

NO TAKE BACKS: PRESIDENTIAL AUTHORITY AND PUBLIC LAND WITHDRAWALS

By Christian Termyn*

I. INTRODUCTION

In the twilight of his presidency, Barack Obama made several announcements withdrawing federal land from development. These executive actions were protective measures taken under longstanding authorities of the Antiquities Act of 1906¹ and the Outer Continental Shelf Lands Act² (OCSLA), which delegate a portion of Congress' primary Constitutional authority over federal lands to the executive branch. Specifically, the statutes authorize the President to unilaterally withdraw certain land from development, which can be an extremely controversial measure depending on the location and size of the parcel to be protected, the productive uses restricted, and the heated politics of federal land management more generally. President Obama's last-minute land withdrawals were no exception.

A lingering question is whether the President, by the same authority, may revoke these protective measures and effectively reopen withdrawn lands to disposition. This question implicates the Constitution, statutes authorizing executive land withdrawals, and other sources of positive law, but is also susceptible to strong intuitions and normative judgments about the role of the Executive in land use policy. The Antiquities Act and OCSLA are silent as to revocability, even as similar statutes authorizing the President to withdraw lands expressly provide for reversal of those withdrawals. As no president until now has revoked a prior land withdrawal under these statutes, the courts have not had the opportunity to weigh in.

President Trump converted these hypotheticals into reality. In April 2017, he issued an executive order calling for a review of national monument designations under the Antiquities Act, signaling an intention to return lands protected under the Act to the public domain.³ Two days later, a second order reversed the Obama Administration's ban on Arctic drilling pursuant to the OCSLA.⁴ Environmental groups have challenged both orders and, for the first time, a federal court was presented with the question whether the Executive may reverse a predecessor's land withdrawal.⁵

This paper concludes that the President currently lacks authority to reverse a land withdrawal under the Antiquities Act or OCSLA. It begins by reviewing executive withdrawal authorities under the two statutes, as well as President Trump's recent executive orders.⁶ Part III then discusses the nature of executive action in the public lands context, taking care to distinguish it from the President's free exercise of Article II powers, including reversal of a predecessor's executive actions.⁷ The President has no inherent authority in the land use context, and reversing a prior land withdrawal constitutes a unique pol-

icy decision requiring delegation of authority from Congress.⁸ Part IV returns to the statutes themselves, concluding that the Antiquities Act and OCSLA cannot be read to delegate such authority.⁹ Congress has repudiated implied executive authority in the public lands context and has demonstrated that it knows how to delegate revocation authority when necessary to fulfill its policy objectives.¹⁰ Part V discusses the potential implications of executive reversal of land withdrawals on use of the Antiquities Act and OCSLA as tools to address environmental policy objectives.¹¹ Part VI then briefly concludes.¹²

II. EXECUTIVE WITHDRAWAL AUTHORITY UNDER THE ANTIQUITIES AND OUTER CONTINENTAL SHELF LANDS ACTS

The Constitution vests Congress with broad powers over the public lands.¹³ One of the major legal mechanisms governing the status of public lands is a land "withdrawal." Historically, withdrawal of federal land refers to the process by which the public domain is withdrawn or reserved for certain specific purposes and thereby segregated from the operation of various other public land laws authorizing the use or disposition of the lands.¹⁴ Withdrawals of public lands were initiated beginning in the earliest days of the Republic to establish military and Indian reservations, lighthouses, townsites, and, eventually, railroads.¹⁵ Today, withdrawals are more commonly a protective measure to preserve the status quo and prevent specific future uses in designated areas.¹⁶

In general, withdrawals of public lands are accomplished by one of three means: (1) express withdrawals of specified lands for a particular purpose by act of Congress; (2) withdrawals by the Executive pursuant to statutory delegation, which can either authorize withdrawal for a particular purpose while leaving the selection and withdrawal of the qualifying lands to the Executive, or generally authorize the Executive to withdraw for public purposes; and (3) withdrawals by the Executive without statutory authority, for instance, where impliedly authorized by Congress' longstanding acquiescence to an executive withdrawal practice.¹⁷ A comprehensive 1969 study of withdrawals and reservations of public domain lands marveled that "[o]ver four hundred statutes, thousands of Executive orders, numerous

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administrative regulations and administrative and judicial adjudications” govern the withdrawal process.¹⁸

The evolution of federal public lands policy, and the complex interrelationship between Congress and the Executive in setting and carrying out that policy, is a rich history well beyond the scope of this paper. However, two strands of the history are necessary as background. First, while the Antiquities Act and OCSLA have been applied expansively to withdraw land from development, executive withdrawal authority has narrowed overall. Presidents have exercised broad implied authority to withdraw lands throughout the nineteenth and into the early twentieth century. More recently, Congress has expressly repudiated any implied withdrawal authority and narrowed express statutory authorities.¹⁹ This trend advises against implying an executive authority to return withdrawn lands to the public domain where a statute is silent.

The second historical note pertains to the shifting policy of retention, management and disposition of public lands, and an evolving conception of the public interest therein. Though public lands legislation was historically concerned with providing for the disposal of the public domain, a growing recognition of the shortcomings of disposal policy led the government to retain many tracts of land in federal ownership.²⁰ The Executive had historically withdrawn land for limited public uses, such as military or Indian reservations.²¹ As conservation became a critical national concern in the late nineteenth century,²² the Executive was to play a key role, and for good reason. Equipped with land withdrawal authority, the President could act decisively to identify and protect certain parcels while Congress remained free to undo or modify the action.²³

The Antiquities Act and OCSLA are just two statutes in an expansive body of law governing executive withdrawal authority. Enacted fifty years apart and for very different purposes, they are not obvious partners for a legal analysis. They share a structural similarity in granting the President a unilateral authority to withdraw land from the public domain without saying anything about a corresponding authority to reverse the withdrawal. And under the Obama Administration, they became primary tools to protect federal land and were wielded with express reference to controversial environmental policy objectives including climate change mitigation. These apparent “one-way” authorities, applied to similar purposes, set the Antiquities Act and OCSLA apart from other federal laws and provide a unique lens into executive public lands authority.²⁴

A. THE ANTIQUITIES ACT OF 1906

The Antiquities Act of 1906 is “one of the earliest statutes vesting the Executive with discretion to make withdrawals.”²⁵ Although the statute is only two sentences long, its impact on federal lands cannot be overstated. Since its passage, seventeen of twenty-one Presidents have used the Act to proclaim 158 national monuments, withdrawing hundreds of millions of acres from the public domain.²⁶ President Franklin D. Roosevelt used his authority thirty-six times, more than any other President, while President Obama withdrew the most acreage, over 550

million acres.²⁷ Numerous withdrawals were accomplished by lame duck Presidents, fueling the political fire around designations despite the fact that use of the Act has been distinctly bipartisan, with some of the most vigorous uses of the Act coming from Republicans.²⁸

The Act authorizes the President to “declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments.”²⁹ As part of a national monument, the President may reserve parcels of land from the public domain which “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”³⁰ Conspicuously missing from the statute is any specification of procedure to create a national monument, beyond that the President shall “proclaim” one.³¹ The Act is also silent as to whether a President may abolish a monument established by a previous presidential proclamation. No President has abolished a national monument, and no court has addressed whether the President has the authority to do so.

Much criticism of the Act centers on whether the President exceeds the statutory authority by proclaiming monuments of certain substance and acreage. Its scope was challenged soon after the Act’s passage, but the United States Supreme Court gave a wide construction to the authority and has never overturned the designation of a monument.³² However, despite longstanding precedent and Congressional acquiescence to executive national monument practice, some scholars still argue that certain monument proclamations are unlawful.³³ These arguments rely on a narrow reading of the original purpose of the Act as solely designed to protect objects of antiquity, rather than for impermissibly broad purposes such as “general conservation, recreation, scenic protection, or protection of living organisms.”³⁴ Critics also argue that the designation of large monuments violates the Act’s open-ended acreage limitation.³⁵ It is contended that the Act is an unconstitutionally broad delegation of Congress’ power under the Property Clause.³⁶

The presidential proclamation creating a national monument under the Act is also rarely the last word as to that monument’s size and legal characteristics. Both Congress and the President have modified monuments established by earlier presidential proclamation—the Trump Administration is only the latest example.³⁷ Modifications include reductions in scope but also, commonly, Congress has enhanced protective designations for monuments. For instance, approximately half of our national parks were first designated as national monuments, including the Grand Canyon, Grand Teton, Zion, and Olympic.³⁸ In at least ten instances, Congress has outright abolished monuments created by the President.³⁹ The executive branch, however, has never outright abolished a monument.

The claim that many monument designations are “illegal”—either too large, inconsistent with the purpose of the Act, or otherwise—was the driving force behind calls for President Trump to rescind previous monument designations. Trump’s Executive Order 13792 directed the Secretary of the Interior to review all monument designations or expansions under the

Antiquities Act since 1996 where the monument 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.”⁴⁰ The Secretary’s charge was to consider each monument’s compatibility with the Antiquities Act and the effects of the withdrawal on various uses of that federal land and surrounding communities, among other considerations.⁴¹

In response, the Department of Interior initiated the first-ever formal public comment period on monument designations under the Antiquities Act.⁴² After receiving nearly three million public comments and issuing an interim report specific to the Bears Ears National Monument, Secretary of the Interior Ryan Zinke released a final report recommending modifications to ten monuments.⁴³ The Secretary’s conclusions are aptly summarized as follows:

(1) Monuments designated under the Antiquities Act were broadly and arbitrarily defined and in some instances mirrored broader land management legislation that had stalled circumventing the legislative process; (2) designating geographic landscape areas as objects of historic or scientific interest raises management questions that may be more appropriately regulated under FLPMA; (3) there is perception that monument designation was intended to prevent access and economic activity, including grazing, mining, and timber production as opposed to protect specific objects, and such designations may limit use of private land; (4) concerns have been raised by state, tribal, and local governments regarding lost jobs, access, and inadequate public involvement; and (5) large designations under the Act may provide less protection than applicable land-management authorities already in place and therefore undermine the intent of the Act.⁴⁴

President Trump wasted no time diminishing the Bears Ears National Monument⁴⁵ and the Grand Staircase-Escalante National Monument,⁴⁶ issuing separate proclamations concurrent with the report’s release. A broad coalition of federally recognized tribes, environmental groups, and others immediately filed suit alleging that President Trump’s proclamations exceed presidential authority under the U.S. Constitution and Antiquities Act and that only Congress may diminish a national monument.⁴⁷

President Trump’s proclamations reduced in size, rather than outright abolished, the two monuments.⁴⁸ The Administration, however, is continuing to review other monument designations; its rhetoric around righting the perceived wrongs of prior administrations’ land management decisions suggests further reductions or reversals could be in store.⁴⁹ This paper is not meant to parse the legality of monuments under review and does not wade into the nuanced legal arguments regarding reductions to Bears Ears and Grand Staircase-Escalation. Instead, it uses the hypothetical revocation of a national monu-

ment to explore the limits of presidential authority over federal land management decisions.

As I will explain, the exercise of presidential land management authority cannot rest on the perceived overreach of a predecessor. A successor may have political and legal gripes with a prior administration’s withdrawals, but there is no on/off switch for these decisions, at least not under present authorities.

B. THE OUTER CONTINENTAL SHELF LANDS ACT

The Outer Continental Shelf Lands Act, passed on August 7, 1953, provides for federal jurisdiction over submerged lands of the outer continental shelf (OCS), a huge area defined as all submerged lands seaward of state coastal waters (three miles offshore) under U.S. jurisdiction.⁵⁰ OCSLA authorizes the Secretary of the Interior to lease those lands for mineral development.⁵¹ It also grants the President broad authority to withdraw portions of the OCS from mineral leasing.⁵²

The OCSLA withdrawal authority is limited to a particular federal action—mineral leasing—but affords the president more discretion than the Antiquities Act.⁵³ Section 12(a) allows the President to bar the disposition of title or rights to land or minerals under federal marine waters.⁵⁴ The president is not restricted to withdrawing “objects of historic or scientific interest” or the “smallest [land parcel] compatible with the proper care and management of the objects to be protected,” as she is when proclaiming national monuments under the Antiquities Act.⁵⁵ Instead, the President can withdraw any sized area of OCS for any public purpose, making Section 12(a) a powerful tool for satisfying broader policy goals.⁵⁶

Since 1953, six presidents have employed Section 12(a), withdrawing as much as several hundred million acres at a time.⁵⁷ Like the Antiquities Act, OCSLA is silent as to undoing actions taken under the withdrawal authority.⁵⁸ Interestingly, not all presidential withdrawals are permanent; some have been expressly time limited despite no textual distinction in Section 12(a) between a permanent or time-limited withdrawal.⁵⁹ While no president before Trump had reversed a permanent withdrawal under OCSLA, there have been several instances of modification and revocation of time-limited withdrawals.⁶⁰ Until the Trump Administration, neither permanent nor time-limited Presidential withdrawals under OCSLA had been tested by the courts.⁶¹

On April 28, 2017, President Trump issued an executive order (EO) titled “Implementing an America-First Offshore Energy Strategy.”⁶² Among other steps to enhance offshore energy development, the order revoked or modified four of President Obama’s executive actions withdrawing portions of the outer continental shelf from mineral leasing.⁶³ President Obama had declared a policy of enhancing the resilience of the northern Bering Sea region and withdrawn from leasing the Norton Basin and St. Matthew-Hall Planning Areas.⁶⁴ President Trump revoked this order citing a need to “further streamline existing regulatory authorities.”⁶⁵

The Trump Order also effectively reversed three other expansive withdrawals of the outer continental shelf that Presi-

dent Obama accomplished through presidential memoranda.⁶⁶ Rather than explicitly revoke the Obama memoranda, the Trump Order merely replaced the language of the memoranda with a withdrawal provision limited just to “those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972”⁶⁷ Environmental organizations quickly filed suit making similar arguments to the challengers in the monument litigation: by exceeding Congress’ delegation of authority to withdraw unleased lands under the OCSLA, President Trump violated the plain text of the statute and the constitutional doctrine of separation of powers.⁶⁸ In March 2019, the District Court of Alaska found that the Congress had not delegated to the president the authority to revoke a withdrawal under the OCSLA.⁶⁹ The court vacated the portions of the Trump Order revoking President Obama’s prior withdrawals, holding that the withdrawals would remain “in full force and effect unless and until revoked by Congress.”⁷⁰

III. THE EXECUTIVE AUTHORITY TO WITHDRAW DOES NOT INCLUDE THE POWER TO REVOKE A WITHDRAWAL

As discussed above, President Trump has fully reversed several withdrawals under the OCSLA and signaled a desire to revoke monument designations under the Antiquities Act. His supporters argue that these actions are indistinguishable from modern Presidents’ frequent modification and revocation of a predecessor’s executive actions. This section explores what exactly the President accomplishes when she withdraws land from the public domain, in order to distinguish executive land withdrawals from executive actions taken pursuant to Article II powers. Since the President has no inherent constitutional authority to withdraw public lands, executive action under the Antiquities Act or OCSLA is confined to the underlying statutory authority. Reversing these actions is less consistent with familiar executive branch functions, and more accurately understood as a separate land action requiring express or implied delegation from Congress.

A. DISTINGUISHING THE USE OF EXECUTIVE ORDERS, PRESIDENTIAL PROCLAMATIONS, AND PRESIDENTIAL MEMORANDA IN THE PUBLIC LANDS CONTEXT

Presidents utilize various written instruments to direct the Executive branch and implement policy. These include executive orders, proclamations, presidential memoranda, administrative directives, findings, and others. Most of the time, the President is free to choose the instrument she wishes to use to carry out the executive function.⁷¹ While the Antiquities Act provides that the President may “declare by public proclamation” a national monument, neither that Act nor OCSLA specifies a particular form or procedure for the land withdrawal.⁷²

To carry out land actions, Presidents have used executive orders, presidential memoranda, and presidential proclamations, sometimes interchangeably,⁷³ though any difference between these devices may be a matter of form rather than

substance. As the Constitution contains no reference to executive orders, judges and scholars have been left to develop a legal and descriptive basis for the instruments from historical practice.⁷⁴ Though historical practice might suggest proclamations are more geared towards private individuals, while orders are more towards administration of government,⁷⁵ more recent accounts suggest that the instruments defy these distinctions too often for any differences to be legally significant.⁷⁶ Federal courts also tend to hold executive orders and proclamations to be “equivalent for the purposes of carrying out the President’s legal authority.”⁷⁷

Just as the Constitution contains no definition of these instruments, it does not clearly authorize their issuance. The common thread, then, is that the execution and implementation of executive actions must stem from some express or implied legal authority.⁷⁸ The President, for instance, has issued a Thanksgiving Proclamation annually since 1863.⁷⁹ Though nobody is challenging the legal basis for this Proclamation, it likely emanates from Article II’s vesting clause.⁸⁰ The bulk of executive action taken by the White House, as opposed to administrative agencies, emanates from Article II power. This would include declaring that it is the “policy of the United States to encourage energy exploration and production,”⁸¹ or directing the Secretary of the Interior to perform a legal analysis of monument designations.

These actions, while referencing our public lands, are not acting upon them with legal force and effect. Arguments that the Article II executive function includes some inherent authority over public land have been rejected.⁸² Executive orders, proclamations and memoranda to withdraw lands, then, must derive from express or implied statutory authority. A “one-way” delegation of authority—to withdraw land from, but not to return it to the public domain—is consistent with the Constitutional separation of powers.

B. A ONE-WAY EXECUTIVE AUTHORITY TO WITHDRAW LANDS IS PERMISSIBLE

In practice, Presidents freely revoke, modify and supersede their own orders or those issued by a predecessor. Executive actions, by their very nature, lack stability in the face of evolving presidential priorities.⁸³ It is a ritual of modern government that incoming Presidents reinstate or rescind President Reagan’s 1984 executive order blocking foreign aid to organizations providing abortions.⁸⁴ Beginning with Gerald Ford’s administration, presidents have actively issued, modified and revoked orders to assert control over and influence the agency rulemaking process.⁸⁵ That Thanksgiving Proclamation?⁸⁶ It’s on thin ice each November.

Several commentators have argued that the executive power includes the authority to revoke executive actions taken under the Antiquities Act and OCSLA authorities. John Yoo and Todd Ganziano advocate a “general principle . . . that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation.”⁸⁷ In their view, it is

rooted in the Constitution that “a branch of government can reverse its earlier actions using the same process originally used,”⁸⁸ and that “[n]o president can bind future presidents in the use of their constitutional authorities.”⁸⁹ This leads them to suggest that “[i]t would be quite an anomaly to identify an executive directive or presidential proclamation that a subsequent president could not revoke.”⁹⁰

These principles might operate on the Article II executive function, but they cannot extend to executive land withdrawal authority, which has no roots in the Constitution. A Ninth Circuit case challenges the broad claim that a discretionary power to act includes a power to revoke.⁹¹ The U.S. Attorney General had moved to denaturalize several recently naturalized U.S. citizens, arguing that the power to denaturalize is “inherent” to the power to naturalize, which the Attorney General derives from statute.⁹² The court examined the statute, silent as to the matter of revocation of citizenship, and made a compelling analogy to the power of U.S. District Courts to vacate their own judgments.⁹³ This seemingly “traditional inherent power” of federal courts to vacate their own judgments was nonetheless confirmed by Congress with an express rule.⁹⁴ The Ninth Circuit reasons that “[i]f [this power] needs confirmation by an express rule approved by Congress, it is too much to infer an analogous power in the Attorney General, for so weighty a matter as revocation of American citizenship, from silence.”⁹⁵

Where authority to act in the first place requires an express rule, as in executive action impacting public lands, a reviewing court should look for clear intent regarding the matter of revocation. The concept that what “one can do, one can undo,” may be an intuitive one, but as the Ninth Circuit suggests, it is easily rebutted and should not control where the underlying authority is delegated to begin with:

The formula the government urges, that what one can do, one can undo, is sometimes true, sometimes not. A person can give a gift, but cannot take it back. A minister, priest, or rabbi can marry people, but cannot grant divorces and annulments for civil purposes. A jury can acquit, but cannot revoke its acquittal and convict. Whether the Attorney General can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could.⁹⁶

We should be careful not to conflate Constitutional with statutorily delegated authority in the public lands context, as Yoo and Ganziano do.⁹⁷ A court examining President Trump’s reversal of land withdrawals, then, should not be persuaded by instances where the President is permitted to undo certain Constitutional powers without Congressional authority.⁹⁸ Our approach to unilateral revocation under the President’s appointment or treaty powers do not support some inherent executive authority to undo actions vested in another branch, such as Congress’ plenary authority over public lands. Whether the President may reverse a predecessor’s land withdrawal, therefore, “depends on whether Congress said she could.”⁹⁹

C. REVOCATION OF A LAND WITHDRAWAL IS A SEPARATE LEGISLATIVE ACT

The sense that what “one can do, one can undo” may be a powerful one, but has no place in the public lands context, where the President is confined to specific delegations of authority. Executive action to undo a predecessor’s land withdrawal requires express or implied authority. This section reaches a similar conclusion from a different angle, arguing that the act of returning withdrawn land to the public domain is not simply the inverse of withdrawing land in the first place. Rather, it has the characteristics of a separate legislative act, which requires a delegation of authority and an intelligible principle to guide the exercise of that authority.

Yoo and Ganziano argue that when Congress grants discretionary authority to issue regulations, Congress also confers the authority to substantially amend or repeal them.¹⁰⁰ They also suggest that reading the Antiquities Act to prevent Presidents from reversing earlier monument designations would read the Act to “micromanage” the discretion granted, “rais[ing] serious constitutional questions.”¹⁰¹ It would be laughable, on any reading, to suggest that the Antiquities Act micromanages Executive land withdrawal authority; indeed, the main criticism of the Act is that the authority delegated is too expansive. A power to revoke previous designations implicates entirely separate legislative goals, distinct policy questions, and would conflict with existing statutes.

A court should approach revocation of a withdrawal under the Antiquities Act or OCSLA as a decision with legislative character separate from the original withdrawal. In both statutes, Congress includes language to guide the President in her decision to remove land from the public domain, a decision with profound economic and environmental impacts. The inverse, returning land to the public domain, is not contemplated by the statutes and would involve a host of separate policy decisions not addressed by the statutory language guiding the original withdrawal.

President Trump directed the Secretary of Interior to review monument designations since 1996 with an eye for returning these lands to the public domain.¹⁰² In the last twenty years, however, these lands have been integrated into a broader system of land management. Disentangling a national monument from this system not only removes legal protections of that land, but also erodes legal and economic structures that have grown up in surrounding communities by virtue of a monument’s unique status. It would also negate funds appropriated by Congress over the years to improve and maintain the land for public use.¹⁰³ In short, revocation entails an entirely different cost-benefit analysis than the decision to withdraw land for the monument in the first place. This type of balancing is at the heart of Congress’ legislative authority over public lands, and it can only delegate this authority with proper guidance.

The decision to revoke a monument designation would also conflict with several statutes articulating broad policies for management of monuments and other protected areas.

Amendments to the National Park Organic Act of 1916¹⁰⁴ make clear that national monuments are part of the National Park System,¹⁰⁵ and are fully covered by the general regulations protecting that System.¹⁰⁶ The various units of this System are a “cumulative expres[sion] of a single national heritage.”¹⁰⁷ Furthermore:

“[P]rotection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.”¹⁰⁸

With the National Park Organic Act and subsequent amendments, Congress has imbued national monuments with purpose beyond the policy considerations guiding the Executive in withdrawing land under the Antiquities Act. Revoking a monument, and derogating these values, is a legislative act for Congress to take itself or to delegate with appropriating guiding principles.

Reading either the Antiquities Act or OCSLA to grant the executive authority to reverse previous withdrawals would also raise constitutional concerns under Nondelegation doctrine. The Supreme Court’s Nondelegation doctrine prevents Congress from delegating its legislative authority to the executive branch without also providing an “intelligible principle” to guide its application.¹⁰⁹ The doctrine is rooted in separation of powers principles and intended to ensure Congress is making core policy choices as well as to facilitate judicial review of executive actions taken under delegated authority.¹¹⁰

Applied to the Antiquities Act and OCSLA, it is clear that the policies guiding land withdrawal would fail to provide adequate guidance for the decision to return the same land to the public domain. For instance, the Executive determines that a public resource is of “historic scientific interest” to justify monument designation under the Antiquities Act.¹¹¹ But can public land simply lose its historical or scientific interest? The two statutes are light on guidance to begin with (indeed, this is a valid criticism of the statutes and a reason for concern as the Executive identifies lands for withdrawal). A lack of guidance, however, should heighten concern about a decision to reverse a withdrawal, a legislative one with legal, economic, and environmental ramifications.

D. REVERSING A LAND WITHDRAWAL DOES NOT EFFECTIVELY ABOLISH AN ACT OF CONGRESS

Because the power to reverse a land withdrawal through executive action is not inherent to the power to withdraw land in the first place we would expect Congress to articulate some policy principles to guide the decision to return land to the public domain. This is notably distinct from the approach taken by the only existing legal authority on abolishing a national monument under the Antiquities Act, contained in a 1938 Attorney General opinion.¹¹² In the opinion for President Coolidge, the Attorney General reasoned that the execu-

tive action to withdraw land was in effect an act of Congress itself.¹¹³ If one conceives of an executive order, or presidential proclamation as an act of Congress, then revoking that order or proclamation would effectively abrogate an act of Congress, something the President obviously cannot do.¹¹⁴

In 1924, President Calvin Coolidge proclaimed Castle Pinckney National Monument from a U.S. fort that had existed in the Charleston harbor since the early Nineteenth Century.¹¹⁵ Fourteen years later, President Franklin D. Roosevelt wanted to abolish the monument and transfer the land to the control and jurisdiction of the War Department.¹¹⁶ Attorney General Homer Cummings advised the President that he was without authority to issue the proposed proclamation revoking the monument.¹¹⁷ The opinion borrowed heavily from an earlier 1862 Attorney General opinion regarding the President’s power to return a military reservation to the public domain:

A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.¹¹⁸

The view that a land withdrawal made by the President under discretion vested in her by statute was in effect a withdrawal by the Congress itself pervades several earlier Attorney General opinions.¹¹⁹ While I would reach the same outcome – requiring an express or implied delegation by Congress to revoke – the opinions rely on an outdated view of executive actions that will be updated if a court reaches the issue.

As noted above, executive actions taken pursuant to authority provided to the President by Congress are distinguished from orders based on the President’s exclusive constitutional authority. Both are discretionary government functions. Both can be legislatively modified and nullified. And both, when based upon legitimate constitutional authority or statutory grants of power to the president, are equivalent to laws.¹²⁰ When an executive order conflicts with a statute, the statute takes precedence.¹²¹ The validity of an executive action, then, is with reference to the underlying authority, but is not a stand-in for that authority where the Executive carries out a Congressional delegation.

Yoo and Ganziano are right that the 1938 Cummings Opinion is on uneven factual and legal ground.¹²² The document is an outdated and unsatisfying guidepost for such a weighty issue, and it is unclear what influence the opinions will have on a reviewing court today.¹²³ On the one hand, Attorney General opinions are not binding on the President.¹²⁴ But statutes are, and as with jurisprudence, Congress can incorporate a legal interpretation of the Attorney General into a subsequent legislative schemes and ratify that interpretation. While a reviewing court today will likely disagree that President Trump is effec-

tively revoking an Act of Congress by reversing withdrawals under the Antiquities Act and OCSLA, it should be persuaded that executive action over public lands must derive from legislative authority.

IV. THE ANTIQUITIES ACT AND OCSLA CANNOT BE READ TO DELEGATE REVOCATION AUTHORITY

The President has no inherent authority to revoke a land withdrawal. The authority to withdraw land in the first place emanates from Congress' Constitutional authority.¹²⁵ Whether a President may revoke a land withdrawal is properly understood as an executive action distinct from the original withdrawal itself. The lawfulness of that action depends on whether Congress intended her to have that power.¹²⁶

A rough division of authority between Congress and the President has grown around specific statutes and long-term understandings.¹²⁷ Yoo and Ganziano argue that OCSLA and the Antiquities Act “do not even attempt to limit the president’s power to reverse previous withdrawals.”¹²⁸ This approach relies on their argument that possession of the authority to grant implies the authority to revoke. This theory is not only incorrect as a matter of law but is misplaced where the authority arose from Congressional delegation. It is also wholly inconsistent with Congress’ treatment of executive withdrawal authority in other statutory schemes. Congress has (a) repudiated implied executive authority in the public lands context, and (b) demonstrated that it knows how to delegate revocation authority and has arguably ratified legal interpretations of limited executive authority under the Antiquities Act.

A. CONGRESS HAS REPUDIATED IMPLIED EXECUTIVE WITHDRAWAL AUTHORITY.

The Executive once exercised broad implied withdrawal authority, including an implied power to modify and revoke prior withdrawals. Beginning soon after the nation’s founding, Presidents set aside land for numerous military bases and Indian reservations on the assumption that no statutory delegation of authority was needed.¹²⁹ In several instances, this assumption supported an implied power to modify or revoke the prior withdrawal.¹³⁰ For example, Presidents commonly eliminated or reduced the size of Indian reservations that had been established through executive order.¹³¹ Eliminating and reducing Indian reservations was particularly controversial, since the withdrawal was not simply a protective action directed at the underlying land, but granted rights of occupancy and use to Indian communities.¹³² The executive actions around reservations and oilfields were also categorically different from the withdrawals contemplated by the Antiquities Act and OCSLA. They were extremely granular actions, reflecting a local presence of the Executive in managing conflict between the Indian tribes and surrounding communities, as well as accommodating for development in the national interest, such as railroads and other public works.

As national policy toward public lands shifted from disposition to reservation, Congress conceded broad managerial

authority to the executive in a series of statutes, including the Antiquities Act.¹³³ Congress’ failure to repudiate earlier withdrawals also led the courts to infer acquiescence in some “implied nonstatutory authority . . . construed to fill all the interstices around express delegations.”¹³⁴ A major Supreme Court case, *United States v. Midwest Oil Co.*,¹³⁵ upheld a withdrawal by President Taft that directly contradicted a recent statute, reasoning that “scores and hundreds” of executive orders establishing or enlarging Indian and military reservations and oil reserves had established an allocation of power.¹³⁶ The case came to stand for the proposition that presidential authority is stronger with respect to powers that Presidents applied expansively in a pattern of actions to which Congress has acquiesced.¹³⁷ Presidents continued to push the boundaries of delegated withdrawal authorities.¹³⁸

Eventually, Congress reasserted control over withdrawals and reservations of public lands by limiting actions that could be taken by the executive branch. This included a policy of walking back executive authority to return withdrawn land to the public domain. For example, the National Forest Management Act provided that forest reserves could only be returned to the public domain by an act of Congress.¹³⁹ Then in 1976, Congress extinguished all non-statutory authority and most earlier statutory authority with the Federal Land Policy Management Act (FLPMA), replacing these authorities with new procedures for withdrawals.¹⁴⁰ FLPMA concluded an exhaustive review of federal land policy by the Public Land Law Review Commission, which reported to Congress in 1970 with an overall message of reasserting public control over executive withdrawal authority.¹⁴¹ While earlier implied executive authorities are instructive, FLPMA’s allocation of withdrawal authority between the Executive and Congress should control any present inquiry into the Antiquities Act and supplies a powerful background principle for interpreting OCSLA as well.

FLPMA expressly repealed the Executive’s implied delegation of withdrawal authority as well as twenty-nine statutory provisions for executive withdrawal.¹⁴² This acted on a principal recommendation by the review Commission that large-scale permanent or indefinite withdrawals should only be accomplished by an act of Congress.¹⁴³ The Commission also recommended that smaller-scale withdrawal authority remaining with the executive branch should be confined to specified purposes, governed by more specific procedures, open to public input, and generally of limited duration.¹⁴⁴ Despite these recommendations, Congress conspicuously left the Antiquities Act in place, with very limited discussion of why.¹⁴⁵ Congress also expressly exempted the “Outer Continental Shelf” from the FLPMA definition of “public lands,” leaving OCSLA in place as well.¹⁴⁶

In light of FLPMA, a court should be reluctant to find implied authority to revoke an executive action, particularly within statutory language that has withstood the review of legislators with an eye for eliminating implied authorities. There is no practice of executive reversal of land withdrawals under the Antiquities Act and OCSLA, and courts upholding implied

executive authority were only willing to do so in light of some practice in which Congress had acquiesced.

B. CONGRESS KNOWS HOW TO DELEGATE REVOCATION AUTHORITY AND HAS PASSED UP OPPORTUNITIES TO AMEND THE ANTIQUITIES ACT AND OCSLA

Congress knows how to delegate revocation authority when it wants to. Several turn-of-the-century statutes delegating withdrawal power to the President specifically included a provision allowing the President or the Secretary of the Interior to revoke a prior withdrawal. The Forest Service Organic Act of 1897 authorized the President to establish national forest reserves to “revoke, modify, or suspend” any past and future executive order or proclamation establishing a national forest.¹⁴⁷ Following a big fight about the controversial withdrawals of President Cleveland under earlier forest acts, Congress amended the statute to “remove any doubt which may exist pertaining to the authority of the President . . . to revoke, modify or suspend.”¹⁴⁸ The President’s express authority to revoke, modify, and vacate certain orders and proclamations establishing national forests remains today.¹⁴⁹

Other examples of express revocation authority include Congress’ 1901 amendment to the Federal Desert Land Act to authorize the Secretary of the Interior to restore withdrawn lands to the public domain after a period of time,¹⁵⁰ and the 1910 Pickett Act, which gave the President authority to “temporarily” withdraw public lands but also provided that those withdrawals were to “remain in force until revoked by him or an Act of Congress.”¹⁵¹ It is clear from these examples that both in the years leading up to the Antiquities Act and after its passage, Congress considered the difference between one and two-way withdrawal schemes in various contexts. To read an implied authority to revoke into the Antiquities Act or OCSLA would render the express revocation clauses in other statutory authorities as mere surplusage.¹⁵²

FLPMA also created a process for the Secretary of the Interior to terminate several categories of prior executive withdrawals. With FLPMA, Congress did not expressly modify, revoke or extend previous withdrawals¹⁵³ but instead directed the Secretary of the Interior to review a substantial number of withdrawals and report to the President recommendations concerning their continuation.¹⁵⁴ The President would then report his recommendations to Congress, and the Secretary would be permitted to terminate any executive withdrawals unless Congress objected by a concurrent resolution within ninety days.¹⁵⁵ As of 1981, 233 withdrawals covering about 20.4 million acres had been revoked under this process.¹⁵⁶

To reiterate, FLPMA expressly provided that the Secretary shall not modify or revoke any withdrawal creating a national monument under the Antiquities Act.¹⁵⁷ The House Committee on Interior and Insular Affairs report on the statute confirms it “would also specifically reserve to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.”¹⁵⁸ This language is a clear signal that Congress was aware of the 1938 Attorney General opin-

ion arguing that legislators retained sole authority to revoke a monument under the Antiquities Act.¹⁵⁹ And when “Congress is deemed to know the executive and judicial gloss given to certain language” a later statute comprehensively addressing the subject is persuasive that Congress has adopted the existing interpretation.¹⁶⁰ The House Report also alleviated concerns that FLPMA only restricted the Secretary of the Interior’s authority to revoke monuments, while remaining silent as to the President’s authority.¹⁶¹

There have been numerous proposals to amend the Antiquities Act over the last several decades, the most recent introduced on May 2, 2017.¹⁶² In reviewing these proposals, I did not locate a single attempt to expressly authorize the President to unilaterally revoke a monument designation. If FLPMA did not confirm otherwise, we might infer that Congress already assumes the President has this authority. Instead, the bulk of the proposals have been to increase Congress’ oversight over the designation and management of national monuments.¹⁶³

V. REVOCABILITY AND OUR ENVIRONMENTAL POLICY OBJECTIVES

The foregoing analysis demonstrates that, as a matter of law, the President cannot revoke a unilateral land withdrawal under the Antiquities Act or OCSLA. This section raises normative arguments for reaching the same outcome, particularly in light of these statutes’ utility in addressing contemporary environmental policy objectives such as climate change adaptation and mitigation.

Congress enacted the Antiquities Act and OCSLA with very different purposes, and their Presidential withdrawal authorities are different tools in contemporary environmental policy. The Antiquities Act was motivated primarily by concern for losing public land resources and historical artifacts before Congress could act. The withdrawal authority was central to this purpose. OCSLA was a much broader legislative scheme, providing for federal jurisdiction of the outer continental shelf and authorizing the Secretary of Interior to lease those lands for mineral development. The withdrawal provision carries nearly identical legal effect to its analogous provision in the Antiquities Act, though it is often obscured by the broader purposes of OCSLA.

The President may not proclaim a national monument under the Antiquities Act with the express purpose of addressing climate change, for instance. However, protecting areas deemed to have “historic or scientific”¹⁶⁴ interest under the Act can nonetheless have economic and environmental benefits consistent with our climate change goals. Proclaiming a national monument brings natural areas under the purview of an agency, generally the National Park Service, Forest Service, or Fish and Wildlife Service, with expertise in long-term conservation of natural resources and unique ecologies. These protected areas serve as carbon sinks and havens for biological diversity. Most importantly, the effect of monument status is also to freeze mineral extraction and other development there, keeping fossil resources in the ground.

Studies show that the old vulnerability of antiquities looting has given way to the new vulnerability of climate change for many of our country's most iconic and historic sites. A report by the Union of Concerned Scientists chronicles how many of these sites are particularly at risk from rising sea levels, more frequent wildfires, increased flooding, and other damaging effects of climate change.¹⁶⁵ The Antiquities Act would not seem to permit land withdrawal for the sake of creating a carbon sink to keep fossil fuels in the ground. However, once an area is deemed to have "historic or scientific interest" under the Act, the damaging effects of climate change should be a consideration in taking protective measures.

As previously discussed, OCSLA permits the President to withdraw areas of the outer continental shelf from mineral leasing for any purpose.¹⁶⁶ President Obama's Executive Order on the North Bering Sea relied on OCSLA to create a "climate resilience area."¹⁶⁷ The corresponding withdrawal of outer continental shelf lands "furthere[d] the principles of responsible public stewardship entrusted to [the White House] and . . . the importance of the withdrawn area to Alaska Native tribes, wildlife, and wildlife habitat, and the need for regional resiliency in the face of climate change."¹⁶⁸

The controversy surrounding withdrawals under both statutes is understandable and extends much deeper than disagreement over how, if at all, to let our concern for climate change drive our decisions around resource extraction and natural area preservation. Outcry over President Obama's withdrawals and President Trump's reaction reflect both real political disagreement over federal land management priorities, as well as valid concern for the reach of executive authority over public lands. Unilateral executive authority to reverse these actions is improper regardless of the claim and would only seem to further aggrandize the President's public lands authority.

One observation is that a one-way authority to protect lands, but not to undo these protections, plays to the Executive's advantages while avoiding its faults. With the Antiquities Act, Congress recognized that the Executive could act more nimbly to identify and protect valuable resources. If it disagreed with a proclamation, Congress remained free to undo or modify the President's action, albeit subject to a possible presidential veto.¹⁶⁹ Grand Staircase-Escalante National Monument, with a boundary currently in legal limbo, is a good example. President Clinton withdrew the lands after legislative proposals for varying degrees of legal protection cleared House and Senate committees but ultimately failed.¹⁷⁰ Deliberative approaches to our public resources are preferable, but there is a fine line between productive deliberation and political gridlock. Gridlock might prevent us from taking any protection action at all, with irreversible consequences for natural and cultural resources.

We should be less concerned about gridlock in the reverse, to return lands to the public domain. Congress's failure to take protective action might be explained by the diffusion of pro-environment interests. By comparison, industry interests advocating for development and resource extraction of public lands are relatively concentrated. This dynamic supports a one-way

executive authority to protect, overcoming gridlock to preserve the status quo and putting the onus on concentrated interests to make the case for development. Moving remedial legislation through both chambers can be a struggle¹⁷¹ and ultimately requires the President's signature, but Congress has successfully reversed monuments and other withdrawals in the past.


It is also important to note that President Obama's use of the Antiquities Act and OCSLA was much more deliberative than critics would suggest. The designation of Bears Ears National Monument is a good example. The monument was first discussed in the 1930s as part of an unsuccessful proposal to establish an Escalante National Monument.¹⁷² Several years ago, an Inter-Tribal Coalition unsuccessfully petitioned Utah's Congressional representatives.¹⁷³ The tribes then successfully petitioned President Obama, whose administration undertook extensive study and community engagement before making proclaiming the monument almost two years later.¹⁷⁴ The process exhibits some of the unique tools at the Executive's disposal in making withdrawal decisions, including field offices and experienced agency staff throughout the West. The Executive branch is also arguably better suited than Congress to integrate the policy considerations around withdrawal into the broader scheme of public lands authorities the agencies implement.

Singing the praises of executive withdrawal authority – exercising agency expertise, grassroots community engagement, and others – might undercut arguments that executive reversal of land withdrawals would be too drastic. Presumably, the reversal of a predecessor's monuments or outer continental shelf withdrawals would reflect patience, sound science and a balancing of stakeholder interests. Unfortunately, President's Trump's proclamations and the underlying review of monument designations by the Interior Department have none of these qualities. They are starkly political and evidence a concerning preoccupation with development our fossil fuel resources at a time when most economic and environmental assessments suggest leaving them in the ground.

A final justification for a one-way executive withdrawal authority, then, is that we cannot afford to play politics with our public resources. The benefits of protective measures under the Antiquities Act and OCSLA come in their stability, particularly with respect to climate change. National monuments are shown to have significant economic benefits over time, and these benefits can far outweigh the extractive value of the resources they hold.¹⁷⁵ However, it takes time for surrounding communities to invest in an economy of conservation, just as environmental benefits such as preserving biodiversity or a carbon sink, or the scientific research these resources enable, are measured not in years but lifetimes. It is in recognition of these long-term benefits that monuments have staying power and are frequently expanded and enhanced by Congress rather than reversed. We will never take full advantage of what Antiquities Act or OCSLA withdrawals have to offer if each Presidential election brings with it the specter of reversal for these unique places and the communities they support.

VI. CONCLUSION

The ongoing debate over executive land withdrawal authority implicates legal and practical considerations of great importance. As this paper has argued, President Trump's unprecedented steps to reverse the protective measures of his predecessors – not only President Obama but Presidents Bush, Clinton, and potentially others – have overstepped his existing legal authority. Congress could amend the Antiquities Act or OCSLA to expressly permit executive reversal, but this would

further aggrandize executive authority over public lands. In this way, a power to revoke suffers from the same criticism that animates core opposition to the withdrawal authority to begin with: unilateral executive action has the potential to be disruptive and unaccountable in either direction. In considering its response to President Trump's recent actions, then, Congress may wish to update the Antiquities Act and OCSLA to clarify and modernize the scope of withdrawal authority. But in so doing, Congress should not be persuaded that the power to “do” requires the power to “undo” to be effective. 

ENDNOTES

¹ 54 U.S.C. § 320301 (2012).

² 43 U.S.C. §§ 1331–1356 (2012).

³ See Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (May 1, 2017) (directing the Secretary of the Interior to review all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation or expansion covers more than 100,000 acres).

⁴ Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20,815, 20,817 (May 3, 2017) (reversing President Obama's January 27, 2015, and December 20, 2016, withdrawals in the Arctic and Atlantic Oceans).

⁵ See League of Conservation Voters v. Donald Trump, No. 3:17-cv-00101-SLG, 2019 WL 1431217 (D. Alaska, Mar. 29, 2019) (concluding that Section 12(a) of the OCSLA permits a president to withdraw lands from disposition but not to revoke a prior withdrawal). There are several cases challenging the reduction of Grand Staircase-Escalante Monument. See Wilderness Soc'y v. Trump, Case No. 1:17-cv-2587-TSC (D.D.C. Dec. 4, 2017); Grand Staircase Escalante Partners v. Trump, Case No. 1:17-cv-02591-TSC (D.D.C. filed Dec. 4, 2017). Five federally recognized tribes are challenging the reduction to Bears Ears National Monument. Hopi Tribe v. Trump, Case No. 1:17-cv-02590-TSC (D.D.C. Dec. 4, 2017).

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part III.

⁹ See *infra* Part IV.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part V.

¹² See *infra* Part VI.

¹³ U.S. CONST. ART. IV, § 3, CL. 2 (“The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

¹⁴ See generally CHARLES F. WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS (1969).

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 1.

¹⁷ *Id.* at A-4, A-5.

¹⁸ *Id.* at 1.

¹⁹ See *infra* Part IV (discussing the Federal Land Policy Management Act).

²⁰ Specific actions to “dispose” of the public domain included homestead laws and government sales to dispense cheap land, mining laws to open mineral wealth, gifts of free land to railroads and land grants to new states. Withdrawing specific lands from disposal was “to become an important means of accomplishing federal purposes or policies when disposal laws threatened to sweep too broad a brush.” See David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 282–83 (1982). The creation of Yellowstone National Park as a “pleasuring ground” on a large and remote tract of federal lands in Wyoming in 1872 is widely regarded as the beginning of the modern federal lands systems. See George Coggins, FEDERAL PUBLIC LAND AND RESOURCES LAW 103, 106 (6TH ED. 2007).

²¹ See Getches, *supra* note 20, at 179 (listing early statutory authorities for executive withdrawals of land for Indian reservations, military installations, timber lands to preserve resources for the military, town sites, salt springs, mineral deposits, and other purposes).

²² See *id.* By the end of the nineteenth century, sixty-seven percent of the original public domain outside Alaska had been transferred to private

ownership, but 473,836,402 acres were still owned by the United States. *Id.* The amount of land remaining in the public domain was reported as of June 30, 1904 by the Public Lands Commission. See S. Doc. No. 189, 58th Cong., 3d Sess. 139, 13 (1905).

²³ See *infra* Part V.

²⁴ See *infra* Part IV(B).

²⁵ Getches, *supra* note 20, at 300.

²⁶ See *Antiquities Act 1906–2016: Maps, Facts, and Figures*, NAT'L PARKS SERV. ARCHEOLOGY PROGRAM, <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (last visited April 7, 2019) (overviewing the National Park Service's chronological list of monuments created by Presidents from 1906 through September 15, 2016).

²⁷ CAROL HARDY VINCENT, CONG. RESEARCH SERV., NATIONAL MONUMENTS AND THE ANTIQUITIES ACT (2016).

²⁸ See *id.* (noting that Presidents T. Roosevelt, Taft, Hoover, and G.W. Bush are the more prominent Republican users of the Act).

²⁹ 54 U.S.C. § 320301(a) (2012). The full text of the delegation reads: “Sec. 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected: Provided, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.” *Id.*

³⁰ *Id.* There does not appear to be a functional difference between a “withdrawal” and “the reservation of parcels thereof.”

³¹ *Id.*

³² See Roberto Iraolo, *Proclamations, National Monuments, and the Scope of Judicial Review under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 159, 172–174 (2004) (providing an exhaustive discussion of Supreme Court and lower court cases confronting challenges to national monument proclamations as well as the limited scope of judicial review under presidential proclamations under the Antiquities Act).

³³ See generally JOHN YOO & TODD GANZIANO, PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS (2017) (contending Congress did not intend for the Act to be used at such a massive scale by the Executive).

³⁴ See Iraolo, *supra* note 32, at 160, 161 (suggesting these broad purposes are more appropriate for a national park or designation established by Congress).

³⁵ See *id.* at 160 (asserting that large monuments violate the Antiquities Act because the President's authority to determine size was intended to be limited).

³⁶ *Id.* at 161 (referencing Congressional power under U.S. Const. art. IV § 3, cl. 2 to dispose of and make all needful Rules and Regulations respecting the Territory or Property belonging to the United States).

³⁷ Presidents have both enlarged and diminished monuments in a handful of cases, and it is unclear whether these changes were legally authorized. It

continued on page 27

appears these changes were consistent with the purpose of the Act, and that if future changes were to deviate from the purpose for which a monument was designated, the analysis becomes similar to a revocation—it would require an Act of Congress. See ROBERT ROSENBAUM ET AL., *THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH A NATIONAL MONUMENT UNDER THE ANTIQUITIES ACT OF 1906* (Arnold and Porter Kaye Scholar, 2017) (stating that in small cases, Presidents have modified monument boundaries).

³⁸ See VINCENT, *supra* note 27 (stating that Congress has converted certain monuments into protective designations, such as national parks).

³⁹ See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 550 (2003) (referencing Congressional power to reverse presidential decisions establishing national monuments).

⁴⁰ Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429, 20,429 (May 1, 2017).

⁴¹ See *id.* (tasking the Secretary to balance the original objectives of the Antiquities Act with the protection of landmarks, structures, and other objects).

⁴² See Stephanie Regenold, *Monumental or Not: Presidential Authority Under the Antiquities Act of 1906*, *THE FED. LAW.* 25, 28 (June 2018).

⁴³ See *id.* at 28–29 (summarizing the Department of Interior’s process for studying and considering public comment regarding possible modifications to monuments).

⁴⁴ *Id.* at 29–30 (citing Secretary Zinke’s Memorandum to the President: Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act).

⁴⁵ Modifying the Bears Ears National Monument, Proc. 9681 (Dec. 4, 2017), 82 Fed. Reg. 58,081, 58,085 (Dec. 8, 2017).

⁴⁶ Modifying the Grand Staircase-Escalante National Monument, Proc. 9682 (Dec. 4, 2017), 82 Fed. Reg. 58,089, 58,089 (Dec. 8, 2017).

⁴⁷ See *Hopi Tribe v. Trump*, Case No. 1:17-cv-02590-TSC (D.D.C. Dec. 4, 2017).

⁴⁸ See Modifying the Bears Ears National Monument, *supra* note 45, at 58,085; Modifying the Grand Staircase-Escalante National Monument, *supra* note 46, at 58,093.

⁴⁹ See, e.g., Remarks by President Trump at Signing of Executive Order on the Antiquities Act (Apr. 26, 2018) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-executive-order-antiquities-act/> (declaring that “[t]oday, I am signing a new executive order to end another egregious abuse of federal power, and to give that power back to the states and to the people, where it belongs”).

⁵⁰ 43 U.S.C. § 1331(a) (2012).

⁵¹ *Id.* at § 1331(b)–(c).

⁵² *Id.* at § 1341(a) (“The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”).

⁵³ *Briefer on Presidential Withdrawal Under OCSLA Sec. 12(a)*, NAT. RES. DEF. COUNCIL (2016), https://www.nrdc.org/sites/default/files/briefer-on-ocsla-withdrawal-authority_20161121_0.pdf [hereinafter NATURAL RESOURCES DEFENSE COUNCIL].

⁵⁴ See *id.* (referring to President’s power to bar disposition of land or titles under federal marine waters).

⁵⁵ 54 U.S.C. § 320301(a)–(b).

⁵⁶ NAT. RES. DEF. COUNCIL, *supra* note 53, at 2.

⁵⁷ *Id.* at i (providing a chronology of withdrawals under §12(a), but not including President Obama’s December 20, 2016, withdrawal of nearly 115 million acres of the Arctic Ocean and 3.8 million acres off the Atlantic coast; earlier in the year, President Obama excluded those areas for a five-year period, making the exclusion permanent following the results of the November election and before President-elect Trump took office).

⁵⁸ See *League of Conservation Voters v. Donald Trump*, No. 3:17-cv-00101-SLG, 2019 WL 1431217, *5 (D. Alaska, Mar. 29, 2019) (“The text of Section 12(a) refers only to the withdrawal of lands; it does not expressly authorize the President to revoke a prior withdrawal. Congress appears to have expressed one concept - withdrawal - and excluded the converse - revocation.”).

⁵⁹ Section 12(a) does say the President “may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.” 43 U.S.C. § 1341(a).

⁶⁰ In 1990, President George H.W. Bush issued a presidential directive ordering the Interior Department not to conduct offshore leasing or preleasing

activity in places other than Texas, Louisiana, Alabama, and parts of Alaska until 2000—prohibiting leasing in the same areas covered by the annual moratoria enacted by Congress through the Interior appropriations process. President Clinton extended the temporary offshore leasing prohibition until 2012, while permanently withdrawing areas designated as marine sanctuaries. Then, in 2008, President George W. Bush revoked the time-limited withdrawal but left in place President Clinton’s permanent withdrawal comprising approximately 10.8 million acres of marine sanctuary. See Bush, G.W. Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 Weekly Comp. Pres. Docs. 986 (July 14, 2008).

⁶¹ NAT. RES. DEF. COUNCIL, *supra* note 53, at 2. Note that the permanent withdrawal is designated “for a time period without specific expiration,” language which President Obama used in his most recent withdrawals under OCSLA. *Id.*

⁶² Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13795, 82 Fed. Reg. 20,815, 20,815 (Apr. 28, 2017) [hereinafter Implementing an America-First Offshore Energy Strategy].

⁶³ *Id.* at 20,816.

⁶⁴ Northern Bering Sea Climate Resilience, Exec. Order No. 13754, 81 Fed. Reg. 90,669, 90,669 (Dec. 9, 2016) (discussing in Section 3 the withdrawal “from disposition by leasing for a time period without specific expiration the following areas of the Outer Continental Shelf: [(1) Norton Basin Planning Area; and (2) St. Matthew-Hall Planning Area]. The . . . withdrawal prevents consideration of these areas for future oil or gas leasing for purposes of exploration, development, or production. This withdrawal furthers the principles of responsible public stewardship entrusted to this office and takes due consideration of the importance of the withdrawn area to Alaska Native tribes, wildlife, and wildlife habitat, and the need for regional resiliency in the face of climate change. Nothing in this withdrawal affects rights under existing leases in the withdrawn areas.”).

⁶⁵ Implementing an America-First Offshore Energy Strategy, *supra* note 62, at 20,816, Section 4(c).

⁶⁶ These were presidential memoranda effecting “Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition” issued on December 20, 2016, January 27, 2015, and July 14, 2008. It appears that the Trump Order leaves in place a memorandum of December 16, 2014 withdrawing the North Aleutian Basin Planning Area, including Bristol Bay, offshore Alaska.

⁶⁷ Implementing an America-First Offshore Energy Strategy, *supra* note 62, § 5. Presumably, the Administration wanted to avoid challenge under the Marine Protection, Research, and Sanctuaries Act, which requires specific procedures and findings of the Secretary of Commerce before a marine sanctuary designation could be withdrawn. See 16 U.S.C. § 1434 (2012).

⁶⁸ See *League of Conservation Voters v. Donald Trump*, 303 F. Supp. 3d 985 (D. Alaska, 2018) (citing Memorandum in Support of Plaintiffs’ Motion for Summary Judgment asserting that President Trump’s withdrawals under OCSLA exceed presidential powers).

⁶⁹ *League of Conservation Voters v. Donald Trump*, No. 3:17-cv-00101-SLG, 2019 WL 1431217, *16 (D. Alaska, Mar. 29, 2019).

⁷⁰ *Id.* at 30.

⁷¹ Congress can also stipulate that the President use one or another of these instruments for a particular purpose. See KENNETH MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* 58 (2001).

⁷² 16 U.S.C. §§ 431–433; 43 U.S.C. §§ 1331–1356.

⁷³ For instance, both proclamations and executive orders have been used to create forest reserves. See U.S. DEPARTMENT OF AGRICULTURE: FOREST SERVICE, *ESTABLISHMENT AND MODIFICATION OF NATIONAL FOREST BOUNDARIES – A CHRONOLOGICAL RECORD 1891–1973* (2012). President Obama declared and withdrew land for monuments through presidential proclamation, even though prior Presidents styled the withdrawals as executive orders. Maybe telling is that Obama’s most recent Proclamations of national monuments were widely reported in the media as “executive orders.” Meanwhile, to withdraw areas of the outer continental shelf under his OCSLA authority, Obama issued presidential memoranda. The Obama WhiteHouse.gov delineated “Presidential Actions” as, separately, Executive Orders, Presidential Memoranda, and Proclamations. See *Presidential Actions*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/briefing-room/presidential-actions>.

⁷⁴ Mary Woodward, *Executive Orders: A Journey*, 10 LEGAL REFERENCE SERVICES Q. 125, 126 (1990) (explaining that neither the Constitution nor any statute defines an executive order).

⁷⁵ See COMM. ON GOV'T OPERATIONS, EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS vii (1957) (observing that that proclamations primarily affect the activities of private individuals, while executive orders usually affect private officials only indirectly). The authors of the study reasoned that, "since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority." *Id.* Subsequent accounts suggest that Presidents "are more apt to utilize executive orders on matters that may benefit from public awareness or be subject to heightened scrutiny," while Memoranda typically carry out more routine executive decisions, or to "perform duties consistent with the law or implement laws that are presidential priorities." VIVIAN S. CHU AND TODD GARVEY, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION AND REVOCATION 3 (2014). Proclamations seem to vary widely from merely declaratory in effect to those with substantive impact. See LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH, PRESIDENTIAL POWER 103 (Stephen M. Sheppard, 2014).

⁷⁶ See generally MAYER, *supra* note 71, at 58.

⁷⁷ *Id.* at 58–59 (citing COMM. ON GOV'T OPERATIONS, EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 4–5 (1957)).

⁷⁸ CHU & GARVEY, *supra* note 75, at 2.

⁷⁹ See *Today in History – November 26*, LIBRARY OF CONG., <https://www.loc.gov/item/today-in-history/november-26/> (last visited Mar. 28, 2019) (chronicling the history of the Thanksgiving Proclamation) [hereinafter *Today in History – November 26*].

⁸⁰ The "vesting clauses" of the U.S. Constitution confer three discrete types of authority on three branches, without an explicit requirement of separation of powers or checks and balances. Art. I § 1 reads "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. See U.S. CONST. art. I § 1. Article II § 1 reads "The executive Power shall be vested in a President of the United States of America." *Id.*

⁸¹ Implementing an America-First Offshore Energy Strategy, *supra* note 62, at § 2.

⁸² Though these arguments have been made, they are no longer at issue. See Getches, *supra* note 20, at note 46.

⁸³ CHU & GARVEY, *supra* note 75, at 7.

⁸⁴ *The Mexico City Policy: An Explainer*, KAISER FAMILY FOUND. (Jan. 28, 2019), <https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/>.

⁸⁵ CHU & GARVEY, *supra* note 75, at 7 (chronicling a long line of substantive changes to Executive oversight through issuance, modification and revocation of executive orders).

⁸⁶ See *Today in History – November 26*, *supra* note 74.

⁸⁷ YOO & GANZIANO, *supra* note 33, at 7 (emphasis added).

⁸⁸ *Id.* at 8 (explaining, for example, that the Constitution describes no process for repealing a statute).

⁸⁹ *Id.*

⁹⁰ *Id.* at 9.

⁹¹ See *Gorbach v. Reno*, 219 F.3d 1087, 1089 (9th Cir. 2000) (en banc) ("We must decide whether the power to confer citizenship through the process of naturalization necessarily includes the power to revoke that citizenship. We conclude that it does not.")

⁹² See *id.* at 1090, 1095.

⁹³ See *id.* at 1091, 1095.

⁹⁴ See *id.* at 1095.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See YOO & GANZIANO, *supra* note 33, at 5–9.

⁹⁸ For instance, Yoo and Ganziano cite that the President can unilaterally undo an appointment without the Senate's approval, even though this negates the earlier Senate confirmation of the appointee. *Id.* at 9 (citing *Myers v. United States*, 272 U.S. 52 (1926)). A plurality of the Supreme Court also allows the President to unilaterally terminate a treaty even though the treaty required the advice and consent of the Senate to be formed. *Id.* (citing *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (vacated by *Goldwater v. Carter*, 444 U.S. 996 (1979)); *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002)).

⁹⁹ *Gorbach*, 219 F.3d at 1095.

¹⁰⁰ YOO & GANZIANO, *supra* note 33, at 7 (citing *Pennsylvania v. Lynn*, 501 F.2d 848, 855–56 (D.C. Cir. 1974)).

¹⁰¹ *Id.* YOO & GANZIANO, *supra* note 33, at 9 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

¹⁰² Review of Designations Under the Antiquities Act, 82 Fed. Reg. at 20,429 (Apr. 26, 2017).

¹⁰³ Congress can influence or even largely block national monument implementation through funding restrictions. The fact that it funds monuments, even controversial ones, suggests it has ratified the withdrawals. A ratification-through-appropriation theory might strengthen over time, with subsequent appropriations. The argument would also not hold for the most recent withdrawals, such as Bears Ears, which has not existed during an appropriations cycle.

¹⁰⁴ 16 U.S.C. § 1 (2012) (directing management of the national parks "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.")

¹⁰⁵ See ROSENBAUM ET AL., *supra* note 37, at 13 (citing 54 USC §§ 100102(2), 100501 (2012)) (defining "National Park System" to include any area administered by the National Park Service, including for "monument" purposes).

¹⁰⁶ See 36 C.F.R. § 1.2 (National Park Service regulations apply to federally owned land administered by NPS); see generally 36 C.F.R. § 7. The Interior Department regulations for parks and monuments vary widely; some are extensive management plans, others are relatively short or nonexistent for specific parks or monuments. There is an argument that revoking a national monument would also effectively rescind any applicable regulation or management plan, requiring some process under the Administrative Procedure Act. It would depend on the process used in implementing the regulation in the first place, whether through notice and comment rulemaking or the agency found good cause to waive notice and comment because the regulations "don't expand on the action already taken by the President." *Id.*

¹⁰⁷ See ROSENBAUM ET AL., *supra* note 37, at 13.

¹⁰⁸ 54 U.S.C. § 100101(b)(12).

¹⁰⁹ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citing *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)).

¹¹⁰ See generally *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001) (examining whether the Clean Air Act had impermissibly delegated legislative power to the Environmental Protection Agency).

¹¹¹ See *infra* Part II(A).

¹¹² Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 186 (1938) [hereinafter *Pinckney*].

¹¹³ See *id.* at 187.

¹¹⁴ See *id.* at 186–187 ("[I]f public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation.")

¹¹⁵ See *Castle Pinckney Uses*, NAT'L PARK SERV., <https://www.nps.gov/fosu/learn/historyculture/castle-pinckney-use.htm> (last visited Apr. 10, 2019).

¹¹⁶ See *Pinckney*, *supra* note 112, at 186. The justification for abolishing the monument was that the fort was in need of repair, that the public had not "manifested any great interest in it as an object of historical importance," and that the expense of restoring the fort for "future preservation" was unjustified. *Id.* Furthermore, the War Department was already using the land for storage purposes and wanted to continue doing so. *Id.*

¹¹⁷ See *id.* at 189.

¹¹⁸ *Id.* at 188 (citing *Rock Island Military Reservation*, 10 Op. Att'y Gen. 359, 364 (1862)).

¹¹⁹ See *Rock Island Military Reservation*, 10 Op. Att'y Gen. 359, 361–62 (1862) ("This view of the Executive authority in the premises seems to me to accord so exactly with the plain and well-accepted theory of the division of powers in our Government. . . . The appropriation of the public domain, either to public or private use, is eminently an act of sovereign power. It is the exercise of ownership and implies the right of control over the title. It is a conversion of the property of the nation equal in responsibility and gravity with the appropriation of the public money and derives its authority from the same high source. Under our system, this extreme power resides only in Congress."); *id.* at 364–65 ("This selection of Rock Island for military purposes was not, as we have seen, the unauthorized act of the President; but was made in the exercise of a discretion vested in him by Congress." [Because] the power to dispose of the public lands . . . belongs to Congress, and not to the President . . . the reservation of Rock Island for military purposes derives its validity . . . primarily from the statute which authorized that selection.");

id. (“[I]nstead of designating the place themselves, [Congress] left it to the discretion of the President, which is precisely the same thing in effect.”); see also 21 Op. Att’y Gen. 120, 121 (1895); 17 Op. Att’y Gen. 168 (1881); 16 Op. Att’y Gen. 121, 123 (1878).

¹²⁰ See MAYER, *supra* note 71, at 35; see also *Jenkins v. Collard*, 145 U.S. 546, 560–61 (1891) (when a President issues a proclamation on matters either within the President’s inherent powers or to execute a delegated authority, the proclamation has the force of law); *Indep. Meat Packers Ass’n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975); see also *Gnotta v. Unites States*, 415 F.2d 1271, 1275 (8th Cir. 1969).

¹²¹ MAYER, *supra* note 71, at 35–36; see also *Marks v. Cent. Intelligence Agency*, 590 F.2d 997, 1003 (D.C. Cir. 1978) (noting that an executive order cannot supersede a statute).

¹²² See generally YOO & GANZIANO, *supra* note 33 (providing their main critiques of the AG opinion as: (1) its reliance on trust law to suggest that a great of power to create something must include the power to abolish it; (2) its reading of the original purposes of the Antiquities Act; and (3) general lack of support and depth of analysis for its conclusion that the President is without authority to revoke the Castle Pinckney National Monument).

¹²³ The challengers in the OCSLA action cite the Attorney General opinion as persuasive authority for a strict reading of the OCSLA text. See Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *League of Conservation Voters v. Donald Trump*, 303 F. Supp. 3d 985 (D. Alaska 2018). The Court agreed those opinions are “persuasive.” See *League of Conservation Voters v. Donald Trump*, No. 3:17-cv-00101-SLG, 2019 WL 1431217, *10 (D. Alaska, Mar. 29, 2019) (noting that “Congress has used the terms ‘withdrawal’ and ‘reservation’ interchangeably for many decades.”)

¹²⁴ See YOO & GANZIANO, *supra* note 33, at 5 (explaining that Attorney General opinions are binding on executive branch agencies, but a president is free to disregard them – especially if he concludes that his oath to take care that the laws are faithfully executed conflicts with such an opinion.)

¹²⁵ Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(4) (2012) (“[I]t is the policy of the United States that Congress exercise its constitutional authority to withdraw . . . Federal lands for specific purposes and that Congress may delineate the extent to which the Executive may withdraw lands without legislative action.”).

¹²⁶ James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 625 (2001).

¹²⁷ COGGINS, *supra* note 20, at 340.

¹²⁸ John Yoo and Todd Ganziano, *Opinion: Trump Can Reverse Obama’s Last Minute Land Grab*, WALL ST. J. (DEC. 30, 2016), <https://www.wsj.com/articles/trump-can-reverse-obamas-last-minute-land-grab-1483142922>.

¹²⁹ Getches, *supra* note 20, at 279.

¹³⁰ See *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686 (9th Cir. 1976) (“We recognize that even after 1975, the President or the Secretary of the Interior could still alter the boundaries of, or even extinguish completely, an executive order reservation in order to make way for a railroad.”); *id.* at 690 (“[b]efore Congress prohibited future changes in Indian reservations by executive order, it was common practice for the President to terminate or reduce in size executive order reservations without payment of compensation.”); see also Rasband, *supra* note 126, at 626 (“It thus appears that if a withdrawal is accomplished by executive authority implied from congressional silence, a court will be more willing to recognize implied authority in the executive to undo what it has already done.”).

¹³¹ Numerous examples appear in *Indian Affairs: Laws and Treaties*, a seven-volume compilation of U.S. treaties, laws and executive orders pertaining to Native American Indian tribes compiled by Charles J. Kappler in the early twentieth century and first published in 1903–1904 by the Government Printing Office. See, e.g., CHARLES J. KAPPLER, 1 INDIAN AFFAIRS: LAWS AND TREATIES 467, 740 (Government Printing Office 1904); CHARLES J. KAPPLER, 3 INDIAN AFFAIRS: LAWS AND TREATIES 694 (Government Printing Office 1913); CHARLES J. KAPPLER, 7 INDIAN AFFAIRS: LAWS AND TREATIES 1463, 1505 (Government Printing Office 1971). Oklahoma State University has digitized the work, library.okstate.edu/kappler/index.htm. The language used to revoke a reservation is sometimes, literally, “hereby revoke,” and other times action to “restore to the public domain” lands previously reserved. See WM. H. Taft, Exec. Order No. 522 (April 24, 1912) (“it is hereby ordered that Executive order dated August 25, 1877, setting aside certain described land in the State of California for Indian purposes, be, and the same hereby is, revoked in so far as it relates to the south half of section 20, township 3 south of range 1 east of the San Bernardino meridian.”); see also WM. H. Taft, Exec. Order

No. 1224 (July 7, 1910) (“It is hereby ordered that Executive orders of August 25, 1877, March 9, 1881, and December 29, 1891, reserving certain described lands in the State of California for Indian purposes be, and the same are hereby, modified and amended in so far as to restore to the public domain for the purpose of settlement and entry the tracts described as follows. . .”).

¹³² See 7 INDIAN AFFAIRS, *supra* note 131 (stating the opinion of Attorney General Harlan F. Stone, “Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (citation omitted) and not without strong reason; for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the general allotment act. Nevertheless, the President has in fact, and in a number of instances, changed the boundaries of Executive order Indian reservations by excluding lands therefrom, and the question of his authority to do so has not apparently come before the courts. . . . When by an Executive order public lands are set aside, either as a new Indian reservation or an addition to an old one, without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an Indian reservation; and so long, at least, as the order continues in force the Indians have the right of occupancy and use, and the United States has the title in fee.”).

¹³³ Getches, *supra* note 20, at 285.

¹³⁴ *Id.* at 280.

¹³⁵ 236 U.S. 459 (1915).

¹³⁶ *Id.* at 469; see also Getches, *supra* note 20, at 290–92.

¹³⁷ See Christine A. Klein, *Preserving Monumental Landscapes under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1355–63 (2002) (elaborating when presidential authority is strengthened by congressional acquiescence).

¹³⁸ Pamela Baldwin, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT 2 (2000).

¹³⁹ National Forest Management Act of 1976, Pub. L. No. 94-588, § 9, 90 Stat. 2949 (1976) (“Notwithstanding the provisions of the Act of June 4, 1897. . . no land now or hereafter reserved or withdrawn from the public domain as national forests pursuant to the Act of March 3, 1891. . . or any act supplementary to and amendatory thereof, shall be returned to the public domain except by an act of Congress.”) (*emphasis added*).

¹⁴⁰ Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1782 (2012).

¹⁴¹ PUBLIC LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND THE CONGRESS 54–57 (1970).

¹⁴² Pub. L. No. 94–579, § 704(a), 90 Stat. 2743 (1976) (citing *U.S. v. Midwest Oil Co.* in repealing the implied executive authority).

¹⁴³ PUBLIC LAND LAW REVIEW COMM’N, *supra* note 141, 54–55.

¹⁴⁴ *Id.* at 55.

¹⁴⁵ See BALDWIN, *supra* note 138, at 2.

¹⁴⁶ Federal Land Policy and Management Act, 43 U.S.C. § 1702(e) (2012).

¹⁴⁷ The Forest Service Organic Act of 1897, ch. 2, § 1, 30 Stat. 11, 36 (repealed 1905) (asserting that “to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests” and that “[t]he President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve”). See generally Robert Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RES. L. 503, 510 (1974) (providing a rich backstory to the inclusion of the revocation provision). Basically, this legislation was the culmination of years of controversy surrounding the withdrawal of considerable tracts of federal land for forest reserves, starting with the Act of March 3, 1891. *Id.* President Cleveland had issued 13 proclamations establishing forest reserves in 7 states, which outraged Western public officials. An earlier appropriations bill in 1897 including a proposal to abolish the reservations and an amendment to give the President authority to abolish any and all reserves. The Western members were opposed to relying on the President to abolish the reserves himself claiming that they could not trust the President to revoke his own orders. The final compromise did not specifically abolish President Cleveland’s earlier withdrawals, but instead gave him the authority to do so. *Id.*

¹⁴⁸ The Forest Service Organic Act of 1897, ch. 2, § 1, 30 Stat. 11, 36 (repealed 1905).

¹⁴⁹ 16 U.S.C. § 473 (2012).

¹⁵⁰ Desert Land Act, 43 U.S.C. § 641 (“The Secretary of the Interior may, in his discretion, continue said segregation for a period not exceeding five years, or

may, in his discretion, restore such lands not irrigated and reclaimed to the public domain upon the expiration of the ten-year period or of any extension thereof.”).

¹⁵¹ 1910 Pickett Act, ch. 421, 36 Stat. 847 (1910) (repealed 1976) (expressly authorized the revocation or vacating of executive orders or proclamations creating forest reserves under the Act of March 3, 1891, ch. 561, 26 Stat. 1103).

¹⁵² See Rasband, *supra* note 121, at 627 (affirming an established canon of statutory interpretation that the court should avoid reading a statute in a way that would render statutory language superfluous).

¹⁵³ 43 U.S.C. § 1701 (“All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.”).

¹⁵⁴ 43 U.S.C. § 1714.

¹⁵⁵ *Id.*

¹⁵⁶ Getches, *supra* note 20, at 316-17 (describing that the revocations were not made according to the prescribed procedures for referral of the Secretary’s recommendations for continuation or termination of withdrawals).

¹⁵⁷ 43 U.S.C. § 1714(j).

¹⁵⁸ H.R. Rep. 94-1163 at 9 (1976) (“With certain exceptions, H.R. 13777 will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.”).

¹⁵⁹ See 39 U.S. Op. Atty. Gen 186 (citing 10 U.S. Op. Atty. Gen. 359 (1862)).

¹⁶⁰ See ROSENBAUM ET AL., *supra* note 37 (citing Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist., 133 F.3d 816, 822 (11th Cir. 1998)) (addressing legislative action after an earlier legal interpretation by the Attorney General); see also United States v. Estate of Romani, 523 U.S. 517, 530-31 (1998) (stating that later congressional actions need not amend the earlier statute in order for ratified principles of law to govern, particularly when the later statute comprehensively addresses a subject).

¹⁶¹ See BALDWIN, *supra* note 133, at 4-5 (“The FLPMA language addresses only actions of the Secretary, while the Antiquities Act is worded in terms of actions the President may take However, it appears from the breadth of the committee report language that Congress may have believed that controlling revocations by the Secretary in this regard would operate to control the revocation of national monument withdrawals – i.e. to control the actions of the President.”).

¹⁶² H.R. 2284, 115th Cong. (2017).

¹⁶³ For instance, the 114th Congress considered proposals to subject monument designations to Congressional and state approval, prohibit the President from establishing or expanding national monuments in particular locations, and make the President’s authority subject to NEPA or impose other requirements for consultation. See VINCENT, *supra* note 27, at 11-12. Recent proposals in the 115th Congress are similar. See *Improved National Monument Designation Process Act, S. 33, 115th Cong. (2017)* (“Before a national monument can

be designated on public land, the President must obtain congressional approval, certify compliance with the National Environmental Policy Act of 1969 (NEPA), and receive notice from the governor of the state in which the monument is to be located that the state legislature has enacted legislation approving its designation.”).

¹⁶⁴ 54 U.S.C. § 320301(a) (2012).

¹⁶⁵ Debra Holtz et al., *National Landmarks at Risk: How Rising Seas, Floods, and Wildfires are Threatening the United States’ Most Cherished Historic Sites*, UNION OF CONCERNED SCIENTISTS (2014) http://www.ucsusa.org/global_warming/science_and_impacts/impacts/national-landmarks-at-risk-from-climate-change.html?_ga=1.143705777.562670586.1493413292#.WQVAARSRLBI.

¹⁶⁶ See *supra* Part II(B).

¹⁶⁷ Northern Bering Sea Climate Resilience, *supra* note 64.

¹⁶⁸ *Id.*

¹⁶⁹ A 1913 memorandum summarizing Congressional and judicial pronouncements on the Executive withdrawal authority confirms a one-way perspective: “the President in the exercise of his executive powers stands in a position to protect and administer the public domain until Congress can act.” 3 INDIAN AFFAIRS, *supra* note 131, at 693.

¹⁷⁰ Congress debated a bill to designate as wilderness 1.8 million acres owned by the federal government in Utah. The proposal cleared House and Senate committees but was not enacted. See Justin James Quigley, *Grand Staircase Escalante National Monument: Preservation or Politics*, 19 J. OF LAND, RES., & ENVTL. L. 55, 69-71 (1999). President Clinton then issued Proclamation 6920 to establish the Grand Staircase-Escalante National Monument, setting aside approximately 1.7 million acres under the Antiquities Act. 61 Fed. Reg. 50223, 50225 (Sept. 4, 1996). In response, legislation was introduced to provide that for any national monument in excess of 5,000 acres, the President would need an act of Congress and the concurrence of the governor and the state legislature. The House passed the legislation, but the Senate did not. See LOUIS FISHER, EXECUTIVE ORDERS AND PROCLAMATIONS, 1933-99: CONTROVERSIES WITH CONGRESS AND THE COURTS 18-19 (1999).

¹⁷¹ Fisher, *supra* note 70, at 106 (“Congress can retaliate against executive orders and proclamations it finds objectionable, but moving remedial legislation through both chambers can be an uphill struggle.”).

¹⁷² Jonathan Thompson, *Bears Ears a Go – But Here’s Where Obama Drew the Line: The Designation’s Concessions are Unlikely to Appease Ardent Opponents*, HIGH COUNTRY NEWS (DEC. 29, 2016), <https://www.hcn.org/articles/obama-designates-bears-ears-national-monument>.

¹⁷³ See *5-year Timeline of Tribal Engagement to Protect Bears Ears*, BEARS EARS INTER-TRIBAL COALITION, [https://bearscoalition.org/timeline/\(last visited March 28, 2019\)](https://bearscoalition.org/timeline/(last%20visited%20March%2028,%202019)).

¹⁷⁴ *Proposal to President Barack Obama for the Creation of Bears Ears National Monument*, BEARS EARS INTER-TRIBAL COALITION (OCT. 15, 2015) <https://bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf>.

¹⁷⁵ See Ray Rasker, *West Is Best: How Public lands in the West Create a Competitive Economic Advantage*, HEADWATERS ECONOMICS (DEC. 2012) <https://headwaterseconomics.org/economic-development/trends-performance/west-is-best-value-of-public-lands/>.

ENDNOTES: JAM V. IFC: ONE STEP FORWARD, TWO STEPS BACK?

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¹ See *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 767 (2019) (referencing International Finance Corporation’s motion to dismiss for lack of subject matter jurisdiction).

² *Id.*

³ *Id.* at 771.

⁴ See generally 22 U.S.C. § 288 (1945) (codifying the International Organizations Immunities Act); 28 U.S.C. § 1605 (2016) (codifying the Foreign Sovereign Immunities Act); *Jam*, 139 S. Ct. at 772 (interpreting the IOIA to allow for the modern immunities of foreign sovereigns under FSIA).

⁵ *Jam*, 139 S. Ct. at 766.

⁶ *Id.* at 768 (quoting 22 U.S.C. § 288a(b)).

⁷ *Id.* at 765-66.

⁸ *Id.*

⁹ *Id.* at 766.

¹⁰ *Id.* at 767.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (outlining D.C. District Court Judge Pillard’s dissent and the circuit split between the D.C. and Third Circuits in 2010).

¹⁴ *Id.* at 772.

¹⁵ *Id.* at 766 (emphasis added) (citing 28 U.S.C. § 1605(a)(2) (2016)).

¹⁶ See generally *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (declining to review novel argument presented by petitioners about substantial contacts with U.S. element); *Saudi Arabia v. Nelson*, 507 U.S. 349, 358-59, 377-78 (1993) (including numerous dissents and not reviewing substantial contacts with U.S. element because the Court did not find commercial activity); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (reviewing only one of three scenarios that could establish commercial activity with substantial contacts to U.S.).

¹⁷ See *Jam*, 139 S. Ct. at 771.

¹⁸ *Id.* at 772.

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* (emphasis added).

²¹ See *id.*