

Yes, Presidents Can Modify (Even Revoke!) National Monuments

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Jonathan Wood
Attorney, Pacific Legal Foundation
Adjunct Fellow, Property and Environment Research Center
LibertarianEnvironmentalism.com

Be careful what you wish for: Congress almost never addresses whether unilateral executive actions are reversible, yet courts have consistently concluded that they are. If that rule is reversed—which is what it would take to deny President Trump the power to modify or revoke national monuments—the President’s and agencies’ exercise of all sorts of delegated powers would be set in stone. Do you really want President Trump’s executive orders and his agencies’ regulations on immigration, trade, the environment, etc. to be binding on future Presidents unless Congress passes legislation to overrule them?¹

Unilateral executive actions are always subject to reconsideration; it takes an act of Congress to make a policy permanent

The challenge: The argument that the Antiquities Act implicitly creates irreversible, unilateral executive authority hinges on either rejecting the rule above or accepting all four of these propositions: (1) For the Antiquities Act, Congress decided to set aside that rule. (2) That it did so silently, which would be unprecedented—no case has been identified where a Court adopted this interpretation from congressional silence. (3) No one in Congress (or outside of it) noticed or said anything about this extraordinary decision at the time. And (4) no one noticed Congress had done this for decades, even though Presidents of both parties repeatedly exercised the power to modify existing monuments.² That’s a tall order!³

¹ Jonathan Wood, *Yes, President Trump can revoke national monuments*, Wash. Post. (Sept. 27, 2017), https://www.washingtonpost.com/opinions/yes-trump-can-revoke-national-monuments/2017/09/27/ec9dee9a-a2f1-11e7-8cfe-d5b912fab99_story.html?utm_term=.10166a64efca.

² McElfish, Mallory, Squillace, and Wood, *Antiquities Act: Legal Implications for Executive and Congressional Action*, 48 *Env'tl. L. Rep.* 10,187 (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134556.

³ Disclaimer: I represent a rancher and hunting interests as defendant-intervenors in the Bears Ears litigation. See *Utah Dine Bikeyah v. Trump*, 17-cv-02605 (D.D.C.).

I. Presidential elections have consequences: Presidents can change the unilateral executive actions of their predecessors

Congress routinely delegates authority to the President or executive agencies to take all sorts of unilateral actions, e.g. issuing regulations. It almost never says anything about repealing or modifying those actions. And yet courts have routinely held that power is implicit in the delegation of unilateral, discretionary executive action.⁴ This principle is so well established that we don't question it in 99% of cases. Incoming Presidents regularly reverse the policies of their predecessors. An executive order may be reversed. A controversial regulation may be radically changed. Another may be scrapped entirely. No one asks whether Congress has expressly authorized those earlier policy decisions to be reconsidered.

Courts, too, treat the issue as an easy one. They have repeatedly concluded that this authority is inherent in the nature of unilateral executive authority. Notably, they don't ask whether other statutes expressly provide for regulations to be modified or revoked, as a few do (although they are rare).⁵ Even where Congress uses mandatory language to describe an agency's obligations, courts will generally interpret statutes to permit reconsideration unless expressly foreclosed.⁶ In other words, it takes a lot to overcome the ordinary rule that unilateral, executive actions are subject to Presidents reconsidering them.

There's good reason for that. A President who could unilaterally set irrevocable policy would have far too much power. Because unilateral, executive actions are reversible, Presidents have an incentive to seek compromise through Congress to achieve lasting reform. If they could set permit policy on their own, there'd be no reason to compromise with Congress. For instance, President Obama had two options to pursue greenhouse gas regulations. He could work with Congress to negotiate a cap-and-trade bill (or whatever). Or he could use the Clean Air Act to adopt regulations targeting greenhouse gases. Because he took the latter route—adopting the Clean Power Plan—President Trump was able to reverse the policy decision. If legislation had been enacted requiring greenhouse gas regulation, President Trump would have been bound by that statute and couldn't reverse it without Congress repealing the statute.

⁴ See Todd Gaziano & John Yoo, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 Yale J. Reg. ____ (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004821.

⁵ See *Commonwealth of Pa. v. Lynn*, 501 F.2d 848, 855-56 (D.C. Cir. 1974).

⁶ *Cal. Sea Urchin Comm'n v. Johnson*, No. 17-555428 (9th Cir. Mar. 1, 2018) (statute providing that an agency "must" adopt a specific regulation and "shall implement" it is insufficiently clear to forbid the Service from subsequently revoking that regulation).

II. Are monument designations different?

In a word, “no.” Nothing in the Constitution, text of the statute, or history of implementation suggests that monument designations are irreversible. On the contrary, the statute, like almost every other, is silent about modification and revocation. From the statute’s early days, Presidents of both political parties have repeatedly modified existing national monuments. To explain why the arguments against the Presidents power are unconvincing,⁷ I’ll start from the constitutional argument, move onto the text (of both the Antiquities Act and other public land statutes), cover the history of presidential administration, and conclude with the statute’s purpose.

The Property Clause

Prof. Squillace and his co-authors, as well as the litigants challenging the Grand Staircase reduction, have argued that the Constitution cuts against the President because the Property Clause charges Congress, not the President, with regulating the public lands. This argument fails for at least two reasons.

First, it doesn’t distinguish anything. When the President or an agency issues a regulation of commerce, immigration, or the environment, it is acting pursuant to delegated authority from Congress. Yet courts have consistently held that such regulations Presidents/agencies can subsequently revoke or modify such regulations, unless Congress expressly says otherwise. Neither Prof. Squillace nor the litigants have identified *a single case* where, from congressional silence, a Court concluded that a unilateral, executive taken pursuant to a delegation of authority foreclosed subsequent reconsideration.

Second, the constitutional argument proves too much. The litigants challenging the Grand Staircase reduction, for instance, argue that any delegation from Congress to the President must be construed strictly to prevent the President from usurping Congress’ power.⁸ I’m sympathetic to that strong theory of the separation of powers, but I suspect the litigants would reject it if applied to the President’s power to designate monuments. It makes no sense to say that the President’s decision to forego power is a greater threat to the separation of powers than his decision to seize it. So what should we make of the long history of Presidents designating monuments that stretch the Antiquities Act’s literal terms? If the constitutional argument prevails, many existing monuments would have to be struck down or substantially reduced. The statute does not expressly authorize the

⁷ See, e.g., Squillace, et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Virginia L. Rev. 55 (2017).

⁸ Memo. Supp. Plaintiffs’ MSJ, *Grand Staircase Escalante Partners v. Trump*, 17-cv-02591 (D.D.C. filed Jan. 20, 2018).

designation of monuments to protect landscapes, for example, thus any lands included in a monument designation for those reasons would have to be excised.⁹ The Antiquities Act does not expressly authorize the designation of ocean monuments, so all ocean monuments must be invalid too.¹⁰ Finally, there's no reason why this constitutional argument would be limited to the Antiquities Act or the Property Clause—any delegation under any of Congress' other powers would similarly have to be construed narrowly, dramatically reducing federal agency's power under every ambiguous statute. So much for *Chevron*!

The Statute

The Antiquities Act is silent on whether monuments can be revoked or reduced. There's no indication that Congress wished to set aside the ordinary rule that discretionary, unilateral monument designations can be reconsidered.¹¹ Thus Prof. Squillace and others must argue that Congress implicitly denied this power, even though they have not identified a single case where any court has adopted such an interpretation by implication. Prof. Squillace argues that several statutes from within a few years of the Antiquities Act show Congress expressly authorized withdrawals to be revoked or modified when it wished to give the President such power. However, his argument is based on a misreading of the statutes, which support the opposite conclusion.

Prof. Squillace has noted that the Pickett Act of 1910 authorized temporary land withdrawals and provided that they “shall remain in force until revoked by [the President] or by an Act of Congress.”¹² Rather than supporting Prof. Squillace's argument, this statute significantly undercuts it. The Pickett Act doesn't contain any provision expressly authorizing the President to revoke national monuments. That power is assumed to exist by the quoted language. If Prof. Squillace's theory were correct and revocation power must be

⁹ Congress considered an early version of the Antiquities Act that would have allowed designations based on “scenic beauty, natural wonders or curiosities” in addition to the objects ultimately included in the statute. That shows that the other items in the list don't include “scenic beauty, natural wonders, [etc.]”. Thus, Congress' decision to exclude them should make it even more clear areas can't be designated for these reasons. See Robert Claus, *Information about the background of the Antiquities Act of 1906*, Dept. of Int. (1945).

¹⁰ Disclosure: I represent several commercial fishermen organizations in a challenge to the Northeast Canyons and Seamounts Marine National Monument, arguing that the Antiquities Act does not extend to the ocean. See *Mass. Lobstermen Assoc. v. Ross*, No. 17-cv-00406 (D.D.C. filed Mar. 7, 2017).

¹¹ There's a 1938 AG opinion arguing that Presidents can modify but not revoke monuments. No one appears to defend that line today, so perhaps that opinion is irrelevant to the litigation. But, for what it's worth, the opinion's analysis is very weak. The opinion claims that revoking a single monument would be tantamount to appealing the Antiquities Act, which the President can't do. That makes no sense; when the EPA withdraws an outdated air pollution regulation that doesn't render the Clean Air Act invalid.

¹² Pickett Act, ch. 421, 36 Stat. 847 (1910).

explicitly granted, the quoted language makes no sense. It would require withdrawals to remain in effect until the President revokes, which he would have no power to do. Prof. Squillace's reliance on this language fares even worse when you consider the rest of the quoted language. The statute's reference to Congress' ability to pass new legislation revoking a withdrawal doesn't imply that Congress otherwise lacks this power under other statutes. The Antiquities Act contains no similar language but of course Congress can change or revoke a monument by passing new legislation. Yet, under Prof. Squillace's argument-by-implication, that power would have to be denied even to Congress. That's absurd!¹³

The other statute Prof. Squillace points to is the Forest Service Organic Act of 1897.¹⁴ He quotes the version of the text appearing in the U.S. Code, which authorizes the President "to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification *may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.*"¹⁵ Although the quoted language does appear to support the theory, the full text of the legislation clearly forecloses it. In full, the statute provides

[T]o remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend and any all Executive orders and proclamations or any part thereof, from time to time as he shall deem best for the public interests.

This language shows that Congress understood the President would have this broad modification/revocation power even if the statute did not expressly address it. Congress was explicitly taking a belt-and-suspenders approach to dispel any question about the President's power to do so. Reading this statute to imply that this power is withheld unless Congress expressly provides it directly contradicts the text.

The litigants have identified other statutes that reference a power to revoke or modify withdrawals, although they are similarly unhelpful. Several of them, including the Newlands Reclamation Act of 1902,¹⁶ address revocation because Congress made it mandatory in certain instances. That statute, for example, provides that the Secretary of

¹³ Jonathan Wood, *Law professors argue the President can't revoke national monuments (and implicitly that Congress can't either)*, PLF Liberty Blog (May 16, 2017), <https://pacificlegal.org/law-review-article-implicitly-argues-not-even-congress-can-reverse-national-monuments/>.

¹⁴ Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897).

¹⁵ Squillace, et al., *supra* n. 7 at 58 (emphasis in original).

¹⁶ Act of June 17, 1902, ch. 1093, § 3, 32 Stat. 388 (1902) (emphasis added).

Interior “*shall* restore to public entry any of the lands so withdrawn” under certain circumstances. That Congress expressly addresses the circumstances where it *requires* the President to revoke a withdrawal casts no doubt on the ordinary rule concerning his discretion to do so.

A Long Tradition of Presidents Modifying Existing Monuments

Decades of presidential administration further reinforce the President’s power to reconsider national monuments. Six presidents have reduced national monuments, including such conservative reactionaries as FDR and JFK. Several of the past reductions have been significant. President Taft reduced the Navajo National Monument by 89 percent. Several Presidents collectively removed hundreds of thousands of acres from the Mount Olympus monument. And other monuments have been reduced by a quarter to a half. Presidents justified these reductions on factors like the desire to increase economic use of the lands, national defense, and other policy considerations.¹⁷ None of those past reductions were challenged. Nor does it appear that their legality was even questioned.¹⁸ For decades, it appears, everyone accepted that the discretionary power to designate monuments inherently includes the power to reconsider them.

Prof. Squillace and others have noted that the last reduction (prior to Bears Ears and Grand Staircase) occurred before the adoption of FLPMA. Although true, it’s legally irrelevant. FLPMA did not alter the President’s Antiquities Act powers. If Congress disapproved of the long-standing practice of President’s modifying existing monuments, it would have said so. Yet the statute only references the Secretary of Interior, whom it forbids from modifying or revoking a monument designation. That provision was necessary because, otherwise, the Secretary is given broad revocation/modification authority.

This conclusion is not altered by FLPMA’s legislative history, including a House Report indicating that the bill would “specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments[.]” Legislative history cannot create ambiguity where there isn’t any, so the lack of any reference to the President’s power in the text of the statute is dispositive.¹⁹ Nor can FLPMA’s legislative history affect the interpretation of the Antiquities Act. Post-enactment legislative history, especially a house report that is three-quarters of a century late, casts no light on what the congressmen

¹⁷ See Gaziano & Yoo, *supra* 4, at 26.

¹⁸ Congress restored protections for some of the lands, by passing legislation converting them into national parks. But that merely shows that when it wants to make such protections permanent, rather than leaving them to the President’s discretion, it knows that it must do so through the legislative process.

¹⁹ See *Hearn v. Western Conf. of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995).

thought when they cast their vote for the Antiquities Act. Furthermore, it would be unconstitutional for a House Report to alter a preexisting statute without satisfying bicameralism and the Presentment Clause.²⁰

The Statute's Purpose

Finally, arguments from the Antiquities Act's purpose fail because the statute never requires any federal land to be designated as a monument in any circumstances. It gives absolute discretion to the President to decline to designate a monument, even one that clearly would fit within the statute, for any reason he wishes. The President may decline to designate a monument on January 19th because it would be unpopular among the local populace or economically harmful. Thus, how can the statute's purpose clearly foreclose the same or a subsequent President considering those same factors to revoke or modify the monument on January 20th? The same broad discretion to create monuments applies to the revocation or modification of the monument and nothing in the statute suggests otherwise.

III. Monument supporters should look to Congress for a compromise solution. Otherwise, the future of these lands will remain at the whim of presidential politics.

Monument designations are not the same as national parks or wilderness areas. Those require an act of Congress to create and, consequently, an act of Congress to modify and revoke. That makes imminent sense. When something requires broad consensus to create, it should take the same sort of consensus to change. For the same reason, actions that can be done easily by a term-limited (and therefore politically unaccountable) President can be undone easily. You make that tradeoff by going the route of unilateral, executive action. More permanent protections can only come through Congress and compromise.²¹

²⁰ See *INS v. Chadha*, 462 U.S. 919 (1983) (A single House of Congress cannot amend a statute, even by passing a unicameral resolution.).

²¹ Jonathan Wood, *Lacking consensus, monument designations breed endless conflict*, FREEcology (Nov. 14, 2017), <https://libertarianenvironmentalism.com/2017/11/14/lacking-consensus-monument-designations-breed-endless-conflict/>.