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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 1906 and the Outer Continental Shelf Lands Act (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question is whether the President, by the same authority, may revoke these protective measures and effectively reopen withdrawn lands to disposition.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 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.

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. Today, withdrawals are more commonly a protective measure to preserve the status quo and prevent specific future uses in designated areas.

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. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20} The Executive had historically withdrawn land for limited public uses, such as military or Indian reservations.\textsuperscript{21} As conservation became a critical national concern in the late nineteenth century,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{30} Conspicuously missing from the statute is any specification of procedure to create a national monument, beyond that the President shall “proclaim” one.\textsuperscript{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.\textsuperscript{32} However, despite longstanding precedent and Congressional acquiescence to executive national monument practice, some scholars still argue that certain monument proclamations are unlawful.\textsuperscript{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.”\textsuperscript{34} Critics also argue that the designation of large monuments violates the Act’s open-ended acreage limitation.\textsuperscript{35} It is contended that the Act is an unconstitutionally broad delegation of Congress’ power under the Property Clause.\textsuperscript{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.\textsuperscript{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.\textsuperscript{38} In at least ten instances, Congress has outright abolished monuments created by the President.\textsuperscript{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 Monument and the Grand Staircase-Escalante National Monument, 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.45

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 monument 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. 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 . . ." 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. 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. 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."77

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, more recent accounts suggest that the instruments defy these distinctions too often for any differences to be legally significant. Federal courts also tend to hold executive orders and proclamations to be “equivalent for the purposes of carrying out the President’s legal authority."75

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. The President, for instance, has issued a Thanksgiving Proclamation annually since 1863. Though nobody is challenging the legal basis for this Proclamation, it likely emanates from Article II’s vesting clause. 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,” 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. 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. 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. Beginning with Gerald Ford’s administration, presidents have actively issued, modified and revoked orders to assert control over and influence the agency rulemaking process.5 That Thanksgiving Proclamation? 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 Gaziano 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.” In their view, it is

Spring 2019
The decision to revoke a monument designation would also conflict with several statutes articulating broad policies for management of monuments and other protected areas.

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. 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, “raise[ing] serious constitutional questions.” 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. 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. 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.

We should be careful not to conflate Constitutional with statutorily delegated authority in the public lands context, as Yoo and Ganziano do. 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. 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.”

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Amendments to the National Park Organic Act of 1916 make clear that national monuments are part of the National Park System, and are fully covered by the general regulations protecting that System. The various units of this System are a “cumulative expression of a single national heritage.” 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.”

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. 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.

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. 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. In the opinion for President Coolidge, the Attorney General reasoned that the executive action to withdraw land was in effect an act of Congress itself. 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.

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. 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. Attorney General Homer Cummings advised the President that he was without authority to issue the proposed proclamation revoking the monument. 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.

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. 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. When an executive order conflicts with a statute, the statute takes precedence. 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. 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. On the one hand, Attorney General opinions are not binding on the President. 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. 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. A rough division of authority between Congress and the President has grown around specific statutes and long-term understandings. Yoo and Ganziano argue that OCSLA and the Antiquities Act “do not even attempt to limit the president’s power to reverse previous withdrawals.” 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. In several instances, this assumption supported an implied power to modify or revoke the prior withdrawal. For example, Presidents commonly eliminated or reduced the size of Indian reservations that had been established through executive order. 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. 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. 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.” A major Supreme Court case, United States v. Midwest Oil Co., upheld a withdrawal by President Taft that directly contradicted a recent statute, reasoning that “scores and hundreds” of executive orders establishing or enlisting Indian and military reservations and oil reserves had established an allocation of power. 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. Presidents continued to push the boundaries of delegated withdrawal authorities.

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. 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. 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. 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 groundwork 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. 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. 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. Despite these recommendations, Congress conspicuously left the Antiquities Act in place, with very limited discussion of why. Congress also expressly exempted the “Outer Continental Shelf” from the FLPMA definition of “public lands,” leaving OCSLA in place as well.

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. 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.” The President’s express authority to revoke, modify, and vacate certain orders and proclamations establishing national forests remains today.

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, 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.” 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.

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 withdrawals but instead directed the Secretary of the Interior to review a substantial number of withdrawals and report to the President recommendations concerning their continuation. 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. As of 1981, 233 withdrawals covering about 20.4 million acres had been revoked under this process.

To reiterate, FLPMA expressly provided that the Secretary shall not modify or revoke any withdrawal creating a national monument under the Antiquities Act. 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.” This language is a clear signal that Congress was aware of the 1938 Attorney General opinion arguing that legislators retained sole authority to revoke a monument under the Antiquities Act. 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. 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.

There have been numerous proposals to amend the Antiquities Act over the last several decades, the most recent introduced on May 2, 2017. 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.

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” 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. 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. President Obama's Executive Order on the North Bering Sea relied on OCSLA to create a "climate resilience area." 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." 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. 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. 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 struggle and ultimately requires the President's signature, but Congress has successfully reversed the President's action, albeit subject to a possible presidential veto. Several years ago, an Inter-Tribal Coalition unsuccessfully petitioned Utah's Congressional representatives. The tribes then successfully petitioned President Obama, whose administration undertook extensive study and community engagement before making proclaiming the monument almost two years later. 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. 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

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).
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.”).
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 Cogdill, 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.
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.
33 See generally JOHN YOO & TODD GANZLANO, 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