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## A Presidential Power of Monumental Proportions: Does the Antiquities Act Permit the Review and Revision of National Monuments or Can the President Steal Your Land?

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A PRESIDENTIAL POWER OF MONUMENTAL PROPORTIONS:  
DOES THE ANTIQUITIES ACT PERMIT THE REVIEW  
AND REVISION OF NATIONAL MONUMENTS OR  
CAN THE PRESIDENT STEAL YOUR LAND?

On April 26, 2017, President Donald J. Trump issued Executive Order 13792 to the Department of the Interior, calling on them to review the size and scope of the twenty-seven national monuments created since 1996.<sup>1</sup> Secretary of the Interior, Ryan K. Zinke, undertook this review with the purpose of providing recommendations as to whether any of these national monuments should be revised.<sup>2</sup> While not expressly named in the Order, many had reason to believe that this review would target two of the most controversial and expansive national monuments created in recent years, the Bears Ears and Grand Staircase-Escalante National Monuments in Utah.<sup>3</sup> President Trump likely found these monuments of particular interest, as they are home to significant deposits of coal, oil, and gas.<sup>4</sup> As predicted, on December 4, 2017, President Trump announced scale backs to both the Bears Ears and the Grand Staircase, resulting in a loss of nearly two million acres combined.<sup>5</sup>

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1. See Exec. Order 13792: Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429, 20429 (Apr. 26, 2017) (issuing order to conduct review of national monument designations). The Order called for the review of all national monuments created since 1996 that were larger than 100,000 acres in size. *Id.*

2. See *id.* (permitting Secretary Zinke to suggest national monument scale back).

3. See Jodi Stemler, *Trump Executive Order Targets National Monuments, Antiquities Act*, 71 OUTDOOR NEWS BULLETIN (May 2017 ed.), <https://wildlifemanagement.institute/outdoor-news-bulletin/may-2017/trump-executive-order-targets-national-monuments-antiquities-act> (discussing Order 13792 and actions taken in accordance with Order). During the signing of Order 13792, President Trump indicated that the Bears Ears would be a target by specifically naming this monument as an example of past abuses of the national monument designation power. *Id.* Secretary of the Interior, Ryan Zinke, also toured both the Bears Ears and Grand Staircase National Monuments shortly after the issuance of the Order 13792, and further indicated that these monuments were of particular interest to President Trump. *Id.*

4. See Laris Karklis, Bonnie Berkowitz & Tim Menko, *Areas cut out of Utah monuments are rich in oil, coal, uranium*, WASH. POST (Dec. 7, 2017), [https://www.washingtonpost.com/graphics/2017/national/utah-monuments/?utm\\_term=.052504a46c49](https://www.washingtonpost.com/graphics/2017/national/utah-monuments/?utm_term=.052504a46c49) (noting areas cut out of Bears Ears and Grand Staircase are rich in natural resources).

5. See Julia Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html> (discussing President Trump's December 4, 2017 proclamation).

While these scale backs are concerning to conservationists, they are also indicative of a larger issue regarding the definition of presidential power afforded under the Antiquities Act.<sup>6</sup> While President Trump's actions have already prompted the filing of multiple lawsuits, the judiciary has failed to provide an answer to this question.<sup>7</sup> Conservationists in the Legislative Branch should look to define the presidential powers created under the Antiquities Act because their failure to do so could place many of the current national monuments at risk for destruction.<sup>8</sup>

This Comment explores the metes and bounds of the power bestowed on the Executive Branch by the Antiquities Act and the potential impact that expanding this power could have on the fate of numerous national monuments.<sup>9</sup> Part I examines the driving motivations behind the Antiquities Act and the broad powers encompassed therein.<sup>10</sup> Part II discusses President Donald Trump's Order 13792 and subsequent Proclamation, ordering the review and scale back of multiple national monuments, as well as the various actions taken by the conservationist community in response.<sup>11</sup>

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6. See *National Monuments At Risk: An Executive Order Jeopardizes Monumental Treasures*, EARTHJUSTICE (Dec. 7, 2017), <https://earthjustice.org/features/national-monuments> (stating ramifications of President Trump's actions are not limited to Bears Ears and Grand Staircase).

7. See Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUB. LAND & RES. L. REV. 153, 154 (2011) (highlighting judiciary's failure to define or limit powers created under Antiquities Act).

8. See Eric C. Rusnak, *The Straw that Broke The Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 723-29 (2003) (calling on legislature to enact bill defining Antiquities Act power); see also U.S. CONST. art. IV, § 3, cl. 2 (conferring Legislative Branch with power to control federal public lands); see generally *UPDATE: Mining interests stake claims in Grand Staircase-Escalante and Bears Ears national monuments*, THE WILDERNESS SOC'Y (Jun. 27, 2018), <https://wilderness.org/blog/update-mining-interests-stake-claims-grand-staircase-escalante-and-bears-ears-national-monuments> (discussing Grand Staircase's scale back impact on landscape and regional economy). "Mining in Grand Staircase-Escalante could mean thousands of acres dug up and stripped, waterways polluted with soil and contaminants and wildlife driven away by dust and noise pollution. Local business owners and outdoor recreationists are also concerned about mining's impacts on tourism, which has been a huge part of the region's economy since the monument was established in 1996." *Id.* Such effects are not a distant possibility as more than 20 mining claims have been staked on newly opened land since the announcement of the Grand Staircase and the Bears Ears scale backs. *Id.*

9. For a discussion of the presidential powers created under the Antiquities Act and the potential impact of expanding this power, see *infra* notes 16-189 and accompanying text.

10. For a discussion of the history and enactment of the Antiquities Act, see *infra* notes 16-46 and accompanying text.

11. For a discussion of the different interpretations of presidential power afforded under the Antiquities Act, see *infra* notes 47-76 and accompanying text.

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Part III examines the creation of the Bears Ears and the Grand Staircase as examples of the controversy surrounding presidential designation of national monuments under the Antiquities Act.<sup>12</sup> Part IV analyzes the competing interpretations of the powers afforded to the President and the Executive Branch under the Antiquities Act, focusing on the characteristics of the Act, which has created a sharp divide.<sup>13</sup> Part V considers the efficacy of possible solutions to resolving the debate over presidential power under the Act.<sup>14</sup> Finally, Part VI highlights the possible ramifications of permitting President Trump's Order 13792 and subsequent Proclamation to go unchecked and the effect it could have on the status of all national monuments.<sup>15</sup>

#### I. AS BROAD AS THE GRAND CANYON?: HISTORY OF ENACTMENT AND DEBATE SURROUNDING THE ANTIQUITIES ACT

On June 8, 1906, President Theodore Roosevelt signed into law what would later become known as the Antiquities Act of 1906.<sup>16</sup> With one swift swoop of his pen, President Roosevelt bestowed upon generations of Presidents the broad discretionary authority to designate any parcel of land, within the borders of the United States, as a "national monument."<sup>17</sup> Such a designation sets aside the parcel of land for conservation purposes and protects it from development.<sup>18</sup> Since its enactment, sixteen Presidents have used the Antiquities Act to designate 157 different parcels of land as national monuments.<sup>19</sup> Although Congress enacted additional laws

12. For a discussion of the creation of the Bears Ears and Grand Staircase and the resulting backlash, see *infra* notes 77-99 and accompanying text.

13. For a discussion of competing interpretations and shortcomings of Antiquities Act, see *infra* notes 100-131 and accompanying text.

14. For a discussion of the possible solutions to resolving the controversy surrounding the Antiquities Act, see *infra* notes 132-168 and accompanying text.

15. For a discussion of threat posed by Order 13792 and President Trump's subsequent Proclamation to national monuments, see *infra* notes 169-189 and accompanying text.

16. See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 484 (2003) (discussing Antiquities Act's legislative history).

17. See *id.* at 483, 485 (discussing broad presidential powers delegated by Antiquities Act).

18. See *id.* at 488 (stating Antiquities Act allows for conservation and preservation of public lands).

19. See *Antiquities Act*, THE WILDERNESS SOC'Y, <https://www.wilderness.org/articles/article/antiquities-act> (last visited Jan. 14, 2018) (stating since President Roosevelt enacted Antiquities Act, it has been used by every President except for Richard Nixon, Ronald Reagan, and George H.W. Bush); *Monuments Protected Under the Antiquities Act, Antiquities Act Designations and Related Actions*, NAT'L PARKS CONSERVATION ASS'N (Jan. 13, 2017), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act> (select "Downloads" drop down menu;

allowing for the preservation of public lands and their resources, none proved to be nearly as successful and instrumental as the Antiquities Act in ensuring that American treasures remain protected.<sup>20</sup>

At the turn of the twentieth century, a desire grew amongst archeologists to provide wide protections for aboriginal objects and artifacts, and prevent private persons from collecting such artifacts and objects on public lands.<sup>21</sup> The Antiquities Act of 1906 was a result of this desire.<sup>22</sup> Although the protections provided in the bill, which would eventually become the Antiquities Act, were initially limited in scope, the final bill signed into enactment contained broader language.<sup>23</sup> In fact, the language that Congress ultimately approved was expansive, and bestowed on Presidents the broad, discretionary authority to protect large tracts of land.<sup>24</sup>

Not only does this legislative history support the premise that the President has expansive powers under the Antiquities Act, but so does the plain language of the Act.<sup>25</sup> The Antiquities Act states in relevant part:

“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 . . . . The President may reserve parcels of land as a part of the national monuments.”<sup>26</sup>

This language unambiguously gives the President free reign to designate and protect any land within the United States as a national monument so long as it is connected in some way to a historic or scientific interest.<sup>27</sup> Seemingly, the only limitation on this

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then follow “Antiquities Act Designations and Related Actions” hyperlink) (listing all national monuments created by presidential action).

20. See Squillace, *supra* note 16, at 488-89 (stating Antiquities Act has been carrying much of burden for public land preservation). One reason why the Antiquities Act has been carrying much of the preservation burden is the ease with which a President can make a National Monument designation. *Id.*

21. See Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 449-50 (1981) (discussing Antiquities Act’s origins).

22. See Squillace, *supra* note 16, at 477-78 (stating lawmakers drafted bill providing protections for archeological, historical, and aesthetic objects).

23. See *id.* at 477-86 (outlining Antiquities Act’s legislative history).

24. See *id.* at 485-86 (discussing expansive language that was ultimately approved).

25. See *id.* at 486 (discussing Act’s plain language).

26. 54 U.S.C.S. § 320301(a)-(b) (2017) (stating President’s authority under Antiquities Act).

27. See Squillace, *supra* note 16, at 486 (discussing Act’s expansive language).

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power is that “parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>28</sup> Although this limitation exists, it is seemingly inconsequential because various Presidents used the Antiquities Act to create expansive national monuments such as the Grand Canyon National Park and Glacier Bay National Park and Preserve.<sup>29</sup> When creating a national monument, the President is not required to prove that the monument encompasses the smallest area possible; instead, the President is only required to prove that the object of protection is of “historic or scientific interest.”<sup>30</sup> Even this requirement is minimal, however, as it requires the President to simply state that this is so.<sup>31</sup>

Although the Antiquities Act’s text is plain and clear, the power it instills in the Executive Branch has been challenged on multiple occasions.<sup>32</sup> In such cases, challengers, many of who are the states where the monuments are located, sought to invalidate the presidential proclamation that established the national monument.<sup>33</sup> Most challengers attempted to do so on the basis that either: (1) the area designated as a monument is devoid of any objects of historical or scientific interest; or (2) that the area designated is overly expansive for the purposes of achieving the proper

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28. § 320301(b) (noting President’s limitation under Act).

29. See *Monuments Protected Under the Antiquities Act*, *supra* note 19 (listing size of national monuments created under Act). The Grand Canyon National Park in Arizona expands over 800,000 acres. *Id.* While, Glacier Bay National Park and Preserve in Alaska expands over nearly 1.5 million acres. *Id.*

30. See *Cameron v. U.S.*, 252 U.S. 450, 455-56 (1920) (holding that President Roosevelt had authority to create Grand Canyon National Park). The Court implied that the size of the park is inconsequential to an analysis of whether the President had authority under the Antiquities Act to create a national monument when it focused its discussion on the fact that the Grand Canyon is of significant scientific interest, rather than the size of the park. *Id.* For a further discussion of the impacts from *Cameron*, see Squillace *supra* note 16, at 492.

31. See Kara McKenna, *Trump’s monument review is as secretive as Obama’s designations*, THE HILL (Sept. 5, 2017, 6:20 PM), <http://thehill.com/blogs/pundits-blog/energy-environment/349299-trumps-monument-review-is-as-secretive-as-obamas> (stating Antiquities Act does not require President to prove that monument is actually of historic or scientific interest).

32. See *Cameron*, 252 U.S. at 455-56 (challenging President Roosevelt’s designation of Grand Canyon); *Wyoming v. Franke*, 58 F. Supp. 890, 892 (D. Wyo. 1945) (seeking judicial declaration voiding presidential proclamation that created Jackson Hole National Monument was void).

33. See *Mountain St. Legal Found. v. Bush*, 306 F.3d 1132, 1134 (D.C. Cir. 2002) (looking to overturn six proclamations that established monuments in Arizona, Washington, Colorado, and Oregon); *Franke*, 58 F. Supp. at 892 (looking to have Proclamation No. 2578 overturned).

care and management of the objects protected.<sup>34</sup> Courts have historically declined to define what an object of historic or scientific interest is or to quantify the area that is necessary to protect such objects.<sup>35</sup> Instead, courts found that these determinations fall squarely within the discretion given to the President under the Antiquities Act and that any finding of an abuse of discretion by the judiciary would be an infringement on the powers of the Executive and Legislative Branches.<sup>36</sup> Accordingly, even when the broad discretion afforded to the President under the Antiquities Act was challenged, it was consistently upheld and affirmed.<sup>37</sup>

It is well established that the Antiquities Act bestows upon the President the power to create national monuments.<sup>38</sup> It is much less clear, however, whether this power also permits the scaling back or complete revocation of a national monument's status.<sup>39</sup> Multiple Presidents, including Woodrow Wilson, Calvin Coolidge, William Taft, and Dwight Eisenhower, engaged in downsizing national monuments.<sup>40</sup> No President, however, has completely revoked a national monument's status.<sup>41</sup>

Although Presidents have engaged in the downsizing of national monuments in the past, it remains unclear whether they had the authority to do so because, up until recently, such presidential actions were not challenged.<sup>42</sup> Due to the recent issuance of Executive Order 13792, calling for the review of over twenty-five national

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34. *Franke*, 58 F. Supp. at 892 (reciting reasons why plaintiff believes designation is beyond scope of presidential power).

35. *See id.* at 895-96 (discussing plaintiff's claims).

36. *See id.* at 896 (stating judiciary has no right to question national monument designations made by President under Act). The court discussed that in making the Antiquities Act, the Legislature made the decision to endow the President with the power to exercise discretion in designating national monuments. *Id.* As a result, the judiciary is in no position to review these designations so long as there is evidence that the land contains an object of historical or scientific interest. *Id.*

37. *See* Johannsen, *supra* note 21, at 456 (discussing judiciary's broad interpretation of President's power under Act).

38. For a discussion of presidential power to create national monuments, see *supra* notes 16-37 and *infra* notes 39-46 and accompanying text.

39. *See* Turkewitz, *supra* note 5 (discussing powers conferred under Antiquities Act).

40. *See Monuments Protected Under the Antiquities Act*, *supra* note 19, at 1-6 (listing instances of downsizing by Presidents).

41. *See id.* (listing status of all national monuments designated under Antiquities Act).

42. *See* Turkewitz, *supra* note 5 (stating courts have never ruled on whether President actually has power to make changes to national monuments' boundaries).

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monument designations, this issue has come to the forefront.<sup>43</sup> Since the issuance of this Order, many environmentalists and conservationists have spoken out against it, claiming that the Antiquities Act gives the President the authority to create national monuments but not the authority to undo or modify them without an act of Congress.<sup>44</sup> Such parties argue that the Act's silence on reversal of a national monument designation is indicative that it is not permitted.<sup>45</sup> To the contrary, parties in favor of the Order claim that the power granted to the President to create monuments also implicitly includes the power of reversal.<sup>46</sup>

## II. AS EXPANSIVE AS JACKSON HOLE?: EXECUTIVE ORDER 13792 AND PRESIDENT TRUMP'S ASSAULT ON NATIONAL MONUMENTS

On April 26, 2017, President Donald J. Trump signed Executive Order 13792, calling for:

“a review of all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation covers more than 100,000 acres, where the designation after expansion covers more than 100,000 acres, or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders, to determine whether each designation or expansion conforms to the policy set forth in section 1 of this order.”<sup>47</sup>

The Order stated that the review was to be undertaken to ensure that national monument designations made during this time were “made in accordance with the requirements and original objectives of the Act and appropriately balance[d] the protection of

43. *See id.* (stating President's power to downsize monuments is currently at issue).

44. *See* Bettina Boxall, *California attorney general to Trump: You can't touch our national monuments*, LOS ANGELES TIMES (June 8, 2017, 3:45 PM), <http://beta.latimes.com/local/lanow/la-me-california-monuments-20170608-story.html> (arguing President Trump is not permitted to modify or undo national monument designations).

45. *See* Todd Gaziano and John Yoo, *It's magical legal thinking to say Trump can't reverse Obama's national monuments*, LOS ANGELES TIMES (July 6, 2017, 4:00 AM), <http://beta.latimes.com/opinion/op-ed/la-oe-yoo-gaziano-revoking-national-monuments-20170706-story.html> (stating argument against national monument review).

46. *See id.* (stating argument in favor of review and revision of national monument designations).

47. Executive Order 13792: Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429, 20429 (ordering Secretary of Interior to conduct review of national monument designations).



landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.”<sup>48</sup> The Order directed the Secretary of the Interior, Ryan K. Zinke, to consider a number of different factors in reviewing these designations and making his recommendations.<sup>49</sup> Additionally, it directed him to issue a report summarizing the findings of his review.<sup>50</sup> This report was to include recommendations for presidential actions, legislative proposals, or other actions that should be appropriately undertaken.<sup>51</sup>

On December 4, 2017, upon the report and recommendations of Secretary Zinke, President Trump issued a proclamation that called for the scaling back of both the Bears Ears National Monument and the Grand Staircase-Escalante National Monument.<sup>52</sup> The proclamation called for an eighty-five percent reduction in the size of the Bears Ears and a near fifty percent reduction in the size of the Grand Staircase.<sup>53</sup> Together, these scale backs resulted in the loss of nearly two million acres of national monument land and constituted the greatest downsizing of protected federal land in his-

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48. *Id.* (stating policy behind review).

49. *Id.* at 20429-30 (laying out considerations that must be taken into account when reviewing national monument designations). The order specifically states that the Secretary should consider:

- (1) the requirements and original objective of the [Antiquities] Act, including the Act’s requirement that reservations of land not exceed ‘the smallest area compatible with the proper care and management of the objects to be protected’;
- (2) whether the designated lands are appropriately classified under the Act as ‘historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest’;
- (3) the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7) of the Federal Land Policy and Management Act (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries;
- (4) the effects of a designation on the use and enjoyment of non-Federal lands within or beyond monument boundaries;
- (5) concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities;
- (6) the availability of Federal resources to properly manage designated areas; and
- (7) such other factors as the Secretary deems appropriate.

50. *Id.* at 20430 (directing Secretary to issue final report 120 days after Order).

51. *See id.* (requiring Zinke to create report).

52. *See Turkewitz, supra* note 5 (discussing President Trump’s scale backs to two national monuments).

53. *See id.* (discussing substance of proclamation).

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tory.<sup>54</sup> It also opened up this previously protected land to all sorts of commercial activity including: oil and gas extraction, mining, and logging.<sup>55</sup>

Following President Trump's proclamation, on December 5, 2017, Ryan Zinke released a copy of his final report and recommendations.<sup>56</sup> In this Report, Zinke suggested that in recent years, Presidents have acted outside the "narrow" scope of the Antiquities Act by using it to restrict "public access, prevent hunting and fishing, burden private land, or eliminate traditional land uses."<sup>57</sup> Zinke argued that the authority to make such protective land designations falls not within the power of the Executive Branch but instead, within the power of Congress.<sup>58</sup> It is upon this premise that Zinke conducted his review and made his recommendations.<sup>59</sup>

Zinke's review was not limited to the Bears Ears and the Grand Staircase.<sup>60</sup> In fact, the report reviewed twenty-five other national monuments, placing a total of twenty-seven national monuments under review.<sup>61</sup> Of these twenty-seven monuments, Zinke made recommendations regarding ten of them.<sup>62</sup>

Although Zinke seemingly made individualized recommendations for each of the ten monuments, upon reading the recommendations, it is clear that they were simply a collection of similarly broad language that stated the national monuments "should be amended" or the "boundary should be revised" on the basis of "appropriate authority, including lawful exercise of your discretion granted by the [Antiquities] Act."<sup>63</sup> Zinke's report offered Presi-

54. *See id.* (discussing magnitude of scale back encompassed by proclamation).

55. *See id.* (discussing implications of national monument scale backs).

56. *See* Juliet Eilperin, *Zinke backs shrinking more national monuments and shifting management of 10*, WASH POST (Dec. 5, 2017), [https://www.washingtonpost.com/national/health-science/zinke-backs-shrinking-more-national-monuments-shifting-management-of-10-others/2017/12/05/e116344e-d9e5-11e7-b1a8-62589434a581\\_story.html?utm\\_term=.b2eb4cbfa0f9](https://www.washingtonpost.com/national/health-science/zinke-backs-shrinking-more-national-monuments-shifting-management-of-10-others/2017/12/05/e116344e-d9e5-11e7-b1a8-62589434a581_story.html?utm_term=.b2eb4cbfa0f9) (stating Zinke report was released following President Trump's announcement).

57. Ryan K. Zinke, MEMORANDUM FOR THE PRESIDENT: FINAL REPORT SUMMARIZING FINDINGS OF THE REVIEW OF DESIGNATIONS UNDER THE ANTIQUITIES ACT, at 1 (2017) (discussing presidential authority under Antiquities Act).

58. *See id.* (stating only Congress has power to enact designations such as "national parks, wilderness, and national conservation and recreation areas").

59. *See id.* (introducing report with discussion of recent abuse of Act).

60. *See id.* at 5-6 (enumerating all monuments that were reviewed).

61. *See id.* (reviewing twenty-two land monuments and five marine monuments).

62. *See* Zinke, *supra* note 57, at 9-18 (listing recommendations regarding select monuments).

63. *Id.* (laying out recommendations for amendment to ten national monuments).

dent Trump no specific recommendations as to how President Trump should revise each monument and its boundaries.<sup>64</sup> Instead, the report ended with a promise for more specific recommendations stating, “[s]pecific monument modification measures will be submitted separately should you concur with the monument modification recommendations in this Final Report.”<sup>65</sup>

Despite the lack of specific recommendations, President Trump’s proclamation on December 4, 2017 called for specific scale backs to both the Bears Ears and the Grand Staircase.<sup>66</sup> Even if one agrees that President Trump is authorized under the Antiquities Act to exercise his discretion in implementing such scale backs, the issue of determining what information he relied on in exercising his discretion still remains unknown.<sup>67</sup> It is possible that President Trump’s Proclamation relied upon “[s]pecific monument modification measures” promised at the end of Zinke’s report.<sup>68</sup> This, however, calls into question what information Zinke relied upon in making his report and recommendations.<sup>69</sup> Concerned conservationist groups filed multiple Freedom of Information Act (FOIA) requests after the proclamation, requesting that the U.S. Department of the Interior and agencies alike provide them access to the documents and information Zinke relied upon in making his

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64. *See id.* (lacking any specific recommendations about how national monuments should be downsized and/or changed).

65. *Id.* at 18 (promising more specific recommendations in future).

66. *See* Turkewitz, *supra* note 5 (discussing content of President Trump’s proclamation regarding national monuments).

67. *See* Zinke, *supra* note 57, at 9-18 (making general recommendations but lacking any specific recommendations).

68. *See id.* at 18 (promising additional information should Zinke’s recommendations be accepted).

69. *See generally id.* at 1-20 (discussing methodology and process generally). While the Zinke Report discusses the review process and factors considered generally, it fails to provide any specific information about what actually lead him to his recommendations. *Id.* In fact, in July 2018, internal documents released demonstrated that Zinke’s team dismissed data received from the Bureau of Land Management, which showed that the Bears Ears and Grand Staircase National Monument protections safeguarded archaeological treasures and boosted tourism in the region. *See* Randi Spivak, *Unredacted Interior documents show Zinke’s monuments review was a sham*, THE HILL (July 30, 2018, 8:00am), <https://thehill.com/opinion/energy-environment/399275-unredacted-interior-documents-show-zinkes-monuments-review-was-a> (discussing contents of internal documents). These internal documents revealed that Zinke and his team largely ignored significant scientific and economic evidence as well as millions of public comments in recommending scale backs at these national monuments. *Id.* These internal documents include internal emails that revealed oil and gas exploration was the true motivation behind the decision to shrink the Bears Ears National Monument. *Id.*

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report.<sup>70</sup> The U.S. Department of the Interior and the other agencies, however, failed to respond to these requests, keeping these concerned agencies in the dark about what prompted Zinke to recommend such expansive scale backs.<sup>71</sup>

In addition to litigation regarding Zinke's failure to respond to FOIA claims, multiple parties filed lawsuits in response to President Trump's Proclamation.<sup>72</sup> On December 4, 2017, just hours after President Trump issued his proclamation, multiple conservation groups as well as several Native American tribes filed lawsuits opposing the scale backs to the Grand Staircase National Monument.<sup>73</sup> Additionally, on December 7, 2017, conservation groups filed a lawsuit opposing the scale backs to the Bears Ears National Monument.<sup>74</sup> Although these lawsuits constitute separate actions, they all make the same allegation: the Antiquities Act authorizes Presidents to create national monuments, but does not authorize Presidents to abolish them in whole or in part.<sup>75</sup> While these lawsuits do not constitute the first attack on presidential power under the Antiquities Act, they are the first to directly raise the question of presidential power to revoke, in whole or in part, a national monument's status.<sup>76</sup>

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70. See Compl. for Decl. and Injunctive Relief at 10-22, *S. Utah Wilderness All. v. U.S. Dep't of Interior*, No. 1:17-cv-02314 (D.D.C. filed Nov. 2, 2017) (discussing multiple FOIA requests that were made).

71. See *id.* at 3 (highlighting all FOIA requests have not been responded to).

72. See *National Monuments At Risk: An Executive Order Jeopardizes Monumental Treasures*, *supra* note 6 (discussing lawsuits filed in response to scale backs at Bears Ears and Grand Staircase).

73. See *id.* (highlighting lawsuits filed by conservationists and Native American tribes regarding Grand Staircase).

74. See *id.* (discussing lawsuit regarding Bears Ears).

75. See Compl. for Injunctive and Decl. Relief at 6, *Wilderness Soc'y v. Trump*, No. 1:17-cv-02587 (D.D.C. filed Dec. 4, 2017) (stating President Trump's proclamation revoking protections at Grand Staircase was unlawful); Compl. for Injunctive and Decl. Relief at 3-4, *Nat. Res. Def. Council, Inc. v. Trump*, No. 1:17-cv-02606 (D.D.C. filed Dec. 7, 2017) (stating Antiquities Act does not authorize President to revoke national monument designation).

76. See Turkewitz, *supra* note 5 (discussing how courts have never addressed President's ability to make changes to national monuments); see also *Utah Ass'n of Cty. v. Bush*, 316 F. Supp. 2d 1172, 1177 (D. Utah 2004) (alleging President Clinton's designation of Grand Staircase was abuse of discretion afforded under Antiquities Act).

III. AS FAR-REACHING AS GLACIER BAY?: THE BEARS EARS AND  
GRAND STAIRCASE DEMONSTRATE THE SHARP DEBATE  
REGARDING THE ANTIQUITIES ACT

As there are currently numerous national monuments, it may seem curious that President Trump's administration singled out the Grand Staircase and the Bears Ears National Monuments for scale backs.<sup>77</sup> The history of and public's reaction to the creation of these monuments demonstrates why a pro-development President, like President Trump, would choose to target these monuments first.<sup>78</sup> Both monuments serve as good examples of the controversy that lies at the heart of most national monument designations: massive presidential land grabs with little consultation or appreciation for the impact they have on the communities that lie within them.<sup>79</sup>

On September 18, 1996, President Bill Clinton issued Proclamation 6920, setting aside 1.7 million acres of land in Utah and establishing the Grand Staircase-Escalante National Monument.<sup>80</sup> Just over ten years later, President Barack H. Obama set aside an additional 1.35 million acres of Utah's land, creating the Bears Ears National Monument.<sup>81</sup> This meant that, collectively, President Clinton and President Obama set aside over three million acres of Utah's land for conservation.<sup>82</sup>

The magnitude of these designations received disapproval from the citizens of Utah.<sup>83</sup> After the creation of the Grand Staircase, Utah senators, Orrin Hatch and Bob Bennett, introduced the

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77. See *Monuments Protected Under the Antiquities Act*, *supra* note 19, at 1-11 (listing all presidentially created national monuments). Some of the 157 national monuments cannot be reviewed and revised in their entirety by presidential order as a handful, while originally preserved under the Antiquities Act, have subsequently been preserved in part pursuant to other congressional laws. See Squillace, *supra* note 16, at 488-89.

78. For a discussion of the public outcry and implications of the creation of the Grand Staircase and the Bears Ears, see *infra* notes 83-99 and accompanying text.

79. For a discussion of the controversy that surrounds national monument designations, see *infra* notes 103-108 and accompanying text.

80. See Rusnak, *supra* note 8, at 669-70 (discussing creation of Grand Staircase).

81. See *Monuments Protected under the Antiquities Act*, *supra* note 19, at 10 (stating information regarding Bears Ear Monument).

82. See *id.* at 2-7, 10 (listing all national monuments in Utah). These three million acres are not the extent of Utah's land preserved under the Antiquities Act as there are numerous additional national monuments in this state. *Id.*

83. See Rusnak, *supra* note 8, at 671 (discussing reaction of Utahans to Grand Staircase designation).

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National Monument Fairness Act of 1997.<sup>84</sup> In his address to the Senate, Senator Hatch highlighted the lack of local and state consultation required under the Antiquities Act, and compared the designation of the Grand Staircase to the attack on Pearl Harbor, which was taken without notice and by complete surprise.<sup>85</sup> He called President Clinton's designation "the mother of all land grabs" and characterized it as "all backwards" as it was designated without full consideration of its impact on the surrounding community.<sup>86</sup> Finally, Senator Hatch appealed to his colleagues in the Senate to join him in support of his National Monuments Fairness Act of 1997, which would require the President to consult the governor of the state affected by the proposed proclamation and, acquire congressional approval of the designation prior to it taking effect.<sup>87</sup> Although his proposed Act never became law, Senator Hatch's statements remain indicative of the sentiments of those opposed to the wide presidential authority afforded under the Antiquities Act.<sup>88</sup>

In 2016, this debate resurfaced when President Obama created the Bears Ears National Monument.<sup>89</sup> With the establishment of the Bears Ears, Utah's Congressmen spoke out vehemently against presidential authority under the Antiquities Act and took action to undue the designation.<sup>90</sup> Multiple Utah legislators spoke out against the designation calling it an "arrogant act by a lame duck president" and a "midnight monument [that] is a slap in the face to

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84. *See* 143 CONG. REC. S 2563 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch) (discussing Grand Staircase Designation).

85. *See id.* (stating national monument designation came as complete surprise to lawmakers). Senator Hatch emphasizes that in making this designation, President Clinton engaged Utah in "no consultation, no hearings, no town meetings, no TV or radio discussion shows, no nothing." *Id.*

86. *See id.* (stating President Clinton designated Grand Staircase and expects Utah to simply make designation work for them). Senator Hatch highlighted the lack of appreciation that Presidents, such as President Clinton, have for the real-life implications that such designations have on local communities, stating that he just "hope[s] the President will be there to help our people in rural Utah" as the designation is implemented. *Id.*

87. *See id.* (discussing safeguards created in his proposed National Monument Fairness Act of 1997 will adequately protect interest of people both in states affected by designations and nationwide).

88. *See id.* at S 2564 (stating persons affected by designations).

89. *See* Robinson Meyer, *Obama's Environmental Legacy, in Two Buttes*, THE ATLANTIC (Dec. 30, 2016), <https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttes/511889/> (discussing different reactions to Bears Ears designation).

90. *See id.* (discussing reactions of Utah Congressmen to President Obama's designation).

the people of Utah.”<sup>91</sup> Utah Congressman, Rob Bishop, referred to the Antiquities Act as the “most evil act ever invented,” telling anyone who likes the way it is constructed to “die.”<sup>92</sup>

Much like Senator Hatch, Congressman Bishop also introduced a bill to the House of Representatives, H.R. 3990, with the purpose “[t]o amend title 54, United States Code, to reform the Antiquities Act of 1906, and for other purposes.”<sup>93</sup> Bill 3990, if enacted, would revise the language of the Antiquities Act and place specific limitations on the permissible size and boundaries of national monuments.<sup>94</sup> It would not only place major restrictions on the President’s ability to create new national monuments under the Antiquities Act, but also potentially place many current national monuments under review.<sup>95</sup>

As they typically do when presented with a proposal to amend the Antiquities Act, conservationists opposed any changes and spoke out against the enactment of Bill 3990.<sup>96</sup> A statement made by conservationist, Collin O’Mara, in reaction to Bill 3990, demonstrates conservationists’ sentiments on changing the Antiquities Act, stating that such changes do “[n]othing less than [place] our nation’s public lands heritage and a core part of our American identity at stake . . .” and destroys the “legacy built by Theodore Roosevelt and his successors from both parties.”<sup>97</sup> What conserva-

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91. *Id.* (quoting Utah Senator Mike Lee and Utah Congressman Jason Chaffetz).

92. *Id.* (quoting Congressman Bishop).

93. National Monument Creation and Protection Act, H.R. 3990, 115th Cong., § 1 (2017) (describing purpose of Bill).

94. *See id.* at § 2 (outlining new qualification requirements for objects of antiquity and size limitations for national monuments). Specifically, Bill 3990 replaces the terms “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” with “object or objects of antiquity.” *Id.* at § 2(1). It also replaces the phrase “confined to the smallest area compatible with the proper care and management of the objects to be protected” with “in accordance with the limitations outlined in subsections (e), (f), (g), and (h).” *Id.* at § 2(2). Additionally, Bill 3990 explicitly gives the President the power to reduce the size of national monuments, restrict the federal government’s power to designate privately owned land as a national monument, and explicitly defines terms used throughout the Act. *Id.* at § 2(j), (k), (n).

95. *See id.* at § 2(j) (enabling President to review established monuments).

96. Judith Kohler, *NWF: Attack on Antiquities Act Threatens America’s Public Lands Legacy*, THE NAT’L WILDLIFE FED’N (Oct. 11, 2017), <https://www.nwf.org/en/Latest-News/Press-Releases/2017/10-11-17-Attack-on-Antiquities-Act-Threatens-Public-Lands> (discussing conservationists’ reactions characterizing H.R. 3990 as “direct assault” on national monuments and conservation efforts).

97. *Id.* (quoting Collin O’Mara regarding Bill 3990). O’Mara, the President and CEO of the National Wildlife Federation, called on conservationists and state affiliates to preserve the long legacy created under the Antiquities Act, which he believes would be at risk if Bill 3990 is enacted. *Id.*

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tionists failed to anticipate, however, was that Utah's disgruntled legislators would not have to wait until the enactment of Bill 3990 to get what they desired.<sup>98</sup> With the issuance of Order 13792 and his subsequent proclamation, President Trump unilaterally asserted that the presidential review and revision contemplated by Bill 3990 is permitted under the Antiquities Act.<sup>99</sup>

#### IV. AS AMPLE AS ACADIA?: LOOKING FOR THE ROOT OF THIS DEEP DIVIDE

While President Trump's Order 13972 and subsequent proclamation unabashedly stands for the proposition that the Antiquities Act bestows upon the President the power to review and revise national monuments designations, in actuality, this power is not so clear.<sup>100</sup> In fact, there exists a deep rift on this issue between conservationists on one side, looking to preserve national monuments, and pro-development minded persons on the other, looking to open access to resource rich national monument land.<sup>101</sup> The ability to review and modify national monuments, encapsulated by both Bill 3990 and President Trump's proclamation, is controversial because, like many federal laws, the Antiquities Act is silent on how to undo an action taken in accordance with the power it affords.<sup>102</sup>

Conservationists, in favor of national monument preservation, argue that the Antiquities Act gives the President wide authority to simply create national monuments.<sup>103</sup> The Act's silence on the power to revoke or revise these designations indicates that the President does not have this power.<sup>104</sup> Accordingly, national monument designations made under the Antiquities Act are permanent and unchangeable.<sup>105</sup>

To the contrary, pro-development persons, in favor of national monument review and revision, claim that the Antiquities Act's si-

98. See Turkewitz, *supra* note 5 (announcing Bears Ears and Grand-Staircase scale backs).

99. See *id.* (quoting President Trump's promise that his actions will "usher in a bright new future . . .").

100. See *id.* (discussing ambiguities that surround presidential power under Antiquities Act).

101. See *id.* (outlining deep divide between parties with different interpretations of power afforded by Antiquities Act).

102. See Gaziano and Yoo, *supra* note 45 (highlighting similarity between Antiquities Act and other federal laws). For example, under the Constitution, Congress is expressly granted the power to create new laws but is unable to repeal them. *Id.* Instead, Congress does so by passing new laws. *Id.*

103. See *id.* (stating position of those in favor of conservation).

104. See *id.* (discussing reasoning behind conservationists' position).

105. See *id.* (analyzing implications of adopting conservationists' position).



lence on the power to revoke or revise is not dispositive.<sup>106</sup> In fact, like many actions taken by the President according to his statutory power, this silence demonstrates that the President has the implied authority to revoke a designation.<sup>107</sup> Presidents often revoke executive orders issued on the basis of statutory power similar to that given in the Antiquities Act, and courts have never held that the law did not permit such revocations.<sup>108</sup>

Seemingly, the reason for such competing interpretations and controversy is the broad and expansive language of the Antiquities Act and the ambiguities created as a result.<sup>109</sup> The United States Constitution gives to Congress the “[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”<sup>110</sup> As such, Congress is attributed the task of managing all public lands.<sup>111</sup> With the enactment of the Antiquities Act, however, Congress conveyed some of this power to the Executive Branch permitting the President to create national monuments.<sup>112</sup> While the power conferred on the President in the Act is seemingly concurrent with that of Congress, it is also absolute in the sense that when creating a new national monument, the President is not required to consult with Congress or seek congressional approval.<sup>113</sup>

In addition to not needing the approval of Congress, the President is also not required to consult local or state authorities regarding the designation.<sup>114</sup> As a result, the Antiquities Act empowers the President to create national monuments that are vastly contrary to the valid interests of local residents and their state legislators.<sup>115</sup> Although the President may view a national monument as territory

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106. *See id.* (stating position of those in favor national monument revision and review).

107. *See* Gaziano and Yoo, *supra* note 45 (discussing basis for position that President has power to review and revise national monument designations).

108. *See id.* (discussing other areas where implicit power of revocation was permitted).

109. *See* Rusnak, *supra* note 8, at 672 (stating Act does not require President to consult with anyone in creating national monuments).

110. U.S. CONST. art. IV, § 3, cl. 2 (granting Congress power to regulate all land within United States’ borders).

111. *See* Rusnak, *supra* note 8, at 669 (stating Constitution grants Congress power to oversee public lands).

112. *See id.* (stating Antiquities Act gave President concurrent power with Congress to govern public lands).

113. *See id.* at 672 (stating congressional approval is not required under Act).

114. *See id.* (stating President is not required to consult local or state authorities).

115. *See id.* at 672-73 (discussing how national monuments may be contrary to local interests in land).

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that must be preserved, it is likely that those living in and around the monument see it as a source of income of which they are being robbed.<sup>116</sup> When this is considered in the context of the breadth with which generations of Presidents exercised this power, it becomes evident why national monument designations have been so controversial.<sup>117</sup>

Although there are surely conflicting viewpoints regarding the breadth and meaning of the authority created under the Antiquities Act, this conflict truly comes down to one thing: a lack of transparency.<sup>118</sup> Those opposed to the current construction of the Antiquities Act take issue with the lack of transparency in regard to how a President creates a national monument.<sup>119</sup> Even those in support of the Act's current construction take issue with the lack of transparency in regards to how the President would review and revise national monuments.<sup>120</sup>

The principle reason for this lack of transparency is that the Antiquities Act affords the President almost absolute power to create national monuments.<sup>121</sup> The Act does not require Presidents to affirmatively prove that the object preserved is an object of historical or scientific significance nor that the parcel preserved encompasses the smallest area necessary for preservation of that object.<sup>122</sup> Therefore, Presidents are empowered to designate large tracts of land as national monuments without having any actual accountability for their decision-making process and determination.<sup>123</sup> This lack of accountability applies not only in the context of creation but, assumedly, would also apply to any review and revision of na-

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116. See Rusnak, *supra* note 8, at 669-70 (contrasting different possible perspectives regarding public land).

117. See *Monuments Protected under the Antiquities Act*, *supra* note 19, at 1-11 (listing all 157 national monuments created by Presidents under Antiquities Act).

118. See McKenna, *supra* note 31 (discussing lack of transparency in application of Antiquities Act).

119. See *id.* (stating President may make unilateral designation under Antiquities Act without any explanation).

120. See *id.* (discussing how Zinke report has added fuel to fire for lack of transparency critics).

121. See *id.* (stating Antiquities Act is ripe for abuse because national monument designations are unilaterally made by President).

122. See *id.* (highlighting President does not have to provide proof of determinations). The President does not need to substantiate his decision in any meaningful way but instead, can create a monument with the "use of the few magic words on the face of the proclamation." *Id.*

123. See McKenna, *supra* note 31 (highlighting that Antiquities Act leaves monument designations up to President's sole discretion).

tional monuments.<sup>124</sup> This makes it simple for Presidents, looking to advance their own political agendas, to abuse the Antiquities Act.<sup>125</sup>

Accordingly, simply expanding the President's authority under the Antiquities Act to include the power to review and revise national monuments would not provide a remedy for the lack of transparency and abuse of power.<sup>126</sup> In fact, it would exacerbate it.<sup>127</sup> As demonstrated by President Trump's Order 13792, providing future Presidents with the power to review and revise national monuments does not remedy the concerns of those opposed to the Antiquities Act's current construction.<sup>128</sup> Similar to the power to create national monuments, Presidents looking to advance their own political agendas and interests could abuse the power to review and revise the designations by either expanding, shrinking, or even completely undoing their predecessors' actions.<sup>129</sup> This would create the potential for a political back and forth in which monuments would be subject to expansion under more pro-conservation minded Presidents and reduction under more pro-development minded Presidents.<sup>130</sup> The fate of national treasures such as the Grand Staircase and the Bears Ears cannot be subject to such a political tug-of-war.<sup>131</sup>

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124. For a discussion of lack of transparency regarding Order 13792 and President Trump's subsequent Proclamation, see *supra* notes 63-71 and accompanying text.

125. See McKenna, *supra* note 31 (stating Antiquities Act is ripe for abuse by Presidents looking to expand their own environmental legacies).

126. See *id.* (cautioning against instituting review and revision process that lacks transparency). A behind-closed-doors review and revision process further perpetuates one of the biggest criticisms of the Antiquities Act: a lack of transparency. *Id.*

127. See *id.* (discussing implications of permitting review and revision).

128. See *id.* (highlighting President Trump's review and revision was lacking in transparency).

129. See Turkewitz, *supra* note 5 (discussing how President Trump's Order 13792 was aimed at undoing national monuments President Obama created).

130. See *id.* (highlighting President Trump's scale backs were aimed at protections put in place by his democratic predecessors). The Trump administration is more development minded, pushing for fewer restrictions for development on public land. *Id.*

131. See *id.* (cautioning against reversing protections for national monuments). Environmentalists say that President Trump's decision threatens to destroy some 100,000 sites of archeological importance. *Id.*

V. AS IMMENSE AS THE VIRGIN ISLANDS CORAL REEF?: AN APPEAL TO THE LEGISLATURE TO FINALLY SET THE RECORD STRAIGHT

As expanding Executive power to include the power to review and revise national monuments does not provide a solution to resolving the controversy surrounding the Antiquities Act, one must turn to the Judicial and Legislative Branches for a resolution.<sup>132</sup> Previously, parties looking to oppose national monument designations have sought a judicial determination of presidential power afforded under the Antiquities Act.<sup>133</sup> Courts, however, have declined to undertake such an endeavor.<sup>134</sup> Accordingly, the real solution does not seem to be one that will come from the judiciary, but instead from the legislature.<sup>135</sup>

As discussed above, following the Bears Ears and Grand Staircase scale backs, numerous conservationist groups filed lawsuits challenging President Trump's actions.<sup>136</sup> Many in the conservationist community placed great importance on these lawsuits, stating that the decisions made in these cases would likely determine the fate of all current and future national monuments.<sup>137</sup> This, however, appears to be a misstatement when considered in light of the court's prior decisions on this issue.<sup>138</sup>

Up until this point, courts have consistently declined to define the presidential powers afforded under the Antiquities Act.<sup>139</sup> First, courts held on numerous occasions that the issue of reviewability and deference afforded to presidential interpretations of ambiguous statutes has rendered the judiciary unable to review presidential

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132. For a discussion of the problems with expanding presidential power under the Antiquities Act, see *supra* notes 118-131 and accompanying text.

133. See Squillace, *supra* note 16, at 486, 502-14 (discussing judicial challenges to Antiquities Act).

134. See Hartman, *supra* note 7, at 162-69 (outlining pitfalls of judicial resolution).

135. See *id.* (discussing effects that court decisions would have). The possible results of a court decision would resolve the dispute regarding the ability of Presidents to review and revise national monuments but would not do anything to resolve the lack of transparency. See *id.*

136. For a discussion of the various lawsuits filed in response to Order 13792 and President Trump's subsequent Proclamation, see *supra* notes 70-76 and accompanying text.

137. See Turkewitz, *supra* note 5 (placing great importance on decisions resulting from lawsuits filed in response to scale backs).

138. See Hartman, *supra* note 7, at 162-69 (highlighting judiciary's failure to define scope of presidential power under Antiquities Act).

139. See *id.* (analyzing limited ability of judiciary to address Antiquities Act challenges); see also Squillace, *supra* note 16, at 534-36 (discussing prior cases in which judiciary has declined to rule on confines of presidential power under Antiquity Act).

national monument designations.<sup>140</sup> Thus, there is no reason to believe that any court can or will do so here.<sup>141</sup> Second, although not yet specifically invoked by the court, it is possible that the court could decline to define presidential power under the Antiquities Act due to separation of powers issues and the possibility that doing so would be an infringement on power constitutionally mandated to Congress.<sup>142</sup> Finally, in the off chance that the court decides to review President Trump's actions, it is possible that it could do so on a limited basis, not broadly defining presidential power under the Antiquities Act but, instead, crafting a narrow holding applicable only to the case before it.<sup>143</sup> With revisions planned for ten additional national monuments and over 100 monuments yet to be reviewed, a limited holding would mean that conservationists, looking to protect these monuments, would have the heavy burden of filing similar lawsuits every time a monument comes up for review and revision.<sup>144</sup> With these considerations in mind, it becomes clear that the judiciary is not a viable option to resolving these ambiguities.<sup>145</sup>

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140. See Hartman, *supra* note 7, at 164-65 (discussing judiciary's limited ability to resolve challenges to Antiquities Act). Due to the wide deference afforded to the President under the Antiquities Act, the judiciary is limited in reviewing designations. *Id.* As such, practically every challenge to a presidential national monument designation is defeated as the President need simply include the "scientific or historic" and "smallest area compatible" language in the proclamation to render the court powerless to review. *Id.* The courts must also afford presidential designations *Chevron* deference, in which the executive agency's statutory interpretation is granted deference if the statute is silent or ambiguous. See *id.*; see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding considerable weight should be accorded to executive department's construction of statutory scheme and afforded deference).

141. See *Wyoming v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945) (stating that it is legislature's responsibility to define presidential power under Antiquities Act). "[I]f Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch." *Id.*

142. See Hartman, *supra* note 7, at 163-65 (discussing possible separation of powers concerns regarding judicial review); see also U.S. CONST. art. IV, § 3, cl. 2 (delegating to Congress power to control all public lands).

143. See Rusnak, *supra* note 8, at 681-82 n.56 (noting case in which court found in favor of challenger to Antiquities Act).

144. See Zinke, *supra* note 57, at 10-18 (listing ten additional monuments for review and revision); see also *National Monuments At Risk: An Executive Order Jeopardizes Monumental Treasures*, *supra* note 6 (highlighting allowing President to undermine monument designations sets dangerous precedent).

145. See Hartman, *supra* note 7, at 163-69 (highlighting problems with judicial review).

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Accordingly, what is needed to resolve this hotly contested issue is for the legislature to act.<sup>146</sup> The Constitution gives Congress the power to control all public land within the United States.<sup>147</sup> It was according to this power that it created the Antiquities Act and delegated to the Executive the power to create national monuments.<sup>148</sup> Now, as the Antiquities Act is under fire, it is Congress's job to clarify what the boundaries of this delegated presidential authority are.<sup>149</sup>

Although Congress previously attempted to make such changes to the Antiquities Act and to provide clarification, it was unsuccessful.<sup>150</sup> The likely reason for this is that conservationists in the Legislature may have been hesitant to make such changes because the current construction fits their conservationist desires.<sup>151</sup> These legislators, however, should keep in mind the considerations discussed above.<sup>152</sup> If conservation is their main concern, it does not seem wise to leave such determinations up to the judiciary, when they could make such determinations themselves.<sup>153</sup> The threat of irreparable harm posed to both current and future national monuments is too great to justify allowing its fate to be determined by a judiciary that has historically taken a hands-off approach to defining presidential powers under the Antiquities Act.<sup>154</sup>

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146. *See id.* at 169 (discussing how failed legal challenges to Antiquities Act have lead opponents to seek change through legislative process).

147. *See* U.S. CONST. art. IV, § 3, cl. 2 (granting Congress power to regulate all land within borders of United States).

148. *See* Hartman, *supra* note 7, at 154 (stating that Congress granted President right to make national monuments).

149. *See* Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945) (highlighting courts have held that it is Congress's job to delineate powers created under Act).

150. *See* Hartman, *supra* note 7, at 154, 169-75 (discussing Congress's largely unsuccessful attempts to modify Act).

151. *See id.* (stating bills to change Act have been introduced in Congress but have never been successful).

152. For a discussion of the problems that arise when relying on judicial resolution of the Antiquities Act dispute, *see supra* notes 139-145 and accompanying text.

153. *See Conservation Groups File Lawsuit After President Trump Illegally Axed Dinosaur Treasure Grand Staircase-Escalante National Monument*, EARTHJUSTICE (Dec. 4, 2017), <https://earthjustice.org/news/press/2017/conservation-groups-file-lawsuit-after-president-trump-illegally-axed-dinosaur-treasure-grand-staircase-escalante-national-monument> (discussing how lifting of protections could pose risk of irreparable harm to national monuments).

154. *See* Turkewitz, *supra* note 5 (itemizing archaeological and historical artifacts that are now at risk after Bears Ears and Grand Staircase scale backs). President Trump's proclamation confined monument protection only to those most celebrated features of the monuments. *Id.* For a discussion of the unwillingness of

Congressional action is both necessary and timely as allowing President Trump's actions to stand would call the fate of many current and future national monuments into question.<sup>155</sup> The broad discretion and deference afforded under the Antiquities Act has permitted Presidents to define for themselves the powers that Congress delegated to them.<sup>156</sup> Numerous Presidents have tested and pushed the boundaries of this power and have found themselves largely unimpeded in doing so.<sup>157</sup> As much of this testing the boundaries has been in favor of the creation of national monuments, conservationists have never raised an issue with a President doing so.<sup>158</sup> President Trump's Order 13792 and the Bears Ears and Grand Staircase scale backs, however, trouble conservationists who are now being faced with a President that is aggressively pushing the boundaries in the other direction.<sup>159</sup>

Accordingly, Order 13792 serves as just one example of the threat posed to national monuments under the Act's current vague construction and broadly defined presidential powers.<sup>160</sup> If the Antiquities Act remains under its current construction, great deference will be afforded to current and future Presidents' decisions and any current and future invasions on national monuments will likely go unimpeded.<sup>161</sup> Even conservationist groups and concerned citizens will be left defenseless in protecting national monuments, as not only is it very difficult to challenge presidential actions under the Act but it is also difficult to gain access to information that is necessary to support any such challenge, as demon-

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judiciary to define the presidential powers afforded under the Antiquities Act, see *supra* notes 32-36 and accompanying text.

155. See Turkewitz, *supra* note 5 (warning permitting President to have power to review and revise monuments could have far reaching implications).

156. For a discussion of the deference afforded to presidential actions under Antiquities Act, see *supra* note 140 and accompanying text.

157. See Turkewitz, *supra* note 5 (discussing inability of court to review presidential designations).

158. For a discussion of prior challenges to designations under Antiquities Act, see *supra* notes 32-33 and accompanying text.

159. See Eilerpin, *supra* note 56 (quoting Secretary Zinke regarding public comments on review and revision). Secretary Zinke made it clear that he will ignore an overwhelming public response opposing changes to national monuments stating, "I don't yield to public pressure. Sound public policy is not based on threats of lawsuit. It's doing what's right." *Id.*

160. For a discussion of Order 13792 and President Trump's Proclamation, see *supra* notes 47-76 and accompanying text.

161. For a discussion of the broad deference afforded to presidential designations under the Antiquities Act, see *supra* note 36 and accompanying text.

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strated by current attempts to obtain information relied upon in Zinke's designation reviews.<sup>162</sup>

With these considerations in mind, conservationists in Congress should take any proposals for change to the Antiquities Act, like the previously discussed Bill 3990, under serious consideration.<sup>163</sup> While these proposals will likely not provide for the expansive powers to create national monuments that is enjoyed under the Antiquities Act's current construction, they are starting points.<sup>164</sup> Conservationists in Congress must realize they can no longer afford to reject such proposals, but instead must compromise with their pro-development peers.<sup>165</sup> Although both sides of the dispute will likely have to make concessions, a solution that is mutually agreeable to both sides of the debate is preferable to leaving the task of defining the presidential powers under the Act to the Judiciary or Executive Branches.<sup>166</sup> Instead, conservationists in Congress should embrace their constitutionally mandated power to control all public lands and use this as a means to protect and control the fate of all national monuments.<sup>167</sup> If they do not, all national monuments will seemingly have lost their best chance at ensuring their survival.<sup>168</sup>

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162. See Compl. for Decl. and Injunctive Relief at 10-22, *S. Utah Wilderness All. v. U.S. Dep't of Interior*, No. 1:17-cv-02314 (D.C.C. filed Nov. 2, 2017) (discussing failure to reply to FOIA requests). Complaint alleges that the FOIA records are essential to their advocacy and that failure to respond is actively impeding their ability to carry out their organizational missions. *Id.*

163. See Eilperin, *supra* note 56 (discussing concerns of conservationists regarding President Trump's actions). Secretary Zinke stated that the Department of the Interior would be open to adopting a national monument designation policy similar to that laid out in Bill 3990. *Id.*

164. For a discussion of Bill 3990, see *supra* notes 93-99 and accompanying text.

165. See Eilperin, *supra* note 56 (discussing reaction of conservationist community to scale backs). Conservationists stated that with the scale backs at the Bears Ears and the Grand Staircase, the Trump administration has essentially waged war on America's national monuments. *Id.* Secretary Zinke indicated that the administration may be looking to force Congress's hand in amending the Antiquities Act, as he explicitly referenced Bill 3990 as a possible solution to what he considered presidential abuse of the Antiquities Act. *Id.*

166. For a discussion of limited authority of the judiciary to review presidential actions under the Antiquities Act, see *supra* notes 133-135.

167. For a discussion of congressional power to control public lands, see *supra* notes 110-111.

168. See Turkewitz, *supra* note 5 (highlighting expansive implications of President Trump's actions).



VI. AS VAST AS THE BEARS EARS?: THE FATE OF AMERICA'S  
NATIONAL MONUMENTS PUT IN LIMBO

After President Trump announced his plan to review a number of national monument designations and implement scale backs of the Bears Ears and Grand Staircase, he was met with a significant amount of opposition.<sup>169</sup> To some, this kind of public outcry may seem somewhat disproportionate considering that President Trump's Order 13792 called for the review of only twenty-seven of the 157 current national monuments.<sup>170</sup> Moreover, of those twenty-seven monuments placed under review, only two of the most expansive national monuments were actually scaled back or revised in anyway.<sup>171</sup> When considered in this limited context, it may make one question the significance of Order 13792.<sup>172</sup> Are scaling back a few of the most expansive monuments, of the 157 current national monuments, really that big of a deal?

In response to that question, many conservationists would likely have a few questions of their own.<sup>173</sup> Do you want to have the opportunity to hike the expansive landscape of Grand Canyon?<sup>174</sup> Do you want generations of future Americans to be able to snorkel and explore the beauty of the Virgin Island coral reefs?<sup>175</sup> Do you want your kids and your grandkids to be able to view the pristine beauty of Alaska at Glacier Bay?<sup>176</sup> Most Americans likely answer

169. For a discussion of public outcry against President Trump's actions, see *supra* notes 66-76 and accompanying text.

170. See Exec. Order 13792: Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429, 20429 (Apr. 26, 2017) (calling for review of all monument designations made since 1996).

171. See Eilperin, *supra* note 56 (stating President Trump's Proclamation downsized two massive national monuments).

172. See Max Greenberg, *Happy 110th anniversary to the Antiquities Act, protector of monuments for all*, WILDERNESS SOC'Y (Jun. 6, 2016), <https://wilderness.org/blog/happy-110th-anniversary-antiquities-act-protector-monuments-all> (discussing public support for designation and protection of national monuments). Many Americans support the designation and protection of America's national monuments. *Id.*

173. See Travis S. Andrews, *'The President Stole Your Land': Patagonia, REI blast Trump on national monument rollbacks*, WASH. POST (Dec. 5, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/12/05/the-president-stole-your-land-patagonia-rei-blast-trump-on-national-monument-rollbacks/?utm\\_term=.9ea8750fae4b](https://www.washingtonpost.com/news/morning-mix/wp/2017/12/05/the-president-stole-your-land-patagonia-rei-blast-trump-on-national-monument-rollbacks/?utm_term=.9ea8750fae4b) (discussing uproar and warnings to public made by conservationists after Trump's proclamation).

174. See *Monuments Protected under the Antiquities Act*, *supra* note 19, at 1 (stating Grand Canyon was created under Antiquities Act and parts still remain protected under it).

175. See *id.* at 7 (stating Buck Island Reef National Monument was created under Antiquities Act and parts still remain protected under it).

176. See *id.* at 5 (stating Glacier Bay National Park and Preserve was created under Antiquities Act and parts still remain protected under it).

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“yes” to all of these questions.<sup>177</sup> All of these invaluable American treasures were created and are currently protected under the Antiquities Act.<sup>178</sup> If presidential designation powers continue to go unchecked, all of these national monuments and numerous others will remain at risk.<sup>179</sup>

Unlike its predecessors, this most recent campaign to revise national monuments is not likely one that will fade into oblivion.<sup>180</sup> Instead, Order 13792 and subsequent proclamations seemingly mark the beginning of what will be an aggressive invasion on America’s national monuments.<sup>181</sup> While the scale backs implemented at the Bears Ears and the Grand Staircase are seemingly limited in scope, if they remain unchecked, they stand for a much larger proposition that such presidential actions are permissible.<sup>182</sup> Accordingly, it is likely that the scale backs will not stop here and that, instead, all 157 of America’s national monuments could suffer a similar fate.<sup>183</sup> Considering the irreparable harm such scale backs

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177. See Greenberg, *supra* note 172 (stating ninety percent of voters favor presidential power to permanently protect some public lands); see also *Conservation Groups File Lawsuit After President Trump Illegally Axed Dinosaur Treasure Grand-Staircase Escalante National Monument*, *supra* note 153 (stating during Zinke review comment period over 2.7 million Americans voiced support for national monuments across country).

178. See *Monuments Protected under the Antiquities Act*, *supra* note 19, at 1, 5, 7 (listing Grand Canyon, Glacier Bay, and Buck Island Reef as national monuments protected under Antiquities Act).

179. See Eilperin, *supra* note 56 (stating Zinke reports called for revisions to national monuments in addition to Bears Ears and Grand Staircase); see also *infra* note 183 (highlighting sweeping implications of President Trump’s actions).

180. See Exec. Order 13792: Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429, 20429 (Apr. 26, 2017) (calling for review of twenty-seven national monuments). Zinke’s review and recommendations were not limited to the Bears Ears and Grand Staircase. *Id.* Additionally, many conservationists believe that if President Trump’s review and revision of the Bears Ears and Grand Staircase are permitted, other national monuments will likely be subject to scale backs. See Turkewitz, *supra* note 5 (discussing conservationists’ reactions to Bears Ears and Grand Staircase scale backs). In fact, Rhea Suh, the President of the Natural Resources Defense Council, posed a question to President Trump: “What’s next, President Trump, the Grand Canyon?” *Id.*

181. For discussion of possible implications of President Trump’s action, see *supra* note 159 and accompanying text.

182. See Turkewitz, *supra* note 5 (discussing concerns of expansive impact of Bears Ears and Grand Staircase scale backs).

183. See *id.* (highlighting sweeping implications of President Trump’s actions). While a number of national monuments have, subsequently, been further protected pursuant to congressionally-created laws such as the National Park Service Organic Act of 1916, the monuments’ fates remain unclear. See generally Squillace, *supra* note 16 (noting many national monuments have been further protected by subsequent congressional action but not in their entirety). For example, while the Grand Canyon has been subsequently preserved by congressional action, parts of it remain at risk. See Hannah Nordhaus, *What Trump’s Shrinking of National Mon-*

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could have on the American treasures encompassed within these national monuments, this is simply unacceptable.<sup>184</sup>

Following President Trump's proclamation, Patagonia, the popular outdoors brand, posted a message to shoppers visiting their website: "The President Stole Your Land."<sup>185</sup> While Patagonia's message is seemingly dramatic, it makes an impact and draws the public's attention to what is at stake.<sup>186</sup> Whether Patagonia realizes it or not, they have the right idea.<sup>187</sup> As discussed above, the Legislature, a branch driven largely by public opinion, is the branch that needs to act now to protect the fate of the national monuments.<sup>188</sup> Accordingly, if you answered "yes" to any of the questions above, do those fighting to protect America's national monuments a favor: reach out to your local congressman or congresswoman and tell them you want your land back.<sup>189</sup>

Maureen A. McCotter\*

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*uments Actually Means*, NAT'L GEOGRAPHIC (Feb. 2, 2018), <https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/> (highlighting national monuments under review by Zinke). In fact, Grand Canyon-Parashat, a part of the Grand Canyon, was one of the national monuments under review by Order 13792. *Id.* Furthermore, upon announcing the Bears Ears and Grand Staircase scale backs, President Trump indicated that these are just the beginning of what would be a number of revisions to national monuments and promised his pro-development supporters that "[t]ogether we will usher in a bright new future of wonder and wealth." See Turkewitz, *supra* note 5.

184. See Turkewitz, *supra* note 5 (outlining what is at stake with Bears Ears and Grand Staircase scale backs). President Trump confined monument protection to only the most celebrated features of the Bears Ears, opening many areas of archaeological significance up for development. *Id.* Conveniently, much of the land that is retracted from monument protection is rich in natural resources, meaning that it will likely soon be subject to mineral extraction. See Karklis, *supra* note 4 (discussing mineral interests at Bears Ears and Grand Staircase).

185. See PATAGONIA, <http://www.patagonia.com> (last visited Jan. 31, 2018) (looking to raise awareness amongst customers).

186. See Turkewitz, *supra* note 5 (arguing if Order 13972 and President Trump's Proclamation permitted to stand, dozens of national monument designations are potentially subject to review and revision).

187. See *National Monuments At Risk: An Executive Order Jeopardizes Monumental Treasures*, *supra* note 6 (stating Trump's actions threaten not only recently created national monuments but also all national monuments created under Antiquities Act).

188. For a discussion of the necessity for legislative action, see *supra* notes 139-159 and accompanying text.

189. See Andrews, *supra* note 173 (discussing conservationists' appeals to public). Led by founder, Yvon Chouinard, Patagonia urged their customers to use social media and hashtag #MonumentalMistakes to protest President Trump's actions. *Id.*

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