Presidential Exit

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The biggest problem that we're facing right now has to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all, and that's what I intend to reverse when I'm president of the United States of America.[1]

Why is @BarackObama constantly issuing executive orders that are major power grabs of authority?[2]

President Trump signed the 30th executive order of his presidency on Friday, capping off a whirlwind period that produced more orders in his first 100 days than for any president since Harry Truman. The rash of executive orders underlines Trump's focus on reversing as much of the Obama administration's policy agenda as he can.…[3]

INTRODUCTION

In 1984, Mexico City played host to the second International Conference on Population, one of many conferences the United Nations sponsors each year. The Reagan administration raised the meeting's profile by announcing a new policy: The U.S. government would now require foreign groups receiving U.S. funds to certify that they will not use funds from any source to "perform or actively promote abortion as a method of family planning."[4] This requirement became known as the "Mexico City Policy" and stayed in place during the subsequent George H.W. Bush administration.[5] Upon taking office four years later, however, one of President Clinton's very first actions was the issuance of a presidential memorandum

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The authors are thankful for…

[1] Barak Obama as candidate, Townhall in Lancaster, PA, March 31, 2008, available at https://www.realclearpolitics.com/video/2014/02/13/obama_2008_i_intend_to_reverse_bush_bringing_more_and_more_power_into_the_executive.html)

[2] Donald Trump Tweet in 2012, available at https://twitter.com/realdonaldtrump/status/222739756105207808?lang=en.

[3] Devin Henry & Timothy Cama, *Trump using executive orders at unprecedented pace*, The Hill, Apr. 29, 2017, available at http://thehill.com/policy/energy-environment/331134-trump-using-executive-orders-at-unprecedented-pace.

[4] LUISA BLANCHFIELD, CONG. RESEARCH SERV., ABORTION AND FAMILY PLANNING-RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 1 (2017).

[5] Alexandra Sifferlin, *Here's What the Mexico City Policy Means for Women*, TIME (Jan. 23, 2017), http://time.com/4644042/mexico-city-policy-abortion-womens-health/.

reversing the Mexico City Policy.[6] When the presidency switched back to the Republicans, President George W. Bush issued a presidential memorandum reinstating the policy,[7] which was quickly reversed by President Obama when the Democrats next took the White House.[8] Following this trend, President Trump reinstated the policy his third day in office.[9]

This now predictable dance, with Republican presidents reinstating the Mexico City Policy and Democrat presidents rescinding it, occurs in different guises with every change in administration. The flow of executive orders, presidential memoranda, proclamations, determinations, executive agreements, national security directives, signing statements and other pronouncements emanating from the early days of every White House administration—what presidency scholar Phillip Cooper calls presidential direct actions[10]—serves as a lightning rod for claims that the president is engaged in a "power grab."[11] Not infrequently, however, one president's grab is about taking back another president's grab.

It should be no surprise that each president uses direct actions to undo many initiatives that predecessor presidents had launched through their own direct actions. This certainly was the case during the first days of the Trump administration. In short order, he took aim at President Obama's actions on the Paris Agreement on climate change,[12] the Project XL oil pipeline permit,[13] the offshore drilling ban,[14] national monument designations,[15] relations with Cuba,[16]

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[6] Available at http://www.presidency.ucsb.edu/ws/?pid=46311; see Suzanne Malveaux, *Obama Reverses Abortion-Funding Policy*, CNN POLITICS (Jan. 24, 2009), http://www.cnn.com/2009/POLITICS/01/23/obama.abortion/.

[7] Available at https://georgewbush-whitehouse.archives.gov/news/releases/20010123-5.html

[8] Available at https://obamawhitehouse.archives.gov/the-press-office/mexico-city-policy-and-assistance-voluntary-population-planning; see *Id.*

[9] Available at https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-mexico-city-policy; see Alexandra Jaffe, *Donald Trump's First Six Days in Office: Here's What He's Done*, NBC NEWS (Jan. 26, 2017), https://www.nbcnews.com/politics/white-house/donald-trump-s-first-six-days-office-here-s-what-n712086.

[10] PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 1-2 (2nd ed. 2014).

[11] COOPER at 2-17.

[12] *President Trump Prepares to Withdraw from Groundbreaking Climate Change Agreement, Transition Official Says*, FORTUNE (Jan.30, 2017), http://fortune.com/2017/01/30/donald-trump-paris-agreement-climate-change-withdraw/.

[13] Available at https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline; see Clifford Krauss, *U.S., in Reversal, Issues Permit for Keystone Oil Pipeline*, N.Y. TIMES (Mar.24, 2017), https://www.nytimes.com/2017/03/24/business/energy-environment/keystone-oil-pipeline.html.

[14] Available at https://www.whitehouse.gov/the-press-office/2017/04/28/presidential-executive-order-implementing-america-first-offshore-energy; see Juliet Eilperin, *Trump Signs Executive Order to Expand Drilling off America's Coasts*, WASH. POST. (Apr.28, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/04/28/trump-signs-executive-order-to-expand-offshore-drilling-and-analyze-marine-sanctuaries-oil-and-gas-potential/?utm_term=.86c19b85bf82.

[15] Available at https://www.whitehouse.gov/the-press-office/2017/04/26/presidential-executive-order-review-designations-under-antiquities-act; see Jennifer A. Dlouhy, *Trump Takes Aim at Western Monuments That May Hold Oil, Coal*, BLOOMBERG (May 10, 2017), https://www.bloomberg.com/news/articles/2017-05-10/trump-takes-aim-at-western-monuments-that-may-hold-oil-riches.

[16] Dan Merica, *Trump Unveils New Restrictions on Travel, Business with Cuba*, CNN POLITICS (June 17, 2017), http://www.cnn.com/2017/06/16/politics/trump-cuba-policy/index.html.

the Trans-Pacific Partnership trade agreement,[17] and a host of other initiatives President Obama took through direct action.[18]

But President Trump is by no means unique in this regard, for many of his predecessors did the same to their predecessors.[19] The reality is that "the act of changing or even terminating executive orders is a common practice that is exercised by the White House,"[20] so much so that it has become one of the principal strategic political uses of direct actions by recent presidents.[21] For example, while President Trump has been characterized as intent on dismantling Obama-era direct actions, President Obama's first executive order revoked an executive order George W. Bush had issued regarding presidential records disclosure,[22] which fulfilled just one among several campaign promises to reverse course.[23] He followed through with numerous other direct actions designed to "sweep away Bush policies."[24]

Hence the media focus on a new president's "First 100 days in office."[25] Part of the media's attention is on new initiatives, but much also focuses on the image of a new president tearing up a predecessor's executive orders (ironically, through new executive orders), often accompanied with the fiery rhetoric of a new sheriff in town.

In short, presidents, like Congress and administrative agencies, routinely engage in *exit* to reverse prior administrations' initiatives and policies, and when one president has made policy through a direct action, the most effective way for a successor to undo it is through another direct action. Yet, while this practice has been a robust feature of the presidency for many decades, and by all appearances will continue, Adam Warber bemoaned in his 2006 book studying executive orders that "the president's power to revoke, supersede, and amend executive orders has managed to escape the research agenda of presidential scholars."[26] This remains equally true today. As Sharece Thrower observed in her 2017 study of executive order longevity, "there exists a facet of presidential power left unexplored—the power to change or overturn previous orders."[27] A full understanding of presidential behavior requires attention to this practice, she

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[17] Available at https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific; see Eric Bradner, *Trump's TPP Withdrawal: 5 Things to Know*, CNN POLITICS (Jan.23, 2017), http://www.cnn.com/2017/01/23/politics/trump-tpp-things-to-know/index.html.

[18] Presidents also use direct actions to order an agency to undo rules the agency adopted in a prior administration, such as President Trump did as his first official act with respect to the Affordable Care Act. *See* Exec. Order 13765, 82 Fed. Reg. 8351 (Jan. 24, 2017); Press Release, The White House Office of the Press Secretary, Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal (Jan.20, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and. As explained *infra*, we treat this type of action as distinct from one in which a president uses a direct action to undo another president's direct action.

[19] *See* COOPER at 118 (discussing President Clinton), 68 (discussing President George W. Bush), and 33 (discussing President Obama). *See generally infra* Part I.

[20] ADAM L. WARBER, EXECUTIVE ORDERS AND THE MODERN PRESIDENCY: LEGISLATING FROM THE OVAL OFFICE 46 (2006).

[21] COOPER at 90-95.

[22] COOPER at 33.

[23] COOPER at 19.

[24] COOPER at 119.

[25] Kevin Liptak, *History of Measuring Presidents' First 100 Days*, CNN Politics (Apr. 23, 2017), available at http://www.cnn.com/2017/04/23/politics/donald-trump-history-100-days/index.html.

[26] WARBER at 61. For full descriptions and comparisons of the acts of amending, superseding, and revoking prior EDAs, *see id*. at 48-51.

[27] Sharece Thrower, *To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity*, 61 AM. J. POL. SCI. 642, 643 (2016). Warber and Thrower both argue that this practice is an important dimension of the presidency deserving far more attention than it has received. Warber urges that "if we are to understand the

contends, because "unlike other policies, presidents can easily alter these orders without the same immediate constraints faced by other branches of government."[28]

We believe these scholars are on target and admit to the same myopia they have exposed. In our 2015 article, *Regulatory Exit*,[29] we examined the design and use of exit strategies in the administrative state. From prenuptial agreements to venture capital investment agreements, exit strategies are ubiquitous in life's relationships. Exit is an inevitable feature of governance, as well, and its challenges arise in a wider range of activities than is commonly recognized. Often regulatory exit is by design—entitlement benefits end when income limits are exceeded; employment regulations drop off when employee numbers fall below thresholds; emission regulations are relaxed as pollutant levels fall. In other instances, regulatory exit looks much messier, as Congress or an agency reopens a statute or rule for amendment, perhaps even to eliminate it altogether.

Exit lurks in the background of the administrative state—the question is whether it should figure more prominently in the foreground, as a matter for intentional design when new regulatory or benefits regimes are being hatched. We argued that it should and set out a framework for four types of exit strategies, showed which are most appropriate for promoting certain behaviors of public and private actors, and examined the challenges that each type of exit raises. This type of analysis, we argued, helps explain the shape administrative programs can and should take.

In all respects, however, our focus was on legislatures and agencies—on *legislative exit* and *administrative exit.* We left out the role of *presidential exit* because it did not seem as important. Given the concerns that have been raised about the Trump administration's rapid and sweeping reversal of President Obama's direct actions, though, this omission appears more and more as a major gap in legal and policy scholarship. Other presidents have surely made use of exit strategies at the beginning of their terms, but the Trump administration's use of exit seems qualitatively different. Indeed, most of his high-profile actions to date have involved some form of exit.

While there is a robust literature on specific types of presidential direct actions, it has not considered them as part of a broader exit strategy.[30] This Article closes that gap by extending our analysis of regulatory exit to the president, examining the different types of presidential exit and how they are employed. Part I explains the exit framework we set out in our 2015 article, describing each of the four categories with illustrative examples. Part II reviews the range of presidential direct actions and scholarship on how presidents have employed them to exit from prior presidents' direct actions. Part III joins these together, mapping the exit framework onto presidential exit in four separate case studies that illustrate the exit categories. Part IV analyzes how Congress (when it delegates direct action authority to the president) and the president (when exercising direct action authority) can influence and constrain successor presidential exit. We also examine in Part IV the innovative strategy of "symbolic exit." This has been the Trump administration's signature approach of announcing exit but not following through, leaving it to

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unique characteristics of executive orders and apply sophisticated tools to analyze them, scholars must realize that there is a degree of interdependency that exists among executive orders. That is, the fate of every directive is dependent on the future policy actions of the president." WARBER at 61.

[28] Thrower at 644.

[29] J.B. Ruhl & James Salzman, *Regulatory Exit*, 68 VAND. L. REV. 1295 (2015) [hereinafter *Regulatory Exit*].

[30] Even Warber and Thrower, while forging a new focus of scholarship on presidential exit, do not explore it from the standpoint of how to systematically design exit strategies for presidential direct actions.

Congress, agencies, or future presidential action to make the exit complete. This is as much a political as a legal strategy and forces us to re-think the nature of exit in the administrative state.

I. UNDERSTANDING EXIT

In our 2015 article, we examined the theory and practice of exit strategies in the administrative state.[31] Despite the central and necessary role of exit, it had been an under-theorized area of legal scholarship. Focusing on exit reveals foundational questions not usually asked in administrative law scholarship: What is the range of exit strategies? Which are most appropriate for promoting certain behaviors of public and private actors, and which are most appropriate for preventing perverse behaviors?

Focusing on Congressional and agency action, we defined exit as the intentional, significant reduction in governmental intervention initiated at a particular time under specified processes and conditions. In order to understand exit as a general phenomenon, we proposed assessing its character along two dimensions. The first dimension measures when the exit design decision is made. *Ex ante* design decisions occur at the front end of the intervention, during the design of the program itself and prior to its implementation. *Ex post* exit design occurs after the intervention has begun. The second dimension tracks the clarity of conditions necessary for exit to occur, regardless of whether they are designed ex ante or ex post. How clear are the exit requirements? This dimension runs from *Transparent* to *Opaque*.

In *ex ante* settings, the process and conditions for exit are established before engagement, as in "sunsetting" provisions determining the time a program will automatically expire unless there is explicit reauthorization.[32] As the exit date approaches, there may be sufficient political support to prevent exit from happening, but it requires action on the part of those who wish to block the exit path. In *ex post* settings, the process and conditions for exit are established after engagement has commenced. An example of this would be California's deregulation of wholesale electricity pricing.[33] Only decades after ratemaking had been implemented did policy makers decide to stop this practice.

The *transparent-opaque* dimension measures how difficult it is to determine whether the conditions for exit have been satisfied. To put it another way, how clearly mapped is the pathway to exit? Are the exit requirements objective and clear or subjective and murky? To a certain extent, the Transparent/Opaque distinction tracks the well-known difference between rules and standards.[34] In Transparent Exit conditions, for example, determining how exit is accomplished is made simple through rule-like thresholds and requirements. In child welfare programs, once

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[31] This section is adapted from *Regulatory Exit, supra note 29,* at 1312-25.

[32] For a critique of sunsetting, see Rebecca M. Kysar, *Lasting Legislation*, 159 U. PENN. L. REV. 1007, ## (2011).

[33] Robert B. Martin, III, *Sherman Shorts Out: The Dimming of Antitrust Enforcement in the California Electricity Crisis*, 55 HASTINGS L.J 271, 275 (2003) (Discussing the deregulation of electricity pricing in California).

[34] *See* Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. __ (forthcoming), *available at* http://ssrn.com/abstract=2412045 [manuscript at 2] ("Rules come in handy for individuals who try to figure out whether their contemplated conduct is prohibited or permitted. The same kind of ex ante clarity is not readily available under standards whose precise implications for a given course of action are determined by a court or an agency only after the fact.").

you reach the age of 18, you're out.[35] For Opaque Exit, determining the conditions for departure is more difficult and costly given the standard-based approach. Delisting a species from the Endangered Species Act is a subjective determination assessing the species' "recovery" and demands a high evidentiary burden.[36]

Combining the two dimensions of timing and clarity allows us to create a simple 2x2 matrix, shown in the figure below. Each cell represents a distinct category of exit.

	Transparent	**Opaque**
Ex Ante	*Mapped Exit* Sunsetting of assault weapons ban	*Uncertain Exit* Endangered species delisting
Ex Post	*Adaptive Exit* California electricity market deregulation	*Messy Exit* Efforts to halt the Affordable Care Act

Mapped Exit strategies generally share a number of common features. The conditions required for exit are objective or easy to determine. If the conditions are met, exit is often automatic. Thus Mapped Exit often operates as a binary on/off switch. There is a burden of proof on the regulated party to prove the conditions have been met and, likewise, the burden of proof on the regulator to rebut exit are both clearly spelled out. The assault weapons ban, for example, was designed to sunset on September 13, 2004, unless Congress renewed it.[37]

Mapped Exit is easy to assess and implement. It should also ensure lower transaction costs of determining eligibility criteria. The actual costs of exiting could be high but the clarity of the conditions for exit allows program participants to identify early on the costs of exit and to adapt their behavior accordingly. This provides a classic example of bargaining in the shadow of the law.[38]

In *Uncertain Exit*, exit has been accounted for up front but the specific conditions for exit are difficult to determine in practice. In these settings, subjective standards make the exit decision dependent on a discretionary judgment. In regulatory contexts, there exists a high burden of proof on the regulated party to obtain exit approval from the agency and often a correspondingly high cost on the regulated party to meet the conditions. In the practice of

[35] *See* Keely A. Magyar, *Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557, 559 (2006) (discussing the negative impacts of ending child welfare programs at age 18).

[36] *See* 16 U.S.C. § 1533(f) (1998).

[37] VIVIAN S. CHU, CONG. RESEARCH SERV., FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES ## (2013); *see also* P.L. 103-322, Title XI (1994).

[38] Robert Cooter, Stephen Marks, and Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

delisting a species under the Endangered Species Act, for example, this *ex ante* strategy imposes a subjective standard and requires a high burden of proof.[39] A series of five standards must be met to ensure that the species has recovered enough to no longer be protected. One would expect to see Uncertain Exit when the consequences of exit are complicated, making clear rules infeasible.

Adaptive Exit occurs when clear standards are established for exit but after the program has commenced. It may be the case that it appeared too difficult to predict the conditions appropriate for exit at the time of program creation and so exit decisions were intentionally pushed off, assuming agencies will learn over time as the program develops. Or it may be the case that the demand for exit is only recognized after creation of the program, when experience makes clear that the original mechanism or conditions for exit were inadequate, making exit either too easy or too difficult. Deregulation provides the bluntest example of adaptive exit, where the government simply departs from a formerly regulated area.

The last category, *Messy Exit*, occurs the least frequently and that is probably a good thing. Here, there are no or poorly defined *ex ante* conditions or mechanisms for exit, either because at program inception the issues were too contested and politicized to consider *ex ante* exit strategies without undermining the supportive coalition, or because the program is designed at inception as not allowing exit. As with Adaptive Exit, the demand for exit is recognized only after creation of the program. The difference is that, with Messy Exit, the very path to exit is unclear. This has clearly been playing out in the drama over the contorted efforts to end the Affordable Care Act. At the time of passage, it was highly contested whether government should even enter the area and there was no discussion of exit. Years later, it is still unclear how exit will be possible.

We apply this model in Part III to Presidential Exit, showing that the categories of Mapped, Uncertain, Adaptive and Messy Exit help explain how presidents back out of predecessors' direct action policies. First, though, in Part II we lay a foundation by reviewing scholarship on the mechanics and history of presidential exit.

II. REVOKING, AMENDING, AND SUPERSEDING PRESIDENTIAL DIRECT ACTIONS

Presidents take many actions and make many statements, not all of which are intended as official exercises of power. A president might frame policy goals in a press conference, or in a Cabinet meeting, or in a letter to Congress, without purporting to call into play presidential authority. Even when a president does mean to exercise authority, other institutions may be necessary to finish the act, such as when an agency must promulgate a rule to implement a president's policy wishes, or when Congress must confirm a judicial appointment. There are many instances, however, when presidents exert some level of legal authority, pursuant to either inherent constitutional powers or statutory delegation, directly, without need of action or consent by any other institution. This Article is about those *presidential direct actions*; more specifically, it is about whether and how one president can exit from a predecessor's direct action through yet another direct action revoking, amending, or superseding the original. In this Part we lay the foundation for exploring that question by outlining the major forms of presidential direct action and summarizing the extensive history of presidential exit.

[39] 16 U.S.C. § 1533(a)(1) (1988).

As an entry point to the theme, Phillip Cooper's book, *By Order of the President*, published in its second edition in 2014, is a masterful analysis of presidential direct actions, working through each type to describe its features and uses and assess its place in history over time.[40] Cooper provides a deep account of six major direct action instruments. We describe them below, and add a seventh.[41]

Executive Orders: Considered the most formal and prominent of the direct actions, executive orders are written directives to government officials and agencies of the Executive branch, instructing them to take action, stop a specified activity, change policy or management direction, or delegate authority.[42] The State Department began numbering executive orders in 1907, and since the Federal Register Act of 1935, executive orders are in almost all cases required to be published in the *Federal Register*.[43]

Presidential Memoranda: Cooper refers to these direct actions as "executive orders by another name," in the sense that "as a practical matter, the memorandum is now being used as the equivalent of an executive order, but without meeting the legal requirements for an executive order," such as numbering and publishing.[44] Modern presidents have routinely used both executive orders and memoranda, and the conventional view is that there is no substantive difference in legal force or effect.[45]

Proclamations: These instruments, which must be published in the *Federal Register*, state conditions, trigger implementation of laws, and recognize symbolic events, such as declaring a natural disaster or declaring a day or week of recognition.[46] Whereas executive orders and memoranda generally are directed to federal agencies and officials within the executive branch,

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[40] For additional background on presidential direct actions from policy scholars, see GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS (2013); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER (2001); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003). Legal scholars for the most part have not focused on presidential direct actions. One notable exception is Professor Kevin Stack's series of articles exploring the exercise and judicial review of presidential direct actions implementing statutorily-delegated powers. *See* Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009); Kevin M. Stack, *The President's Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005). Several legal academics and practitioners have voiced concerns over presidential abuse of direct actions. See. e.g., John C. Duncan, Jr., *A Critical Consideration of Executive orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333 (2010); Tara L. Branum, *President or King – Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1 (2002); Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267 (2000-2001).

[41] Depending on how one classifies them, there are almost thirty different types of presidential direct actions and their boundaries are fuzzy at best. DODDS at 5-10.

[42] COOPER at 21.

[43] COOPER at 22; see also APP http://www.presidency.ucsb.edu/data/orders.php.

[44] COOPER at 120.

[45] COOPER at 120-2.

[46] COOPER at 172.

proclamations generally are aimed outward, to foreign, state, local, and private institutions.[47] This is not always the case, however, as presidents have used proclamations to declare areas of federal public lands and waters national monuments under the Antiquities Act.[48]

Presidential Determinations: Although similar to presidential memorandums, directives generally are focused on foreign policy and are numbered chronologically by fiscal year.[49] They usually are made pursuant to statutes that require the president "to make findings concerning the status of a foreign country or some activity in the foreign policy field," at which point some action or other condition is triggered under the statute.[50]

National Security Directives: These are formal notifications to government agencies or officials regarding presidential decisions in the field of national security to coordinate military policy, foreign policy, intelligence policy, or other security policies, usually those managed through the National Security Council.[51]

Executive Agreements: Cooper describes executive agreements as "the substance of a treaty without the constitutional process."[52] Indeed, he notes that the State Department defines two kinds of international agreements, treaties and executive agreements, the latter being "other international agreements" the president enters pursuant to a treaty, legislation, or simply "the constitutional authority of the president."[53]

Signing Statements: These are written comments a president issues at the time of signing legislation. Although most merely comment briefly and favorably on the bill signed, the more controversial statements express concerns and limitations. For example, the statement might claim that the legislation infringes on the constitutional powers of the presidency, or announce interpretations of language used in the legislation, or instruct executive branch officials how to implement the new law, including ignoring it.[54]

Tweets: The rising use by politicians of social media as a channel of communication has raised questions regarding the status of President Trump's frequent "tweets" as official policy. Cooper did not include these—until recently, no one could be blamed for thinking a tweet is just a tweet—but they warrant their own treatment given how important a role they have come to play in the Trump administration. For example, former White House Press Secretary Sean Spicer somewhat circularly explained the status of President Trump's tweets, stating that "The President is the President of the United States, so they're considered official statements by the President of

[47] COOPER at 173.
[48] *See infra* Part III.C.
[49] COOPER, *supra* note **Error! Bookmark not defined.**, at 123.
[50] COOPER, *supra* note **Error! Bookmark not defined.**, at 123-24.
[51] COOPER at 208.
[52] COOPER at 282.
[53] COOPER at 282.
[54] COOPER at 325.

the United States."[55] We take him at his word, as did a panel of the Ninth Circuit Court of Appeals when ruling on the so-called "travel ban," pointing to a Trump tweet as tantamount to an official presidential "assessment."[56] Indeed, the Department of Justice recently declared in litigation that the tweets are "official statements of the President of the United States."[57] We show below that President Trump has used tweets to shape a new style of presidential exit we call Symbolic Exit, which we contend must be taken seriously notwithstanding how different they are in form compared to the traditional categories of presidential direct action Cooper describes.

These and other presidential direct actions operate in an environment driven by two default rules. The first is that, notwithstanding their remarkably unencumbered promulgation process, they "remain in effect unless and until they are amended, superseded, or revoked."[58] This means that an incoming president is "inheriting a large body of executive orders and other pronouncements."[59] This pileup of direct actions is, therefore, in a sense binding on successors.[60] The second default rule, however, is that direct actions "remain effective until subsequent presidential action is taken,"[61] which usually is through another direct action amending, superseding, or revoking the original.[62] Easy come, easy go.

While great attention has focused on President Trump's efforts to amend, supersede, or revoke a prior direct action, it is important to recognize that presidential exit has a long and rich history—Trump is by no means an outlier. We recounted the Mexico City and other examples of presidential exit in the Introduction. But how often does it really happen, and under what conditions?

To measure the frequency of presidential exit over time, political science scholar Adam Warber systematically quantified and classified executive orders for the period from President Franklin D. Roosevelt's first term through President Clinton's second term, dividing them into three categories: symbolic orders designed to accomplish ceremonial and similar tasks, such as declaring National Boating Week; (2) routine orders for managing housekeeping matters, such as establishing the order of official delegations in a federal agency; and (3) policy orders issued to initiate or reverse major policy, such as the Mexico City orders.[63] He found that policy orders

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[55] CNNPolitics, *White House: Trump's Tweets are "Official Statements*," http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html

[56] See Hawaii v. Trump, No. 17-15589, n. 14 (9th Cir., June 12, 2017) (citing a tweet when noting that "the President recently confirmed his assessment that it is the 'countries' that are inherently dangerous, rather than the 180 million individual nationals of those countries who are barred from entry under the President's 'travel ban.' See Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM)").

[57] James Madison Project v Dept of Justice, DOJ brief available at https://assets.documentcloud.org/documents/4200037/Trump-Twitter-20171113.pdfhttp://www.abajournal.com/news/article/government_says_trumps_tweets_are_official_presidential_statements

[58] COOPER at 2; WARBER at 46.

[59] COOPER at 2.

[60] WARBER at 46; DODDS at 10.

[61] COOPER at 120.

[62] WARBER at 46; DODDS at 10.

[63] WARBER at 39.

accounted for just over one-third of all executive orders issued in the study period,[64] but that they were the primary target of subsequent changes by successor presidents. Indeed, "presidents generally changed between 15 and 39 major policy directives each year" through the study period.[65]

Sharece Thrower's more recent study of over 6,000 executive orders issued between 1937 and 2013 largely confirms Warber's assessment.[66] Thrower does not differentiate between symbolic, routine, and policy orders, but does differentiate between amending, superseding, and revoking. She finds that one-quarter of all executive orders issued in her study period were fully revoked and another quarter were substantially amended or superseded, meaning roughly half of the executive orders were the target of successor change.[67]

In short, "beginning with Nixon, chief executives have been active in altering and rescinding executive orders that were issued by previous administrations."[68] In fact, President Trump's pace puts him near the back of the pack. Based on our analysis, as of [November 21], he has revoked only eight substantive policy executive orders and four substantive policy presidential memorandums.[69]

Both Warber and Thrower also explore why and when presidents alter predecessor actions and what practical political considerations constrain the practice. Although it is difficult for Congress and the courts to monitor and control presidential direct actions generally, Warber argues that "presidents must constantly be aware of their political environment and exercise caution when influencing the policy process" when considering making a change to an existing executive order.[70] Thus, although "theoretically, the president's power to veto or change existing orders is absolute," Warber warns that "presidents seeking to change controversial orders risk entangling themselves in political and public relations conflicts."[71]

On the other hand, Warber observes, the political costs of tinkering with prior orders is likely lower than are the costs of revising federal agency regulations. Public participation and congressional oversight are nonexistent in the executive order context, whereas agency regulations are subject to mechanisms such as public notice and comment and the Congressional

[64] Most orders fall into the routine category and a small portion into the symbolic category. Routine constituted substantial majority of orders for his study period (59.7%), and symbolic orders were a small percentage (2.8%), with policy orders averaging (37.5%) but fluctuating from as high as 73.9 percent in the Clinton administration to as low as 22.2 percent in the Eisenhower administration. WARBER 39 Tbl 2.1

[65] WARBER at 57. By contrast, President Carter led the pack at over 54 per year. WARBER at 57. Not surprisingly, Warber found that very few symbolic orders are amended, superseded, or revoked—an average of fewer than two per year over his study period. WARBER at 56 tbl 2.5.

[66] Thrower at 654.

[67] Thrower at 644 ("of the 6158 executive orders, 18% are amended, 8% are superseded, and 25% are revoked.")

[68] WARBER at 16.

[69] We reviewed each of President Trump's executive orders and presidential memorandums, looking for instances in which he expressly revoked a prior direct action that had substantive policy effect. In addition to his presidential memorandum reversing the Mexico City policy, see EOs 13688, 13782, 13783, 13795, 13807, and 13812. [UPDATE]

[70] WARBER at 46. For executive orders, "the political costs are greater when a president tinkers with a controversial directive that becomes salient among the mass media and public." WARBER at 55

[71] WARBER at 53

Review Act.[72] Thus it is no surprise that both Democrat and Republican presidents change more orders of opposing party predecessors than same party predecessors, with Republican presidents considerably more aggressive in this respect over the full study period.[73] The leading presidents in this behavior, however, are a more recent bipartisan collection of Presidents Nixon, Carter, Reagan, and Clinton, suggesting once again that the pace of presidential exit has ramped up since President Nixon took office.[74]

Thrower's more rigorous empirical study of executive orders found that most changes to executive orders take place in the first ten years of an order's life, with revocation occurring on average at 13 years.[75] Focusing on revocation, which is the most decisive and unambiguous form of presidential exit, Thrower advanced three core arguments: (1) that orders originally issued under ideological discord will resist revocation longer because they reflect policy compromises; (2) that orders based on stronger statutory authority enjoy longer lives; and (3) presidents are more likely to revoke orders issued by political adversaries.[76] Based on her detailed statistical models, she found these mostly to be true—greater ideological division between the issuing president and a successor increased the hazard of revocation, but this effect was dampened when the order was based on strong statutory authority or involved foreign policy.[77] Moreover, orders issued during a divided government enjoy a lower risk of revocation over time,[78] and presidents are less likely to revoke prior orders during election years or when they experience low political capital.[79]

Warber and Thrower thus generally agree that presidents face practical political constraints when tinkering with predecessors' direct actions—while purportedly "easy go" legally, it may not always be so easy politically. In Part III we examine several such instances, and in Part IV we extrapolate from them to develop a more general model of strategies for constraining presidential exit.

III. PRESIDENTIAL EXIT IN THEORY AND PRACTICE

We have set out a model for understanding the different types of regulatory exit and showed that presidential exit has been happening for a long time, frequently and consistently, regardless of the political party. We now bring these together to develop a theoretical framework explaining presidential exit and apply it to a series of case studies.

Our definition for exit in our 2015 article was the "intentional, significant reduction in governmental intervention initiated at a particular time under specified processes and conditions."[80] These conditions do not map well onto presidential exit, however, as the nature of presidential exit is very different from that of administrative and legislative exit.

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[72] WARBER at 53

[73] WARBER 59 and 60 tbl 2.7

[74] WARBER at 59.

[75] Thrower at 645 fig1. It takes "an average of 5 years until an order is first amended or superseded and 13 years until revocation." Thrower at 644.

[76] Thrower at 643.

[77] Thrower at 653.

[78] Thrower at 650.

[79] Thrower at 652.

[80] *Regulatory Exit* at 1302.

In contrast to other forms of exit which involve multiple actors, presidential exit requires only one actor. The president plays a role in legislative exit through the enactment process, and in agency exit through Executive oversight of agencies, including using direct actions to order agency action. In these interactions, the president can attempt to influence how exit is designed according to our model categories, and can attempt to push the other institutions toward or away from initiating exit. The President could, for example, veto legislation on the ground that it does not adequately plan exit, or could push an agency to reverse prior administration policies and regulations. In both realms, however, the president must work with Congress or the agency to steer legislative or administrative exit. With presidential exit, by contrast, there usually is no required intermediary or partner.

Another difference is institutional transition. Although the political party leaders in control of a chamber of Congress might flip in an election, congressional succession is gradual, and there are always members from a prior Congress carrying on into a new Congress. And while presidents can appoint new heads of agencies, Senate approval is required and turnover in the vast staffs of many federal agencies can appear to take place at glacial speed. By contrast, the president is one person—when a new president takes office, *all* of the predecessor leaves office, all at once, period. This is why there is so much media focus on the first hundred days of a new administration, the assumption being that the president can do something big quickly.

Taken together, this means that the speed of presidential exit is much more rapid than agency or legislative exit. For Congress to exit, it must hold hearings and pass legislation. And the president can veto the statute. Agencies have more freedom, but the *State Farm* doctrine limits the extent to which agencies can exit many programs, requiring new rulemaking to reverse existing rules.[81] That is the main reason the EPA has had so much difficulty exiting the Clean Power Plan.[82]

To reflect these differences, our definition for presidential exit is broad: *Presidential exit occurs when a president uses a direct action to substantially reverse the policy or legal position established by a prior president's direct action.* This would include the Mexico City policy, with each administration from an opposing party reversing the prior administration's policy. It would not include amendments that represent incremental shifts in policy. For example, cost benefit analysis of proposed regulation was first established by an executive order of President Reagan.[83] President Clinton issued a new executive order, requiring benefits to justify instead of exceeding costs and some other minor changes.[84] In his executive order, President George W. Bush expanded the cost benefit analysis from major rules to significant regulatory guidance, among other changes.[85] And President Obama, in turn, issued his own executive order.[86] The key point is that none of these successive amendments fundamentally changed the original

[81] Motor Vehicle Mfg. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding that the Administrative Procedure Act's arbitrary and capricious standard applies to agency actions rescinding regulations).

[82] Noah Feldman, *Gorsuch Could Sway Climate Policy. Prepare to Be Surprised.*, BLOOMBERG VIEW (Mar.29, 2017), https://www.bloomberg.com/view/articles/2017-03-29/gorsuch-could-sway-climate-policy-prepare-to-be-surprised.

[83] Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

[84] Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

[85] Exec. Order 13,422, 72 Fed. Reg. 2763 (2007).

[86] Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

requirement of cost benefit analysis. Thus these would not be considered examples of presidential exit.[87]

With this definition in hand, the matrix developed for regulatory exit can be applied to presidential exit. Recall that there are four categories. For presidential exit they play out as follows:

In *Mapped Exit,* the path for exit is clear for subsequent presidents at the time the original policy is implemented. This is the case for the Mexico City policy and, in fact, for most direct actions. The subsequent president can simply countermand the prior policy through a stroke of the pen with no justification given. Easy come, easy go. We explore this in the context of the Paris Climate Agreement.

In *Uncertain Exit,* the path for exit by a subsequent president is known at the time the original policy is implemented, but the standard is opaque. The president has the power to exit but only if he meets a standard, and it is not obvious whether the standard is met. We explore this in the context of the XL oil pipeline permit.

In *Adaptive Exit,* the path for exit by a subsequent president is not known at the time the original policy is implemented, but the standard is transparent. No one knew the rules for exit at the outset because no one thought about the possibility of exit. We explore this in the context of shrinking national monuments.

Messy Exit covers the situation where the government declares exit from an existing policy that did not consider exit at the time of its creation and the standards for exit are opaque. The ongoing debacle seeking to rescind the Affordable Care Act provides a clear example. Strictly speaking, however, Messy Exit is inapplicable in the presidential context because the default rule is that, absent congressionally imposed constraints in the case of statutorily-delegated direct action authority,[88] the president's exit path is clear at the outset—simply rescind the prior direct action. Easy come, easy go. In place of *Messy Exit*, we propose a variant, *Messed Up Exit,* where the president transforms what should have been straightforward exit into an *ex post* opaque standard.

[87] Indeed, Cooper refers to this series of orders as an example of "the decree inertia principle: the tendency of a line of executive orders of a particular type to continue from administration to administration and grow in size and complexity in the process." COOPER at 93.

[88] We discuss this phenomenon in Part IV.A.

	Transparent	**Opaque**
Ex Ante	*Mapped Exit* Paris Climate Agreement	*Uncertain Exit* XL oil pipeline permit
Ex Post	*Adaptive Exit* Shrinking National Monuments	*Messed Up Exit* Transgender Military Ban

A. Mapped Exit – The Paris Agreement

On December 12, 2015, to great acclaim, over 195 nations adopted the Paris Agreement.[89] This was a heady moment, providing almost a resurrection for international negotiations to address climate change. Just five years earlier, plenary negotiations in Copenhagen had broken down, producing a last-minute informal agreement among the heads of state of the United States, Brazil, China, India, and South Africa.[90] The rest of the countries were so angry about the ad hoc process that the only consensus it could achieve was "to take note" of the Copenhagen Accord.[91] There were serious concerns that international climate negotiations were doomed to failure and that a more promising path lay in purilateral and bilateral arrangements.[92]

The success of negotiations in Paris was due in large part to intense diplomatic efforts leading up to the meeting. At the preparatory conference in Durban in 2011, for example, the delegates had agreed to develop an agreement for adoption at the conference of parties in Paris in 2015 to take effect by 2020.[93] The Durban text seemed odd at first glance. It committed the parties "to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties."[94] The purpose of this convoluted text would become clear in Paris. Negotiations between China and the United States were also significant. In August, 2015, they had mutually agreed to address climate change. The United States pledged

[89] *Paris Agreement – Status of Ratification*, United Nations, http://unfccc.int/paris_agreement/items/9444.php; *see also* U.N. Framework Convention on Climate Change, *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add. 1, art. 7, ¶ 6 (Dec. 12, 2015), *available at* http://unfccc.int/files/home/application/pdf/paris_agreement.pdf.

[90] *See* Darren Samuelsohn, *Obama Negotiates 'Copenhagen Accord' With Senate Climate Fight in Mind*, N.Y. TIMES, Dec. 21, 2009; Juliet Eilperin & Anthony Faiola, *Climate Deal Falls Short of Key Goals*, WASH. POST, Dec. 19, 2009, at A01.

[91] John M. Broder, *Remember the Copenhagen Accord?*, N.Y. TIMES (June 8, 2010), https://green.blogs.nytimes.com/2010/06/08/remember-the-copenhagen-accord/.

[92] David Doniger, *The Copanhagen Accord – A Big Step Forward*, HUFFINGTON POST (May 25, 2011), https://www.huffingtonpost.com/david-doniger/the-copenhagen-accord-a-b_b_402299.html.

[93] Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Dec. 1/CP.17, U.N. Doc. FCCC/CP/2011/9/Add.1, at 2 (Mar. 15, 2012).

[94] Id. para. 2.

to reduce its emissions 26-28% by 2025 with a 2005 baseline.[95] In legal terms, this was a non-binding commitment – simply a public pledge by President Obama.[96]

The success was also due to the nature of the Paris commitments. Parties agreed to submit Intentional National Determined Contributions (NDCs) to the UN Framework Convention on Climate Change secretariat, periodically meeting to review progress and set new domestic goals.[97] This bottom-up "pledge and review" process marked a sharp break from the top-down "targets and timetables" approach of the Kyoto Protocol, which had relied on national goals determined by international negotiation.[98] The NDCs were determined by each country and best suited to their particular situation and preferences. At the time of the Paris Agreement's adoption, leaders from around the globe hailed the re-engagement of the international community in concerted greenhouse gas reduction efforts.[99]

Opponents of the Obama administration's climate change efforts argued that U.S. adoption of the Paris Agreement was unlawful because it lacked the advice and consent of the Senate. Any agreement resulting from Paris, they charged, was a treaty and would require ratification.[100] With a Republican majority in the Senate, of course, this would be nigh impossible. It was this threat that had led negotiators in Durban to provide such an expansive description of the result in Paris. It also explained why there had been a last-minute amendment prior to adoption of the Paris Agreement. U.S. negotiators had been very careful to wordsmith the Agreement text so that commitments read as "should" rather than "shall." Final adoption was actually held up so that a last minute amendment could replace the word "shall" to "should" in text they had overlooked.[101]

With this background, State Department lawyers claimed that ratification was unnecessary because the Senate had already ratified the UN Framework Convention on Climate Change in 1992.[102] Because the President had already been granted authority to comply with the UNFCCC, adoption of the Paris Agreement required no Senate action. It was simply a means to implement the UNFCCC and did not add any commitments. As a result, the U.S. agreement in Paris was characterized as an executive agreement.[103]

As described in Part I, executive agreements have long been a common practice of American statecraft, approving over 90% of binding international agreements.[104] The legal basis

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[95] Press Release, U.S.-China Joint Announcement on Climate Change (Nov. 11, 2014), http://perma.cc/VA6Z-K2HX.

[96] David Wirth, *The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?*, 39 HELR 515, 532 (2015).

[97] U.N. Framework Convention on Climate Change, *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add. 1, art. 4, ¶ 2 (Dec. 12, 2015), *available at* http://unfccc.int/files/home/application/pdf/paris_agreement.pdf.

[98] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf.

[99] Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec.12, 2015), *available at* https://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html.

[100] Sam Mulopulos, *Why the Paris Climate Agreement is a Treaty*, HUFFINGTON POST (May 11, 2016), *available at* https://www.huffingtonpost.com/young-professionals-in-foreign-policy/why-the-paris-climate-agr_b_9914606.html.

[101] John Vidal, *How a 'typo' Nearly Derailed the Paris Climate Deal*, THE GUARDIAN (Dec.16, 2015), https://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal.

[102] *Senate Republicans Mull Options for Review of U.S. Participation in Paris Climate Talks*, BLOOMBERG BNA (May 19, 2015), https://www.bna.com/senate-republicans-mull-n17179926673/.

[103] *Id.*

[104] MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2015), https://fas.org/sgp/crs/misc/RL32528.pdf.

for this was set out in Circular 175 in 1955, and has been exercised by every President since then, Republican and Democratic.[105] While treating the Paris Agreement as an executive agreement made it easier for the United States to join, it equally made it easier for a subsequent President to exit.

During the campaign, President Trump wasted few opportunities to denounce climate change policies and made clear his opposition to the Paris Agreement.[106] Despite press coverage of efforts by his daughter and Secretary of State urging Trump to remain in the Agreement, it was no surprise when he decided that the United States would exit (though it was a surprise that he tweeted the impending announcement in a widely covered news conference, heightening the drama as in a reality TV show).[107]

The uncertainty lay in how exit would be executed. There were several options available. Trump could have declared that that the Paris Agreement actually was a treaty and sent it to the Senate for ratification (where it surely would have failed). He could have stated that, by rescinding Obama's Executive Agreement, he was immediately withdrawing the United States from the Paris Agreement. Or he could have stated his opposition to the Paris Agreement and simply ordered the State Department to stop participating in meetings and ignore U.S. commitments. He chose none of these. Instead, he triggered the exit procedure laid out in Article 28.1 of the agreement, starting a two-year process that will allow the United States formally to exit after November 4, 2020.[108]By choosing this last strategy, Trump implicitly accepted that the U.S. entry to the Agreement had been valid.

Using the Exit framework set out in Part II, the Paris Agreement presents a clear example of Mapped Exit. From the time Obama entered into the Paris Agreement, the possible exit strategies of a future president were clear. The Trump administration has followed the procedure set out in the Paris Agreement at the time of its adoption.

B. Uncertain Exit – The Keystone XL Pipeline

One of the most contentious policy decisions the Obama administration faced in its second term was whether to approve an application TransCanada Keystone Pipeline, L.P., filed with the U.S. Department of State to obtain authorization to construct, connect, operate, and maintain oil pipeline facilities at the U.S.-Canadian border in Phillips County, Montana, to export Canadian crude oil to the United States. Known as the Keystone XL pipeline, all indications were that the Obama administration originally was moving in the direction of granting the permits, having issued an environmental impact statement in 2011 declaring the project environmentally on par with alternatives.[109] Although over a dozen major pipelines cross

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[105] *Id.* at 9.

[106] *Donald Trump would 'cancel' Paris Climate Deal*, BBC NEWS (May 27, 2016), http://www.bbc.com/news/election-us-2016-36401174.

[107] Donald J. Trump, (@realDonaldTrump), Twitter (May 31, 2017, 6:05P.M.), http://twitter.com/realdonaldtrump/status/870083798981111808?lang=en.

[108] Article 28.1 of the Agreement provides that a party may withdraw by giving one year's written notification to the U.N. Secretary-General, beginning three years after the Paris Agreement's entry into force. Because the Paris Agreement came into force on November 4, 2016, the United States will only be able to give notice for withdrawal starting on November 4, 2019. Under this time frame, the U.S. will withdraw one year later, on November 4, 2020, which is the day after the 2020 presidential election is scheduled.

[109] *See* U.S. Department of State, Final Environmental Impact Statement for the Keystone XL Project (Aug. 26, 2011).

the border with Canada, the Keystone XL pipeline took on a symbolic, if not toxic, profile, and the Obama administration slowed down its process.[110] The State Department eventually issued a Supplemental EIS (SEIS) in January 2014 to update its environmental assessment and tee up a final permit decision but making no recommendation.[111] Environmental interest group objections, centered around climate change impacts, grew even louder in volume.[112] Ultimately, after long delay, President Obama announced his agreement with Secretary of State John Kerry's decision of November 6, 2015, to deny the permit.[113] As a candidate, President Trump vowed to reverse that decision. Within days of taking office, he issued a presidential memorandum directing the State Department to revisit the matter.[114] The State Department announced issuance of the permit with President Trump's blessing on March, 24, 2017,[115] and immediately became embroiled in litigation challenges.[116]

That the Keystone XL pipeline required State Department approval at all is a story of presidential exercise of power through direct action. Presidents long have taken the position that their authority over foreign relations empowers them to permit or deny border-crossing infrastructure. A complex web of executive orders and agency rules and guidance governs the Presidential permit process, with two executive orders being of central importance to oil pipelines. In 1968, President Johnson issued Executive Order 11423 to designate the Department of State as the agency administering the presidential permit program for specified cross-border facilities, including oil pipelines.[117] Executive Order 11423 references no specific constitutional or statutory authority, asserting instead that "proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country."[118] In 2004, President George W. Bush amended Executive Order 11423 with Executive Order 13337, which requires the State Department to issue a presidential permit "if the Secretary of State finds that issuance of a permit to the applicant would serve the national interest."[119]

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[110] *See* Juliette Elperin, *The Keystone XL Pipeline and its Politics Explained*, Washington Post, The Fix, (Feb. 4, 2014), available at https://www.washingtonpost.com/news/the-fix/wp/2013/04/03/the-keystone-xl-pipeline-and-its-politics-explained/?utm_term=.9ff4c8c98af5; *A Chronological History of Controversial Keystone XL Pipeline Project*, The Canadian Press (Jan. 24, 2017), available at http://www.cbc.ca/news/politics/keystone-xl-pipeline-timeline-1.3950156.

[111] *See* U.S. Department of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project (Jan. 2014) (2014 XL SEIS)

[112] See supra note 110.

[113] *See* U.S. Dep't State, Keystone XL Pipeline Determination, *available at* https://2009-2017.state.gov/secretary/remarks/2015/11/249249.htm (Nov. 6, 2015).

[114] https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline

[115] See https://www.washingtonpost.com/news/energy-environment/wp/2017/03/24/trump-administration-grants-approval-for-keystone-xl-pipeline/?utm_term=.5910fa2e282d

[116] *See Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00029-BMM (D. Mont., complaint filed Mar. 27, 2017); *Northern Plains Resource Council v. Shannon*, No 4:17-cv-00031-BMM (D. Mont., complaint filed Mar. 30, 2017).

[117] 33 Fed. Reg. 11,741 (Aug 16, 1968).

[118] *Id*.

[119] 69 Fed. Reg. 25,299, 25,300 (Apr. 30, 2004). Notably, a different set of Executive Orders covers natural gas pipelines and electric transmission lines, designating other agencies as the permit administrators, and federal legislation also governs those facilities, whereas no federal statute has been enacted governing oil pipeline siting, much less oil pipeline border crossings. *See generally* Cong. Res. Serv., Presidential Permits for Border Crossing Energy Facilities, CRS R43261 (Oct. 29, 2013).

On their face, the two executive orders governing presidential permits for oil pipeline look like a routine infrastructure approval process. Although the executive orders do not mention specific statutes such as the National Environmental Policy Act (NEPA) or Endangered Species Act (ESA), the State Department conducts what it describes as a "NEPA consistent review" of applications for a presidential permit, which includes review "consistent with" the ESA.[120] By "consistent with," however, the State Department means *not required by*. The reality of presidential permits for oil pipelines is that they are *presidential* permits. The president issues them *through* the State Department, but Executive Order 13337 explicitly provides that the president retains the authority to make the final decision on whether or not to issue the presidential permit.[121] Environmental assessment laws such as NEPA and the ESA apply to federal agencies, but do not apply to the president acting as the president.[122] While the State Department has to make a finding regarding the national interest and has taken upon itself the practice of conducting environmental assessment, the president makes the ultimate decision—issuing a presidential permit is a classic direct action.[123]

For our purposes, Executive Orders 11423 and 13337 established an Uncertain Exit regime. We defined uncertain exit as "ex ante and opaque," meaning that "exit has been accounted for up front, but the specific conditions for exit are difficult to determine in practice."[124] In the regulatory exit context, the lack of clarity stems from the use of subjective standards that make the exit dependent on a discretionary judgment. Often the regulated party must meet a high burden of proof because the requirements for exit are open-ended and fact-dependent. This is equally true for the presidential permit regime for oil pipelines.

Executive Order 11423 established a default rule that no oil pipeline may cross into the United States without a presidential permit. Executive Order 13337 imposes a high burden on pipeline applicants to convince the State Department that the border crossing would serve the national interest, and the State Department has imposed rigorous environmental and other assessment steps in connection with satisfying that burden. There is no objective standard for what is in the national interest, and the State Department—and even more certainly the president—retains substantial discretion to make that judgment. When President Trump acted to reverse President Obama's permit denial, therefore, the process for doing so was clearly defined *ex ante*—the State Department would review the application pursuant to the executive order

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[120] U.S. Dep't State, *Environmental Reviews for Presidential Permitting*, https://www.state.gov/e/oes/eqt/reviews/index.htm.

[121] 69 Fed. Reg. at 25,300.

[122] See 40 C.F.R. 1508.12 (The president is not an agency for purposes of NEPA); Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (absent specific mention of the president, statutory silence cannot be construed to extend jurisdiction over the president).

[123] There is sparse case law on the legal implications of this unusual structure for presidential direct action. One court has held that nothing about the State Department's role in the presidential permit process changes the presidential character of the action, thus insulating the State Department's actions from the requirements of NEPA and the ESA. *See* Sisseton-Wahpeton Oyate v. U.S. Department of State, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009). By contrast, another court held that, while the President's exercise of permitting power is constitutional, the executive order delegating the permitting evaluation function to the State Department subjects the agency to judicial review of its NEPA compliance. *See* Sierra Club v. Clinton, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010). Under that reasoning, it is not clear what would happen if a court deems the State Department's EIS deficient under NEPA but the President nonetheless issues a border crossing permit under the retained "final decision" authority. Also, presumably the President could nullify the effect of the court's decision by withdrawing delegation of the State Department's permitting functions for any particular permit.

[124] *Regulatory Exit* at 1319.

regime—but the "national interest" standard was opaque. Indeed, this time the permit was deemed to meet the "national interest" standard based on no new environmental or other impact analysis from the State Department.

C. Adaptive Exit – Shrinking National Monuments

Following through on a promise made early in his term, on April 26, 2017, President Trump ignited a firestorm of controversy by issuing an executive order directing Secretary of the Interior Ryan Zinke to recommend whether President Trump should reduce or abolish terrestrial and marine national monuments that had been established or expanded by proclamation of his predecessors beginning with President Clinton's first term.[125] Trump's unprecedented order specified the policies, substantive criteria, and procedural steps Secretary Zinke was to use in making his recommendations, and required a final report within 120 days of the order. Following a public comment period that yielded over 2 million comments, Secretary Zinke provided a final report on August 24, 2017, recommending that President Trump amend the proclamations establishing or expanding ten national monuments, so as to significantly modify the boundaries and management conditions they imposed.[126] President Trump did so on December 8, 2017, for two large national monuments, providing extensive justifications tracking the executive order's criteria for drastically reducing their sizes and altering their management regimes.[127] So far, this sounds like a plan to implement simple Mapped Exit. But there is a hitch—it is not clear that President Trump has any legal authority to alter so much as a comma in his predecessors' proclamations. A flurry of lawsuits filed the day of the two proclamations present that legal question front and center.[128]

Each of the national monuments targeted in Secretary Zinke's report was established by presidential proclamation issued under the authority of the Antiquities Act of 1906.[129] Although a short and seemingly obscure statute, the Antiquities Act has played a surprisingly large role in federal public lands conservation dating back to President Teddy Roosevelt, who signed the Act and was the first to use the authority by designating the Devil's Tower National Monument four months later.[130] The statute's operative language establishes a remarkable authority in the president to "declare by public proclamation" areas of "land owned by the Federal government to be national monuments."[131] These areas must be "historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest"[132] and must "be confined to the

[125] Exec. Order No. 13792, 82 Fed. Reg. 20,429 (May 1, 2017)

[126] Official 2-page summary here https://www.doi.gov/sites/doi.gov/files/uploads/monument-report-summary.pdf. Copy of leaked full final report here https://assets.documentcloud.org/documents/4052225/Interior-Secretary-Ryan-Zinke-s-Report-to-the.pdf

[127] Proc. 9681, 82 Fed. Reg. 58089 (Dec. 8, 2017); Proc 9682, 82 Fed. Reg. 58081 (Dec. 8, 2017).

[128] *See* Courtney Tanner, *Here's a Breakdown of the 5 Lawsuits Filed Against Trump that Challenge His Cuts to 2 Utah National Monuments*, The Salt Lake Tribune, available at http://www.sltrib.com/news/politics/2017/12/11/heres-a-breakdown-of-the-5-lawsuits-filed-against-trump-challenging-his-cuts-to-two-utah-national-monuments/.

[129] 54 U.S.C. 320301-320303.

[130] *See* National Park Service, Devil's Tower, https://www.nps.gov/deto/learn/historyculture/first-fifty-years-monument-established.htm. The proclamation is available at http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record/?libID=o293443.

[131] 54 U.S.C. 323301(a).

[132] 54 U.S.C. 320301(a).

smallest area compatible with the proper care and management of the objects to be protected."[133] Beyond that, the statute imposes no substantive or procedural constraints—a president may proclaim a national monument purely as a direct action, without involvement of Congress, federal agencies, state or local officials, or the public, and subject to narrowly limited judicial review.[134]

The broad authority packed into the Antiquities Act has made it an environmental policy darling of recent presidents—at least until President Trump—with billions of acres of terrestrial and marine federal public lands and waters designated as national monuments since President Clinton's first term.[135] These designations have long been controversial for reasons President Trump spelled out in his executive order, including that they "have a substantial impact on the management of Federal lands and the use and enjoyment of neighboring lands" and "result from a lack of public outreach and proper coordination with State, tribal, and local officials and other relevant stakeholders."[136] The controversy of interest for our purposes, though, concerns whether presidential exit from a prior national monument proclamation is even possible.

As soon as President Trump announced his intention to reopen his predecessors' national monument proclamations, a robust debate ensued over whether the Antiquities Act permits a president to alter existing monuments.[137] Although a few presidents have tinkered with the size and management of existing national monuments, none of these changes has been significant and no president has attempted to completely abolish a national monument.[138] The statute is silent on whether a president can shrink or abolish and existing monument, and no court has decided the question.[139] Thus the debate has focused on interpretations of the statute's legislative history, provisions of related legislation, and the scope of presidential power generally. Indeed, President Trump's executive order did not expressly reference the Antiquities Act as its authority, declaring instead that is it based on "the authority vested in me as President by the Constitution and the laws of the United States of America."[140]

We do not weigh in here regarding the controversy over the correct interpretation of the Antiquities Act. Rather, the fact that there is a controversy—that it is not clear whether President Trump can do what he purports to want to do—raises his executive order as an example of *adaptive* presidential exit. We defined Adaptive Exit as occurring "when clear standards are established for exit but not until after the program has commenced," and surmised that it "may also be the case that the demand for exit is only recognized after creation of the program, when experience makes clear that the original mechanism or conditions for exit were inadequate,

[133] 54 U.S.C. 320301(b).

[134] Mt. States Legal Found. V. Bush, 306 F.3d 1132, 1135 (D.C. Cir. 2002).

[135] National Park Serv., Antiquities Act Monuments List, https://www.nps.gov/history/archeology/sites/antiquities/MonumentsList.htm.

[136] 82 Fed. Reg. at 20,429.

[137] *Compare* Robert H. Seamon, *Dismantling Monuments*, FLA. L. REV. forthcoming, https://ssrn.com/abstract=3054682 (manuscript at ##) (yes); Marc Squillace et al., *Presidents Lack Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. Online 55, ## (2017) (no).

[138] *See* Congressional Research Serv., Antiquities Act: Scope of Authority for Modification of National Monuments, CRS Rep. R44687 (Nov. 14, 2016), available at http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf

[139] *See* Congressional Research Serv., Antiquities Act: Scope of Authority for Modification of National Monuments, CRS Rep. R44687 (Nov. 14, 2016), available at http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf

[140] 82 Fed. Reg. at 20,429.

making exit either too easy or too difficult."[141] We also explained that engaging in Adaptive Exit can lead to the creation of a Mapped Exit or Uncertain Exit regime going forward.[142] By all appearances, President Trump's executive order was the first step in this direction, establishing the criteria and process for exit, and his proclamations followed that process to accomplish exit.

The intensity of the debate over what "clearly" is the position of the Antiquities Act on exit highlights that there were, in fact, no clear standards for exit when the statute was enacted. Over a century later, for all practical purposes President Trump has invented an Adaptive Exit response. His executive order enlisted the Secretary of the Interior to probe whether the monuments in question are "historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest" and are "confined to the smallest area compatible with the proper care and management of the objects to be protected," as well as to evaluate the impacts of the monuments on state, local, and other interests.[143] Eventually the courts will sort out whether a president can amend a prior Antiquities Act proclamation at all, and if so under what circumstances, conditions, and limits. At that point, if exit is legally permissible, a Mapped Exit or Uncertain Exit regime will have been established moving forward.

D. Messed Up Exit – Transgender Ban in the Military

On July 26, 2017, President Trump tweeted that "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military."[144] This tweet purported to reverse a policy of the Obama administration that would allow openly transgender troops to serve.[145] It is hard to imagine a clearer statement of exit. What resulted, though, was an opaque standard where exit still remains unclear.

Despite President Trump's claim of consultation, this policy reversal had not been reviewed with the Pentagon. Indeed, the Defense Department had actually been in the process of assessing rules and regulations for the integration of transgender soldiers.[146] A barrage of questions from the press enquired how the policy would be applied to transgender soldiers already serving, whether they would be discharged or allowed to remain, how the policy would apply for future enlistments, and other applications.[147] The military leaders could offer no details.[148] It had become the victim, in some respects, of a sneak attack.

President Obama had made great fanfare when he had established the policy in 2016,[149] referring to President Harry Truman's historic executive order requiring desegregation of troops

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[141] *Regulatory Exit* at 1321.

[142] *Regulatory Exit* at 1331.

[143] 82 Fed. Reg. at 20,429.

[144] http://www.cnn.com/2017/07/26/politics/trump-military-transgender/index.html.

[145] *Ibid.*

[146] Amanda Terkel, *Transgender Military Members At Risk Of Harassment Under Trump, Says Former Army Secretary*, HUFFINGTON POST (Aug.29, 2017) https://www.huffingtonpost.com/entry/eric-fanning-trump_us_59a47882e4b0446b3b85ba2b.

[147] *Id.*

[148] "The *Times* said it asked eight Defense Department officials how the ban would be carried out and how it would affect openly transgender active-duty members. None of the officials could give a definitive answer." Jeannie Suk Gersen, *Trump's tweeted transgender ban is not a law*, NEW YORKER (July 27, 2017).

[149] Announcement of the policy came through the Department of Defense. See https://www.nytimes.com/2017/07/26/us/politics/trans-military-trump-timeline.html?_r=0.

in 1948.[150] Unlike the Truman and Obama policy changes, however, the Trump tweet raised more questions than it answered. The day after the announced exit from Obama's policy, the chairman of the Joint Chiefs of Staff wrote that there would be no exit. Marine General Joe Dunford stated that "There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance."[151] Despite the absolute tone of the tweet that had started this controversy, the military's position was confirmed by the White House spokeswoman, who explained that "implementation policy is going to be something that the White House and the Department of Defense are going to have to work together to lawfully determine."[152]

A month after his initial tweet, President Trump signed a presidential memorandum setting out the policy change.[153] But this did not clearly establish exit, either. Claiming that the Obama administration had failed to identify a sufficient basis to conclude that terminating the transgender ban would not hinder military effectiveness (among other impacts), the order said that further study was needed.[154] As a result, the order directed the Secretaries of Defense and Homeland Security to revert to the pre-Obama policy, barring enlistment of openly transgender people and not spending money for sex-reassignment surgical procedures. In practice, though, the order did not follow through on the tweet's claim of exit. The ban would only remain in place "until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above."[155] Secretary of Defense, James Mattis responded by stating that the Obama policy would remain in place until he had received input from an expert panel on how best to implement Trump's announced policy.[156]As a result, there is no meaningful guidance for transgender troops currently serving, who remain on active duty while the internal expert group assesses the issues.

The transgender military ban could provide an example of Messy Exit. It is ex post because there were no provisions for exit in the original Obama policy. It is opaque because there is no way to know how or when the ban will actually be lifted. It currently applies only to enlistments, but even this may not stick, since Trump's presidential memorandum provides that the restrictions may be lifted if the Secretary of Defense "provides a recommendation to the contrary that I find convincing."[157] Months after Trump's announced exit, no one knows how

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[150] Executive Order 9981, July 26, 1948 "It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin."

[151] W. J. Hennigan, *Top U.S. General Says Pentagon will not Change Policy on Transgender Troops until White House Acts*, L. A. TIMES (July 27, 2017), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-top-u-s-general-tells-military-leaders-1501171360-htmlstory.html.

[152] https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/07/26/white-house-press-secretary-almost-bails-on-briefing-over-her-failure-to-discuss-white-house-policy/?utm_term=.7e5f9df3f438

[153] Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security. August 25, 2017, available at https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland.

[154] Press Release, Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security (Aug.25, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland.

[155] *Id.*

[156] https://www.npr.org/sections/thetwo-way/2017/08/30/547258742/mattis-puts-hold-on-transgender-ban-for-current-military-service-members.

[157] Press Release, Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security (Aug.25, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland.

exit is happening, by what means or by what standard. In the strict sense, however, this is not an example of Messy Exit as we defined it, because it is unquestionably clear that President Trump could at any moment act to rescind the Obama policy under the background Mapped Exit rule for presidential direct actions of easy come, easy go.[158] Rather, starting with the communication of exit through tweet, his approach has made a bit of a mess of easy go. In other words, we need a new category of exit. In the next section we delve deeper into what that might look like.

IV. UNDERSTANDING PRESIDENTIAL EXIT

We now come full circle back to the question Sharece Thrower posed at the conclusion of her study of executive order longevity: If presidents know that their direct actions can be subsequently amended or revoked, does that influence their decision on the types of actions they issue—particularly if they care about their legacies? Of course, presidents do know that successors can, and likely will, revoke, amend, and supersede some of their direct actions. And so does Congress. But what if they don't want it to happen, at least not without a fight? How can Congress or the president make direct actions "sticky"? And what is to be made of President Trump's apparent practice of gumming up his own exit events?

A. Constraining Presidential Exit

A central theme in our earlier *Regulatory Exit* article was our analysis of the ways Congress and agencies can constrain legislative and administrative exit through design strategies implemented at the *inception* of a regulatory regime. Similarly, Congress and the president can design strategically to constrain the practice of future presidential exit.

1. Congressional Design Strategies

Although the flow of direct actions from the White House is often denounced as prime evidence of the increasing concentration of power in the president, the irony is that many direct actions exercise authority Congress has delegated to the president.[159] The Antiquities Act case study provides a shining example. The Antiquities Act "power grab" debate until recently had focused on whether presidents have the authority to declare national monuments of vast proportions given the condition that they be "smallest area" needed.[160] But the debate now has turned to exit authority—whether President Trump has the authority to substantially reduce or revoke prior Antiquities Act proclamations. That question is complicated by the statute's complete silence on the issue.[161] But what if, instead, Congress expressly had dictated the terms of presidential exit in the statute itself?

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[158] Whether the ban itself would be legal is a question outside the scope of our analysis.

[159] MAYER at 40-54 (differentiating between executive orders based on constitutional authority, statutory authority, and asserted inherent executive powers); Stack, *The Statutory President*, at 546-57; Thrower at 646 (differentiating between executive orders "based on explicit authority from statutes" and those based on "vague claims of authority from the Constitution").

[160] Seamon at 16-21 (discussing the recent practice of presidents declaring "landscape monuments" and questioning its legality).

[161] Seamon argues that the power to modify or abolish national monuments should be implied based on practice, facilitating the president's duty to carry out the laws, and the default principle of free reign to change predecessor direct actions. Seamon at 33-40. Squillace et al. do not address the implied powers aspect, arguing that

For example, Congress might have provided that, once designated by presidential proclamation, any modification of the boundaries or management conditions of a national monument would require an Act of Congress. Or, the provision might require that any such modification, if proposed by the president, be subject to the consent of the states within which the national monument is situated, or following the model *for agency* regulations, that the Secretary of the Interior provide a justification for why modifications are not arbitrary and capricious or fail to meet some other standard. A similar approach might require what President Trump has come close to attempting—i.e., that subsequent modifications must be based on the same presidential findings regarding values and size that Congress has imposed on national monument *creation* in the first place.[162]

Congress surely could impose these and similar conditions on the president's creation of a national monument without treading on constitutionally-mandated separation of powers—the president has no inherent constitutional authority to declare national monuments on federal land. Such exit conditions are commonplace and present no constitutional concern when imposed on an agency for, say, reducing an emissions limit established in an agency rule or changing the use restrictions of a national forest—that was a central point we made in *Regulatory Exit*. So why not for the president? If Congress can delegate relatively unfettered power to presidents to proclaim national monuments, it can surely constrain or enable the presidential power to exit from them once proclaimed.

To be sure, we are not arguing that Congress has a free hand in how it designs presidential exit. It would be a far different question, for example, were Congress to attempt to constrain presidential exit in realms where the president's direct actions are purported to be based solely on the president's inherent constitutional powers and for which no congressional consent or involvement is needed at the inception. For example, consider an omnibus statute under which Congress purports to govern direct actions by dictating that, once issued, successor presidents have no authority to amend, supersede, or revoke them. As applied to President Obama's executive agreement entering the Paris Accord, this would have prevented President Trump from exiting. But Congress had no power to prevent President Obama from entering the Paris Accord—that was the point of his using an executive agreement rather than a treaty—and, similarly, Congress has no power to prevent President Trump from exiting the accord.[163] To be sure, Congress could attempt through legislation to nullify either President Obama's entry or President Trump's exit, such as by constraining or mandating federal agency measures consistent with the accord, but that would require presidential cooperation and falls well short of directly controlling a president's execution or revocation of direct actions.

If Congress can constrain presidential exit for statutorily-based direct actions but not for purely constitutionally-based actions, why would it do so? The Antiquities Act again provides a

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the statute and related federal laws reserve all power to alter declared monuments to Congress. Squillace et al. at 56-71. We do not address the issue of implied authority here.

[162] Squillace et al. argue that "allowing a President to second-guess the judgment of a predecessor as to the amount of land needed to protect the objects identified in a proclamation is fraught with peril because it essentially denies the first President the power that Congress granted to proclaim monuments." Squillace et al., at 68. But the essence of presidential exit's "easy come, easy go" default rule is exactly that of allowing a president to second-guess the judgment of a predecessor.

[163] Stephen P. Mulligan, Cong. Research Serv., CRS Rep. No. R44761, Withdrawal from International Agreements: Legal Frameworks, the Paris Agreement, and the Iran Nuclear Agreement, at 6, 17 (Feb. 9, 2017) (noting that "in the case of executive agreements, the President's authority to terminate such agreements "has not been seriously questioned in the past" and concluding the Paris Agreement is such an action)

fitting example. On the one hand, if the congressional purpose is to promote national monuments, then constraining exit makes sense—it ensures national monuments, once proclaimed, either remain intact permanently or, if exit is not entirely precluded, can only be modified using the mapped or uncertain exit process Congress had imposed *ex ante*. On the other hand, perhaps emboldened by the sense of exit immunity, recent presidents have proclaimed such large monuments that many commentators have questioned whether they truly meet the statute's criteria for values and size.[164] It may be politically difficult for Congress to override such outliers through negating legislation. To guard against that kind of runaway train, therefore, providing a Mapped Exit power could signal to incumbent presidents that the criteria should be followed closely, so that successors do not reshape monuments with the stroke of a pen. Leaving the matter unaddressed has lead to President Trump's attempt to implement Adaptive Exit and the battle between opposing interpretations of the statute that will certainly bedevil the impending litigation challenging his move.

The analytical framework we developed in *Regulatory Exit* for making such choices thus maps well onto choices Congress has regarding presidential exit for statutes delegating direct action authority. In the case of presidential exit, however, this choice is made against a background default Mapped Exit rule that presidents have a free hand to amend, supersede, or revoke prior direct actions. Hence, Congress must first make a threshold determination whether to depart from that rule. Congress might do so for a variety of reasons. As noted above for the Antiquities Act, it may wish to promote the goals of the statutory program by making it work in one direction—e.g., always adding to the stock of monuments. Or, Congress might anticipate that private and public reliance on prior presidential direct actions may lead to entrenched interests which should be upset, if at all, only through congressional initiative.

If for these and similar reasons Congress decides "easy go" is not the appropriate exit model, it has three choices: Mapped Exit, Uncertain Exit, and Adaptive Exit. If Congress wishes to tightly control the conditions of exit, which may promote passage of the delegating statute if there is concern over unbridled presidential discretion, an *ex ante* Mapped Exit model is appropriate. Agreement over the need for exit may prevail, but not over the precise terms, in which case *ex ante* Uncertain Exit balances the desire for exit conditions with the flexibility of presidential discretion to interpret the ambiguous terms. If exit is simply not a concern, or dealing with it *ex ante* could be too politically controversial, Congress could punt the issue by remaining silent on the issue, as it did in the Antiquities Act, leaving it to later legislative or presidential Adaptive Exit.

2. Presidential Design Strategies

A significant distinction within the regulatory exit domain concerns how easily an exercise of authority can be reversed in the future. While it is true that no Congress can absolutely bind a future Congress, undoing a prior Congress's legislation with new legislation is difficult because of the enactment process, the slow turnover rate of members, and the need for presidential concurrence. Similarly, agencies must navigate procedural obstacles to reverse prior adopted rules, and cannot deviate outside the bounds of statutory and judicial parameters. Leaving aside the politics, when Congress or an agency builds exit *ex ante* into a program, there are substantial legal and practical obstacles constraining a later Congress or agency hoping to undue or alter the exit strategy. Presidents, however, have a far easier time undoing a

[164] Seamon at 16-21.

predecessor's direct actions—usually just a matter of issuing another direct action, which often has no process constraints. Yet, as our case studies show, this is not always the case in practice.

As a starting point, Thrower's empirical findings on executive order longevity suggest that president can often boost the life span of a direct action based on timing (issue during a divided government), subject matter (e.g., foreign relations), and authority references (clear statutory authority).[165] These exit constraints make it more costly politically for successors to attempt to unwind the action. Can a president go further and expressly build in legal or structural constraints on presidential exit, as Congress can do for statutorily-based direct actions?

Obviously, a president cannot prevent successors from amending, superseding, or revoking a direct action simply by inserting a prohibition on exit into the text of the direct action itself. But as our case studies of the Paris Agreement and Project XL pipeline suggest, presidents can use what Professor Sarah Light (in this issue) calls exit "horcruxes" to impede successor exit.[166] That is, a president can tie a direct action to external instruments or institutions that substantially alter the optics, if not the structural and legal viability, of successor exit.

President Obama's executive agreement committing the U.S. to the Paris Agreement is an example of a horcrux strategy tying the direct action to another, more legally stable action—the international agreement—which specified an express Mapped Exit withdrawal process. Could President Trump have simply rescinded President Obama's executive agreement as a way of exiting the Paris Agreement? Almost certainly. But he did not. That would have been the ultimate thumbing of one's nose at the international community, with potential reputational costs in foreign relations felt well beyond the confines of the Paris Agreement and well beyond President Trump's tenure in office.

Similarly, the presidential permit process for the Project XL pipeline operates under the two executive orders making future exit more difficult by inserting a horcux into the process in the form of a third-party institution—the State Department and its delegated role of permit evaluation and issuance. President Trump's reversal of President Obama's permit denial could have taken the form of a bare executive order revoking the two "governing" executive orders and issuing the permit straight from the Oval Office. But he did not—his order specifically incorporated the two executive orders and directed the State Department to follow them. Even if paying lip service to the process, President Trump's channeling of his decision through the State Department was tacit acknowledgement of the exit regime his predecessors had erected. To have acted outside that process would have made fodder for more of the power grab critique.

Hence, while presidents cannot impose exit regimes with binding legal effect on successors, the horcrux strategy can slow down presidential exit by implanting procedural obstacles outside the White House. These can go even further than the above examples, including by setting into motion agency actions leading to restructuring agency organization and policy and, even more potently, promulgation of agency legislative rules. In Professor Light's model, these tactics involve horizontal horcruxes that split exit authority and process between institutions in such a way as to impede the completion of presidential exit.

Consider, for example, President Clinton's 1993 executive order on environmental justice,[167] which cemented and extended efforts the EPA had already initiated to promote more socially equitable environmental regulation and enforcement. Twenty-five years later, the EPA's environmental justice program, administered through its Office of Environmental Justice, is vast,

[165] Thrower at 650-55.
[166] Sarah Light, *Administrative Horcruxes*, DUKE L J. (manuscript at ##) (this issue)
[167] EO 12898

including extensive guidance documents on regulation and permitting, grants to promote environmental justice, and inter-agency coordination.[168] Unwinding this extensive agency structure will involve extensive effort. To be sure, President Trump could do so through a direct action revoking President Clinton's order and specifying the dismantling of the initiatives, as none of them has been codified through legislation or agency rulemaking, but it will take a concerted, planned effort and many strokes of the pen to unwind EPA's environmental justice implementation organization and process.

Another effective strategy a president can take is to include in the direct action orders to initiate agency rulemaking. If the agency follows through, a successor can easily revoke the direct action itself, but undoing the agency regulation involves either promulgation of another agency regulation or enactment of legislation defunding or prohibiting the action. For example, President Obama in 2013 issued a presidential memorandum on power sector carbon standards directing the EPA to promulgate rules governing carbon emissions from existing and new power plants.[169] President Trump revoked that memorandum by executive order in March 2017,[170] but not before the EPA promulgated the Clean Power Plan in 2015 in response to the Obama action.[171] Obviously, President Trump could not revoke the Clean Power Plan through presidential direct action. Instead, he has directed EPA to review the rule under the criteria spelled out in his order and ordered that EPA "if appropriate, shall, as soon as practicable…publish for notice and comment proposed rules suspending, revising, or rescinding those rules"—i.e., to engage in administrative exit.[172] President Obama's memorandum is history, and at the end of the day the Clean Power Plan may be as well, but the horizontal split horcrux will have had its effect in delaying the effect of presidential exit, allowing politics to challenge the presidential exit and litigation to challenge the administrative exit.

Hence, Professor Light's horcrux concept is a useful way of thinking about how presidents can constrain successor exit. The essence is to leverage other Executive branch entities to slow down the successor exit process. In some cases a successor could ignore the horcrux, as President Trump could have accomplished with the Project XL permit, but its presence makes that approach more politically costly. In the agency rulemaking strategy, the presidential direct action can be nullified but the horcrux lives on in the agency and cannot be ignored—the agency must follow applicable administrative exit procedures. Presidents thus are not without means of constraining successor exit.

B. Presidential Self-Constraint Through Symbolic Exit

While President Trump has not engaged in significantly greater exit from predecessor direct actions early in his administration than past presidents,[173] his use of exit feels quite different. For starters, it seems ubiquitous. Indeed most of his high-profile actions have involved exit of one kind or another – not just the direct action examples in our case studies but efforts to

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[168] https://www.epa.gov/environmentaljustice

[169] https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards

[170] EO 13783 sec. 3, 82 Fed. Reg. 16093, 16094 (Mar. 28, 2017).

[171] "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64661 (October 23, 2015) (Clean Power Plan).

[172] EO 18783 sec. 4, 82 Fed. Reg. 16093, 16095 (Mar. 28, 2017).

[173] See supra note __

end the Affordable Care Act, withdraw from the Trans Pacific Partnership, pull out of NAFTA, and end the Deferred Action for Childhood Arrivals (DACA) program, to name just a few. Indeed, in a sense his presidency has been predicated on exit through his concerted efforts to dismantle the Obama administration's legacy.[174]

In many of these efforts, President Trump has engaged in a novel strategy we call "Symbolic Exit." These are not symbolic actions such as declaring National Blood Donors Day. Instead, President Trump follows a consistent strategy where he publicly announces exit, often through tweets, which is followed by intense media coverage. In fact, though, these exits are usually incomplete. Indeed, the irony of this approach is that President Trump has self-imposed constraints on what otherwise could have been plain vanilla easy go Mapped Exit. Our case studies make this clear.

In pulling out of the Paris Agreement, President Trump chose to use the exit provisions of the agreement (which requires a two year period before withdrawal comes into force) instead of sending the treaty to the Senate or unilaterally withdrawing. In doing so, he retained the option to stay in the Agreement until 2019. For the Antiquities Act, the president indicated his intent to exit from some of the current National Monument designations but the Secretary of the Interior was asked to recommend specific changes and it remains unclear whether any of these will be adopted. The same is true for the transgender military ban. President Trump tweeted the ban but later conditioned it on military advice, even allowing for lifting the ban entirely if he were so persuaded.

There is a clear pattern. Often using social media (as in the transgender military ban) or a high-profile press conference (as in the Paris Agreement), Trump makes a big show of exit to his base. If you look at the substance, though, the nature of exit is less clear. They are almost all subject to further review or a time lag. This inevitable bow to political realities does not alter the clear message of exit, even if the eventual exit is much less significant than first declared.

The Trump administration is therefore noteworthy in introducing a new dimension of ambiguity to presidential exit. He is the first systematically to promote symbolic exit. In past administrations, the contours of presidential exit have been clear. Exit means exit: "I revoke that direct action;" "I supersede that action with this one;" "I amend Section X of that action." No more action is needed. Trump, by contrast, proclaims to the Twitterverse, "I'm exiting!" But, upon closer inspection, the message is, "I'll let you know later what we're doing."

This strategy is political, not legal. Each of these exits sends a clear message to his base. In exiting the Paris Agreement, Trump has signaled that he is rejecting climate change commitments. In exiting the Antiquities Act, Trump is signaling his support of state rights in the battles over control of federal public lands. In exiting the transgender in the military policy, Trump has signaled his opposition to LGBT issues. The expert panel may ultimately decide to bar transgender soldiers, or it may not. But by the time they announce their decision, the public's eye will have turned to another issue.

While Symbolic Exit looks like planned self-constraint and may prove an effective political strategy—scoring political points while retaining flexibility—it comes with high costs to other institutions and the public. By declaring exit but creating ambiguity in what this actually means, Symbolic Exit creates uncertainty. Did the tweets—which we now know are official presidential statements—mean exit or not? Not setting out clearly the path toward exit spawns litigation, placing courts in the position of determining the contours of presidential exit in practice. To put this in perspective, imagine if an agency or Congress acted like this, declaring an

[174] Alex Pappas, *Trump is dismantling Obama's executive action legacy*, Foxnews.com, Sept. 8, 2017.

intent to reverse course, throwing the gears of process into motion, but then vacillating and protracting the "in exit mode" process indefinitely. The uncertainty this would impose on economic and social interests would be damaging. Indeed, one might reasonably conclude that President Trump's Symbolic Exit strategy has thrown Congress and agencies like the EPA into exactly that mode. This new form of presidential exit thus illustrates both the power of presidential direct actions, and of exit from them.

CONCLUSION

Regardless of one's view on the policy positions behind President Trump's practice of Symbolic Exit, the tactic and its impact on other political actors suggests that Warber and Thrower were on point in urging more rigorous scholarly attention to presidential exit. Indeed, given it ubiquitous presence through history, presidential exit is far more ingrained in the institution of the Executive than it is in Congress and administrative agencies. As the Mexico City Policy ping-pong of orders reversing orders shows, presidents must expect that any direct action they issue will be a target of successor exit. Through legal constraints Congress inserts into delegatory legislation, and through the horcruxes a president slips into administrative agencies, the "easy go" default rule of presidential exit can be adjusted. As we concluded in *Regulatory Exit*, therefore, Congress, when it delegates direct action authority to the president, and presidents, when issuing their direct actions, should purposively consider *at that time* whether and how to manage successor exit.