JOSHUA B. KENNEDY

The Limits of Presidential Influence: Two Environmental Directives and What They Mean for Executive Power

Abstract: The executive order process can be a long and complicated one, as directives may wind their way through various agencies before finding their way onto the president's desk. Even after these orders have been issued, federal agencies will have a wide degree of latitude under certain conditions as it pertains to implementing them. In this article, I study the history of three separate presidential directives, two dealing specifically with environmental issues and one with general regulatory issues, in order to provide a picture of the process from inception to implementation. I consider three cases and explore the factors that drive presidents in choosing when or whether to issue an order and those that drive federal agencies to react as they do. This article encourages scholars to reconsider what they consider "unilateral," pointing to the instances in which presidents must engage in bargaining within the executive branch they ostensibly head.

Keywords: Presidential Power, Environmental Directives, Executive Orders, E.O. 12630, Cooperative Conservation

On June 23, 2016, the United States Supreme Court split 4–4 in the contentious *United States v. Texas* case,[1] affirming the ruling handed down by a lower court that effectively halted a wide array of President Barack Obama's

The author wishes to thank E. Scott Adler, Ken Bickers, Jeff Cohen, John Griffin, Jennifer Wolak, Patrick Novotny, and Andrew Rudalevige for their thoughtful comments and suggestions throughout the course of this project. The author also wishes to thank the JPH anonymous reviewers for their valuable feedback.

THE JOURNAL OF POLICY HISTORY, Vol. 30, No. 1, 2018.
© Donald Critchlow and Cambridge University Press 2017
doi:10.1017/S0898030617000367

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

"Immigration Accountability Executive Actions" (to use the White House's preferred terminology).[2] This once more drew attention to the concept of unilateral presidential action, especially the limits of that power, and an equally divided Court did little to resolve the debate that even now rages on about the acceptability of directives handed down by the president. But President Obama's actions with respect to immigration are not the first, and they will not be the last, to attract careful scrutiny and become the subject of intense discussions about the appropriate reach of executive power. Many of these discussions center on theoretical questions about whether presidents have this or that kind of authority, but there is still much that we do not understand about unilateral directives, specifically in regards to their implementation.

The process that presidential directives follow from conception to implementation is often complex. Much existing research assumes that directives are effective by their very nature, but some scholars have given us insight that suggests that such an assumption is unwarranted.[3] Indeed, extant scholarship often treats, for methodological purposes, the executive branch as a single actor. However, I argue that such a view is highly misleading. Instead, scholarship moving forward ought to consider more carefully the role that *agencies* themselves play in what is often considered, at least in the study of presidential politics, as "unilateral action." "Unilateral" is in many ways a misnomer when it comes to understanding directives like executive orders, for the whole executive branch is a tangled web of interconnected actors, with on some occasions different preferences, goals, and understandings of how best to reach a desired outcome. Not all presidential directives are created equally, nor are they implemented equally. To that end, my principal goal in this article is to illuminate in greater depth the process behind an order's generation in order to better understand the circumstances under which "the bureaucracy" will comply with a presidential directive. What explains the variance in how agencies implement executive orders? Chiefly, I argue that the degree to which agencies feel they have a stake in the implementation of a directive drives their rate of compliance.

As scholars are starting to understand in greater depth, a directive is typically issued only after an extended effort by interested parties (presidential staffers, affected agencies, other interested parties, and sometimes the president himself) to settle on what the order should include. Neither does the process end with an agency *response* to an executive order, a response being something that might come in the form of an actual published regulation or

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

in an intra-agency memorandum discussing policy changes. But this kind of responsiveness does not by itself equate to *compliance*, and a greater focus on the limitations of enforcement and what these limitations mean for presidential power is needed.

What is the distinction between responsiveness and compliance? Responsiveness could be considered as a form of acknowledgment, whereas compliance is more in line with accomplishing the order's stated objectives, whatever those might be; that is, just because agencies reference an order in a regulation does not necessarily mean that they are *complying* with that order's intent. Consider Executive Order 12291, which was Ronald Reagan's attempt to significantly curtail the amount of federal regulation.[4] The order requires agencies to "prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis," which involves, among other things, "a description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms." As far as responsiveness is concerned, agencies have certainly answered the order, often including a particular statement acknowledging that they have considered the potential effects of a proposed regulation and judged the regulation necessary anyway. In other cases, agencies claim that the rule falls outside the bounds of what is required for analysis via E.O. 12291, and no analysis is done. Certainly this qualifies as a response, but does it constitute compliance?

That is a more vexing question to answer. The guidelines set forth in E.O. 12291 as to what constitutes a regulation that requires a Regulatory Impact Analysis are vague; when agencies claim they evaluated a rule and determined that it required no such analysis, we are not given much information as to how they reached this conclusion. Are they complying with the order? That is difficult to say conclusively. The agency has responded to the order in determining an analysis as required under the directive is not applicable in a given situation, but this does not mean agencies are complying in the way the president intends. Compliance, then, demands a more intense evaluation and a different method to determine what it looks like.

In this article, I will trace some key environmental directives to illustrate how agencies react under certain conditions, and the limits to compliance that presidents face after orders are issued. I highlight the advantages and limitations to "unilateral" executive politics through interviews with governmental officials in multiple administrations and an initial focus on two illustrative cases: Ronald Reagan's Executive Order 12630, dealing with government takings of private property, and the Cooperative Conservation efforts of the George W. Bush Administration (Executive Order 13352). Exploring the

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

distinctions between these cases provides valuable insight into the processes of order issuance and subsequent compliance, though they remain largely exploratory and further analysis is necessary.

EXECUTIVE ORDERS: FROM CONCEPTION TO IMPLEMENTATION

Executive orders provide a useful test-bed for examining extant assumptions about presidential power. Scholars of the presidency will be very familiar with Richard Neustadt's critical thesis, namely, that "presidential power is the power to persuade."[5] The crux of this argument is that the president's formal authority is so limited that almost anything he or she accomplishes is owed to being able to persuade other governmental actors to come along. Neustadt's theory fundamentally changed the study of the presidency and, following its publication, massively influenced a great deal of presidential scholarship.

But Neustadt was not without critics and challengers. One of the most well-known challenges came from William Howell in 2003, who expertly argues that executive orders, as a form of unilateral presidential action, could overcome the necessity of persuading others to go along with the president's wishes.[6] Executive orders, as directives that technically need only the president's input, might theoretically provide a more concrete and forceful path for an executive wishing to put a mark on policy. Such a supposition may be true theoretically, but it makes the often-repeated mistake of treating the executive branch as a singular actor in line with something like unitary executive theory.[7] Scholars in the realms of administrative law and public administration have a long history of noting the organizational complexity that drives the federal bureaucracy, and it is well known to these researchers that a president's order is not effective by definition; it requires navigating this complexity effectively.[8]

Indeed, public administration and administrative law scholars seem to make an assumption that is nearly the opposite of that made by many presidential scholars: that the executive branch is decidedly *not* unitary. Such research is littered with cautionary tales about the inherent complexity of bureaucracy and how difficult that complexity makes attempts to command. While much existing political science research (though certainly not all of it) employs rational choice theory to explain outcomes, Allison and Zelikow caution against overreliance on this paradigm: "Although the Rational Actor Model has proved useful for many purposes, there is powerful evidence that it must be supplemented by frames of reference that focus on the governmental machine—the organizations and political actors involved in the policy

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

process."[9] Their contention is that pure rational choice theory, which focuses on preference maximization, misses the key roles that others play. I do not wish to imply that political scientists are at all unaware of organizational complexity; that is decidedly untrue. Indeed, it is a *virtue* of rational choice theory that it allows for simplification in theory-testing. I only wish to contend that in the realm of presidential power, it is a quite-incomplete picture, and more in-depth analysis is required to obtain a comprehensive understanding of so-called unilateral presidential powers.

Returning to Howell and Neustadt, these competing accounts of what makes presidents powerful set up a clear tension in the study of the presidency. I argue that both are, to a certain extent, limited in their explanatory potential. Presidents do in some instances have the potential to use command power, as Howell argues. However, so too must presidents often generate enough buy-in from potentially affected agencies in order to secure a desirable outcome, which is more in line with Neustadt's argument about the utility of persuasion.

One thing made plainly clear in my discussions with various governmental representatives and readings of numerous executive orders is that these directives are unilateral only in a very limited sense. It is the president's signature, affixed to the order, that gives it legal authority, but as Rudalevige and others have contended, we must pay more attention to how executive orders are generated in the first place.[10] Why? Because, as I intend to show, the generation process plays a key role in determining how agencies react to and implement an order. The process can be complicated, involving input from multiple agencies and allowing for repeated drafts to deal with concerns raised by interested parties. And bargaining does not end upon issuance; even taking agency considerations into account, there is rarely any guarantee of compliance. This, in turn, requires monitoring of implementation and the ability to impose consequences for nonresponsiveness, which can be difficult or, in some cases, virtually impossible.

I begin with the formulation process. A cursory look at executive orders is all one needs to know that the process is not unilateral and rarely involves the use of command authority in anything but a technical sense. Executive orders deal with varying kinds of matters, from administrative "house-keeping" issues to the implementation of congressional statutes, from highly complicated and nonsalient directives to those still discussed today because of their lasting impacts. One thing is abundantly clear: regardless of from where the order originates, issuance is often the final step in a long process that involves an extended "back-and-forth" among many actors in the executive branch.

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

As Neustadt notes, the executive branch is hardly a monolithic actor, and when it comes to presidential directives, the multi-actor nature of the bureaucracy is on full display.[11]

Other scholars have classified executive orders on the basis of subject area, and I do not wish to rehash their schema.[12] Instead, I wish to draw attention to a different kind of classification scheme pertaining to order origination, discussed also by Mayer and Rudalevige:[13] those directives that originate in a "top-down" fashion from within the White House (either at the direction of the president or through some advisory commission) and those that originate from the agency itself (a "bottom-up" approach). Though the role the agency plays in the issuance of executive orders is becoming clearer, it is still imperative to recognize that presidential orders are not always, as Truman's famous quote suggests, a case of the president saying "'Do this! Do that!'"[14] Often, presidential orders are carried out at the request of the agency itself, a case of the bureaucrats asking the president for the legal justification they need to carry out some action. In some cases, then, agencies do not need to be told what to do, but are rather content to ask the president to give them the authority to do what they already wish to do.[15] In other instances, executive orders can come at the request of Congress.[16] Lastly, some directives start in the White House or some extension thereof. This can be at the behest of the president himself or based on the work of agencies in the EOP. My general theoretical expectation is that orders that are generated via a "bottom-up" process are more likely to engender compliance from affected agencies because those agencies will feel as though they have a stake in a directive in which they had a great deal of input. Conversely, orders generated from a "top-down" process may spur resentment or accusations of meddling, leading to foot-dragging, at best, and disobedience, at worst.

Regardless of where any given executive order starts, once it has been issued there is a question of how compliance among affected agencies will be monitored and enforced. In some instances, the order may not be enforced at all; it may simply best be classified as a statement of policy, meant more for consumption than for action, though divining the intent of an executive order is not a straightforward process.[17] In other cases, presidents clearly intend their orders to shape policy within (and sometimes outside) the executive branch of the federal government. Though executive orders do carry the force of law, the extent to which presidents can actually enforce them is more debatable. There are but a limited range of options to attempt to encourage compliance.[18]

One former administration official said there is a clear understanding that executive orders are "just a piece of paper. . . . You want some accountability."[19]

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

That accountability can come in various forms; executive orders often contain reporting requirements, for example. Statements such as this, from President Bill Clinton, are common: "Not later than 6 months after the effective date of this Executive order, each Federal agency shall submit to the Office of Management and Budget [OMB] a report regarding the implementation of this order."[20] Still, the question remains: If the president or his staff should find that agencies are not following through, what recourse is available?

Performance criteria for individuals can be enforced through financial incentives, and if subordinates prove ineffective, they can sometimes (but not always) be fired or otherwise relocated.[21] But any budgetary consequences will necessarily require the cooperation of Congress, and the importance of messaging simply highlights how important persuasive power is. It is rarely as simple as telling agencies to do something; the process of compliance takes an extended period of time. In this way we observe some of what Neustadt meant when he said that it was a fallacy to speak of "a single structure, 'the' executive branch,"[22] and his subsequent admonitions for persuasive bargaining seem much more palatable under this view.

TWO ILLUSTRATIVE CASES

To explore the executive-order process in greater depth, I chose two cases that had very different formulation processes and very different responses from the agencies involved. The formulation process acts as my principal explanatory variable, with agency compliance acting as the dependent variable. Mayer describes the dual nature through which directives tend to arise: "Executive orders typically either originate from the advisory structures within the Executive Office of the President or percolate up from executive agencies desirous of presidential action."[23] This is a critical distinction, one to which I refer as a "top-down" versus a "bottom-up" method of executive-order issuance. In the former case, the directives are driven largely by the president or by the president's close advisers; in the latter, agencies take the lead and seek to have some policy codified at the president's direction.

The distinctions between these two order types could potentially have far-reaching consequences. Rudalevige has shed some light on the bargaining process inherent in any seemingly "unilateral" directive, and whether an order comes from the president or the agency may very well confound the way in which this bargaining process works.[24] It is possible that because of a continued centralization of policymaking within the White House apparatus that agencies are more reluctant to comply with orders that come from the

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

top (especially if they feel excluded from the formulation of the directive in question).[25] As such, I selected two cases, one from each perspective ("top-down" or "bottom-up"), to highlight some of the critical differences between the two.

These examples are meant to provide a glimpse into how orders are generated, what factors seem to encourage compliance, and the circumstances under which agencies stall or otherwise ignore directives. The cases are E.O. 12630 (a "top-down" directive), which was heavily disliked and fought every step of the way by affected agencies such that it was, for practical purposes, simply ignored; and Cooperative Conservation (a "bottom-up" directive), which was a mostly successful initiative that was largely embraced by the affected agencies. In the case of E.O. 12630, there was much protestation among those in the environmental movement as to its feared devastating consequences, yet the ability of agencies to seemingly disregard it demonstrates the profound lack of enforcement power the president possesses. Cooperative Conservation, in contrast, demonstrates the bargaining and give-and-take involved in the executive-order process: agencies went along dutifully because they agreed with the order's goals, not simply because they were directed to take some action.

Why pick these two cases? Critically, they allow me to control for potentially powerful competing explanations for agency compliance or the lack thereof. Both are at the direction of conservative Republican presidents, which helps to account for ideological distinctions between presidents of different parties; both deal in the same general policy area of environmental regulation, which helps to account for the influence of policy type on the degree of compliance; and both involved significant bargaining before and after issuance, helping to control for the amount of discussion between White House personnel and agency actors on the ground. The generation process remains a fundamental difference between the two cases and provides for some exploratory hypothesis-testing, but the emphasis should be on the term *exploratory*; I do not contend that these two cases cover the entire range of possible executive orders. However, they are similar enough that they ought to help us derive some important implications for future research.

EXECUTIVE ORDER 12630: REGULATION AND PROPERTY TAKINGS

At issue in Executive Order 12630 is whether government regulation of private property, such as that in the realm of environmental protection, could conceivably violate the Fifth Amendment's provision on government takings:

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, *without just compensation*" [emphasis mine].[26] The extent to which government regulations were subject to the Fifth's "takings clause" was not a new issue in the 1980s. In the 1922 Supreme Court case *Pennsylvania Coal Co. v. Mahon*,[27] the Court wrote that "the general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[28] The decision dramatically changed the applicability of the Fifth Amendment to issues of government regulation and was the first in a series of cases that would raise these particular issues.[29]

The legal fact that government regulations could conceivably be viewed as violations of the Fifth Amendment eventually spurred robust scholarly debate,[30] a number of additional cases, and a movement designed to take advantage of this doctrine and loosen the grip of government regulation, colloquially called by many the "takings project."[31] The general idea, according to Richard Epstein, is that "land use regulation and more comprehensive forms of economic regulation . . . are all (large-number) takings of private property."[32] Epstein, a noted conservative legal scholar, is considered by some to be the ideological progenitor of this movement within government,[33] and the project did ultimately gain some favor within the Reagan administration.[34] However, numerous legal scholars, including some on the ideological right, adamantly rejected Epstein's general thesis.[35]

But the issue of regulations as a conceivable violation of the takings clause was fresh on the minds of administration officials when the Supreme Court handed down its ruling in *Nollan v. California Coastal Commission*, as well as other cases.[36] The Court found in favor of the Nollans, who were seeking permission to demolish a small house on a parcel of land they were buying so that they could construct a more permanent home.[37] The state agency charged with making such decisions about land use granted the request, but it was predicated on the condition that the Nollans provide for a degree of access on their property such that general parties could access other public areas of the beach.[38] The Supreme Court, in ruling for the Nollans, wrote that, regardless of the possible utility of public access on the private beach, "if [the state of California, where the property is located] wants an easement across the Nollans' property, it must pay for it."[39] Several months later, in a message to Congress, President Ronald Reagan referenced the case as he staked out his position on the issue of regulation and property takings: "The Administration has urged the courts to restore the constitutional right of a citizen to receive just compensation when government at any level takes

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

private property through regulation or other means. Last spring, the Supreme Court adopted this view in *Nollan v. California Coastal Commission*."[40] The president would follow this up shortly thereafter on March 16, 1988, with the issuance of Executive Order 12630, titled "Governmental Actions and Interference With Constitutionally Protected Property Rights."[41]

The text of the order, couched in legalese, may seem at first blush to be relatively inconsequential. The purpose, Reagan explained, was "to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public resulting from lawful government action."[42] The protections to which the president referred concerned the Fifth Amendment's "takings clause," which holds that "private property [shall not] be taken for public use, without just compensation." The directives included, among other things, several reporting requirements meant to compel agencies to disclose to the Office of Management and Budget their compliance with the order through proof of "awards of just compensation."

The response to this order was unrestrained and, among environmentalists, highly negative. While those in support of the order viewed it as making significant positive strides in the area of property rights, opponents were far less generous.[43] One legal scholar described E.O. 12630 as "significantly overstating the threat that takings law posed," as "fictionalizing the threat that the Fifth Amendment poses to the public purse," and concludes that "the Takings Order amounts to nothing more than a President's attempt to control executive agency decision-making by claiming that certain regulations are simply too costly to implement."[44] The League of Conservation Voters said the order "advocates a biased anti-regulatory view toward government regulatory programs" and represented "an erroneous interpretation of the Just Compensation Clause,"[45] and the Sierra Club called the order (and its mimics at the state level) an "epidemic" that had the effect of "weakening and sometimes killing green legislation."[46]

Given the heavy skepticism with which many viewed Reagan's approach to both regulations and environmental issues, opposition to E.O. 12630 was expected. Still, the order was a clear directive handed down by the president applying to a wide subset of government agencies. But it have the effect of giving the president too much power in the area of environmental regulations? The order itself spawned a number of debates along normative lines,[47] but the real point of interest is not whether the Reagan administration was justified in implementing the order. Instead, it is whether agencies followed

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

through with carrying it out. More than a decade later, the Government Accountability Office undertook a study of the effects of E.O. 12630 on a limited subset of agencies and found that compliance was questionable at best.[48] The report states, for example: "The four agencies [in the study; they are the Departments of Agriculture and Interior, the EPA, and the Army Corps of Engineers] told us that they fully consider the potential takings implications of their planned regulatory actions, but provided us with limited documentary evidence to support this claim."[49] The implementation of the order seems, at best, inconsistent, and some involved in the process claimed there was willful avoidance in the bureaucracy of following E.O. 12630.[50] What explains why and how agencies, having received a presidential order with relatively clear reporting guidelines, evaded compliance?

Understanding the lack of responsiveness to the order requires a look at the factors that led up to its eventual issuance. As it happens, the Supreme Court's rulings in the cases that supported the notion of regulations constituting a taking under Fifth Amendment law were not handed down independent of administration involvement. A number of officials in the Department of Justice, as well as the White House, had sympathy for Professor Epstein's view.[51] Many of them, including Roger Marzulla, who served as assistant attorney general for Land and Natural Resources in the later years of the Reagan administration, leaned on the solicitor general to file *amicus curiae* briefs in favor of the takings as property rights position in a number of cases, including *Nollan*.[52]

The solicitor general, Charles Fried, did not react with much enthusiasm. Fried did not share Epstein's views to the extent that other officials in the Justice Department and the White House did, writing:

> "Attorney General [Edwin] Meese and his young advisers—many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right. . . . If the government labored under so severe an obligation, there would be, to say the least, much less regulation."[53]

Fried felt the extent to which the attorney general and his assistants, including Marzulla, were going was excessive and that his concerns were not properly

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

taken into account,[54] and he actively opposed supporting the takings position for a time. He eventually partly acceded in an attempt at a compromise, but the Supreme Court's ruling, in Fried's words, "dismissed my halfway proposals in a footnote and adopted the Attorney General's full-blooded position."[55]

These debates with Fried were in part the genesis for E.O. 12630, though not the genesis of the takings project more generally.[56] The Supreme Court rulings gave those arguing in favor of regulations constituting government takings legal legitimacy, and the directive followed a few months thereafter. The formulation process took place mostly in White House circles and in the Justice Department among sympathetic officials.[57] Before the order was issued, agencies were given a chance to offer comment, as is standard practice.[58] But, Marzulla noted, none of the agencies affected were particularly enthusiastic about the directive, with the EPA being the most vocally opposed.[59]

Compliance, the GAO report would show more than a decade later, was spotty at best. This was unsurprising to those involved in the process. Marzulla, for his part, noted that the order came near the end of Reagan's presidency, and in spite of the fact that he was succeeded by his vice president, it was unclear that George H. W. Bush would make the takings issue as much of a priority as his predecessor had. But that did not seem to be unduly bothersome; Marzulla points out that many presidential directives, E.O. 12630 perhaps included, "are statements of policy, statements of philosophy."[60] In other words, it may be sufficient for those involved in the policy process to make their views known even with the knowledge that compliance will be low, or, in some cases, perhaps nonexistent.

The case of E.O. 12630 serves to highlight three very important components of the executive-order process. First, bargaining seems to be key; government officials, presidents included, acknowledge the difficulties of securing enforcement of their directives in a manner that they, the principals, would find satisfactory.[61] And bargaining over 12630 seems to have been modest at best; the solicitor general, Charles Fried, voiced numerous concerns over the takings project strategy but still felt compelled to go along, at least part of the way.[62] The fact that the order's genesis occurred mostly in circles sympathetic to Reagan's antiregulatory agenda, including Justice Department officials and the Office of Management and Budget, suggests that other agencies either lacked input or shared the concerns that were driving the issuance of the directive. Agencies, as the GAO report and government officials who worked in Washington at the time suggest, did not respond well and did not take the order particularly seriously.[63]

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

Second, it is difficult to determine a president's intent with an executive order. On the one hand, Ronald Reagan had pursued a vigorous agenda of regulatory reform, and reductions in the size of the *Federal Register* are evidence of at least partial success in this endeavor. At the same time, if Marzulla is correct, the administration may not have overly concerned itself with the actual successful implementation of Executive Order 12630. It is clear that some executive orders are used for purposes of going public or otherwise advertising an administration's position, and in the case of the takings project, those working on the directive seemed resigned to the fact that the bureaucracy would not take the order seriously. However, how are we to identify orders that presidents expected would not be carried out? How can directives be evaluated on a symbolic basis, and when are noncompliance and nonresponsiveness not of concern to the president? These are points worth considering as research into presidential power continues to move forward, but answers may be elusive. Adam Warber has made some important strides in this area, particularly when it comes to the classification of executive orders across various dimensions,[64] and additionally providing critical insight into cases where presidents may use these directives for reasons of appealing to certain interests rather than directing agencies alone.[65] This research by itself cannot tell us when presidents may not care about compliance, but combined with Rudalevige's archival work, such work does shed some light on the variable nature of presidential directives.[66] Clearly, however, more work is needed.

The third important point is that responsiveness does not necessarily translate to compliance. A cursory look through the *Federal Register* as well as the GAO report on E.O. 12630 shows that agencies were responding, but their methods of actually implementing the directive were, in many cases, perfunctory.[67] It is often the case, as discussed earlier, that agencies will reference executive orders in the making of rules. But this by itself does not mean that agencies are following the rule's true intent. To be sure, presidents may not actually expect them to (as Marzulla intimated with respect to E.O. 12630), but it would be misleading to say that an agency through simple response has followed through on an order's provisions.

Such was the case with E.O. 12630, according to Marzulla. The extent to which agencies actually followed the order's intent amounted to little more than boilerplate responses in his estimation.[68] This gets to a larger point in presidential-bureaucratic scholarship generally about determining what compliance looks like in actuality. Is it a quantifiable concept? The GAO takes plenty of cases where it is required to evaluate agency compliance with presidential directives, but because these cases are generally initiated by request,

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

it selects on the dependent variable and are thus unreliable. After all, if a member of Congress asks the GAO for a review of agency compliance, as one did in the case of E.O. 12630, it is not a stretch to assume they are asking precisely because they expect that agencies are *not* complying. Still, there are some promising avenues moving forward as it pertains to presidential intent and executive-order compliance. For example, Rudalevige's archival work represents a possible avenue moving forward to better account for executive orders that are considered symbolic or otherwise not enforceable.[69] His detailing of the process before an order is issued could shed some light on when compliance is expected, and thus allow us to better develop models to test when agencies are following through with an order's intent.

EXECUTIVE ORDER 13352: COOPERATIVE CONSERVATION

Though George W. Bush had made statements on environmental issues as a candidate and, later, as president-elect and president, the connection between Bush and environmentalism would seem to be tenuous at best.[70] President Bush was criticized for his approach to environmental issues and climate change both during and after his presidency,[71] for dismissing the Kyoto Protocol, questioning scientific data in support of climate change and other environmental maladies, and generally, according to Harris, "actively [seeking] to reverse the [environmental] gains of previous decades."[72] One editorial in the *San Francisco Chronicle* in mid-2002, about a year and a half after Bush became president, claimed that the administration "has arguably racked up the worst environmental record since our most important environmental regulations became law."[73]

Given the decided lack of enthusiasm among many environmentalists for the Bush presidency, one might be inclined to expect very little movement during the administration toward sound environmental policy. And yet this was not the case with cooperative conservation, formalized largely in Executive Order 13352, titled "Facilitation of Cooperative Conservation," which was defined in the order as "actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals."[74]

The seeds for the program had been planted years before the order itself was issued, however. In her first speech as Secretary of the Interior, Gale Norton emphasized to her department what she called the "Four C's: Communication,

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

Consultation, Cooperation, all in the service of Conservation."[75] The slogan, Norton said, subsequently became a bedrock of Interior's attitude toward pursuing its objectives; over time, the "Four C's" were pared down to the phrase "Cooperative Conservation," which grew into a large interagency executive-branch program that met with considerable success. But what accounts for this success? On the surface, there are some parallels one can draw between Cooperative Conservation and the preceding case, Ronald Reagan's E.O. 12630. Both were pursued by Republican administrations generally viewed unfavorably within the environmental community. Both involved presidents exercising their unilateral powers. Yet E.O. 12630 went virtually unheeded by the executive branch, while Cooperative Conservation was judged by most involved as a relative victory policywise.

The reasons for this success are varied. Perhaps the most important factor was that the agencies involved (particularly the Department of the Interior, the Department of Agriculture, the Department of Commerce, the Department of Defense, and the Environmental Protection Agency) seemed amenable to a new direction. Much conservation policy was directed at the federal level, and satellite offices in many local communities had poor relations with the neighborhoods of which they were ostensibly a part. However, poor relations were not universal; some federal land managers had met with success dealing with the communities in which they were located, and Cooperative Conservation, Secretary Norton said, was an effort "to replicate those successes."[76] There was general enthusiasm for more local community involvement that cut across ideological lines; conservatives and liberals were united in agreeing that the process, as it worked, was inefficient.

Here we see an important step in the executive-order process: the agencies that were facing direction were *willing to bargain*. There was not any initial opposition to the plan, nor was it sprung on agencies much the way E.O. 12630 was. Cooperative Conservation offered a solution to a problem that agency workers, both conservative and liberal, acknowledged needed to be dealt with. This was not a case of a president saying "Do this! Do that!" so much as it was a case of the president and the executive branch working together to reach a mutually satisfactory goal.

Yet it could hardly be said that the Bush administration was content with simply getting agencies on board with the plan. After Cooperative Conservation was put in place, following significant bargaining, there needed to be some sort of monitoring of enforcement and compliance. The Department of the Interior, for its part, took both a "carrot" and "stick" approach to encouraging responsiveness and compliance with the initiative. Employees engaged

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

in facilitating the goals of Cooperative Conservation were eligible for official recognition. Satellite offices of Interior could receive intradepartmental grants to carry out proposed projects designed to further the goal, and private-sector groups were eligible for grants as well. The "stick" side involved including specific measures designed to assess individual employees' efforts in Cooperative Conservation as a part of standard performance evaluations. Those with significant successes could expect to receive more money, while those who failed to measure up risked taking a financial hit.[77] Further, the executive order subjected agencies to various reporting requirements, specifically requiring that they notify the Council on Environmental Quality (CEQ) of their progress in fostering the program's goals.[78] Affected agencies were also expected to contribute money for the White House Conference on Cooperative Conservation, which was established in E.O. 13352 to be conducted in 2005.

The conference was held as planned a year later in St. Louis, Missouri. Enthusiasm among participants was high, though the visibility of their efforts was considerably reduced because the conference took place in late August, coinciding with a number of devastating hurricanes that struck the United States that year (including Hurricane Katrina).[79] The conference served to highlight a number of cases where the program's goals were successfully implemented, drawing attention to projects throughout the United States over the duration of the event. One such case was an attempt to conserve a species of tortoise critical to the coastal ecosystem in the gulf area; in this particular instance, low-income residents in southern Alabama were having difficulty finding affordable living conditions, a problem partially handled by increased development to land "essential to the threatened gopher tortoise."[80] This led to cessation of building in numerous areas of Mobile County in an attempt to avoid possible regulatory violations. The solution involved a special district government, the Mobile Area Water and Sewage System, establishing a special reserve ("a 'conservation bank'") to house the tortoises.[81] MAWSS obtained assistance from federal agencies, local residents and researchers, and interest groups in creating and managing the habitat. The case study is careful to point out the successes: "Since the bank began, the number of resident tortoises has grown from 12 to more than 60. . . . The bank has been equally successful for developers and home buyers. The moratorium on building permits was lifted, allowing construction of affordable housing to continue."[82] Hundreds of cases were documented similarly, addressing the difficulties areas faced and how partnerships were formed to tackle environmental problems and bring about a satisfactory resolution.

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

The celebration of voluntary involvement in cooperative conservation helped to underscore its success; as the conference collection of case studies notes, "[the program's] strength rests in the many voluntary solutions its practitioners bring to the resolution of conservation challenges—its track record of people working collaboratively at local, regional, and national scales to solve problems that might otherwise only have a regulatory answer."[83] This spirit of bargaining and cooperation mirror in many ways the process that led to the order's issuance in 2004. There is less a focus on coercion or outright direction from the executive and more bargaining taking place.

In 2008, the GAO undertook a study of cooperative conservation and judged it relatively successful, though with some limitations.[84] Experts consulted in the report, either personally interviewed by the GAO or their scholarly work reviewed, held the general belief that cooperative conservation's goals were "an effective approach for managing natural resources."[85] The report also looked in depth at seven particular cases, concluding that in each those involved were able to effectively manage an array of environmental problems to reach a satisfactory conclusion. Though the GAO had a number of recommendations to improve the program, the report concluded that cooperative conservation had numerable successes and remains "a promising tool with which to approach the ongoing and potential conflicts that arise in managing the nation's land and resources."[86]

FINDINGS

The two cases both illustrate two key points about the nature of compliance with executive orders. The first is that a willingness to bargain among affected agencies is far more likely to yield compliance than situations where agencies are reticent to meet White House goals. This seems an obvious point, but it is worth emphasizing given that, until recently, so much of the research on unilateral presidential power has assumed that executive orders (and other directives) are effective simply by definition.[87] More recent research has begun giving glimpses into the complexities of the executive-order process, and scholars of presidential power are beginning to tackle some of the toughest questions about executive discretion.[88] What is clear is that the executive-order process is often one of give-and-take, and future models of presidential control over the bureaucratic apparatus must take this bargaining into account.

The second point, related to the first, is how strikingly nonunilateral so much "unilateral" action often is. President Reagan's E.O. 12630 was issued only after the "takings project" had been bubbling in legal circles for years,

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

and only following a ruling by the Supreme Court. Similarly, President Bush issued Executive Order 13352 in 2004, but the seeds for Cooperative Conservation had been planted years before, perhaps most notably when Secretary of the Interior Gale Norton delivered her first address to her department in 2001. It would be years before the directive actually came about, and it is clear from talking to those involved in the process that Cooperative Conservation was a result of efforts of officials at all levels of government as well as people within the private sector. The executive-order process has largely been examined with the issuance of the order as the starting point, but clearly it is far more complex. The truly unfortunate problem is that we do not observe the executive orders that are not issued, nor can we. Perhaps, had agencies not been so willing to tackle environmental problems they all agreed needed to be addressed, E.O. 13352 would never have been a reality. Contrast this experience with Reagan's "takings" order, the generation of which was a much more centralized process, and the picture becomes a great deal clearer. Without buy-in, the chance of successful implementation lessens considerably.

These points add a new wrinkle to concepts of presidential governance. The administrative presidency may indeed involve just as much bargaining as the legislative presidency, though the extent to which public pressure plays a role is probably distinct in the two cases. Career bureaucrats, it has been noted, are committed to doing their jobs and doing them well, but this does not mean that they are content to simply follow along when the president says "do this."[89] In fact, they may view bargaining as a very necessary component to doing their jobs well; this can explain, in part, the reticence within the bureaucracy to follow the dictates of E.O. 12630 while responding much more favorably to E.O. 13352. A crucial distinction between these two cases is the level of bargaining involved in each before their issuance, and the nature of that bargaining was indeed quite different.

These cases help to provide some insight into the difference between "top-down" and "bottom-up" executive orders, but there are some important caveats to note. First, this information is not definitive; the cases herein both involve environmental issues handled by a specific subset of agencies. Would these lessons hold in different policy areas? That has yet to be established. Second, both cases occurred during the administrations of conservative Republican presidents. Would agencies react differently when negotiating with Democratic presidents? Some preliminary answers may be gleaned from Rudalevige's account of bargaining; his archival work suggests that presidents from both parties face difficulties in dealing with a variety of issues and agencies.[90] Ultimately, however, more comprehensive work across different policy areas is needed to draw any definitive conclusions.

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

CONCLUSION

For several years, it seemed that Richard Neustadt's famous idiom that "Presidential power is the power to persuade" would inevitably fall by the wayside in a tidal wave of research focused on the ability of presidents to flex their unilateral muscles.[91] The title of William Howell's exceptional work on executive orders, *Power Without Persuasion*, conveys this judgment in absolute simplicity. "Using executive orders, proclamations, and other kinds of directives," Howell writes, "presidents have helped define federal policies on civil rights, the environment, health care, and social welfare; and using executive agreements and national security directives, presidents since FDR have fastened their command over foreign policy."[92] The wrinkle in this thinking, however, is the assumption that presidents and presidents alone have done these things. Unquestionably, executive orders have contributed to the shaping of U.S. policy in critically important ways. But as the cases herein demonstrate, viewing them as unilateral or in a world without bargaining is inherently flawed.

Indeed, the cases of E.O. 12630 (the takings executive order) and 13352 (cooperative conservation) serve to make this point quite eloquently. In one case, the order failed, in large part because agencies could not agree on its utility; disagreements within the very department where the order was largely being drafted (the Department of Justice) convey that individual organizations could not reach a mutually satisfactory goal. The agencies did not want the order, and if administrative officials are to be believed, perhaps the president was not concerned about its implementation either. Responsiveness existed, but compliance was highly questionable.

In the case of E.O. 13352, the order was a success. Agencies agreed with its intentions. Officials in government as well as in the private sector recognized a problem and saw a way forward to resolve a number of environmental problems. The order's formulation did not take place in tight White House circles, but rather was a collaborative effort. The president did not tell agencies to "do that"; he instead gave them the legal justification and the blueprint for pursuing goals that most of the parties together found mutually satisfactory. Cooperative conservation was in no sense an example of a president exercising unilateral authority over an agency apparatus ostensibly under his control; it was instead, as Neustadt suggested years ago, a case of bargaining.

This should not be taken to suggest that "top-down" orders are never effective, however. As one example, E.O. 12291, an order that came most directly from the White House and that encountered bureaucratic opposition,

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

still managed to accrue a good deal of responsiveness and compliance within the federal apparatus, but even this order had its limitations.[93] Individuals involved in the process believed, in spite of compliance, that better results could be achieved through an open bargaining process, a suggestion that would later be codified by President Clinton.[94]

In light of this, it is time for presidential scholars to reconsider the formerly accepted truism that presidential power is indeed "the power to persuade," and that unilateral presidential powers are rarely as straightforward as we might think initially. The process is complex and certainly requires a degree of bargaining to be successful. It is true that presidents can issue orders on their own, but this may be more a theoretical than a practical point, and as the case of E.O. 12630 tells us, a limited ability to enforce the provisions of an unpopular directive opens up plenty of opportunities to avoid compliance. Presidents who intend to make direct executive action a hallmark of their administrative style must be aware of the challenges they will face from bureaucrats at all levels. The power of command is not an absolute truism in the realm of the American presidency.

Georgia Southern University

NOTES

1. See *United States v. Texas* (2016), 579 U.S. ____, http://www.supremecourt.gov/opinions/15pdf/15-674_jhlo.pdf.

2. See Office of the Press Secretary, "FACT SHEET: Immigration Accountability Executive Action," https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action.

3. See, for example, Andrew Rudalevige, "The Contemporary Presidency: Executive Orders and Presidential Unilateralism," *Presidential Studies Quarterly* 42, no. 1 (2012): 138–60.

4. Ronald Reagan, "Executive Order 1229—Federal Regulation," online by Gerhard Peters and John T. Woolley, *The American Presidency Project* (1999–2015), http://www.presidency.ucsb.edu/ws/index.php?pid=43424. Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, 2001).

5. Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York, 1990), 11.

6. William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton, 2003).

7. See, for example, Stephen G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, 2008).

8. Graham T. Allison and Morton H. Halperin, "Bureaucratic Politics: A Paradigm and Some Policy Implications," *World Politics* 24 (1972): 40–79; Graham Allison and

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

Philip Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis,* 2nd ed. (New York, 1999); Harold H. Bruff, "Presidential Power Meets Bureaucratic Expertise," *Journal of Constitutional Law* 12, no. 2 (2010): 461–90; Milton H. Halperin and Priscilla A. Clapp, *Bureaucratic Politics and Foreign Policy*, 2nd ed. (Washington, D.C., 2006); Harold Seidman and Robert Gilmour, *Politics, Position, and Power: From the Positive to the Regulatory State*, 4th ed. (New York, 1986); Peter M. Shane and Harold H. Bruff, *Separation of Powers Law: Cases and Materials*, 3rd ed. (Durham, 2011); Peter L. Strauss, "Overseer, or 'The Decider?' The President in Administrative Law," *George Washington Law Review* 75, no. 4 (2007): 696–760; James Q. Wilson, *Bureaucracy*, 2nd ed. (New York, 2000).

9. Allison and Zelikow, *Essence of Decision*, 5.

10. "The Contemporary Presidency: Executive Orders and Presidential Unilateralism."

11. Neustadt, *Presidential Power and the Modern Presidents*.

12. George A. Krause and Jeffrey E. Cohen, "Opportunity, Constraints, and the Development of the Institutional Presidency: The Issuance of Executive Orders, 1939–96," *Journal of Politics* 62, no. 1 (2000): 88–114; Howell, *Power Without Persuasion*; Mayer, *With the Stroke of a Pen*; Rudalevige, "The Contemporary Presidency."

13. Mayer, *With the Stroke of a Pen*; Rudalevige, "The Contemporary Presidency."

14. Quoted in Neustadt, *Presidential Power and the Modern Presidents*, 10.

15. Mayer, *With the Stroke of a Pen*; Rudalevige, "The Contemporary Presidency."

16. Rudalevige, "The Contemporary Presidency."

17. Telephone interview with Roger Marzulla (Assistant Attorney General for the Land and Natural Resources Division, Department of Justice, 1987–89), 29 January 2014.

18. Howell, *Power Without Persuasion*; Mayer, *With the Stroke of a Pen*.

19. Telephone interview with Lynn Scarlett (Assistant Secretary of the Interior, 2001–5; Deputy Secretary of the Interior, 2005–9), 5 September 2013.

20. William J. Clinton. "Executive Order 12843—Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances," online by Gerhard Peters and John T. Woolley, *The American Presidency Project* (1999–2015), http://www.presidency.ucsb.edu/ws/index.php?pid=61539.

21. Both Lynn Scarlett and Gale Norton emphasized that much of the implementation is carried out by individuals in the career Senior Executive Service (SES), who do not possess the same employment protections as other career employees. While they can be difficult to fire, career SES officials can be relocated as a form of punishment for ineffective management. One example, Scarlett said, involved a particularly obstinate official from the SES who was moved to a much less desirable location.

22. Neustadt, *Presidential Power and the Modern Presidents*, 33.

23. Mayer, *With the Stroke of a Pen*, 61.

24. Rudalevige, "The Contemporary Presidency."

25. See, for example, David E. Lewis, *Presidents and the Politics of Agency Design* (Princeton, 2003); Andrew Rudalevige, *Managing the President's Program: Presidential Leadership and Legislative Policy Formation* (Princeton, 2002).

26. U.S. Constitution, Amendment V.

27. 260 U.S. 393, http://supreme.justia.com/cases/federal/us/260/393/case.html.

28. The opinion was written by Justice Oliver Wendell Holmes Jr.

29. Roger J. Marzulla, "The New 'Takings' Executive Order and Environmental Regulation: Collision or Cooperation?" *Environmental Law Reporter* 18 (1988): 10254–60.

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

30. Kirsten Engel, "Taking Risks: Executive Order 12,630 and Environmental Health and Safety Regulation," *Environmental Law Review* 14 (1989): 213–45; Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass., 1985); William A. Fischel and Perry Shapiro, "Takings, Insurance, and Michelman: Comments on Economic Interpretations of 'Just Compensation' Law," *Journal of Legal Studies* 17, no. 2 (1988): 269–93; Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," *Harvard Law Review* 80, no. 6 (1967): 1165–1258; Carol M. Rose, "*Mahon* Reconstructed: Why the Takings Issue is Still a Muddle," *Southern California Law Review* 57 (1984): 561–99.

31. Douglas T. Kendall and Charles P. Lord, "The Takings Project: A Critical Analysis and Assessment of the Progress So Far," *Boston College Environmental Affairs Law Review* 25, no. 3 (1998): 509–87; see also Epstein, *Takings*; Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* (New York, 2008); Charles R. Wise, "The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government's Ability Regulate?" *Administrative Law Review* 44 (1992): 403–27.

32. Epstein, *Takings*, 263.

33. Kendall and Lord, "The Takings Project."

34. Epstein, *Supreme Neglect*; Kendall and Lord, "The Takings Project."

35. Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account* (New York, 1991); Epstein, *Supreme Neglect*.

36. The other case concerning regulations as property takings is *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California* (482 U.S. 304).

37. See *Nollan v. California Coastal Commission* (1986), 177 Cal. App. 3d 719 [223 Cal. Rptr. 28], http://law.justia.com/cases/california/calapp3d/177/719.html.

38. See *Nollan* (1986), and *Nollan v. California Coastal Commission* (1987), 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, https://bulk.resource.org/courts.gov/c/US/483/483.US.825.86-133.html.

39. 483 U.S. 825; the opinion was written by Justice Antonin Scalia.

40. "1988 Legislative and Administrative Message: A Union of Individuals," 25 January 1988, at http://www.presidency.ucsb.edu/ws/index.php?pid=36046&st=congress&st1=#axzz2im5b9yeR.

41. At http://www.presidency.ucsb.edu/ws/index.php?pid=35554.

42. Ronald Reagan, "Executive Order 12630—Governmental Actions and Interference with Constitutionally Protected Property Rights," online by Gerhard Peters and John T. Woolley, *The American Presidency Project* (1999–2015), http://www.presidency.ucsb.edu/ws/index.php?pid=35554.

43. Marzulla, "The New 'Takings' Executive Order and Environmental Regulation."

44. Robin E. Folsom, "Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control over Executive Regulatory Decisionmaking," *Boston College Environmental Affairs Law Review* 20, no. 4 (1993): 639–97, 642; see also Engel, "Taking Risks"; Kendall and Lord, "The Takings Project."

45. League of Conservation Voters, 1990 Scorecard Vote, "More Regulatory Red Tape Threatens Environmental Protection: Senate Roll Call Vote 182," at http://scorecard.lcv.org/roll-call-vote/1990-182-more-regulatory-red-tape-threatens-environmental-protection.

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

46. B. J. Bergman, "Ronald Reagan's Revenge: The 'Takings' Campaign and How It Grew 'Anti-Environment, Anti-Taxpayer, Anti-Democratic,'" *The Planet* 1, no. 1 (1994), http://www.sierraclub.org/planet/199407/takings.asp.

47. Folsom, "Executive Order 12,630"; Jerry Jackson and Lyle D. Albaugh, "A Critique of the Takings Executive Order in the Context of Environmental Regulation," *Environmental Law Reporter* 18 (1988): 10463–478; Marzulla, "The New 'Takings' Executive Order and Environmental Regulation."

48. GAO-03-1015 (2003).

49. Ibid., 14.

50. Personal interview with Gale Norton; 10 September 2013; Telephone interview with Roger Marzulla; 29 January 2014.

51. Fried, *Order and Law*; Kendall and Lord, "The Takings Project."

52. Telephone interview with Roger Marzulla, 29 January 29, 2014.

53. Fried, *Order and Law*, 183.

54. Telephone interview with Roger Marzulla, 29 January 2014.

55. Fried, *Order and Law*, 186.

56. Telephone interview with Roger Marzulla, 29 January 2014.

57. Ibid.

58. Mayer, *With the Stroke of a Pen*.

59. Telephone interview with Roger Marzulla, 29 January 2014.

60. Ibid.

61. Rudalevige, "The Contemporary Presidency."

62. Fried, *Order and Law*.

63. Personal interview with Gale Norton, 10 September 2013; Telephone interview with Roger Marzulla, 29 January 2014.

64. Adam L. Warber, *Executive Orders and the Modern Presidency: Legislating from the Oval Office*, (Boulder, 2006).

65. Adam L. Warber, "Public Outreach, Executive Orders, and the Unilateral Presidency," *Congress & the Presidency* 41, no. 3 (2014): 269–88.

66. Rudalevige, "The Contemporary Presidency."

67. Telephone interview with Roger Marzulla, 29 January 2014.

68. Ibid.

69. Rudalevige, "The Contemporary Presidency."

70. Maurie J. Cohen, "George W. Bush and the Environmental Protection Agency: A Midterm Appraisal," *Society and Natural Resources* 17 (2004): 69–88; Kristy Michaud, Juliet E. Carlisle, and Eric R.A.N. Smith, "Nimbyism vs. Environmentalism in Attitudes Toward Energy Development," *Environmental Politics* 17, no. 1 (2008): 2–39; Barry Rabe, "Environmental Policy and the Bush Era: The Collision Between the Administrative Presidency and State Experimentation," *Publius: The Journal of Federalism* 37, no. 3 (2007): 413–31.

71. Cohen, "George W. Bush and the Environmental Protection Agency"; Paul G. Harris, "Beyond Bush: Environmental Politics and Prospects for U.S. Climate Policy," *Energy Policy* 37 (2009): 966–71; Peter J. Jacques, Riley E. Dunlap, and Mark Freeman, "The Organisation of Denial: Conservative Think Tanks and Environmental Scepticism," *Environmental Politics* 17, no. 3 (2008): 349–85; W. Henry Lambright, "Government and Science: A Troubled, Critical Relationship and What Can Be Done About It," *Public*

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press

Administration Review 68, no. 1 (2008): 5–18; David Schlosberg and John S. Dryzek, "Political Strategies of American Environmentalism: Inclusion and Beyond," *Society and Natural Resources* 15 (2002): 787–804.

72. Harris, "Beyond Bush," 967.

73. "Timber Policy Reflects President's World View," *San Francisco Chronicle*, 26 August 2002, http://www.sfgate.com/opinion/editorials/article/Timber-policy-reflects-president-s-world-view-2777793.php.

74. George W. Bush, "Executive Order 13352—Facilitation of Cooperative Conservation," online by Gerhard Peters and John T. Woolley, *The American Presidency Project* (1999–2015), http://www.presidency.ucsb.edu/ws/index.php?pid=61446.

75. Personal interview with Gale Norton, 10 September 2013.

76. Ibid.

77. Ibid.

78. Telephone interview with Lynn Scarlett, 5 September 2013.

79. Personal interview with Gale Norton, 10 September 2013.

80. White House Conference on Cooperative Conservation, "Faces and Places of Cooperative Conservation: Profiles in Citizen Stewardship" (St. Louis, 2005), 43.

81. Ibid.

82. Ibid.

83. Ibid., 6.

84. GAO-08-262 (2008).

85. Ibid., 5.

86. Ibid., 57.

87. Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence, Kans., 2002); Howell, *Power Without Persuasion*; Mayer, *With the Stroke of a Pen*; Kenneth R. Mayer, "Going Alone: The Presidential Power of Unilateral Action," in *The Oxford Handbook of the American Presidency*, ed. George C. Edwards III and William G. Howell (New York, 2009).

88. Joshua B. Kennedy, "'Do This! Do That!' and Nothing Will Happen': Executive Orders and Bureaucratic Responsiveness," *American Politics Research* 43, no. 1 (2015): 59–82; Rudalevige, "The Contemporary Presidency."

89. See, for example, Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, 2001); Gregory A. Huber, *The Craft of Bureaucratic Neutrality: Interests and Influence in Governmental Regulation of Occupational Safety* (New York, 2007); Marissa Martino Golden, *What Motivates Bureaucrats? Politics and Administration During the Reagan Years* (New York, 2000).

90. Rudalevige, "The Contemporary Presidency."

91. Neustadt, *Presidential Power and the Modern Presidents*, 11.

92. Howell, *Power Without Persuasion*, 175.

93. Telephone interview with E. Donald Elliott (General Counsel, Environmental Protection Agency, 1989–91), 12 April 2014.

94. See, for example, E. Donald Elliott, "TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It," *Law and Contemporary Problems* 57, no. 2 (1994): 167–84.

https://doi.org/10.1017/S0898030617000367 Published online by Cambridge University Press