

Taking It Personally: When Energy Policy Becomes a Spite Taking

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In January 2025, the White House issued a presidential memorandum directing federal agencies to immediately suspend all offshore wind development, including projects operating under existing leases and permits, pending a review of “national energy priorities.” The memorandum instructed the Department of the Interior and related agencies to halt regulatory approvals and freeze federal funding. A subsequent executive order expanded the moratorium by revoking renewable energy subsidies and prohibiting the issuance of new offshore wind permits. Acting pursuant to these directives, the Bureau of Ocean Energy Management (“BOEM”) issued Stop Work Orders to multiple offshore wind projects, including Revolution Wind, LLC, halting billions of dollars in ongoing development and effectively stranding investments made in reliance on vested property rights. This Article introduces the concept of Fifth Amendment “spite takings” to expose a doctrinal vulnerability in takings jurisprudence that threatens the stability of large-scale infrastructure investment and warrants closer attention to governmental motive within the public purpose inquiry. When the government exercises its power not to advance a legitimate public purpose, as required by the Fifth Amendment, but instead to target a disfavored owner or industry out of animus or retaliation, the resulting taking becomes what this Article terms a “spite taking.” This Article first provides background on takings doctrine and the nature of property interests in energy development. It then applies the Penn Central factors to BOEM’s Revolution Wind Stop Work Order, framing the agency action as giving rise to inverse condemnation. The shortcomings of a purely regulatory takings analysis motivate the Article’s central argument: that

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the presidential directives operate as a functional condemnation subject to the Fifth Amendment's public purpose requirement. This Article therefore recommends a spite takings balancing test to identify when impermissible motive drives presidential action. Drawing on equal protection and administrative law where courts already assess official statements, procedural irregularities, and patterns of disruption to uncover pretext, this Article argues that similar evidentiary tools should inform takings analysis where animus is alleged.

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I. INTRODUCTION

In January 2025, the White House issued a presidential memorandum (“Memorandum”) directing federal agencies to immediately suspend all

offshore wind development, including projects under existing leases and permits, pending review of “national energy priorities.”¹ The Memorandum instructed the Department of the Interior and other agencies to freeze regulatory approvals and federal funding.² An executive order (“Executive Order”) later expanded the moratorium, revoking renewable energy subsidies and prohibiting new offshore wind permits.³ Acting on the President’s directive, the Bureau of Ocean Energy Management (“BOEM”) issued Stop Work Orders to multiple offshore wind projects, including Revolution Wind, LLC (“Revolution Wind”), that halted billions of dollars in ongoing development and effectively stranded investments made in reliance on vested rights.⁴

This Article argues that these types of government-led development-stage halts, which stop or suspend an energy project after major entitlements have vested and construction has begun, are not mere public policy shifts but are instead unconstitutional takings under the Fifth Amendment.⁵ When objective evidence suggests that the government’s asserted purpose conceals retaliatory or selectively punitive targeting of a disfavored industry, the resulting taking becomes what this Article calls a

1. *See* Temporary Withdrawal of All Areas on the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government’s Leasing and Permitting Practices for Wind Projects, 90 Fed. Reg. 8363 (Jan. 20, 2025) [hereinafter Memorandum].

2. *See id.* at 8364.

3. EXEC. ORDER NO. 14315, 90 Fed. Reg. 30821 (July 7, 2025). In a case brought by eighteen attorney generals claiming the Executive Order was arbitrary and capricious, in violation of the Administrative Procedure Act, a court held the Executive Order was unlawful. *See* Memorandum and Order at 1–3, 47, *State of New York et al. v. Trump et al.* No. 1:25-cv-11221, Doc. 234 (D.Mass. Dec. 8, 2025).

4. *See* U.S. Dep’t of the Interior, Bureau of Ocean Energy Mgmt., Director’s Order to Revolution Wind, LLC (Aug. 22, 2025), <https://www.boem.gov/sites/default/files/documents/renewable-energy/Director%26%23039%3BsOrder-20250822.pdf> [https://perma.cc/YFX7-APKN]. [hereinafter Stop Work Order]. Following the Stop Work Order, Revolution Wind filed a complaint, citing violation of due process. *See* Complaint for Declaratory and Injunctive Relief at 2, 4, *Revolution Wind, LLC v. Burgum, et al.* No. 1:25-cv-02999 (D.D.C. Sep. 4, 2025) (Doc. 1), 2026 U.S. Dist. LEXIS 9369 [hereinafter Complaint]. A court granted a preliminary injunction, enjoining enforcement and allowing construction to resume. *See generally* Order Granting Preliminary Injunction, *Revolution Wind, LLC v. Burgum, et al.*, No. 1:25-cv-02999, Doc. 36 (D.D.C. Sep. 22, 2025). After the preliminary injunction was granted, the Department of the Interior issued a new round of orders for Revolution Wind and four other offshore wind farms to halt development, all of which have since been enjoined. Adam Vann, *Trump Administration Actions to Curtail Offshore Wind Energy Development Meet Judicial Resistance* (Mar. 11, 2026), <https://www.congress.gov/crs-product/LSB11402> [https://perma.cc/Y6ZU-DJLY]. This Article does not seek to litigate that dispute or predict the final outcome. Rather, Revolution Wind serves as a contemporary example of how a development-stage halt presents constitutional takings questions that could arise under any administration or energy context.

5. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

“spite taking.” Spite takings reveal a doctrinal weakness that has the potential to destabilize billions of dollars in infrastructure investment and invite renewed attention to governmental motive as an essential component of the public purpose inquiry.⁶

Part II of this Article provides background on the foundations of takings doctrine and energy property interests. Part III applies the *Penn Central* factors to BOEM’s Revolution Wind Stop Work Order, treating it as an agency action under inverse condemnation.⁷ Beginning with a regulatory *Penn Central* analysis exposes the limits of the framework and sets up Part IV’s argument that the presidential directives function as a condemnation subject to the Fifth Amendment’s public purpose requirement.⁸ Part V examines how federal and state courts have treated motive as relevant to public purpose. Part VI extends the public purpose analysis by proposing a spite takings balancing test to identify when spite drives presidential action. Drawing on equal protection and administrative law, where courts already examine patterns of official statements and procedural disruption to detect pretext, this Article argues that similar evidentiary tools should also belong within the public purpose analysis.⁹

II. FOUNDATIONS OF MODERN ENERGY TAKINGS

Energy projects require billions of dollars in spending sustained over years of permitting, construction, and regulatory review.¹⁰ A wind farm cannot operate without coordinated federal and state approvals and a pipeline cannot cross state lines without regulatory authorization.¹¹ The

6. See Complaint, *supra* note 4, at 8. This Article develops a novel category of takings that arise from presidential directives imposing development-stage halts and advances a Spite Takings Balancing Test. The analysis departs from existing scholarship, which largely centers on challenges to local condemnations where pretext masks conferral of private benefit to a favored private party.

7. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

8. *Id.*

9. Equal protection recognizes that discriminatory intent can invalidate facially neutral policies and administrative law allows courts to look past stated rationales when the record reveals pretext or arbitrary reasoning. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977) (identifying historical background, procedural departures, and differential treatment as indicators of intent); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to articulate a rational connection between facts and choices).

10. See Alexandra B. Klass, *Takings and Transmission*, 91 N.C.L. REV. 1079, 1117 (2013) (noting that interstate transmission lines can take over a decade to plan and construct due to permitting obstacles); James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 675–80 (2019) (describing the scale of infrastructure investment required by the domestic oil, gas, and renewable energy buildout).

11. See 16 U.S.C. § 1456(c)(3)(A) (requiring that federally permitted activities affecting a state’s coastal zone be consistent with the state’s coastal management program); Coleman &

resulting property interest is not a deed to land that the owner can freely repurpose, but rather an amalgamation of federal leases, permits, and contractual commitments whose value is inseparable from the regulatory framework that authorizes it.¹² This Part describes how those interests take shape in the energy sector and how takings doctrine and judicial decisions constrain the government's power to disrupt them.

A. Bundle of Wires: Defining Property in the Energy Sector

As a threshold inquiry in evaluating a takings claim, courts must first confirm the existence of a legally recognized property interest.¹³ Property is a set of legally enforceable relationships that determines who may control and benefit from valuable resources.¹⁴ An owner holds a particular combination of rights within the broader “bundle of sticks” that defines the scope of property entitlements.¹⁵ States decide which interests qualify as property, including fee simple estates, leaseholds, easements, mineral rights, licenses, and contract-based entitlements.¹⁶ Legislatures and courts continually adjust these categories as technology evolves, reclassifying and recognizing new forms of ownership to reflect changing social and market realities.¹⁷

Klass, *supra* note 10, at 680–81 (detailing the regulatory regimes governing pipeline construction for oil and natural gas).

12. See *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 614–16 (2000) (describing how federal Outer Continental Shelf lease contracts, combined with statutory approval requirements under the Outer Continental Shelf Lands Act and Coastal Zone Management Act, create an integrated set of rights whose value depends on continued governmental performance); Troy A. Rule, *Property Rights and Modern Energy*, 20 GEO. MASON L. REV. 803, 804–06 (2013) (characterizing energy property interests as hybrid entitlements shaped by both private investment and regulatory authorization).

13. *Zimmerman v. Hudson*, 264 P.3d 989, 1001 (Kan. 2011).

14. JOSEPH WILLIAM SINGER ET AL., *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* xxxi (8th ed. 2022).

15. The “bundle of sticks” metaphor first appears in print when Felix S. Cohen used it to characterize property as a collection of separate entitlements. See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 357 (1954). The bundle includes the right to possess, right to exclude, right to alienate, right to use, right to enjoy profits, and right to destroy. See Singer, *supra* note 14, at xxxii.

16. See Singer, *supra* note 14, at 30–35; *Lynch v. United States*, 292 U.S. 571, 576–80 (1934) (contract rights as property). Because each state defines property differently, federal takings analysis depends on local definitions to identify what property right existed. See Steven C. Begakis, *Stop the Reach: Solving the Judicial Takings Problem by Objectively Defining Property*, 91 NOTRE DAME L. REV. 1197, 1197 (2016); see also Timothy M. Mulvaney, *Reconceptualizing “Background Principles” in Takings Law*, 109 MINN. L. REV. 689, 694–97 (2024) (examining how *Tyler v. Hennepin County* complicates the assumption that state law solely defines property interests for federal takings analysis).

17. See Rule, *supra* note 12, at 803.

Energy development generates property interests that depart from conventional forms of ownership. For example, in the energy sector, oil, gas, and mineral interests can be severed from the surface estate and transferred.¹⁸ Courts have treated these severed interests as property even when conservation rules or production limits restrict extraction.¹⁹ Certain jurisdictions have also recognized property interests tied to renewable resources, including wind rights.²⁰ For example, California courts have recognized wind development potential as a compensable interest when condemnation diminishes its value.²¹ Colorado's wind statute similarly recognizes that contracts can confer real property rights in wind even though the resource itself cannot be physically severed from the surface.²²

Modern energy projects often rely on a hybrid structure of federal leases, permits, and approvals that create the “bundle of wires” for developers to enjoy.²³ Courts require compensation when the government abruptly withdraws formal commitments after inducing a developer's reliance.²⁴ Furthermore, because energy projects operate within extensive public mandates, energy property interests sit at the center of modern takings disputes.²⁵

The ongoing disruption of offshore wind development illustrates the vulnerability of these hybrid property interests. Five large-scale offshore wind projects on the East Coast were under active construction when the federal government ordered work to stop.²⁶ Vineyard Wind, an 800-megawatt (“MW”) project off Massachusetts developed by Avangrid and Copenhagen Infrastructure Partners, was approximately 95% complete and had already begun delivering power to the grid.²⁷ Coastal Virginia

18. See Singer, *supra* note 14, at 30–35; Kevin J. Lynch, A Fracking Mess: Just Compensation for Regulatory Takings of Oil and Gas Property Rights, 43 COLUM. J. ENV'T L. 335, 351 (2018).

19. See Michael Pappas, *Energy Versus Property*, 41 FLA. ST. U. L. REV. 435, 473 (2014) (discussing the continuing recognition of mineral interests as property even if those property interests are limited).

20. See Rule, *supra* note 12, at 812.

21. See *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272, 277 (1997).

22. COLO. REV. STAT. § 38-30.7-103(1)–(2) (2024) (structuring real-property expectations).

23. See *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 620 (2000) (noting that government approvals allowed for enjoying exploration and development rights).

24. *Id.* at 620–21 (requiring the government to honor leasehold commitments or provide relief).

25. See Lynch, *supra* note 18, at 337 (discussing potential takings claims if jurisdictions were to ban fracking to protect public health).

26. Neil Gerrard, *Five US Offshore Wind Construction Projects Receive Stop Work Orders*, CONSTR. BRIEFING (Dec. 24, 2025), <https://www.constructionbriefing.com/news/five-us-offshore-wind-construction-projects-receive-stop-work-orders/8110602.article> [<https://perma.cc/8P7V-TS85>].

27. See U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt., *Vineyard Wind 1*, <https://www.boem.gov/renewable-energy/state-activities/vineyard-wind-1> [<https://perma.cc/5FS8-S4FK>] (last visited Mar. 18, 2026); Press Release, Vineyard Wind, CIP, Avangrid Announce First Power from Nation-Leading Vineyard Wind 1 Project (Jan. 3, 2024),

Offshore Wind, developed by Dominion Energy, is the largest of the five projects at 2.6 gigawatts, with a total project cost exceeding \$11 billion.²⁸ Two projects were located off New York: Empire Wind, an 810-MW Equinor project that was more than 60% complete with an estimated \$4 billion invested²⁹ and Sunrise Wind, a 924-MW Ørsted project that was about 45% complete with forty-four of eighty-four monopile foundations and an offshore converter station installed.³⁰

Revolution Wind, a 704-MW project developed by Ørsted, is located approximately fifteen nautical miles southeast of Point Judith, Rhode Island.³¹ It holds twenty-year power purchase agreements with Connecticut and Rhode Island covering the project's full capacity.³² Fifteen federal and state agencies reviewed the project across three presidential administrations before BOEM issued a joint Record of Decision approving construction in August 2023.³³ By August 2025, offshore construction was approximately 80% complete.³⁴ Ørsted had spent or committed approximately \$5 billion in permitting and construction.³⁵ When the government halted construction, it did not merely pause a building project; it destabilized every component of the property interest it had spent years helping to create. Together, these five projects represent tens of billions of dollars in committed capital. Each held valid federal leases, had completed multi-agency environmental review, and was well into construction when BOEM issued the Stop Work Orders in late 2025.

A development-stage halt of a legally licensed energy project certainly creates a cognizable property interest sufficient to warrant a takings

<https://www.vineyardwind.com/press-releases/2024/1/3/cip-avangrid-announce-first-power-from-nation-leading-vineyard-wind-1-project> [<https://perma.cc/8GVA-KE3X>].

28. *Coastal Virginia Offshore Wind*, DOMINION ENERGY, <https://coastalvawind.com> [<https://perma.cc/32QW-HT4U>] (last visited Mar. 18, 2026); DOMINION ENERGY, COASTAL VIRGINIA OFFSHORE WIND PROJECT UPDATE (2026), https://s2.q4cdn.com/510812146/files/doc_presentations/2025/2026-01-30-DE-CVOW-update-vTC.pdf [<https://perma.cc/298C-NE3K>].

29. *Empire Wind 1*, EQUINOR, <https://www.empirewind.com/ew-1> [<https://perma.cc/32X7-8XAT>] (last visited Mar. 18, 2026); *Empire to File Preliminary Injunction Against Lease Suspension Order*, EQUINOR (Jan. 2, 2026 at 1:23 PM), <https://www.equinor.com/news/20260102-empire-wind> [<https://perma.cc/7QP9-FMM2>].

30. *Sunrise Wind LLC to File Preliminary Injunction Against Lease Suspension Order*, ØRSTED (Jan. 6, 2026), <https://sunrisewindny.com/news/2026/01/sunrise-wind-llc-to-file-preliminary-injunction-against-lease-suspension-order> [<https://perma.cc/5T6Q-JHPM>].

31. *Revolution Wind*, ØRSTED, <https://revolution-wind.com> [<https://perma.cc/5RL6-QHGV>] (last visited Mar. 18, 2026).

32. See Complaint, *supra* note 4, at 47.

33. See Complaint, *supra* note 4, at 58.

34. See Complaint, *supra* note 4, at 4.

35. See Complaint, *supra* note 4, at 7.

analysis, even if the precise characterization of the interest—whether as real property, contract right, or vested entitlement—ultimately depends on state law.³⁶

B. Constitutional Limits and Judicial Review

The Fifth Amendment to the U.S. Constitution provides that the government cannot take private property for a public use without payment of just compensation.³⁷ This Takings Clause safeguards existing rights and sets the limit on uncompensated government interference to align public authority with private fairness.³⁸ Takings claims arise through one of two procedural paths: condemnation or inverse condemnation.³⁹ This Section distinguishes condemnation-based challenges grounded in public use from regulatory inverse condemnation claims governed by the *Penn Central* test.

1. Condemnation and the Public Use Limitation

Condemnation refers to the government’s formal exercise of eminent domain.⁴⁰ Governments may exercise eminent domain to acquire property for a public purpose, such as easements for transmission lines or pipelines that will ultimately serve the public.⁴¹ Judicial review of a condemnation action therefore centers on whether the asserted purpose qualifies as a public use.⁴²

36. Courts have recognized developers’ interests as compensable property in various settings. See Rule, *supra* note 12, at 812 (describing hybrid property-regulatory entitlements in energy projects). Contract law protects reliance interests through expectation and reliance damages and, in some cases, promissory estoppel. See RESTATEMENT (SECOND) OF CONTS. § 90 (AM. L. INST. 1981) (where a promisor should reasonably expect their promise to induce substantial action or forbearance, the promise is binding if injustice can only be avoided by enforcement); *Id.* § 349 (reliance damages). This Article brackets those alternative remedies and instead analyzes the reliance and sunk costs as vested property entitlements.

37. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

38. Courts treat the Takings Clause as a limit on power rather than a source of entitlement, focusing on the burden the government imposes on the owner. See Stewart E. Sterk, *The Roles of State and Federal Law in Energy Condemnations*, 9 BRIGHAM-KANNER PROP. RT.S CONF. J. 205, 217–18 (2020); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (describing purpose of the Fifth Amendment to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

39. See *Lynch*, *supra* note 18, at 408 (“either eminent domain by the government, or inverse condemnation claim by a private party”).

40. See Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 63 (2012).

41. See Coleman & Klass, *supra* note 10, at 661.

42. See Shelley Ross Saxer, *The Aftermath of Takings*, 70 AM. U. L. REV. 589, 593 (2020).

The Supreme Court has long recognized broad legislative discretion to define public use.⁴³ The Court has upheld condemnations to eliminate blight and correct concentrated land ownership, emphasizing judicial deference to legislative judgments concerning public welfare.⁴⁴ In *Kelo v. City of New London*, the Court extended this deference to economic development plans.⁴⁵ In doing so, however, the majority acknowledged that a taking would fail if the asserted public purpose merely concealed an impermissible motive to “bestow a private benefit,”⁴⁶ but offered little guidance on how courts should identify such pretext in future cases.⁴⁷ Justice Kennedy’s concurrence further stressed that a purported public purpose cannot mask favoritism or retaliation.⁴⁸

Despite this warning, modern federal courts have tended to treat the Takings Clause as remedial, presupposing the legitimacy of the government’s stated purpose and viewing the Clause as a mechanism for compensation following “otherwise proper interference” with property.⁴⁹ Under this approach, disputes concerning governmental motive are frequently rerouted into substantive due process analysis, leaving the Takings Clause focused primarily on the magnitude and character of the burdens imposed.⁵⁰

Conversely, many state courts have interpreted their own takings provisions as imposing an independent public purpose requirement.⁵¹ The New Jersey Supreme Court held that a blight designation, unsupported by evidence, exceeded constitutional limits.⁵² Other states, including Colorado, have struck down as unconstitutional condemnations that primarily serve private economic gain or rest on pretextual claims of

43. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 65 (2014).

44. *Berman v. Parker*, 348 U.S. 26, 31–33 (1954) (redevelopment purposes); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–43 (1984) (land redistribution in market correction).

45. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005) (holding that economic development constitutes a public use).

46. *Id.* at 478 (justifying transfer to private developers). “Pretext” is defined as a “false or weak reason or motive advanced to hide the actual or strong reason or motive.” *Pretext*, BLACK’S LAW DICTIONARY (12th ed. 2024).

47. Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 174 (2009).

48. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (“[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.”).

49. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005).

50. *Id.*

51. *See Saxer*, *supra* note 42, at 594 (noting that at least forty-four states amended their constitutions or enacted legislation to address public use concerns following *Kelo*).

52. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 449 (N.J. 2007).

necessity.⁵³ These state doctrines preserve “public use” as a substantive check on eminent domain power rather than a background assumption.⁵⁴

2. Inverse Condemnation

While condemnation proceedings are actions brought by the government seeking to take private property for a public purpose (and offering a payment of just compensation), inverse condemnation proceedings are actions brought by the property owner claiming that a government’s regulatory actions have gone “too far” and resulted in a taking that requires just compensation.⁵⁵ Where regulation or other state action destroys or severely impairs a vested property right, courts ask whether the government has imposed an excessive burden on the owner relative to any public benefits achieved.⁵⁶ For example, a zoning ordinance that excludes renewable-energy development may frustrate vested development rights and require just compensation.⁵⁷ When regulation authorizes physical invasion of property⁵⁸ or deprives the owner of all economically viable use,⁵⁹ courts will find a per se taking. Courts identify per se takings without factual balancing because they involve a direct confiscation of property and immediately trigger just compensation.⁶⁰

53. See *City of Lafayette v. Town of Erie Urb. Renewal Auth.*, 434 P.3d 746, 749 (Colo. App. 2018) (finding bad faith and affirming the taking was not for a lawful purpose).

54. See *Bd. of Cnty. Comm’rs v. Lowery*, 136 P.3d 639, 652 (Okla. 2006) (explaining “[t]o permit the inclusion of economic development alone in the category of ‘public use’ or ‘public purpose’ would blur the line . . . [and] render our constitutional limitations . . . a nullity”); see also *Brinkmann v. Town of Southold*, 96 F.4th 209, 225 (2d Cir. 2024) (Menashi, J., dissenting) (arguing that state doctrines inform the meaning of public use and prevent the Takings Clause from becoming an “odd outlier”).

55. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); Fennell, *supra* note 40, at 65–67; see also *Lynch*, *supra* note 18, at 408 (describing inverse condemnation as by a private party).

56. See *Armstrong v. United States*, 364 U.S. 40, 49, 80 (1960) (explaining that the Fifth Amendment is designed “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

57. Peggy Kirk Hall, Whitney Morgan & Jesse Richardson, *Land Use Conflicts Between Wind and Solar Renewable Energy and Agricultural Uses* 3–4 (Nat’l Agric. Law Ctr., Jan. 10, 2022), <https://nationalaglawcenter.org/wp-content/uploads/assets/articles/Wind-Solar-Land-Use.pdf> [<https://perma.cc/J8NG-KTYC>] (noting local regulation of wind and solar facilities includes attempts of total exclusion).

58. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding a New York law requiring landlords to install cable equipment in apartment buildings effected a per se taking); see also *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2070–74 (2021) (holding a California regulation granting union organizers intermittent access to worksites constituted a per se taking).

59. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–19 (1992) (holding a statute barring residential construction effected a per se taking).

60. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (describing per se takings requiring just compensation).

Beyond *per se* circumstances, judicial review of an inverse condemnation action addresses whether the governmental regulation has gone “too far.”⁶¹ In *Penn Central Transportation Co. v. New York City*, the Supreme Court supplied the principal balancing test for regulatory takings. The Court directed lower courts to weigh the (1) economic impact, (2) extent of interference with investment-backed expectations, and (3) character of the governmental action.⁶² Courts apply these factors case-by-case—even for temporary development moratoria—to consider the severity and duration of the burden and the manner in which the regulation targeted the property.⁶³ In the interest of fairness and justice, the *Penn Central* test ensures that governmental flexibility in pursuing public objectives does not come at the expense of individual property owners.⁶⁴ The *Penn Central* factors carry particular significance in the energy sector where projects depend on long development timelines, extensive costs, and coordination across agencies.⁶⁵ The stability of energy property rights shapes both the investment in new projects and the pace of system build-out.⁶⁶ Thus, this Article uses the *Penn Central* framework as the starting point for its condemnation analysis.⁶⁷

In sum, judicial review of condemnation tests the legitimacy of the government’s asserted public purpose, while review of inverse condemnation examines the fairness of its impact on the property owner.⁶⁸ Together, these doctrines define the constitutional boundaries of government power over private property.⁶⁹

III. POWER TRIP: WHEN REGULATION GOES TOO FAR

The 2025 Memorandum and Executive Order did not themselves rewrite agency rules or amend leasing regulations. Instead, the presidential directives operated through BOEM’s project-specific Stop Work Orders,

61. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

62. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

63. *Id.* (describing ad hoc, factual nature of inquiry); *Lingle*, 544 U.S. at 537 (focusing on burden and character); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 321 (2002) (concluding that temporary moratoriums are best analyzed under *Penn Central*).

64. See *Lingle*, 544 U.S. at 539 (explaining how the character of government action factor differentiates between compensable burden and fair economic adjustment).

65. *Klass*, *supra* note 10.

66. See *Rule*, *supra* note 12, at 813.

67. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

68. See *Coleman & Klass*, *supra* note 10, at 665–66 (describing the outer limits on the government’s ability to obtain private property).

69. See *Coleman & Klass*, *supra* note 10, at 665–66.

which bear all the signs of a regulatory act: restricting use, pausing an ongoing project, and conditioning continued operation.⁷⁰ Because the Stop Work Orders could function as an agency action, this Part begins with an inverse condemnation analysis under *Penn Central*, using Revolution Wind, one of five wind projects subjected to BOEM's Stop Work Orders, as a case study.⁷¹ Section A considers the economic impact of the order on Revolution Wind. Section B weighs the extent to which the order interferes with the developer's investment-backed expectations. Section C examines the character of the governmental action.

A. Economic Impact

Penn Central's first factor analyzes the economic impact of the regulatory action on the property owner's interest, focusing on the extent to which the regulation diminishes the value of the property as a whole.⁷² The more significant the diminution in value, the more this factor weighs in favor of the property owner.⁷³ In Revolution Wind's case, the Stop Work Order inflicts demonstrably severe economic harm, nearly destroying the property's value.⁷⁴ While the immediate economic harm is substantial, a permanent cancellation resulting from an indefinite halt could produce losses exceeding \$6 billion.⁷⁵ The Stop Work Order also directly threatens Revolution Wind's ability to fulfill its twenty-year power purchase agreements with Connecticut and Rhode Island, which cover the entire 704-MW capacity of the project.⁷⁶ Disruption of these agreements risks triggering substantial liquidated damages, jeopardizing

70. See Stop Work Order, *supra* note 4, at 1 (directing Revolution Wind to halt all ongoing activities on the Outer Continental Shelf pursuant to review initiated by the presidential memorandum); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (distinguishing regulatory actions that affect property interests from physical invasions).

71. See *Penn Central*, 438 U.S. at 124; Neil Gerrard, *Five US Offshore Wind Construction Projects Receive Stop Work Orders*, CONSTR. BRIEFING (Dec. 24, 2025), <https://www.constructionbriefing.com/news/five-us-offshore-wind-construction-projects-receive-stop-work-orders/8110602.article> [<https://perma.cc/AT6C-2U9P>].

72. See *Penn Central*, 438 U.S. at 124.

73. *Id.* at 130–31.

74. See Complaint, *supra* note 4, at 7 (detailing that the Stop Work Order is causing millions of dollars of losses per week).

75. See Complaint, *supra* note 4, at 7, 47.

76. See Complaint, *supra* note 4, at 47. A power purchase agreement is a contract where the buyer takes title to the produced electricity and is then responsible for remarketing the electricity. RACHIT KANSAL, ROCKY MOUNTAIN INST., INTRODUCTION TO THE VIRTUAL POWER PURCHASE AGREEMENT 3 (2018), <https://rmi.org/wp-content/uploads/2018/12/rmi-brc-intro-vppa.pdf> [<https://perma.cc/ZR8A-JZNB>].

billions of dollars of future revenue and surpassing a mere diminution in value.⁷⁷

Furthermore, this targeted, open-ended halt is not merely temporary and differs greatly from the development moratorium in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. There, the Court considered an area-wide, time-limited pause on construction as part of a comprehensive planning process rather than a taking.⁷⁸ Owners along Lake Tahoe retained ongoing use of their property and could begin desired development when the moratorium ended.⁷⁹ By contrast, the Stop Work Order targets a single, nearly completed project after the federal government conferred the necessary entitlements for construction and after the developer committed billions of dollars in sunk costs.⁸⁰ The Stop Work Order also subjects the project to an indefinite review of national energy priorities rather than a defined period of planning.⁸¹ Thus, even though the government has styled the halt as a regulatory pause, the measure operates as a potentially permanent major economic deprivation for Revolution Wind.⁸²

B. Interference with Investment-Backed Expectations

Penn Central's second factor examines the extent to which the government regulation interferes with “distinct investment-backed expectations.”⁸³ It analyzes how the regulation has or will disrupt existing, vested financially-committed plans for the property's use. The greater the interference, the more this factor weighs in favor of the property owner.⁸⁴ Revolution Wind's reliance interests stand on a decade-long foundation of

77. See Complaint, *supra* note 4, at 8.

78. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 311–14, 331 (2002).

79. *Id.* at 311–14.

80. See Complaint, *supra* note 4, at 8.

81. See Stop Work Order, *supra* note 4, at 1 (stating that Revolution Wind cannot resume activities until BOEM completes an uncertain, indefinite review). This analysis focuses on the initial Stop Work Order issued to Revolution Wind. The subsequent round of Stop Work Orders issued to other offshore wind projects are technically time-limited, though courts have granted preliminary injunctions against those as well. Adam Vann, *Trump Administration Actions to Curtail Offshore Wind Energy Development Meet Judicial Resistance* (Mar. 11, 2026), <https://www.congress.gov/crs-product/LSB11402> [https://perma.cc/Y6ZU-DJLY]. Unfortunately, an administration that begins with targeted, indefinite halts and follows with sweeping, slightly more descriptive orders may use the second round as a strategy to obscure the retaliatory character of the first.

82. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (noting that regulatory takings doctrine aims to identify governmental actions that are equivalent to a physical taking).

83. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

84. See *id.* at 124, 127–28.

federal and state regulatory consensus that the wind farm is lawful and safe.⁸⁵ The company had spent or committed approximately \$5 billion in developing, permitting, engineering, and constructing the wind farm, all in reliance on valid governmental approvals.⁸⁶ By the time BOEM issued the Stop Work Order, offshore construction had reached approximately 80% completion: Revolution Wind had installed all 67 monopile foundations and roughly 70% of the wind turbine generators.⁸⁷

These investments reflected reasonable expectations that the project would proceed to completion, premised upon a multi-year process involving extensive reviews by fifteen federal and state agencies which spanned three presidential administrations.⁸⁸ Revolution Wind spent over \$100 million pursuing final approvals, which culminated in the issuance of a Construction and Operations Plan approval and a Record of Decision finding that the wind farm was consistent with federal law.⁸⁹

Most tellingly, the federal government itself publicly affirmed the legitimacy of Revolution Wind's expectations in previous court filings, stating that a developer should be able to rely on their approved permits as "developers need to make business and financial decisions in furtherance of completing the authorized activity."⁹⁰ The sudden halt by the Stop Work Order constitutes a frustration of vested rights and high-value investment-backed expectations.⁹¹

C. Character of Governmental Action

The third *Penn Central* factor questions the "character of the governmental action," focusing on the nature of the government action rather than its economic impact.⁹² While governments may act to protect public health, safety, or welfare, their actions must remain consistent with principles of fairness and justice.⁹³ The greater the burden of the government action upon one or a group of private owners instead of the general public as a whole, the more this factor will weigh in favor of the property owner as lacking in fairness and justice.⁹⁴ In *Revolution Wind*, the Stop Work Order cites national security concerns and interference with

85. See Complaint, *supra* note 4, at 58.

86. See Complaint, *supra* note 4, at 7.

87. See Complaint, *supra* note 4, at 4.

88. See Complaint, *supra* note 4, at 58.

89. The approval process required extensive documentation, field surveys, analyses, and response to public comments. See Complaint, *supra* note 4, at 14.

90. See Complaint, *supra* note 4, at 3–4.

91. See Complaint, *supra* note 4, at 4.

92. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

93. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

94. See *Penn Central*, 438 U.S. at 123–24.

other reasonable uses of the Outer Continental Shelf.⁹⁵ However, during the approval process, the Department of Defense confirmed that the wind farm would not conflict with any military operations.⁹⁶ Additionally, Revolution Wind intended to supply renewable electricity to more than 350,000 homes in Rhode Island and Connecticut, reducing regional dependence on fossil fuels and contributing to energy reliability.⁹⁷ Halting the project not only stranded private capital, but also deprived the public of the very environmental and economic benefits that the government purported its actions to promote.⁹⁸

That deprivation carries particular weight in light of the current state of the nation's electric grid. The United States faces escalating electricity demand driven by the rapid expansion of data centers, the electrification of transportation and industry, and the broader imperatives of economic competitiveness. While the Executive Order that declared a national energy emergency did not include wind as an acceptable source, the "need [for] a reliable, diversified, and affordable supply of energy...to sustain the basics of modern life" seems to imply the necessity for energy regardless of where it comes from.⁹⁹ A July 2025 report from the Department of Energy reinforced the urgency, finding that the pace of expanding generation and transmission capacity has not kept up with demand and that resource adequacy shortfalls pose a serious threat to grid reliability and national security.¹⁰⁰

The Northeast grid, which four of the five halted wind projects was designed to serve, experienced acute reliability stress during winter months when natural gas pipeline constraints and cold weather peaks in electricity demand strained the region's generation capacity.¹⁰¹ ISO New England, the regional grid operator, has long identified this vulnerability as a serious risk.¹⁰² A 2018 ISO New England assessment found that 800

95. See Stop Work Order, *supra* note 4, at 1.

96. See Complaint, *supra* note 4, at 28.

97. See Complaint, *supra* note 4, at 4.

98. See Complaint, *supra* note 4, at 37 (describing Revolution Wind's capacity to provide clean energy to Connecticut and Rhode Island power grids).

99. See EXEC. ORDER NO. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025) (declaring a national energy emergency).

100. DEPARTMENT OF ENERGY, RESOURCE ADEQUACY REPORT: EVALUATING THE RELIABILITY AND SECURITY OF THE UNITED STATES ELECTRIC GRID 1–2 (July 2025); EXEC. ORDER NO. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025).

101. See ISO NEW ENG. INC., OPERATIONAL FUEL-SECURITY ANALYSIS 4–6 (2018), https://www.iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf [<https://perma.cc/YM2F-L8GQ>].

102. See *Harsh Weather Conditions Could Pose Challenges to New England's Power System this Winter*, ISO NEWSWIRE (Dec. 6, 2021), <https://isonewswire.com/2021/12/06/harsh-weather-conditions-could-pose-challenges-to-new-englands-power-system-this-winter> [<https://perma.cc/GBL8-QHCM>] ("For the past two decades, ISO New England has raised

MW of offshore wind generation during a two-week cold snap would save ratepayers between \$40 and \$45 million.¹⁰³ Offshore wind turbines produce at a particularly high capacity during winter, when onshore demand peaks and gas supplies tighten, making them a natural complement to the region's existing generation mix.¹⁰⁴ ISO New England confirmed that it was counting on Revolution Wind to come online and had incorporated the project into its near-term reliability analyses.¹⁰⁵ Yet, the Stop Work Orders issued in December 2025 compounded this vulnerability at the onset of winter, depriving the grid of planned capacity at precisely the moment it was most needed.¹⁰⁶ Collectively, the five halted wind projects represent a combined generation capacity of 5.8 gigawatts, enough electricity to power roughly 2.5 million homes, and billions of dollars in projected ratepayer savings.¹⁰⁷

concerns about fuel supply issues and their impact on electricity supply during periods of extreme cold weather.”).

103. The assessment modeled three hypothetical offshore wind scenarios using production estimates based on wind speeds recorded at three offshore sites during the December 24, 2017, through January 8, 2018, cold spell. The findings also indicated that 800 MW of offshore wind generation during this period would have avoided more than 108,000 metric tons of carbon emissions. *See generally* ISO NEW ENG. INC., HIGH-LEVEL ASSESSMENT OF POTENTIAL IMPACTS OF OFFSHORE WIND ADDITIONS TO THE NEW ENGLAND POWER SYSTEM DURING THE 2017-2018 COLD SPELL (2018), https://www.iso-ne.com/static-assets/documents/2018/12/2018_iso_ne_offshore_wind_assessment_mass_cec_production_estimates_12_17_2018_public.pdf [<https://perma.cc/92QH-SCXU>].

104. *See Stoppage of Revolution Wind Project Will Increase Costs for CT and New England Ratepayers, Make Grid Less Reliable*, CONN. DEP'T OF ENERGY & ENV'T PROT. (Sep. 2025), <https://portal.ct.gov/deep/news-releases/news-releases---2025/deep-stoppage-of-revolution-wind-project-will-increase-costs-for-ct-and-new-england-ratepayers-make> [<https://perma.cc/24DS-59EA>] (noting that offshore wind “produces its strongest output in winter”).

105. *See New England Expected to Have Sufficient Electricity Supplies this Winter*, ISO NEW ENG. INC. (Nov. 17, 2025), <https://www.iso-ne.com/static-assets/documents/100029/20251117-pr-winter-outlook.pdf> [<https://perma.cc/9GL2-VLU3>] (noting, before the halts occurred, that Vineyard Wind was “expected to be online this winter and [was] included in ISO-NE’s assessments”).

106. *See* Miriam Wasser, *Vineyard Wind, Country's First Large-Scale Offshore Wind Project, Finishes Construction*, WBUR (Mar. 14, 2026), <https://www.wbur.org/news/2026/03/14/vineyard-wind-construction-complete-massachusetts-offshore-wind> [<https://perma.cc/5XWP-JBD8>].

107. *See, e.g., id.* Vineyard Wind, thanks to the preliminary injunction in its favor, completed construction March 13, 2026, and is expected to provide electricity to power 400,000 homes while also saving ratepayers \$1.4 billion over the first 20 years of operation. *See also* *Avangrid, CIP Announce First Power from Nation-Leading Vineyard Wind 1 Project*, VINEYARD WIND (Jan. 3, 2024), <https://www.vineyardwind.com/press-releases/2024/1/3/cip-avangrid-announce-first-power-from-nation-leading-vineyard-wind-1-project> [<https://perma.cc/E3GC-Z9TS>] (806 MW and 400,000 homes); *Coastal Virginia Offshore Wind*, DOMINION ENERGY, <https://coastalvawind.com> (last visited Mar. 18, 2026) (2.6 gigawatts and 660,000 homes); *Empire Wind 1*, EQUINOR, <https://www.empirewind.com/ew-1> [<https://perma.cc/VDN7-CNPU>] (last visited Mar. 18, 2026) (810 MW and 500,000 homes); *Sunrise Wind LLC to File Preliminary Injunction Against Lease Suspension Order*, ØRSTED (Jan. 6, 2026),

Energy law generally gives governments broad authority to regulate for safety, environmental protection, reliability, and market stability.¹⁰⁸ Here, however, the imbalance of a seemingly protective measure actually causing public detriment illustrates that the Stop Work Orders have gone “too far.”¹⁰⁹

Application of the *Penn Central* factors indicates that the Revolution Wind Stop Work Order, if evaluated as a regulatory measure, would likely result in a taking, requiring just compensation.¹¹⁰ Yet, the order did not emerge from independent agency rulemaking or adjudication.¹¹¹ Rather, it arose from implementation of the President’s earlier directives. Even if a court treated the directives themselves as quasi-regulatory, the same analysis would indicate an uncompensated taking.¹¹² *Penn Central* uncovers only part of the problem. The ad hoc test assumes that the underlying governmental action is itself a legitimate exercise of authority and asks only whether the resulting burden on a particular owner is disproportionate. However, a significant doctrinal gap exists when the alleged constitutional defect lies not in the severity of the burden, but in the asserted public purpose itself. The Public Use Clause fills that analytical gap—particularly where, as here, a president unilaterally halts a nearly completed project, the directive appears to lack any public benefit or purpose, and in fact results in public detriment.¹¹³

<https://sunrisewindny.com/news/2026/01/sunrise-wind-llc-to-file-preliminary-injunction-against-lease-suspension-order> [<https://perma.cc/6LKP-7YPZ>] (924 MW and 600,000 homes); *Revolution Wind*, ØRSTED, <https://revolution-wind.com> [<https://perma.cc/4WE8-H4BZ>] (last visited Mar. 18, 2026) (704 MW and 350,000 homes).

108. JIM LAZAR, *ELECTRICITY REGULATION IN THE US: A GUIDE* 32 (2d ed. 2016), <https://www.raonline.org/wp-content/uploads/2023/09/rap-lazar-electricity-regulation-US-june-2016.pdf> [<https://perma.cc/Y4W5-2Z5V>] (noting broad discretion given to regulate for the public interest).

109. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992) (explaining that while ordinary regulation is expected to adjust economic burdens, severe deprivation requires compensation).

110. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

111. *See Stop Work Order*, *supra* note 4, at 1 (directing Revolution Wind to halt all ongoing activities on the Outer Continental Shelf pursuant to review initiated by the presidential memorandum).

112. *See Stop Work Order*, *supra* note 4, at 1.

113. *See Fennell*, *supra* note 40, at 66 (describing that “regulatory takings analysis starts with the assumption that the governmental act falls within the realm of legitimate governmental activity”).

IV. POWER NOT GROUNDED IN A PUBLIC PURPOSE

The Public Use Clause of the Fifth Amendment requires exercises of condemnation to advance a genuine public purpose.¹¹⁴ The government cannot take property, whether through regulation or otherwise, if it will not benefit the public.¹¹⁵ As such, the inquiry now shifts to whether the presidential directives resulting in Stop Work Orders for offshore wind projects can be justified as serving any public purpose at all.¹¹⁶ Section A considers the threshold question of statutory authority, asking what legal power, if any, supported the presidential directives,¹¹⁷ revealing the limits of existing doctrine when neither statutory authority nor an evidentiary record exists to demonstrate a legitimate public end. Section B then examines how courts should approach the task of determining public purpose in the absence of an evidentiary record and whether that inquiry necessarily entails examining governmental motive, which we argue it does.

A. Lack of Valid Statutory Authority

Although the power of eminent domain is inherent in “the sovereign,” courts have insisted that any exercise of eminent domain power by executive officials or administrative agencies must rest on a clear statutory delegation.¹¹⁸ An executive action that purports to take or restrict property without statutory authorization falls outside the scope of legitimate public use.¹¹⁹ Here, offshore energy development is regulated under the Outer Continental Shelf Lands Act (“OCSLA”), and OCSLA does not authorize a president to unilaterally order a project specific halt on existing offshore wind leases.¹²⁰

In the Memorandum, the President invoked Section 12(a) of the OCSLA, which authorizes the President to withdraw *unleased* lands from

114. *See id.* at 337 (reasoning that “the true purpose must primarily benefit the public”).

115. U.S. Const. amend. V.

116. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (explaining that a government action cannot fail to meet the public use requirement).

117. The government cannot impose burdens outside its lawful authority. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

118. *See Saxer*, *supra* note 42, at 634 (stating that statutory authority is required for “a governmental agency or other government entity to take property on behalf of the sovereign”).

119. *See Hooe v. United States*, 218 U.S. 322, 335–36 (1910) (“The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.”).

120. 3 U.S.C. § 1331 *et seq.*

future leasing.¹²¹ That provision allows a president to adjust the leasing program going forward, while leaving in place statutes that govern the suspension, cancellation, or enforcement of already-issued leases.¹²² By directing the Secretary of the Interior to “review the necessity of terminating or amending” executed wind leases and implementing a project-specific halt on an already-issued federal lease (OCS-A-0486), the President exceeded the boundaries of congressional delegation.¹²³

Additionally, the Stop Work Order cited 43 U.S.C. § 1337(p)(4) and 30 C.F.R. § 585.102(a) as justification to halt Revolution Wind’s ongoing development.¹²⁴ However, these provisions merely outline the factors that agencies must evaluate during the initial approval process.¹²⁵ Neither grant BOEM—or a president—authority to issue the Stop Work Order on an *established* leasehold.¹²⁶ The OCSLA also requires BOEM to provide notice and opportunity to cure before cancelling a lease for “noncompliance,” procedures that BOEM did not follow here.¹²⁷ BOEM’s issuance of the Stop Work Order without a clear delegation of power substantially undermines any claim that the resulting interference rested

121. See Memorandum, *supra* note 1; 43 U.S.C. § 1341(a) (“The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the Outer Continental Shelf.”).

122. See 43 U.S.C. § 1341(a); see also *id.* at § 1334(1) (“for the *suspension* or *temporary prohibition* of any operation or activity” (emphasis added)); *id.* at § 1334(2) (“with respect to *cancellation* of any lease or permit” (emphasis added)).

123. See Memorandum, *supra* note 1; see also Complaint, *supra* note 4, at 20.

124. 43 U.S.C. § 1337(p)(4) (providing the requirements of energy leases, easements, or rights-of-way); 30 C.F.R. § 585.102(a) (explaining BOEM’s responsibilities).

125. See 30 C.F.R. § 585.100.

126. BOEM’s authority is as follows:

The Secretary of the Interior delegated to the Bureau of Ocean Energy Management the authority to manage the development of energy on the Outer Continental Shelf from sources other than oil and gas, including renewable energy, through the *issuance* of leases, easements, and right-of-way for activities that produce or support the production, transportation, or transmission of energy.

Id. (emphasis added).

127. *Id.* at 585.106(b)–(d). The federal government’s settlement with TotalEnergies, a French energy company that held federal offshore wind leases on the Outer Continental Shelf, illustrates this point. Rather than invoking the OCSLA’s mandatory cancellation procedures, the government bypassed that process entirely, negotiating a payment of approximately \$928 million to extinguish TotalEnergies’ lease rights. See *Interior and TotalEnergies Agree to End Offshore Wind Projects, Lowering Costs for American Families*, DEP’T OF INTERIOR (Mar. 23, 2026), <https://www.doi.gov/pressreleases/interior-and-totalenergies-agree-end-offshore-wind-projects-lowering-costs-american> [https://perma.cc/69TT-CW44]. Electing to pay rather than proceeding through the statutory regime suggests that the government recognized it lacked legitimate grounds for cancellation under OCSLA. A payment equivalent to fair market value for the leases is functionally just compensation under the Fifth Amendment, implicitly confirming that the lease interests carried compensable property value the government could not take without consequence.

on a legitimate exercise of public power.¹²⁸ Where lawful power is lacking, no public purpose is enough; where power exists, sincerity of purpose still matters.¹²⁹

B. Presidential Directives Are Outside the Traditional Categories

Even if a court were to find valid statutory authority existed, the legitimacy of the condemnation would still turn on whether the action serves a genuine public purpose.¹³⁰ Public commentary by senior officials undermines the claim that the Stop Work Order serves a public purpose, particularly the assertion that the Stop Work Order serves “national security” interests.¹³¹ Two days after BOEM issued the Stop Work Order, Environmental Protection Agency Administrator, Lee Zeldin, stated that “[t]he President is not a fan of wind,” making no reference to national security.¹³² Similarly, Douglas J. Burgum, Secretary of the Interior, stated publicly that the action was part of the Administration’s broader look at tax subsidies, including production and investment tax credits.¹³³ Secretary Burgum also claimed the department based the halt on electricity prices and a safety concern for whales, only loosely referencing national security with mentions of “radar” and “undersea drones.”¹³⁴ These statements demonstrate inconsistency between the government’s provided rationale and actual purpose.

In most condemnation cases, the inquiry into public purpose is straightforward because courts can look to the legislative record, administrative findings, or a development plan that explains why the government must take the property.¹³⁵ Those materials give courts a

128. The absence of statutory authority is an independent basis of relief under the Administrative Procedure Act. *See supra* note 3. But it also bears on the public use inquiry because the Fifth Amendment requires that a taking rest on both lawful authority and a genuine public purpose. *See supra* note 119 and accompanying text.

129. *See Saxer, supra* note 42, at 634.

130. *See Fennell, supra* note 40, at 61.

131. *See Complaint, supra* note 4, at 46.

132. *See Complaint, supra* note 4, at 46.

133. *See Complaint, supra* note 4, at 45–46. These federal tax incentives support large energy projects, particularly utility scale renewables. The production tax credit provides a per-kilowatt-hour credit for electricity generated from qualifying facilities and sold to third parties during a specified credit period, and the investment tax credit allows developers to claim a credit for a percentage of eligible project costs. *See* I.R.C. § 45 (production tax credit); *Id.* § 48 (investment tax credit).

134. *See Complaint, supra* note 4, at 45–46.

135. Traditional takings cases arise from legislative determinations, not executive directives, which is why courts have historically deferred to the evidentiary findings of legislatures or administrative agencies acting under statutory delegation. *See Berman v. Parker*, 348 U.S. 26, 32–33 (1954) (upholding a congressional redevelopment plan based on extensive studies and carefully formulated legislative determinations); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–43

concrete basis for assessing purpose. Presidential directives, however, lack these traditional processes.¹³⁶ They originate from unilateral executive decisions, bypassing the ordinary procedures that would document true purpose.¹³⁷ Here, the Memorandum asserts “public interest” as its reasoning and the Executive Order advances broad claims of “national security” and “unreliable, foreign-controlled” resources, but neither offers new data or factual findings to support those assertions.¹³⁸

A lack of statutory grounding, inconsistent public statements by senior officials, and resulting evidentiary gap warrant a deeper inquiry into the government’s asserted purpose.¹³⁹ In these circumstances, the only remaining way to evaluate purpose is to examine *why* the government acted, which necessarily requires an inquiry into motive.¹⁴⁰

V. SPITE TAKINGS

When the government condemns private property under a claim to serve the public, but the circumstances reflect political or personal motive, courts should ask whether the government acted toward the stated public end or if the government’s action was, in reality, an action taken in spite—a spite taking.¹⁴¹

The idea that malice can nullify otherwise lawful acts is a historic property law doctrine.¹⁴² Nineteenth-century courts condemned “spite fences” and similar uses of property designed solely to injure neighboring

(1984) (noting that courts must defer to legislative judgments of public purpose so long as they rest on a factual record).

136. *Kelo v. City of New London*, 545 U.S. 469, 477–84 (2005) (noting the judiciary will not second-guess a legislative judgment on public purpose if the judgment is supported by evidence in the record).

137. *See* Memorandum, *supra* note 1; *see also* Stop Work Order, *supra* note 4 (demonstrating that the halt of offshore wind occurred through a unilateral presidential memorandum rather than through a legislative or adjudicative process that would generate findings of fact).

138. Memorandum, *supra* note 1; EXEC. ORDER NO. 14315, 90 Fed. Reg. 30821 (July 7, 2025).

139. *Kelo*, 545 U.S. at 477–84 (2005) (noting that legitimacy depends on an evidentiary record demonstrating public purpose).

140. *See* *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 336–39 (Pa. 2007) (“In order to uphold the invocation of the power of eminent domain, this Court must find that the recreational purpose was real and fundamental, not post-hoc or pre-textual.”).

141. *See* *Kelo*, 545 U.S. at 478 (explaining that the government is not allowed to take property under “the mere pretext of a public purpose”).

142. *Panton v. Holland*, 17 Johns. 92, 98 (N.Y. Sup. Ct. 1819) (stating for the first time in American law history that “[i]n the exercise of a lawful right, a party may become liable to an action, where it appears that the act was done maliciously”).

owners.¹⁴³ Those decisions exemplified the true definition of property as a social relationship.¹⁴⁴ Property should be treated as an entitlement to use and enjoy one's own land, not a license to inflict harm on others.¹⁴⁵ The same reasoning naturally extends to the government's exercise of eminent domain power.¹⁴⁶ The power to condemn does not authorize the government to impose harm on some for the private gain of others.

Spite takings represent an analytical extension of the Public Use Clause of the Fifth Amendment, highlighting how improper exercises of executive power can turn constitutional protection into an instrument of personal or partisan preference beyond ordinary political disagreement.¹⁴⁷ Although the Revolution Wind case study centers on offshore wind development, this Article proposes a property-neutral test.¹⁴⁸ The test constrains presidential efforts to use takings power against any disfavored sector.¹⁴⁹ This Part analyzes cases that recognize pretext and favoritism as constitutionally relevant within the public purpose inquiry.

A. Taking Without Giving

Takings doctrine historically affords substantial deference to the government's judgment of public use.¹⁵⁰ However, that deference has never rendered motive irrelevant, because the Public Use Clause presupposes condemnation serves a legitimate public end.¹⁵¹ In *Lingle v. Chevron U.S.A., Inc.*, a petroleum company challenged a Hawaii statute

143. Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. U. L. REV. 357, 373, 390 (detailing spite as relevant in property across "spite wells" in water law, "spite fences" in land use, restraints on alienation, and support rights).

144. *See id.* at 364, 420; Singer, *supra* note 11, at 68–69.

145. *See* Hornsby v. Smith, 13 S.E.2d 20, 24 (Ga. 1941) ("When one acting solely from malevolent motives does injury to his neighbor, to call such conduct the exercise of an absolute legal right is a perversion of terms.").

146. *See* Brinkmann v. Town of Southold, 96 F.4th 209, 219–23 (2d Cir. 2024) (Menashi, J., dissenting) (arguing that courts should consider motive and bad faith when determining whether a taking is pretextual).

147. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (stating that a "purely private taking could not withstand the scrutiny of the public use requirement" and "would serve no legitimate purpose of government and would thus be void"). Spite takings could also arise in state and local condemnations or other settings that strand projects. This Article focuses on presidential actions in the energy sector because they combine three features that heighten the risk of spite-based intervention: the capital intensity and long development timelines of energy infrastructure, concentration of federal entitlements, and significance of energy sources as partisan symbols.

148. *See* Rule, *supra* note 10, at 845–49 (emphasizing that property and takings rules should be designed to accommodate evolving energy technologies while remaining principled and not tied to any single fuel or technology).

149. A separation-of-powers discussion is beyond the scope of this Article.

150. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

151. *Id.* at 490 (Kennedy, J., concurring) (describing that takings with "only incidental or pretextual public benefits, are forbidden by the Public Use Clause").

that capped the rent oil companies could charge dealers who leased company-owned service stations. The company argued that the regulation failed to “substantially advance” legitimate state interests and therefore effected a taking.¹⁵² The Supreme Court rejected the “substantially advances” test because it resembled a means-ends inquiry into the wisdom and effectiveness of a governmental action, which was supported by an extensive legislative and administrative record.¹⁵³ Some scholars read *Lingle* as channeling all pretext-based challenges into the Due Process Clause and argue that takings law is not where courts should test for motivation.¹⁵⁴ That interpretation, however, ignores the distinction between ordinary land use regulations backed by extensive legislative records and unilateral presidential actions that function as condemnation without any such record.¹⁵⁵

The Court in *Lingle* asked whether a regulation *effectively advanced* its stated goal which is a due process inquiry with the available remedy being just compensation.¹⁵⁶ The spite takings inquiry asks a different question: whether a genuine public use exists at all. Every major takings case decided by the Supreme Court has satisfied that threshold. *Berman v. Parker* allowed the elimination of blight—for the public’s benefit.¹⁵⁷ *Kelo* allowed economic revitalization—for the public’s benefit.¹⁵⁸ *Koontz v. St. Johns River Water Management District*, an exaction case, involved the government overreaching—for the public’s benefit—in its demand for private property in exchange for a permit.¹⁵⁹ In each, the constitutional dispute concerned the *scope* or *proportionality* of an action taken in pursuit of what was ultimately found to be a public end.¹⁶⁰

152. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532–33 (2005).

153. *Id.* at 542–44.

154. See Fennell, *supra* note 40, at 75–78 (discussing the view that *Lingle* removes means-ends review, including pretext-type inquiries, from the Takings Clause and locates it within due process); Lynn E. Blais, *The Problem With Pretext*, 38 *FORDHAM URB. L.J.* 963, 982–83 (2011) (arguing that the *Lingle* Court’s concerns surrounding the substantially advances test “also dictate that the concern for pretext fall out of eminent domain jurisprudence”).

155. See Fennell, *supra* note 40, at 75–78 (arguing that failures of the public use requirement should be treated as due process violations rather than Takings Clause problems).

156. *Lingle*, 544 U.S. at 540, 544.

157. *Berman v. Parker*, 348 U.S. 26, 31–33 (1954).

158. *Kelo v. City of New London*, 545 U.S. 469, 483–84 (2005).

159. *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 604–07 (2013). The Court also confirmed that the Takings Clause applies to government actions that function as takings even absent a formal exercise of eminent domain and that the constitutional inquiry follows the substance of the government’s action rather than the label attached to it. *Id.*

160. See *Berman*, 348 U.S. at 33 (upholding condemnation for slum clearance as within the legislature’s power to address blight); *Kelo*, 545 U.S. at 484 (upholding condemnation for economic development as a permissible “public use”); *Koontz*, 570 U.S. at 612 (applying heightened scrutiny to the government’s permit conditions but not questioning the underlying public purpose of wetland conservation).

A spite taking is different. Where prior takings cases involved the government pursuing, however imperfectly, a recognized public end, a spite taking involves the government deploying sovereign power without any public purpose at all. In the *Revolution Wind* case, the government is not overreaching in pursuit of a public purpose; it is deploying sovereign power to prevent the public from receiving a benefit it was already on track to receive.¹⁶¹ Halting a near-complete offshore wind project does not redirect resources toward a competing public good. It destroys private investment and eliminates a public benefit simultaneously, with no record evidence that either outcome serves a legitimate public end. A condemnation launched primarily to punish a particular industry or technology is not a constitutionally valid exercise of eminent domain power.¹⁶² A taking devoid of genuine public use is not merely undercompensated—it is unconstitutional—and no amount of just compensation can cure it.¹⁶³

Furthermore, nothing in *Lingle* forecloses an inquiry into motive when public purpose appears to be lacking. *Lingle* removed a test that assessed regulatory *effectiveness*; it did not strip the Public Use Clause of the independent force necessary to distinguish genuine public purpose from fabricated pretext.¹⁶⁴ Administrative law already prohibits courts from crediting manufactured rationales for government action. For example, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court rejected litigation affidavits offered to justify agency action as “merely ‘post hoc’ rationalizations” that could not substitute for the agency’s own contemporaneous reasoning.¹⁶⁵ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* sharpened the rule, holding that a reviewing court “may not accept appellate counsel’s post hoc rationalizations for agency action.”¹⁶⁶ And in *Department of Commerce v. New York*, the Court refused to credit the Secretary of Commerce’s stated rationale for adding a citizenship question to the census after concluding that the explanation “seems to have been contrived,” holding that “[t]he reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by

161. *See supra* notes 106–09 and accompanying text.

162. *See* *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (requiring the stated use to be the true purpose behind the taking, otherwise the taking is void).

163. *See Lingle*, 544 U.S. at 543.

164. *Id.* at 543, 548.

165. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962)).

166. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

courts and the interested public.”¹⁶⁷ Spite takings review reaches the residual category in which neither APA invalidation nor ordinary regulatory-takings analysis fully captures the constitutional defect: targeted executive action affecting vested property where the asserted public purpose is itself pretextual. If courts demand that degree of sincerity for authorized agency action, the Public Use Clause should require the same when a president exercises the power to take private property.¹⁶⁸

B. Presidential Takings: Considering Motivation Whether by Seizure or Shutdown

The President’s actions in 2025 are not the first time a president has issued an order that constituted a taking of an energy project.¹⁶⁹ In 1943, Franklin D. Roosevelt issued an executive order directing the Secretary of the Interior to take immediate possession of all coal mines experiencing labor strikes “for the successful prosecution of the war.”¹⁷⁰ In *United States v. Pewee Coal Co.*, the Court held that the government effected a taking by physically seizing and operating a coal mine and ordering operations to continue for the benefit of the United States.¹⁷¹ *Pewee Coal* recovered losses incurred during the seizure period.¹⁷² Motive played a limited role in the analysis because the government carried out a true physical seizure of property.¹⁷³ However, the Court meticulously detailed the government’s actions, emphasizing that these actions demonstrated the government’s stated purpose aligned with the actual purpose.¹⁷⁴

167. *Dep’t of Com. v. New York*, 588 U.S. 752, 756 (2019).

168. *Lingle*, 544 U.S. at 543 (stating that if an action fails the public use requirement, it is void, and no compensation can authorize it).

169. EXEC. ORDER NO. 9340, 8 Fed. Reg. 6465 (May 1, 1943).

170. The order states as follows:

The Secretary of the Interior is authorized and directed to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale, and distribution of coal.

Id.

171. *United States v. Pewee Coal Co.*, 341 U.S. 114, 117–18 (1951).

172. *Id.*

173. *Id.*

174. The court detailed the government’s actions:

To convince the operators, miners and public that the United States was taking possession for the bona fide purpose of operating the mines, the Government formally and ceremoniously proclaimed that such was its intention. It required mine officials to agree to conduct operations as agents for the Government; required the American flag to be flown at every mine; required placards reading “United States Property !” to be posted on the premises; and appealed to the

President Roosevelt also issued a separate Executive Order which was followed by a Limitation Order from the War Production Board requiring all “nonessential” gold mines to stop operations and shut down “in the interest of national defense.”¹⁷⁵ In *United States v. Central Eureka Mining Co.*, the Court considered whether this directive constituted a taking. While the claimant’s action alleged a taking of the right to mine gold, the Court highlighted that the War Production Board did not take physical possession of the mines, as the government did in *Pewee Coal*.¹⁷⁶ The Court concluded that a general order to shut down the mines in the interest of national defense did not constitute a taking.¹⁷⁷ Critically, the record evidenced a “well-considered decision to accomplish a proper result” and the Court reasoned “[t]here is no suggestion that any of the officials who were responsible for the order were motivated by anything other than appropriate concern for the war effort.”¹⁷⁸

These federal wartime cases exemplify that courts must consider motive when executive actions affect private property interests.¹⁷⁹ Had the *Central Eureka* Court found that the order stemmed from anything other than wartime necessity, the outcome could have been entirely different.¹⁸⁰

C. State Precedent: Taking Motive Seriously

State courts, building on signals from the Supreme Court itself, already treat the sincerity of a stated public purpose as a measure of constitutional legitimacy. Justice Kennedy’s concurrence in *Kelo* recognized that even a facially legitimate taking could be unconstitutional if recited as a pretext “to confer benefits on particular, favored private entities.”¹⁸¹ He emphasized that courts must ensure the purpose of the taking is

miners to dig coal for the United States as a public duty. Under these circumstances . . . it should not and will not be assumed that the seizure of the mines was a mere sham or pretense to accomplish some unexpressed governmental purpose instead of being the proclaimed actual taking of possession and control.

Id. at 118–19.

175. EXEC. ORDER NO. 9024, 7 Fed. Reg. 329 (Jan. 16, 1942); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 156–57 (1958).

176. *Id.* at 165.

177. *Id.*

178. *Id.* at 168.

179. *See id.*; *United States v. Pewee Coal Co.*, 341 U.S. 114, 117–18 (1951).

180. *See United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (relying on the Court’s explicit finding regarding the legitimacy of the officials’ motives in upholding the action); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (explaining that a government action that fails the public use requirement is impermissible).

181. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

legitimate.¹⁸² While the majority granted broad deference to legislative judgment, Justice Kennedy opened the door to a doctrinal mechanism for probing motive within the public use framework.¹⁸³

Furthermore, state courts have increasingly treated public-use pretext as both justiciable and outcome-determinative.¹⁸⁴ In *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, the New Jersey Supreme Court invalidated a blight designation that relied on conjecture rather than evidence, warning that an “unsubstantiated declaration” cannot support public use.¹⁸⁵ Colorado courts have gone a step further.¹⁸⁶ In *City of Lafayette v. Town of Erie*, the court expressly approved looking “behind” a stated purpose when bad faith is credibly at issue and recognized “pretextual takings” as unconstitutional where the given public justification masks an illegitimate private end.¹⁸⁷

Many state courts also treat bad-faith or pretextual condemnations as beyond the bounds of “public use.”¹⁸⁸ In *New England Estates, LLC v. Town of Branford*, a Connecticut town took land under the guise of environmental remediation, but a jury found that the town’s true aim was to block an affordable housing project.¹⁸⁹ In *Earth Management, Inc. v. Heard County and Carroll County v. City of Bremen*, Georgia courts invalidated condemnations used “for the sole purpose” of preventing a hazardous-waste facility or rival public facility.¹⁹⁰ Additionally, in *Borough of Essex Fells v. Kessler Institute for Rehabilitation, Inc.* and *In re Village of Hewlett Bay Park*, New York courts called a taking for a

182. *Id.* at 491 (suggesting that “[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit”).

183. *Id.* at 493 (proposing that “there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose”).

184. *See* *Brinkmann v. Town of Southold*, 96 F.4th 209, 219–23 (2d Cir. 2024) (Menashi, J., dissenting) (noting that many state courts invalidate takings based on a government actor’s bad faith).

185. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 458–59 (N.J. 2007).

186. *City of Lafayette v. Town of Erie Urb. Renewal Auth.*, 434 P.3d 746, 751–53 (Colo. App. 2018) (formally adopting judicial scrutiny for pretextual condemnations).

187. *Id.*

188. *Id.* at 221–29. *Brinkmann v. Town of Southold*, 96 F.4th 209, 221–29 (2d Cir. 2024) (Menashi, J., dissenting). Many states have also adopted a heightened scrutiny for economic takings. *See* Saxer, *supra* note 42, at 593–95. For example, the Virginia legislature explicitly incorporated “primary use” into its constitution to prevent a taking of private land for private economic development. However, the issue continues to be “one for ultimate decision by the courts.” *See* James J. Knicely & Francis A. Cherry, Jr., *Eminent Domain Reform: The “Virginia Way”*, 45 REAL EST. L.J. 290, 367 (2016).

189. *New England Estates, LLC v. Town of Branford*, 988 A.2d 229, 252–53 (Conn. 2010).

190. *Earth Mgmt., Inc. v. Heard Cnty.*, 283 S.E.2d 455, 457–59 (Ga. 1981); *Carroll Cnty. v. City of Bremen*, 347 S.E.2d 598, 600–02 (Ga. 1986).

facially valid public purpose a “perversion of the condemnation process” when the real function was to stop a disfavored private development.¹⁹¹ Across these decisions, state courts reject the idea that a commendable end can redeem a corrupt beginning, instead focusing on the government’s motive and recognizing that the constitutionality of eminent domain turns on *why* the government acted.¹⁹²

Not all courts, however, have embraced this scrutiny. In *Brinkmann v. Town of Southold*, the Second Circuit confronted a town that raised regulatory hurdles, including a targeted moratorium with selective waivers for similar properties, in an attempt to block development of a big-box hardware store.¹⁹³ The town turned to condemnation once previous tactics failed, announcing it would instead create a “passive use park” on the site.¹⁹³ The majority acknowledged that the belated decision to condemn the parcel after the owners satisfied all previous demands was “sufficient to support a finding that the decision to create the park was a pretext” to prevent the owner’s intended hardware store.¹⁹⁴ Yet the court held that the town’s motives were constitutionally irrelevant so long as the project objectively produced a recognized public amenity and paid just compensation.¹⁹⁵ On that view, a public park would categorically be a public use and courts would never “inquire into alleged pretexts and motives” as long as governments eventually used the condemned land for the public.¹⁹⁶

Judge Menashi’s dissent in *Brinkmann* denied that logic and supplied a contrary approach.¹⁹⁷ While no one disputes that a park is a traditionally public use, Southold never wanted a park at all.¹⁹⁸ Judge Menashi emphasized that the town wanted to stop the owners from lawfully operating a hardware store after failing to block the project through zoning, permit denials, and purchase negotiations.¹⁹⁹ The town “grabbed the land for itself” only after the owners had navigated the arduous

191. *Borough of Essex Fells v. Kessler Inst. for Rehab., Inc.*, 673 A.2d 856, 860–61 (N.J. Super. Ct. Law Div. 1995); *In re Vill. of Hewlett Bay Park*, 265 N.Y.S.2d 1006, 1009–10 (N.Y. Sup. Ct. 1966).

192. *Brinkmann v. Town of Southold*, 96 F.4th 209, 221–29 (2d Cir. 2024) (Menashi, J., dissenting) (explaining that several state courts treat condemner motive as central to the constitutional validity of a taking).

193. *Id.* at 214–18.

194. *Id.* at 211.

195. *Id.* at 210.

196. *Id.* at 217–19.

197. *Id.* at 211.

198. *Brinkmann v. Town of Southold*, 96 F.4th 209, 219 (Menashi, J., dissenting).

199. *Id.*

200. *Id.* at 230–32.

regulatory process.²⁰⁰ The park rationale acted as a thin cover for what was, in substance, punishment of a disfavored use.²⁰¹ Rejecting the sufficiency of a “passive use park” label, Judge Menashi insisted that the Takings Clause contains “no Fake Park Exception” to the public-use requirement.²⁰² Judge Menashi argued that using eminent domain to prevent an owner from engaging in a lawful use is not a public purpose.²⁰³

By treating public purpose as a test of sincerity, state courts have invalidated condemnations driven by spite, even when those actions appeared legitimate on the surface.²⁰⁴ The *Brinkmann* majority’s refusal to look behind a facially valid public use is at odds with the direction of state takings law. Federal takings doctrine has previously drawn on state-level takings innovations for approaching exaction and land use claims.²⁰⁵ Likewise, federal courts should treat these state pretext decisions, and Judge Menashi’s dissent, as a guide for recognizing spite takings.

VI. SPITE TAKINGS BALANCING TEST

A spite taking does not arrive without warning, and the basis for recognizing one has been building across federal and state courts as motive increasingly marks the boundary between lawful public use and unconstitutional abuse of power. *Pewee Coal* and *Central Eureka* show that executive action survives only when the record reflects genuine, evidence-based public purpose.²⁰⁶ State courts have extended that principle by treating sincerity as a measure of legitimacy.²⁰⁷ The proposed spite takings balancing test builds on these developments by giving courts a structured basis for evaluating motive whether the problem is the refusal to engage with evidence of pretext in the existing record, as in *Brinkmann*, or the absence of a traditional record entirely, as with the presidential directives that effectively halted Revolution Wind.

201. *Id.* at 219.

202. *Id.* at 230–31.

203. *Id.* at 219.

204. *Brinkmann v. Town of Southold*, 96 F.4th 209, 221.

205. *Id.* (describing cases relying on a sincerity-of-purpose inquiry to strike down condemnations fueled by spite or bad faith despite facially legitimate ends).

206. See Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. 679, 708 (2023) (describing how approaches to exaction and land use cases exemplify judicial federalism in takings).

207. See *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–17 (1951); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 165–68 (1958) (wartime takings cases upholding emergency measures where the record demonstrated a war-related purpose).

208. See *Brinkmann v. Town of Southold*, 96 F.4th 209, 221–29 (2d Cir. 2024) (Menashi, J., dissenting).

A. Identifying Spite

Three factors appear to be relevant in determining if a government action is a spite taking: (1) past statements and actions revealing a motive that contradicts the asserted purpose, (2) abrupt departures from established procedural standards, and (3) indicators of differential treatment across property owners.²⁰⁸ These factors give courts an objective basis for a motive inquiry without relying on speculation or subjective intent.²⁰⁹ This spite framework draws on observable patterns.²¹⁰ In doing so, courts can preserve judicial neutrality while enforcing constitutional integrity.²¹¹

When all three factors are present, courts should presume that the asserted public use is pretextual and that the action constitutes an unconstitutional spite taking. The government may rebut that presumption, but only with substantial evidence demonstrating a genuine, independently verifiable public purpose. Generalized claims, unsupported by contemporaneous environmental studies, cost analyses, or other evidence, should not suffice.²¹² While no single factor should be dispositive, a finding of multiple factors would suggest a sustained pattern of spite or malice that cannot be explained by ordinary policy reassessment.²¹³ The test provides a structured way to identify spite when the circumstances point to pretext for animus, retaliation, or favoritism. The remedy remains confined to invalidating spiteful directives, rather than inviting courts to second-guess the wisdom of ordinary energy policy.

209. *See* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (explaining that a decision-making body's purpose may be determined from direct and circumstantial evidence, including historical background, series of events leading up to the action, and contemporaneous statements); *City of Lafayette v. Town of Erie Urb. Renewal Auth.*, 434 P.3d 746, 751–52 (Colo. App. 2018) (considering timing and severity of the taking and approving looking behind the stated purpose).

210. *Brinkmann*, 96 F.4th at 220 (Menashi, J., dissenting) (stating that the most probative evidence of intent is “objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor”).

211. *See id.*; *Shoked*, *supra* note 143, at 390–92 (noting that modern spite doctrine and motive analysis focus on outward conduct and objective patterns rather than probing subjective mental states); *see also* *Kelly*, *supra* note 47, at 183–84 (explaining the usual difficulty of establishing motivation of government officials).

212. *See* *Shoked*, *supra* note 143, at 390–92; *Brinkmann*, 96 F.4th at 229 (Menashi, J., dissenting) (noting “a careful and extensive inquiry” of the record).

213. Courts typically demand multiple, converging pieces of evidence before concluding that a taking is pretextual. *See City of Lafayette*, 434 P.3d at 751–52 (relying on the timing and lack of explanation of the condemnation); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338–39 (Pa. 2007) (requiring “substantial and rational proof” to show the “authorized public purpose is the true goal of the taking”).

214. *See City of Lafayette*, 434 P.3d at 751–52 (suggesting that only a persistent, unexplained pattern inconsistent with ordinary planning justifies labeling a taking as spiteful).

B. Applying the Spite Takings Balancing Test

The 2025 presidential directives bear the classic signs of a pretextual pattern, motivated less by reasoned policymaking than by animus and electoral calculus.²¹⁴ This Section applies the spite takings balancing test to the directives to determine whether they reflect a genuine policy shift or presidential spite. Section 1 sets forth the President's history of public remarks regarding offshore wind. Section 2 examines whether the presidential directives present abrupt procedural departures from established norms. Section 3 considers whether the stated rationales of the directives apply consistently across energy sectors or single out offshore wind for disfavored treatment.

1. The Energy Seems Off: Public Statements with a Revealing History

Courts should first examine whether past statements and actions suggest underlying animus. Evidence of the President's hostility toward wind energy starts long before 2025.²¹⁵ In 2012, he testified before the Scottish Parliament in opposition to the European Offshore Wind Deployment Centre, an offshore wind development visible from his golf course in Aberdeen.²¹⁶ He recounted the millions of dollars he invested into the golf course and called the turbines "ugly," "horrible structures" that would ruin tourism in Scotland.²¹⁷ When pressed for evidence by the committee regarding his tourism claims, he discounted the presented research and declared that he was an expert and thus he was also the evidence.²¹⁸

During his first term, President Trump repeatedly described wind turbines as unreliable and "a graveyard for birds."²¹⁹ He also claimed,

215. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (stating that a court should strike down a taking intended to favor a private party with only pretextual public benefits).

216. Donald J. Trump (@realDonaldTrump), X (Apr. 23, 2012, 2:30 PM), <https://x.com/realdonaldtrump/status/194493341302394880> [<https://perma.cc/59PW-BT3Z>] (calling wind farms "disgusting looking").

217. ECON., ENERGY & TOURISM COMM., *Renewable Energy Targets Inquiry*, 2012, SP 13-4, at 1-2 (Scot.).

218. *Id.* at 2, 8.

219. *Id.* at 4.

220. See GLOBAL NEWS, *President Trump speaks at NRCC annual spring dinner*, at 32:10-33:02, 33:38-34:00 (YouTube, Apr. 2, 2019), https://www.youtube.com/live/5aLYEaJb_Ew?si=Kpdb-eRf6-wh5gfY. While birds do occasionally collide with wind turbine blades, many forms of human interactions and man-made structures are far more harmful to birds. See *Wind Turbines and Birds*, U.S. DEP'T OF ENERGY, <https://windexchange.energy.gov/projects/birds> [<https://perma.cc/5VNG-2LTC>] (last visited Nov. 14, 2025).

contrary to scientific data, that the noise of the turbines causes cancer.²²⁰ At the 2019 Conservative Political Action Conference, he called wind power “not so good,” describing a scenario of being unable to watch television without the wind actively blowing.²²¹ In the years preceding his second term, he publicly criticized offshore wind (not offshore oil) as “driving the whales crazy” and pledged to shut down wind farms.²²²

The President’s repeated disparagements of a single technology over many years can serve as powerful context for understanding subsequent executive conduct.²²³ These statements illustrate how the President’s hostility was not newly formed or merely policy-driven, but instead demonstrated a consistent pattern of disdain, suggesting that later actions were personal and retaliatory rather than in the interest of public welfare or national security.

2. Winds of Change: Abrupt Departures from Established Standards

Courts should next consider whether the government action represents an abrupt departure from established standards. The 2025 presidential directives triggered abrupt procedural departures and internal inconsistencies that undermine the credibility of the government’s stated

221. See GLOBAL NEWS, *supra* note 220, at 32:23–32:29; *Wind Turbine Sound*, U.S. DEP’T OF ENERGY, <https://windexchange.energy.gov/projects/sound> [<https://perma.cc/Z46G-GYE2>] (“[S]ound from wind power plants does not pose a risk of hearing loss and has no direct impact on physical human health.”) (last visited Nov. 14, 2025).

222. See GLOBAL NEWS, *supra* note 220, at 33:38–34:00. The modern U.S. power grid operates as a highly interconnected network of transmission lines linking diverse generation sources. Klass, *supra* note 10, at 1098. When wind or solar output declines, other resources increase production to keep supply and demand in balance. The fact that the wind is not blowing at a particular moment does not mean that customers lose power. Other generators on the grid supply the electricity instead. See Pappas, *supra* note 19, at 440.

223. See GLOBAL NEWS, *Trump says windmills are “driving the whales crazy” in tirade against wind energy*, at 1:20 (YouTube, Jan. 7, 2025), <https://www.youtube.com/watch?v=EbcVF4qrTXU> [<https://perma.cc/TC6X-S3L8>]; Arathy Somasekhar, *Trump Rakes in Millions at Texas Fundraisers, Promising Pipelines and Fracking*, REUTERS (May 24, 2024), <https://www.reuters.com/world/us/promising-pipelines-fracking-trump-rakes-millions-texas-fundraisers-2024-05-23> [<https://perma.cc/VCB7-7TQB>], (pledging to shut down wind). *But see Marine Life in Distress*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/frequent-questions-offshore-wind-and-whales> [<https://perma.cc/6NKA-A4HP>] (last visited Nov. 14, 2025) (“[T]here is no scientific evidence that noise resulting from offshore wind site characterization surveys could potentially cause whale deaths. There are no known links between large whale deaths and ongoing offshore wind activities.”).

224. See Shoked, *supra* note 143, at 390–92 (noting that modern spite doctrine and motive analysis focus on outward conduct and objective patterns rather than probing subjective mental states).

rationale.²²⁴ BOEM and other agencies had already certified compliance with statutory and environmental requirements following exhaustive reviews by fifteen federal and state agencies. In that context, the subsequent presidential halt should, at a minimum, supply factual justification or uncover previous error.²²⁵

Where Congress relied on surveys and reports documenting blight in *Berman v. Parker*, the President should have to provide an equivalent record.²²⁶ Yet, the Memorandum, Executive Order, and Stop Work Order, identify no new factual circumstances, errors, or legal deficiencies to justify the development-stage halt.²²⁷ Unlike in *Pewee Coal*, where the record detailed an extensive showing of the government's actions aligning with its stated purpose, the presidential directives contain no comparable justification.²²⁸ Without environmental studies, cost analyses, or national security assessments demonstrating a new, identifiable problem, the evidentiary foundation for a genuine public purpose is nonexistent.²²⁹

The December 2025 suspensions confirm that the government's stated rationale was pretextual. After a court enjoined the original Stop Work Order in September 2025, the Department of the Interior did not defend its stated rationale.²³⁰ Instead, the agency issued a new wave of suspensions covering Revolution Wind and the other four offshore wind projects, supplemented with additional (yet still minimal) national security language crafted after the fact. Again, courts granted preliminary injunctions.²³¹ Rather than standing on the reasoning originally offered at the time of its original Stop Work Order, the government retrofitted a justification in an attempt to survive the scrutiny the original rationale could not withstand.²³² As in *Department of Commerce*, where the Court identified a "significant mismatch between the decision the Secretary made and the rationale he provided" and characterized the government's explanation as "more of a distraction" than a justification, the background

225. See Complaint, *supra* note 4, at 58.

226. See *id.*

227. See Kelly, *supra* note 47, at 222–23 (describing the extensive survey data and findings of blight that underpinned Congress's decision in *Berman*).

228. See generally Memorandum, *supra* note 1; Stop Work Order, *supra* note 4; see also EXEC. ORDER NO. 14315, 90 Fed. Reg. 30821 (July 7, 2025).

229. See *United States v. Pewee Coal Co.*, 341 U.S. 114, 117–18 (1951).

230. See *Kelo v. City of New London*, 545 U.S. 469, 477–84 (2005) (noting that legitimacy depends on an evidentiary record demonstrating public purpose).

231. Adam Vann, *Trump Administration Actions to Curtail Offshore Wind Energy Development Meet Judicial Resistance*, CONG. RSCH. SERV. (Mar. 11, 2026), <https://www.congress.gov/crs-product/LSB11402> [<https://perma.cc/Y6ZU-DJLY>].

232. *Id.*

233. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

here “tells a story that does not match” the government’s asserted purpose.²³³ The proximity of the directives to the start of the President’s second term, combined with the contemporaneous remarks by Administrator Zeldin and Secretary Burgin, further indicates that the actions were not motivated by an emergent national security threat.²³⁴ The President’s long-standing pattern of hostility toward wind energy, evident well before assuming office, strengthens the inference that these directives were not genuine policy reversals, but fulfillments of a personal vendetta once he obtained executive power.

The pattern intensifies concerns raised in Judge Menashi’s dissent in *Brinkmann*.²³⁵ Where *Brinkmann* involved a formal condemnation dressed up as a park to block a lawful hardware store, the Stop Work Order operates as a functional condemnation dressed up as national security and subsidy reform to block a lawful offshore wind project.²³⁶ If the Takings Clause contains no “Fake Park Exception,” then it likewise contains no “Fake National Security Review” or “Fake Subsidy Review” exception.²³⁷

3. Power Imbalance: Differential Treatment Across Industries

Finally, courts should evaluate whether the governmental action reflects differential treatment across comparable entities. Justice Kennedy’s concurrence in *Kelo* aptly cautioned that courts must ensure the asserted public purpose is not a mere pretext for “impermissible favoritism.”²³⁸

While the presidential directives froze offshore wind “pending review,” other executive orders fast-tracked oil and gas projects on the same federal lands.²³⁹ Additionally, the directives exempted oil, gas, and mineral leases from the moratorium despite describing environmental and cost considerations relevant to every energy sector.²⁴⁰ The selective scope

234. See *Dep’t of Com. v. New York*, 588 U.S. 752, 783–85 (2019).

235. *City of Lafayette v. Town of Erie Urb. Renewal Auth.*, 434 P.3d 746, 751–52 (Colo. App. 2018) (considering timing and severity of the taking).

236. *Brinkmann v. Town of Southold*, 96 F.4th 209, 219–23 (2d Cir. 2024) (Menashi, J., dissenting).

237. *Id.*; Complaint, *supra* note 4, at 4.

238. *Brinkmann*, 96 F.4th at 219.

239. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (suggesting that “[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit”).

240. Interior, Press Release, *Dep’t of the Interior Implements Emergency Permitting Procs. to Strengthen Domestic Energy Supply* (Apr. 23, 2025), <https://www.doi.gov/pressreleases/department-interior-implements-emergency-permitting-procedures-strengthen-domestic> [<https://perma.cc/K3E3-U6Z8>].

241. See Memorandum, *supra* note 1; see also Department of Energy, *Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid* (July 2025) (identifying reliability, cost, and environmental risks across fossil fuel and renewable resources);

compounds the inconsistency. If environmental risk or system cost were genuine drivers, one would expect a similar stance across energy types.²⁴¹ The carve-out undermines neutrality, framing the Stop Work Order as a targeted obstruction of a disfavored industry rather than a measure remedying a public problem.²⁴²

Unlike the record in *Central Eureka*, which indicated that the officers were not motivated by anything other than the asserted purpose of wartime necessity, President Trump's pattern points to motivations outside of the public interest.²⁴³ Scholars have warned that "political takings" can occur when government officials are "unduly influenced or even controlled" through campaign contributions and that redevelopment can transform into a vehicle for favoritism.²⁴⁴ Reports from 2024, before President Trump's second term, describe fundraising meetings in which he told oil and gas executives that a substantial campaign donation of \$1 billion would ensure a roll back of Biden-era environmental regulations.²⁴⁵ Such rhetoric, while political, can still inform judicial analysis.²⁴⁶ When the

Coleman & Klass, *supra* note 10, at 674–83 (2019) (explaining that all major generation technologies impose environmental and system cost externalities).

242. *Contra* Brinkmann v. Town of Southold, 96 F.4th 209, 214–18 (2d Cir. 2024) (recognizing pretext where the condemners were granting selective waivers to other properties).

243. The TotalEnergies settlement further illustrates this differential treatment. The government conditioned reimbursement of approximately \$928 million in lease fees on TotalEnergies first investing that amount in fossil fuel projects and permanently forgoing all future offshore wind development in the United States. See *Interior and TotalEnergies Agree to End Offshore Wind Projects, Lowering Costs for American Families*, DEP'T OF INTERIOR (Mar. 23, 2026), <https://www.doi.gov/pressreleases/interior-and-totalenergies-agree-end-offshore-wind-projects-lowering-costs-american> [<https://perma.cc/69TT-CW44>]. Bluepoint Wind and Golden State Wind faced similar terms. Upon termination of their offshore leases in April 2026, each was required to invest the full value of its terminated lease fees into fossil fuel development, approximately \$765 million and \$120 million respectively, before the government would authorize reimbursement. See *Trump Cancels More Wind Leases to Spur Oil, Gas Investment*, BLOOMBERG LAW (Apr. 28, 2026), <https://news.bloomberglaw.com/environment-and-energy/trump-cancels-more-wind-leases-to-spur-oil-and-gas-investment>. The willingness to expend that level of public resources to remove a wind developer, rather than to remediate any potential environmental or security problems, reflects a policy of funding the elimination of one energy source while accelerating another.

244. *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 165–68 (1958).

245. See Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About That, Justice Stevens*, 39 URB. LAW. 529, 537–38 (2007) (noting that local officials may favor private donors or allies in eminent domain decisions); Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 58 (2007) (arguing that campaign finance and private partnerships create favoritism risks); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 16 (2005) (highlighting that financial dependence on private donors distorts local condemnations, converting neutral planning into political exchange).

246. See Somasekhar, *supra* note 223.

247. See *Dep't of Com. v. New York*, 588 U.S. 752, 780–85 (2019) (recognizing extrinsic statements may evidence pretext).

exercise of power departs from neutrality, favors one industry over another, and aligns a bit too neatly with private interests, the inference of pretextual spite strengthens.²⁴⁷

Collectively, these factors reveal that the presidential directives halting offshore wind development lack a genuine public purpose. The Public Use Clause is not a formality; it is a constitutional prerequisite to the government's authority to take private property. When the objective evidence demonstrates that the government's stated purpose was manufactured to conceal animus toward a disfavored industry, that prerequisite is not met. Spite takings review enforces this limit by requiring even the highest officials to demonstrate that condemnation-like exercises of power rest on a real public purpose.²⁴⁸ Here, the President's asserted purpose was pretextual and the halting of development-stage offshore wind projects amounted to an unconstitutional spite taking because the public use requirement the Fifth Amendment demands never existed.²⁴⁹

VII. CONCLUSION

Development-stage halts of fossil fuel infrastructure, nuclear projects, or long-distance transmission corridors can generate the same pattern of stranded investments, abandoned procedures, and contested justifications illustrated by the Revolution Wind case.²⁵⁰ Spite takings review would require courts to ask whether the government's exercise of its taking power serves a genuine public purpose. When the evidentiary record, treatment of comparable projects, and timing of actions reveal that it does not, the taking cannot stand, regardless of the justification the government attaches to it after the fact. Providing this form of review would help stabilize expectations for developers and communities by creating a more

248. *See Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (stating a court should strike down takings intended to favor a private party with only pretextual public benefits).

249. *Id.* at 478 (majority opinion) (explaining that the government cannot commence a pretextual taking).

250. *Id.* at 490 (Kennedy, J., concurring) (pretextual takings are "forbidden by the Public Use Clause").

251. *See Saxer*, *supra* note 42, at 603–07, 617–24 (discussing how large infrastructure projects can be halted or abandoned after significant investment, leaving affected owners without the anticipated public benefits).

predictable legal framework for the energy transition, regardless of the direction it ultimately takes.²⁵¹

The spite takings balancing test distinguishes broad, generally applicable policy shifts from targeted project-specific directives. Courts applying the test can verify that condemnation-like action rests on both lawful authority and a genuine public purpose, ensuring the public use requirement retains real substance. A spite taking extends the old rule against spite fences to the public sphere, confirming that neither private owners nor presidents may use property rights or takings power solely to injure an opponent.

252. Meeting energy demand requires expanded capacity from every available source, making a predictable legal framework essential to ensuring that expansion can occur. *See supra* notes 99–100 and accompanying text.