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PERSPECTIVE

President has clear power to modify monuments

By Todd Gaziano and John Yoo

Can the U.S. Supreme Court issue an opinion, like the infamous "separate but equal" decision of *Plessy v. Ferguson*, that no later Supreme Court could reverse? Can Congress enact a law, like the Smoot-Hawley Tariff of 1930, that no later Congress could ever repeal? The answer is no, even if the courts and Congress occasionally claim such power. Attempts to permanently entrench a particular decision violate the constitutional rule America adopted from Britain that no officer or branch of government may bind a successor.

This rule governs presidential actions as well, and it applies equally to Presidents Barack Obama, Donald Trump, and all their successors. Yet some imagine an odd exception. They claim that Obama's declaration of national monuments under the Antiquities Act are "permanent," whether politically abusive or not, and that no later president can revoke or significantly shrink any of these immense monuments. That's wrong for monuments of any type, and it is doubly wrong for monuments that were illegal to begin with.

In April, Trump ordered a review of the largest national monuments created or expanded since 1996 as well as any during that period that did not receive proper public input. Interior Secretary Ryan Zinke's interim recommendation in May that Trump significantly shrink Bears Ear National Monument is well within the law, and is consistent with Pacific Legal Foundation's (PLF) public comments on it. Trump should also revoke the Northeast Canyons and Seamounts Monument that PLF is suing to overturn since that monument on the high seas is 130 miles from land, was never lawful, and is causing significant economic and environmental harm.

The Antiquities Act of 1906 granted the president authority to designate federal lands as national monuments for certain purposes, although the designations must be limited to the smallest area necessary to preserve the objects of interest. As our research elsewhere explains, the act includes the power to revoke or modify prior designations. Indeed, every grant of power to the president in the Constitution or by statute includes the power to modify prior acts unless expressly withheld, and the president also has inherent constitutional authority to correct prior illegal applications of a federal law.

New York Times News Service

Monument Valley, part of the federal land surrounding the Bears Ears Buttes in Utah, March 6, 2016.

The Antiquities Act is not a one-way ratchet or immune from the legal presumptions that apply to all federal law. Yet those who question a president's power to revoke or reduce a prior monument note that the Antiquities Act is silent about the president's revocation power and then leap to the conclusion that revocation authority must not exist. That conclusion reverses the normal legal presumption, has no judicial support, and flies in the face of constitutional principle.

The courts have never held that the president lacks the power to reverse course unless it is expressly granted, and there are many examples of the courts upholding a revocation power that was not express. For example, agencies that issue regulations don't need express authority to revoke or modify them. Presidents revoke prior executive orders all the time, many of which are based on statutory powers, and the courts have never ruled that the underlying statutory authority only works in one direction.

Congress would have to be very clear to limit revocation authority to overcome the strong presumption that it exists, and even then, there might be constitutional limits to attempt to withhold revocation authority. The natural reading of the Antiquities Act text, by contrast, strongly implies that the President has a continuing duty to modify monument boundaries to comply with the act's terms.

The main hope of those who think national monuments are inviolate, including California Attorney General Xavier Becerra, is a cursory opinion by Attorney General Homer Cummings from 1938. No court has ever discussed that AG opinion or reached its conclusion. Our research explains Cummings's many errors, including his flawed understanding of an 1862 attorney general opinion on a different statute that doesn't even support Cummings's position in the end. Thus, Becerra's reliance on Cummings's opinion is foolhardy. No one can defend the 1938 AG opinion on the merits, and it will almost certainly be overruled prior to any monument revocation.

The additional statutes Becerra and others cite provide even less support for their position. The Pickett Act's language cuts against them; the Forest Service Act of 1897 predates the Antiquities Act and proves nothing. The ambiguous comment in a House committee report before passage of the Federal Land Policy and Management Act of 1976 doesn't change the meaning of the Antiquities Act, and nothing in that later statute purports to amend the president's authority under the Antiquities Act. This grasping at straws will get them nowhere.

In the last 20 years, congressional debates that could have created more durable land management decisions were frequently short circuited by presidents who acted alone to declare expansive national monuments without local support. Such acts have consequences. Congress would have compromised on some matters, but its laws are politically accountable and immune from easy repeal. It's naive to think that unilateral presidential decrees could or should have the same permanence.

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