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# Has the President of the United States the Power to Suspend the Operation of an Act of Congress?

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**B**EGINNING with the reign of Henry III the right of the crown to suspend or dispense with laws without the consent of parliament was consistently claimed as an attribute of the royal prerogative.<sup>1</sup> Under James II, however, the general tension in the political situation made it expedient to secure a judicial expression of opinion on the subject, so, James, having "recalled" all unsatisfactory judges, caused a collusive action to be instituted to test his rights. One Sir Edward Hales had incurred a penalty of £500, under an Act of Parliament commonly known as the Test Act<sup>2</sup> for accepting military command without taking the oath and making the subscription required by the statute. He pleaded a dispensation from the crown and the plea was held good.

The court<sup>3</sup> held, "That to dispense with penal laws (where the subject hath no particular damage), for necessary and urgent occasions is an inseparable prerogative of the king.

That the king is the sole judge of such necessity [and] that no Act of Parliament could take away that right.

That the trust residing in him came not from the people but was a sovereign right of the king *ab antiquo*."

Thus fortified, James so incessantly exercised this power that it is said to have been one of the leading causes of his loss of the throne.

The importance of this matter from the viewpoint of James' contemporaries is evidenced by its being the very first of the grievances set out in the Bill of Rights and by its mention no less than four times in this famous statute. In one place it reads "That the pretended power of suspending of

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<sup>1</sup> Taswell-Langmead: English Constitutional History.

<sup>2</sup> 25 Car. II, c. 2.

<sup>3</sup> Godden v. Hales, 2 Shower Rep. 475, 11 State Trials 1165.

laws or the execution of laws by regall authority without consent of Parlyament is illegall." And finally it is enacted. "That from and after this present session of Parlyament noe dispensation by non obstante of or to any statute or any part thereof shall be allowed but that the same shall be held void and of no effect except a dispensation be allowed of in such statute."

To say that this power is still within the category of debatable constitutional questions in the United States, seems almost absurd. Yet both Mr. Roosevelt and Mr. Taft have assumed to suspend statutes relating to the public land and their action is not only vigorously advocated by many eminent officials of the executive and legislative departments of the government but even seems to find support in adjudicated cases.

It is our purpose to discuss and analyze these cases so as to determine how far, if at all, *Godden v. Hales* is authority in the United States today.

The constitution of the United States confides the control of the public lands to Congress.<sup>4</sup> "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." Pursuant to this authority Congress enacted Section 2319 of the Revised Statutes which provides that "All valuable mineral deposits in lands belonging to the United States, both surveyed or unsurveyed, are hereby declared to be free and open to exploration and purchase, and the land in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such."

The President, however, by numerous proclamations, has decreed that this statute shall not apply to 62,115,242 acres of public lands, an area equal to the area of all the New England States plus Indiana. In the language of the withdrawal orders these lands are "temporarily withdrawn from sale," but language cannot alter the intrinsic facts. To deny to any citizen of the United States the right to enter any specific tract of land when Congress says he may enter, is a suspension of the Act, no matter how euphemistically it may be phrased.

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<sup>4</sup>Art. IV, Sec. 3.

A decided crisis in the situation occurred when President Taft withdrew 2,183,022 acres of supposed oil land in California on September 27, 1909. In a message to Congress, shortly thereafter, the President stated, for the first time, that he doubted the validity of his action and asked Congress to ratify it. This Congress refused to do, but on June 28, 1910, authorized future withdrawals of oil, gas and phosphate lands.<sup>5</sup> In accordance with this act, the President again withdrew the same lands and undertook to ratify and continue in force his earlier withdrawals.

It is apparent that this statute by no means renders the constitutional power of the President to withdraw a moot question. The title to thousands of acres entered after the first withdrawal but before the second, depends entirely on the solution of this problem as do also all entries on lands containing metals such as gold, silver, copper, etc., or minerals such as gypsum and the like, for the statute only authorizes withdrawal from entry under the mining laws of lands containing oil, gas and phosphates.

Certain cases have been cited, which seem to support the power in question, however contrary it seems to fundamental constitutional principles. We proceed to consider these au-

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<sup>5</sup> An act to authorize the President of the United States to make withdrawals of public lands in certain cases. (Act of June 25, 1910, ch. 421).

Sec. 1. (Temporary withdrawals by President for power sites, irrigation, etc., authorized.)

That the 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. (36 Stat. L. 847.)

Sec. 2. (Mining rights continued—exceptions—rights of bona fide oil and gas claimants—status of prior claims—homesteads, etc., settlements excepted—restriction on new forest reserves.) That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas-bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And further provided, That this Act shall

thorities. The withdrawal of 1909 has been recently considered by the Secretary of the Interior,<sup>6</sup> and held valid. The opinion is rather cursory and gives no precedents for the judgment. The sole reason assigned for this decision is stated at page 306. "The fact of such withdrawals was known to Congress, and recognized and thereupon it enacted substantive legislation."

It hardly seems reasonable to dismiss so important a constitutional question involving millions of acres of valuable land in a few sentences. The decision must be disregarded as valueless as a contribution to the discussion of the matter.

Aside from this land office case, the most extreme advocacy of this presidential prerogative is found in the report of Mr. Garfield, (formerly Secretary of the Interior):

"From the earliest days the executive has found it necessary in the public interest to take action concerning the public lands by withdrawing areas from entry. There was no specific provision of law for many of those withdrawals and yet they were made unhesitatingly by the executive as steward. . . . Full power [to control public land] under the constitution was vested in the executive branch of the government, and the extent to which that power may be exercised is governed wholly by the discretion of the executive, unless any specific act has been prohibited by the constitution or by legislation."<sup>7</sup> No ju-

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not be construed as a recognition, abridgment, or enlargement of 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: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made; And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming except by Act of Congress. (36 Stat. L. 847.)

Sec. 3. (Report of withdrawals to Congress.) That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals. (36 Stat. L. 848.)

<sup>6</sup> Lowell (1911), 40 L. D. 303.

<sup>7</sup> C. J. Taney, in *Ex Parte Berryman* (1861), Fed. Cas. No. 9487, said: "The government of the United States is one of delegated and

dicial authority can be found to support this novel view of executive power, but some eminent members of both Houses of Congress seem to give it hearty approval.

The strongest decision in favor of an inherent as distinguished from a statutory power to withdraw, is from a State court. In *Florida Town Improvement Co. v. Bigalsky*,<sup>8</sup> the Supreme Court of Florida said: "Without authority of Act of Congress it is well settled that the President of the United States by executive order could reserve a part of the public domain for a specific public purpose such as a military reservation." The decision is based on the authority of *Grisar v. McDowell*, *infra*, which, as will be shown, in no way supports it. The right to withdraw land for military posts does not depend on any inherent or constitutional power of the President but is directly authorized in three distinct Acts of Congress, the Acts of May 3, 1798, April 21, 1806, and June 14, 1809.

In *O'Connor v. Gertgens*,<sup>9</sup> the court uses the following language: "The interior department possesses plenary power to withdraw public lands from settlement and market at will . . . And it seems quite immaterial what may be the reason or basis of the order or what land it affects." This decision was affirmed on appeal in *Gertgens v. O'Connor*,<sup>10</sup> on the ground that the respondent had the better right under a curative statute recognizing the withdrawal, but did not adopt the language quoted. It is also to be noted that the withdrawal approved by the State court was within the indemnity limits of a railroad grant, and that the United States Supreme Court has held in numerous cases that indemnity lands cannot be withdrawn.<sup>11</sup>

In *Nevada Ditch Co. v. Bennett*,<sup>12</sup> the following dictum appears: "It has been the policy of the general government from

limited power . . . and neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted."

<sup>8</sup> *Fla. Town Imp. Co. v. Bigalsky* (1902), 44 Fla. 771, 33 So. 450.

<sup>9</sup> *O'Connor v. Gertgens* (1902), 85 Minn. 481, 89 N. W. 869.

<sup>10</sup> *Gertgens v. O'Connor* (1903), 191 U. S. 237, 24 S. Ct. 94, 48 L. Ed. 163.

<sup>11</sup> *Hewitt v. Schultz* (1900), 180 U. S. 139, 21 S. Ct. 309, 45 L. Ed. 463, reversing 7 N. D. 601, 76 N. W. 230; *Southern Pacific R. R. Co. v. Bell* (1901), 183 U. S. 675.

<sup>12</sup> *Nevada Ditch Co. v. Bennett* (1896), 30 Ore. 59, 45 Pac. 484, 60 Am. St. Rep. 777.

an early date when the exigencies of the public service required it, for the President, through the instrumentality of executive order, to reserve such portions and parcels of the public domain from sale and settlement as seemed expedient and thereby set them apart for public use and it may be conceded the President had authority for so doing." To support this view *Grisar v. McDowell* is again cited so that this case should be read in the light of the discussion on *Grisar v. McDowell*. The quotation was clearly dictum, for the withdrawal in question had been set aside and was not given effect by the court.

*Behrends v. Goldstein*,<sup>13</sup> authorizes the setting apart of land for a naval station which was provided for by statute.

These quotations state most clearly the extreme view in favor of the doctrine. As soon as we turn to the federal and particularly to the United States Supreme Court decisions, we find no such certainty. It is really extraordinary to note how often this question is incidentally involved without bringing out a satisfactory, authoritative and conclusive decision on either side.

In order that there may be no misapprehension of the situation it must be noted that there are many Acts of Congress, which expressly authorize the President to withdraw lands for purposes stated in such acts.<sup>14</sup> The validity of such statutory withdrawals is assumed. The power that has been contended for by the land department is the power to withdraw without authority of an Act of Congress. Whenever, therefore, the courts have given effect to a withdrawal authorized by statute, it is obvious that such decision is no authority for an inherent or constitutional power to withdraw.

The language of *Cohens v. Virginia*,<sup>15</sup> is particularly apposite to the discussion and should be borne in mind: "It is a maxim not to be disregarded, that general expressions, in every

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<sup>13</sup> *Behrends v. Goldstein* (1902), 1 Alaska 518.

<sup>14</sup> Statutes authorizing withdrawals in addition to those referred to in cited cases taken from argument of Senator Borah, in the Senate on May 11, 1910: 1 U. S. Stat. 251 (Garrison); 2 U. S. Stat. 277-280, 391 (Salt Springs); 2 U. S. Stat. 448 (Lead Mines); 2 U. S. Stat. 684 (Salt Works); 2 U. S. Stat. 784 (Military Purposes); 3 U. S. Stat. 347 (Timber for Navy); 12 U. S. Stat. 819 (Indian Reservations); 12 U. S. Stat. 754 (Town Sites); 30 U. S. Stat. 36 (Forests); 32 U. S. Stat. 388 (Reclamation Purposes).

<sup>15</sup> (1821) 6 Wheat. 264, 5 L. Ed. 257.

opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The favorite authority of all the proponents of the power in question is *Wilcox v. Jackson*,<sup>16</sup> yet it in no way supports the point. The withdrawal therein validated was in strict accord with express authority given by Act of Congress. Surely it can not be a precedent to justify a withdrawal without such Congressional authorization. In this case, it appears that the Secretary of War withdrew from sale certain land for military purposes in 1824. Plaintiff having obtained a pre-emption certificate on the withdrawn land brought ejectment against the military commandant in possession. The court held first, that ejectment would not lie; second, that the withdrawal by the Secretary of War was, in effect, the act of the President; third, that the President was authorized by the statutes of 1798, 1806 and 1809 to reserve lands for military purposes, and, fourth, that the Act of June 26, 1834, which authorized the sale of the very lands in question, in terms reserved from sale "such reservations as the President shall deem necessary to retain for military purposes."

The next case is *Grisar v. McDowell*.<sup>17</sup> The decision is particularly interesting by reason of the almost universal misconstruction of certain language therein. As heretofore noted, it is cited in the two strongest cases in favor of the power, in fact, is the very basis of these decisions.

The plaintiff *Grisar* as the successor in interest of the City of San Francisco, brought ejectment against *McDowell* who was the department commander of the United States army at San Francisco, and as such was in possession of the land in-

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<sup>16</sup> (1839) 13 Peters 498, 10 L. Ed. 264.

<sup>17</sup> (1867) 6 Wall. 363, 18 L. Ed. 863.

volved. It appeared that in 1850 and 1851 President Fillmore had directed that these lands, as part of a larger tract, should be set apart for public purposes. Thereafter Congress caused fortifications and other public works to be erected thereon. A long contest ensued between the United States and the City of San Francisco as to whether the lands in question were a part of the "pueblo lands" belonging to the municipality under the Mexican laws. Eventually by decree of the Circuit Court the claim of the city was confirmed to four square leagues excepting such portions as had been "previously reserved or dedicated to public uses by the United States." The government appealed but prior to the determination of the appeal relinquished to the city by statute and the city accepted, title to said land subject to the reservations contained in the decree of the Circuit Court.

The Court held that as the title of the city was based on the decree as confirmed by Congress, which excluded the land in question, the land belonged to the United States, and that the plaintiff, as successor in interest of San Francisco, could not question whether the President had authority to make the reservation. The court also held that the act of the President in making the reservation was ratified by Congress when it appropriated money to fortify it.

But the court went further and said: "From an early period in the history of the government it has been the practice of the President to order from time to time as the exigencies of the public service required parcels of land belonging to the United States to be reserved from sale and set apart for public use.

"The authority of the President in this respect is recognized in numerous Acts of Congress. Thus in the Pre-emption Act of May 29, 1830, (4 Stat. at L. 421), it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by Act of Congress or by order of the President, or which may have been appropriated for any purpose whatsoever.' Again, in the Pre-emption Act of September 4, 1841, 'Lands included in any reservation by any treaty, law or proclamation of the President of the United States or reserved for salines or for other purposes,' are exempted from entry under the Act (5 Stat. at L. 453). So by the Act of March 3, 1853, providing for survey of public lands

in California and extending the pre-emption system to them, it is declared that all public lands in that State shall be subject to pre-emption and offered at public sale with certain specific exceptions and among others of 'lands appropriated under authority of this act or reserved by competent authority.' (10 Stat. at L. 246.) The provisions of the Acts of 1830 and 1841 show very clearly that by competent authority is meant the authority of the President and officers acting under his direction (*Wolcott v. Des Moines Co.*)”

The language of the court is, of course, merely dictum. When the court held that the plaintiff could not question the validity of the reservation and that the reservation had been ratified by Congress, the case was disposed of, and the question of the original right to withdraw became immaterial. Conceding to it the fullest weight, however, where is there any language holding that the President can withdraw “without authority of Act of Congress?” All that the court says is, that it has been the practice of the President to withdraw land, and that such practice has been recognized in the various pre-emption acts.

Relying directly on this case is *U. S. v. Payne*,<sup>18</sup> approving a withdrawal for an Indian reservation. An Act of Congress of May 28, 1830, authorizes such reservations for Indian purposes by the President. The case is, notwithstanding, cited to support the doctrine of inherent power.

This ends the line of cases relating to what may be designated withdrawals for public purposes such as military reservations and the like. There is a tendency among some of the strongest opponents of the inherent right of the President, to concede it for these purposes. There is, however, no justification for the concession. Wherever a withdrawal for such purposes has been validated by the courts there has been a statute on the books justifying it, though in one or two cases the judge writing the decision did not seem to be aware of it.

We now come to an entirely distinct line of decisions which may be collectively designated as the Iowa land grant cases.

In 1846 Congress made a grant of land to the State of Iowa, and a question at once arose whether the grant extended be-

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<sup>18</sup> (1881) 8 Fed. 883.

yond a place called the Raccoon Forks. A dozen conflicting decisions were handed down by the successive Secretaries of the Interior and Attorneys General, but it was finally judicially determined not to extend beyond the Forks. Pending the decision the land beyond the Forks was withdrawn. Junior grants were bestowed on these lands and several curative statutes were passed to protect innocent settlers from the hardships arising out of the confused departmental rulings. As a result the matter had the attention of the U. S. Supreme Court on eight or ten different occasions and the decisions must be read in the light of the situation.

The first of the cases is *Wolcott v. Des Moines Co.*<sup>19</sup> The court here confirmed the validity of the withdrawal beyond the Raccoon Forks, using the following language: "Besides, if this power to withdraw was not competent,—which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of the 8th August, 1846, carried along with it by necessary implication not only the power but the duty of the land office to reserve from sale the lands embraced in the grant. Otherwise its object might be entirely defeated. Hence, immediately upon a grant being made by Congress for any of these public purposes to the State, notice is given by the Commissioner of the General Land Office to the registers and receivers to stop sales either public or by private entry. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the lands and reserve them to the United States till it was authoritatively disposed of."

*Wolcott v. Des Moines* is perhaps the leading case on this subject. It is cited in virtually all the subsequent decisions as directly supporting the power to withdraw without statutory authorization. On the contrary, it distinctly holds that the power is implied by the Statute of 1846.

The doctrines thus laid down are somewhat extended in *Wolsey v. Chapman*,<sup>20</sup> the next case involving the Iowa land

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<sup>19</sup> (1866) 5 Wall. 681, 18 L. Ed. 689.

<sup>20</sup> (1879) 101 U. S. 755.

grant. The defendant claimed under a junior grant which excluded "land reserved from sale by any law of Congress or proclamation of the President." The land involved had been reserved from sale by proclamation of the President as appears in *Wolcott v. Des Moines*. This fact was of course known to Congress, and, whether the reservation was valid or not in its inception it was clearly ratified so far as the junior grant was concerned. The decision in favor of plaintiff simply gave effect to the express provision of the Statute. Yet the decision contains two dicta, the first, one of the strongest statements against the inherent power of the President to withdraw, the second, one of the strongest statements in its favor. The first is as follows: "The truth is there can be no reservation of public land from sale except by reason of some treaty, law or authorized act of the executive department of the government." But the court also said: "The proper executive department of the government had determined that because of the doubts about the extent and operation of the act nothing should be done to impair the rights of the State above the Raccoon Forks until the differences were settled by judicial decision. For that purpose an authoritative order was issued directing the local land officer to withhold all disputed lands from sale. This withdrew the land from private entry, and as we held in *Riley v. Wells*,<sup>21</sup> was sufficient to defeat a settlement for the purposes of pre-emption while the order was in force, notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate a withdrawal."

The last case of the Iowa grant cases is *United States v. Des Moines Nav. & Ry. Co.*<sup>22</sup> Here the court reviewed with care the earlier decision and said that the effect of *Wolcott v. Des Moines* was as follows: "Even in the absence of a command to that effect in the statute it was the duty of the officers of the land department immediately upon a grant being made by Congress to reserve from settlement and sale the lands

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<sup>21</sup> *Riley v. Welles* (1870), 154 U. S. 578, 19 L. Ed. 648 (Memorandum decision—not officially reported), affirming *Wolcott v. Des Moines*. It contained no such language as is here stated.

<sup>22</sup> (1891) 142 U. S. 510. Also see *Hamlin v. Western Land Co.* (1893), 147 U. S. 531, and *Bullard v. Des Moines* (1881), 122 U. S. 167, also affect the Iowa grant.

within the grant; and that if there is a dispute as to its extent it was their duty to reserve all lands which upon either construction might become necessary to make good the purposes of the grant.”

Do these cases fairly support the contention that the President can, at any time, for any purpose withdraw from entry as much land as to him shall seem proper? We think not. They go to this extent and no further: When Congress grants land for a specific purpose it is the duty of the land office to preserve the land necessary to satisfy the grant,<sup>23</sup> without express direction. In making withdrawals to satisfy such grants, however, the amount of land necessary is a matter which must be largely confided to the good judgment of the land officers. It is obvious that where Congress has granted a large tract of land for a public improvement, there is apt to be an inrush of homesteaders before the precise limits of the grant are established. To permit settlers to acquire these lands might defeat the very purposes of the grant and their own interests as well, by rendering the proposed improvement impractical. In withdrawing lands which “feed” the grant, the land department is fulfilling its proper sphere of carrying the laws into execution. It is a very different proposition to withdraw lands which Congress has said shall be open to entry. This is nullifying, not executing the law.<sup>24</sup>

At the very time that the court was considering the Iowa cases a number of the western railroad grants came up for decision, putting the question of withdrawal in an entirely new light, and seriously impairing the doctrine of implied power.

Wolcott v. Des Moines clearly held that a grant of land for a specific purpose carried with it by necessary implication not only the power but the duty to withdraw it from entry for

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<sup>23</sup> N. P. R. R. Co. v. Musser Santry (1897), 168 U. S. 604.

<sup>24</sup> The doctrine of wide discretionary powers of land officers as to the quantity of land withdrawn to aid the grant sustained and applied in *Wisconsin v. Forsythe* (1895), 159 U. S. 46, *Spencer v. McDougal* (1895), 159 U. S. 62, *Wood v. Beach* (1894), 156 U. S. 548, and *Northern Lumber Co. v. O'Brien* (1905), 134 Fed. 303 (1905), 139 Fed. 614, all holding that the land office could withdraw lands in the indemnity limits as distinguished from the place limits of a railroad grant. But these decisions have been in effect, overruled in *Southern Pacific R. R. Co. v. Bell* (1901), 183 U. S. 675, and *Hewitt v. Schultz* (1900), 180 U. S. 139.

other purposes. The land office was under this view allowed to exercise some discretion in the matter, and the logical conclusion was to permit the withdrawal of indemnity railroad lands by the land office, as in *Wisconsin v. Forsythe*, supra. As has been noted, this decision was afterwards overruled largely because of a new theory which was first distinctly set out in *Buttz v. N. P. R. R. Co.*<sup>25</sup> This case established the proposition that instead of the land office having implied authority to withdraw the lands, the grant itself withdrew the lands, and the action of the land office was merely formal and ministerial. Mr. Justice Field said: "When the general route of the road is fixed in good faith and information thereof given to the land department . . . the law withdraws from sale or pre-emption the odd sections . . . although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption it has been the practice of the department in such cases to formally withdraw them."<sup>26</sup>

In *St. Paul and Pacific Railroad Co. v. Northern Pacific Railroad Co.*,<sup>27</sup> the court said: [The lands] "were excepted by legislation from grants independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared."

We have reviewed the authorities upon which reliance is placed to support the doctrine that the President can constitutionally and without Act of Congress withdraw lands which Congress has said shall be open to entry by any American citizen. They seem to offer little basis for the claim of so formidable a power. Nothing can be plainer than that the power to

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<sup>25</sup> (1886) 119 U. S. 55.

<sup>26</sup> This language was quoted with approval in *U. S. v. S. P. R. R. Co.* (1892), 146 U. S. 570; *S. P. v. Groeck* (1898), 87 Fed. 970, and *U. S. Oregon v. Cal. R. R. Co.* (1899), 176 U. S. 28. The same doctrine was foreshadowed in *Van Wyck v. Knevals* (1882), 106 U. S. 360, and *Walden v. Knevals* (1884), 114 U. S. 373, which held it was the duty of the Secretary to withdraw when the line of road was definitely fixed but the lands were thereby withdrawn whether the Secretary withdrew them or not. See also to same effect *McFadden v. Mt. View Mining and Mill Co.* (1899), 97 Fed. 670; *Apis v. U. S.* (1898), 88 Fed. 931; and *Russian American Packing Co. v. U. S.* (1905), 199 U. S. 570, permitting a withdrawal for a fish hatchery under 26 Stat. 1095.

<sup>27</sup> (1890) 139 U. S. 1.

suspend laws is a legislative and not an executive function,<sup>28</sup> and in our government the only legislative power of the President is the right to veto. Instead of occasional dicta torn from a qualifying context, it would require strong unequivocal decisions repeatedly affirmed to establish a doctrine so discordant with the recognized plan of American government.

As an offset to the language of the message of Mr. Secretary Garfield, we quote from President Taft's special message to Congress on January 14, 1910: "The power of the Secretary of Interior to withdraw from the operation of existing statutes, tracts of land the disposition of which, under such statute, would be detrimental to the public interests, is not clear or satisfactory. This power has been exercised in the interests of the public with the hope that Congress might affirm the action of the executive by laws adapted to the new conditions." This message is important in two ways. It shows, in the first place, something more than doubt in the mind of the President as to the validity of the practice of executive withdrawals of lands. In the second place, it brings out into full view the extraordinary extent of the power claimed, which is nothing less than the right to inhibit the execution of such laws as are, in the opinion of the executive officers "detrimental to the public interest."

Turning now to the decisions on the other side, we first direct attention to two cases which, while not involving withdrawals, so clearly and cogently discuss the delimitations of executive power that in themselves, they constitute a decisive answer to the problem under discussion. The first of these is by the late District Judge Dedy of Oregon. In *McCall v. McDowell*,<sup>29</sup> the court in considering the power of the President to suspend the right to a writ of habeas corpus said: "The power of the President is executive—a power to execute the laws but not to suspend them. The latter is a legislative function and so far as it exists belongs naturally and by force of the Constitution exclusively to Congress." The other case is from the United States Supreme Court, *Kendall v. United States*.<sup>30</sup> In this the Postmaster General claimed to be subject

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<sup>28</sup> *McCall v. McDowell* (1867), 15 Fed. Cases No. 8673.

<sup>29</sup> (1867) 15 Fed. Cas. No. 8673.

<sup>30</sup> (1838) 12 Peters 613.

alone to the direction and control of the President. The Court said: "This is a doctrine that cannot receive the sanction of this court. It would be resting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it would be clothing the President with a power entirely to control the legislation of Congress and paralyze the administration of justice. To hold that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution and entirely inadmissible." It is impossible, we submit, to avoid the conclusions to be drawn from these cases.

But it is by no means necessary to rely on general principles. The question of the power to withdraw has often been referred to by the courts and time and again denied. The strongest expression of opinion on either side of the question is found in *Lockhart v. Johnson*,<sup>31</sup> where the court said: "Public lands belonging to the United States for whose sale or other disposition Congress has made provisions by its general laws are to be regarded as legally open for entry and sale under such laws unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority either expressed or implied."

The quotations which follow are in many instances dicta, and while not entirely satisfactory, are at least as strong as the cases on the other side. As heretofore stated, it is nothing short of remarkable that a question so often before the Court should have given rise to such ill considered, indecisive and equivocal language in the opinions. *Brandon v. Ard*:<sup>32</sup> "The withdrawal [of lands] . . . prior to definite location of the road and before they were regularly selected to supply deficiencies in place or granted limits was within authority of law. Such unauthorized withdrawal did not stand in the way of *Ard*" [selecting under homestead laws].

*Kansas Pacific R. R. Co. v. Atchison etc. R. R. Co.*:<sup>33</sup> "The order of withdrawal of lands along the 'probable lines' of de-

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<sup>31</sup> (1900) 181 U. S. 516.

<sup>32</sup> (1908) 211 U. S. 11.

<sup>33</sup> (1884) 112 U. S. 414.

fendant's road . . . by the Commissioner . . . affected no rights which without it would have been acquired to the lands nor in any respect controlled the subsequent grants."

In *Northern Pacific R. R. Co. v. Sanders*,<sup>34</sup> it was held that a withdrawal after filing a general route did not prevent a mineral entry.

*Nelson v. N. P. Railway Co.*:<sup>35</sup>

"The withdrawal . . . was made only out of abundant caution and in accordance with a practice of the land department and did not and could not affect any rights, given to homestead occupants, by Congress."

*Burfenning v. Chicago etc. Railway Co.*:<sup>36</sup>

"The action of the land department cannot over-ride the expressed will of Congress or convey away public land in disregard or defiance thereof." (See also *Cedar Rapids etc. R. R. Co. v. Herring*, 110 U. S. 27)

In *U. S. v. Tichenor*,<sup>37</sup> the court disallowed a withdrawal even for military purpose in excess of the acreage specified in the statute thus nullifying any inherent right even for such public purposes saying: "The power to dispose of the public land is granted to Congress. No appropriation can be made for any purpose but by authority of Congress."

*Holmes v. U. S.*:<sup>38</sup> "Withdrawal of land by the secretary not withdrawn by the grant itself does not preclude entry."

*U. S. v. Blandauer*:<sup>39</sup> "The President or head of a department cannot reserve any public land from sale except when authorized by some treaty, law or authorization by Congress." In this case the court held that the withdrawal involved was not authorized by Congress and was therefore invalid. The case was, however, reversed on appeal, the Circuit Court of Appeals holding that the statute did authorize the withdrawal.

There are at least five other late cases in the United States Supreme Court which deny the power of withdrawal. They are

<sup>34</sup> (1897) 166 U. S. 620.

<sup>35</sup> (1903) 188 U. S. 108.

<sup>36</sup> (1896) 163 U. S. 321.

<sup>37</sup> (1882) 12 Fed. 415.

<sup>38</sup> (1902) 118 Fed. 99.

<sup>39</sup> (1903) 122 Fed. 703; S. C. 128 Fed. 910.

Hewitt v. Schultz,<sup>40</sup> Moore v. Cormode,<sup>41</sup> Southern Pacific R. Co. v. Bell,<sup>42</sup> Sjole v. Dreschel,<sup>43</sup> and Osborn v. Froyseth.<sup>44</sup> In none of these cases is the principle discussed, but in each the power to withdraw lands within the indemnity limits of a railroad grant is denied.<sup>45</sup>

The cases just cited are conclusive authority that the right of the President to withdraw is neither inherent nor unlimited. For if it was, what is there in the character of indemnity railroad lands which prevents their being subject to this power? If the President has no power to withdraw lands which certainly aided a grant for a specific purpose, a fortiori is he precluded from withdrawing the oil lands which Congress has said shall be open to entry. Furthermore, these cases squarely overrule several rather recent cases, such as Wisconsin v. Forsythe, *supra*, which held that indemnity lands could be withdrawn, and seriously impair the authority of Wolsey v. Chapman, *supra*.

In order to clarify the matter, it may be well to advert to the fact that the railroad grants primarily give all odd numbered sections for a specified distance on either side of the road. These are called the "place limits." By repeated adjudications it has been held that the gift of the "place limits" is in praesenti and upon the definite location of the route title vests in the railroad as of the date of the grant. Besides the "place limits," an additional amount of land on either side of the road and beyond the "place limits" is usually designated within which the railroad may select sections in lieu of acreage lost in the "place limits," by reason of being already in private ownership. These lands are called the "indemnity limits." They do not vest on definite location of the route, but only upon selection by the railroad and approval by the Secretary of Interior.

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<sup>40</sup> (1901) 180 U. S. 139.

<sup>41</sup> (1901) 180 U. S. 167.

<sup>42</sup> (1902) 183 U. S. 675.

<sup>43</sup> (1905) 199 U. S. 564.

<sup>44</sup> (1910) 216 U. S. 571.

<sup>45</sup> In *Hewitt v. Schultz*, *supra*, the court quotes at length from a land office decision which held that the statute involved in the case forbade withdrawal. If the statute, which opened land to homestead entry impliedly forbade withdrawal from homestead entry then similarly does

With this explanation, it is manifest that if *Wolsey v. Chapman* were followed then *Wisconsin v. Forsythe* was correctly decided and *Southern Pacific Railroad v. Bell* and kindred cases are wrong. *Wolsey v. Chapman*, it will be remembered held that the grant gave implied authority to the executive department to withdraw and left the amount to be withdrawn virtually to its unreviewable discretion. Now the withdrawal of the indemnity lands is of very material aid to the satisfaction of the grant, and if the land office deems it necessary to withdraw them it could hardly be said to be an abuse of discretion. But if the theory of *Buttz v. Northern Pacific Railroad Co.* be correct, that the law itself withdraws the land, then the later cases are properly decided, for of course the law would not withdraw lands whose vesting depends not upon the statute but upon voluntary selection by the railroad, and the Iowa grant cases are no longer law.

Whatever the theory of the later cases, they incontestably refute the proposition that the President can withdraw lands in his discretion. They show that somewhere, in any event, there is a limit, and this irresistibly brings us back to the point that the limit and the source of the power are found in the same place and that is the statute.

The latest case on the subject is *Hoyt v. Weyerhaeuser*.<sup>46</sup> In this case a railroad selected lands in the indemnity limits, and the Secretary withdrew it. By reason of some informality in the selection, the Secretary refused to confirm it and in the meantime a claimant entered the land under the Timber and Stone Act. Thereafter the railroad rectified the informalities and the Secretary approved the selection. In the Court of Appeals the whole case turned on the validity of the withdrawal and it was held invalid. Sanborn, C. J., said: "The Secretary's withdrawal and his subsequent suspension were alike futile. He was without lawful authority to make either . . . The attempted withdrawals . . . were unauthorized by law and without legal effect." In the Supreme Court, the validity of the withdrawal was not considered except by Harlan and Day,

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the statute opening lands to mineral entry forbid the withdrawal of such lands from mineral entry.

<sup>46</sup> (1908) 161 Fed. 324. Reversed sub. nom. *Weyerhaeuser* (1910), 219 U. S. 380.

J.J., in a vigorous dissent. The majority opinion held that the eventual approval by the Secretary related back to the time of the first selection and cut out the intervening entry, irrespective of withdrawal. It cannot be determined from the discussion what was the majority's view on the withdrawal itself.

Before concluding it may be interesting to glance at the views of the land department on this subject. In Fort Boise Hay Reservation,<sup>47</sup> Mr. Lamar (later U. S. Supreme Court Justice), said: "It is true that the executive for the purpose of carrying out the will of Congress as expressed in legislation may put lands in reservation without special authority." Again, as to the general power he said: "To so hold would indicate that the executive might in violation of law put in reservation for military purposes any amount of lands and thus take them out of operation of the general laws. To assert such a principle is to claim for the executive the power to repeal or alter the Acts of Congress at will." In *Atlantic & Pacific R. R. Co.*,<sup>48</sup> Mr. Lamar said: "Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me in its exercise" . . . Again, "Waiving all question as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion."

In *Northern Pacific R. R. Co. v. Miller*,<sup>49</sup> Mr. Vilas said: "The extent to which the Supreme Court has gone in its decisions and the extent which the reason of the thing supports appears that the President may, in execution or furtherance of a public purpose committed generally or specifically, by Con-

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<sup>47</sup> (1887) 6 L. D. 16.

<sup>48</sup> (1887) 6 L. D. 84.

<sup>49</sup> (1888) 7 L. D. 100, 112.

gress to the executive to effectuate, when in his judgment such action is desirable to the accomplishment of that purpose and will not infringe any limiting provision of statute governing the particular case, withdraw or withhold by his order any portion of the public domain from the operation of the general laws for its disposition, and devote it to such public use subject to review by Congress; and also that in such a case the order of the department or land office will be conclusively presumed to have been directed by him without proof of the fact and probably irrespective of it, . . . and thus are sustained withdrawals of land grants in furtherance of the construction of railroads where no legislative direction has manifested the will of Congress. The principle does not, however, contemplate an arbitrary or capricious suspension of the statutes much less contravention of a particular mandate expressed or clearly implied, even by the President's direct act."

In *Northern Pacific R. R. Co. v. Davis*,<sup>50</sup> Mr. Hoke Smith said: "The practice of issuing executive orders for the withdrawal of public lands from sale or other disposal because they were or might be needed for public purposes, or to effectuate grants, has undoubtedly existed for many years and grown with its use. But the origin of this asserted power on the part of the executive is involved in obscurity. In view of the provisions in Art. 4 of the Constitution conferring upon Congress the exclusive 'Power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. S.' it would seem that there ought to be some legislation which either by expression or clear implication confers upon the executive so important a power as that of withholding public lands from the operation of laws, relating to their disposal whenever in the discretion of the executive it is thought proper to do so—a disposal be it remembered expressly reserved by the Constitution to Congress itself. But in my researches I have not been able to find such legislation.

"So great is the power claimed, so far-reaching and dangerous may be the results of its exercise, that if the matter were submitted to me as an original proposition I do not think I

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<sup>50</sup> (1894) 19 L. D. 87.

would be warranted in ordering such a withdrawal in absence of legislation and entirely upon a supposed power inherent in the Secretary of the Interior."

A careful consideration of all the cases will demonstrate:

1. That there is no case in which a withdrawal has ever been given effect unless it was expressly or impliedly authorized by a specific statute. This applies to withdrawals for military reservations and like public purposes as well as others.

2. That no withdrawal has ever been given effect unless the land was either intended for the government's own use such as military posts, light-houses, navy yards, etc., or else to preserve land to satisfy a grant made by Congress for a specific purpose.

3. That there are many cases in which the executive department has been denied the power to withdraw.

We therefore conclude that the withdrawal of September 27, 1909, being neither authorized by statute nor for the government's own use nor to satisfy a grant made by Congress, is void; that its direct effect is to suspend the operation of Section 2319 of the Revised Statutes; that it is attempted legislation by the executive department and as such an unwarranted usurpation of the constitutional functions of Congress.

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