

# Obama still figuring out how to use his presidential power

## Steven Thomma

WASHINGTON — As a professor of constitutional law, as a U.S. senator and as a presidential candidate, Barack Obama paid heed to the bedrock American principle that a president's power is properly checked by Congress and the courts.

After two years in the Oval Office, however, Obama's use of executive power is evolving.

On issues of national security, he's defining his power broadly, sometimes testing the limits of checks and balances. He's kept many of the controversial powers that President George W. Bush claimed, including the license to imprison suspected terrorists without trial and to kill them overseas — even if they're U.S. citizens.

On domestic issues, he's more tentative, often deferring to lawmakers.

At the same time, he's considering bold new executive moves that likely could never pass Congress. Among them: using the massive purchasing power of the federal government to reward business that pay a living wage, and regulating emissions that cause global warming without first winning legislation to combat climate change. However, these initiatives have percolated in his administration for months without decision, and he still could balk.

Taken together, the record suggests a leader still finding his way.

He's growing more comfortable with his power in questions of national security, where it's often exercised behind closed doors. He's less surefooted asserting himself domestically, where his moves would be more visible and open to rebuke from Congress or big political forces that he wants to court, such as business.

He's moved quickest to keep many of the national security powers he inherited from a president he often criticized for using them.

"Even though there's an overlay of hope and change in the rhetoric, the powers that Obama claims are as vast and staggering as those claimed by George W. Bush," said Gene Healy, a vice president of the Cato Institute, a libertarian think tank, and author of "The Cult of the Presidency, America's Dangerous Devotion to Executive Power."

Rather than change course, Obama is, with some exceptions, embracing the powers amassed by his predecessors — and building on them.

"The president ran as if he were going to be a bulwark against excessive executive branch power," said Laura Murphy, an attorney for the American Civil Liberties Union. "Instead, he's doing what happens to most people who get into power, who think, 'I'm OK, I know what I'm doing.'"

Ever since the Founding Fathers worked to limit the powers of the nation's chief executive, presidents have tested the boundaries of those restraints. Many have asserted unchecked power in times of crisis and war.

Abraham Lincoln suspended the right of habeas corpus during the Civil War. Franklin D. Roosevelt imprisoned Japanese Americans by executive order during World War II. Harry Truman threatened to draft striking railroad workers into the military, brushing aside questions about checks on his power saying, "we'll draft them and think about the law later."

They do it in peacetime, too.

Theodore Roosevelt set aside 16 million acres of public land by executive order and unilaterally gave pensions to elderly Civil War veterans. John F. Kennedy created the Peace Corps by executive order. Richard Nixon imposed wage and price controls. Bill Clinton responded to his loss of Congress in 1994 with a stream of executive orders. "Stroke of the pen. Law of the Land. Kinda cool," former Clinton adviser Paul Begala once said.

For Obama, the first test was whether he'd keep or repudiate the national security powers claimed by Bush.

While running for the White House, Obama vowed to rein in the president's power to lock people up on his own authority.

"The separation of powers works," he said in 2007. "Our Constitution works. We will again set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary."

Yet once in office, he said flatly that he has the power to hold prisoners without charges or trial.

"We are not going to release anyone if it would endanger our national security," he said last year.

Thus, his administration's decision to try accused 9/11 mastermind Khalid Sheikh Mohammed in a civilian court in New York was clouded from the start by the notion that Obama might not honor the verdict if it were an acquittal.

Now, under political pressure to stay away from New York, and jarred by the acquittal of another accused terrorist on all but one of more than 280 criminal charges, the Obama

administration is weighing whether to try him before a military commission — the Bush administration's preference — or perhaps skip the trial altogether and keep Mohammed locked up.

The president's also asserted the power to kill U.S. citizens abroad if his administration considers them a terrorist threat to the United States. Last Christmas Eve, the United States fired a cruise missile at Yemen to try to kill a radical Islamic cleric connected to the Fort Hood, Texas, massacre a month before. The cleric, Anwar al Awlaki, is a U.S. citizen who'd been in contact with the accused radical Muslim gunman at Fort Hood.

Shortly after that, the then-head of national intelligence confirmed to Congress that the administration has the power to kill targeted U.S. citizens overseas.

"Whether that American is involved in a group that is trying to attack us, whether that American is a threat to other Americans, those are the factors involved," former Director of National Intelligence Dennis Blair told Congress earlier this year. "We don't target people for free speech. We target them for taking action that threatens Americans."

Awlaki survived the Christmas Eve missile strike, but classified U.S. diplomatic cables revealed by WikiLeaks last week reported that the U.S. continued to pound suspected terrorists inside Yemen into this year.

Obama did roll back some of the powers that Bush claimed, notably the right to use such methods as waterboarding while interrogating suspected terrorists. But he's kept others, and thus strengthened presidential powers claimed by his predecessor.

"It's very dangerous," said Murphy at the ACLU. "Each president thinks he's doing the right thing for the moment, not always understanding the precedent he establishes for future presidents."

Whoever controls the White House generally works to add more power to the presidency. Former Vice President Dick Cheney, for example, was a forceful advocate for greater power in the Oval Office. His experience as White House Chief of Staff under President Gerald Ford convinced him that Congress had constrained the presidency far too much following the Vietnam War and the Watergate scandal.

Veterans of the Clinton White House argue that Obama can flex his executive powers without permission from Congress — at least the new one, where Republicans will control the House of Representatives.

"Congressional gridlock doesn't mean that progress has to stand still," said former White House Chief of Staff John Podesta. Despite the loss of the House of Representatives to Republican control, Obama still has his hands on what Podesta called "all the levers of his enormous power and authority."

"I've seen that strategy work before, of course," Podesta said. "President Clinton used his extensive executive authority to make significant changes after the Democrats lost control of the Congress in 1994."

The White House declined to comment on the record about reports that it's considering using federal contracts to drive wages higher. One top official did say the policy could be used to make sure the government sends its money to "good" companies, but that the administration wouldn't use the power of the purse to manipulate wages and benefits.

"That would not be something we would ever consider," said a senior administration official, who spoke on condition of anonymity because the policy is still being debated.

"Any changes to procurement policy need to be done under the rubric of economy and efficiency, of getting a better deal for the taxpayer. . . . You can't do social policy through contracting. But at the same time you want to do business with productive firms, firms that play by the rules, that pay their taxes, that are good actors in the American economy."

Another possible executive order would regulate emissions that cause global warming — after Congress failed the past two years to do so.

First, however, Obama must find authority to act in past laws — often far in the past. The power to regulate emissions comes from the 1990 Clean Air Act, advocates of action say. The power to use government contracts to raise wages comes from the 1949 Procurement Act. The power to create a recently unveiled loan program to help people insulate their homes comes from the law that created the Federal Housing Administration in 1934.

Obama's political challenge will be to minimize hostile reaction to his orders. Too much reaction could drive Congress to curb his initiatives.

"It's a careful balancing act for presidents. They have this authority, but they can't overreach," said Ann O'Leary, a lecturer at the University of California-Berkeley School of Law. "Presidents want to make sure they have the legal authority, but also that they don't anger Congress."

A generation ago, historian Arthur Schlesinger wrote in his book, "The Imperial Presidency," that the growth of presidential power "was as much a matter of congressional abdication as of presidential usurpation."

As Obama enters the second half of his term facing a more-Republican Congress, he's poised to test whether Congress will push back and, if so, how hard.