



Presidential Climate Action Project

Climate Action Brief: The Use of Presidential Power

Among the issues the Bush Administration will leave for the next president is a continuing controversy about the use of presidential power.

A number of President Bush's actions – among them his order directing warrantless domestic surveillance and his use of signing statements as a virtual line-item veto of Congressional intent – have led to protests that the President has violated the boundaries of executive authority. The American Bar Association criticized President Bush's use of signing statements as “contrary to the rule of law and our constitutional system of separation of powers.”¹

This legacy could lead the Congress, the courts and the voters to push the presidential power pendulum to the opposite extreme, handcuffing the executive branch even in areas where its powers are clear. Yet the 44th President will need all the tools he or she commands to deal with the serious problems the next administration will have to tackle, including global climate change.

To address this issue, the Presidential Climate Action Project commissioned the Center for Energy and Environmental Security at the University of Colorado School of Law to analyze presidential powers. The result is a 200-page analysis based on a review of 140 legal cases and numerous scholarly articles.[#]

In its analysis, the Center notes that America's past presidents have interpreted their authority differently. President William Taft believed the president could not do anything without specific permission from Congress. Theodore Roosevelt was more willing to be assertive under the “stewardship theory” – the idea that presidents have an affirmative duty to pursue the common good unless prevented by a direct constitutional or legislative prohibition. Franklin D. Roosevelt's philosophy was the most expansive. “In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility and I will act,” he told Congress in his Labor Day address of 1942.

As it turned out, FDR did not need to engage in a power struggle with the legislative branch. He was a popular president in a time of crisis. He asked Congress to delegate to him the new authority he felt he needed to deal with the Depression, and Congress did so. As a result, FDR became a strong and enabled leader with the full consent of the legislative branch at a time when strong leadership was

critical. That is the precedent the next President should follow in dealing with energy, the climate and the economy.

The President will have many traditional tools at his or her disposal, including executive orders, directives, proclamations, signing statements, national security directives, executive communications with Congress, the ability to call Congress into special session, the veto, the execution of treaties and the creation of executive agreements, a type of international agreement that falls short of a formal treaty and does not require Senate ratification. And, of course, the President has the bully pulpit.

In regard to climate change, the next administration's authority includes the power to:

- Regulate greenhouse gas emissions under the Clean Air Act;
- Institute a carbon cap-and-trade regime as EPA did for SO₂ and NO_x in 1995;
- Propose and champion national goals for energy efficiency, renewable energy use, greenhouse gas reductions and other critical objectives;
- Enter into executive agreements to collaborate with other nations on research and policies that will reduce energy vulnerability and greenhouse gas emissions;
- Restore the federal government's capacity for climate action by appointing highly qualified experts in climate science and policy to key government leadership positions;
- Rescind Executive Order 13422, in which President Bush established political oversight of federal science;
- Restore specific greenhouse gas reduction goals for federal agencies, which were eliminated in another executive order issued by President Bush.

But like FDR, the next President may need new powers to deal with climate change and the other urgent issues. As the Center for Energy and Environmental Security notes, "One of the key actions to be taken by a future president to address climate change policy would be to work with Congress for the appropriate and necessary delegations of authority that will give him or her the power to act with flexibility, without delay and with certainty within the framework of the Constitution."

As in FDR's era, the 44th President will be most able to lead boldly on climate change when there is a clear mandate from the voters that the time has come for strong national action. As University of Chicago Professor William Howell has noted, "Not once in the modern era have the courts overturned a president who enjoys broad-based support from Congress, interest groups and the public."

Creating that mandate for strong but legitimate use of presidential power is one of the key responsibilities facing the presidential candidates in this election season – and one of the key challenges for the many organizations working to build grassroots support for climate action.

This brief was prepared by the nonpartisan Presidential Climate Action Project at the University of Colorado Denver. PCAP, which is developing a 100-day climate action plan for the next President of the United States, issues briefs from time to time for the use of the presidential candidates as they consider policies to deal with climate change. Details are available at www.climateactionproject.com.

ⁱⁱ*The Boundaries of Executive Authority: Using Executive Orders to Implement Federal Climate Change Policy,*
Center for Energy and Environmental Security
http://www.climateactionproject.com/docs/CEES_Report_1_2008.pdf