

**The Presidency and U.S. Environmental Policy**  
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President Donald Trump has sought to significantly shape environmental policy since he took office in January 2017. He initiated efforts to rollback several climate change rules adopted under President Barak Obama's administration, most significantly replacing the Clean Power Plan and relaxing regulations of greenhouse gas emissions from motor vehicles. He significantly reduced the size of two national monuments in Utah, Grand Staircase-Escalante and Bears Ears, testing presidential power under the Antiquities Act. He appointed Scott Pruitt to head the Environmental Protection Agency (EPA). As Attorney General of Oklahoma Pruitt sued the EPA 14 times. Although the environment was likely not at the top of Trump's priorities in nominating Neil Gorsuch and Brett Kavanaugh to the Supreme Court, both justices bring a skeptical eye to environmental regulation. In sum, these examples demonstrate that if one is interested in environmental policy, who is president matters a great deal.

In this chapter I will employ historical institutionalism as an overarching theoretical framework to examine the changing nature and current tools of presidential policymaking in the environmental realm. The chapter is organized as follows: (I) theoretical framework; (II) brief overview of presidential history, with a focus on Theodore Roosevelt and Franklin D. Roosevelt as major policymakers before the rise of the environment as a major policy arena in the 1960s; (III) discussion of changes in "secular time" that affected the president's policymaking power, especially the rise of the administrative presidency and legislative gridlock; (IV) an examination of the major presidential policymaking tools and their significance; and (V) concluding thoughts.

## **I. THEORETICAL FRAMEWORK**

Over time, the president has become a more significant actor in environmental policymaking. Stephen Skowronek helps make sense of this with his concept of "secular time." In his larger project on presidential authority and power over time, he argued that over time "the resources available to presidents ... have changed dramatically." Presidents have more institutional resources and governing responsibilities today, and hence more power and responsibility for policymaking. However, other political actors have also become more powerful over time, which Skowronek referred to as institutional thickening. Hence, presidents potentially have more power to act as policymakers and simultaneously can be more constrained (Skowronek 1993, 30, 29-32). A couple of illustrations from environmental policy demonstrate the point: Bill Clinton's use of rulemaking to protect over 50 million acres of national forest from roads through the rulemaking power, and George W. Bush's effort to rollback existing provisions of the Clean Air Act blocked by opposition from Congress, the courts, interest groups, and the states (Klyza and Sousa 2013, 112-135). In concluding his study of presidential authority and power through

history, Skowronek discussed the waning of political time: although secular time has granted president's more power, parallel changes have granted other actors more power as well, power that has served to reduce presidential authority. In environmental policymaking, this plays out in presidents being able to make powerful independent moves within an existing structure, but they are limited in their ability to deconstruct past policies and institutions. The green state that they inherit is extremely resistant to change, for reasons discussed below.

In more recent work, Skowronek and co-author Karen Orren argued that the president has taken on a more significant role in the rise of what they call the "policy state" (2017). "The opportunity structure," they wrote, "turns on contingencies in the struggle for political power. Creativity is on tap, for governing arrangements adjust to whatever policies can be sustained. ... As constraints loosen and the formal division of institutional labor erodes, rules regulating institutional interactions cannot but grow more complicated and less decisive" (Orren and Skowronek 2017, 91). This passage underscores how, over time, the opportunities for presidential policymaking have both grown and grown more complicated. Turning more specifically to the president, they argue that political mobilization by issue activists, interest groups, and campaign benefactors center around the president as a way to achieve policy goals. The president developed and extended the use of tools in response, for instance, the increased use of executive orders. Furthermore, "The normalization of obstruction invites the executive branch and the judiciary to bypass the legislature and open alternative paths to policy" (Orren and Skowronek 2017, 143-142, 123-138). This is a topic I will return to below.

## **II. HISTORY**

The first major environmental policymaking foray by a president occurred in 1891 when President Benjamin Harrison made use of a new discretionary authority granted him by Congress. The Forest Reserve Act, passed that year, stated that the president could reserve public forest lands as public reservations. Harrison established the 1.2 million acre Yellowstone Park Timberland Reserve with the new authority, and went on to create 15 more reserves totaling over 16 million acres. The following presidents, Grover Cleveland and William McKinley, followed suit and established over 46 million acres of new forest reserves. But these actions merely set the stage for Theodore Roosevelt, who made tremendous use of his presidential powers to protect millions of acres of land across the country (Graham 2015, 25-33).

Conservation was a signature policy of Roosevelt's presidency, when he made great use of discretionary powers granted him by Congress and made novel use of the executive power. He designated or consolidated 150 national forests, with the system totaling over 168 million acres by the time he left office. He made use of the power granted the president in the Antiquities Act (1906) to establish 18 national monuments, several of which would become national parks. Furthermore, his interpretation of the law led to the creation of monuments of hundreds-of-thousands of acres. And he relied on his own executive powers to establish 55 bird and game sanctuaries, laying the foundation of the national wildlife refuge system. All told, Roosevelt protected approximately 180 million acres of land and established the president as a major actor in making environmental policy. Of additional significance, Roosevelt was a close partner with Congress in the legislative process that led to many significant conservation laws, and he demonstrated the tremendous significance of presidential appointments in the field, as Gifford

Pinchot, his head of the Forest Service, was a significant policy entrepreneur (Carpenter 2001, 275-289; Graham 2015, 40-43; Land Areas Report 1909). More generally, Skowronek commented that Roosevelt “opened several new avenues of executive action” based on direct relationships with the public, with national organizations beyond the party, and, most importantly for environmental policy, “through his expanded national administrative arm, a more direct role for the presidency in the promulgation and management of national policy ... It became a more autonomous center of governing, able to tap the professional expertise and administrative capacities of an expanded executive establishment” (Skowronek 1993, 246).

It wasn't until Theodore Roosevelt's cousin Franklin Delano Roosevelt (FDR) was elected in 1932 that the president again became a focal point of policymaking. FDR's conservation work focused on legislative leadership, pushing Congress to create the Civilian Conservation Corps, the Tennessee Valley Authority, and the Soil Conservation Service. Conservation was a central part of FDR's agenda (Daynes and Sussman 2010, 30-36; Graham 2015, 124-136). Major presidential environmental policymaking would become a regular part of the presidency beginning in the 1960s, and presidents from that period on are discussed below.

### **III. CHANGES IN SECULAR TIME**

For Skowronek, secular time always led to a changed political environment for the president. For instance, writing about the challenges faced by FDR, he observed that there were more organizations; these organizations were more independent; and the president was more dependent on these organizations to bring about change. These changes worked to constrain presidential action, even as other changes that some have termed the birth of the “modern presidency,” namely the creation of the executive office of the president, further increased presidential powers (1993, 316). In this section I discuss significant changes affecting presidential power related specifically to environmental policy since the 1960s. Generally, scholars have focused on the rise of the “administrative presidency” (Nathan 1983). In the 1970s and 1980s, this meant the rise of power of the Office of Management and Budget (OMB) as a manager of regulation and the federal bureaucracy more generally (Lewis and Moe 2014, 395-400); expanding the size and scope of the staff of the White House and the executive office of the president (Burke 2014); and increased attention to the appointments of cabinet secretaries and subcabinet officials (Moe 1985). Orren and Skowronek noted that with the growth of the policy state, presidents in the 1970s “sharpened their claims that the Constitution anticipates an executive branch unified under a single head and that the president serves in that role as the tribune of democracy” (Orren and Skowronek 2017, 111).

When he created the OMB, they continued, Richard Nixon “sought to pull discretion from the agencies and bring action within the executive branch more fully in agreement with his own policy priorities and political coalition” (Orren and Skowronek 2017, 111). Jimmy Carter continued down this path by creating the Office of Information and Regulatory Policy (which became the Office of Information and Regulatory Affairs (OIRA)) within OMB. And finally, Ronald Reagan issued a pair of executive orders that sought to bring the regulatory apparatus of the administrative state under clearer presidential control. Executive Order (EO) 12,291, issued in 1981, required that agencies justify new regulations using a cost-benefit analysis. Agencies were also required to submit a regulatory agenda biannually. The EO explicitly stated that the

goals of the order include to “... increase agency accountability for regulatory actions, [and to] provide for presidential oversight of the regulatory process ...” Four years later Reagan issued EO 12,498 that provided increased structure to the regulatory planning process. This allowed the president and OMB to become involved in the regulatory process much earlier, increasing presidential control (Shanley 1992, 61-78). All subsequent presidents issued their own executive orders dealing with regulatory planning and management.

Beyond these efforts by presidents to gain more control over the administrative state, a number of other major changes occurred in the political environment, many of which contributed to increased congressional gridlock, especially after 1990 (Binder 2015). The main changes were: (1) increased partisanship, (2) increased interest group mobilization, and (3) a more pervasive media (Klyza and Sousa 2013, 19-31). Political scientists reported on intensifying partisanship, beginning in the 1970s. By the mid-2010s, Congress was as partisan as it had ever been (“House and Senate Means” 2016). This partisanship was both general, and specific to environmental policy (Layzer 2012). As measured by the League of Conservation Voters, the gap between Democrats and Republicans rose from 16 points in the Senate in 1974 to 92 points in 2017; in the House from 18.5 points to 89 points. This extreme partisanship was important for presidents in two ways. First, it made it more difficult for Congress to act, hence providing more space for presidential action. And second, presidential action itself grew more partisan. That is, the differences from Democratic to Republican administrations became greater. The entire U.S. political system has been affected by the tremendous growth of interest groups and their attention to the political process. This growth has, at times, provided the president with allies, but more generally has thickened the political space in which the president operates (Bosso 2005; Duffy 2003; Klyza and Sousa 2013, 24-27; Porter 2014, 504). And finally, the transformation of media over the last several decades has also altered the entire political environment. In certain ways this has connected to earlier trends (e.g., the president can “go public” now via twitter), but the pervasiveness of the media and the 24-hour news cycle have altered the space in which political action occurs (Porter 2014, 504-505).

Turning to the environment more specifically, two other changes in the political environment are worth noting. First, the nature of environmental problems in the 2010s are markedly different from those of the 1960s. The Clean Air and Clean Water Acts largely sought to control point sources (factories, motor vehicle exhaust); the Endangered Species Act sought to protect charismatic species like bald eagles and grizzly bears. The challenges today often focus on nonpoint sources deeply interwoven into our economy and society: runoff from farms, lawns, and parking lots; greenhouse gases emitted not just by industry but by (almost) every car and plane; endangered frogs living on private lands (Klyza and Sousa 2013, 28-29). And second, over time, a series of laws, institutions, and expectations dealing with conservation, natural resources management, and pollution have created a green state. This green state has been constructed in layers, reflecting interests and ideas from different times. New layers are frequently built atop existing, and sometimes contradictory, structures. Hence, “[C]ontradictions, conflict, and opportunity are built into the green state” (Klyza and Sousa 2013, 34, 31-41). For instance, President Clinton made use of a 1906 law to establish 19 new national monuments and to expand three existing monuments, covering nearly 6 million acres in total.

In closing, over the course of secular time, presidential power to make policy has increased. But the political environment in which the president operates is characterized by institutional thickening. As we turn to more specifics below, we will see a more active president, but one whose actions can be stymied. And the actions are often unstable, as presidential administrations from different parties work to unravel previous presidential policies.

#### **IV. PRESIDENTIAL POLICYMAKING POWERS**

Presidents have a variety of tools that they can use in order to influence or make policy. There is a broad literature on presidential power (e.g., Neustadt 1980), but in this section I will focus more specifically on presidential power and tools as related to environmental policymaking. In general, these are divided into four categories: (1) legislative agenda setting and persuasion; (2) judicial appointments and litigation; (3) the administrative presidency; and (4) direct policymaking through executive orders, discretionary statutory authority, and rulemaking (Klyza and Sousa 2013, 91-100).<sup>1</sup>

##### **The Legislative Presidency**

The president plays a formal legislative role through his signature to enact legislation or his veto to block, or seek to block, legislation. More informally, the president can play a major role as an agenda setter. Although modern presidents have generally not been significantly involved in the legislative process on the environment, they have played a role. Environmental laws, such as the Wilderness Act, the Land and Water Conservation Fund Act, and the Wild and Scenic Rivers Act, were important components of Lyndon Johnson's Great Society, which featured "faith in the role of government in protecting the public interest" (Turner 2012, 135, 38-41; Allin 1982, 172-177).

Nixon, president when Congress passed many major environmental laws, was primarily a partner with Congress rather than a leader on shaping the agenda and legislation (with the exception of his advocacy of the Endangered Species Act and his veto, subsequently overridden, of the Clean Water Act) (Daynes and Sussman 2010, 74-76; Graham 2015, 221-243). Carter was actively involved in the legislative process, challenging Congress on a series of water projects, working for the passage of the Clean Air Act Amendments, Superfund, and several energy laws (Daynes and Sussman 2010, 89-94; Graham 2015, 252-271). His most important legislative role was in passage of the Alaska Lands Act. When Congress failed to enact a law in 1978, Carter made use of the Antiquities Act to protect 56 million acres, essentially forcing Congress back to work until it passed the law in 1980 (Allin 1982, 223-256; Turner 2012, 164-176).

Reagan's legislative work on the environment was primarily through the budget, slashing EPA spending. This work pioneered what would become a major new pathway in environmental policy in the 1990s and beyond: using budget and appropriations to achieve policy goals, especially when Congress was unable or unwilling to make changes to fundamental laws.

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<sup>1</sup> There are other less direct ways that presidents can shape environmental policy, such as through presidential rhetoric (e.g., Peterson 2004 and Short 1989), that will not be discussed in this chapter.

Indeed, much of Reagan's presidency as it related to the environment focused on broad themes such as reducing the size of government and reducing regulation, rather than particular environmental policies (Daynes and Sussman 2010, 179-180). In his 1988 presidential campaign, then Vice President George H.B. Bush (Bush I) proclaimed that he would be the environmental president. When in office, he followed through on the promise by being significantly involved in the policy process leading to passage of the Clean Air Act Amendments of 1990. Indeed, Bush used substantial political capital in helping get the law enacted and it was one of the chief domestic policy successes of his presidency (Cohen 1995; Daynes and Sussman 2010, 160-164).

Clinton's major legislative work was defensive, primarily focused on Republican efforts to pass appropriations riders aimed at reducing environmental protections and reducing government spending on the environment and related agencies. As discussed below, Clinton moved aggressively into making policy through executive politics in his second term (Daynes 1999, 272-281, 290-300; Daynes and Sussman 2010, 107-109; Graham 2015, 312-327; Layzer 2012, 197-216, 227-231; Nie 1997). Despite a Republican majority in Congress for five-and-one-half years, Bush II was unable to get much accomplished in environmental policy. Efforts to amend the Clean Air Act were blocked by moderates in his own party. He did help gain the passage of the Healthy Forests Restoration Act (Daynes and Sussman 2010, 197-199; Layzer 2012, 283-286). Obama also had limited legislative success on the environment. During his campaign and first year in office, he spoke frequently of the importance of dealing with climate change. The House did pass legislation (American Clean Energy and Security Act), but the Senate never seriously considered parallel legislation. When the Republicans gained control of the House in the 2010 elections, the window for climate change legislation, or really any significant environmental legislation, closed for the Obama presidency. His most significant environmental legislative accomplishment was the American Recovery and Reinvestment Act (2009), which included over \$80 billion in clean and renewable energy funding (Klyza and Sousa 2013, 290-296).

In closing, all presidents since 1960 have had to play some legislative role on the environment as the issue became a significant part of the governmental agenda. In most cases, however, the president did not play a major role in the legislative process. The two major exceptions were Carter on the Alaska Lands Act and Bush I on the Clean Air Act Amendments. But as legislative gridlock set in, policymaking moved onto other pathways, and, as discussed below, the president played a major role on some of these pathways.

### **Judicial Appointments and Litigation**

In the era of increasing gridlock and partisanship, the courts are playing an increasing role in making environmental policy. Presidents have two essential tools to influence this judicial policymaking: (1) judicial appointments and (2) litigation strategy.

Environmental positions are usually not at the top of the list when presidents are vetting judges, but overall judicial philosophy on matters such as federalism, deference to agency decisions, property rights, and the reach of the interstate commerce clause have major implications for decisions on environmental policy. Environmental groups became much more engaged in the judicial appointment process, as did many other interests as the process became more politicized

in the 1980s and following (Klyza and Sousa 2013, 162-163). Do such appointments make a difference? A study comparing voting by all Carter and Reagan appointed federal court of appeals judges in cases dealing with the Clean Air Act and Clean Water Act from 1977-1990 found that Carter appointees supported regulatory burden-increasing outcomes 64 percent to Reagan appointees 52 percent. Conversely, Reagan appointees supported burden-reducing outcomes 46 percent of the time, with Carter appointees at 33 percent (Kovacic 1991). The significance of these decisions in changing policy is unclear. Other studies have come to different conclusions. For instance, a study of all D.C. Circuit decisions from 1985-1995 that remanded EPA rules for a “hard look” by the agency concluded that judges’ votes reflected the careful consideration of legal principles far more than ideology (Jordan 2001). At the Supreme Court level, decisions can have significant policy effects. Decisions such as *TVA v. Hill* (1978) on the Endangered Species Act and *Massachusetts v. EPA* (2007) on greenhouse gas emissions had far-reaching policy implications. Yet it is a stretch to connect these policy ramifications to presidential appointment decisions.

In terms of litigation strategy, this can take many forms. Presidents can choose not to defend policies put in place by their predecessors. This can be a common way to seek to change policy in a passive way. For instance, Bush II did not defend Clinton’s roadless rule against numerous legal challenges (Klyza and Sousa 2013, 96). Presidents can also decline to appeal decisions that go against the government but that favor their policy position. Another strategy is “sue and settle.” In such cases, the administration settles lawsuits in ways that support its policy preference, rather than waiting for a judge’s decision. Examples of such an approach include responses to lawsuits by both the Clinton and Bush II administrations on the Northwest Forest Plan and Bush II on wilderness study areas in Utah (Klyza and Sousa 2013, 163-174; Layzer 2014, 305-307).

### **The Administrative Presidency**

As discussed above, the administrative presidency is the concept that presidents make use of a variety of tools to achieve greater control of the vast administrative state in order to direct that state to act in ways favored by the president (Porter 2014, 513-517). Two major works focused directly on the administrative presidency and environmental policy. Robert Shanley (1992) explored the use of the administrative presidency by Presidents Reagan and Bush. He devoted attention to information collection and dissemination (although it was less focused on environmental policy specifically), executive orders (see more below, his main focus was on OMB and regulatory planning EOs), risk management, and enforcement. Shanley’s book, however, is best described as descriptive, without a theoretical focus to explain presidential behavior. Robert Durant (1992) concentrated more specifically on how Reagan made use of the administrative presidency to reorient and direct public lands policy (the book focused on Bureau of Land Management (BLM) lands in New Mexico). He concluded that on the ground, competing policy goals often conflicted with one another, casting doubt on the effectiveness of the approach overall.

Other particular tools of the administrative presidency include appointments, enforcement, and implementation strategies (Klyza and Sousa 2013, 94-96). Appointments at the top of the executive branch have long been a way for presidents to shape environmental policy. John F.

Kennedy and Lyndon Johnson's Interior Secretary Steward Udall, for instance, guided the department, and the presidents, in a direction favored by conservationists. Carter appointed a strong environmentally-oriented team to run Interior and the EPA. Upon assuming office, Reagan made strongly partisan and ideological appointments to the cabinet and subcabinet, notably in the environmental arena: James Watt (Mountain States Legal Foundation) to head the Interior Department, Anne Gorsuch as EPA Administrator, John Crowell from Louisiana-Pacific timber company as assistant agriculture secretary overseeing the Forest Service, and Robert Buford (a rancher) as director of the BLM. Watt and Gorsuch resigned amid scandals (Daynes and Sussman 2010, 180-184; Durant 1992, 34-41; Graham 2015, 279-292). Clinton continued what was becoming a pattern of Democratic presidents appointing environmentally-oriented secretaries and administrators and Republicans appointing industry-oriented people to such positions. Clinton's appointments included Carol Browner at EPA, Bruce Babbitt at Interior, George Frampton, former president of the Wilderness Society, as assistant interior secretary and then head of the Council on Environmental Quality (CEQ), and Kathy McGinty as head of CEQ (Daynes 1999, 266-268). Although Bush II's appointees did not have or gain the notoriety of Reagan's appointees, they represented the president in his efforts to tilt the green state in the direction he favored (Rabe 2007). The pattern continued under Obama and Trump, but Trump's appointees echoed back to Reagan's as strong partisans. His first EPA Administrator, Scott Pruitt, was dogged by alleged scandals and resigned after less than 18 months in office.

Presidents can also make use of different enforcement approaches to shift policy in certain directions. During the first year of the Reagan Administration, for instance, there was a 70 percent decline in civil actions forwarded from the EPA to the Justice Department. This decline suggested an implementation strategy friendlier to industry (Layzer 2012, 109-110; Shanley 1992, 109-129). Studies indicate an increase in EPA enforcement activity under Clinton, followed by a decline under Bush II. Bush II also adopted internal mechanisms to slow enforcement of the Endangered Species Act (Klyza and Sousa 2013, 95-96; Layzer 2012, 216-218, 266-270, 291-305).

Presidents have some flexibility in terms of how they choose to implement existing laws, and in some cases the use of this flexibility leads to policy change (Rudalevige 2016, 874-875). For instance, Clinton made use of this flexibility in crafting the Northwest Forest Plan, his response to the spotted owl crisis (Sousa 2011). Another example is setting the "social cost of carbon" for use in benefit-cost analysis. The value of this cost has huge ramifications for determining the benefits and costs of climate change regulations. Although the EPA used a range of costs and discount rates, under Obama the central rate used was \$50 per ton in 2030, while the figure under Trump is \$7 per ton. This obviously can have huge policy ramifications.

Presidents have been making use of the administrative presidency for decades. But with increased partisanship and a gridlocked Congress, who the president is, and the tools she or he can bring to bear in directing the executive branch, become increasingly important. Bringing the weight of the administrative presidency to bear can tilt the green state in the direction favored by development interests or environmental interests in non-trivial ways.



## Polycymaking

Beginning in the early 2000s, political scientists published a series of studies focusing on “direct presidential action.” In the environmental policy realm, this included executive orders, discretionary statutory authority, and rulemaking. These studies, in turn, led to others that sought to downplay the significance of such direct action alone (e.g., Dickinson and Gubb 2016). The political science literature was, on the whole, quiet on environmental policy (see Cooper 2002; Gitterman 2017; Howell 2003; Mayer 2001; Rudalevige 2014; Shull 2006; Warber 2006).

Jonathan West and Glenn Sussman compiled data on executive orders relating to the environment issued by presidents since FDR. From Kennedy through Clinton, the number of such orders ranged from 12 (Reagan’s second term) to 48 (Carter), representing 7 percent (both of Reagan’s terms) to 18 percent (Nixon’s incomplete second term). They further categorized the EOs as dealing with adoption, implementation, or structure. Most of them dealt with implementing laws, followed by structural (dealing with administrative organization), followed by the more significant adoption of new initiatives (West and Sussman 1999, 79-90). Bringing this analysis to the present, Clinton issued 45 EOs on the environment (12 percent), Bush II issued 30 (10 percent), Obama issued 24 (9 percent), and Trump, through October 2018, issued 9 (11 percent).

Several of the executive orders specifically on the environment delivered important policy change. Perhaps most significant was Clinton’s EO 12,898 in 1994, which required federal agencies to make environmental justice part of their missions. Although the implementation of the executive order has been widely critiqued as being ineffective, it is also the case that, given the lack of an environmental justice act, EO 12,898 is still the foundation of federal environmental justice policy (Cooper 2002, 106-112; Konisky 2015). Other significant orders included those by Nixon dealing with the CEQ and the implementation of the National Environmental Policy Act (NEPA) and the regulation of off-road vehicles on public lands; by Carter elaborating on the CEQ and NEPA administration, as well as protecting wetlands and floodplains; by Reagan dealing with property rights and regulatory takings (in addition to the OMB executive orders discussed above); and by Bush II expediting permitting and regulatory review of energy projects (Shanley 1992, 52-58, 78-83; Klyza and Sousa 2013, 93-94). Among Trump’s executive orders on the environment so far, the most important have initiated reviews of certain national monuments designated under the Antiquities Act and the Waters of the United States rule under the Clean Water Act, but neither have significantly altered policy in their own right.

A more powerful, yet more restrained, polycymaking tool available to presidents is to make use of discretionary authorities granted to the president by Congress. The most significant of these laws is the Antiquities Act (Kelso 2017). As noted above, Carter made aggressive use of the law to designate 56 million acres of federal land as national monuments. But these designations were part of a legislative process, and they were revoked as part of the Alaska Lands Act. It was Clinton, in the period of rising gridlock, who first made wide-ranging use of the law. Stymied by a Republican Congress and impeachment, Clinton turned to discretionary powers to make environmental policy. Beginning in 1996 with the Grand Staircase-Escalante National Monument, a 1.7 million acre monument in Utah, Clinton went on to designate a total of 19 new

national monuments and expand three others, covering nearly 6 million acres (Belco and Rottinghaus 2009; Klyza and Sousa 2013, 100-112). Although Bush II only used the Antiquities Act to designate two small monuments on land (totaling fewer than 100 acres), he made bold and innovative use of the law to designate four marine national monuments covering over 200 million acres (Morello 2009). Obama followed the pattern of both of his predecessors by creating 28 new and expanding two land-based national monuments totaling nearly 5.7 million acres and creating one new and expanding two existing marine national monuments covering nearly 550 million acres (Eilperin and Dennis 2016). This presidential policymaking under the Antiquities Act provoked responses in Congress, but gridlock prevented any movement there. Trump, however, ordered a review of all monuments created since 1996 and moved to substantially decrease the size of Grand Staircase-Escalante and Bears Ears. It is unclear if he, or any president, has the authority to substantially reduce an existing monument and his actions are being challenged in court. It is clear, however, that with Congress unable to act on land protection, or limiting presidential power to do so, presidents—especially Democratic ones—are making use of the Antiquities Act to protect land.

Beyond the Antiquities Act, Nixon made use of statutory discretion to create the EPA, the agency that administers the U.S. pollution control laws, and the National Oceanic and Atmospheric Administration (NOAA), which oversees climate, coastal, and marine policies. Relying on the Reorganization Act of 1946, Nixon delivered Reorganization Plans Number 3 (EPA) and 4 (NOAA) in 1970 to reorganize existing agencies and programs into these two new agencies (Andrews 2006, 229, 457). Although such discretionary laws are extremely rare, when they are available they give the president enormous policymaking power.

The final technique of direct policymaking used by presidents is rulemaking. As noted above, presidents have been using the OMB and OIRA since the 1970s in order to gain increased control over the entire rulemaking process. But in addition to that, as gridlock intensified in Congress, presidents have sought to use rulemaking to make policy that could not be made through Congress (Klyza and Sousa 2013, 96-100). Clinton's most sweeping policy achieved through rulemaking was the "roadless rule." The rule protected 58 million acres of national forest lands from roadbuilding. Adopted in 2001, the rule survived numerous lengthy legal challenges and rulemaking efforts by Bush II to fundamentally alter it. But in 2017 the final (?) court challenge to the rule came to an end, and the roadless rule stands as a major policy change achieved through rulemaking (Klyza and Sousa 2013, 112-123). When Bush II failed to get Congress to amend the Clean Air Act to further his policy goals, he turned to rulemaking. Perhaps his most high profile effort was to alter the threshold of "new source review" for existing point sources, alterations that would have exempted almost all facilities from the need to install new pollution control equipment when they updated or replaced their equipment. The EPA adopted the new rule, but it was blocked by the Court of Appeals for the D.C. Circuit. Judges there rejected the new regulation as a violation of the Clean Air Act. Bush II failed, but what he sought to do was make significant policy change through rulemaking (Klyza and Sousa 2013, 123-135; Layzer 2012, 275-283).

Almost all of the Obama administration's climate change policy came about through rulemaking (Klyza and Sousa 2013, 298-301). When Congress failed to pass a climate change bill, and in response to the Supreme Court's ruling in *Massachusetts v EPA*, the administration began a

series of rulemakings to reduce greenhouse gas emissions, first from motor vehicles by increasing fuel efficiency standards and later from utilities. It was this latter rule, the Clean Power Plan, that was the administration's most significant environmental policymaking through rulemaking. Based on relatively little statutory guidance, the EPA developed a complex plan for states to meet greenhouse gas reduction goals from fossil fuel burning utilities, leading to over a 30 percent reduction in such emissions by 2030. Although enjoined by the courts, and in the process of being replaced by the Trump administration, the Clean Power Plan demonstrated just how far presidents could now take rulemaking in the service of policymaking. Indeed, over the last several decades, rulemaking has become more and more important for presidents—both gaining greater control over rulemaking from the agencies throughout the executive branch and employing it to make policy once the purview of Congress.

In the realm of environmental policy, presidents have become more significant policymakers since the 1960s. Although there has been some significant use of executive orders, their significance for policymaking has been eclipsed by the discretionary power afforded the president by the Antiquities Act, and even more significantly, by the use of rulemaking. Presidents have made expansive use of rulemaking, often relying on broad discretion in certain statutes, from the Clean Air Act to the Forest Service Organic Act.

The president is a major actor in making environmental policy, especially in our current era of a gridlocked Congress. That gridlock has lessened the president's role in legislative policymaking, although a commitment of significant political capital to an issue like climate change may help to break through it. The tools of the administrative presidency and interacting with the judiciary tend to be rather blunt ways to shape policy. In the use of discretionary authority and rulemaking, however, the president has become arguably the major environmental policymaker in the political system.

## **V. CONCLUSION**

The Constitution grants the president significant powers that can be used to make environmental policy, namely as a partner with Congress in the legislative process and as head of the executive branch. Indeed, Theodore Roosevelt made great use of these tools to make significant and substantial environmental policy in the early twentieth century. As secular time has passed since then, presidents' policymaking power has grown simultaneously more powerful and more constrained. Presidents can make use of the administrative presidency and technology to further their goals, but confront a much thickened policymaking terrain. In the last several decades, as legislative gridlock has taken hold and partisanship has intensified, presidents have been turning to their policymaking powers more frequently. From using rulemaking and the Antiquities Act to protect land to rulemaking to make or unmake climate change policy, recent presidents rather than Congress have become the central institution of policymaking. This has two important implications for environmental policy. First, who the president is matters now more than ever. The policy preferences of the president and her or his party carry much more policy weight during an era of legislative gridlock than in the 1960s and 1970s. And second, relatedly, much of this presidentially made policy is contingent. Although it may be unlikely that Congress will overturn or alter this policy, judges can and will, and future presidents may. So despite the legislative gridlock, environmental policy today is especially fluid and provisional. Clinton

issued a rule to protect over 50 million acres, courts in various regions of the nation rejected and upheld the rule, Bush II sought to replace the rule, judges weighed in again. The fate of millions of acres was in a state of flux for over a dozen years. A similar story is currently unfolding in climate change policy. Obama created a regulatory framework under the Clean Air Act, only to have the courts and Trump hold up and seek to rollback these policies. It would seem that our current secular time will continue to be one of contingency in the realm of environmental policy.

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