

# “UN-SHELFING” LANDS UNDER THE OUTER CONTINENTAL SHELF LANDS ACT (OCSLA): CAN A PRIOR EXECUTIVE WITHDRAWAL UNDER SECTION 12(A) BE TRUMPED BY A SUBSEQUENT PRESIDENT?

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*On December 20, 2016, President Barack Obama invoked his power under section 12(a) of the Outer Continental Shelf Lands Act of 1953 (OCSLA) to “withdraw” approximately 119 million acres of submerged land on the outer continental shelf. The action prevents these areas from being considered for any future exploration, development, or production of oil or gas. Environmental groups hailed this “11th-hour offshore drilling ban” as a significant victory to protect the fragile ecosystems of the Chukchi Sea and parts of the Beaufort Sea in the Arctic, as well as ecosystems along the edge of the continental shelf in the Atlantic Ocean.*

*Congress enacted OCSLA to establish a statutory framework to govern the exploration and extraction of oil and gas on the outer continental shelf lands. In section 12(a) of OCSLA, Congress delegated to the president the authority to “from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”*

*But on April 28, 2017, President Donald J. Trump issued Executive Order No. 13795 to implement his vision of an “America-First Offshore Energy Strategy.” The order purports to rescind President Obama’s OCSLA withdrawals. Drilling advocates claim that President Trump can lawfully do so. Environmental groups maintain that he cannot.*

*This Article explores this critical issue by examining the text*

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of OCSLA, unearthing its legislative history, and applying bedrock legal principles such as the separation of powers doctrine. First, the plain language of OCSLA does not provide textual support for a future president to revoke a prior withdrawal. Second, the legislative history demonstrates that Congress was acutely aware of the environmental consequences of mineral development on the shelf. It modeled OCSLA's executive withdrawal provision after the withdrawal provisions it had already created for non-submerged lands. For these "uplands" Congress granted the executive branch the power to remove lands, but restricted the president's authority to restore such lands into disposition. Congress intended a similar limitation in section 12(a).

Finally, the separation of powers doctrine buttresses the conclusion that a subsequent president cannot revoke a previous withdrawal made under OCSLA section 12(a). A conclusion that a president has implied authority to restore federal lands would effectively allow the executive branch to re-write the statute in violation of the doctrine.

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## INTRODUCTION

The outer continental shelf of the United States is comprised of the submerged lands under exclusively federal control.<sup>1</sup> These lands are located beyond the limit of the U.S. territorial waters, which typically extend seaward for three nautical miles from the low tide line to the 200-mile “exclusive economic zones” (EEZs) of the United States.<sup>2</sup> Thus, within the 200-mile EEZ of the United States, the 197 seaward natural miles are under federal jurisdiction as outer continental shelf lands.

In 1953, Congress enacted OCSLA to establish a statutory framework to govern the exploration and development of oil and gas on the outer continental shelf lands.<sup>3</sup> The statute establishes a “comprehensive leasing process for certain [outer continental shelf] mineral resources and a system for collecting and distributing royalties from the sale of these federal mineral resources.”<sup>4</sup> In OCSLA section 12(a), Congress also delegated to the president the authority to “from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”<sup>5</sup>

On December 20, 2016, President Barack Obama invoked his power under section 12(a) of OCSLA to withdraw approximately 119 million acres of unleased submerged land on the outer continental shelf to “prevent[] consideration of this area for any

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<sup>1</sup> See Kenneth W. Swenson, *A Stitch in Time: The Continental Shelf, Environmental Ethics, and Federalism*, 60 S. CAL. L. REV. 851, 852 (1987).

<sup>2</sup> *Id.* at 854–55. International custom established the three-mile limit for territorial waters; it was said that “a nation could claim sovereignty over all the territory it could successfully defend.” *Id.* at 851 n.4. Because “the largest landbased cannons of the era—the 17th to 19th centuries—could fire to a distance of roughly three nautical miles . . . nations agreed to honor the sovereignty of coastal nations over a three nautical mile extension from the shore.” *Id.* (citing PHILIP C. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 5–7 (1927)).

<sup>3</sup> See Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (2012); ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 3–4 (2014).

<sup>4</sup> ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 3–4 (2014) (citing 43 U.S.C. §§ 1311(a), 1332, 1333(a)(1)). OCSLA defines minerals to include “oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from ‘public lands’ as defined in section 1702 of this title.” 43 U.S.C. § 1331(q).

<sup>5</sup> 43 U.S.C. § 1341(a).

future mineral leasing for purposes of exploration, development, or production.”<sup>6</sup> Environmental advocates hailed this “11th-hour offshore drilling ban” as a significant victory to protect the fragile ecosystems of the Chukchi Sea and parts of the Beaufort Sea in the Arctic, as well as the ecosystems of certain canyons along the edge of the continental shelf in the Atlantic Ocean.<sup>7</sup>

When President Obama issued his OCSLA withdrawals, drilling advocates asserted that OCSLA section 12(a) allows a later president, such as President Trump, to rescind a withdrawal of outer continental shelf lands made by a prior administration.<sup>8</sup> Environmental advocates assert otherwise.<sup>9</sup> But, stepping back, why should we be concerned whether a subsequent president can “trump” a previous president’s withdrawal of outer shelf lands from oil and gas leasing?

The short answer is rooted in the tremendous importance that the outer continental shelf has in terms of both its environmental importance and its potential for oil and gas development.<sup>10</sup> Governmental reports estimate that the outer continental shelf “ranked fourth in crude oil reserves and second in natural gas reserves among the producing areas” and “[i]ts crude oil reserves of 2,620 million barrels were 11 percent of United States total reserves, and its natural gas reserves of 29,448 billion cubic feet

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<sup>6</sup> *Id.*; see also Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016); Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016).

<sup>7</sup> See, e.g., Keith Goldberg, *Obama’s 11th-hour Offshore Drilling Ban May Be Hard to Sink*, LAW 360 (Dec. 21, 2016), <https://www.law360.com/articles/875398/obama-s-11th-hour-offshore-drilling-ban-may-be-hard-to-sink>.

<sup>8</sup> See, e.g., Andrew Follet, *Obama’s Last-Minute Offshore Drilling Ban Could Be Illegal*, THE DAILY CALLER (Dec. 22, 2016, 9:30 AM), <http://dailycaller.com/2016/12/22/obamas-last-minute-offshore-drilling-ban-could-be-illegal/>; Reid Porter, *API: America Needs Forward-Looking Offshore Energy Plan*, AM. PETROLEUM INST. (Dec. 20, 2016), <http://www.api.org/news-policy-and-issues/news/2016/12/20/america-needs-forward-looking-offshore-e>.

<sup>9</sup> See Goldberg, *supra* note 7; Pat Parenteau, *Will Obama’s Offshore Drilling Ban be Trumped?*, THE CONVERSATION (Jan. 2, 2017, 8:54 PM), <http://theconversation.com/will-obamas-offshore-drilling-ban-be-trumped-70125>.

<sup>10</sup> See Barry Hart Dubner, *Problem on the United States Continental Shelf—Measuring the Environmental “Effectiveness” of the Outer Continental Shelf Act (OCSA)*, 34 NAT. RESOURCES J. 519, 520 (1994).

were 18 percent of total United States dry natural gas reserves.”<sup>11</sup>

But accompanying the potential development of these oil and gas reserves come a hefty environmental price tag. For instance, these areas can hold “important, irreplaceable values . . . for marine mammals, other wildlife, wildlife habitat, [and] scientific research” and “the vulnerability of these ecosystems to an oil spill” is significant.<sup>12</sup>

Inherent in normal drilling operations are environmental impacts such as “air and water degradation, oil spills, seabed disturbances, and harm to marine life.”<sup>13</sup> Oil and gas exploration and production can therefore negatively affect the shelf’s resources, including commercial fisheries that depend on the shelf.<sup>14</sup> Moreover, “it is universally agreed that the available technology for spill containment is incapable of containing a spill in unfavorable weather conditions,” even when employing the most rigorous protocols after a spill.<sup>15</sup> As a result, should an oil spill occur, the “consequences for wildlife and scenery can be devastating.”<sup>16</sup>

It is therefore unsurprising that past presidents, such as President Obama, have exerted their executive authority to protect portions of the outer continental shelf from mineral development. But with the accession of Donald Trump to the presidency, the energy policy of the United States shifted. On March 28, 2017, President Trump issued an Executive order declaring that “[i]t is in the national interest to promote clean and safe development of our Nation’s vast energy resources” and that existing regulations that “unduly burden the development of domestic energy resources” should be suspended, revised, or rescinded.<sup>17</sup> On April 28, 2017,

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<sup>11</sup> *Id.* at 521 (citing U.S. Dep’t of Energy, *U.S. Crude Oil, Natural Gas, and Natural Gas Liquid Reserves*, 1991 ANN. REP. 22 (1992)).

<sup>12</sup> Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016).

<sup>13</sup> CURRY L. HAGERTY, CONG. RESEARCH SERV., R41132, OUTER CONTINENTAL SHELF MORATORIA ON OIL AND GAS DEVELOPMENT 4 (2011).

<sup>14</sup> *See generally* FISHERIES AND OIL DEVELOPMENT ON THE CONTINENTAL SHELF, (Colleen S. Benner & Robert W. Middleton eds. 1991).

<sup>15</sup> Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L.75, 89(1992).

<sup>16</sup> *Id.*

<sup>17</sup> Exec. Order No. 13,783, 82 Fed. Reg. 16,903 (Mar. 28, 2017).

President Donald J. Trump followed up by issuing Executive Order No. 13795 to implement his vision of an “America-First Offshore Energy Strategy.” The order purports to rescind President Obama’s OCSLA withdrawals. Environmental groups have already filed a lawsuit challenging President Trump’s action.<sup>18</sup> Thus, the question as to whether a future president can lawfully rescind a prior withdrawal is no longer academic.

This Article explores whether OCSLA section 12(a) allows a subsequent president to “un-shelf” lands set aside by a previous president. In Part I, the Article provides a background on the outer continental shelf, the statutory structure of OCSLA, and the history of previous executive withdrawals under OCSLA section 12(a). Next, Part II analyzes section 12(a) of OCSLA and concludes that a subsequent president lacks authority to rescind a prior president’s withdrawal under OCSLA section 12(a).

Like in any question of statutory interpretation, the goal is to discern congressional intent. Here, the question is whether Congress, when it enacted OCSLA section 12(a) in 1953, intended the president to have the authority to restore previously withdrawn unleased lands. This Part therefore employs traditional tools of statutory construction, such as analyzing the plain language of OCSLA, exploring the congressional intent of the provision in the context of the overall Act and broader statutory scheme involving federal lands, as well as applying long-standing legal principles like the separation of powers doctrine.

Turning first to the plain language of OCSLA, a textual reading does not support the proposition that a future president can restore previously withdrawn unleased lands. The text of OCSLA section 12(a) simply grants the power that “[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf”—missing from the section is statutory authorization for a president to “un-withdraw” lands.<sup>19</sup> This alone is strong—if not conclusive—evidence that Congress did not intend a future president to have the authority to rescind prior withdrawals.

Second, Congress’s intent when it enacted section 12(a) further reinforces the plain language interpretation of section

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<sup>18</sup> See Complaint, League of Conservation Voters et al. v. Trump et al., No. 3:17-cv-00101, 2017 WL 1736693 (D. Alaska May 3, 2017).

<sup>19</sup> 43 U.S.C. § 1341(a).

12(a). When viewed in context with other existing statutes governing federal land management, Congress did not intend to grant the president “restoration” authority in OCSLA section 12(a). Congress sought to create a parallel statutory scheme for the executive withdrawal of submerged lands as it had already created for terrestrial lands. In several statutes governing such “uplands” Congress knew how to expressly grant the president authority to rescind withdrawals or reservations of land, yet it did not do so in OCSLA.

Long-standing legal principles and canons of statutory construction buttress the conclusion that OCSLA section 12(a) does not provide the president authority to rescind a prior withdrawal. Past Attorneys General have uniformly opined that, absent express statutory authority, a conclusion that a president has implied authority to restore federal lands would violate the separations of powers doctrine because the executive branch would be in essence re-writing Congress’s statute. In other words, presidential actions that are rooted in powers delegated by Congress carry the force of law and those executive actions can only be subsequently undone by Congress.<sup>20</sup> The Article concludes that, once a president withdraws outer continental shelf lands under OCSLA section 12(a), Congress – not a subsequent president – must “un-shelf” such lands.

## I. THE SHELF EXPLAINED

This Section briefly explains what lands constitute the continental shelf and provides a brief overview of federal authority over the *outer* continental shelf lands. Next, it introduces OCSLA and discusses the executive withdrawal provision in OCSLA section 12(a). Finally, this Section concludes by summarizing previous presidential withdrawals under OCSLA section 12(a), including President Obama’s December 20, 2016 actions withdrawing approximately 120 million acres of unleased outer continental shelf lands from future oil and gas exploration and drilling, as well as President Trump’s April 28, 2017 action to rescind President Obama’s withdrawals. This discussion sets the stage for an analysis in Section II of whether a subsequent president, such as President Trump, can lawfully “un-shelf” lands under OCSLA section 12(a).

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<sup>20</sup> See Part.II.B.2.

### A. *The Outer Continental Shelf*

The continental shelf “is the seaward extension of the continental land mass” and is part of the continental margin, which demarcates the border between the ocean’s crust and the continental crust.<sup>21</sup> Naturally, the size of the shelf in any given location varies; it can extend seaward from one mile to upwards of 800 miles.<sup>22</sup> Scientists estimate that the area of the continental the fifty U.S. states is approximately 760,100 square nautical miles.<sup>23</sup> To place the total area of these submerged lands into context, the size of the U.S. continental shelf is close to the “area embraced in the Louisiana purchase [sic], which was 827,000 square miles, and almost as large as the original 13 colonies.”<sup>24</sup>

Authority over the continental shelf is governed by international law; under customary international law principles, as well as the Law of the Sea treaty, nations may assert control over a 200-mile “exclusive economic zone.”<sup>25</sup> By a proclamation issued in 1984, the United States carved out its 200-mile EEZ, which thereby gives the United States the sovereign right to explore, manage, conserve and exploit the natural resources within its zone

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<sup>21</sup> Swenson, *supra* note 1, at 854–55 (“Moving from the shore seaward, the continental margin consists of the shelf, the continental slope, and the continental rise. At that point begins the actual ocean floor—the abyssal plain.”). The “outer continental shelf” is defined in OCSLA as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.” 43 U.S.C. § 1331(a).

<sup>22</sup> See Dubner, *supra* note 10, at 520. Under the United Nations Conventions on the Law of the Sea, a “nation’s continental shelf [in general] cannot extend beyond 350 nautical miles from its recognized coastline regardless of submarine geology.” ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 1 (2014).

<sup>23</sup> See Swenson, *supra* note 1, at 854 n.15 (citing NOSSAMAN ET AL., STUDY OF OUTER CONTINENTAL SHELF LAND OF THE U.S. 353 (1968)). If the South Pacific islands that are under United States jurisdiction are included, the area would balloon to approximately 2.3 million square nautical miles (or 1.7 billion acres). *Id.* at 854 (citing L.M. Alexander & L.C. Hanson, *Regionalizing the U.S. EEZ*, 27 OCEANUS 7, 8 (1984–85); R.W. Knecht & T.R. Kitsos, *Multiple-Use Management in the EEZ*, 27 OCEANUS 13 (1984–85)).

<sup>24</sup> Dubner, *supra* note 10, at 520–21 (quoting *Annual Report of the Secretary of the Interior*, Fiscal Year ended 30 June 1945, 4 Whiteman Digest 760).

<sup>25</sup> Kenneth W. Swenson, *A Stitch in Time: the Continental Shelf, Environmental Ethics, and Federalism*, 60 S. CAL. L. REV. 851, 851 (1987) (citing United Nations Convention on the Law of the Sea art. 56(1)(a), Dec. 10, 1982, 1833 U.N.T.S. 397).



on the continental shelf.<sup>26</sup>

In turn, the U.S. continental shelf lands are further divided into areas of state and federal control. The *outer* continental shelf lands of the United States are the submerged lands under exclusively federal control.<sup>27</sup> These lands are located *beyond* the limit of the U.S. territorial waters, which typically extend seaward for three nautical miles from the low tide line.<sup>28</sup> Thus, within the 200-mile EEZ, the 197 seaward natural miles are under federal jurisdiction as outer continental shelf lands.

There is little doubt that a prime motivation for the United States to assert its authority over the outer continental shelf lands is because of the significant mineral resources found there.<sup>29</sup> One governmental report estimated that the outer continental shelf “ranked fourth in crude oil reserves and second in natural gas reserves among the producing areas” and “[i]ts crude oil reserves of 2,620 million barrels were 11 percent of United States total reserves, and its natural gas reserves of 29,448 billion cubic feet were 18 percent of total United States dry natural gas reserves.”<sup>30</sup>

But along with these oil and gas reserves comes an environmental price tag. For instance, these areas can hold “important, irreplaceable” ecological resources and “the vulnerability of these ecosystems to an oil spill” is significant.<sup>31</sup> For instance, the outer continental shelf extending from Alaska’s Chukchi and Beaufort Seas provides invaluable wildlife habitat for marine mammals and other wildlife, as well as Alaska Native subsistence use.<sup>32</sup> Likewise, the outer continental shelf in parts of the Atlantic Ocean is home to canyons that support deep water corals, marine mammals and other wildlife, upon which commercial fisheries depend.<sup>33</sup>

Setting aside the disastrous effects from a significant oil spill,

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<sup>26</sup> See Swenson, *supra* note 1, at 851 (citing Proclamation No. 5030, 3 C.F.R. § 22 (1984)).

<sup>27</sup> See *id.* at 852.

<sup>28</sup> See *id.* at 854–55.

<sup>29</sup> See Dubner, *supra* note 10, at 520.

<sup>30</sup> *Id.* at 521 (citing U.S. Dep’t of Energy, *U.S. Crude Oil, Natural Gas, and Natural Gas Liquid Reserves*, 1991 ANN. REP. 22 (1992)).

<sup>31</sup> Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016).

<sup>32</sup> See *id.*

<sup>33</sup> *Id.*

the mere exploration and subsequent production of oil or gas from the shelf raises a host of environmental concerns. In “unproven” oil producing areas, exploration wells are drilled, which “involves a large operation and requires numerous personnel and on-shore support facilities.”<sup>34</sup> Once oil or gas is found, fixed platforms or anchored drilling vessels are constructed to support additional wells and related production facilities.<sup>35</sup> The extracted oil or gas is then transferred via pipeline or boat to shore.<sup>36</sup> In situations where the oil or gas is not transported to an existing processing facility elsewhere, onshore transmission (or processing) facilities are required.<sup>37</sup>

While the full range and extent of environmental impacts vary for each project, most projects exhibit certain common effects. For instance, oil and gas rigs can disrupt, and in some cases destroy, bottom-dwelling marine communities, and the construction of pipelines, if necessary, “often cross fragile coastal zone areas.”<sup>38</sup> Drilling operations also require a significant quantity of fluids to lubricate and keep the drill bits from overheating.<sup>39</sup> These lubricants can contain chemicals and toxic additives, which if discharged, have the potential to pollute the receiving water.<sup>40</sup>

Although these impacts are significant on their own, the “real hobgoblin” of oil development on the outer continental shelf is very real possibility of an oil spill.<sup>41</sup> “[I]t is universally agreed that the available technology for spill containment is incapable of containing a spill in unfavorable weather conditions.”<sup>42</sup> Thus, even employing the most rigorous protocols after a spill might not avoid significant environmental damage. It is therefore not hyperbole to assert that an oil spill’s “consequences for wildlife and scenery can

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<sup>34</sup> Dubner, *supra* note 10, at 524 (citing Wiygul, *supra* note 15, at 86).

<sup>35</sup> See Wiygul, *supra* note 15, at 86.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> *Id.* at 86–87.

<sup>39</sup> See *id.* at 87 n.46 (stating that “drilling fluid discharges may range from 3,000 to 6,000 barrels per well drilled”) (citing NAT’L RES. COUNCIL, DRILLING DISCHARGES IN THE MARINE ENVIRONMENT 15 (1983)).

<sup>40</sup> See *id.* at 87. Although some studies suggest that no long-term effects have been observed from discharge of drilling fluids, comprehensive studies of highly developed OCS areas, such as in the Gulf of Mexico, have not been undertaken. *Id.* at 88.

<sup>41</sup> *Id.* at 89 (calling oil spills “unpredictable” and “ugly”).

<sup>42</sup> *Id.*

be devastating.”<sup>43</sup>

B. *The Outer Continental Shelf Lands Act (OCSLA)*

In 1953, Congress enacted OCSLA to establish a statutory framework to govern the exploration and development of oil and gas on the outer continental shelf lands.<sup>44</sup> Congress found that the outer continental shelf is “a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.”<sup>45</sup>

But Congress was cognizant of the environmental impacts from opening the outer continental shelf to drilling. It found that “exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the United States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments,” it sought to protect “affected areas from any temporary or permanent adverse effects of such impacts.”<sup>46</sup>

To achieve these ends, OCSLA vests the Secretary of Interior with the responsibility to manage drilling and leasing activities on the outer continental shelf.<sup>47</sup> Thus, the statute establishes a

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<sup>43</sup> *Id.*

<sup>44</sup> See 43 U.S.C. §§ 1331–1356; see also ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 3–4 (2014). Congress declared that “the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.” 43 U.S.C. § 1332(1). OCSLA was enacted in the same year as the Submerged Lands Act, which vested authority, with limited exceptions, to the respective coastal state of the first three miles of submerged coastal lands. See Robin Kundis Craig, *Treating Offshore Submerged Lands as Public Lands: A Historical Perspective*, 34 PUB. LAND & RESOURCES L. REV. 51, 70 (2013) (“(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . .” (quoting 43 U.S.C. § 1311(a) (2006))).

<sup>45</sup> 43 U.S.C. § 1332(3); ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 4, 3 (2014).

<sup>46</sup> 43 U.S.C. § 1332(4).

<sup>47</sup> See HAGERTY, *supra* note 13, at 10.

“comprehensive leasing process for certain [outer continental shelf] mineral resources and a system for collecting and distributing royalties from the sale of these federal mineral resources.”<sup>48</sup>

Although Congress established a strong national policy and a detailed statutory framework for the Secretary of the Interior to follow to manage the extraction of resources from the outer continental shelf, it also actively controlled development activity on the shelf.<sup>49</sup> Through other statutes and treaties, Congress has limited “leasing, exploring for, developing, [and] producing oil and gas” from the outer continental shelf.<sup>50</sup> For instance, Congress enacted the National Marine Sanctuaries Act, which can be used to restrict the development of portions of the outer continental shelf,<sup>51</sup> as well as legislation that prohibits areas within the Gulf of Mexico from oil and gas leasing in order to fulfill treaty obligations with Mexico.<sup>52</sup>

### C. *Pre-Obama Presidential Withdrawals under OCSLA*

Another significant source of authority that Congress employed to restrict outer continental shelf development is housed with the president. Under section 12(a) of OCSLA, Congress delegated to the president the authority to, “from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”<sup>53</sup> Presidents for the past fifty-five years have

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<sup>48</sup> ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 4 (2014)

(citing 43 U.S.C. §§ 1331(a), 1332, 1333(a)(1)). OCSLA defines minerals to include “oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from ‘public lands’ as defined in section 1702 of this title.” 43 U.S.C. § 1331(q).

<sup>49</sup> See HAGERTY, *supra* note 13, at 5–6 (discussing sources of moratoria policy and compiling a chronology of annual congressional moratoria enacted in Department of Interior appropriations).

<sup>50</sup> *Id.* at 5.

<sup>51</sup> See National Marine Sanctuaries Act, 16 U.S.C. §§ 1431–1445 (2000); See Hagerty, *supra* note 13, at 5, 9.

<sup>52</sup> See Hagerty, *supra* note 13, at 7 (explaining treaty obligation in Gulf of Mexico Energy Security Act of 2006). For an existing lease in the moratoria areas, GOMESA provided for a “bonus or royalty credit” in exchange for such lease. *Id.* (citing Bonus or Royalty Credits for Relinquishing Certain Leases Offshore, 73 Fed. Reg. 52,917 (Sept. 12, 2008)).

<sup>53</sup> 43 U.S.C. § 1341(a).

invoked section 12(a) to withdraw submerged lands. And all OCSLA executive withdrawals have been aimed to protect outer continental shelf lands for environmental reasons.

For example, in a proclamation issued on March 15, 1960, President Dwight D. Eisenhower established the Key Largo Coral Reef Preserve in Florida by withdrawing from disposition specified outer continental shelf lands in the area.<sup>54</sup> The proclamation found that “this unique coral formation and its associated marine life are of great scientific interest and value,” was “being subjected to commercial exploitation and [was] in danger of destruction.”<sup>55</sup> President Eisenhower declared that he acted under authority vested under the Constitution and the statutes of the United States, “particularly section 12(a)” of OCSLA.<sup>56</sup> The proclamation specified the precise area that was being withdrawn and President Eisenhower “call[ed] upon all persons to join in the effort to protect and preserve this natural wonder for the benefit of future generations.”<sup>57</sup> Accordingly, the proclamation did not specify an expiration date for the withdrawal and thus is permanent.

In 1969, President Nixon established the Santa Barbara Channel Ecological Preserve by withdrawing “from all form of disposition, including mineral leasing” and reserving the specified outer continental shelf lands “for use for scientific, recreational, and other similar uses as an ecological preserve.”<sup>58</sup> Similar to President Eisenhower’s proclamation, the order called upon users of the area, especially “those engaged in commercial and sport fishing” to act “in a manner which will help to protect and preserve the values of this area for scientific study, recreation, and other similar use or the benefit and enjoyment of this and future

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<sup>54</sup> See Proclamation No. 3339, 25 Fed. Reg. 2,352 (Mar. 15, 1960).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* Because “a portion of this reef lies inside the three-mile limit in the area relinquished to the State of Florida by the United States through the Submerged Lands Act,” the president likely cited his general constitutional authority over non-continental shelf lands, as well as OCSLA section 12(a). *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Outer Continental Shelf Off California: Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5,655–56 (Mar. 26, 1969) (Public Land Order 4587), the order was issued by President Nixon’s Secretary of the Interior, Walter J. Hickel. *Id.* at 5,651. Additional outer continental shelf lands were “withheld from leasing as an adjunct to the Ecological Preserve.” *Id.* at 5,656.

generations.”<sup>59</sup>

It was approximately twenty years before a president issued another withdrawal.<sup>60</sup> Like the past presidential OCSLA actions, the withdrawal was executed due to environmental concerns regarding mineral development on the shelf. On June 26, 1990, President George H.W. Bush issued a Statement on Outer Continental Shelf Oil and Gas Development under OCSLA section 12(a).<sup>61</sup> He expressed “[his] belief that development of oil and gas on the outer continental shelf (OCS) should occur in an environmentally sound manner.”<sup>62</sup> President Bush based his actions in an effort “to achieve a balance between the need to provide energy for the American people and the need to protect unique and sensitive coastal and marine environments.”<sup>63</sup>

The areas withdrawn under his action overlapped with an existing moratorium previously issued by Congress that “prohibited ‘leasing and related activities’ in the areas off the coast of California, Oregon, and Washington, and the North Atlantic and certain portions of the eastern Gulf of Mexico.”<sup>64</sup> But unlike previous withdrawals under OCSLA section 12(a) by Presidents Eisenhower and Nixon, some of the withdrawals made by President Bush in his 1990 action were for a finite period of time so as to “allow time for additional studies to determine the resource potential of the area and address the environmental and scientific concerns which [had] been raised.”<sup>65</sup> President Bush later

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<sup>59</sup> Outer Continental Shelf Off California: Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5,655–56 (Mar. 26, 1969) (Public Land Order 4587) (there was no expiration date specified in the Public Land Order).

<sup>60</sup> See ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 4 (2014).

<sup>61</sup> See *id.*; Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869–71 (June 26, 1990).

<sup>62</sup> Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869 (June 26, 1990); *Id.* at 869 (directing that “further leasing and development activity be deferred until a series of environmental studies are complete”).

<sup>63</sup> *Id.* at 870.

<sup>64</sup> ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 4 (2014); Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869–71 (June 26, 1990).

<sup>65</sup> Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869–71 (June 26, 1990) (explaining that the withdrawals for portions of the outer continental shelf in Florida, California, Washington and Oregon were

clarified in 1992 that his June 26, 1990 withdrawal was “subject to revocation should the President determine the scheduling of a lease sale to be required in the interest of national security.”<sup>66</sup>

The “combined effect of [President Bush’s withdrawals] is that the coast of southwest Florida and more than 99 percent of the California coast will be off limits to oil and gas leasing and development until after the year 2000.”<sup>67</sup> And the remaining 1 percent were removed from disposition until 1996 “and then only if the further studies” that he also mandated “satisfactorily address concerns related to these tracts.”<sup>68</sup> In addition to the moratoria established by his executive action, President Bush also approved a related “proposal that would establish a National Marine Sanctuary in California’s Monterey Bay and provide for a permanent ban on oil and gas development in the sanctuary.”<sup>69</sup>

In a June 12, 1998 memorandum, President William J. Clinton extended by 10 years the moratoria over the much of the outer continental shelf lands covered by President Bush’s 1990 withdrawal, which had already been further extended until 2002 by a Department of Interior leasing plan.<sup>70</sup> President Clinton also expanded President Bush’s permanent ban on oil and gas development in the National Marine Sanctuary in California’s Monterey Bay to include all marine sanctuaries by withdrawing from “disposition by leasing for a time period without specific expiration those areas of the Outer Continental Shelf currently designated Marine Sanctuaries under the Marine Protection,

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until 2000, while parts of the California withdrawal area were withdrawn from oil and gas development permanently as part of the establishment of the National Marine Sanctuary in Monterey Bay).

<sup>66</sup> Statement on Outer Continental Shelf Oil and Gas Program for 1992–1997 (Aug. 4, 1992).

<sup>67</sup> Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869 (June 26, 1990) (withdrawing until after 2000 “Sale Area 116, Part II, off the coast of Florida; Sale Area 91, off the coast of northern California; Sale Area 119, off the coast of central California; and the vast majority of Sale Area 95, off the coast of southern California.”).

<sup>68</sup> *Id.* The remaining areas were concentrated in the Santa Maria Basin and the Santa Barbara Channel. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 1 PUB. PAPERS 945 (June 12, 1998) (extending “through Jun. 30, 2012, those areas of the Outer Continental Shelf currently under moratoria pursuant to sections 108–111 of Pub. Law. 105–83.”); Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869–71 (June 26, 1990) (explaining scope of extension).

Research, and Sanctuaries Act of 1972.”<sup>71</sup>

In a separate statement, President Clinton explained that he was taking action to withdraw such lands “because of [the area’s] unique and sensitive ocean resources,” and that “the marine sanctuaries should be permanently protected from new leasing.”<sup>72</sup> With respect to the extension of President Bush’s 1990 moratoria, President Clinton stated that he was doing so “[t]o protect our oceans and coasts from the environmental risks of offshore oil and gas drilling.”<sup>73</sup>

In his memorandum, President Clinton also asserted that these withdrawals to be “subject to revocation by the President in the interest of national security.”<sup>74</sup> This was consistent with President Bush’s OCSLA withdrawals of June 26, 1990, which imposed a temporal limit by year on the withdrawal (i.e., 2000 and 1996), as well as a national security exception.<sup>75</sup>

On January 9, 2007, President George W. Bush issued a memorandum withdrawing certain outer continental shelf lands in order to be consistent with a moratorium recently made by Congress.<sup>76</sup> Although it was not necessary, he also purported to restore certain outer continental shelf lands in the “portion of the Central Gulf of Mexico planning area,” as defined in the Gulf of

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<sup>71</sup> Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 1 PUB. PAPERS 945 (June 12, 1998); 16 U.S.C. §§ 1431–1434 (2000), 33 U.S.C. §§ 1401–1445 (1974); Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869 (June 26, 1990).

<sup>72</sup> OFFICE OF THE PRESS SECRETARY, PROTECTING OUR OCEANS FROM OFFSHORE OIL DRILLING (1998).

<sup>73</sup> *Id.*

<sup>74</sup> Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 1 PUB. PAPERS 945 (June 12, 1998).

<sup>75</sup> *See id.*; Statement on Outer Continental Shelf Oil and Gas Development, 1 PUB. PAPERS 869–71 (June 26, 1990) (discussing time limits on withdrawals); Statement on Outer Continental Shelf Oil and Gas Program for 1992–1997, (Aug. 4, 1992) (stating that his June 26, 1990 withdrawal was “subject to revocation should the President determine the scheduling of a lease sale to be required in the interest of national security.”).

<sup>76</sup> *See* Memorandum on Modification of the June 12, 1998, Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 1 PUB. PAPERS 15–16 (Jan. 9, 2007) (withdrawing “from disposition by leasing through June 30, 2012, (1) those areas under moratoria pursuant to sections 104 and 106 of Public Law 109-54, and (2) those areas under moratoria pursuant to section 105 of Public Law 109-54” with some exceptions for certain lands specified in Public Law 109-432).



Mexico Energy Security Act of 2006, which were required to be open for leasing as a result of treaty obligations.<sup>77</sup>

Later, on July 14, 2008, President Bush issued a memorandum which also purported to alter the previous memoranda by Presidents H.W. Bush and Clinton, as well as his own memorandum of January 9, 2007.<sup>78</sup> Although at first blush this memorandum appears to restore outer continental shelf lands that had been previously withdrawn, the memorandum merely “lift[ed] [executive] constraints that generally matched the annual congressional moratoria.”<sup>79</sup> In other words, President Bush’s memorandum did not actually restore any outer continental lands for leasing because those lands were statutorily withdrawn and his memorandum did not change that.

Contemporaneous remarks by President Bush suggest that his July 14, 2008 memorandum was symbolic in order to prompt Congress, in his words, “to lift this legislative ban and allow the exploration and development of offshore oil resources.” Thus, as a result of the July 14, 2008 memorandum, “the only thing standing between the American people and these vast oil resources [would be] action from the U.S. Congress.”<sup>80</sup>

President Bush’s memorandum also expanded the scope of President Clinton’s 1998 withdrawal with respect to marine sanctuaries by establishing a permanent ban (i.e., “for a time period without specific expiration”) by eliminating the national

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<sup>77</sup> *Id.* (withdrawing certain outer continental lands “excluding that portion of the Central Gulf of Mexico planning area defined as the ‘181 South Area’ in section 102(2) of title I (“Gulf of Mexico Energy Security”) in Division C of Public Law 109-432, the Tax Relief and Health Care Act of 2006”); *see also* ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 5 (2014) (discussing Gulf of Mexico Energy Security Act of 2006). President Bush did not have to modify or rescind prior memoranda to the extent that the lands were required to be available to leasing under the Gulf of Mexico Energy Security Act of 2006, since enactment of that provision voided the executive withdrawal as to those lands. *Id.*

<sup>78</sup> *See* Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 2 PUB. PAPERS 1015 (July 14, 2008).

<sup>79</sup> HAGERTY, *supra* note 13, at 7.

<sup>80</sup> Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 2 PUB. PAPERS 1015 (July 14, 2008); Remarks on Energy, 2 PUB. PAPERS 1014 (May 24, 1999). Because Congress is the source of the executive authority to withdraw, when Congress lifts a moratorium, any executive withdrawal that applied to those lands would be rescinded by operation of law. *See infra* note 154.

security exception found in the Clinton memorandum.<sup>81</sup>

D. *President Obama's OCSLA Section 12(a) Withdrawals*

President Obama was the most active president to invoke his withdrawal authority under OCSLA section 12(a). On March 31, 2010, he withdrew “from disposition by leasing through June 30, 2017, the Bristol Bay area of the North Aleutian Basin in Alaska.”<sup>82</sup> The memorandum made clear that the “withdrawal prevents consideration of Bristol Bay for leasing for any oil or gas development in the Outer Continental Shelf, whether for exploratory or production purposes.”<sup>83</sup>

Approximately four years later, President Obama, in a subsequent withdrawal memorandum issued on December 16, 2014, expanded his March 31, 2010 withdrawal in the Bristol Bay area in terms of both geographical and temporal scope.<sup>84</sup> To support his withdrawal, he cited to the “importance of Bristol Bay and the North Aleutian Basin Planning Area to subsistence use by Alaska Natives, wildlife, wildlife habitat, and sustainable commercial and recreational fisheries,” and sought “to ensure that the unique resources of Bristol Bay remain available for future generations.”<sup>85</sup> The memorandum indefinitely withdrew from disposition by leasing the area of the outer continental shelf currently in the North Aleutian Basin Planning Area, including Bristol Bay, Alaska.<sup>86</sup>

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<sup>81</sup> Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 2 PUB. PAPERS 1015 (July 14, 2008) (the withdrawal covered “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, 16 U.S.C. 1431–1434, 33 U.S.C. 1401 *et seq.*”).

<sup>82</sup> Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 1 PUB. PAPERS 434–35 (Mar. 31, 2010). Unlike past presidents, President Obama relied exclusively on OCSLA. *Id.* (invoking “the authority granted [] in section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a) . . .”).

<sup>83</sup> *Id.* (unlike past presidents who cited inherent general authority under either the laws of the United States or under the U.S. Constitution, President Obama relied exclusively on OCSLA section 12(a)).

<sup>84</sup> See Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 2014 DAILY COMP. PRES. DOCS. 1 (Dec. 16, 2014).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

The following year, President Obama indefinitely withdrew from disposition by leasing areas of the outer continental shelf designated “as leasing deferral areas within the Chukchi Sea Planning Area and the Beaufort Sea Planning Area in the 5-year oil and gas leasing program for 2012-2017” and also “the Hanna Shoal region of the Chukchi Sea Planning Area lying within the contours of the 40-meter isobath.”<sup>87</sup> In his presidential memorandum of January 27, 2015, President Obama supported the withdrawal by citing “the critical importance of certain areas within the Beaufort and Chukchi Seas to subsistence use by Alaska Natives as well as for marine mammals, other wildlife, and wildlife habitat,” and sought to “ensure that the unique resources of these areas remain available for future generations.”<sup>88</sup>

Less than a year later, on December 9, 2016, President Obama issued another OCSLA section 12(a) withdrawal as part of an Executive order addressing “Northern Bering Sea Climate Resilience.”<sup>89</sup> The order found that “Arctic environmental stewardship is in the national interest” and re-articulated that “the United States has resolved to confront the challenges of a changing Arctic.”<sup>90</sup> Accordingly, it takes steps to advance commitments made by the United States in the U.S.–Canada Joint Statement on Climate, Energy, and Arctic Leadership issued on March 10, 2016, as well as in President Obama’s January 21, 2015 Executive Order on the issue.<sup>91</sup>

In section 3 of the order, President Obama cited OCSLA section 12(a) for his authority to withdraw “from disposition by leasing for a time period without specific expiration” outer continental shelf lands in “the Norton Basin Planning Area” and areas in the “St. Matthew-Hall Planning Area lying within 25 nautical miles of St. Lawrence Island.”<sup>92</sup> Like in his past OCSLA

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<sup>87</sup> Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition, 2015 DAILY COMP. PRES. DOC. 1 (Jan 27, 2015).

<sup>88</sup> *Id.*

<sup>89</sup> Exec. Order No. 13,754, 81 Fed. Reg. 90,669 (Dec. 9, 2016).

<sup>90</sup> *Id.* (pledging “to conserve Arctic biodiversity; support and engage Alaska Native tribes; incorporate traditional knowledge into decision making; and build a sustainable Arctic economy that relies on the highest safety and environmental standards, including adherence to national climate goals.”).

<sup>91</sup> See Exec. Order No. 13,689, 80 Fed. Reg. 4,191 (Jan. 21, 2015).

<sup>92</sup> Exec. Order No. 13,754, 81 Fed. Reg. 90,669 (Dec. 9, 2016) (detailing area and incorporating a map and table of the area as part of the order).

withdrawals, the action “prevents consideration of these areas for future oil or gas leasing for purposes of exploration, development, or production.”<sup>93</sup>

On December 20, 2016, President Obama issued his final two OCSLA section 12(a) withdrawals by removing from oil and gas leasing approximately 119 million acres of outer continental shelf lands in areas of the Arctic and Atlantic Ocean.<sup>94</sup> In his memorandum covering the Arctic area, President Obama expressed his concern for “the important, irreplaceable values of the Chukchi Sea and portions of the Beaufort Sea for marine mammals, other wildlife, wildlife habitat, scientific research, and Alaska Native subsistence use.”<sup>95</sup> He also identified “the vulnerability of these ecosystems to an oil spill” especially in light of the “unique logistical, operational, safety, and scientific challenges and risks of oil extraction and spill response in these Arctic waters.”<sup>96</sup> His withdrawal from disposition by leasing extends “for a time period without specific expiration,” thus it is in effect a permanent ban, which “prevents consideration of withdrawn areas for any mineral leasing for purposes of exploration, development, or production.”<sup>97</sup>

In his companion memorandum covering “26 major canyons and canyon complexes offshore the Atlantic coast,” President Obama recognized the “critical importance of canyons along the edge of the Atlantic continental shelf for marine mammals, deep water corals, other wildlife, and wildlife habitat.”<sup>98</sup> Similar to the

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<sup>93</sup> *Id.*; Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 2014 DAILY COMP. PRES. DOC. 1 (Dec. 16, 2014).

<sup>94</sup> *See* Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016); Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) (stating that the withdrawal “prevents consideration of withdrawn areas for any mineral leasing for purposes of exploration, development, or production.”).

<sup>95</sup> Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016).

Arctic memorandum, the Atlantic memorandum withdrawal was permanent in order “to ensure that the unique resources associated with these canyons remain available for future generations.”<sup>99</sup>

E. *President Trump’s Executive Order 13795 of April 28, 2017*

On March 28, 2017, President Trump issued an Executive order that declared that “[i]t is in the national interest to promote clean and safe development of our Nation’s vast energy resources” and that existing regulations that “unduly burden the development of domestic energy resources” should be suspended, revised, or rescinded.<sup>100</sup> On April 28, 2017, President Donald J. Trump followed up by issuing Executive Order No. 13795 to implement his vision of an “America-First Offshore Energy Strategy.”<sup>101</sup>

In E.O. 13795, President Trump declared that “energy and minerals produced from lands and waters under Federal management are important to a vibrant economy and to our national security.” Accordingly, the order establishes that “the policy of the United States [is] to encourage energy exploration and production, including on the Outer Continental Shelf.”<sup>102</sup> Section 5 of the order, titled “Modification of the Withdrawal of Areas of the Outer Continental Shelf from Leasing Disposition,” states that it modifies previous OCSLA withdrawals:

The body text in each of the memoranda of withdrawal from disposition by leasing of the United States Outer Continental Shelf issued on December 20, 2016, January 27, 2015, and July 14, 2008, is modified to read, in its entirety, as follows: “Under the authority vested in me as President of the United States, including section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing, for a time period without specific expiration, 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, 16 U.S.C. 1431–1434, 33 U.S.C. 1401 *et seq.*”<sup>103</sup>

The text of this section would appear to rescind both of President Obama’s December 20, 2016 OCSLA withdrawals, as well as his

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<sup>99</sup> *Id.*

<sup>100</sup> Exec. Order No. 13,783, 82 Fed. Reg. 16,903 (Mar. 28, 2017).

<sup>101</sup> Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 20,815–16.

January 27, 2015 withdrawals. Section 4 of President Trump's E.O., which is titled "Responsible Planning for Future Offshore Energy Potential," also states that "[t]o further streamline existing regulatory authorities, Executive Order 13754 of December 9, 2016 (Northern Bering Sea Climate Resilience), is hereby revoked."<sup>104</sup> Because Executive Order 13764, which was issued by President Obama, contained an OCSLA 12(a) withdrawal, President Trump's Executive Order would appear to rescind that withdrawal, as well.

The intent of President Trump's E.O. was therefore to return the outer continental shelf leasing inventory to the way it existed at the time President Bush issued his July 14, 2008 OCSLA withdrawals. Thus, it retained protection to OCS areas that were designated as national marine sanctuaries as of July 14, 2008, which was the same language used in President Bush's memorandum of that date.<sup>105</sup>

## II. UN-SHELFING LANDS

With this background explained, the next question is: does OCSLA section 12(a) allow a subsequent president to "un-shelf" outer continental shelf lands set aside by a previous president? This part seeks to answer this critical question and in doing so several key observations can be made.

First, as with any question of statutory interpretation, the goal is to discern congressional intent. Here, the question is whether Congress, when it enacted OCSLA section 12(a) in 1953, intended to vest the president with the authority to restore withdrawn lands to the leasing inventory. To answer this question, this part employs traditional tools of statutory construction, such as analyzing the plain language of the OCSLA, exploring the congressional intent

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<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 20,816; Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 2 PUB. PAPERS 1015 (July 14, 2008). The Secretary of Interior has already begun to implement Executive Order 13,795. In Order No. 3350, he ordered the Bureau of Ocean Energy Management (BOEM) to initiate a new five-year Outer Continental Shelf Oil and Gas Leasing Program to include the areas previously withdrawn under OCSLA. U.S. DEPT. OF INTERIOR, SEC'Y OF INTERIOR, ORDER NO. 3350, AMERICA-FIRST OFFSHORE ENERGY STRATEGY (2017). In addition, BOEM has published a Request for Information and Comments on the Preparation of the 2019-2025 National Outer Continental Shelf Oil and Gas Leasing Program in the Federal Register. 82 Fed. Reg. 30,886 (July 3, 2017).

of the provision in the context of the overall statutory schemes involving federal lands, and applying long-standing legal principles and canons of statutory construction.

Second, turning to the plain language of OCSLA, a textual reading does not support the proposition that a future president can revoke a prior executive withdrawal under OCSLA section 12(a). The text of section 12(a) simply states that “[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”<sup>106</sup> Missing from the section is statutory authorization for the president to “un-withdraw” lands that had been previously subject to an executive withdrawal. The absence of express authority is strong — if not conclusive — evidence that Congress did not intend to grant a future president the authority to rescind prior withdrawals.

Third, Congress’s intent in enacting section 12(a) when viewed in context with the OCSLA and other existing statutes governing federal land management further reinforces the plain language interpretation of section 12(a). Congress sought to create a parallel statutory scheme for the executive withdrawal of submerged lands as it had already created for terrestrial lands. Congress was acutely aware of the environmental consequences of mineral development on both terrestrial lands and on the continental shelf. Consequently, in striking the balance between competing uses of federal lands, Congress knew how to grant specific authority to a president to reverse or modify prior executive removals of lands. And it did not do so in OCSLA section 12(a).

Fourth, long-standing legal principles and canons of statutory construction buttress the conclusion that OCSLA section 12(a) does not provide authority to a president to rescind a prior withdrawal. Past Attorneys General have uniformly opined that, absent express statutory authority, the conclusion that a president has implied authority to restore federal lands would violate the separations of powers doctrine because the executive branch would be in essence re-writing Congress’s statute. In other words, presidential actions that are rooted in powers delegated by Congress carry the force of law and those executive actions can only be subsequently undone by Congress. Thus, once a president

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<sup>106</sup> 43 U.S.C. § 1341(a) (1953).

withdraws outer continental shelf lands under OCSLA section 12(a), only Congress can “un-shelf” such lands.

A. *The Plain Language of Section 12(a) of OCSLA*

In OCSLA, Congress delegated to the president the authority to remove unleased outer continental shelf lands from disposition for mineral leasing. OCSLA section 12(a) states:

The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.<sup>107</sup>

As the Supreme Court instructs “[w]e begin, as always, with the text of the statute.”<sup>108</sup> As a textual matter, in OCSLA section 12(a) Congress plainly did not grant specific authority for the president to “un-withdraw” lands after those lands have been withdrawn from disposition.<sup>109</sup> The absence of this language provides convincing support that a subsequent president alone cannot rescind a prior withdrawal because such a power does not expressly appear in OCSLA section 12(a).<sup>110</sup>

The application of the canon of statutory construction, *expressio unius est exclusio alterius*, further supports this interpretation of OCSLA section 12(a).<sup>111</sup> Under the maxim, in situations “[w]here a statute designates a form of conduct, the manner of its performance and operation and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions.”<sup>112</sup> Here, Congress did not grant the power to the president to restore withdrawn lands to the oil and gas leasing inventory; indeed the name of OCSLA section 12(a) is simply “Withdrawal of unleased lands by President” — not

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<sup>107</sup> *Id.*

<sup>108</sup> *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (citing *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007)).

<sup>109</sup> As some commentators expressed when President Obama released his memorandum, “[t]he provision, by itself, is unambiguous . . .” Keith Goldberg, *Obama’s 11th-hour Offshore Drilling Ban May Be Hard To Sink*, LAW 360, (Dec. 21, 2016), <https://www.law360.com/articles/875398/obama-s-11th-hour-offshore-drilling-ban-may-be-hard-to-sink> (proponents of Obama’s withdrawal maintain that OCSLA section 12(a) is “unidirectional”).

<sup>110</sup> *See id.*

<sup>111</sup> *See* NORMAN J. SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007).

<sup>112</sup> *Id.*



“Withdrawal, *Modification, and Restoration* of unleased lands by President.”<sup>113</sup>

Finally, OCSLA section 12(a)’s language that the president may “from time to time” withdraw outer shelf lands does not provide express support for presidential authority to “un-withdraw” lands. Contrary to the suggestion of one commentator, this phrase does not “envisio[n] that there’s a temporal nature to the withdrawal, not a permanent withdrawal.”<sup>114</sup> A careful reading of OCSLA section 12(a) demonstrates that the phrase “from time to time” is more fairly read as defining *when* (i.e., *how often*) presidents may invoke their power under the provision to withdraw lands.<sup>115</sup>

Moreover, in another federal land act, which pre-dates OCSLA, Congress restricted the president’s ability to make permanent withdrawals by only granting the president authority to “temporarily withdraw from settlement” the public lands.<sup>116</sup> This demonstrates that Congress knows how to cabin the time period of a withdrawal when it wants to do so.<sup>117</sup>

In sum, the text of OCSLA section 12(a) does not support presidential authority to “un-shelf” lands once they have been withdrawn by a previous president. And an examination of OCSLA’s legislative history and other atextual sources further supports this conclusion.

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<sup>113</sup> 43 U.S.C. § 1341(a) (1953). OCSLA section 12 at the time of enactment was simply titled “Reservations.” *Id.*

<sup>114</sup> Goldberg, *supra* note 109.

<sup>115</sup> Vasan Kesavan & J. Gregory Sidak, *The Legislator-In-Chief*, 44 WM. & MARY L. REV. 1, 13–18 (2002). The phrase “from time to time” is found four times in the U.S. Constitution, referring to how often an action may or must be taken, as well as within OCSLA. *Id.* at 13. For instance, the phrase “from time to time” is found in the State of the Union Clause of Article II, sec. 3, “in the Journal of Proceedings Clause of Article I, section 5 and the Receipts and Expenditures Clause of Article I, Section 9 to delineate the frequency of a legislative duty, and in the Vesting Clause of Article III, Section 1.” *Id.* at 13–14. In each the phrase is used “to delineate the frequency of a legislative power.” *Id.* at 14.

<sup>116</sup> See David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279, 292 (1982) (citing “the Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976)” which is also known as the Pickett Act).

<sup>117</sup> *Id.*

### B. *Atextual Analysis of OCSLA Section 12(a)*

Even though Congress did not grant in the plain language of OCSLA section 12(a) the president the authority to restore previously withdrawn outer continental shelf lands, critics of President Obama's December 2016 Presidential Memoranda nonetheless suggest that nothing in OCSLA prevents President Trump "from withdrawing the withdrawal."<sup>118</sup> But this interpretation is not supported in light of the legislative history of OCSLA and OCSLA section 12(a), as well as parallel executive withdrawal provisions in federal terrestrial land statutes, Attorney General Opinions interpreting such provisions, and the separation of powers doctrine.

The legislative history of OCSLA shows that Congress sought to fashion OCSLA section 12(a) after executive withdrawal provisions it had already enacted created for "uplands." In consideration of the balance it sought to achieve with respect to protecting the environment and opening lands to development, Congress did not grant the executive branch the power to reverse prior executive removals of lands — especially when such executive actions had been aimed to protect sensitive lands. And numerous Attorney General Opinions confirm that a conclusion that there exists an implied power in OCSLA section 12(a) for a president to rescind a prior withdrawal would violate the separation of powers doctrine.

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<sup>118</sup> Goldberg, *supra* note 109. Another argument raised is that Executive orders or proclamations can be rescinded or modified by a subsequent president. Therefore, President Trump can revoke President Obama's previous memoranda. But this general proposition does not apply because the source of the president's authority to withdraw unleased lands under OCSLA comes from Congress—not from inherent executive authority expressed in an Executive order or proclamation. Therefore, the format of how the president expresses the congressional delegation (i.e., the OCSLA withdrawal via memorandum or Executive order) is immaterial to the analysis as to whether it can be revoked. *See, e.g.*, ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 3 (2016) (although "Presidents generally have authority to revoke, modify, or supersede their own Executive orders and proclamations or those issued by predecessors [] because the authority . . . is provided by a specific statute, the authority to revoke such proclamations has been interpreted to be more limited."); 10 Op. Att'y Gen. 364 (1862) (an executive action based on congressional delegation carries with it "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.").

1. *The Legislative History of OCSLA and OCSLA Section 12(a) Does Not Support Executive Authority to Restore Withdrawn Lands*

The legislative history of OCSLA shows that Congress viewed the continental shelf lands as part of the public lands. Consequently, the legislative history of section 12(a) demonstrates that Congress viewed the executive removal authority for submerged lands as symmetrical to “uplands” provisions.<sup>119</sup> In other words, in enacting section 12(a), Congress was well aware that it could (and knew how to) give the president authority to restore previously withdrawn lands, but it did not do so in OCSLA.

As Professor Robin Kundis Craig, a leading environmental scholar, persuasively asserts, “Congress viewed the Outer Continental Shelf as a form of federal public lands” when it enacted OCSLA.<sup>120</sup> She observes that Congress created a “perfect parallelism of regulatory regimes for federal lands [whereby] the OCSLA governs the OCS while other statutes govern federal terrestrial lands.”<sup>121</sup> Professor Craig notes how OCSLA “borrows heavily from federal public lands statutes governing terrestrial mineral and energy development” and how “[a]s originally enacted, the OCSLA made clear that it was a mineral leasing statute and that it was superseding similar statutes for terrestrial public lands.” In short, Congress viewed the outer continental shelf “as new federal public lands, subject to further congressional reservation, Presidential withdrawal, and disposition through leases by the Secretary of the Interior.”<sup>122</sup>

Professor Craig’s conclusion that OCSLA and the terrestrial acts “are otherwise parallel regulatory schemes for assigning mineral interests in federal lands” is evident in the legislative history for OCSLA section 12(a).<sup>123</sup> As an initial matter, analyzing the legislative history of OCSLA section 12(a) requires exploring two related 1953 acts that were considered and passed in the same year to address the submerged lands of the continental shelf: OCSLA and the Submerged Lands Act of 1953.<sup>124</sup>

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<sup>119</sup> See Craig, *supra* note 44, at 78–79.

<sup>120</sup> *Id.* at 78.

<sup>121</sup> *Id.* at 78–80 (discussing numerous ways how OCS lands are “just like terrestrial federal public lands.”).

<sup>122</sup> *Id.*

<sup>123</sup> See *id.*

<sup>124</sup> See, e.g., Submerged Lands Act, 43 U.S.C. §§ 1301–1315 (1953); Outer

The OCSLA provisions began as part of the Submerged Lands Act, H.R. 4198, which had originally passed the House on April 1, 1953.<sup>125</sup> The bill, which was cited as Submerged Lands Act, originally contained three titles. Title I provided definitions of various terms employed in the bill, while title II established “the rights and claims by the States to the lands and resources beneath navigable waters within State boundaries.”<sup>126</sup> Title III then declared that the natural resources found on outer continental shelf that were beyond State boundaries were under federal jurisdiction and control.<sup>127</sup>

When the bill was considered by the Senate, however, the Senate amended H.R. 4198 by striking out everything “after the enacting clause and inserting new provisions which were similar to those contained in titles I and II of the House version.”<sup>128</sup> Because the Senate deleted title III, those provisions were subsequently resurrected in H.R. 5134 (titled, “A Bill to Amend the Submerged Lands Act”).<sup>129</sup>

The Committee on the Judiciary in the House of Representatives reported favorably on H.R. 5134 on May 12, 1953, without amendment and it recommended that the bill pass,<sup>130</sup> which it did on a rollcall vote of 309 yeas to 91 nays on the next day.<sup>131</sup> As proposed, H.R. 5134 did not contain a provision like OCSLA section 12(a) addressing presidential withdrawal power.<sup>132</sup> Rather, section 16 of H.R. 5134 addressed “the powers reserved to the United States” and provided that “in time of war or for necessary national defense” the United State retained certain rights such as the right of “first refusal to purchase all or any portion of

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Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (1953); Craig, *supra* note 44, at 78 (observing that “OCSLA is very much a companion statute to the Submerged Lands Act.”).

<sup>125</sup> H.R. REP. NO. 83-413, at 1 (1953). The Committee on the Judiciary had held “hearings and executive sessions on over 40 bills dealing with the overall question of the submerged lands.” *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 1–2.

<sup>128</sup> *Id.* at 1. On May 22, 1953, President Eisenhower signed H.R. 4198, thereby making the Submerged Lands Act law. S. REP. NO. 83-411, at 52 (1953).

<sup>129</sup> H.R. REP. NO. 83-413, at 1–2 (1953); H.R. 5134, 83rd Cong., at 1 (1953).

<sup>130</sup> *See* H.R. REP. NO. 83-413, at 1 (1953).

<sup>131</sup> *See* 99 CONG. REC. 4895 (1953).

<sup>132</sup> *See* H.R. REP. NO. 83-413, at 1. Section 12 in H.R. 5134 addressed “Income from Outer Continental Shelf” and directed certain rent and royalties to be deposited in the Treasury of the United States. H.R. 5134 § 12.

the oil or gas that may be produced from the outer continental shelf . . . .”<sup>133</sup>

Although the Senate placed H.R. 5134 on the calendar on May 14, 1953, Senator Cordon from Oregon on the same day introduced and referred to the Committee on Interior and Insular Affairs S. 1901, titled Outer Continental Shelf Lands Act.<sup>134</sup> The bill contained the Senate’s version of title III of H.R. 5134 and in section 10, entitled “National Emergency Reservations,” it addressed withdrawals:

The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf and reserve them for the use of the United States in the interest of national security.<sup>135</sup>

Thus, unlike the House version (H.R. 5134), the first Senate version (S. 1901) provided the president with the power to withdraw and reserve unleased continental shelf lands, but the president could only do so if it was “in the interest of national security.”<sup>136</sup>

Section 10(a) of S. 1901, however, was subsequently amended to delete the requirement that the withdrawal be “in the interest of national security.” On June 15, 1953, the Committee released its report on S. 1901 which renumbered section 10 to section 12 and deleted the phrase “National Emergency” from the title, as well as the requirement that any withdrawal of unleased continental shelf lands made under this provision be reserved for use in the interest of national security.<sup>137</sup>

In explaining the bill, the Committee report summarized the new section 12, now entitled “Reservations,” stating that it “authorizes the President to withdraw from disposition under the act any of the unleased areas of the outer shelf. Such a provision is

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<sup>133</sup> H.R. REP. NO. 83-413, at 7, 11 (naming section 16 “Powers Reserved to the United States” and describing rights); H.R. 5134 § 16. A similar provision exists in the current version. 43 U.S.C. § 1341(b) (2015) (“In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf.”).

<sup>134</sup> See H.R. 5134; S. 1901, 83d Cong.

<sup>135</sup> H.R. 5134; S. 1901 § 10.

<sup>136</sup> *Id.* The remainder of section 10 contained provisions similar to H.R. 5134 giving the United States additional rights, such as the right to first refusal to oil and gas produced on the outer continental shelf. *Id.*

<sup>137</sup> See S. REP. NO. 83-411, at 22 (1953).

similar to authority given to the President on the public domain.”<sup>138</sup> It further explained in the section specifically addressing the deletions and changes:

The committee believes that the authority of the President to withdraw certain areas of the seabed of the Continental Shelf from leasing should not be limited to security requirements. The authority vested in the President by the amended section is comparable to that which is vested in him with respect to federally owned lands on the uplands.<sup>139</sup>

The committee may also have been persuaded by Assistant Attorney General J. Lee Rankin from the Department of Justice’s Office of Legal Counsel to remove the restriction of withdrawal authority to national security interests.<sup>140</sup> In comments to the committee, he opined:

S. 1901 (sec. 10 (a)) provides that the President may withdraw and reserve unleased areas for Federal use in the interest of national security. This provision is unnecessary, since leasing is not mandatory in any case; and it is undesirable, in that it may imply that it constitutes the only permissible reason for refusing to lease. It should be omitted, or at least the final phrase, “for the use of the United States in the interest of national security,” should be deleted. The House bill has no corresponding provision.<sup>141</sup>

Members of Congress, as well the Department of Justice, were cognizant that other reasons, especially environmental concerns, had provided the basis for withdrawals and reservations under the terrestrial statutes.<sup>142</sup> In fact, there had been a long history of withdrawals on federal lands that were rooted as conservation measures.<sup>143</sup> As one scholar has noted “[a]lthough it is not widely appreciated, the use of withdrawals has been a major force in conservation law and history, especially during those eras when statutory law was not nearly as broad and diverse as it is today.”<sup>144</sup>

On June 25, 1953, the Senate passed H.R. 5134 by replacing

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<sup>138</sup> *Id.* at 14.

<sup>139</sup> *Id.* at 26.

<sup>140</sup> *See id.* at 39–41.

<sup>141</sup> *Id.* at 39.

<sup>142</sup> *See id.* at 3 (discussing the applicability of conservation laws).

<sup>143</sup> *See* Getches, *supra* note 116, at 279 (discussing executive removals based on conservation efforts).

<sup>144</sup> *Id.*

the bill with the provisions in S. 1901.<sup>145</sup> In other words, H.R. 5134 became S. 1901.<sup>146</sup> During the debate, which discussed provisions in both H.R. 5134 and S. 1901, there was no mention of the presidential withdrawal provision. Following the Senate’s passage, the House, on July 14, 1953, disagreed with the Senate’s amendments to H.R. 5134, and it convened a committee of conference to reconcile the opposing bills.<sup>147</sup>

The House committee members agreed to consider the bill as proposed by the Senate and with respect to the executive withdrawal provision found in the Senate bill, the Conference Report merely noted that “[t]he President is authorized to withdraw from disposition under the act any of the unleased areas.”<sup>148</sup> That same day on July 29, 1953, Representative Graham submitted the Conference Report and statement on H.R. 5134 to the full House and requested that the House immediately agree to the conference report, which it did.<sup>149</sup> The next day, on July 30, 1953, Senator Cordon submitted the conference report on H.R. 5134 to the Senate and the Senate voted 45–43 to adopt the report.<sup>150</sup> President Eisenhower signed OCSLA into law on August 7, 1953.<sup>151</sup>

## 2. *Parallel Terrestrial Executive Land Removal Provisions Demonstrate that Congress Did Not Intend the President to Have the Authority to Rescind Prior Withdrawals under OCSLA Section 12(a)*

The legislative history and the corresponding scholarship on OCSLA detailed above establish that Congress viewed outer continental shelf as submerged lands that were part of the public

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<sup>145</sup> See 99 CONG. REC. 7264–65 (1953).

<sup>146</sup> See *id.* at 7264 (1953) (Senator Cordon moving that “all after the enacting clause of H. R. 5134 be stricken out, and that in lieu thereof there be substituted the text of Senate bill 1901, as it has been amended.”).

<sup>147</sup> See 99 CONG. REC. 8785 (1953) (disagreeing with Senate amendments and appointing committee of conference).

<sup>148</sup> H.R. REP. NO. 83-1031, at 11, 13 (1953) (Conf. Rep.) (House receding from its disagreement and agreeing with Senate to an amendment containing new bill and stating language in bill with explanation of provision).

<sup>149</sup> See 99 CONG. REC. 10416–20 (1953) (submitting conference report to full House and asking for consent to consider the conference report).

<sup>150</sup> See 99 CONG. REC. 10500 (1953).

<sup>151</sup> See Outer Continental Shelf Lands Act of 1953, Pub. L. 83-212, 67 Stat. 462.

domain of federal lands. Likewise, it is clear that Congress viewed OCSLA section 12(a) as being akin to other executive withdrawal provisions that applied to the “uplands.” This therefore raises another important question: how did Congress interpret the scope of executive power to withdraw – and more importantly, to restore – lands under the principal terrestrial land management statutes?

An analysis of the terrestrial executive withdrawal provisions shows that Congress knew how and when it wanted to grant the president the authority to restore lands to the public domain after the land had been removed from disposition. Conclusions set forth in numerous Attorney General Opinions confirm that absent specific authority from Congress, the executive branch is not authorized to return land to the public domain or rescind prior withdrawals.

At the time Congress enacted OCSLA, executive “upland” land withdrawals and reservations were mostly accomplished by several major statutes addressing the development of natural resources, as well as conservation efforts. But even before these statutes, questions arose under statutes governing military installments as to whether the executive branch had the authority to return land back to the public domain after it has been withdrawn or reserved. Interpretations by U.S. Attorneys General on this issue uniformly found that the executive branch lacked authority to return such lands, absent express statutory authorization from Congress.

For instance, on November 8, 1862, Attorney General Edward Bates analyzed whether President Abraham Lincoln had the power to return certain lands, which were home to Fort Armstrong in Rock Island, Illinois, to “the body of the public lands.”<sup>152</sup> Attorney General Bates found that the “question compels a negative answer.”<sup>153</sup> Much like the authority vested under OCSLA section 12(a), he observed that the president:

derived his authority to appropriate this land . . . not from any power over the public land inherent in his office, but from an express grant of power from Congress.<sup>154</sup>

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<sup>152</sup> Rock Island Military Reservation, 10 Op. Att’y Gen. 359–60 (1862).

<sup>153</sup> *Id.* at 363.

<sup>154</sup> *Id.* For this reason, any attempt for a subsequent president to invoke inherent authority to restore outer continental shelf lands would likely fail. First,



He recognized that the president “as the executive head of the nation” was “vested by law with ample power to supervise and control” military installations and the related lands, and suggested that the president could even withdraw such facilities and lands for military purposes.<sup>155</sup> But Attorney General Bates opined that the president “had no power to take them out of the class of reserved lands, and restore them to the general body of public lands.”<sup>156</sup> Simply stated, he found no statutory authority for the president to do so because “[i]t is certain that no such power is conferred on the President in the act under which the selection of a site for Fort Armstrong was made.”<sup>157</sup>

Attorney General Bates reasoned that to find an implied power in the statute would raise serious separation of powers concerns because it would be “to claim for the Executive the power to repeal or alter an act of Congress at will.”<sup>158</sup> He compared it a discretionary grant of power to execute a trust whereby the grant of power “by no means implies the further power to undo it when it has been completed.”<sup>159</sup> Thus, “if the President could not do this without the aid of Congress, neither could he annul the same work without the same aid.”<sup>160</sup>

Subsequent opinions by later Attorneys General support the view that without express authorization the executive branch lacks

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even though previously there had been a question as to whether the president had executive authority as the result of congressional acquiescence, Congress foreclosed “the implied authority of the President to make withdrawals and reservations resulting from acquiescence of Congress.” Pub. L. No. 94-579, 90 Stat 2743, at 2792, § 704(a) (codified at 43 U.S.C. §§ 1701–1782 (1976); *see also* Getches, *supra* note 116, at 286 (“There is no question that Congress has constitutional authority to make or to authorize withdrawals by legislative act. But arguments that the executive has some inherent constitutional authority to make withdrawals of public lands are without merit.”)). It is for this reason that later presidents, such as found in President Obama’s December 2016 memoranda, have relied exclusively on OCSLA section 12(a) the source of authority to withdraw lands. *See* Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) (stating that “[u]nder the authority granted to me in section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing . . .”).

<sup>155</sup> Rock Island Military Reservation, 10 Op. Att’y Gen. 363 (1862).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 364.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 363–64.

authority to restore lands to the public domain. In 1881, Secretary of War Robert T. Lincoln asked President James A. Garfield's Attorney General, Wayne MacVeagh, to offer his opinion concerning Fort Fetterman in the Wyoming Territory.<sup>161</sup> Secretary Lincoln questioned:

When a reservation of public lands is made by the President for military purposes, and at some subsequent period such lands become no longer necessary for the purposes for which they were reserved, may the President by a revocation of his order restore the lands to the public domain?<sup>162</sup>

Attorney General MacVeagh opined that “the question propounded must be answered in the negative.”<sup>163</sup> In support, he cited two past Attorney General Opinions, including Attorney General Bates's opinion from 1862.<sup>164</sup> MacVeagh reasoned that once the president acted to carve out lands, as is done when a president withdraws land from disposition for oil and gas leasing under OSCLA, the land “becomes severed from the mass of public lands and appropriated to a particular public use by authority of Congress, which alone can authorize such disposition of the public domain.”<sup>165</sup>

Although these Attorney General Opinions from 1861 and 1881 involved reservations of lands for military purposes, other acts of Congress that governed the “uplands” similarly were interpreted to foreclose the authority of the executive to restore lands to the use that Congress had initially established. In fact, many of these statutes were enacted to address Congress's concern for environmental conservation and its unease that too much of the public lands were being transferred in title or right into private hands.

A very early example of an executive withdrawal provision showing Congress's awareness as to its intended scope of executive removal power is found in the General Revision Act of

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<sup>161</sup> See *Military Reservation at Fort Fetterman*, 17 Op. Att'y Gen. 168 (1881) (noting that Fort Fetterman “was duly declared and formally set apart by the President August 29, 1872.”).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See *id.* (“[i]n an opinion dated August 10, 1878, Attorney-General Devens observes that ‘if lands have been once set apart by the President in an order for military purposes, they can not again be restored to the condition of public lands or sold as such except by an authority of Congress’s (16 Opin., 123).’”).

<sup>165</sup> *Id.* at 168–69 (citing 10 Op. Att'y Gen. 359 (1862)).

1891.<sup>166</sup> The Forest Reserve Act, as it became known, “reflect[ed] the mix of views about the appropriate use of the public lands which was prevalent on the cusp between the eras of disposal and retention of public lands.”<sup>167</sup> During this time, a “concern for conservation grew within the government and among the general public” as exemplified by Congress’s creation of a two million acre “public park or pleasuring ground for the benefit and enjoyment of the people . . . ,” which would later be known as Yellowstone National Park.<sup>168</sup>

The executive withdrawal provision in the Forest Reserve Act stated:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation declare the establishment of such reservations and the limits thereof.<sup>169</sup>

Similar to OCSLA section 12(a), the provision contained no explicit authority for the president to restore lands after it had reserved under the provision.

Yet in two other acts during this era, Congress demonstrated that it knew how to grant the executive branch the power to re-visit a presidential action withdrawing or reserving public lands. In the National Forest Organic Act of 1897, Congress declared:

The 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.<sup>170</sup>

Moreover, in the prefatory language of the Act, Congress showed that its language granting the president the power to revisit a prior order was a conscious decision “to remove any doubt which may

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<sup>166</sup> See Getches, *supra* note 116, at 286 (citing the General Revision Act, ch. 561, 26 Stat. 1095 (1891)).

<sup>167</sup> *Id.* at 284.

<sup>168</sup> *Id.* (citing 16 U.S.C. § 21).

<sup>169</sup> General Revision Act of 1891, ch. 561, § 41, 26 Stat. 1095, 1103 (1891).

<sup>170</sup> Forest Service Organic Act of 1897, ch. 2, 30 Stat. 11, 36 (1897); Getches, *supra* note 116, at 284 (citing Act of June 4, 1897, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473–481 (1976))).

exist pertaining to the authority of the President thereunto.”<sup>171</sup> It summarized the provision as authorizing and empowering the president “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.”<sup>172</sup>

Likewise, Congress enacted the General Withdrawal Act, also known as the Pickett Act, in 1910, in which it similarly granted the president broad executive withdrawal as well as explicit restoration powers.<sup>173</sup> Like the National Forest Organic Act of 1897, it expressly allowed the president to “revoke” his prior withdrawals:

[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.<sup>174</sup>

This is convincing evidence that Congress knew how to grant the president power to revoke prior withdrawals, something that it did not do in OCSLA section 12(a).<sup>175</sup>

Meanwhile, Congress also enacted the Antiquities Act of 1906, in which it granted the president the power to set aside federal lands as national monuments to “protect historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest sensitive lands.”<sup>176</sup> The reservation

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<sup>171</sup> Forest Service Organic Act of 1897, 30 Stat. 11, 34 (1897).

<sup>172</sup> *Id.*

<sup>173</sup> See Getches, *supra* note 116, at 292. (citing Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976)).

<sup>174</sup> General Withdrawal Act, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976).

<sup>175</sup> It is arguable whether Congress needed to expressly state that Congress had the power to revoke such reservation since Congress has the authority under the Property Clause “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2; see also *Kleppe v. New Mexico*, 426 U.S. 529 (1976). But due to the Supreme Court’s suggestion that there existed implied executive withdrawal powers due to congressional acquiescence in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), Congress’s intent “was taking the subject of withdrawals under its control and limiting executive authority.” Getches, *supra* note 116, at 291–92.

<sup>176</sup> Antiquities Act of 1906, Pub. L. 59-209, 34 Stat. 225 (1906).

provisions found in section 2 of the Act stated “[t]hat the President of the United States is hereby authorized, in his discretion, to declare by public proclamation . . . 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.”<sup>177</sup> This provision is strikingly similar to OCSLA section 12(a) in that it confers the power to the president to reserve land, but contains no express reference to “un-reserve” land.

On two separate occasions, the serving Attorney General at the time analyzed whether a president could go beyond the statutory language provided for in the Antiquities Act. In both instances, the Attorney General determined that the president could do nothing more than “reserve” lands pursuant to the Act and did not have implied authority to either transfer reserved lands or rescind a prior reservation.

First, on July 8, 1929, President Herbert Hoover’s Attorney General, William D. Mitchell, opined “whether it is within the Executive authority to transfer the national monuments, now under the administration of the War Department and the Department of Agriculture, to the National Park Service in the Department of the Interior.”<sup>178</sup> The Attorney General first observed that the source of power over federal lands is rooted in the Constitution, which assigns authority to Congress:

Since the Constitution (Article IV, section 3, clause 2) vests in Congress the “Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,” the directions of Congress are controlling with respect to the administration of territories set apart as reservations for various purposes.<sup>179</sup>

Based on this constitutional commitment to Congress, he found that “[w]here Congress has itself designated the supervising authority, either expressly or by fair implication, it is not within Executive authority to alter such designation.”<sup>180</sup>

He further noted that the Antiquities Act did not expressly establish which executive department had jurisdiction over

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<sup>177</sup> *Id.* at § 2.

<sup>178</sup> Transfer of National Monuments to National Park Service in the Department of the Interior, 36 Op. Att’y Gen. 75, 75 (1929).

<sup>179</sup> *Id.* at 76.

<sup>180</sup> *Id.*

national monuments created by the president.<sup>181</sup> He, however, could not read this silence to delegate to the president the authority to decide.<sup>182</sup> Rather, because Congress had exercised power to assign which department would have jurisdiction over national monuments in the past, Congress, not the president, must change any jurisdiction.<sup>183</sup>

Second, the culmination of the interpretations of Attorneys General on the scope of presidential authority in this context came on September 26, 1938 – fifteen year prior to Congress’s enactment of OCSLA.<sup>184</sup> Attorney General Homer Cummings, who served for President Franklin D. Roosevelt, was asked to review a proposed proclamation of the Acting Secretary of the Interior abolishing the Castle Pinckney National Monument in Charleston, South Carolina, which had been established by presidential proclamation in 1924 under the Antiquities Act of 1906.<sup>185</sup>

Attorney General Cummings analyzed the statute and recognized that “[t]he statute does not in terms authorize the President to abolish national monuments, and no other statute containing such authority [had] been suggested.” Thus, any presidential authority, he reasoned, must “exist[] by implication.”<sup>186</sup> Relying on many of the Attorney General Opinions mentioned above, Attorney General Cummings confirmed the prior interpretations that “if 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.”<sup>187</sup>

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<sup>181</sup> See *id.* at 76–77. The Antiquities Act of 1906 is now codified at 54 U.S.C. §§ 320301–320303.

<sup>182</sup> See *id.* at 79.

<sup>183</sup> See *id.*

<sup>184</sup> See Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185 (1938).

<sup>185</sup> See *Id.* at 185–86 (reading at that time section 2 of the Antiquities Act of 1906 to authorize the President “in his discretion, to declare by public proclamation historic land marks, 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.”). The Antiquities Act of 1906 is now codified at 54 U.S.C. §§ 320301–320303.

<sup>186</sup> Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 186 (1938).

<sup>187</sup> *Id.* (citing 17 Op. Att’y Gen. 168 (1881), 10 Op. Att’y Gen. 359 (1862) and 36 Op. Att’y Gen. 75, 79 (1929)).

He distinguished the executive actions at issue under the Antiquities Act with one performed under the General Withdrawal Act of June 25, 1910, which, as discussed above, authorizes only temporary withdrawals.<sup>188</sup> Unlike the Antiquities Act (and OCSLA for that matter), the General Withdrawal Act provides that “such withdrawals or reservations shall remain in force until revoked by the President or by an act of Congress authorizes the President, by necessary implication, to revoke reservations made by him under it.”<sup>189</sup>

Attorney General Cummings concluded his analysis by acknowledging that the president’s authority to establish monuments “in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>190</sup> But he further explained that this power does not carry with it “the power to abolish a monument entirely.”<sup>191</sup>

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<sup>188</sup> See *id.* at 188. The fact that the Antiquities Act speaks in terms of “reservation” while the General Withdrawal Act of 1910 and OCSLA in terms of “withdrawal” is immaterial; the material aspect is whether the lands at issue “form[] part of the public domain.” *Id.* For instance, Attorney General Cummings focused on the language in the Antiquities Act which authorized monuments to be created upon lands “owned or controlled” by the government, and therefore it did not matter that Castle Pinckney National Monument was acquired from the State of Carolina by cession as opposed to formed part of the public domain. *Id.* Similarly, OCSLA authorizes reservations be made to unleased lands on the outer continental shelf, which is under federal control. 43 U.S.C. § 1341(a) (1953); 43 U.S.C. § 1331(a) (1953) (defining outer continental shelf as being “subject to [United States] jurisdiction and control.”). See also *Tulare v. Bush*, 185 F. Supp. 2d 18, 27 (D.D.C. 2001), *aff’d*, 306 F.3d 1138 (D.C. Cir. 2002) (holding that the reservation of land for monument “withdr[ew] land from disposition under public land laws, such as the sale and leasing of the land.”). Although they have been construed to be slightly different, i.e., a reservation is a withdrawal with a designated public purpose, while a withdrawal removes public land from most uses, the effect is the same in the context. See *Getches*, *supra* note 116, at 295.

<sup>189</sup> Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 188 (1938). The Attorney General further distinguished statutes like the Antiquity Act and OCSLA from others that give presidential authority to rescind reservations and withdrawals by citing to Forest Service Organic Administration Act (FSOAA) of 1897. The FSOAA had authorized the president to establish national forest reserves, but “expressly provide[d] that the President at any time may modify any Executive order establishing any forest reserve by reducing its area or by vacating it altogether.” *Id.*

<sup>190</sup> *Id.* (quoting the Antiquities Act of 1906, Pub. L. 59-209, 34 Stat. 225 (1906)).

<sup>191</sup> *Id.* at 188–89. Although based on his reasoning, Attorney General Cummings concluded that “the President is without authority to issue the proposed proclamation” abolishing the monument, Congress later abolished by

## CONCLUSION

The plain language of OCSLA section 12(a), coupled with analysis of its legislative history, parallel “upland” statutes, and Attorney General Opinions interpreting similar executive withdrawal provisions compel the conclusion that a subsequent president lacks authority to restore previously withdrawn lands to the federal oil and gas leasing inventory. Once a president withdraws outer continental shelf lands under the power vested by Congress under OCSLA section 12(a), the action has “the validity and sanctity which belong to the statute itself,” and without a corresponding statutory authorization to restore such lands “the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can.”<sup>192</sup> In other words, a subsequent president cannot re-write OCSLA section 12(a) to “un-shelf” lands previously withdrawn by prior president.

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statute. *Id.*; see Castle Pinckney National Monument, S. C., abolishment, Pub. L. No. 84-447, Stat. 61 (1956); see also ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 3 (2016). Scholars also question whether a subsequent president can diminish the size of an existing monument. See generally Mark Squillace, Eric Biber, Nicholas S. Bryner, & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017).

<sup>192</sup> Rock Island Military Reservation, 10 Op. Att’y Gen. 364 (1862).