

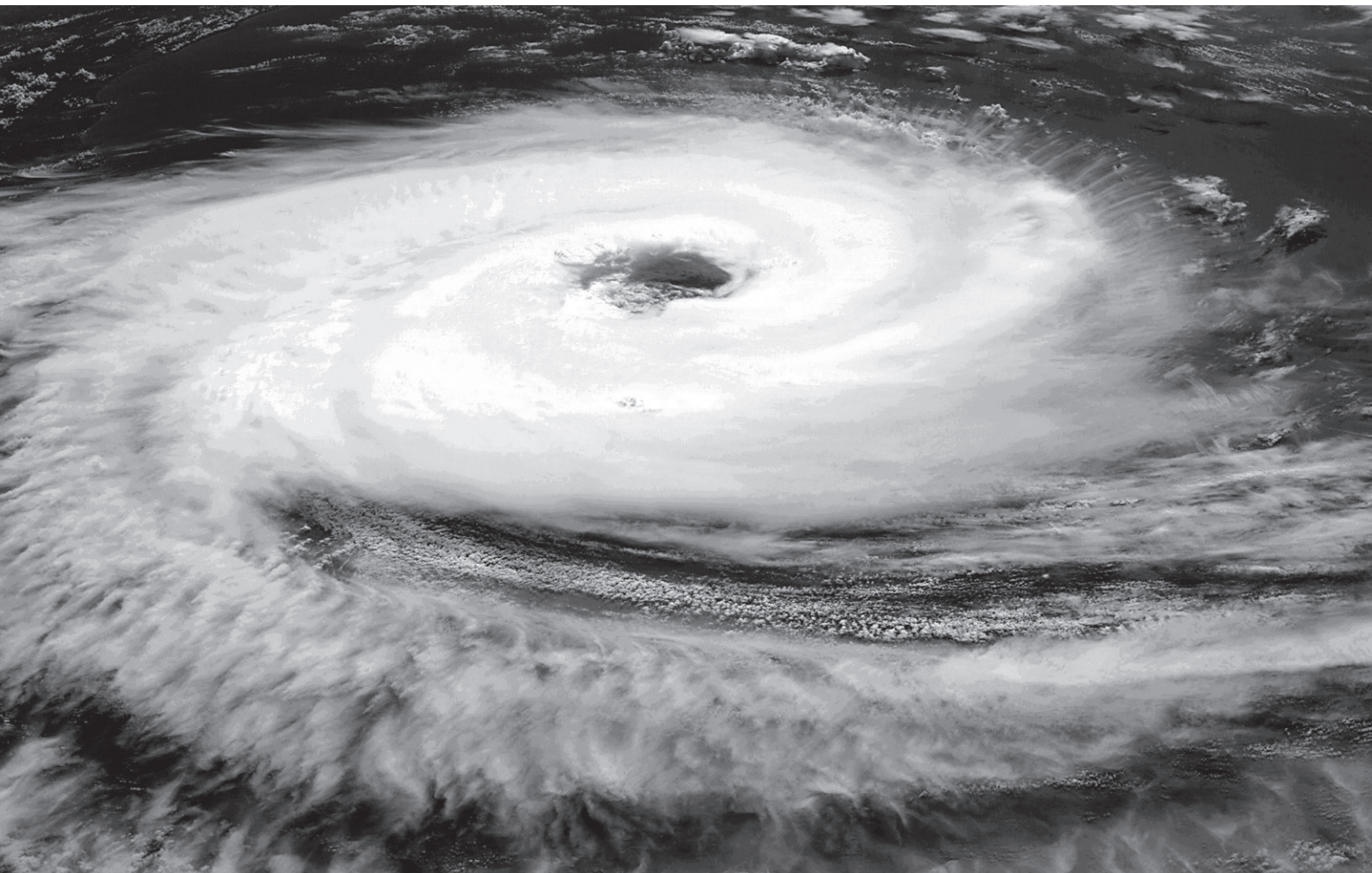
OBAMA'S CLIMATE POLICY

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ADDRESSING CLIMATE CHANGE
THROUGH EXECUTIVE ACTIONS

Anna Kronlund

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ADDRESSING CLIMATE CHANGE THROUGH EXECUTIVE ACTIONS



Anna Kronlund
Researcher
The Finnish Institute of International Affairs

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- President Barack Obama's recent action to address climate change indicates that it will be one of the second term's topical questions. The new climate change action plan introduced by Obama in June 2013 is composed of various executive actions and based on three pillars: reducing carbon pollution; leading international attempts to approach climate change; and preparing the US for the effects of climate change.
- The measures already adopted on climate change provide an opportunity to examine the possibilities that the president has to implement his climate action plan through executive powers without Congress. The decision to advance the political agenda through executive decisions is at least partly attributable to the partisan gridlock currently gripping US politics.
- The reach and effect of the executive decisions to address climate change outlined in the climate action plan are yet to be determined. The topical question seems to be whether the actions already taken offer hope that the US will reach its target to reduce carbon pollution and slow the effects of climate change, or whether legislative action from Congress will be called for.
- Although climate change is now being addressed through executive actions that do not require new legislation from Congress, this does not rule out the possibility that legislation will be passed in the future.

The Center for US Politics and Power
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Introduction

Due to the (anticipated) lack of legislative response from Congress, President Barack Obama decided to take action on climate change that doesn't require the backing of Congress. The climate action plan was duly launched in June 2013 and was followed by a Presidential Memorandum directing the Environmental Protection Agency (EPA) to provide carbon pollution standards for both new and existing power plants (issued June 25, 2013). The EPA, which is to write regulations in accordance with laws such as the Clean Air Act (1970) and the Clean Water Act (1972), was established by President Nixon in 1970. Details on the process by which federal agencies draft and issue regulations are provided in the Administrative Procedure Act (1946).

The difficulties President Obama has been experiencing in implementing his legislative agenda through the 113th Congress have marked a recent trend in US politics. The current situation, which has been variously defined as a stalemate or a political gridlock, is at least partly attributable to the divided government in which the Republicans are the majority party in the House of Representatives while the Democratic Party controls the White House and the Senate.

Lately, Congress has come up against criticism for becoming a more partisan and polarised institution, in which the parties are criticised for voting as a block as in the parliamentary system of government. The data indeed show that the percentage of party unity votes in relation to the total number of votes seems to be increasing.¹ With political biases

becoming more evident, the question to consider, however, is to what extent the current claim of partisanship is exceptional when set against a history of Congress and party polarisation. Arguably, the current gridlock in the US political system does not mean that no legislation will be passed.

In light of the above, the aim of this paper is twofold: to consider the power problematique in US politics and to examine Obama's actions to tackle climate change with the powers vested in him as president under the existing laws and the Constitution, rather than seeking the backing of Congress. To this end, the paper examines the possibilities that the president has to implement his political agenda through executive actions.²

Addressing climate change through executive actions

In this year's State of the Union Address, President Obama cited climate change as a challenge that must be resolved for the future. The speech indicated that if Congress does not take the necessary action, the president will proceed through executive actions. Arguably, the administration sees climate change as a challenge that does not end with the partisan impasse. The new climate change action plan introduced by Obama in June 2013 is composed of various executive actions. In essence, the potential for the climate action plan to cut carbon pollution lies with the EPA's authority to issue regulations under the Clean Air Act. In the Presidential Memorandum (issued on June 25, 2013), Obama referred to his authority under the laws of the US and the Constitution to direct the EPA to establish standards for carbon pollution for both new and existing power plants.

The executive authority that is the focus of this paper can be implemented through presidential actions such as executive orders, presidential proclamations or presidential memoranda. It seems that the difference between a presidential memorandum and executive orders and proclamations is not a matter of substance but rather one of form. Each of

1 See Table 8-3, *Vital Statistics on Congress* provided by the Brookings Institution together with the American Enterprise Institute at: <http://www.brookings.edu/~/media/Research/Files/Reports/2013/07/vital%20statistics%20congress%20mann%20ornstein/Vital%20Statistics%20Chapter%208%20-%20Political%20Polarization%20in%20Congress%20and%20Changing%20Voting%20Alignments.pdf>. As the Pew Research Center's study *Partisan Polarization Surges in Bush, Obama Years Trends in American Values: 1987-2012* indicates, the partisan differences have become more pronounced, but the phenomenon is multidimensional and issue-based, and can be examined from various angles. <http://www.people-press.org/2012/06/04/partisan-polarization-surges-in-bush-obama-years/>.

2 This paper is the first publication of the Center for US Politics and Power, which works in conjunction with the Global Security Programme at FIIA and was established in 2013 with the support of the Jane and Aatos Erkkö Foundation.

the three aforementioned presidential instruments can be used to manage the actions of governmental agencies and officials. (Executive orders and proclamations are largely used also “to achieve policy goals” or “to outline a policy view intended to influence the behavior of private citizens”.) The use of executive orders is nothing new, and can be traced back to the beginning of the Republic. Executive orders, proclamations and memoranda can have the “force and effect of law” when they are published and directed under a legitimate claim of authority.

The Constitution does not provide any definition of these powers nor grant the president the authority to issue them. The power of the president to implement and execute these presidential actions originates from the implicit statutory and constitutional authority. In this respect, focal constitutional provisions are detailed in Article II, which denotes that “the president shall be the Commander in Chief”, “the executive powers shall be vested in a President”, and that the president “shall take Care that the Laws be Faithfully executed”.

The executive actions under consideration here are reviewable by Congress and the court. In the *Youngstown vs. Sawyer* Supreme Court case opinion (1952) it was emphasised that the authority to issue executive orders “must stem either from an act of Congress or from the Constitution itself”. Further, Congress can proceed to terminate the authority upon which the action is claimed or to repeal the action if it is not constitutionally based. Alternatively, Congress may use its appropriations power to circumscribe the influence of executive orders. The latter can also be revoked or repealed by subsequent administrations.³

In short, the actions that could be detailed in regard to the climate action plan are, for instance, actions through federal agencies and departments (regulations, standards and policies), diplomatic actions and the president’s budget for the fiscal year 2014. It seems, however, that policy actions to address climate change would be on firmer ground if codified through legislation ruling against the possibility

of their being revoked by a subsequent administration. Congress seldom returns to repeal the laws it has passed, and this would require the majority approval of both Houses.

As discussed above, the climate change issue can be tackled by using executive powers, but they will only extend so far. The fact that the climate action plan was now outlined using presidential powers in particular does not rule out the possibility that Congress will legislate on the issue in the future. Ostensibly, in the contemporary situation of a divided government, passing legislation on climate change should garner support across party lines.

A clearer description of the current state of affairs calls for a brief outline of some of the main developments in climate change through executive actions during the first Obama administration. In spring 2009 the Interagency Climate Change Adaptation Task Force was established, and in autumn 2009 the Federal Leadership in Environmental, Energy and Economic Performance (13514) executive order was issued instructing the task force to provide recommendations on how federal programmes and policies can better face the challenge of a changing climate. The first Obama administration also committed itself to reducing greenhouse gas emissions by 2020 in accordance with the agreement reached in the Copenhagen Conference in 2009. Other actions that could be mentioned include, for example, the establishment of the fuel economy standards and promotion of the use of renewable energy. While the actions taken during the first presidential term have facilitated progress to some extent, the recently established climate action plan continues the efforts to promote the goals and provides new means for achieving them.⁴

During Obama’s first term, Congress seemed to possess the momentum to pass new climate change legislation. The House passed the American Clean Energy and Security Act of 2009 (also known as the Waxman–Markey Bill), with a close vote of 219 to 212 (both Republicans and Democrats opposing). The situation, in which both the majority of Congress and the White House were controlled by Democrats, seemed to have been the perfect time to pass the bill,

3 On executive orders in detail, see CRS report for Congress, *Executive Orders: Issuance and Revocation*. (Vanessa K. Burrows, March 25, 2010). <http://www.fas.org/sgp/crs/misc/RS20846.pdf>.

4 For further details see <http://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf>.

but the momentum was lost due to the lack of votes in the Senate. Theda Skocpol's report, prepared originally for the Rockefeller Foundation, *Naming the Problem: What It Will Take to Counter Extremism and Engage Americans in the Fight Against Global Warming* (2013), explores the obstacles to the cap-and-trade legislation (and thus indicates why the momentum waned in Congress), including aspects such as the political and economic circumstances, the leadership skills of President Obama, interest groups and lobbying, the Tea Party movement, party reflections, popular opinion, and the GOP opposition. According to the report, some Democrats (in both Houses) from states reliant on coal-fired electricity production and coal and oil states were not going to vote on the cap-and-trade legislation.⁵ The report aptly indicates the complicated nature of debates on climate change in the US.

While presidents usually enjoy better success in their own party, it does not necessarily mean that the party (and Congress if it holds the majority) is willing or able to implement the president's agenda. The parties can, particularly in a time of divided government, use parliamentary tactics to influence the legislative procedures, and thus the legislative outcomes, in their favour. The members can filibuster or delay bringing the issues to the floor and to a vote. It seems that the negative agenda is becoming more prevalent in Congress, in other words keeping the items off the agenda. Filibustering has increased along with the rise of partisanship in Congress since the 1970s. Even though filibustering is traditionally a Senate practice, the House has also historically used parliamentary means to delay the legislative process and ultimately to paralyse the process altogether.⁶

President Obama's climate action plan

Europe has led the efforts to slow climate change, but the US has recently intensified its actions on climate change, as President Obama pointed out in his speech at the Brandenburg Gate in mid-June

2013. The climate action plan details the US effort to address climate change. The plan is essentially designed to reduce carbon pollution, to prepare the US for the effects of climate change and to lead international initiatives to approach climate change. It seems that the EPA's authority to issue regulations for both existing and new powers plants will be meaningful for reaching the 17% target of reducing emissions in accordance with the Copenhagen Accord.⁷

An important aspect of the climate change discourse is the ratification of international agreements and treaties. The treaties are one area where the president needs to work in cooperation with the Senate. According to the Constitution (Article II, Section 2), the president can conclude treaties with the "advice and consent of the Senate" provided two-thirds of Senators present concur. According to the climate action plan, the international efforts to address climate change would mean both bilateral and multilateral modes of collaboration with the major economies and the main emerging economies. The US is involved in the international agreements and climate change negotiations, such as the UN Framework Convention on Climate Change.

However, as mentioned in the plan, any further international agreement must be flexible and comprehensive, but also ambitious with both developed as well as emerging economies being parties to the agreement. Bearing in mind that the US has signed but not ratified the 1997 Kyoto Protocol, it seems that the US has not been willing to participate in agreements which do not secure equivalent commitments for developed and developing countries. The Senate passed the Byrd-Hagel Resolution in 1997 claiming that the US should not sign any agreement (Kyoto) setting the commitment to reduce greenhouse gas emissions which does not secure similar commitments for developed and developing countries.

5 The report is available at: http://www.journalism.columbia.edu/system/documents/695/original/Skocpol_CapTrade_report_January_2013.pdf.

6 Koger, Gregory. 2010. *Filibustering: A Political History of Obstruction in the House and Senate*. Chicago: Chicago UP, 3-7.

7 See <http://www.whitehouse.gov/the-press-office/2013/06/19/remarks-president-obama-brandenburg-gate-berlin-germany>. See also climate action plan, <http://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf>; Presidential Memorandum, June 25, 2013 <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

Challenges in implementing a more comprehensive climate change policy through legislative action

It seems that in the current political context there are at least three factors preventing climate change from being addressed in a more comprehensive manner. Two of these are closely related to Congress. Climate change is not likely to be addressed in the near future through legislation not only because of the lack of a bipartisan approach in Congress, but also because of other pending political issues such as immigration reform or budget issues dominating the legislative agenda and calendar.

A third factor, more closely related to the executive branch, is that climate change was not really as topical in the recent presidential campaign as it was in the first one, and consequently a clear mandate to address the issue seems to be lacking. In this context, other factors worth mentioning could be the above-discussed partisanship, but also the obscured climate change negotiations, the slow economic recovery, and polarised news coverage of climate change.⁸ The lack of a political mandate to address the issue seems secondary, however, because there will be no third term for Obama.

In this year's State of the Union Address, President Obama urged Congress to find "a bipartisan, market-based solution to climate change". The emphasis was on the possibility of overcoming the apparent contradiction between taking action to address the issue and the requirement to enforce "strong economic growth". The recovering economy seems to be one of the main arguments for opposing a more comprehensive climate change policy. The "war on fossil fuels" is considered to pose a threat

to the economy and the labour market. Criticisms have also been levelled against the US taking unilateral action to impose regulations that only affect the United States (see e.g. Senator James Inhofe's (R-OK) remarks on the EPA regulations, CR July 17, 2013, S5727- S5729).

As stated above, the policy actions would be on firmer ground if codified through legislation. Even though the current 113th Congress has not managed to take more comprehensive action on climate change due to the lack of legislative will, there have been some proposals related to the issue. According to the Center for Climate and Energy Solutions, in May 2013 a total of 51 actions were introduced in the 113th Congress focusing on climate change. Although Congress grants powers, it can also proceed to circumscribe authorisations, or to amend or repeal laws. The climate action plan has been taken up by the Congress. The Energy and power subcommittee of the House Energy and Commerce Committee held hearings entitled "The Obama Administration's Climate Change Policies and Activities" on September 18, 2013.

The opponents of more comprehensive action on climate change have targeted the EPA in particular, along with its power to regulate greenhouse gas emissions under the Clean Air Act. Defunding would be one way of curtailing the EPA's possibilities to authorise regulations, as would requiring approval to ensure that specific conditions have been fulfilled before certain rules can be issued or finalised. There could also be an effort to prohibit any regulations enforced pursuant to the executive actions, referring here to the Presidential Memorandum directing the EPA to complete carbon pollution standards for both existing and new power plants.⁹

8 For further details, see Kelly, Cathleen. 2012. Environment. In Dormandy, Xenia (ed.) *The Next Chapter: President Obama's Second-Term Foreign Policy*, 26-30. Chatham House. Available at: http://www.chathamhouse.org/sites/default/files/public/Research/Americas/0113pr_dormandy.pdf. See also Purvis, Nigel, Springer, Cecilia, and Grausz, Samuel. 2013. *The New US Domestic Climate and Clean Energy Agenda. The Outlook for 2013*. Transworld, Working Paper 14, March 2013. Available at: http://www.iai.it/pdf/Transworld/TW_WP_14.pdf; Schulzová, Helena. 2013. *Adjustments of US Energy Policy and Climate Change: Trends at the Federal and State Level*. Transworld, Working Paper 2013. Available at: <http://www.transworld-fp7.eu/?p=1179>.

9 For further details on the 51 legislative actions, see <http://www.c2es.org/federal/congress>. On the recent legislative measures, see for example the Energy Consumer Relief Act (H.R.1582) passed in the House on August 1, 2013; the REINS Act (H.R.367) passed in the House on August 2, 2013, or the National Energy Tax Repeal Act (S.1324) introduced in the Senate on July 18, 2013. Congress has also proceeded to enact more comprehensive climate change action legislation; see Climate Protection Act (S.332), introduced in the Senate on February 2, 2013. For further information, see <http://thomas.loc.gov/home/thomas.php>.

On the basis of the authority provided by the Congressional Review Act (1996), Congress may disagree with the main regulations by enacting a “joint resolution to disapprove”. However, passing a bill circumscribing the EPA’s authority to issue regulations, for example, is not likely in the contemporary context when the Senate is controlled by the Democrats. To overrule the plausible presidential veto, a two-thirds majority would be needed in both Houses. There could be an effort to include a provision on an omnibus bill that Congress would be able to pass and the president would be willing or compelled to sign otherwise. Arguably, the new regulations will also face judicial review.¹⁰

Despite the lack of specific climate change legislation, the issue is being addressed through several means in Congress, including proposed appropriations bills (such as the water and energy spending bill FY 2014, or the Interior and Environment Appropriations Bill covering funding for EPA FY 2014). Obama’s climate action plan has also been taken up by the Congress. The Energy and power subcommittee of the House Energy and Commerce Committee held hearings entitled “The Obama Administration’s Climate Change Policies and Activities” on September 18, 2013.

To successfully pass climate change legislation there should be some common ground in order to secure the bipartisan approach. It has been suggested that Congress could use fiscal policies and tax reform to address climate change. To this end, during his remarks on climate change on the Senate floor (CR July 24, 2013, S5987), Senator Brian Schatz (D-HI) noted that Congress has the potential to secure common ground in three fields in particular: innovative financing structures to advance the employment of clean energy, tax inducements, and energy effectiveness.

10 In *Massachusetts v. Environmental Protection Agency* 549 U.S.497 (2007), the Supreme Court held that the EPA can impose regulations on greenhouse gases as “air pollutants” under the Clean Air Act. The regulations laid down by the EPA, however, are still under Court review. The Supreme Court, for example, will consider the Cross-State Air Pollution Rule in its next term. A list of the “clean air cases” provided by the Center for Climate and Energy Solutions is available at: <http://www.c2es.org/federal/courts/clean-air-act-cases>.

Due to the inseparability of the climate change issue from policy areas such as the environment, energy and the economy, several governmental agencies cover climate change-related issues. At the Congressional level, the key committees considering climate change legislation include the Senate Committee on Energy and Public Works and the House Committee on Energy and Commerce, in addition to the House and Senate appropriations committees when considering spending bills. The Bicameral Task Force on Climate Change aims to draw both public and congressional attention to climate change and to advance policies to effectively address the issue. Further, the Safe Climate Caucus has committed itself to addressing climate change on the House floor on a daily basis. At the executive level, one important actor is the Council on Environmental Quality that coordinates the environmental actions at the federal level and oversees the Office of the Federal Environmental Executive.¹¹

One of the issues affecting the implementation of the climate change action in Congress is lobbying, but also the pressure to represent the interests of individual states. Some states have taken rather different views on how to deal with the issue. California, for example, has launched a cap-and-trade programme that came into effect in 2012.¹²

Yet the establishment of a federal level plan does not rule out the enactment of legislation addressing or related to the issue in the future (such as an energy efficiency bill), not to mention the passing of more comprehensive climate legislation. By referring to the Clean Air Act, Obama accentuated in his speech on climate change at Georgetown University (June 25, 2103) that the issue has enjoyed bipartisan support in the past and has become a partisan issue only recently. In the weekly address “Confronting the Growing Threat of Climate Change” (June 29, 2013), Obama also emphasised that people have the power at the ballot box: “Remind everyone who represents you, at every level of government, that there is no

11 For further details, see: <http://globalwarming.markey.house.gov/>; <http://democrats.energycommerce.house.gov/index.php?q=page/bicameral-task-force-on-climate-change>; <http://waxman.house.gov/issues/safe-climate-caucus>; <http://www.whitehouse.gov/administration/eop/ceq>.

12 See: <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm>.

contradiction between a sound environment and a strong economy – and that sheltering future generations against the ravages of climate change is a prerequisite for your vote”.¹³

Arguably, popular opinion could be an asset for the president that Congress cannot afford to disregard. According to the Yale Project on Climate Change Communication in April 2013, 70% of Americans said that global warming should be a “very high (16%), high (26%), or medium priority (29%) for the President and Congress”. This figure has decreased by seven points, however, since autumn 2012.¹⁴

All in all, Obama’s second term is an interesting political context because there is not very much to be won or lost anymore, other than the president’s party success in the next election. Yet the question also remains about what the president can possibly gain politically at this point. Healthcare was Obama’s “signature” domestic issue in his first term, and one which garnered a lot of attention as a result. In addition to immigration reform and the economy, addressing climate change through executive actions is set to become one of the president’s most topical issues during his second term.

13 See Obama’s speech at Georgetown: <http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>. For the weekly address, see <http://www.whitehouse.gov/the-press-office/2013/06/29/weekly-address-confronting-growing-threat-climate-change>.

14 <http://environment.yale.edu/climate-communication/files/Climate-Policy-Report-April-2013-Revised.pdf>.

The Finnish Institute of International Affairs
tel. +358 9 432 7000
fax. +358 9 432 7799
www.fiia.fi

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