# MONUMENTAL DISAGREEMENTS: A CALL TO MOVE AWAY FROM "SIGN HERE" SCHOLARSHIP

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Invited to respond to *Dismantling Monuments*, Professor Richard Seamon's exploration of the legal controversies surrounding President Trump's decision to dramatically reduce the size of two national monuments in Utah, I initially feared that I would have little to say.[1] "Amen" adds little from a scholarly standpoint, and having written contemporaneously on the same topic,[2] I knew that Professor Seamon had done a quite admirable job of presenting the legislative history of the Antiquities Act and related statutes, establishing that the large national monuments spanning millions of acres that we see today are well beyond the congressional expectations of 1906. Seamon also accurately notes that earlier presidents made significant reductions to monuments that their predecessors declared.[3]

While the conclusions that I draw from my own study of the topic are more equivocal than Seamon's pronouncement that President Trump was authorized to do what he did, I applaud him for thoroughly engaging the history surrounding the Act and its application over the past century. I will comment on some particular areas of disagreement with Seamon later, but I will initially focus on the surprising level of opposition that the mere suggestion of shrinking national monument boundaries provoked.

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1. Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553 (2018). Note that in this context, "national monuments" does not refer to structures like the Washington Monument or the Lincoln Memorial in our nation's capital, but to the results of presidential proclamations made under the Antiquities Act of 1906. Pub. L. 59-209, 34 Stat. 225 (1906). These parcels of public land that preserve objects of historic or scientific interest have ranged from less than an acre to thousands of square miles in size. *See* Monuments Protected Under the Antiquities Act, NAT'L PARKS CONSERVATION ASS'N (Jan. 13, 2017), https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act [https://perma.cc/NDR3-KUG5] (listing all the national monuments designated under the Antiquities Act). On December 4, 2017, President Trump signed a proclamation reducing the size of the Bears Ears National Monument (which had been declared by President Obama on December 28, 2016) from approximately 1.35 million acres to about 202,000 acres. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017). That same day, President Trump also reduced the Grand Staircase-Escalante National Monument (originally proclaimed by President Clinton) from almost 1.9 million acres to just slightly more than one million acres. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

2. John Murdock, *Monumental Power: Can Past Proclamations Under the Antiquities Act be Trumped?*, 22 TEX. REV. L. & POL. 349–421 (2018).

3. Seamon, *supra* note 1, at 575–76.

## I. ACADEMIC OPPOSITION TO MONUMENT MODIFICATIONS

As Seamon notes, many other law professors disagree with his conclusion.[4] In fact, 121 professors signed a letter to the Secretaries of the Interior and Commerce unequivocally concluding that anyone who thinks a president possesses the power "to abolish or diminish a national monument after it has been established" is "mistaken."[5] In their telling, this is not a close call. They contend that "[t]he plain text of the Antiquities Act makes this clear."[6]

As Seamon, I, and others have all independently pointed out, the text of the Antiquities Act is far from clear on this point.[7] That lack of clarity flows from the Act's utter silence regarding what, if anything, happens *after* the President "in the President's discretion, declare[s] by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments."[8] Sometimes, legislative silence has been interpreted as bringing with it the implied power to undo what was explicitly authorized.[9] In other circumstances, silence has been interpreted as demonstrating a legislative intent that nothing beyond the powers expressly granted be exercised.[10] In my view, a plausible case can be made for either interpretation with regard to the Antiquities Act, but the issue certainly deserves more than simply being waved away as "clear."

Oddly, the 121 professors contend that the Antiquities Act was so clear on the point of barring subsequent revocations and modifications that Congress felt the need to say this again 70 years later:

> Congress confirmed this understanding of the Antiquities Act when it enacted the Federal Land Policy and Management Act (FLPMA) in 1976, which included provisions governing modification of withdrawals of federal lands. Those provisions indicate that the Executive Branch

4. Seamon, *supra* note 1, at 555 & n.7.

5. Letter from 121 Law Professors to Sec'y of the Interior Zinke and Sec'y of Commerce Ross (July 6, 2017), https://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf [https://perma.cc/HXE7-LPUL] [hereinafter 121 Law Professors' Letter].

6. *Id.*

7. *See generally* Seamon, *supra* note 1 (finding that the Antiquities Act impliedly authorizes reduction or revocation); Murdock, *supra* note 2 (discussing various arguments for and against presidential reductions and revocations); and JOHN YOO & TODD GAZIANO, PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS, AM. ENTERPRISE INST. (Mar. 2017), http://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf [https://perma.cc/Q5LP-KG6K] (concluding that the President holds a general discretionary revocation power under the Antiquities Act).

8. 54 U.S.C.A. § 320301(a) (2014).

9. *See* Murdock, *supra* note 2, at 402–06.

10. *See id.* at 406–07.

> may not "modify or revoke any withdrawal creating national monuments."[11]

Yet, FLPMA did not resolve the issue. FLPMA does not say, as the professors imply, that "the Executive Branch" is barred from modifying or revoking a national monument. The statute states that "the Secretary" is barred from doing so.[12] However, it is the President, not the Secretary of the Interior, who is specifically authorized by the Antiquities Act to declare national monuments.[13] This FLPMA provision, on its face, thus appears to say that the Secretary cannot do what the Secretary was never authorized to do in the first place. Perhaps, as Seamon suggests, in the midst of a major realignment of land policy—one that granted the Secretary important new powers—this provision was intended to emphasize that the Secretary's powers regarding national monuments had *not* been expanded.[14] Or, as Professor Mark Squillace and others argued in *Presidents Lack the Authority to Abolish or Diminish National Monuments*, which the professors cite in their letter and specifically incorporate by reference, such language may well be the result of a drafting mistake, and the true intent was to bind the President (or clarify that he was *already* bound).[15]

Nevertheless, even if that was the intent, one must deal with the actual enacted text and the fact that the President and the Secretary are not directly interchangeable. Indeed, the distinction has significant legal consequences because, unlike the decisions of most federal officials, presidential declarations are exempt from the requirements of the National Environmental Policy Act (NEPA).[16] While some in Congress may have wanted FLPMA to bind the entire Executive Branch, Congress passed, and the President signed a bill that said something very different. FLMPA simply does not say what the professors wish it did.

FLPMA has also not been interpreted by the Executive Branch as barring the modification of national monument boundaries. Presidents Carter, Clinton, and Obama modified existing monuments through

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11. 121 Law Professors' Letter, *supra* note 5.

12. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 204(j), 90 Stat. 2743 (1976) (codified at 43 U.S.C. § 1714(j) (2002)).

13. 16 U.S.C. § 431 (1906).

14. *See* Seamon, *supra* note 1, at 598–99 & n.248.

15. Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 60 (2017); 121 Law Professors' Letter, *supra* note 5, at nn.6, 11.

16. 40 C.F.R. § 1508.12 (2018) (defining the term "federal agency" as not including Congress, the judiciary, or the President); Tulare Cty. v. Bush, 306 F.3d 1138, 1143 (D.C. Cir. 2002) (finding that NEPA provides no cause of action against the President); Alaska v. Carter, 462 F. Supp. 1155, 1159–60 (D. Alaska 1978) (finding the President not subject to the environmental impact statement requirements of NEPA because he is not a federal agency).

expansions.[17] Squillace and the other co-signers seek to tap dance around these facts by linking modifications only with diminishments.[18] Previously, though, Squillace also equated expansions with modifications.[19] That, of course, was quite consistent with the common usage of the words. Matters that are truly clear in the text, as the professors claim, should not require the selective editing and verbal gymnastics that the letter and its attachments sometime employ.

## II. A CALL FOR OBJECTIVITY OVER ACTIVISM

Overall, the law professors' letter is an attempt at advocacy fueled by cherry-picking. To be sure, there are cherries to be picked, but the history of the Antiquities Act also includes the equivalent of rotten apples that complicate arguments for the professors' preferred conclusions. To add one more example, the letter boldly states, "[N]othing in the Act limits the acreage of a monument . . . ."[20] Thus, in the main text of their letter, the professors completely ignore the provision in the Antiquities Act that reads, "The limits of the [national monument] parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[21] This "smallest area" provision would later prove important in justifying President Trump's reductions. This should not have come as a total surprise because the same clause was also highlighted in a 1938 opinion of the Attorney General.[22] Because no court has yet addressed the issue, that opinion is the most important legal document on the question of post-proclamation presidential authority. However, the "smallest area" clause apparently ran counter to the professors' desire to protect the large areas previously proclaimed, so it was largely kept hidden from view in their letter.

Such comment letters and amicus briefs accompanied by a long list of

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17. Carter expanded Glacier Bay by 550,000 acres. Proclamation No. 4618, 3 C.F.R. § 84 (1978). Katmai was expanded by 1,370,000 acres. Proclamation No. 4619, 3 C.F.R. § 86 (1978). Clinton expanded three monuments. Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 717 (2002). Obama quadrupled the size of Papahanamokuakea, a marine monument first proclaimed by President George W. Bush, adding "an area larger than all the national parks combined." Proclamation No. 9478, 81 Fed. Reg. 60,227 (Aug. 26, 2016); Cynthia Barnett, *Hawaii Is Now Home to an Ocean Reserve Twice the Size of Texas*, NAT'L GEOGRAPHIC (Aug. 26, 2016), https://news.nationalgeographic.com/2016/08/obama-creates-world-s-largest-park-off-hawaii/ [https://perma.cc/95RF-J8J9].

18. *See* 121 Law Professors Letter, *supra* note 5, at n.8.

19. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 499 (2003) ("After Franklin Roosevelt and until Jimmy Carter, presidents continued to expand and otherwise modify existing monuments, but new monuments slowed to a trickle.").

20. 121 Law Professors' Letter, *supra* note 5.

21. 54 U.S.C.A. § 320301(b) (2014).

22. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 186 (1938).

signatures are becoming more common. Is such "sign here" scholarship a beneficial academic engagement that informs public policy decisions or merely an exercise in groupthink and peer pressure? The decision to sign such a letter—which can seem quite convincing at first blush and may come through a trusted colleague—creates a social barrier to future scholarship, effectively clearing the field of authors who might provide needed nuance. Better to stick with the team on this one, a signer might conclude, and write on something else.

Here, I personally doubt each and every signer would—if independently evaluating the matter and reviewing all of the history—reach the conclusions presented in the letter with the same high level of certainty. For example, Professor Albert Lin, now one of the 121 who sees this issue as "clear," was once, when writing on his own, "uncertain" about a president's ability to reduce the size of a monument.[23] One wonders what has changed, besides the occupant at 1600 Pennsylvania Avenue.

Today, in our public discourse, measured reasoning often seems secondary to promoting strongly held policy preferences. Tribalism increasingly trumps all, and, sadly, the tribal options can often feel limited to being either pro-Trump or anti-Trump, with little room left for an issue-by-issue approach based on neutral principles.

It is distressing to see these trends on social media and in popular commentary, but it is even more distressing to see such trends in academia. Higher education draws its cultural power, such that it still has, from the perception that most academics are objectively pursuing the truth. I am not so naïve as to believe that law professors do not bring personal biases and professional agendas to their scholarly work. To a degree, this is to be expected. It is not wrong to engage on topics that one finds personally interesting, and it is not improper to seek to right what one has determined to be wrong. Nevertheless, to be effective and persuasive, the work of correction must be done through a process that is widely perceived as being legitimate. Maintaining a sense of legitimacy depends on a high level of objectivity, transparency, and reasonableness in argumentation.

In short, the analysis must be seen as *fair*. The application of a fair analysis can (and should) sometimes lead to outcomes that a professor might not personally prefer. This concern about the state of legal writing extends beyond the classroom to the courtroom as well. A "results oriented" approach to argumentation makes for bad court opinions and bad law review articles. It is my hope that we see fewer of both.

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23. Lin, *supra* note 17, at 711–12 ("Once the President establishes a monument, he is without power to revoke or rescind the reservation, although it remains uncertain whether the President may reduce a monument in size.").

## III. SEAMON CRITIQUED

Professor Seamon's article generally serves as an excellent counterpoint to the overstated certainty put forward by the 121 law professors. Nevertheless, his work is not completely immune to some of the same types of problems. Seamon's critique of the important 1938 opinion from Attorney General Homer Cummings, especially, is off the mark in several respects.

Cummings approvingly observed that previous presidents diminished the size of monuments under the statute's "smallest area" provision.[24] The Attorney General, however, refused to extend that power to the complete revocation of a monument saying, "[I]t does not follow from his power so to confine that area that he has the power to abolish a monument entirely."[25] Seamon disagrees and argues that "it *does* follow" [26]—in other words, implying the power to take away *one* acre logically entails the power to take away *every* acre. This is a bit like the argument made by former ambassador and unsuccessful presidential candidate Alan Keyes that the income tax is really a "slave tax."[27] If the government is allowed to take one dollar from your labor, then one day it can take every dollar. Both arguments have some logical and rhetorical appeal, but our laws are filled with distinctions based on differences in degree rather than type—situations where we draw a line and do not insist on taking matters to what one might perceive as their logical conclusions.

Most people distinguish between taking away *some* and taking away *all*. Authorizing a surgeon to amputate your leg does not imply that she may also remove your heart. Categories that lie on the same spectrum, such as taxes and penalties, may blur together at some point, but society still keeps them separate for the vast majority of the time based on assessments of reasonableness, purpose, and intent.

Beyond giving short shrift to the many examples of line-drawing present in life and the law, Seamon also does not squarely address the potential distinction with the two types of land that the Antiquities Act describes. As Seamon explains well, the original focus of the statute was on distinct "objects of historic or scientific interest."[28] Originally, these objects were anticipated to be things like ancient pueblos, but other objects ranging from a mammoth fossil to the Grand Canyon have also been protected under the Act.[29] In addition to the primary object, the

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24. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

25. *Id.*

26. Seamon, *supra* note 1, at 595 (emphasis in original).

27. *Alan Keyes on Tax Reform*, ON THE ISSUES (Sept. 7, 2018), http://ontheissues.org/celeb/Alan_Keyes_Tax_Reform.htm [https://perma.cc/ET8K-JL6P].

28. 54 U.S.C.A. § 320301(a) (2014).

29. Seamon, *supra* note 1, at 566, 568.

president is also authorized to "reserve parcels of land as a part of the national monument" with, as we have discussed before, "[t]he limits of the parcels . . . . confined to the smallest area compatible with the proper care and management of the objects to be protected."[30] Thus, the boundaries of a national monument can extend beyond the walls of the house, the tip of the bone, or the edge of the canyon. Arguably, one can read the Act and the Cummings opinion as protecting the presidential proclamation of a protected "object" from being overturned, while still leaving future presidents the flexibility to whittle away (or add to) what one might call the protective buffer lands around the object.

The principle can be illustrated by considering the facts surrounding that 1938 opinion, which involved Castle Pinckney, a Civil War era fort on an island in Charleston Harbor.[31] While the Attorney General did not authorize the requested elimination of its national monument status—sought because the upkeep costs for this isolated relic seemed to the FDR administration out of proportion to its limited historical value—the president still could have reduced the protected acreage on the island beyond the fort itself.[32] At Castle Pinckney, reducing the buffer acreage surrounding the fort would do little to address the underlying concern, but such would not be the case with the large western landscape monuments currently under debate. There, the extent of the buffer acreage (along, as well, with the questionable value of some protected objects) is at the very heart of the controversy.[33] In sum, Seamon's assertion that the power to abolish monuments follows unavoidably from the power to modify them—and that "it is illogical to conclude otherwise"—ignores other valid possibilities based on the presence of the "smallest area" provision.[34]

More concerning than his all or nothing approach to monument

30. 54 U.S.C.A. § 320301(b) (2014).

31. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 186 (1938).

32. *Id.* at 189.

33. As I briefly touched on in my previous article, the current plaintiffs challenging the recent reductions may have their best chance of success if they can highlight instances where President Trump completely removed Antiquities Act protection from the actual "objects" that were specifically identified in the original proclamations. This strategy, however, may be of limited usefulness as it appears that President Trump's modified boundaries include the major geographical objects for which the Bears Ears National Monument and the Grand Staircase-Escalante National Monument were named. (Mining deeper in the proclamations may yet produce some gems, though.) Seamon is right, however, to highlight that prior diminishment proclamations have likely eliminated some objects from monument boundaries. Seamon, *supra* note 1, at 576. Indeed, the distinction that I have suggested is not clearly required by the statutory text, which refers to both the objects and the parcels of land together as part of the same category known collectively as "national monuments." Nevertheless, this potential distinction is one approach available to a court dealing with a case of first impression.

34. Seamon, *supra* note 1, at 595.

changes is Seamon's uncritical amplification of Professor John Yoo and Todd Gaziano's assertion that the 1938 opinion is "erroneous as a matter of law."[35] Seamon writes, "[Attorney General Cummings' reading of the Bates opinion] is dubious to the extent that General Bates's opinion rested on the particular statute governing the particular reservation and the President's undoing of that reservation."[36] However, Bates very clearly viewed his opinion as one built, not on narrow particulars, but on broad principles of wide application. Attorney General Bates wrote as follows:

> If I have thus far treated this question more fully upon general considerations than with reference to the special facts of the case in hand, it is because the principle it involves seemed to me to require a fair examination and discussion. Claiming for the Executive a power, as I think, subversive of the Constitution, this principle, if it be correct, must extend far beyond the case in which it is now invoked, and if it be erroneous, ought to be rejected as a rule of administration.[37]

Bates's decision that the Secretary of War was not authorized to open land to settlement that had previously been reserved for military purposes was not based on reasoning applicable only to those particular circumstances. Instead, Bates clearly articulated his position that unless Congress expressly granted the president the power to reverse a previously authorized land use decision, then such a power would not be inferred from silence.[38] Attorney General Cummings followed that same principle in 1938 when he rejected the proposed abolishment of the Castle Pinckney National Monument, while seeing enough expressed in the statute's "smallest area" provision to authorize modifications. It is possible to disagree with Cummings' conclusions, but not on the grounds that he misunderstood the Bates opinion.

## CONCLUSION

Professor Seamon's work generally serves as a helpful antidote to the sometimes fevered letter signed off on by 121 other law professors. Nevertheless, Seamon's less searching embrace of Yoo and Gaziano—whose works can also be marked by overstatements—serves as a reminder that confirmation bias is a virus that can infect us all. It is probably more accurate to say that it *already* infects us all, and at its best,

35. Seamon, *supra* note 1, at 595 & n.228 (quoting YOO & GAZIANO, *supra* note 7, at 5). Yoo and Gaziano have written a number of academic and popular pieces arguing for the power to fully revoke monuments. For a longer critique of their efforts, see Murdock, *supra* note 2, at 392–407.

36. Seamon, *supra* note 1, at 595–96.

37. Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 368 (1862).

38. *Id.* at 363; *see* Murdock, *supra* note 2, at 399–402.

the academic enterprise merely seeks to keep the viral count low.

The things we most *want* to be true can sometimes lead us astray. It is tempting to let the perceived righteousness of our ends modify our means. Yet, without legitimate means academia is reduced to but one more special interest group clamoring for attention. Professors should be willing to give and receive constructive criticism, and we do that best when we start with our own assumptions.[39] Almost two thousand years ago, Paul of Tarsus advised, "[T]est everything; hold fast what is good."[40] That is still good advice today.

39. This author is not immune from making unwarranted assumptions. When analyzing the potential for a legislative compromise in my previous article, I assumed that opposition to large national monuments and for extractive development would be a net plus for candidates in western states like Montana. A June 2018 survey suggests otherwise, though. Fifty-three percent of those surveyed in Montana indicated that they strongly opposed President Trump's reductions, with another eighteen percent somewhat opposed. Only twenty-one percent were in support of those actions. These results were in line with those from other states as well. *Public Lands Voter Personas Online Survey*, CTR. FOR WESTERN PRIORITIES (June 2018), http://westernpriorities.org/wp-content/themes/2015_cwp/images/WtW%202018%20-%20Topline%20Summary.pdf [https://perma.cc/Q8FG-TUVW] (discussing specifically question 15-4 of the survey). I doubtless have additional blind-spots and welcome the assistance of all who can make matters more clear through relevant data and good arguments.

40. *1 Thessalonians* 5:21 (English Standard Version).