

To: JASON.WAANDERS@sol.doi.gov[JASON.WAANDERS@sol.doi.gov]
From: Molly Ross
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Just remembered that I had not sent you this yet...hope it gets through!



**The President Has No Power Unilaterally to
Abolish a National Monument
Under the Antiquities Act of 1906**

We have been asked whether a sitting President may unilaterally abolish a National Monument that was established by an earlier President under the authority of the Antiquities Act of 1906. The question arises in the context of arguments by some that President Trump should attempt to rescind or revoke the creation of certain National Monuments by President Obama. After evaluating the relevant statutes, the U.S. Constitution and other relevant authorities, we have concluded that a President does not have the power to do so.

Executive Summary

In our system of Government, Presidents have no power other than that granted to them by the U.S. Constitution or by an Act of Congress. The issue here does not invoke any power granted the President by the U.S. Constitution. The issue instead concerns administration of federally owned land, and the Constitution gives that power exclusively to Congress. Property Clause, Art. IV, § 3. Whether or not the President has the power unilaterally to revoke a National Monument designation therefore depends on whether that power is expressly or by implication delegated to the President by an Act of Congress. There is no Act that does so expressly. The question is therefore whether such a power may be implied. The Act in question is the Antiquities Act of 1906, 54 U.S.C. § 320301(a). A recent op-ed in the Wall Street Journal by John Yoo and Todd Gaziano argues such a power should be implied in that Act.¹

Contrary to their arguments, however, reading a revocation power into that statute by implication would be improper. This is so for several reasons.

First, the U.S. Attorney General opined long ago that no such power of revocation exists under the Antiquities Act. No President has attempted to revoke such a designation since that Opinion was issued.

Second, under established principles of statutory interpretation, Congress adopted that Attorney General's Opinion by thereafter enacting the Federal Land Policy and Management Act in 1976. In that context, the House Committee explained that that law "would also specially

¹ "Trump Can Reverse Obama's Last Minute Land Grab," The Wall Street Journal (Dec. 31, 2016 Jan. 1, 2017).

reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act”²

Third, as to those National Monuments which were made part of the National Park System, Congress has mandated that the power to manage those special places “shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.”³ Revoking the designation of such a National Monument and pulling it out of the National Park System would certainly be in derogation of the reasons such special places were added to that System.

The revocation of the designation of a National Monument, and particularly one added to the National Park System, is therefore beyond the power of a President acting alone. Such a revocation may only be effectuated by an Act of Congress. The interpretation proffered by Yoo and Gaziano would therefore, if acted upon, result in a usurpation of congressional powers by the Executive Branch.

Yoo and Gaziano attempt to justify their arguments by claiming that President Obama made “federal land grabs” in designating Monuments. That claim is misleading. The President may only proclaim a National Monument as to land that is already owned or controlled by the federal government. No President may make a National Monument by seizing private or state-owned lands.

I. The Antiquities Act of 1906.

The Nineteen Century saw substantial western expansion of United States, and it was the federal government that acquired the land making that expansion possible. While that government had acquired land since its founding, the government substantially increased its holdings by such events as the Louisiana Purchase of 1803, the Oregon Compromise with England in 1846 and the treaty resolving the Mexican-American War in 1848.⁴ No sooner had the public land domain been established in the Eighteenth Century than a policy of disposing of the land had been initiated.⁵ The federal government transferred nearly 816 million acres of

² “Establishing Public Land Policy; Establishing Guidelines for its Administration; Providing for the Management, Protection, Development, and Enhancement of the Public Lands; and For Other Purposes,” H. Rep. No. 94 1163 (hereafter the “House Report”) at 9.

³ 54 U.S.C. § 100101(b)(2).

⁴ See generally “Natural Resources Land Management Act,” S. Rep. No. 94 583 (hereafter the “Senate Report”) at 27 32; Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data 5* (2014), available at <https://fas.org/sgp/crs/misc/R42346.pdf>.

⁵ See Senate Report at 28.

public domain land to private ownership and 328 million acres to the States as they became established.⁶

By late in the Nineteenth Century, however, demands grew to “withdraw” some public lands from that available for sale, grant or other disposition so it could be retained by the federal government for conservation and similar purposes. The first permanent federal land reservation was Yellowstone National Park, created in 1872, and in 1891 the President was given power to withdraw forest lands and prevent their disposal.⁷ The federal government retained for the benefit of all Americans a large part of the land that government had acquired, totaling approximately 600 million acres.⁸

In recognition of the slow process of enacting federal legislation, Congress adopted the Antiquities Act in 1906 to empower the President to protect some of that federal land promptly. That Act provides:

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.⁹

President Theodore Roosevelt was the first to use that Act, establishing 18 National Monuments, including Devil’s Tower, Muir Woods and the Grand Canyon. Almost every President thereafter has designated additional National Monuments. These Monuments were created to provide for the enjoyment and use of the federal lands by the American people.

II. The President Has No Implied Power to Revoke a National Monument Created under the Antiquities Act.

The question here is whether a President may unilaterally revoke a prior Presidential designation of a National Monument. Because the Antiquities Act does not expressly empower the President to do so, proponents of such a power argue that that power may be read into the Act by implication. Gaziano and Yoo and some members of Congress argue that the President has many implied powers and that this is merely one such power. They point to the President’s power to fire Executive Branch officials even after the Senate has confirmed the appointment and to the President’s power over foreign treaties.¹⁰

⁶ Kristina Alexander and Ross W. Gorte, Cong. Research Serv. RL34267, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention* 5 (2007), available at <https://fas.org/sgp/crs/misc/RL34267.pdf>.

⁷ 17 Stat. 326; 26 Stat. 1095.

⁸ Alexander and Gorte, at 9.

⁹ 54 U.S.C. § 320301(a).

¹⁰ They also point to the Executive Branch’s power to rescind agency regulations, but they ignore the fact that the Supreme Court has made clear that rescinding a regulation is the equivalent of adopting a new regulation and requires the same process. See *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

The problem with that argument and those examples is that they ignore the source of the power in question. As former President and Supreme Court Chief Justice Taft stated,

The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.... The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.¹¹

Article II of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. Constitution, Art. II, § 1. And the President is granted certain specific powers, including as to treaties with foreign countries. *See id.*, Art. II, § 2. The only case cited by Gaziano and Yoo arises under that Article and only explores the scope of that provision. But here we are not dealing with the scope of the power of the Executive Branch under that provision.¹² Here, rather than the power of the Executive Branch, we are dealing with management of federal lands. That issue invokes instead the Congressional Branch’s powers under Article IV of the Constitution, specifically the Property Clause, which provides that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States” *Id.*, Art. IV, § 3, Cl. 2

Thus, the Constitution gives Congress, not the President, the power to administer federal lands. For the President to have the power to revoke a Monument designation under the Antiquities Act, therefore, the issue is whether that Act, not the Constitution’s grant of the executive power to the President, may be interpreted to imply the unstated power to revoke a Monument designation thereunder.

This is a question on which the Attorney General of the United States ruled in the negative. In 1938, President Franklin Roosevelt asked the Attorney General for a formal Legal Opinion as to whether the President could rescind former President Coolidge’s designation of the Castle Pinckney National Monument under the Antiquities Act. After careful study, Attorney General Homer Cummings explained that the answer was “no.”

¹¹ William Howard Taft, OUR CHIEF MAGISTRATE AND HIS POWERS 139 40 (1916), *available at* <https://archive.org/stream/ourchiefmagistra00taftuoft#page/n5/mode/2up>.

¹² As the Supreme Court later explained the case on which Gaziano and Yoo rely, that case “finds support in the theory that [the officer at issue there] is merely one of the units in the executive department and hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is. ... [T]he necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.” *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627 28 (1935).

A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.¹³

The Attorney General's Opinion explained that under long-standing precedent "if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation."¹⁴ Since the Cummings Opinion, no President has attempted to unilaterally rescind a National Monument.¹⁵ Rather, as contemplated by the Cummings Opinion, when some Monuments have been abolished, it has been Congress that has done so by legislation.¹⁶

Moreover, after the Cummings Opinion, Congress adopted Cummings' conclusion that no revocation power may be implied into the Antiquities Act. "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."¹⁷ The later congressional action need not amend the statute in order for such principles to govern, particularly when the later statute comprehensively addresses a subject.¹⁸ And the legislative history of the later statute can be persuasive" as to Congress's intention in that regard.¹⁹

¹³ *Proposed Abolishment of Castle Pinckney Nat'l Monument*, 39 Op. Atty. Gen. 185, 185 (1938), citing *Opinion by Attorney General Edward Bates to the Secretary of the Interior*, 10 U.S. Op. Atty. Gen. 359 (1862). As a general matter, opinions of the Attorney General are binding on the Executive Branch offices that request them until they are overruled or withdrawn. See *Pub. Citizen v. Burke*, 655 F. Supp. 318, 321–22 (D.D.C. 1987) ("As interpreted by the courts, an Attorney General's opinion is binding as a matter of law on those who request it until withdrawn by the Attorney General or overruled by the courts." (citation and internal quotations omitted)), *aff'd*, 843 F.2d 1473 (D.C. Cir. 1988); cf. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1472, 1482–84 (2010).

¹⁴ 39 Op. Atty. Gen. at 186–87.

¹⁵ Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 553 (2003).

¹⁶ Congress has abolished a number of National Monuments by legislation. See, e.g., Wheeler National Monument in 1950 (64 Stat. 405); Shoshone Cavern in 1954 (68 Stat. 98); Papago Saguaro in 1930 (46 Stat. 142); Old Kasaan in 1955 (69 Stat. 380); Fossil Cyad in 1956 (70 Stat. 898); Castle Pinkney in 1956 (70 Stat. 61); Father Millet Cross in 1949 (63 Stat. 691); Holy Cross in 1950 (64 Stat. 404); Verendrye in 1956 (70 Stat. 730), and Santa Rosa Island in 1946 (60 Stat. 712).

¹⁷ *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) (addressing legislative action after earlier Attorney General interpretation); see also, to the same effect, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 and n.66 (1982) (considering whether rights should be implied under a statute); *Souter v. Jones*, 395 F.3d 577, 598 (6th Cir. 2005).

¹⁸ See *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998) and cases cited. This is so because statutes covering the same material are interpreted together. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

¹⁹ *Merrill Lynch*, 456 U.S. at 382.

In 1976, Congress concluded a years-long re-examination and reorganization of laws governing management of federal lands, adopting the Federal Land Policy and Management Act (“FLPMA”).²⁰ In 1964, Congress had created a commission to undertake that review, and one of its recommendations was that “large scale withdrawals and reservations for the purpose [among other things] of establishing or enlarging” National Monuments “should be reserved to congressional action.”²¹ Congress largely adopted that approach and expressly repealed a large number of statutes previously authorizing the Executive Branch to make withdrawals of federal land and overturned a court decision implying such power.²² But FLPMA did not change the provisions of the Antiquities Act that relate to the establishment of National Monuments.²³ And while Congress gave the Secretary of the Interior some powers to make withdrawals, FLPMA provided that the Secretary did not have power to “revoke or modify” any Antiquities Act monument designation.²⁴ The House Report made clear that, while the President would continue to have the power to establish National Monuments under that Act, only Congress would be empowered to revoke a Monuments designation.

With certain exceptions [including under the Antiquities Act], H.R. 13777 will repeal all existing law relating to executive authority to create, modify, and terminate withdrawal and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, *It would also specially reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act* These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.”²⁵

In FLPMA, therefore, Congress not only failed to negate its adoption of the Cummings Opinion but clearly relied on that opinion - - that only Congress had the authority to revoke the designation of a National Monument - - in crafting the new comprehensive approach to withdrawals and revocations of withdrawals. Congress thereby adopted the Cummings Opinion and gave it the force of a congressional enactment.

The conclusion that only Congress may revoke a National Monument designation applies doubly to those National Monuments created under the Antiquities Act and administered by the

²⁰ Pub. Law No. 94 579, codified at 43 U.S.C. § 43 U.S.C. § 1701 *et seq.* As the Senate Report accompanying the Bill that became FLPMA explained, Congress had long recognized “a need to review and reassess the entire body of law governing Federal lands.” Senate Report at 34.

²¹ Public Land Law Review Commission, “One Third of the Nation’s Land: A Report to the President and the Congress” at 54 (1970); *see also* Senate Report at 36 37.

²² *See* P. Law No. 74 597, § 704.

²³ “The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments),” House Report at 29.

²⁴ 43 U.S.C. §1714 and § 1714(j).

²⁵ House Report at 9 (emphasis added).

National Park Service (“NPS”).²⁶ That is so not only because of the impact of FLPMA on this issue but also because of 1970s amendments to the Organic Act of 1916 governing the National Park System.²⁷ Those amendments made clear that the various parts of the National Park System - - including the National Monuments²⁸ - - are united in a single System “as cumulative expressions of a single national heritage.”²⁹ And in the 1978 “Redwood Amendment,” Congress mandated that

the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.³⁰

Congress clearly did not intend that a President could unilaterally revoke a prior National Monument designation; such an act would certainly be in derogation of the values and purposes for which it had previously been established.³¹ Thus, no President could revoke the establishment of a National Monument as part of the National Park System without Congress’ directly and specifically so providing.³²

²⁶ For example, recent Proclamations establishing national monuments as part of the National Park System have provided “The Secretary of the Interior (Secretary) shall manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation.” *Presidential Proclamation, Establishment of the Belmont Paul Women’s Equality National Monument*, 81 Fed. Reg. 22505 (April 15, 2016).

²⁷ See Pub. L. No. 91 383 (National Park System General Authorities Act) and Pub. L. No. 95 625 (National Parks and Recreation Act of 1978), both now codified at 54 U.S.C. § 100101.

²⁸ See 54 U.S.C. §§ 100102(2), 100501 (defining “National Park System” to include any area administered by the Director of the National Park Service, including for “monument” purposes). Those Monuments are as fully covered by general regulations protecting the entire System as are any National Parks created by Congress. See 36 C.F.R. § 1.2 (National Park Service regulations apply to federally owned land administered by NPS).

²⁹ 54 U.S.C. § 100101(b)(1)(B).

³⁰ *Id.* § 100101(b)(2).

³¹ For example, the Presidential Proclamation designating Bears Ears National Monument explains that it is intended to preserve features of the lands that are sacred to Native Americans, paleontological resources, and a wide variety of vegetation. *Presidential Proclamation, Establishment of the Bears Ears National Monument*, 83 Fed. Reg. 1139 (Jan. 5, 2017).

³² In a small handful of cases, Presidents have changed the boundaries or reduced the size of National Monuments for discrete purposes. It is not clear whether such a change would be legally authorized, though these changes were consistent with the purpose of the Antiquities Act and the prior designations and were never subjected to challenge. Nonetheless, any change that derogated from the values and purposes for which the Monument was created, and certainly any change so significant that it amounted in effect to a revocation of the designation, could only be made by Congress.

III. To Call Use of the Antiquities Act a “Land Grab” is to fundamentally Misapprehend That Act

Underlying much of the contention surrounding the designation of new Monuments by President Obama is the notion that they constitute a federal “land grab,” as Gaziano and Yoo argue. In fact, as with all National Monuments, these lands could not have been designated as Monuments by the President unless they were already owned or controlled by the federal government. That is true, of course, as to the recent Monument designation by President Obama in Utah of Bears Ears National Monument which is highlighted by Gaziano and Yoo. If these lands had not been included in a National Monument, they would nevertheless still have been owned by the federal government.

As discussed above, western expansion during the Nineteenth Century saw the establishment of western territories and, eventually, western States. Those territories and then States occupied land the federal government had acquired by war, purchase and diplomacy, some of which the federal government transferred to settlers and to the new States. But the federal government continued to own the rest of that land for the benefit of all the people of the United States.

For example, Utah Territory was established in 1850 through an Organic Act of Congress.³³ That Act established the geographic limits of the Territory and expressly reserved the federal government’s rights to divide the territory or to cede portions to neighboring territories.³⁴ Part of that Territory was ceded to create other territories such as Nevada and Wyoming.³⁵ Utah became a state in 1896. The federal government made land grants to the new State to fund schools, build State public buildings and site reservoirs.³⁶ Congress required, however, that the incoming State include in its State constitution provisions “forever disclaim[ing] all right and title” to federal lands within the State’s boundaries.”³⁷ Thus, the Utah Enabling Act provides:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States.³⁸

³³ An Act to Establish a Territorial Government for Utah, ch 51, 9 Stat. 453 (1850).

³⁴ *Id.*

³⁵ Carlyn Osborn, *The State Formerly Known as a Desert*, Library of Congress (April 8, 2016), <https://blogs.loc.gov/maps/2016/04/the-state-formerly-known-as-desert>.

³⁶ See Utah Enabling Act, ch 138, § 6 12, 28 Stat. 107 (1894), <https://archives.utah.gov/research/exhibits/Statehood/1894text.htm>.

³⁷ *Id.* § 3.

³⁸ Utah Enabling Act, § 3; see also Utah Const., Art. III, § 2.

In other words, the State agreed that it and its people did not have, and would never attempt to claim, title to federal lands other than those that the federal government expressly agreed to give them. Similar provisions were included in the Acts creating other western States and in their respective State Constitutions.³⁹

Other National Monuments established under the Antiquities Act stand on a different footing because they were established in concert with a city, State or private citizen or organization which owned the land and gave it to the federal government on the condition that it be included in a National Monument. If such a Monument designation were revoked, one can only imagine the chaos that would result, at least absent federal legislation, in terms of the disposition of the land and rights so contributed. But only Congress has the power to do so.

IV. Conclusion.

For over one hundred years, the Antiquities Act has allowed Presidents to declare National Monuments and preserve worthy lands for the enjoyment of all Americans and future generations. There are today National Monuments in 31 states. For all Americans, they offer recreational opportunities and preserve a heritage of beauty, scientific marvels, and human achievement. But the Antiquities Act and subsequent legislation reserved to Congress, which has Constitutional authority over public lands, the sole power to revoke such a designation.

Robert Rosenbaum, Andrew Shipe, Lindsey Beckett, Andrew Treaster, Jamen Tyler

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³⁹ See, e.g., Nevada Enabling Act, ch 36, § 4, 13 Stat. 30 (1864); Nev. Const. Ordinance; Enabling Act of 1889, § 4, 25 Stat. 676 (1889) (enabling Washington, Montana, North Dakota and South Dakota); Wash. Const., Art. XVII, § 16; Wyo. Const., Art 21, § 26.