AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Separation of Powers

United States v. Midwest Oil Company, 236 U.S. 459 (1915)

In order to encourage the exploration and development of oil reserves, Congress passed a law in 1897 making all federal land with oil deposits "free and open to occupation, exploration and purchase by citizens of the United States." The result was a land rush in California and elsewhere to find, claim, and extract the available oil. By 1909, the director of the Geological Survey reported that oil lands in California would soon pass entirely out of government hands, warning that the Navy in the Pacific would be obliged to purchase its oil supplies from private sources. The director also recommended reforms in the policies governing federal oil lands so as to better conserve the available supply and stabilize oil prices. In response, President William Howard Taft issued a proclamation temporarily withdrawing over 3 million acres of public land in California and Wyoming from exploration and development under the laws.

The president was not entirely convinced of his own authority to issue the withdrawal order. In a January 1910 message to Congress, Taft admitted that the power "to withdraw from the operation of existing statutes tracts of land, the disposition of which under such statutes would be detrimental to the public interest, is not clear or satisfactory. The power has been exercised in the interest of the public with the hope that Congress might affirm the action of the executive by laws adapted to the new conditions. Unfortunately, Congress has not thus far fully acted on the recommendations of the Executive, and the question as to what the Executive is to do is, under the circumstances, full of difficulty. It seems to me that it is the duty of Congress now by statute to validate the withdrawals that have been made. . . ." Congress finally obliged with a new statute passed on June 25, 1910 allowing the president to temporarily withdraw lands in the future but specifically declining to recognize, abridge or enlarge "any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act."

In March 1910, a group of wildcat drillers bored a well in an area of Wyoming covered by the presidential order, discovered oil, and, in May of that year, filed a claim, later selling their rights to the well to Midwest Oil Company. The federal government filed suit in district court to recover the extracted oil and the land, but the district judge ruled in favor of Midwest Oil. On appeal, the circuit court was divided and certified a series of questions for the Supreme Court to answer so as to resolve the case.

Taft's predecessor, Theodore Roosevelt, had already antagonized Congress by setting aside millions of acres of federal land for forest reserves on his own authority. When, in 1907, Congress attached a rider to an agriculture appropriations bill prohibiting the creation of additional national forests, Roosevelt set aside 40 million more acres before the bill took effect. Congress retaliated by killing off several of Roosevelt's pet programs just as he was leaving office. Taft had had his doubt about the legality of some of those actions but found himself in the taking a similar initiative with his order, and it was the Woodrow Wilson administration that mounted a defense of Taft's actions in the courts. Although each president had largely acted with the acquiescence of Congress, Roosevelt's flaunting of congressional interests with his exercise of unilateral presidential action demonstrated the risks that the practice held.

JUSTICE LAMAR delivered the opinion of the court.

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. . . . On the part of the Government it is urged that the President, as Commander-in-Chief of the Army and Navy, had power to make the order for the purpose of retaining and preserving a source of supply of fuel for the Navy, instead of allowing the oil land to be taken up for a nominal sum, the

Government being then obliged to purchase at a great cost what it had previously owned. It is argued that the President, charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution (Art. 2, § 1), and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties.

The Appellees, on the other hand, insist that there is no dispensing power in the Executive and that he could not suspend a statute or withdraw from entry or location any land which Congress had affirmatively declared should be free and open to acquisition by citizens of the United States. They further insist that the withdrawal order is absolutely void since it appears on its face to be a mere attempt to suspend a statute -- supposed to be unwise, -- in order to allow Congress to pass another more in accordance with what the Executive thought to be in the public interest.

1. We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government." Scores and hundreds of these orders have been made; and treating them as they must be . . . as the act of the President, an examination of official publications will show that . . . he has during the past 80 years, without express statutory authority -- but under the claim of power so to do -- made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition. They affected every kind of land mineral and nonmineral. The size of the tracts varied from a few square rods to many square miles and the amount withdrawn has aggregated millions of acres. The number of such instances cannot, of course, be accurately given, but the extent of the practice can best be appreciated by a consideration of what is believed to be a correct enumeration of such Executive Orders mentioned in public documents. They show that prior to the year 1910 there had been issued 99 Executive Orders establishing or enlarging Indian Reservations; 109 Executive Orders establishing or enlarging Military Reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges and rights of way for use in connection with Military Reservations; 44 Executive Orders establishing Bird Reserves.

In the sense that these lands may have been intended for public use, they were reserved for a public purpose. But they were not reserved in pursuance of law or by virtue of any general or special statutory authority. For, it is to be specially noted that there was no act of Congress providing for Bird Reserves or for these Indian Reservations. There was no law for the establishment of these Military Reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement or to reserve them for any of the purposes indicated.

. . . . Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary it uniformly and repeatedly acquiesced in the practice and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservation for useful, though non-statutory purposes.

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But notwithstanding . . . the continuity of this practice, the absence of express statutory authority was the occasion of doubt being expressed as to the power of the President to make these orders. The matter was therefore several times referred to the law officers of the Government for an opinion on the subject. One of them stated (1889) (19 Op. 370) that the validity of such orders rested on "a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, portions of the public domain." . . .

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2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department -- on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting

rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself -- even when the validity of the practice is the subject of investigation.

This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart* v. *Laird* (1803). There, answering the objection that the act of 1789 was unconstitutional in so far as it gave Circuit powers to Judges of the Supreme Court, it was said that, "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

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3. . . . These rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale; and while no such express authority has been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. . . .

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The case is therefore remanded to the District Court with directions that the decree dismissing the Bill be *Reversed*.

Justice McREYNOLDS took no part in the decision of this case.

Justice DAY, with whom concurred Justice McKENNA and Justice VAN DEVANTER, dissenting.

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It is to be observed that the lands here in controversy are situated in the State of Wyoming. There was no suggestion that such lands would ever be needed as a basis of oil supply for the Navy. They were withdrawn solely upon the suggestion that a better disposition of them could be made than was found in the existing acts of Congress controlling the subject.

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The Constitution of the United States in Article IV, § 3, provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In this section the power to dispose of lands belonging to the United States is broadly conferred upon Congress, and it is under the power therein given that the system of land laws for the disposition of the public domain has been enacted. . . .

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It is thus explicitly recognized, as was already apparent from the terms of the Constitution itself, that the sole authority to dispose of the public lands was vested in the Congress and in no other branch of the Federal Government. The right of the Executive to withdraw lands which Congress has declared shall be open and free to settlement upon terms which Congress has itself prescribed, is said to arise from the tacit consent of Congress in long acquiescence in such executive action resulting in an implied authority from Congress to make such withdrawals in the public interest as the Executive deems proper and necessary. There is nothing in the Constitution suggesting or authorizing such augmentation of executive authority or justifying him in thus acting in aid of a power which the framers of the Constitution saw fit to vest exclusively in the legislative branch of the Government.

It is true that many withdrawals have been made by the President and some of them have been sustained by this court, so that it may be fairly said that, within limitations to be hereinafter stated, executive withdrawals have the sanction of judicial approval, but, as we read the cases, in no instance has this court sustained a withdrawal of public lands for which Congress has provided a system of disposition, except such withdrawal was -- (a) in pursuance of a policy already declared by Congress as one for which the public lands might be used, as military and Indian reservations for which purposes Congress has authorized the use of the public lands from an early day, or (b) in cases where grants of Congress are in such conflict that the purpose of Congress cannot be known and therefore the Secretary

of the Interior has been sustained in withdrawing the lands from entry until Congress had opportunity to relieve the ambiguity of its laws by specifically declaring its policy.

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In the case now before us Congress in the statutes referred to had expressly subjected these lands to the operation of the placer mining law and had authorized their exploration for oil and their location, entry and purchase as mineral lands. Congress had in this way exercised its power and manifested its will and such was the situation when the withdrawal in question was made. Deriving the aim of the Executive from the various documents to which we have referred it may be fairly deduced that the prevailing purpose (and that was the sole purpose so far as the lands here involved were concerned) in making the withdrawal was to anticipate that Congress, having the subject-matter brought to its attention, might and would provide a better and more economical system for the disposition of such public lands, and secondarily to preserve some of the oil lands in California as a basis of naval supply in the future, the latter purpose not at that time declared or recognized by Congress. For these purposes the President had no express authority from Congress; in fact, such is not claimed. The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legislation or long continued acquiescence as public purposes for which such withdrawals could be made by the Executive. That the President might by virtue of his executive authority take action to preserve public property or in aid of the execution of the laws reserve tracts of land for definitely fixed public purposes, declared by Congress, such as military or Indian reservations, may be conceded; but we are unable to find sanction for the action here taken in withdrawing a large part of the public domain from the operation of the public land laws in the power inherent in this office as created and defined by the Constitution or in any way conferred upon him by the legislation of Congress or in that long acquiescence in the exercise of authority sanctioned by Congress in such manner as to be the equivalent of a grant to the President.

The constitutional authority of the President of the United States (Art. II, §§ 1, 3), includes the executive power of the Nation and the duty to see that the laws are faithfully executed. "The President 'shall take care that the laws be faithfully executed.' Under this clause his duty is not limited to the enforcement of acts of Congress according to their express terms. It includes "the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." Cooley's *Principles of Constitutional Law*, p. 121; *In re Neagle* (1890). The Constitution does not confer upon him any power to enact laws or to suspend or repeal such as the Congress enacts. *Kendall* v. *United States* (1838) . . . .

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. . . . The grant of authority to the Executive, as to other departments of the Government, ought not to be amplified by judicial decisions. The Constitution is the legitimate source of authority of all who exercise power under its sanction, and its provisions are equally binding upon every officer of the Government, from the highest to the lowest. It is one of the great functions of this court to keep, so far as judicial decisions can subserve that purpose, each branch of the Government within the sphere of its legitimate action, and to prevent encroachments of one branch upon the authority of another.

In our opinion, the action of the Executive Department in this case, originating in the expressed view of a subordinate official of the Interior Department as to the desirability of a different system of public land disposal than that contained in the lawful enactments of Congress, did not justify the President in withdrawing this large body of land from the operation of the law and virtually suspending, as he necessarily did, the operation of that law, at least until a different view expressed by him could be considered by the Congress. This conclusion is reinforced in this particular instance by the refusal of Congress to ratify the action of the President, and the enactment of a new statute authorizing the disposition of the public lands by a method essentially different from that proposed by the Executive.

For the reasons expressed, we are constrained to dissent from the opinion and judgment in this case.