

Winter 1-1-2019

The Executive Power of Reversal

John C. Yoo
Berkeley Law

Follow this and additional works at: <https://scholarship.law.berkeley.edu/facpubs>

Part of the [Law Commons](#)

Recommended Citation

42 Harv. J. L. & Pub. Pol'y 59 (2019)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

THE EXECUTIVE POWER OF REVERSAL

JOHN C. YOO*

I am going to talk a little about originalism, but more so how it relates to executive power and the power of reversal. The executive power of reversal is the President's power to reverse his predecessors' actions, with or without the coordination of the other branches of government. I will tie this in with some modern controversies.

The argument here is actually just a small point I made with my coauthor, Todd Gaziano, in a piece in the *Yale Journal on Regulation* where we argued a new President has the power to de-designate national monuments or reduce them in size.¹ It was not expected to be a controversial point about presidential power. But then 121 environmental law professors—I did not even know there were 121 of them—signed a letter saying that no President can reduce or de-designate a national monument.² They argued that the Antiquities Act's delegation of power to the President to designate a piece of land as a monument is a one-way ratchet: once a President designates a piece of land as a monument he, or a subsequent president, can never de-designate the monument without the approval of Congress.³ Of course, I made the point that, "Well, what would happen if President Trump designated all the golf courses to be national monuments?" That means no president will ever be able to de-designate them. And I said, "Don't tell the President this or soon we will have a lot more national monuments."

I was very surprised this restrictive view was widely held. After further research, I came to the conclusion that this is the

* Emanuel S. Heller Professor of Law, University of California at Berkeley School of Law; Visiting Scholar, American Enterprise Institute; Visiting Fellow, Hoover Institution. I thank Helena Gu for her research assistance.

1. John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617 (2018).

2. Letter from 121 Envtl. Law Professors to Ryan Zinke, Secretary, U.S. Dep't of Interior, & Wilbur Ross, Secretary, U.S. Dep't of Commerce (July 6, 2017), https://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf [<https://perma.cc/9FWB-576X>].

3. *Id.*

crux of many of the current debates on presidential power: not simply the use of presidential power to expand the presidency, but rather the presidential power to reverse actions or decisions made previously. I would have thought the presidential power of reversal was natural and inherent, but it has turned out to be quite controversial. This is the topic of a forthcoming article I am working on with Professor Saikrishna Prakash, titled “The Presidential Power to Reverse.”

Many of the current debates on executive power are really debates about the executive’s power of reversal: What is at issue in the debate over Deferred Action for Childhood Arrivals?⁴ Reversal: does President Trump have the power to reverse the use of prosecutorial discretion by President Obama?⁵ Does the President have the power to reverse a designation of land as a monument made by himself or a previous president?⁶ Does he have the authority to fire Special Counsel Robert Mueller?⁷ In that case, the issue is whether the President has the power to reverse a previous Justice Department regulation that places conditions on the President’s own power to remove.⁸ Can the President terminate the Paris Agreement,⁹ as he did just recently, the North American Free Trade Agreement,¹⁰ or even the World Trade

4. Vanessa Romo, Martina Stewart & Brian Naylor, *Trump Ends DACA, Calls On Congress To Act*, NPR (Sept. 5, 2017, 3:57 PM), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act> [<https://perma.cc/P4H2-H4W7>].

5. Hans A. von Spakovsky & David Inserra, *Thank Trump if he Finally Ends the Unconstitutional DACA Program*, THE HILL (Sept. 1, 2017, 5:10 PM), <http://thehill.com/blogs/pundits-blog/immigration/348924-thank-trump-if-he-finally-ends-the-unconstitutional-daca> [<https://perma.cc/VCS2-T69Q>].

6. Devin Henry, *Five Things to Know About Trump’s National Monuments Order*, THE HILL (Dec. 4, 2017, 4:10 PM), <http://thehill.com/policy/energy-environment/363180-five-things-to-know-about-trumps-national-monuments-order> [<https://perma.cc/D5CB-QQG2>].

7. John Yoo & Saikrishna Prakash, *Opinion, Of Course Trump Can Fire Mueller. He Shouldn’t*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/opinion/trump-fire-mueller.html> [<https://nyti.ms/2IPCfp5>].

8. *Id.*

9. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Peace Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [<https://nyti.ms/2rv52tR>].

10. Ana Swanson, *Trump administration unveils goals in renegotiating NAFTA*, WASH. POST: WONKBLOG (July 17, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/17/trump-administration-outlines-goals-for-nafta-rewrite/?utm_term=.837af7e88b59 [<https://perma.cc/WJK9-2D5D>].

Organization Treaty?¹¹ Does the President have the right to withdraw regulations that were issued by previous administrations?¹² Can he subject new regulations to a cost-benefit analysis and replace the old ones?¹³ This is an issue of reversal that seems to be the theme underlying these debates about presidential power. The difference is that the President is using these powers to shrink his political authority, rather than expand it, as past Presidents of both parties have done.

I argue that not only is there a presidential power of reversal but that, in some ways, the power is more vigorous than the reversal power of the other two branches. Compare how the other two branches exercise their own powers of reversal. The Supreme Court reverses past Supreme Court opinions with new opinions, and Congress repeals past statutes with new statutes. In both of those cases, like the presidential power, the Constitution's text does not state how to undo past decisions.

We have always assumed the way to undo a past decision is by following the same formal process used to achieve it in the first place.¹⁴ This is clearest with statutes. There is no provision in the Constitution that tells us how to undo a statute. We have always naturally assumed that to repeal a congressional statute, Congress must take the same action and pass another statute that repeals the first.¹⁵ But there is not always a direct correlation for reversal with the presidency. There are actions for which the President must receive the advice and consent of the Senate; however, to undo those actions the President can act on his own to reverse without the Senate's advice and consent.¹⁶ For example, the President, under the Constitution,

11. Ellyn Ferguson, *Congress Can Stop Trump From Ditching WTO, Analysts Say*, ROLL CALL (July 5, 2018, 1:28 PM), <https://www.rollcall.com/news/policy/congress-stop-trump-ditch-wto> [<https://perma.cc/CP5E-X3T7>].

13. See Maeve P. Carey, *Can a New Administration Undo a Previous Administration's Regulations?*, CONG. RES. SERV. (Nov. 21, 2016), <https://fas.org/sgp/crs/misc/IN10611.pdf> [<https://perma.cc/UM8Z-MPB4>].

13. Rachel Augustine Potter, *How the Trump Administration Can Use Benefit Cost Analysis to Justify Deregulation*, BROOKINGS INST. (Aug. 1, 2017), <https://www.brookings.edu/research/how-the-trump-administration-can-use-benefit-cost-analysis-to-justify-deregulation/> [<https://perma.cc/SN3C-8C5X>].

14. Karen Petroski, *Rethorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 496 (2004).

15. *Id.*

16. U.S. CONST. art. II, § 2, cl. 2; Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73, 81 (2006).

must receive the advice and consent of the Senate to appoint executive branch officers.¹⁷ But when it comes time to reversing the appointment, most executive positions are undone by a single executive action: firing.¹⁸ Two examples include the officers who contested their terminations in *Humphrey's Executor*¹⁹ and *Morrison v. Olson*.²⁰

Some people argue that Congress can place limitations on the President's removal power.²¹ But it is important to study cases like *Humphrey's Executor* and *Morrison v. Olson* in those places where separation of powers is taught in constitutional law. Those two cases are about the executive undoing an action that originally had been undertaken by the President and Senate together.²² This issue has not been settled. For example, there was a huge constitutional controversy on this issue with the Tenure of Office Act of 1867, which led to President Andrew Johnson's impeachment and near-removal from office.²³ This question about the limits that can be placed on the President's removal power was not fully settled by the

17. U.S. CONST. art. II, § 2, cl. 2.

18. Delahunty & Yoo, *supra* note 16, at 81.

19. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

20. *Morrison v. Olson*, 487 U.S. 654 (1988).

21. See, e.g., Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1783–84 (2006) (arguing that “[d]espite the prevailing intuition that Congress cannot remove officers, the case for a congressional removal power is a compelling one,” and that the President “has no constitutional right to remove presidentially appointed non-executive officers” and “has far less removal authority than is commonly supposed”).

22. See *Morrison*, 487 U.S. at 692 (examining whether a “good cause” removal provision placed by Congress on the attorney general’s ability to remove an independent counsel impermissibly burdened the President’s ability to faithfully execute the laws of the United States); *Humphrey's Ex'r*, 295 U.S. at 618–19 (explaining that President Franklin Roosevelt removed William E. Humphrey from his office as Commissioner of the Federal Trade Commission in 1933 after Humphrey had been nominated for that position by President Herbert Hoover in 1931 and confirmed by the Senate).

23. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667, 746–58 (2003) (detailing the history of President Andrew Johnson’s battle with Congress over the constitutionality of the Tenure of Office Act, which restricted the President’s ability to remove certain executive officers without the approval of the Senate, and describing Johnson’s impeachment and acquittal by a single vote).

Supreme Court in *Myers v. United States*,²⁴ and we are still fighting about it today.

Consider treaty termination. The President must get the advice and consent of the Senate to make a treaty,²⁵ but the President can terminate a treaty by himself.²⁶ While that might have been controversial at the founding, it does not seem to be controversial now. Congress terminates treaties by itself as well.²⁷ We do not follow the same formal process to undo a treaty that we used to make the treaty. When it comes to the presidency, we have come to assume that this has to do with presidential power over foreign policy.

As a case in point, America's treatment under the Washington administration of the Franco-American Treaty of Alliance in 1778 is very interesting and worth more study than it has ever received.²⁸ France's contributions were critical to America's successful fight for independence. When the French Revolution occurred and every nation in Europe tried to invade France, the French quite reasonably sent an ambassador to the United States.²⁹ The ambassador reminded the American government of France's aid to the American fight for

24. 272 U.S. 52, 106 (1926) (deciding whether the President has exclusive power of removing executive officers of the United States without congressional approval and answering the question in the affirmative), *overruled in part by Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

25. U.S. CONST. art. II, § 2, cl. 2.

26. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 265 (2001) ("Terminating a treaty in accordance with its express terms or with international law is a power not mentioned directly in the Constitution, but was obviously part of the traditional executive's foreign affairs power.").

27. See, e.g., Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 789 (2014) (describing how Congress passed legislation in 1798 stating that the four treaties the United States currently had with France would henceforth be considered terminated).

28. See John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1311 (2002) (noting that in debates over treaty interpretation and power over foreign affairs scholars have tended to overlook the significance of George Washington's Neutrality Proclamation and his cabinet's debate over the interpretation of the Franco-America Treaty of Alliance of 1778 on which the Neutrality Proclamation relied).

29. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 782 (2012) ("The United States henceforth received an official ambassador from France, and, following the French Revolution, President Washington recognized the new French government in 1793 by receiving Citizen Genet.").

independence and asked the United States to return the favor.³⁰ The French sought to utilize their mutual defense treaty to build a navy on American soil for use in fighting the British.³¹

There was a great debate in the Washington cabinet about whether to obey the terms of the treaty.³² What did President Washington do? He declared neutrality.³³ He effectively changed the foreign policy of the United States as it had existed under the Continental Congress. There was debate at that time, and ever since, about control of foreign policy and who gets to declare neutrality. Neither Thomas Jefferson nor Alexander Hamilton disputed that it was the President's right to make that decision.³⁴ Both men argued about where the source of that power came from and how far it could go, but neither Jefferson nor Hamilton, who both served in Washington's cabinet, thought that Congress could decide whether to declare neutrality or not. In a way, Washington was not just setting foreign policy. He was reversing the foreign policy of a previous government.

Another historical example concerns the Emancipation Proclamation and the decision to use force in the Civil War. President Buchanan's view was that secession was unconstitutional, but that the President had no constitutional authority to stop it from happening.³⁵ Abraham Lincoln was

30. See William Casto, *America's First Independent Counsel: The Planned Criminal Prosecution of Chief Justice John Jay*, 1 GREEN BAG 2D 353, 354 (1998) (noting that "[a]s soon as he landed, [the ambassador] began encouraging Americans to attack France's enemies by land and sea").

31. See *id.* (explaining that Ambassador Genet's "most successful project was to launch a privateer fleet that attacked British shipping up and down the East Coast").

32. See Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 410–11 (2012) (describing the debate in Washington's cabinet between Alexander Hamilton, Thomas Jefferson, and Edmund Randolph over the validity of the treaty with France).

33. See George Washington, *A Proclamation by the President of the United States of America* (Apr. 22, 1793), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 156 (James D. Richardson ed., Washington, 1898).

34. See Reinstein, *supra* note 33, at 429 (noting that the cabinet vote in support of Washington's issuance of the Neutrality Proclamation was unanimous).

35. See Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 MICH. L. REV. 1263, 1282 (2004) (noting Buchanan's argument that the South did not have a right to secede but that the federal government did not have legal authority to invade those states).

elected and immediately decided that he could reverse that prior policy and even reverse that reading of the Constitution, which Buchanan had published in all the national newspapers during the lead-up to secession.³⁶

It is this point—that no President has the right to bind future Presidents in the use of their presidential powers—that underlies many of our modern debates. It is at the core of the executive power. This was a big fight in the Reagan administration. There were a number of people who sued and attacked the Reagan administration's deregulatory agenda by saying that President Reagan could not undo existing regulations.³⁷ These challenges repeatedly made it to the D.C. Circuit,³⁸ and this phenomenon is what is really going on behind the *Chevron*³⁹ doctrine. The D.C. Circuit, and ultimately the Supreme Court in *Chevron*, said you can use the same process to deregulate as you used to regulate, even though the delegations never mentioned how you would undo a regulation.⁴⁰

Financial regulations raise an interesting thought experiment, because it is unclear whether they are reversed,

36. See Abraham Lincoln, President of the United States, Message to Congress in Special Session (July 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 421 (Roy P. Basler ed., 1953), <https://quod.lib.umich.edu/l/lincoln/lincoln4/1:741?rgn=div1;view=fulltext> [<https://perma.cc/3M3U-V5KM>].

37. See Martin Tolchin, *The Rush to Deregulate*, N.Y. TIMES (Aug. 21, 1983), <https://www.nytimes.com/1983/08/21/magazine/the-rush-to-deregulate.html> [<https://nyti.ms/2yKeDzJ>].

38. See, e.g., *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1443 (D.C. Cir. 1983) (reviewing orders of the Federal Communications Commission deregulating the radio industry); *Comput. & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982) (reviewing a claim that the Federal Communications Commission impermissibly deregulated services in the telecommunications industry), *cert. denied*, 461 U.S. 938 (1983).

39. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

40. See *id.* at 865–66 (1984) (holding that the Environmental Protection Agency's interpretation of the Clean Air Act was entitled to deference because it was based on a permissible construction of the statute); *Office of Commc'n of United Church of Christ*, 707 F.2d at 1443 (“[I]n the absence of more specific congressional direction, we cannot say that the Commission has overstepped either the bounds of its statutory authority or its administrative discretion in undertaking most of the deregulatory actions under review.”); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (holding that rescission or modification of a rule is subject to the same informal rulemaking procedures as promulgation).

repealed, or deregulated. Take, for example, Sarbanes-Oxley,⁴¹ Dodd-Frank,⁴² or the statutory expansions of regulation. It is really the agencies that have been heavily regulating securities.⁴³ When I was in law school, we spent all this time on something called Rule 10b-5.⁴⁴ I was very disappointed to learn that it was not Congress that passed Rule 10b-5—it was done by the SEC.⁴⁵ It is the fundamental bar on insider trading.⁴⁶ So, what if a President came into office on January 21st, 2017, and said, “I hereby repeal all regulations and return all executive branch-made law to the state it was in on January 19th, 2009?” Could the President just do it all at once—repeal and reverse? And could the President do it simultaneously for every regulation and say, “I’m returning power to Congress”?

When the constitutional system says that what the President is really doing is exercising delegated authority—say, with regard to the monuments or some other regulatory powers⁴⁷—and we are pretending there are no nondelegation limits to that, then Congress can condition and describe the mechanism for undoing that sort of action.⁴⁸ But most statutes do not delegate authority to the President and then spell out how to reverse the use of delegated authority.⁴⁹ They are usually silent. So, the President’s power to reverse his constitutional decisions

41. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of the U.S. Code).

42. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

43. See John C. Coffee, Jr., *Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1036 (2012) (noting the replacement of auditor self-regulation with the PCAOB); James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit’s Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1842–43 (2012) (discussing the significant market impact when the SEC adopted Rule 19c-3 and again when the SEC implemented the pilot program exempting certain stocks from the Uptick Rule).

44. 17 C.F.R. § 240.10b-5 (2018).

45. *Id.*

46. *Id.* § 240.10b5-1.

47. See generally JOHN YOO & TODD GAZIANO, AM. ENTER. INST., *PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS* (2017).

48. *Id.* at 7 (noting in the context of the Antiquities Act that in the absence of Congressional assignment of a revocation power the president maintains discretionary power to revoke national monument designations).

49. *But cf.* Administrative Procedure Act § 2(c), 5 U.S.C. § 551(5) (2012) (including the agency process for repealing a rule within the definition of “rule making”).

creates a presumption that when Congress hands over that power and does not say anything about how to undo it, the same reversal power is inherent.⁵⁰

I think the President is empowered to revert to the status quo before his predecessor was in office, and then the issue is whether Congress can stop him. That is the power of executive reversal.

50. YOO & GAZIANO, *supra* note 48, at 19 (“It is a general principle of government that the authority to execute a discretionary power includes the authority to reverse the exercise of that power.”).