Debate on the Antiquities Act continues in the early months of the Trump Administration. Opponents of Obama's recently-proclaimed Bears Ears National Monument (see earlier post) have pushed for Trump to revoke or significantly alter the designation, fueling debate as to whether a president has the authority under the Antiquities Act to do so.

By way of background, the relevant portion of the Antiquities Act, 54 USC § 320301, now reads (in part):

> (a) Presidential Declaration.-The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.
>
> (b) Reservation of Land.-The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

The Constitution gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," (Article IV, sec. 3, cl. 2), and a portion of that authority is delegated to the President via the Antiquities Act. The Act doesn't specifically say whether, once a proclamation has been made, the President has the power to revoke it. No court has ever answered the question, because no President has ever tested it out.

Several people have waded in to examine this question. John Yoo and Todd Gaziano wrote an op-ed in the Wall Street Journal last December arguing that Trump has the power to reverse Obama's proclamations. In February, Robert Rosenbaum and others at Arnold & Porter Kaye Scholer countered with a memo on behalf of the National Parks Conservation Association, arguing that the President cannot revoke an national monument designation; only Congress can do so. Raúl Grijalva of the House Committee on Natural Resources wrote to former committee colleague and now Interior Secretary Ryan Zinke last month to request his opinion.

Also in March, the American Enterprise Institute released a longer white paper by Yoo and Gaziano outlining their position that the President can revoke or reduce the size of a national monument. The white paper is replete with partisan rhetoric against the Obama

Administration and against Obama's use of the Antiquities Act, but is selective in its historical analysis, and fails to engage with the legal scholarship on the Antiquities Act or address the implications of decades of subsequent congressional actions on national monuments and on federal land management generally.

Robert Rosenbaum's piece in the Washington Post on March 29 offers a rebuttal, and two days later, the University of Colorado's Mark Squillace and UC Hastings' John Leshy wrote an op-ed in the New York Times outlining the remarkable record of conservation throughout the 111 years of the Antiquities Act and defending it against legislative efforts to amend it, as well as the suggestion of executive action to reverse its use. I encourage anyone interested in the topic (and even those who aren't) to take a look.

Here, I'd like to address just a few of the specific claims made by Yoo and Gaziano in their white paper. Many of the arguments they make had already been addressed in the Arnold & Porter Kaye Scholer memo, as well as in earlier legal scholarship, especially Mark Squillace's 2003 article in the *Georgia Law Review*, "The Monumental Legacy of the Antiquities Act of 1906."

First, Yoo and Gaziano seek to re-frame the history and past judicial decisions on the Antiquities Act in order to make an argument about the purpose of the Act. The authors raise the argument that the Act has been "abused" for the purpose of effectively creating new, large national parks, and that the large size of some monuments designated throughout the Act's history runs counter to the statute. Their claim purports to be rooted in textual analysis of the Act, but relies on an assumption due to the context of "earlier and contemporaneous bills" that would have "limited monument designation to 320 or 640 acres (page 3). The Act instead provides that monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." Yoo and Gaziano posit that the lack of a size limit "provide[s] flexibility for special situations and not to allow a million-acre designation" (page 3). Contemporaneous history, however, also points to officials in the Interior Department who favored broad empowerment of the President to set aside public lands, and suggests that these officials had a hand in adding the Act's more expansive language of "other objects of historic or scientific interest" to meet this goal. No court has ever invalidated a presidential designation of a national monument — from the Grand Canyon under Teddy Roosevelt (its status as a national monument, prior to conversion to a national park, was upheld by the Supreme Court against mining claims in Cameron v. United States), to the Giant Sequoia NM under Clinton (upheld by the DC Circuit in Tulare County v. Bush).

More directly to the question of whether the Act grants the President the authority to undo

national monument designations, Yoo and Gaziano ignore related federal laws — two other instances where, in contrast to the Antiquities Act, the President was given specific authority both to make withdrawals of public lands and to revoke or modify those withdrawals (the Pickett Act of 1910 and the Forest Service Organic Act of 1897) (discussed in Squillace's 2003 article).

Assumptions as to the purposes of legislation further plague Yoo and Gaziano's argument with regard to the 1976 Federal Land Policy and Management Act (FLPMA). FLPMA was a major shift in federal land policy, and repealed many earlier land management statutes or portions of statutes, including a lengthy list of withdrawal statutes (see FLPMA Sec. 704). One of the few things it didn't change was the Antiquities Act. Yoo and Gaziano speculate that this was "perhaps because presidential abuses had abated" (page 10). Yet if Congress was in any way concerned that the Antiquities Act had been misused in the past, why not change it? The same sorts of arguments had been made about a host of other presidential withdrawal authorities that FLPMA did change. Since the whole land management system was revamped, and the Antiquities Act was untouched, it is hard to conclude that Congress disapproved of the Act or past interpretations of the Act by Congress, Presidents, and courts. It seems equally unlikely that Congress wished to express a particular view of the Act's purpose, contrary to the way the Act had been applied for decades. The House Report during the process of enacting FLPMA reflected an understanding that Congress — not the President — had the ability to revoke or reduce the size of national monuments:

> With certain exceptions, [the bill] will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other "national" recreation units, such as National Recreation Areas and National Seashores. It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System. These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress. (H. Rep. 94-1163, May 15, 1976, at 9).

Ultimately, the question of whether the Antiquities Act authorizes a revocation or a

downsizing of a national monument should be rooted in a discussion of where the President's land management authority comes from. Yoo and Gaziano point to analogies from the Constitution's grants of executive power to argue that the power of designating national monuments includes an implied power to undo them. However, as the Arnold & Porter Kaye Scholer memo well articulates, those analogies miss the mark; federal land management authority is unrelated to constitutional grants of executive discretion, because it is expressly given to Congress under the Property Clause in Article IV. The Antiquities Act stems from Congress' delegation of a portion of that authority.

The purpose and context of the Antiquities Act, including congressional action and inaction over the past century, suggest that a one-way ratchet — presidential designation, with significant reduction or revocation only by Congress — is exactly what was intended. Congress was concerned that historical, archaeological, and natural or scenic resources could be damaged or lost, and devised a delegation to the President to act quickly when needed to preserve those resources, leaving Congress the opportunity to deliberate on a longer-term solution for the area in question, if it so decided. On 10 occasions, Congress has reversed those presidential decisions; far more often, it has concurred or built upon the President's actions by expanding monuments or re-defining them as national parks. This is how the process is supposed to work. Antiquities Act designations do not, as critics say, cut off debate or circumvent the democratic process. They simply alter the status quo in favor of conservation — a precautionary approach. If Congress studies the matter and decides to change or abolish the monument to allow for different uses of the land, it has the power to do so through the usual legislative process; until that action is taken, objects of historic or scientific interest are protected.

On the modification (rather than full revocation) of national monuments, Yoo and Gaziano cite precedents of monument downsizing from Presidents Eisenhower, Truman, Taft, Wilson, and Coolidge (page 15). Squillace's 2003 article, in examining some of these examples, highlights the inconsistency of allowing presidential modifications with the purposes of the statute — the most significant changes were made in response to political pressure. Allowing the President to reduce the size of the monument would go against the conservation-oriented purpose that should orient toward quick, precautionary action to preserve resources, while requiring more express, deliberative action to rethink or adjust those protections. Nonetheless, even an argument for authority to make adjustments to the size of monuments would not necessarily imply authority to revoke monument proclamations or to effectively revoke them through dramatic downsizing.

So what comes next? Whether Trump will try to undo Obama's monuments is up to him. Back in February, the Utah Legislature passed (and Gov. Gary Herbert signed) a

resolution calling on the President to rescind the designation of Bears Ears. The Outdoor Industry Association responded by deciding to move its regular convention out of the state (citing other public lands policy issues as well). Herbert has continued to say he'll push for Trump to walk back the Bears Ears designation; according to media reports, he hasn't yet discussed the matter directly with Trump, but has invited Secretary of the Interior Ryan Zinke to visit the area. In Nevada, pro– and anti-Antiquities Act resolutions have been introduced. We'll see what happens.

(Thanks to Sean Hecht for comments on this post.)