. 24, 2017), <https://www.doi.gov/pressreleases/secretary-zinke-sends-monument-report-white-house>. While this Report was not publicly available, it was leaked to the Washington Post a few weeks later. John Siciliano, *10 National Monuments Could Be Scaled Back Under Draft Ryan Zinke Plan*, WASH. EXAM’R (Sept. 18, 2017), <http://www.washingtonexaminer.com/10-national-monuments-could-be-scaled-back-under-draft-ryan-zinke-plan/article/2634725>. On December 5, 2017, the Department of the Interior released Secretary Zinke’s Final National Monument Report. Press Release, U.S. Dep’t of Interior, Sec’y Zinke Recommends Keeping Fed. Lands in Fed. Ownership, Adding Three New Monuments (Dec. 5, 2017), <https://www.doi.gov/pressreleases/secretary-zinke-recommends-keeping-federal-lands-federal-ownership-adding-three-new>.

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 Ctys. 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.”).

210. ZINKE, *supra* note 203, at 9–18. The other monuments that Secretary Zinke recommended changes to included: Gold Butte National Monument, Cascade-Siskiyou National Monument, Katahdin Woods and Waters National Monument, Northeast Canyons and Seamounts National Monument, Organ Mountains-Desert Peaks National Monument, Pacific Remote Islands National Monument, Rio Grande Del Norte National Monument, and Rose Atoll National Monument. *Id.*

211. *Id.* at 4.

212. Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,083 (Dec. 4, 2017); Proclamation Modifying Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089, 58,095 (Dec. 4, 2017).

and provided limited reasoning for the reductions,²¹³ President Trump thoroughly explained why he was reducing Grand Staircase-Escalante and Bears Ears National Monuments.²¹⁴

1. Grand Staircase-Escalante National Monument

President Trump's reduction of Grand Staircase reignited controversy that has historically surrounded the region.²¹⁵ 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.²¹⁶ The bills met staunch opposition from conservationists.²¹⁷ While the bill passed the House, environmental organizations and the Clinton Administration helped to defeat the bill in the Senate.²¹⁸ 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."²¹⁹ Hopi elders shared President Clinton's sentiment about the future: "This is a time of healing . . . [t]he healing must begin."²²⁰ And then "with a stroke of [a] pen,"²²¹ President Clinton designated the 1.7 million-acre Grand Staircase-Escalante National Monument²²²—the largest monument ever designated in the continental United States.²²³

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.²²⁴ President Clinton's actions also provoked responses from

213. See, e.g., Proclamation Reducing Petrified Forest National Monument, 37 Stat. 1716 (1911) (limiting rationale to a short preamble); see also Proclamation Reducing White Sands National Monument, 3 C.F.R. 46, 46 (1938) (limiting rationale to a short preamble).

214. *Id.*

215. CHRISTOPHER MCGRORY KLYZA & DAVID SOUSA, AMERICAN ENVIRONMENTAL POLICY, 1990–2006 114 (2008).

216. *Id.*

217. *Id.* at 115.

218. *Id.*

219. Paul Larmer, *A Bold Stroke: Clinton Takes A 1.7 Million-Acre Stand in Utah*, in GIVE AND TAKE: HOW THE CLINTON ADMINISTRATION'S PUBLIC LANDS OFFENSIVE TRANSFORMED THE AMERICAN WEST 4, 4 (Paul Larmer ed., 2004) [hereinafter Larmer, *Bold Stroke*].

220. *Id.*

221. *Id.* at 5.

222. Proclamation No. 6920, 3 C.F.R. 64, 64–68 (1997), reprinted in 110 Stat. 4561 (1997) [hereinafter Proclamation Establishing Grand Staircase-Escalante National Monument].

223. Eric C. Rusnak, *The Straw That Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 670 (2003).

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.”²²⁵ Over 50 years after a Wyoming senator compared FDR’s designation of Jackson Hole National Monument to Pearl Harbor,²²⁶ Senator Frank Murkowski, Republican of Alaska, exclaimed that the designation “had the feel of Pearl Harbor.”²²⁷ Speaking more pragmatically, Senator Jim Hansen, Republican of Utah, vowed to cripple the Monument by withholding its funding²²⁸ and also introduced legislation to abolish the Monument.²²⁹ Lawmakers introduced a series of bills throughout that year to reform the Antiquities Act, all of which failed.²³⁰ But in 1998, Congress passed two pieces of legislation that authorized land exchanges and increased the Monument by about 24,000 acres.²³¹

On December 4, 2017—in response to Secretary Zinke’s recommendations—President Trump issued his proclamation “modifying” the Monument.²³² 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.”²³³ 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

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 Ctys. 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.”).

225. Paul Larmer, *The Mother of all Lands Grabs*, in *GIVE AND TAKE: HOW THE CLINTON ADMINISTRATION’S PUBLIC LANDS OFFENSIVE TRANSFORMED THE AMERICAN WEST* 17, 17–18 (Paul Larmer ed., 2004) [hereinafter Larmer, *Land Grabs*].

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.

229. Mark Squillace, *The Antiquities Act and the Exercise of Presidential Power: The Clinton Monuments*, in *THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION* 106, 122 (David Harmon et al. eds., 2006).

230. Rusnak, *supra* note 223, at 723–28.

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

232. Proclamation Modifying Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017).

233. *Id.* at 58,089.

nature of the needed protection, and the protection provided by other laws.”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.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.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.²³⁷ The Proclamation excludes 861,974 acres from Grand Staircase and divides it into three separate monuments: Grand Staircase, Kaiparowits, and Escalante Canyons.²³⁸

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

234. *Id.*

235. *Id.* at 58,089–90.

236. *Id.* at 58,090.

237. *Id.* at 58,091.

238. *Id.* at 58,091, 58,093.

239. Complaint for Declaratory and Injunctive Relief ¶ 1, *Grand Staircase Escalante Partners v. Trump*, No. 1:17-CV-02591 (D.D.C. Dec. 4, 2017) [hereinafter *Grand Staircase Escalante Partners Complaint*]; Complaint for Injunctive and Declaratory Relief ¶ 1, *Wilderness Soc’y v. Trump*, No. 1:17-CV-02587 (D.D.C. Dec. 4, 2017) [hereinafter *Wilderness Soc’y Grand Staircase Complaint*].

240. 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*, *supra* note 239, ¶ 164 (“The Trump Proclamation is based on considerations wholly outside the Antiquities Act and lacks legal or factual justification.”).

241. See *Grand Staircase Escalante Partners Complaint*, *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*, *supra* note 239, ¶ 151 (“Congress has affirmed its sole jurisdiction to regulate the Monument through a series of legislative acts . . .”).

242. Order on Motion to Consolidate, *Wilderness Soc’y v. Trump*, No. 1:17-CV-02587 (D.D.C. Feb. 15, 2018).

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.²⁴³ In the 1930s, tribal efforts to designate the area as a 4 million-acre national monument failed.²⁴⁴ Eighty years later, local tribes, as part of a larger coalition, proposed the Bears Ears National Monument.²⁴⁵ After extensive planning and negotiation, President Obama designated the Bears Ears National Monument.²⁴⁶

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.”²⁴⁷ 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.”²⁴⁸ 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.²⁴⁹ In response to this criticism, in October 2017, President Trump called Senator Hatch to announce his plans to reduce Bears Ears.²⁵⁰

On December 4, 2017, the same day he “modified” Grand Staircase, President Trump issued a proclamation “modifying” Bears Ears.²⁵¹ The “modifying” proclamation reduces the Monument by almost 85%—from

243. Proclamation No. 9558, 3 C.F.R. 402, 403–07 (2016) [hereinafter Proclamation Establishing Bears Ears National Monument].

244. Jonathon Thompson, *Bears Ears A Go – But Here’s Where Obama Drew the Line*, HIGH COUNTRY NEWS (Dec. 29, 2016), <http://www.hcn.org/articles/obama-designates-bears-ears-national-monument>.

245. *Id.*

246. Proclamation Establishing Bears Ears National Monument, 3 C.F.R. at 407; Brian Maffly, *Jewell Defends Bears Ears Monument Process*, SALT LAKE TRIB. (Apr. 26, 2017), <http://archive.satrib.com/article.php?id=5216776&itype=CMSID>.

247. Robinson Meyer, *Obama’s Environmental Legacy, in Two Buttes*, ATLANTIC (Dec. 30, 2016), <https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttes/511889/>.

248. Amy Joi O’Donoghue, *Obama Settles Monumental Debate in Utah*, DESERT MORNING NEWS (Dec. 28, 2016), <https://www.deseretnews.com/article/865670039/White-House-declares-New-Bears-Ears-monument-for-Utah.html>.

249. *Id.*

250. Juliet Eilperin & Darryl Fears, *Trump Says He Will Shrink Bears Ears National Monument, a Sacred Tribal Site in Utah*, WASH. POST (Oct 27, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/10/27/trump-says-he-will-shrink-bears-ears-national-monument-a-sacred-tribal-site-in-utah/?utm_term=.131dcd05dc89.

251. Proclamation Modifying Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,081 (Dec. 4, 2017).

1.35 million to 201,876 acres.²⁵² 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.²⁵³

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.²⁵⁴ Several days later, another group—including Patagonia, the Access Fund, and Utah Diné Bikéyah—filed a complaint against the same defendants.²⁵⁵ Lastly, nine environmental organizations brought suit.²⁵⁶ All three complaints allege that the President lacks the authority to reduce or revoke national monuments.²⁵⁷ The complaints argue that President Trump’s proclamation essentially revoked Bears Ears and replaced it with two smaller monuments.²⁵⁸ On February 15, 2018, the District Court for the District of Columbia consolidated all three of these lawsuits.²⁵⁹

252. *Id.* at 58,083.

253. *Id.* at 58,085.

254. Complaint for Injunctive and Declaratory Relief ¶¶ 16–21, *Hopi Tribe v. Trump*, No. 1:17-CV-02590 (D.D.C. Dec. 4, 2017) [hereinafter *Hopi Bears Ears Complaint*].

255. Complaint for Declaratory and Injunctive Relief ¶¶ 8–76, *Utah Diné Bikéyah v. Trump*, No. 1:17-CV-02605 (D.D.C. Dec. 6, 2017) [hereinafter *Utah Diné Bears Ears Complaint*].

256. Complaint for Injunctive and Declaratory Relief ¶¶ 16–52, *NRDC v. Trump*, No. 1:17-CV-02606 (D.D.C. Dec. 7, 2017) [hereinafter *NRDC Bears Ears Complaint*].

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”).

259. Order Regarding Consolidation, *Hopi Tribe v. Trump*, No. 17-CV-2606 (D.D.C. Feb. 15, 2018); see also Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. CIV. RTS. CIV. LIBERTIES L.R. 213, 213 (2018) (chronicling the creation of Bears Ears National Monument).

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.²⁶⁰ 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.²⁶¹

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.²⁶²

The Antiquities Act is silent, however, on whether the President can abolish national monuments.²⁶³ In 1938, FDR asked Attorney General Homer Cummings to consider whether he could abolish Castle Pinckney National Monument.²⁶⁴ 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."²⁶⁵ 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.²⁶⁶ Furthermore, though

260. Iroala, *supra* note 209, at 170–71; Udall, *supra* note 3, at 12.

261. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

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. 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).

264. Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL L. REV. 535, 554 (2001).

265. 39 Op. Att’y Gen. 185, 186 (1938).

266. *Id.* at 187–88.

Attorney General Cummings acknowledged that earlier presidents had reduced monuments,²⁶⁷ 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.²⁶⁸

Many scholars have provided additional reasons why the President lacks the authority to abolish monuments.²⁶⁹ 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.²⁷⁰ 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.²⁷¹ Instead, the Antiquities Act delegates the President “one-way” authority to designate monuments.²⁷²

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.²⁷³ 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.

273. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 71–79 (Rachel E. Barkow et al. eds, 8th ed. 2017).

should be exercised.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.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.²⁷⁶

Although some dispute these conclusions²⁷⁷—and others affirmatively argue that the President has the authority to abolish national monuments²⁷⁸—this Note begins from the generally accepted, but legally untested, theory that the President lacks the authority to abolish national monuments.²⁷⁹

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))).

275. Michael Margherita, *The Antiquities Act & National Monuments*, 30 TUL. ENVTL. L.J. 273, 288–89 (2017).

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.”).

277. Udall, *supra* note 3, at 14 (concluding that it is “[un]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).

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.”).

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.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.²⁸¹ Second, based on this history, Congress has acquiesced to presidents reducing national monuments.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 Clys. 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.²⁸³ Justice Jackson's framework has become the test for considering the President's legal authority under the Constitution.²⁸⁴ 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.²⁸⁵ The only limitation to presidential authority in this circumstance is where the "Federal Government as an undivided whole lacks power."²⁸⁶ 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.²⁸⁷ 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."²⁸⁸ Presidential authority in the second category depends upon the particular circumstances of the presidential action.²⁸⁹

Third, when the President acts in defiance of Congress his power is at its lowest extent.²⁹⁰ In this circumstance, the President can only act when his power is exclusive.²⁹¹ 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."²⁹²

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.²⁹³ 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 . . .").

283. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952).

284. *Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme [from *Youngstown*] provides the accepted framework for evaluating executive action in this area."); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("[W]e have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful . . ."); Michael J. Turner, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. 665, 677 (2009) ("[I]n *Dames & Moore*, the Supreme Court explicitly adopted Jackson's taxonomy . . .").

285. *Youngstown*, 343 U.S. at 635.

286. *Id.* at 636–37.

287. *Id.* at 637.

288. *Id.*

289. *Id.*

290. *Id.*

291. *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).

292. *Youngstown*, 343 U.S. at 638.

293. *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.

297. Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(4) (2012).

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.²⁹⁹ Based on Justice Jackson’s framework, presidents would lack the authority to reduce national monuments in either of these situations.³⁰⁰

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.³⁰¹ 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.³⁰² The passage of FLPMA marked the end of the disposal era of federal lands policy.³⁰³ Prior to FLPMA, some of the original homesteading laws dispensing federal land to settlers in the American West were still on the books.³⁰⁴ 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.³⁰⁵ Accordingly, FLPMA repealed almost all presidential authority over public lands, including any implied powers.³⁰⁶ However, it left the Antiquities Act largely untouched.³⁰⁷

While FLPMA left the Antiquities Act largely untouched,³⁰⁸ § 204(j) of FLPMA provides that the Secretary of the Interior shall not modify or revoke any national monuments created under the Antiquities Act.³⁰⁹ 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).

301. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

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.*

304. Patrick Perry, *Law West of the Pecos: The Growth of the Wise-Use Movement & Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. REV. 275, 292 (1996).

305. Squillace, *Presidents*, *supra* note 302.

306. *Id.* at 59–60.

307. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2754.

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.³¹⁰ 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.”³¹¹ Under this reading, the President would clearly lack the authority to modify or reduce national monuments.³¹²

The legislative history of FLPMA could be interpreted to support this reading.³¹³ 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.”³¹⁴ 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.³¹⁵ 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.³¹⁶ Further, the 1938 Attorney General Opinion acknowledging that presidents have reduced national monuments in the past would be irrelevant for the same reason.³¹⁷

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.³¹⁸ While some argue that this language gives the President broad authority to reduce national monuments,³¹⁹ 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).

314. H.R. REP. NO. 94-1163, at 9 (1976).

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).

317. Squillace, *Presidents*, *supra* note 302, at 58–61.

318. 54 U.S.C. § 320301(b) (Supp. III 2016).

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 begin 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 FLPMA 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

320. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2754.

321. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (“The plain text of the [statute] begins and ends our analysis.”); *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (“Our analysis begins with the language of the statute.”).

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 Ctys. 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.”).

325. *Lamie v. United States*, 540 U.S. 526, 529–30 (2004).

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”).

332. *Utah Ass’n of Cty.s. v. Bush*, 316 F. Supp. 2d 1172, 1195–1200 (D. Utah 2004).

333. *Id.*

334. Exec. Order No. 10355, 17 Fed. Reg. 4831, 4831 (May 28, 1952).

335. *Id.*

336. *Utah Ass’n of Cty.s.*, 316 F. Supp. 2d at 1195.

Secretary from modifying national monuments, it repealed Executive Order 10355.³³⁷ 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.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.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.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.³⁴¹ Based on that narrow reading, FLPMA does not render the past practice of presidents reducing national monuments irrelevant.³⁴²

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.³⁴³ According to Attorney General Cumming's 1938 Opinion, a President's monument designation is equivalent to an act of Congress.³⁴⁴ Based on Justice Jackson's framework,

337. *Id.* at 1195–1200.

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).

339. Squillace, *Presidents*, *supra* note 302, at 60.

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, *Rescission of a Previously Designated National Monument: A Bad Idea Whose Time Has Not Come*, 37 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.”).

341. Baldwin, *Presidential*, *supra* note 295, at 25.

342. *Utah Ass’n. of Ctys.*, 316 F. Supp. 2d at 1199.

343. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

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.³⁴⁵ But as discussed above, others dispute this conclusion.³⁴⁶

If Congress ratifies a monument, however, the monument becomes an explicit act of Congress.³⁴⁷ Beginning in 1862, courts have found that Congress ratified presidential action, either expressly or impliedly.³⁴⁸ 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."³⁴⁹

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."³⁵⁰ 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."³⁵¹ But ratification in the context of national monuments is slightly different because the President has the authority to designate monuments.³⁵² 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

land withdrawal made under a statute delegating authority from Congress to the president is in effect an act by the Congress itself.").

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).

347. *Utah Ass'n of Ctys. v. Clinton*, No. 2:97-CV-479, 1999 U.S. Dist. LEXIS 15852, at *34–36 (D. Utah Aug. 12, 1999).

348. *Id.* at *34–37; Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. UN. L. REV. 1123, 1130–31 (2003); Kent F. Wisner, *The Aftermath of Chadha: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211, 1220 n.59 (1985).

349. *Utah Ass'n of Ctys.*, 1999 U.S. Dist. LEXIS 15852, at *37.

350. *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301–02 (1937).

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

352. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

Monument.³⁵³ 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.³⁵⁴ The exchange of these mineral rights would “eliminate this potential incompatibility, and would enhance management of the Grand Staircase-Escalante National Monument.”³⁵⁵ The Automobile National Heritage Act corrected some minor errors in the Grand Staircase proclamation and added certain lands to the Monument.³⁵⁶ The Act explicitly provides that “[t]he boundaries of the Grand Staircase–Escalante National Monument . . . are hereby modified.”³⁵⁷ Both of these acts indicate that Congress ratified the Monument.

But one district court has disagreed.³⁵⁸ 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.³⁵⁹ 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.”³⁶⁰ 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.”³⁶¹

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.³⁶² 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.³⁶³

353. Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139.

354. *Id.* at §§ 1, 3.

355. *Id.*

356. Automobile National Heritage Act, Pub. L. No. 105-355, 112 Stat. 3247, 3252–53 (1998).

357. *Id.* at 3252.

358. *Utah Ass’n of Ctys. v. Clinton*, No. 2:97-CV-479, 1999 U.S. Dist. LEXIS 15852, at *48 (D. Utah Aug. 12, 1999).

359. *Id.* at *4.

360. *Id.* 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,³⁶⁴ and courts have upheld broad exercises of that authority.³⁶⁵ Although the plaintiffs in *Utah Ass'n of Counties* argued that this particular exercise was beyond the President's authority,³⁶⁶ 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.³⁶⁷ And numerous presidents designated monuments on a similar scale as well.³⁶⁸ 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.³⁶⁹ The district court erred by relying on previous case law dealing with ratification of illegal presidential acts to create the "distinctively clear intent" standard.³⁷⁰ Under a regular preponderance of the evidence standard, Congress explicitly stating the Monument's boundaries should be sufficient to demonstrate ratification.³⁷¹

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."³⁷² 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*."³⁷³ By specifically dictating that the BLM should manage the

364. 54 U.S.C. § 320301(a)–(b) (Supp. III 2016).

365. See *supra* note 209 (outlining the various instances that courts upheld national monument designations).

366. *Utah Ass'n of Cty.s.*, 1999 U.S. Dist. LEXIS 15852, at *4.

367. *Cameron v. United States*, 252 U.S. 450, 456 (1920); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

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.

370. *Utah Ass'n. of Cty.s.*, 1999 U.S. Dist. LEXIS 15852, at *46.

371. *Id.*

372. Establishment of the National Landscape Conservation System, 16 U.S.C. § 7202(a) (2012).

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.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.³⁷⁵

In the current litigation surrounding President Trump's reduction of Grand Staircase, the plaintiffs argue that Congress ratified the Monument.³⁷⁶ They specifically point to funding for the Monument, the land exchange bills, and the NLCS.³⁷⁷ The Wilderness Society argues that Congress expressly ratified the Monument.³⁷⁸ But the Grand Staircase-Escalante Partners don't explicitly say that Congress ratified the Monument.³⁷⁹ Instead, they argue that Congress has expressed "its sole prerogative over the monument," and that the President cannot circumvent this statutory "superstructure."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.³⁸¹ Therefore, this phrase makes the "distinctively clear intent" standard inapplicable and potentially lowers the burden of proof required to prove congressional ratification.³⁸²

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

374. *Id.*

375. Baldwin, *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.").

376. Wilderness Soc'y Grand Staircase Complaint, *supra* note 239, ¶¶ 86–90; Grand Staircase Escalante Partners Complaint, *supra* note 239, ¶¶ 123–28.

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.").

378. Grand Staircase Escalante Partners Complaint, *supra* note 239, ¶¶ 123–29.

379. *Id.* ¶¶ 126, 142–48.

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.").

381. *Id.* ¶¶ 123–28.

382. Utah Ass'n of Cty. v. Clinton, No. 2:97-CV-479, 1999 U.S. Dist. LEXIS 15852, at *46 (D. Utah Aug. 12, 1999).

a large percentage of current national monuments. Congress has dictated management strategies for a considerable number of monuments.³⁸³

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*.”³⁸⁴

A corollary statute exists for monuments that the NPS manages.³⁸⁵ In 1916, Congress passed the Organic Act of 1916.³⁸⁶ The Organic Act created the NPS to manage the growing number of national parks throughout the U.S.³⁸⁷ In 1978, Congress updated the Organic Act to include NPS-managed national monuments.³⁸⁸ 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*.”³⁸⁹ 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.³⁹⁰ 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.

383. 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).

384. Establishment of the Landscape Conservation System, 16 U.S.C. § 7202(c)(2) (2012) (emphasis added).

385. 54 U.S.C. § 100101 (Supp. II 2015).

386. John Copeland Nagle, *How National Park Law Really Works*, 86 UNIV. COLO. L. REV. 861, 871 (2015).

387. *Id.*

388. ARNOLD & PORTER KAYE SCHOLER, *supra* note 316, at 13.

389. 54 U.S.C. § 100101 (emphasis added).

390. See generally *Antiquities Act*, NAT'L PARK SERV., *supra* note 48 (listing all 155 national monuments and their names, land calculations, and proclamation dates). *Antiquities Act, Frequently, supra* note 276.

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. *Antiquities Act, Frequently*, *supra* note 276.

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).

395. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

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 FLPMA argument—may not ignore the past practice of presidents reducing national monuments.³⁹⁸ While it is true that “[p]ast practice does not, by itself, create power,”³⁹⁹ courts often look to historical practice to determine the extent of presidential power.⁴⁰⁰ For example, in *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.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.”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.”⁴⁰³ Importantly, the Court relied on historical practice in its analysis, but did not come to a conclusion completely consistent with historical practice.⁴⁰⁴ Accordingly, the Court relied on historical practice to hold that the recess appointment clause applies to both inter- and intra-session appointments.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.⁴⁰⁶

3990, 115th Congress (2017). The Bill would expressly allow the President to modify national monuments, suggesting that the President currently lacks that authority. *Id.*

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

399. *Dames & Moore*, 453 U.S. at 686.

400. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (“To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution’s text and structure, as well as precedent and history bearing on the question.”); see also *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 48 (2006) (Stevens, J., dissenting) (dissenting because of the “historical practice supporting petitioner’s reading”); *Nat’l Fed’n of Fed. Emps., Local 1309 v. Dep’t of Interior*, 526 U.S. 86, 95–96 (1999) (concluding that historical practice was not clear enough to support the agency’s position); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597–98 (1980) (Brennan, J., concurring) (“[R]esolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice . . .”).

401. *NLRB*, 134 S. Ct. at 2556, 2560.

402. *Id.* at 2560.

403. *Id.*

404. *Id.* at 2559–60.

405. *Id.* at 2561.

406. *Id.* at 2567.

Although there is a difference between interpreting a provision of the Constitution and interpreting a statute, the underlying consideration in *Canning* 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 *Canning* 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).

413. 39 Op. Att’y Gen. 185, 188 (1938).

consistently argued that the President cannot reduce national monuments.⁴¹⁴ 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.⁴¹⁵ 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.⁴¹⁶

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.⁴¹⁷ 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.⁴¹⁸ Third, some argue the smallest area compatible requirement gives the President broad authority to reduce national monuments.⁴¹⁹

Those that support the third view often argue that history supports this broad view of the smallest area compatible requirement.⁴²⁰ 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.⁴²¹ 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.⁴²² 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.⁴²³ Additionally, in 1941, FDR reduced Wupatki National Monument by about 53 acres.⁴²⁴ Several years earlier, however, FDR expanded the Monument by over 30,000 acres.⁴²⁵ These reductions only suggest that the President who establishes or expands a national monument can slightly adjust boundaries on those same monuments.⁴²⁶ 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.⁴²⁷

576–80 (arguing that presidents have broad authority to reduce national monuments because “the many proclamations excluding lands from monuments reflect that a president can reduce the size of a monument established under the Antiquities Act”).

421. For example, Richard Seamon argues that presidents have broad authority to reduce national monuments based on historical practice. Seamon, *supra* note 278, at 576–80. Although he does cite to some examples of presidents significantly reducing national monuments, *id.* at 579 n.118, he also cites instances in which presidents slightly reduced national monuments to support his view. *Id.* at 579 n.119; see *supra* Parts I.E–H (discussing the reductions of White Sands, Wupatki, and Craters of the Moon National Monuments). Similarly, Secretary Zinke concludes in his Final National Monument Report that there is “no doubt” that presidents can modify monuments established by their predecessors because presidents have reduced the size of 16 national monuments on 18 occasions. ZINKE, *supra* note 203, at 4. Secretary Zinke specifically cites to President Taft's reduction of Navajo National Monument to support this claim. *Id.* However, President Taft established Navajo National Monument. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48. Therefore, President Taft's reduction of Navajo National Monument only shows that presidents can modify monuments they created. *Id.* It does not suggest that the President can reduce national monuments established by previous presidents. *Id.*

422. *NLRB v. Canning*, 134 S. Ct. 2550, 2560 (2014).

423. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

424. Proclamation Reducing Wupatki National Monument, 3 C.F.R. 52, 52 (1941) (indicating that when President Taft established the Navajo National Monument it was 160 square miles, which is equivalent to 102,400 acres).

425. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

426. Squillace, *Monumental*, *supra* note 41, at 561.

427. *Id.* at 553.

When presidents modify monuments they created, they are exercising that same discretion.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.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.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.”⁴³¹

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

428. *Id.* at 555.

429. Proclamation Reducing Hovenweep National Monument, 3 C.F.R. 70, 70 (1956); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

430. Proclamation Reducing Glacier Bay, 3 C.F.R. 24, 36 (1955).

431. Proclamation Reducing Santa Rosa Island National Monument, 3 C.F.R. 35, 35 (1946); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

432. *United States v. Midwest Oil Co.*, 236 U.S. 459, 483 (1915).

433. *Id.*

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.”).

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.⁴³⁶ 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.⁴³⁷ In 1946, President Truman updated the boundaries of Great Sand Dunes National Monument for the same reason.⁴³⁸ In 1962, President Kennedy also updated the boundaries of Timpanogas Cave National Monument based on geologic survey information.⁴³⁹ Finally, in 1975, President Ford issued a proclamation fixing a typographical error in his proclamation expanding Buck Reef National Monument.⁴⁴⁰ 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.⁴⁴¹ Similarly, FDR slightly reduced Craters of the Moon National Monument so Idaho State Highway No. 22 could be built.⁴⁴² 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.⁴⁴³

First, these reductions only support the view that the smallest area compatible language gives the President the slight authority to adjust national monuments.⁴⁴⁴ But on a more critical analysis, the reasoning

436. *Id.*

437. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

438. Proclamation Updating Great Sand Dunes National Monument, 3 C.F.R. 55, 55 (1946).

439. Proclamation Updating Timpanogas Cave National Monument, 3 C.F.R. 39, 39 (1962), reprinted in 76 Stat. 1457 (1963).

440. Proclamation Updating Buck Island Reef National Monument, 3 C.F.R. 444, 444-45 (1975), reprinted in 89 Stat. 1231 (1977).

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).

442. Proclamation Reducing Craters of the Moon National Monument, 3 C.F.R. 87, 87-88 (1941), reprinted in 55 Stat. 1660 (1942).

443. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. 24, 36 (1955).

444. 39 Op. Att'y Gen. 185, 188 (1938).

underlying these reductions is questionable. All national monument designations are subject to valid existing rights.⁴⁴⁵ Private rights within national monument boundaries are largely unaffected.⁴⁴⁶ When FDR and President Eisenhower reduced monuments they did so to accommodate private property interests.⁴⁴⁷ FDR removed 87 acres because of a right-of-way.⁴⁴⁸ While FDR's proclamation reducing Craters of the Moon for State Highway No. 22 does not say so,⁴⁴⁹ State Highway No. 22 also had a right-of-way.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.⁴⁵¹ Similarly, President Eisenhower removed private land from Glacier Bay that was suitable for agricultural use.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.⁴⁵³ These reductions suggest that presidents misunderstood the effects of monument designations.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

445. Ranchod, *supra* note 264, at 572–73.

446. *Cf. id.* at 573 (“Valid existing rights must be respected, but can be regulated in order to protect the purposes of the monument.”).

447. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36; *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

448. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

449. Proclamation Reducing Craters of the Moon National Monument, 3 C.F.R. 87, 87–88 (1941), *reprinted in* 55 Stat. 1660 (1942).

450. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

451. *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.”).

452. Proclamation Reducing Glacier Bay National Monument, 3 C.F.R. at 36.

453. *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 . . .”).

454. *Id.*

National Monument.⁴⁵⁵ 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.⁴⁵⁶ Importantly, President Eisenhower eliminated 470 acres from the Monument *after* this land exchange.⁴⁵⁷ While the standard a court would apply in determining whether Congress ratified a monument is not clear,⁴⁵⁸ the land exchange would imply that Congress ratified Black Canyon.⁴⁵⁹ In the case of congressional ratification, President Eisenhower would have lacked the authority to reduce the Monument.⁴⁶⁰

Presidents have slightly reduced national monuments on three other occasions. President Taft removed 160 acres from the 608,640-acre Mount Olympus National Monument.⁴⁶¹ President Eisenhower reduced the 13,883-acre Colorado National Monument by about 90 acres⁴⁶² and then reduced Arches National Monument by about 240 acres.⁴⁶³ 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.⁴⁶⁴ This first occurred in 1911 when President Taft reduced Petrified Forest National Monument by about 50%.⁴⁶⁵ Similarly, President Wilson reduced Mount Olympus National Monument by about 300,000 acres or in half.⁴⁶⁶ FDR also reduced the Grand Canyon National Monument II by roughly 70,000 acres.⁴⁶⁷ President Eisenhower reduced the Great Sand Dunes National Monument by about

455. Proclamation Reducing Black Canyon National Monument, 3 C.F.R. 23, 23 (1960), *reprinted in* 74 Stat. c56 (1960); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

456. Act of May 1, 1958, Pub. L. No. 85-391, 72 Stat. 102.

457. Proclamation Reducing Black Canyon National Monument, 3 C.F.R. at 23.

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).

461. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

462. Proclamation Reducing Colorado National Monument, 3 C.F.R. 56, 56–58 (1959), *reprinted in* 73 Stat. c69 (1959); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

463. Proclamation Reducing Arches National Monument, 3 C.F.R. 32, 32–33 (1960), *reprinted in* 74 Stat. c79 (1961).

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).

465. *Antiquities Act*, NAT'L PARK SERV., *supra* note 48.

466. *Id.*

467. *Id.*

20% or 8,520 acres.⁴⁶⁸ Finally, President Kennedy reduced Bandelier National Monument by about 1,000 acres.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.⁴⁷⁰ Consistent with *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.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.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.⁴⁷³ This practice of explicitly stating that monuments are the

468. Proclamation Reducing Great Sand Dunes National Monument, 3 C.F.R. 23, 23–24 (1956), reprinted in 70 Stat. c31–32 (1957); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 70.

469. Proclamation Reducing Bandelier National Monument, 3 C.F.R. 62, 63–65 (1963), reprinted in 77 Stat. 1006 (1963); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

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

471. 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”).

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. See *supra* Part II (discussing why the President lacks the authority to abolish national monuments).

473. 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), reprinted in 110 Stat. 4561 (1997)

smallest area compatible did not start until the Carter Administration.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.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.⁴⁷⁶ On the other three occasions, the proclamations reserved as much land “as is” or “may be necessary” for the management of the monument.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.⁴⁷⁸ Claiming that the

(“The Federal land and interests in land reserved consist of approximately 1.7 million acres, which is the smallest area compatible with the proper care and management of the objects to be protected.”).

474. Squillace, *Monumental*, *supra* note 41, at 555.

475. See *infra* notes 476–77 (providing the text of the original proclamations).

476. Proclamation Establishing Great Sand Dunes National Monument, 47 Stat. 2506 (1932) (“[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) (“[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.”).

477. Proclamation Establishing Grand Canyon National Monument II, 47 Stat. 2547 (1932) (“[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 *as is necessary* for its proper protection” (emphasis added)); Proclamation Establishing Bandelier National Monument, 39 Stat. 1764 (1916) (“[I]t appears that the public interests would be promoted by reserving [the area] with as much land *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) (“[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 *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. 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.”).

478. Squillace, *Monumental*, *supra* note 41, at 555.

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?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.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.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.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.⁴⁸³

Additionally, Congress responded when presidents significantly reduced monuments by protecting the land those presidents removed from national monuments.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.⁴⁸⁵ After President Kennedy’s reduction, Congress passed two pieces of legislation. First, in 1976, Congress designated 70% of the Monument as wilderness.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 Ctys. 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.

485. Proclamation Reducing Bandelier National Monument, 3 C.F.R. 62, 63–65 (1963), *reprinted in* 77 Stat. 1006 (1963); *Antiquities Act*, NAT’L PARK SERV., *supra* note 48.

486. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.

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 park⁴⁹³ 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

487. Bandelier National Monument Administrative Improvement and Watershed Protection Act of 1998, Pub. L. No. 105-376, 112 Stat. 3388.

488. *Id.*

489. *Id.* at 3389.

490. *Id.*

491. *Id.*

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

493. Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241.

494. Squillace, *Monumental*, *supra* note 41, at 564.

495. 52 Stat. at 1242.

496. Washington Park Wilderness Act of 1988, Pub. L. No. 100-668, 102 Stat. 3961–62; *Monument Profiles: Mount Olympus*, *supra* note 84.

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 wilderness⁴⁹⁹ 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 park⁵⁰⁵ 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

498. Proclamation Reducing Great Sand Dunes National Monument, 3 C.F.R. 23, 23–24 (1956), *reprinted in* 70 Stat. c31–32 (1957); *Antiquities Act*, NAT'L PARK SERV., *supra* note 48; Kerr, *supra* note 20, at 7.

499. Act of Oct. 20, 1976, Pub. L. No. 94-567, 90 Stat. 2692.

500. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3474.

501. Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, 114 Stat. 2527, 2529.

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.

505. Act of Mar. 28, 1958, Pub. L. No. 85-358, 72 Stat. 69.

506. Petrified Forest National Park Expansion Act of 2004, Pub. L. No. 108-430, 118 Stat. 2606.

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.⁵⁰⁸ 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.⁵⁰⁹

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.⁵¹⁰ 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.⁵¹¹

Second, on two occasions, presidents made slight adjustments to monuments they designated or expanded.⁵¹² These reductions *at most* suggest that presidents can reduce monuments they established or expanded.⁵¹³ But no court has ever held that the President has the legal authority to make slight reductions.⁵¹⁴ 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.⁵¹⁵ 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 reclaimed 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.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.⁵¹⁷ On three of these occasions, the reasoning presidents provided for their reduction was based on a mistaken understanding of monument designations.⁵¹⁸ On another one of those occasions, the President may have lacked the authority to reduce monuments because of congressional ratification.⁵¹⁹ Last, in five instances, presidents have significantly reduced monuments established by their predecessors.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."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.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."⁵²³ Advocates of congressional acquiescence argue that presidents have reduced monuments on numerous

516. *See supra* notes 437–40 (describing the modifications of Natural Bridges, Great Sand Dunes, Timpanogas Cave, and Buck Island Reef National Monuments).

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).

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).

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).

520. *See supra* notes 464–69 (describing the reductions of Petrified Forest, Grand Canyon II, Great Sand Dunes, Mount Olympus, and Bandelier National Monuments).

521. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

522. *Id.*

523. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (citing *Youngstown*, 343 U.S. at 610–11).

occasions.⁵²⁴ 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.⁵²⁵

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.⁵²⁶ 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.⁵²⁷ In *Medellin*, the Supreme Court addressed this issue.⁵²⁸

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.⁵²⁹ 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.⁵³⁰ Therefore, Congress had acquiesced to presidents acting in this manner.⁵³¹ 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.⁵³² Applying that narrow standard, the Court held that there was no evidence of congressional acquiescence to that particular activity.⁵³³ 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.

529. *Medellin v. Texas*, 552 U.S. 491, 491 (2008).

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.⁵³⁴

Medellin suggests that courts will define any claim of congressional acquiescence in very narrow terms.⁵³⁵ The President must show acquiescence to the action in the particular situation and not a generalized claim of congressional acquiescence in an entire field.⁵³⁶ Consistent with *Medellin*, the question is whether Congress acquiesced to presidents significantly reducing national monuments, not merely modifying monuments in general.⁵³⁷

Although Congress may not have amended the Antiquities Act,⁵³⁸ Congress has responded in other ways when presidents have significantly reduced national monuments. For example, after President Wilson reduced Mount Olympus National Monument,⁵³⁹ Congress designated the area as a national park that included most of the land President Wilson had taken out of the Monument.⁵⁴⁰ While the Monument was only 600,000 acres when President Roosevelt designated it,⁵⁴¹ by 2014 the Monument-turned-Park contained over 900,000 acres.⁵⁴² Since the standard for congressional acquiescence is whether the practice has never been questioned, one congressional response would defeat a claim of acquiescence.⁵⁴³

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 Monuments as national parks.⁵⁴⁴ After FDR reduced Grand Canyon National Monument II, Congress increased the size of Grand Canyon National Park.⁵⁴⁵ Finally, after President Kennedy reduced Bandelier National Monument, Congress passed a bill that “enhanced [the] protection

534. *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, *supra* note 284, at 689 (explaining that the *Medellin* Court “insiste[d] that the specific actions taken by the President have a history of congressional acquiescence”).

535. *Medellin*, 552 U.S. at 501.

536. *Id.* at 532.

537. *Id.*

538. *But see supra* Part IV.A (discussing the argument that Congress amended the Antiquities Act when it passed FLPMA).

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

540. Act of June 29, 1938, Pub. L. No. 778, 52 Stat. 1241; Squillace, *Monumental*, *supra* note 41, at 564.

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

542. Kerr, *supra* note 20, at 8.

543. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

544. See *supra* Parts V.A.3–4 (discussing Congress’s response to the reduction of Great Sand Dunes and Petrified Forest National Monuments).

545. Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975).

of the lands within the Monument's upper watershed."⁵⁴⁶ These responses all demonstrate that Congress has not been indifferent or acquiesced.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."⁵⁴⁸ But during the early 1900s, President Roosevelt was deeply concerned about development around the Grand Canyon.⁵⁴⁹ The Atchinson, Topeka, and Santa Fe Railroad was planning on building a large hotel on the rim of the Grand Canyon.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.⁵⁵¹ These concerns led Roosevelt to designate the Grand Canyon as a national monument in 1908.⁵⁵² While the Monument was controversial at its time, Grand Canyon National Park is now a beloved part of the American landscape.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.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.⁵⁵⁵

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

546. Bandelier National Monument Administrative Improvement and Watershed Protection Act of 1998, Pub. L. No. 105-376, 112 Stat. 3388.

547. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

548. ROTHMAN, PRESERVING, *supra* note 35, at 65.

549. *Id.*

550. *Id.*

551. *Id.* at 66.

552. Proclamation Establishing Grand Canyon National Monument, 35 Stat. 2175 (1908).

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.").

554. VINCENT & BALDWIN, *supra* note 40, at 3-4 ("About half of the current national parks were first designated as national monuments.").

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.⁵⁵⁶ 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.⁵⁵⁷ 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.⁵⁵⁸ 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.⁵⁵⁹

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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).

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