Antiquities Act: Legal Implications for Executive and Congressional Action

Summary

Secretary of the Interior Ryan Zinke's review of 27 national monuments has focused new attention on the Antiquities Act of 1906. Two recent proclamations by President Trump reducing existing Utah monuments, and the potential for further actions by the president and Congress, may substantially affect the future shape and effect of this important law. On December 7, 2017, ELI held a seminar to explore presidential and congressional authority in declaring and modifying national monuments. Panelists discussed the Act's legal history, the importance of existing national monuments, the role of Congress in managing these lands, and what might be expected from pending court challenges. Below we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

James McElfish (moderator) is a Senior Attorney at the Environmental Law Institute.
Brenda Mallory was General Counsel for the Council on Environmental Quality during the Obama Administration.
Mark Squillace is a Professor of Natural Resources Law at the University of Colorado Law School.
Jonathan Wood is an Attorney at the Pacific Legal Foundation and an Adjunct Fellow at the Property and Environment Research Center.

James McElfish: We have an excellent panel on a timely topic. Our panelists include Mark Squillace, professor of law at University of Colorado Law School and the former director of the Natural Resources Law Center there. Mark started his legal career at the Department of the Interior (DOI) back in the 1970s, where I got to know him as an officemate. Mark is one of the leading authorities on the Antiquities Act,[1] having written an article[2] on this topic more than a decade ago on a lot of issues that we're still trying to figure out today.

Mark is going to lead us off with a brief background on what the Antiquities Act is about or how it came to be, then we will move to our other panelists, including Brenda Mallory, who is a former general counsel for the Council on Environmental Quality. Before that, she had a long career at the U.S. Environmental Protection Agency as the acting general counsel and at Beveridge & Diamond prior to that. Brenda's going to talk about what the Antiquities Act and its uses look like from the point of view of the administration, overseeing litigation, land conservation, and conservation of cultural resources, having been involved with some of those decisions closely during the Obama Administration.

She'll be followed by Jonathan Wood of Pacific Legal Foundation. Jonathan has written extensively and done a great deal of work dealing with public lands, and is also a litigator on those issues. I expect Jonathan will have a point of view that differs from that of our other panelists on the powers of the president and the powers of the U.S. Congress. We're pleased to have Jonathan with us. Mark will then offer his point of view on some of the issues that I hope Jonathan will tee up for us. Then we'll have an opportunity for audience questions.

To offer some background: as you no doubt know, President Donald Trump issued proclamations[3] on December 4, 2017, downsizing two of the larger terrestrial national monuments in southern Utah: Bears Ears and Grand Staircase-Escalante, designated by Presidents Barack Obama and Bill Clinton, respectively. Under the proclamations, Bears Ears will have two units, and Grand Staircase-Escalante will be downsized by about 900,000-plus acres and divided into three subunits.

Promptly after the president's proclamations, five of the tribes that participated in getting Bears Ears proclaimed as a national monument in the first place filed suit challenging the action.[4] Ten organizations filed suit the same day on Grand Staircase-Escalante, both here in the federal district court for the District of Columbia.[5] Patagonia and a number of other organizations filed suit also, challenging the president's proclamations.[6]

1. 54 U.S.C. §§320301-320303.
2. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473 (2003).
3. Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 8, 2017); Proclamation No. 9682, 82 Fed. Reg. 58089 (Dec. 8, 2017).
4. Utah Dine Bikeyah et al. v. Trump et al., Case No: 17-cv-2605 (D.D.C. filed Dec. 6, 2017).
5. The Wilderness Society et al. v. Donald J. Trump et al., Case No: 17-cv-2587 (D.D.C. filed Dec. 4, 2017).
6. Grand Staircase Escalante Partners et al. v. Trump et al., Case No: 17-cv-2591 (D.D.C filed Dec. 4, 2017).

There's a lot on the legislative front, including pending legislation to reform or curb the president's powers on the Antiquities Act. There are also legislative responses to the December 4 actions by the president, which are not necessarily the only actions with respect to existing monuments. DOI Secretary Ryan Zinke's report[7] was posted the following day, with recommendations for what should happen to those additional monuments.

The Antiquities Act power conferred by Congress on the president has traditionally been a very broad authority, but it has typically resulted in different takes between the executive branch and Congress over what the management outcome should be for particular lands. Many of the lands that were proclaimed as national monuments by presidents have entered the National Park System or other units of our national conservation system.

In my own experience, when I first got to Washington, President Jimmy Carter had essentially tried to take Alaska lands to the next level by proclaiming 13 national monuments covering much of the state.[8] That in effect provoked or promoted a congressional response that resulted in the Alaska National Interest Lands Conservation Act of 1980.[9] We had a give-and-take, usually between the president and Congress, and we've seen that throughout history. We'll see what happens here where the give-and-take is between one administration and the next on using presidential powers. Without further ado, I'll turn it over to Mark.

Mark Squillace: I will share a few thoughts about the Antiquities Act, how it came to be, and some of the historical controversies that have led to the issues that we have today. Let me highlight for you some of the reasons that the Antiquities Act was established. It really concerned looting that was occurring on public lands around the turn of the 19th to the 20th century. There were reports from various archeologists and archeological societies about the looting that was going on. It wasn't just pot hunters, by the way. It included major museums.

There's a famous story told about the American Museum of Natural History essentially lifting out an antiquity site from Chaco Canyon and hauling it back to D.C. for their museum. So, this was a big concern from a number of members of Congress. Then, in 1900, three bills were introduced into Congress before the U.S. House of Representatives Committee on Public Lands chaired by Rep. John Lacey (R-Iowa). That effort led to DOI getting involved. The House bills were fairly narrowly focused on protecting relatively small archeological sites, but DOI had long had its sights on trying to develop some legislation that would give the president the power to set aside national parks.

The DOI response to the House bills was very broad legislation that essentially would allow the president to set aside lands for their scenic beauty and natural wonders, as well as to protect ancient ruins and other objects of scientific or historic interest. It took six years before these bills were worked out between the different versions that were presented, but in 1906, Congress ultimately passed the Antiquities Act. Of interest, it ended up including the language that was originally proposed by DOI providing for the protection of objects of historic and scientific interest. So, that becomes very important in terms of the way the law has evolved.

The statute gives the president the authority to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest on lands owned or controlled by the United States. The statute provides that the president may "reserve" this land or a part thereof from the operation of certain public land laws. The limits, however, have to be "confined to the smallest area compatible with the care and management of the objects." That last phrase becomes important in interpreting while going forward.

When the law passed in 1906, Teddy Roosevelt was president. He wasted no time in designating monuments. He declared four in 1906, including the first—Devils Tower National Monument. He designated five more in 1907. Before he left office in early 1909, President Roosevelt had designated 17 monuments, including several large ones. The one that is probably most important for our purposes is the Grand Canyon National Monument, which consisted of more than 800,000 acres when designated in 1908. It is important not just because it's the Grand Canyon, but because it led to the lawsuit that is at the center of the current controversy over the size of national monuments.

In *Cameron v. United States*,[10] there was a man, Ralph Henry Cameron, who located mining claims around the Grand Canyon. He had been mining there for quite some time with his brother and another partner. He eventually located several mining claims along the Bright Angel Trail and he decided to charge $1 to tourists who wanted to pass through his claims to get down to the bottom of the canyon. He was charging people for quite a long time.

The Santa Fe Railroad Company set up a hotel on the South Rim of the Grand Canyon. Its guests were upset with having to pay Cameron to pass through his mining claims, so the railroad eventually complained to DOI, which decided to investigate Cameron's claims and determined that his claims were not valid. But Cameron wouldn't leave. He continued to charge people. Ultimately, the United States brought a lawsuit against Cameron to have him evicted from the land.

In response, Cameron made an argument that his claims were indeed valid. But he also argued, importantly for our purposes, that the president lacked the authority

7. Memorandum From Ryan Zinke on Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act (Dec, 5, 2017), *available at* https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf.

8. The president acted to preserve these lands pending congressional consideration of Alaska conservation lands legislation; he proclaimed 13 national park monuments, two U.S. Fish & Wildlife Service monuments, and two national forest monuments, covering 56 million acres. Proclamation No. 4611-4627, 43 Fed. Reg. 57009-31 (Dec. 1, 1978).

9. Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. §§410hh-3233, 43 U.S.C. §§1602-1784 (1980)).

10. 252 U.S. 450, 455-56 (1920).

to designate the Grand Canyon as a national monument, in part because of its size. The court rejected the claims as invalid and pointed to the key language from the Antiquities Act regarding objects of historic and scientific interest, and noted that the Grand Canyon is the greatest eroded canyon in the United States, if not the world. So, the court essentially confirmed the authority of the president to designate large-scale, what we might today call landscape-scale, monuments like the Grand Canyon.

There is, I think, some sense from the debate that goes on today that the controversies over the Antiquities Act are new. It's fair to say they're not new. They've been going on pretty much since the beginning of the Act. One of the earliest controversies concerned the more than 600,000-acre Mount Olympus National Monument. It was designated by Teddy Roosevelt just two days before he left office. It didn't sit well, particularly with the U.S. Forest Service, which was afraid it was going to lose the land to the National Park Service. It didn't sit well also with the logging and mining community up in the Pacific Northwest.

So in 1915, President Woodrow Wilson, claiming a need for timber to support the war effort, decided to cut the monument nearly in half. He cut more than 300,000 acres from the monument. This created quite a stir within the burgeoning environmental community at the time, but no lawsuit was filed and the decision was not challenged. It was just allowed to go forward. Ultimately, of course, Congress renamed and expanded the monument as Olympic National Park and much of the land that was cut out was restored. In fact, the land in the park now covers more than one million acres.

The other case that's worth noting here is the Jackson Hole National Monument, a whole different story. Jackson Hole was designated in part because John D. Rockefeller had donated a significant chunk of land just outside of what was then a small Grand Teton National Park located around the high peaks. Rockefeller wanted the Interior Department, then headed by Harold Ickes, to designate a new Jackson Hole National Monument. President Franklin Roosevelt decided to go forward and do just that. The decision was extremely controversial in Wyoming. Cliff Hansen, who at the time was the Teton County commissioner and later became a U.S. senator from Wyoming, was so incensed by the decision that he drove an illegal cattle drive through the new monument in protest.

But what was interesting about Jackson Hole is that while there was great opposition that ultimately led to the only amendment to the Antiquities Act, prohibiting new monuments in the state of Wyoming, the opponents, including Hansen and others, later admitted that they were wrong and that the Jackson Hole National Monument, which eventually became part of the Grand Teton National Park, was probably the best thing that ever happened to Teton County.

Brenda Mallory: In my role at the Council on Environmental Quality at the end of the Obama years, a very large part of my portfolio was working on national monuments. So, I came to understand and appreciate this little-known tool, the Antiquities Act, and the power that it has had and the place that it has had over the years and over the century in protecting not only iconic places that we know and love like the Grand Canyon, the Statue of Liberty, and Joshua Tree, but also smaller, more historic monuments like Stonewall Inn, Harriet Tubman Underground Railroad National Park, and the Belmont-Paul Monument. It's played a really wonderful role in allowing us to not only protect our heritage and history, but to recognize cultural aspects as well. I am very supportive of the Act and the way that it has worked, and want to see it unchanged as we go forward.

My main message is to urge that people pay attention to what's going on in the public lands sphere. Public lands don't get the same level of attention as any number of the other things that are occupying the media, both trade press and broad media. But I think there are fairly transformative activities occurring on public lands in the way that DOI and the current Administration are looking at the use and regulation of public lands and the role that the public should have in that process. It is important that people look at this and pay attention to what's happening.

Bears Ears was designated on December 28, 2016. It was designated at 1.35 million acres after five sovereign tribes approached the Obama Administration and urged the designation of the monument. Their request actually was for a monument of 1.9 million acres. After examination and working with broad groups of people, the Administration arrived at a designation of 1.35 million acres.

It's important to note that this stunning area has been of great interest for well over a century. There are reports of archeologists back in the late 1800s who were urging that the area be protected and be given some special status. As early as 1935, DOI Secretary Harold Ickes had a proposal to designate Bears Ears as a monument for President Roosevelt. Thus, the special and unique nature of this area was identified early on.

If you're following this issue in the press, there are all sorts of references to the "uns"—the actions occurring here are unlawful. They're unconstitutional. They're unprecedented. They're un-American. They're unfriendly. It just goes on. I think it's really not just about the action that the president took on December 4, but also this entire process, the whole idea of reexamining with such broad scope. Nothing like that's ever been done with monument designations that have occurred over a two-decade period. And to do it based on criteria that weren't clear or established makes the actions even more noteworthy. This process and the resulting litigation is going to result in some examination of issues that involve the Antiquities Act and how it is operated that have not previously been considered.

Before I shift topics, let me address one of the "uns," which has to do with the way that the proclamations

themselves are structured. There's a 1938 attorney general opinion[11] that very clearly says that a monument proclamation cannot be revoked. The opinion recognizes that modification of some monuments had occurred previously, but it doesn't rule on or analyze what that means. It also doesn't address the inherent inconsistency of its modification acknowledgement with its analysis of the president's authority to revoke, which is based on the language on the face of the statute. So, what you'll see when you look at the proclamations that the president issued is the Administration very carefully trying to frame its actions within the language of modification and to talk about what they're doing in ways that they're hoping will allow for some sense that this is no different than what has been done before.

But that's just not correct. Let's talk about some of the modifications that have occurred previously. They involved monuments that were designated in the 1909 to 1938 time period. The latest monument modification was made by President John F. Kennedy in the early 1960s.

Proclamations looked and were structured very differently then than they are today. I don't think that this answers the legal question, but, as I think Jim was suggesting, the context was different: there were monuments that were designated when presidents were on their way out the door. There was no analysis or identification of what the objects were. That happened afterwards. Then, presidents on several occasions went in and adjusted the boundaries based on the analysis of what the objects were.

Under those scenarios, there was an argument about changed circumstances. In the new Grand Staircase-Escalante proclamation, there is a suggestion that the president is relying on changed circumstances to support his actions. Again, I think they are trying to fit the monument changes within the framework of previous modifications. I would say the circumstances here are so vastly different from anything that we have seen previously that even if you get over the legal hurdle, which I think you don't, you have a framework for previous modifications that doesn't compare to what we're seeing in the current cases.

Another thing embedded in the proclamation is what appears to be a new standard, where the object that's appropriate for protection is not just historic and scientific, which is the language of the statute, but have to be "significant" historic and scientific objects. There is also a suggestion that uniqueness is a criterion. Finally, there is a suggestion that if there are other protective laws covering the area, those laws are used to decide whether or not the area is at risk and therefore appropriate for protection as an object.

These three factors, which were also included in Zinke's report, are given some importance even though their origins are unclear and unexplained. I think this is going to be an area where we're going to see additional attention as we're going forward, whether it's in a lawsuit or outside of that context.

Before moving on, I note that months before President Trump's proclamation, when people were asking what is this monuments review process and trying to understand what was going on, someone said to me, "I've heard that this is really all about Grand Staircase and Bears Ears." I said, no, not Grand Staircase. That's so old. That's been in place for decades. There are communities that built up around it. There's judicial support and congressional ratification of it. They just pulled a huge, 80%-intact dinosaur frame out of the monument. That's not going to be one that is subject to change.

It's a good thing that I'm not a betting person. Grand Staircase surprised me in part because of its strong historical and cultural links. You would think that would make it untouchable. This raises a concern—are we going to start going back and looking at all of our other monuments? The history didn't matter here. Does it not matter in some of the other significant monuments?

In the Zinke report, in addition to identifying Cascade-Siskiyou in Oregon and Gold Butte in Nevada as two other areas where actual boundary modification is recommended—he has also identified Katahdin Woods, Organ Mountains, Rio Grande del Norte, Pacific Remote Islands, and Rose Atoll as areas for which management modifications are appropriate. He's also suggesting that there be three new monuments designated: Camp Nelson, Medgar Evers House, and the Badger-Two Medicine in Montana, his home state.

But the report makes clear that DOI believes that there should be a broader examination of the management and the management plans for the monuments that have been created and have been in place for years, to see whether or not they are consistent with the three new criteria that they suggest should govern monument designations, as well as the "energy dominance" goal that is covering many things.

I like this quote from the Conservatives for Responsible Stewardship blog:

> The implications of President Trump attempting to overstep the limits of his power by rolling back national monuments extend well beyond the harm caused to the monuments themselves—and our natural and cultural heritage that they protect. This move threatens to erode the separation of powers on which our democracy is founded. It represents an abuse of power. . . . Americans, not just hunters, anglers and other outdoor lovers who recognize the value of these monuments, but constitutional conservatives and all Americans who cherish our democracy [should] stand against this ill-considered move by the president.[12]

The thing that struck me about this quote is that it is basically a rallying cry or call to attention that it is not just the lands and monuments on the ground that we should be worried about. The Trump Administration's revocation of

11. Proposed Abolishment of the Castle Pickney National Monument, 39 Op. Att'y Gen. 185 (1938).

12. David Jenkins, *Trump's Monument Rollback Is Unconstitutional*, Conservatives for Responsible Stewardship (Nov. 30, 2017), http://www.conservativestewards.org/1214-2/.

monuments threatens to erode our notion of the separation of powers and democracy. Further in the blog, it actually goes on to say that because the administration was told in advance that this action would be illegal, the idea that they're proceeding in the face of that actually makes it even more troubling.

Both the House members and Zinke, when he issued his report, made a big point of saying that the monument actions are not about obtaining oil and gas. Zinke said people are talking as if potential oil and gas activities are a real important feature of what's happening on the land, and that's just furthest from the truth. But at the same time, going on within DOI is this wholesale examination of all of the agency's activities, all of the plans that they are responsible for, with a focus on energy dominance.

I would say read the energy burdens report,[13] which was issued in response to the president's Executive Order about energy development.[14] It is a road map to the kinds of activities that I think we can fully expect to see as it relates to public lands and, again, worth paying attention to. There are also some major leases that have been announced or proposed where DOI is considering activities that are on the doorstep of a number of monument areas, including Bears Ears. Again, the document announcing the leases was issued either at the end of November or early in December, and some of the proposed leases would occur in March 2018.[15]

When the discussion about revoking monuments started, there was an emphasis on this notion of monuments taking things away from states. To reiterate, we're talking about federal land. It was federal land before it was a monument. It's federal land now. Zinke has referenced the federal framework as a reason why we don't have to worry about protection, because the federal government will still have it. But at the same time, the current planning by the federal government is very different than the conservation emphasis that we have seen previously. That's an important point.

The other issue mentioned in critiquing monument designation is the need to listen to local communities. The Obama Administration made a great effort to do outreach around conservation and public lands issues, in particular. In his first term, there was an initiative called America's Great Outdoors, where public officials from all agencies were going out to communities to talk to people about what aspects of their communities they found valuable and deserving of protection, what kind of protection, and how that should be handled.

From that initiative, which led to something like 51 listening sessions with 10,000 participants across the country, 105,000 written comments were then pulled together and very much became part of our road map for how the Administration proceeded on conservation, but also in examining how the monuments were approached. That approach always included engagement with the local communities. I would say in most, if not every case, there was at least one public meeting. In addition, DOI officials were engaging with folks over longer periods.

Obviously, I'm not the only person saying that President Trump doesn't have authority to do what he is trying to do here. There's been overwhelming agreement among scholars and other lawyers who are looking into this issue. It doesn't mean it's unanimous, of course, but I would say overall there is agreement. And Jonathan will say I am incorrect.

Finally, I wanted to put a couple recent articles on your radar. In November 2017, a paper came out called *Distorting the Antiquities Act to Aggrandize Executive Power—New Wine in Old Bottles*[16] that addresses the separation-of-powers issue. I also wrote a blog post[17] for the American College of Environmental Lawyers on the fate of the then-anticipated designations, but it also has attached to it a number of articles that were written, including the professors' letter that was submitted to DOI as part of the monuments review process.

Jonathan Wood: I'm going to take the unpopular position, at least on this panel, that there is really no significant question about the president's power to revoke or reduce the size of national monuments. This should be a wholly unremarkable conclusion because it's the case with essentially every type of unilateral executive authority. The main difference between legislative authority and executive authority is that legislative authority endures. When Congress passes legislation and it's signed by the president, it is really hard to undo that. The reason is because it's hard to pass it in the first place. But when the executive acts on its own, it is easy to do and it is easy to take back. That's the trade off you make by choosing to go the unilateral executive route rather than seeking compromise and consensus through Congress.

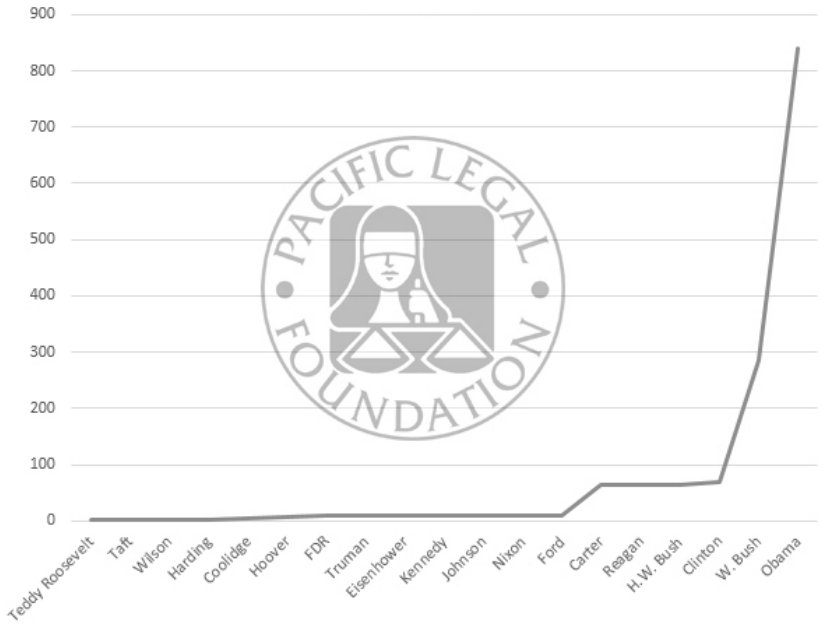
Before I explain the case for why that is and why that should work here, I want to set up a little bit about why a statute that's 111 years old is suddenly more controversial than it's ever been. It has certainly gone through periods of controversy, but nothing quite like this. I see President Trump's actions as impetus for a congressional

13. U.S. Dept. of the Interior, Final Report: Review of the Department of the Interior Actions That Potentially Burden Domestic Energy (2017), *available at* https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf.
14. Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).
15. *Canyon County District March 2018 Competitive Oil and Gas Lease Sale—Environmental Assessment*, U.S. Dep't of the Interior, Bureau of Land Management, https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=122746 (last visited Feb. 9, 2018).
16. Bruce Fein & W. Bruce Delvalle, *Distorting the Antiquities Act to Aggrandize Executive Power—New Wine in Old Bottles* (Nov. 30, 2017), *available at* http://www.conservativestewards.org/wp-content/uploads/2017/11/Illegal-Distortion-of-the-Antiquities-Act.pdf (forthcoming in updated article form in the April 2018 issue of *News & Analysis*).
17. Brenda Mallory, *With Litigation Guaranteed, the Fate of National Monuments Will Be Uncertain for Some Time* (Sept. 1, 2017), American College of Environmental Lawyers, www.conservativestewards.org/wp-content/uploads/2017/11/Illegal-Distortion-of-the-Antiquities-Act.pdf.

response—essentially the other side of the coin to what Jim was saying earlier.

In the past, presidents' aggressive use of the Antiquities Act to designate monuments pushed Congress to reform that power on the margin. Similarly, President Trump's decision to reduce national monuments will likely nudge Congress to compromise, perhaps by reversing individual decisions and, going forward, making monuments both harder to designate and modify. So, maybe some of the lands excluded from Bears Ears will end up back within the monument.

Figure 1. Millions of Acres Within Monument Designations at the End of a President's Tenure



In the long term, I think we're better off if federal land decisions are made in a way that reflects consensus and compromise rather than raw presidential power. There's no avoiding the problem that recent presidents have been very aggressive in using the Antiquities Act to achieve environmental goals unilaterally, rather than seeking congressional compromise. This graph shows the cumulative acres within national monument boundaries at the end of each president's term.

As you can see, Teddy Roosevelt, who we think of as the champion of the Antiquities Act, did not utilize it very much. It took almost 100 years for Presidents Roosevelt to Clinton to designate 79 million acres of national monuments. In the past 16 years, we've added 10 times that amount. If you're wondering why people are upset about a 111-year-old law, this is it: presidents are increasingly using it as a tool to decide whether hundreds of millions of acres of ocean and federal lands are available for people to earn their livelihoods. Remember this chart when you see reports that President Trump's decision to reduce national monuments is "unprecedented," not because monument reductions are unprecedented—many presidents have done that—but because they are so big. The reason President Trump's reductions dwarf his predecessors is that we have far more land in monuments today than ever before.

Mark gave a good overview on the language, and I won't repeat it. But I do want to highlight that the statute provides three restrictions on the president's power: monuments can only be designated to protect certain objects, including "objects of historic or scientific interest"; they can only be designated on "land owned or controlled by the federal government"; and the boundaries must be the smallest area compatible with the objects identified. In practice, these limits have all proved to be toothless.

Presidents have interpreted "objects of historic or scientific interest" to mean essentially anything. Secretary Zinke, who has made this problem a focus of his review, highlights several of the most extreme examples: things like fish, landscapes, and the night sky. He notes that proclamations establishing monuments have also identified, as objects of historic or scientific interest, World War II bombing craters and "deafening silence." Clearly, we've moved far beyond the Native American artifacts and antiquities that Congress had in mind when it enacted the statute.

The second restriction on the president's power, limiting monument designations to federal land, worked for the first 100 years of the Antiquities Act. That changed in 2006 when George W. Bush, relying on an opinion from the Clinton Administration, designated a monument on the high seas. Obviously, the ocean is not "land" and is thus categorically ineligible for monument designation. But these designations are illegal for another reason: the ocean beyond the nation's territorial sea is not "owned or controlled" by the federal government. I'm representing commercial fishermen in a lawsuit challenging the Northeast Canyons and Seamounts Marine National Monument.[18] Through that litigation, we might find out whether the second limit on the president's designation authority is the only limit courts will enforce.

The third limit, as Mark said, courts have largely refused to enforce. Although the Antiquities Act says that monuments must be the smallest area compatible with the protection of the object, courts have given presidents broad discretion to make that determination.

Monument designations are controversial because people feel like their voices are not heard. Monuments can be

18. Mass. Lobstermen Assoc. v. Ross, No. 17-cv-00406 (D.D.C. filed Mar. 7, 2017).

designated at the president's whim, by simply signing a proclamation. This power is not subject to the Administrative Procedure Act,[19] so there's no right to public comment, nor any obligation for the president to consider or respond to that comment if he allows it. So, a lot of the concerns you're hearing about the Trump Administration's review—that it's a sham because the majority of comments supported monuments—are exactly the criticisms that opponents of monument designations have been making for years. In fact, President Trump provided more process than his predecessors, by allowing a full public notice-and-comment process.

Finally, the last point I want to make about the text of the statute, which dispenses with any argument that modifying a monument is contrary to its purpose, is that it never requires the designation of a monument in any circumstances whatsoever. The president has absolute discretion to decline to create a monument for any political and economic reason. You can have the clearest case of an important object on federal land that's going to be destroyed if a monument is not created, and the president has no obligation whatsoever to designate the monument.

So, if you're arguing that modifying a monument is contrary to the statute's purpose—as Mark does—the challenge is to square that argument with Congress' decision to never require presidents to designate monuments in any circumstances. In my view, it borders on absurdity to claim that a president can refuse to create a monument for economic or political reasons, but if he does makes a designation, his successor's consideration of those same factors to modify the monument is a fatal attack on the statute's purposes.

The background rule for unilateral executive actions, like monument designations, is that they remain subject to the whims of subsequent presidential politics. This is not a controversial proposition, but is accepted in virtually every case.[20] That's especially true when the president unilaterally acts pursuant to a delegation from Congress. Hence, whenever Congress delegates authority to agencies to issue regulations or otherwise take unilateral executive action, courts consistently hold that the agencies also have the authority to reconsider those regulations or executive actions. Any departure from that rule is so unusual that courts expect Congress to clearly state that it wishes to do so.

Reversing that rule would create much mischief. If you go through the U.S. Code, you'll see thousands of provisions that say the Secretary may regulate this or that in the public interest. Those provisions almost never say that those regulations can be repealed or modified. Yet, courts have consistently said they can. This is inherent in the nature of unilateral executive action. What one president or agency does with the stroke of a pen (or through notice-and-comment rulemaking), a later president or agency can undo through the same process.

This principle is so strong that courts will acknowledge the authority to change past unilateral executive actions even if the statute significantly cabins discretion or imposes mandatory obligations. For instance, I recently argued a case in the Ninth Circuit that presented this scenario: a statute gave an agency discretion to take an action on the condition that it adopt a regulation that contained elements specifically spelled out in the statute and, if the agency took the action, it "shall implement" the required regulation.[21]

The agency accepted the authority, took the action, and initially complied with the conditions. But it later soured on the deal and declared that it would no longer abide by the conditions and was repealing the regulation (without reversing the action to which that condition attached). When we sued, the agency responded that unilateral executive actions, like issuing regulations, can be revoked or modified unless Congress expressly prohibited reconsideration. It didn't matter that the statute said that the agency "shall" issue the regulation, that the regulation "must" contain certain elements, and that the agency "shall implement" the regulation. The agency argued that the regulation could be repealed at the agency's discretion because Congress did not explicitly provide that this unilateral executive action is irreversible.

Like Brenda, I'm not a betting person. So, I don't know what the odds are that the court will reject the agency's argument in that case, but it gives you an indication of just how reticent courts are to say that Congress blocked the executive from reconsidering earlier executive decisions. When Congress wants to do that, courts expect it to say so. There is *no* precedent for a court reading that prohibition into congressional silence, which is what would be required to hold that President Trump cannot modify a monument. There is no indication that Congress wished to set aside this background rule for the Antiquities Act.

On the contrary, its application is confirmed by the history of presidents implementing the statute. As Brenda and Mark both noted, many presidents have reduced the size of monuments. Those reductions came from presidents of both parties, suggesting that this is not a partisan issue. Although none have yet revoked a designation, no one argues that the legal question turns on revocation versus modification. The president can either do both or neither. And history supports the former.

Many past reductions have been significant. The largest was a 90% reduction, but there have been several that were mentioned earlier that were reductions by as much as one-half. So, in terms of historical practice, this is by no means unprecedented. This is something presidents have been doing without question since the Antiquities Act was enacted. For instance, the second president to ever exercise power under the statute used it to reduce the size of a monument.

Denying this power can also lead to absurd results. You can imagine situations where a president might designate

19. 5 U.S.C. §§500-559.

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

21. Cal. Sea Urchin Comm'n v. Johnson, No. 17-55428 (9th Cir. argued Dec. 5, 2017).

a monument to protect an object that is later discovered to have been a hoax.[22] Would the land have to be set aside forever? Beyond hoaxes, if a monument were designated to protect an object that has been removed and put in a museum, does it make any sense to say that federal land has to be set aside forever?

As I see it, based on how strong the background rule is and how consistently courts have followed it, here's the challenge to anyone denying the president's authority. They have to convince a court that Congress withheld the power to reconsider a discretionary executive action (1) contrary to the universal and long-established background rule; (2) that Congress did so silently or implicitly, which would be unprecedented; (3) that it took this unprecedented step without commenting on it at the time, even in legislative history; and (4) that no one noticed Congress had done so for decades. That strikes me as an extremely difficult list of obstacles to overcome.

Simply put, if Congress had meant to depart from the ordinary rule, it would have said so in the statute. But it didn't. That no one made this argument when prior presidents reduced national monuments, including shortly after the statute was enacted, reinforces the point.

Mark has argued that several other federal land use statutes imply that withdrawal decisions are a unique class of unilateral executive actions for which the background rule does not apply. I think none of them are convincing, but I'll go through them quickly and trust Mark will go in with a bit more detail.

First, Mark has observed that no president has reduced any national monument since the 1976 Federal Land Policy and Management Act (FLPMA),[23] suggesting that perhaps that statute has changed the law. I think the language of the statute forecloses that argument. There's nothing in it that purports to change the president's power. At most, there is a sentence in the legislative history that could be read to suggest that Congress was reserving to itself the power to modify or revoke national monuments. But it is not clear in context what that sentence means.

The legislative history is describing a provision of FLPMA that solely speaks to the Secretary of the Interior's power. Generally, the statute places withdrawal authority, subject to limits, in the Secretary's hands. However, there is an express exemption from that provision for monument designations under the Antiquities Act. In other words, FLPMA preserved the status quo for monuments. Thus, one way to read the legislative history is Congress was reserving power to itself vis-à-vis the Secretary, not the president. If, prior to FLPMA, the president had the power to modify or revoke national monuments, and Congress wished to withdraw that authority, you would expect Congress to have said so in the statute.

Instead, the statute is abundantly clear that the only limits are being placed on the "Secretary." It says nothing about the president's authority. Courts consistently hold that legislative history, no matter how clear, cannot supplant unambiguous statutory text.[24] Thus, even if Congress had meant to take away the president's power to modify or revoke national monuments, it failed to do so—the legislative history notwithstanding.

Finally, the legislative history from FLPMA cannot be a useful guide in interpreting the Antiquities Act because post-enactment legislative history sheds no light on what Congress was thinking when it voted. Here, seven decades passed between passage of the Antiquities Act and FLPMA. This is not a reflection of what Congress thought in 1906 when it passed the statute, and it's not a reflection of what FLPMA says.

The next statute that Mark points to is the Pickett Act of 1910,[25] which he argues indicates that Congress, when it wanted to give the president power to modify or revoke withdrawals, did so expressly. However, the statute doesn't say that at all. It actually reinforces the ordinary rule. The Pickett Act authorizes the president, in his discretion, to make withdrawals and provides that ". . . such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress."[26]

The first thing to note is that this language ("until revoked by him") does not affirmatively authorize the president to revoke any withdrawals. Rather, it assumes the revocation power exists and it places it on an equal footing with Congress' power to pass legislation. So, if you accept that this somehow implicitly deprives the president of this power in other cases, why would the same not apply to Congress? When the president's power is put on an equal footing with Congress' power to pass legislation, why does the negative implication apply to the one and not the other? Instead, I think this language is clear evidence that Congress understood the ordinary rule that discretionary executive action is subject to reconsideration, just as it is subject to Congress passing a new law. If Congress thought that ordinary rule wouldn't apply, it would have expressly given the president the power to revoke withdrawals under the Pickett Act, rather than making it an implication of the statute.

Again, I want to stress that if you read "until revoked by him" to implicitly deny the president revocation power under other statutes, you face the challenge of thinking what to do about the "or by an Act of Congress" language. Just as the Antiquities Act does not expressly mention the power to modify or revoke monument withdrawals, it also does not reference Congress' power to modify a monument through new legislation, a power it has exercised several times (just as presidents have exercised their power to modify monuments). Thus the burden is on opponents of the

22. *See Calaveras Skull*, Wikipedia, https://en.wikipedia.org/wiki/Calaveras_Skull (last visited Feb. 6, 2018) (describing a hoax perpetrated by California miners on a state geologist involving a skull purporting to prove that humans, mastodons, and elephants coexisted).
23. 43 U.S.C. §§1701-1736, 1737-1782; ELR Stat. FLPMA §§102-603.
24. *See* Hearn v. Western Conference of Teamsters Pension Trust Fund, 68 F.3d 301, 304 (9th Cir. 1995).
25. Pickett Act, ch. 421, 36 Stat. 847 (1910).
26. *Id.*

president's power to explain why this negative implication from the Pickett Act applies to the president's power but not Congress.

Consider the constitutional consequences of declaring unilateral executive action irrevocable, by future presidents or Congress. That unprecedented result would effect a fundamental change to the separation of power. Policy decisions immune from presidential politics are an exercise of legislative authority, not executive authority. Thus, permanent withdrawals can only result from Congress and the president compromising on legislation, as they do when creating national parks and wilderness areas. There are no counterexamples of a presidential decision that is binding on future presidents without Congress acting.

The last statute that Mark has argued supports his interpretation is the Forest Service Organic Administration Act of 1897.[27] This statute is interesting because, unlike the Pickett Act, it expressly authorizes the president to revoke or modify executive orders and proclamations. The codified version provides that "[t]he President of the United States is authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof issued under section 471."[28] But this version of the statute creates more questions than it answers.

First, you have to ask how strong a negative implication this statute could create. There's no indication that Congress has ever commented on whether it meant to create this negative implication, so you'd have to apply the same implication to many unrelated statutes—in effect reversing the background rule and making unilateral executive actions irreversible unless Congress expressly provides otherwise. For instance, if a survey of the U.S. Code revealed a single provision in some obscure statute that expressly authorized an agency to modify or revoke a regulation, would that be strong evidence that such power is withheld in the vast majority of statutes that don't mention the power to revoke or modify regulations? I don't think anyone would accept that because it is contrary to universal practice and would have far-reaching implications. Would President Trump's actions on immigration, the environment, and many other issues be binding on all future presidents unless a statute explicitly authorized them to be set aside?

But you don't have to grapple with that problem because the statute rejects the negative implication Mark ascribes to it. Congress might expressly provide a revocation authority for many reasons, even if it thought such power would exist anyway. Out of an abundance of caution, Congress might take a belt-and-suspenders approach. I think that's almost certainly what Congress is doing. To understand why, it helps to look beyond the version that appears in the U.S. Code, to the legislation actually enacted by Congress.

The language that appears in the U.S. Code is something of a Frankenstein provision, cobbling together language from several provisions of the bill. In total, there are three or four provisions that talk about revocation. The first such provision, for instance, provides "*to remove any doubt which may exist pertaining to the authority of the President thereon to*, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations. . . ."[29] This is explicitly a "belt-and-suspenders" provision to ensure the president would have authority, even though Congress thought it would have existed even without this language.

In summary, I think the case against the president's authority to reconsider monuments is a nonstarter. Every case dealing with unilateral executive authority comes out the same way: the power to make a unilateral, executive decision includes the power to reconsider it. If you want protection for these landscapes to be permanent, there is a clear way to do that. Go to Congress and seek a compromise. National parks and wilderness areas are permanently protected precisely because it takes an Act of Congress to create them, making them both much harder to create and undo.[30]

We should think of national monument decisions as a way to get a conversation started. But if the goal is to permanently set aside and protect these lands, then you have to go through Congress and achieve a compromise; unilateral executive authority cannot protect land in a permanent way. Concluding otherwise is just asking for even more conflict, because now every single presidential vote is about the locking of hundreds of millions of acres, perhaps permanently.

If Congress approves of a monument designation, they can make it permanent by creating a national park to include those lands. And Congress has repeatedly done this. There would be no reason for Congress to spend its limited time in converting monuments to national parks if monument designations themselves are permanent. The reason why legislation is passed to create a national park is to take it out of the president's discretion.

Finally, a brief word about the bills that have been proposed to reform the Antiquities Act.[31] Basically, they are aimed at fixing the process, to get Congress more involved, and ensure that more voices are heard.

Mark Squillace: Let me start by pointing out that the dramatically increased acreage of national monuments that Jonathan talked about is, I think, a little misleading. The reason for the great increase is the recently designated marine monuments—which is sort of a new phenomenon that is under challenge, by the way. Jonathan is involved in a case challenging one of these monuments. But these are vast areas of the ocean. If you just look at the land-based monuments, I don't think the graph would show what Jonathan suggests it shows. So, let me respond to some of

27. Act of June 4, 1897, ch. 2, §1, 30 Stat. 11-62 (1987) (codified as amended at 16 U.S.C. §§471-81).
28. 16 U.S.C. §473.
29. *Supra* note 27, 30 Stat. 34
30. *See* Jonathan Wood, *Yes, 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-d5b912fabc99_story.html?utm_term=.956dd7f42cde.
31. H.R. 3990, 115th Cong. (2017); S. 33, 115th Cong. (2017).

what Jonathan was arguing regarding the president's power to rescind.

Let's first look at the Property Clause of the Constitution. I think one of the problems with the approach that Jonathan and others take when defending the president's power to rescind or modify monuments is the failure to acknowledge the nature of the delegation of power to the executive branch. This is not the situation where the chief executive is exercising its inherent authority to issue an Executive Order or to take some other purely executive action. This is delegated power from the Congress under the Property Clause, and the U.S. Supreme Court has made clear that it is the Congress, not the president, who exercises plenary authority over our public lands. The Court has made clear that delegations of congressional power are construed narrowly.

So, when the Antiquities Act grants the president the authority to reserve land and says nothing about the power to modify or revoke that reservation, the president's power is so limited. This is a simple textualist argument that the power to reserve does not include the power to modify or revoke. Again, if you are construing these delegations narrowly, that seems to be the logical conclusion and there's really nothing wrong with viewing this as one-way power from a policy perspective.

Jonathan has already gone through the statutes. I don't know how he reads them the way he does. I don't read them that way. I certainly think that Congress' intent to limit the Antiquities Act power in one direction makes sense if you consider other laws enacted in close proximity to the Antiquities Act, like the Reclamation Act of 1902,[32] which deals with secretarial authority over reclamation withdrawals. But there are two principal laws that are particularly important because they are highlighted by Attorney General Homer Cummings in his 1938 opinion. Brenda mentioned this opinion,[33] which essentially prohibited President Roosevelt from rescinding a monument that he had wanted to rescind.

The attorney general opinion points out that the Pickett Act[34] and the Forest Service Organic Administration Act,[35] which expressly authorize both withdrawals and notification and revocation of such withdrawals, suggest quite clearly that Congress did not intend such two-way authority under the Antiquities Act. It's a straight-up legal argument. It's true that the opinion does sort of concede or suggest that maybe there's some authority to limit monuments and basically cut back and modify monuments that were previously created, but as Brenda pointed out, that issue wasn't really addressed specifically in the opinion itself. So, I think it's fairly clear from the attorney general opinion and the text of the statute that there is no implicit or clear authority of the president to modify or revoke.

The proponents of this authority point to past practice, suggesting that past practice is enough to override the text. I would just point out this issue has never been challenged in court. I wrote about this in 2003, by the way, in the *Georgia Law Review* article that Jim mentioned. I reached this conclusion in writing that article. I guess I didn't realize that it was going to become such a big hit in 2017. I offered additional thoughts about that in a more recent article I published with several colleagues.[36]

The other issue, I think, that is worthy of a bit of attention here is the language about the smallest area compatible. It was interesting to me to hear Jonathan say that he doesn't really think that this is a vehicle for allowing the president to modify a monument or to shrink a monument. I think it's interesting in part because that seems to be the hook that the Trump Administration is hanging its decisions on. If you look at the proclamations from the Trump Administration for both Bears Ears and the Grand Staircase-Escalante, they explicitly say that the original proclamations were not the smallest area compatible with the original determination that was made by Presidents Clinton and Obama.

I think it is a really tough argument to make, as I think Jonathan sort of acknowledged. It's partly because of an interesting case that was litigated over the Jackson Hole National Monument, *Wyoming v. Franke*,[37] which often gets overlooked. The *Franke* case basically deals with the problem about what kind of process should be available to review decisions to modify a national monument.

The *Franke* case was in 1945, a year before the APA. One interesting problem that we have today is that the president is not considered an agency for purposes of the APA, and so we don't really know whether the president or the courts are going to follow APA-like procedures or whether courts are going to review these decisions as if there's an administrative record and ask for the agency to provide that record or ask for a record from the U.S. Department of Justice on this. But there is this interesting question and I think it's instructive that the Wyoming court in *Franke* basically rejected any suggestion that it had broad authority to question a decision by a prior president to identify objects of historic or scientific interest.

I think in these cases in particular, where you have myriad objects that were identified in the proclamations and that plainly exist on the land, it's going to be very difficult to make that case. If that's the basis upon which the government is going to try to defend these decisions, I think that they're going to have a tough case to make. But it is interesting just to speculate about how the courts are going to handle this from the perspective of an evidentiary record, whether they might have a hearing or whether they will allow the parties to get into the question of which objects should be or should not be protected.

32. National Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (1902).
33. *Supra* note 12.
34. Act of June 25, 1910, ch. 421, §1, 36 Stat. 847.
35. *Supra* note 27.
36. Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. 55 (2017).
37. Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).

Jonathan also talked about the language in FLPMA. There's an argument about FLPMA that I think is often overlooked, regarding this particular language that's both in legislative history and in the statute. The thing that's important to recognize about FLPMA is that it totally rewrote the rules on withdrawals, looking broadly at all the withdrawal authority that existed. It did that in part because this language came about as a result of the recommendations from the Public Land Law Review Commission.[38] So, FLPMA doesn't just add new withdrawal authority to FLPMA, it looks at the whole world of withdrawals and it makes judgments about how withdrawals should be handled going forward.

Although the Public Land Law Review Commission had recommended that the Antiquities Act be essentially rescinded along with the other withdrawal authorities that were rescinded, Congress specifically decided to retain the Antiquities Act. It was one of the few withdrawal laws that survived the enactment of FLPMA, and so it's an interesting story. The language that Jonathan points out in FLPMA §204(j) that suggests that the Secretary can't modify or revoke monuments, my co-authors and I think, remained in the law because there was this original proposal essentially to turn over Antiquities Act authority to the Secretary, and that language apparently remained in the statute after they decided that they weren't going to do that, but would instead leave the authority with the president. That could explain why the provision in FLPMA refers to the Secretary.

But I do think that the language in the legislative history is relevant and important. I take Jonathan's point that this legislative history is long after the Antiquities Act was passed. But when you think about this legislative history in context and understand that Congress is essentially rewriting all of the rules with respect to withdrawals, courts ought to pay attention to this language, and it's explicit. This is in the final House report on the bill that became FLPMA.[39] Congress said that they were reserving to themselves the power to modify or revoke national monuments.

I would point out that this just reinforces the legal argument that was made by Attorney General Cummings. It doesn't really require a change in the law. The fact that the presidents have modified monuments in the past, I don't think proves the legal argument. I mean it's true that it's happening. It was true that there were arguments maybe that shouldn't have been made at the time, but these were never challenged in court. The cases that have just been filed will raise for the first time this question of whether you can have a modification of a monument that was created by the president.

Let me close with a brief argument about the policy. One of the arguments I suppose that you can make is granting the president one-way authority is sort of extraordinary. I think Jonathan is making the point that we shouldn't allow presidents to make withdrawals in only one direction but that such extraordinary power should be reserved for Congress. But recognizing the Antiquities Act as providing one-way authority to the president is perfectly consistent with the goals of the Act. When Congress enacts the law, they want to be sure that the president has the opportunity to protect lands that are sensitive for a whole host of reasons and that could be lost or the resources or objects that are being protected could be lost if the president can't act quickly.

The Congress can then take its time and decide how it wants to proceed with protecting or not protecting those lands. As Jonathan points out, in many, many cases, Congress decided to extend the protections of the Antiquities Act, and has done so with respect to many national monuments that are now among our most precious and treasured national parks—Zion, Acadia, Olympic, Grand Canyon. So, many important national parks became parks because the president had the foresight to first protect them as national monuments.

I think it's particularly interesting and instructive that the state of Utah has a major campaign that promotes what they call their "Mighty 5 National Parks."[40] Four of those national parks began as national monuments, and arguably could not have been protected in the same way if they had been allowed to exist just as public lands that are open to location and development under the various mining and mineral development laws. So, Utah itself, I think, has recognized at least implicitly the value of these monuments.

If you go down to the area around Grand Staircase-Escalante in particular, that area has really been transformed economically. The whole history of the Antiquities Act is that, even if there is local opposition to these monuments, eventually that turns around. I think we are actually seeing that happen in the Grand Staircase-Escalante National Monument area. If we allow Bears Ears to proceed and claim its national monument status in the full scope that President Obama intended, I think we will see the same thing happening down there.

James McElfish: Do we have questions?

Audience Member: I'm interested further in the exact limits of the authority that designates the minimum area required to protect objects that are historical or threatened. Is there a process for evaluating what the smallest area would be to protect those objects and how's that possible?

Brenda Mallory: There's not a separate process that is different from the whole designation process itself. But generally, what happens is that the agency works with folks on the ground who are providing information about the mon-

38. The Public Land Law Review Commission was established as an independent agency by act of Congress. Pub. L. No. 88-606, §3, Sept. 19, 1964, 78 Stat. 982 (1964).

39. H.R. Rep. No. 94-1163, at 9 (1976) ("[The bill] would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act. . . .").

40. *The Mighty 5: Utah's National Parks*, Utah Office of Tourism, https://www.visitutah.com/places-to-go/most-visited-parks/the-mighty-5/ (last visited Jan. 30, 2018).

ument designation, where the boundary lines make sense given the type of object, where it is, and how that would actually effectuate the goal of the monument designation. It's through the same mechanism that's used to get input from folks about the designation in general.

James McElfish: I actually have a question on that, which deals with the legislation introduced in the midst of this process, which would change or reform the Antiquities Act's power. Jonathan, could you talk about Rep. Rob Bishop's (R-Utah) legislation and in what ways it might constrain the Antiquities Act's power, if it were enacted, affecting things going forward?

Jonathan Wood: There are two reform bills. With Chairman Bishop's in the House, essentially, the approach is that very small monuments are easy. As you get bigger and bigger monuments, the procedural requirements to make the designations are harder. That's the primary means by which that bill is trying to change the dynamics of monument designation. Sen. Lisa Murkowski (R-Alaska)'s bill in the U.S. Senate takes a completely different approach that would require congressional action, as well as the consent of either the governor or the state legislature depending on what kind of monument is at issue. But both are trying to get at the procedural issue and the problem of having unilateral executive authority impacting such large swaths of federal land.

I don't know what the odds are that either will get adopted. It is more likely that we get some sort of compromise and agreement if the president's authority to change existing monuments is recognized. Then, I think, both sides have something to bargain for and bargain with. One of the reasons why federal land decisions have been so controversial in the past is that there's very little incentive for monument supporters to go along with and reach compromises.

For instance, before Bears Ears was designated, there was a push in the House to protect an area contained within it. Congress tried to make a legislative compromise and that fell apart. I think those kinds of failures are more likely if someone expects that, well, I can just get the president to agree with me and I'm going to get what I want forever.

Brenda Mallory: To add to that, there are a number of other pieces of legislation that are designed to codify the acts that were taken by Trump on December 4.[41] For example, one bill on Bears Ears would revoke the Obama Administration designation and put in what the Trump Administration tried to accomplish by proclamation.[42] They don't rise to the level of big bills like Representative Bishop's or Senator Murkowski's, but there are a lot of things that have been put out there. They are designed in a very targeted way to deal with the designation.

Sen. Dean Heller (R-Nev.) has a bill that will prohibit any designations in Nevada.[43] Former Rep. Reid Ribble (R-Wis.) introduced a bill that would also require congressional approval and NEPA compliance and state-enacted legislation in order to approve them.[44] Many of the bills introduce process-oriented changes that would affect the way the Antiquities Act is operated.

Mark Squillace: To add a quick point on this—both of these bills, I think, have little chance of getting enacted, because I don't think they'll get through the Senate. But the Bishop bill I think, and Jonathan is right, basically has this progressive approach that requires more as you get a larger-sized monument. I think it caps monuments at 8,500 acres, if I'm not incorrect. So, that's a big difference from the current situation that we have.

We might as well repeal the Antiquities Act rather than enact the Murkowski bill. To my mind, it's just not a rational approach. I mean if you want to repeal it, I suppose you should repeal it. But the idea that you're going to make it harder to designate a national monument than it is to designate a national park or any other protected area, wilderness area or whatever, seems kind of silly to me. As Jonathan points out, you would essentially have to get legislative approval for monuments in other states. That of course is not required for wilderness areas or parks. You do typically have to work with the local legislature on these things, but formal approval is not required. So, I don't really see that as being a realistic alternative to the Antiquities Act.

Audience Member: This is a general question to all the panelists. Do you see any main difference in the legal argument in favor of or against the capacity to revoke marine versus inland monuments and also the kind of activities that could be conducted in those marine monuments, like fishing, for example?

Jonathan Wood: I'm involved in one of the lawsuits challenging the president's power to designate ocean monuments under the Antiquities Act. I think challenging the president's power to revoke or modify a monument would be even harder if the president's justification was that this was illegal in the first place. That tees up the underlying legal questions. If the president is right, obviously it can't be illegal for him to revoke that earlier legal action.

Aside from changing boundaries, presidents have incredibly broad discretion to decide how monuments are managed. Secretary Zinke's report indicated that there are a lot of monuments for which the boundaries aren't going to be changed. But there is going to be a change in how they're managed to ensure that they affect far fewer activities.

41. *See, e.g.*, National Monument Designation Transparency and Accountability Act or 2017, H.R. 2284, S. 132, 115th Cong. (2017); California Desert Protection and Recreation Act of 2017, S. 32, 115th Cong. (2017).
42. Shash Jaa National Monument and Indian Creek National Monument Act, H.R. 4532, 115th Cong. (2017).
43. Nevada Land Sovereignty Act, S. 22, H.R. 243, 115th Cong. (2017).
44. Mast Act, H.R. 4988, 113th Cong. (2014).

James McElfish: Mark, do you want to address the differences with marine monuments and the power to modify management?

Mark Squillace: Right. We're likely to see that. I think Zinke has announced that he's going to open commercial fishing in three of the marine monuments. So, that likely will be on the table.

On the broader question, I wanted to point out that the legal issue—and I believe it has been raised in the case that Jonathan is involved with—is whether or not the president has the authority to designate a national monument in the exclusive economic zone (EEZ). There is a legal opinion from the Office of Legal Counsel in the Department of Justice.[45] It basically takes the position that the EEZ is considered land "controlled" by the United States and therefore the president can designate a monument on such land. You will remember that the Antiquities Act talks in terms of federal lands that are owned or controlled by the United States, and so it's that "controlled" language that justifies the marine monuments in the EEZ. The question remains whether that is enough control and whether monuments are allowed in these areas.

Let me address the question that Jim just referred to about whether you can modify a monument by removing restrictions. This is sort of caught up in the whole broad question of whether you get to revoke or modify monuments in the first place. Part of the problem with the argument that there is somehow a distinction between rescission and modification, is that if in fact a president could modify but not revoke a monument, then you could presumably take 99.9% of the monument away or remove all the restrictions that were included in the original monument. Can you still even call it a monument and claim that you're only modifying the monument?

So, there is this kind of slippery slope problem with suggesting that somehow modifications are different from rescissions. Certainly, one of the big important restrictions in marine monuments is the restriction on commercial fishing, because you're trying to protect the natural resources and biological resources in those monuments. So there are going to be some interesting arguments over these issues, but I think that they're not really different in terms of whether, as Jonathan and I have sort of talked about, the president has discretion to really do anything to monuments that were created by a predecessor president.

James McElfish: I think we're going to need to leave it there. I want to thank our panelists. I feel like these are three of the folks who know the most about this issue and that are deeply involved both academically and in litigation and advising groups.

45. Memorandum From Randolph D. Moss, Assistant Attorney General, on the Administration of Coral Reef Resources in the Northwest Hawaiian Islands (Sept. 15, 2000), *available at* https://www.justice.gov/file/19366/download.