

Executive Orders Renew Focus on Environmental Justice

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On February 11, 1994, President Clinton signed an Executive Order addressing “Environmental Justice in Minority Populations and Low-Income Populations.”¹ Nearly 27 years later, on his first day in office, President Biden signed an Executive Order titled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”² President Biden was not finished addressing inequity regarding environmental impacts, however. On January 27, 2021 President Biden signed another Executive Order, “Tackling the Climate Crisis at Home and Abroad,” which includes provisions on environmental justice.³ That Biden Order amends the Clinton Order in part. This article will discuss these Executive Orders.

What Is Environmental Justice?

The term “environmental justice” is abstract, but it boils down to the concept that environmental harms should be fairly distributed rather than disproportionately born by minority and low-income communities. A bill before Congress in 2008 defined it as follows:

The term environmental justice means the fair treatment and meaningful involvement of all individuals regardless of race, color, national origin, educational level, or income with respect to the development, implementation, and enforcement of environmental laws.⁴

Therefore, environmental justice is not just about unequal exposure to contaminants. It is also about the ability of people to participate in the planning and enforcement regarding the environmental harms and stressors that may affect them.

What Is an Executive Order?

An Executive Order (EO or Order) is issued by a President to direct executive agencies to take certain actions consistent

with the President’s policies. The President has the authority to issue an EO based on the U.S. Constitution, which in Article II, Section 1, states that “the executive Power shall be vested in a President of the United States of America.” That means the President may direct actions of the executive branch of the government, which include departments, agencies, bureaus, and offices, and all of their employees. However, that authority has limits. To be lawful, the EO must be consistent with the will of Congress, as a President does not have the authority to create a law – only Congress can legislate. Thus, an EO can redirect executive agency priorities that are consistent with existing laws.

Executive Order Limitations

While EOs are easy to issue, they are hard to enforce. For example, any President can revise or repeal any EO literally by the stroke of a pen. Also, the tools to force an agency to comply are few. The President, of course, can direct employees to comply, being the boss of all executive agency employees. However, others cannot force agencies to follow an EO. This is because Executive Orders typically do not provide for judicial review, meaning a court cannot order an agency to follow an EO’s terms.

Executive Order 12898

In 1994, President Clinton signed EO 12898 to balance some inequities faced by minority and low-income communities. The EO directed every federal agency to make “achieving environmental justice part of its mission” to the “greatest extent practicable.”

A memorandum issued by President Clinton at the time of signing explained that the purpose of the EO 12898 was to focus federal attention on the issue of environmental justice. It addressed environmental justice’s two underlying issues: the unequal adverse environmental impacts on underserved communities; and

the ability of those communities to be involved in government decision making affecting them. The Order intended “to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment.”⁵

According to EO 12898, federal agencies must identify and address the fact that minority and low-income populations experienced “disproportionately high and adverse human health or environmental effects” from government programs and policies. To make that happen, each agency was required to develop a strategy to enforce health and environmental laws in areas with minority or low-income populations, increase public participation, and improve research and data collection related to the health and environment of those populations. Going forward, federal agencies must conduct any activities that would substantially affect human health or the environment in a way that includes participation from disadvantaged communities and limits the adverse effects on those groups. The EO also set up an Interagency Working Group and required reports to the White House on agency progress toward the goals.

Language at the end of the EO makes clear that judicial review of the Order was not available: “This order ... shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person.”

Executive Order 13985

On January 20, 2021, President Biden signed EO 13985, an Order with broader goals than only environmental justice, yet still advancing the concept. Executive Order 13985’s main goal was for the federal government to have a comprehensive approach to advance equity for all, “including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”⁶

The Order established some fundamental principles to achieve parity. It pointed to “entrenched” policies of the government that pose barriers for underserved communities to benefit fairly. The Order defined an underserved community as one with “populations sharing a particular characteristic ... that have been systematically denied a full opportunity to participate in aspects of

economic, social, and civic life.” The Order directed federal agencies to allocate resources to address the historic failure to invest “sufficiently, justly, and equally” in underserved communities.

As part of the mandate for the heads of federal agencies to act, EO 13985 required them to consult with members of communities that have been historically underrepresented. This harkened back to EO 12898’s directive that agencies increase public participation among minority and low-income communities. In language similar to that found in EO 12898, EO 13985 stated that it did not create a right enforceable by law.

Executive Order 14008

A week after signing EO 13985, President Biden signed EO 14008 addressing climate change. Sections of that EO explicitly addressed the issue of environmental justice. Notably, the Order amended EO 12898, expanding its reach. EO 14008 made environmental justice a priority in the actions of the federal government, identifying economic and environmental justice as “key considerations in how we govern.” As with other EOs, it did not create a right to sue to enforce its terms.

EO 14008 created a White House Environmental Justice Interagency Council (EJ Council) with the goal of developing a strategy to address current and historic environmental injustice by consulting with local environmental justice leaders. The EJ Council also was required to evaluate EO 12898 and make recommendations. That report was issued in May 2021.⁷

The EJ Council’s report recommended 24 pages of changes to EO 12898, vastly exceeding the length of the original 2,100-word Order. Those changes included giving environmental justice a definition, which is:

the just treatment and meaningful involvement of all people regardless of race, color, national origin, or income, or ability, with respect to the development, implementation, enforcement, and evaluation of laws, regulations, programs, policies, practices, and activities, that affect human health and the environment.

It also defined “meaningful participation” as requiring that agencies consider potentially affected peoples’ viewpoints in the decision-making process. Under the

recommendations, agencies would be required to take affirmative steps to establish meaningful participation, such as:

- seeking and facilitating involvement of potentially affected populations;
- providing appropriate communication sensitive to culture, language, and disabilities;
- considering factors affecting participation such as transportation and location; and
- making technical assistance available to increase participation.

The recommendations did not suggest changing the language regarding judicial review of EO 12898.

Application of EO 12898

It is too early to determine the impacts of President Biden's EOs on environmental justice. However, the impact of EO 12898 has endured. After all, until President Biden, none of the three Presidents following President Clinton amended or revoked EO 12898. Nevertheless, true to its terms, enforcement of the Order is outside of the courts' domain, perhaps limiting its effectiveness.

For example, in 2021 a federal court in Kentucky considered a claim that the Department of Veterans Affairs (VA) failed to evaluate the environmental justice impacts of siting a hospital as required under EO 12898.⁸ In particular, the community bringing the suit was concerned about noise impacts from having the hospital nearby, which was in the greater Louisville, KY area.⁹ The court noted that EO 12898 did not authorize a right to judicial review, but that courts still considered whether the goals of the Order were assessed under other laws, such as the National Environmental Policy Act (NEPA), which requires agencies to take a hard look at impacts affecting health and the human environment when planning federal projects and actions. Additionally, an agency's environmental justice review becomes part of the administrative record of decision and courts may consider whether the review was consistent with the standard set out in the Administrative Procedure Act, i.e. not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁰

The *Crossgate* court found the VA considered environmental justice issues when choosing where to site

the facility, "specifically with respect to minority populations and low-income populations." In its evaluation, the VA found that no community of concern (meaning minority or low income) was located within a 1-mile radius of the VA hospital location at either alternative site, "thus the environmental or health impacts from construction or operation of the medical center would not be disproportionately borne by any low income or minority communities."¹¹ The court held that the VA had demonstrated compliance with its environmental justice obligations via this analysis.

In 2020 a different court considered EO 12898. The issue in that case was whether the U.S. Air Force had adequately considered the impacts on environmental justice communities when choosing cities as permanent sites for conducting Urban Close Air Support training missions. The environmental advocates who brought the lawsuit claimed that low-income communities were more likely to be adversely affected by noise from the jets due to inadequate housing. In this case, unlike in *Crossgate*, the court found the agency's reviews under NEPA and EO 12898 were flawed. The Air Force had concluded that no citizens would be adversely affected by noise impacts from its training, and therefore, minority and low-income citizens would not be disproportionately impacted. After noting that there was no cause of action created by the EO, the court rejected the Air Force's efforts regarding disadvantaged communities: "the USAF's consideration of environmental justice impacts are too cursory."

Making Environmental Justice into Law

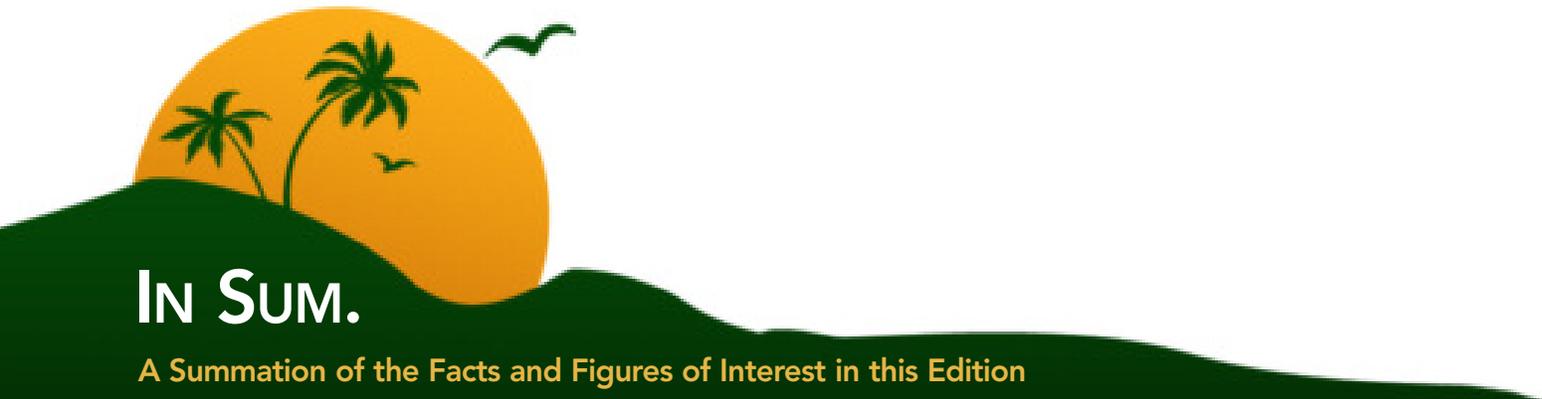
Thus, it is fair to say that EO 12898 has remained intact, albeit unevenly applied, over nearly 30 years. When subsequent administrations did not necessarily require strict compliance with its terms, Congress has taken note. For example, in 2008, the Senate Minority Report on the bill S.2549, "The Environmental Justice Renewal Act," reported that the EPA had not fully implemented EO 12898 and that the National Environmental Justice Advisory Council met half the amount of times as it had under the Clinton Administration.¹² One purpose of S.2549 was to "ensure that every Federal Agency take environmental justice into account when carrying out activities and programs," in effect, making the provisions of EO 12898 enforceable under law. The bill was not brought to a vote.

More recently, the Senate tried again to give environmental justice evaluations the force of law. The “Environmental Justice for Law Act” was introduced in March 2021.¹³ In its findings the bill describes agencies as “inconsistent” regarding their obligations under EO 12898 to update strategic plans for environmental justice and report on their progress in enacting those plans. It is pending before the Senate Committee on Environment and Public Works. 🐦

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Endnotes

1. [Exec. Order 12898](#) (Feb. 11, 1994), 56 Fed. Reg. 7629 (Feb. 16, 1994).
2. [Exec. Order 13985](#) (Jan. 20, 2021), 86 Fed. Reg. 7009 (Jan. 25, 2021). This Order also revoked Exec. Order 13958 of Nov. 2, 2020, which established a Presidential Advisory 1776 Commission.
3. [Exec. Order 14008](#) (Jan. 27, 2021), 86 Fed. Reg. 7649 (Feb. 1, 2021). See “Securing Environmental Justice and Spurring Economic Opportunity” in Sections 219-223 of EO 14008.
4. The Environmental Justice Renewal Act, [S.2549](#), § 2(5) (110th).
5. [President William J. Clinton, Memorandum on Environmental Justice](#) (Feb. 11, 1994).
6. [Exec. Ord. No. 13985](#) (Jan. 21, 2021), 86 Fed. Reg. 7009 (Jan. 25, 2021).
7. White House Environmental Justice Advisory Council, [Final Recommendations: Justice40 Climate and Economic Justice Screening Tool & Executive Order 12898 Revisions](#) (May 21, 2021).
8. [City of Crossgate v. U.S. Dep’t of Veterans Affairs](#), 2021 WL 1069041 (W.D. Ky. March 18, 2021).
9. According to Wikipedia, Crossgate, KY has approximately 251 people, 96% white, with a median household income of \$66,000.
10. 5 U.S.C. § 706(2)(a).
11. [City of Crossgate](#), 2021 WL 1069041, *15 (internal quotations omitted).
12. [S.2549](#) (110th).
13. [S.872](#) (117th) (March 18, 2021).



IN SUM.

A Summation of the Facts and Figures of Interest in this Edition

- ★ *Year the last slave ship landed in United States (in Mobile, AL):* **1860**

- ★ *Year President Clinton issued an Environmental Justice Executive Order:* **1994**

- ★ *Year President Biden issued an Executive Order about Environmental Justice:* **2021**