

BANGOR DAILY NEWS

Obama speech avoids executive actions that could prompt lawsuits

By David Ingram, Reuters
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WASHINGTON — Despite anticipation that President Barack Obama would seize on his authority to act without U.S. congressional approval, his State of the Union speech appeared to mention only a handful of executive actions that could face legal challenges.

In his Tuesday night speech, Obama stayed away from the kind of bold, detailed proposals that some lawmakers and media pundits said beforehand would shake up his relationship with Congress, legal experts said afterward.

He vowed to act on his own but offered modest or vague ideas that hardly stretched what Americans think of as a president's power, and that were unlikely to send business organizations rushing to file many lawsuits in courthouses.

His proposals to go it alone included a minimum wage increase for federal contract workers, creation of a "starter savings account" to help millions of people save for retirement and plans to establish new fuel efficiency standards for trucks.

Despite the administration's buildup before the speech, the high-flying rhetoric of the address itself and a promise of more such proposals, Curt Levey, president of the Committee for Justice, a conservative legal group, said the president was not very explicit about what executive actions he might take.

"The theme was clearly there," Levey said. "It might have been a little more conciliatory, a little less explicit than I anticipated."

One mention

Exactly once in the 6,800-word speech to lawmakers — when Obama said he would require a minimum wage of \$10.10 an hour in future federal contracts — did he use the phrase "executive order."

It is possible that contractors could sue over the requirement, although any such lawsuit would need to overcome the Procurement Act of 1949, which gives presidents the power to set contracting rules that they think "promote efficiency and economy."

A federal judge in Maryland cited the law in 2009 when he upheld an executive order from President George W. Bush that required contractors to check the immigration status of their employees.

“Under longstanding statutory authority, presidents can issue directives that facilitate the efficiency of federal contracting, and courts have historically accorded some deference to presidential policy determinations on this issue,” Boris Bershteyn, a former Obama regulatory official, wrote in an email.

Even the top Republican in the U.S. House of Representatives, Speaker John Boehner of Ohio, told reporters on Tuesday that Obama “probably has the authority” to issue the minimum-wage order for federal contractors. One thing he could do only with congressional approval is raise the minimum wage for most workers. On this he did not propose going it alone.

“Wherever and whenever I can take steps without legislation to expand opportunity for more American families, that’s what I’m going to do,” Obama said in the annual speech.

A history of presidential action

U.S. history is filled with examples of presidents taking action without congressional approval, only to provoke a rebuke from lawmakers, voters or the courts.

President Harry Truman in 1952 seized control of steel mills to prevent their closure, which he said would hurt U.S. troops fighting in the Korean Peninsula, but the U.S. Supreme Court ruled that Truman had acted unlawfully.

Obama has been provocative himself in using the inherent power of the executive branch. In 2011, he and Attorney General Eric Holder said they would abandon the courtroom defense of a law that prohibited federal recognition of same-sex marriages.

And in an ongoing case, the Supreme Court is considering whether Obama overstepped his authority when he made administration appointments in a way that bypassed senators’ usual power to vote on nominees.

Tuesday’s State of the Union speech fell short of that drama. He said he would be willing to act without Congress to prevent mass shootings, but he gave no specifics. He also referenced efforts to reduce carbon pollution from power plants, but litigation in that area would be nothing new.

Past Obama administration proposals about fuel efficiency standards were largely supported by automakers and labor leaders, who said higher standards brought greater regulatory certainty.

Obama said he would direct the Treasury Department to create a new form of retirement account, but while he gave no legal basis for it, it was not immediately clear who might oppose the idea enough to sue over it.

Ilya Shapiro, a senior fellow at the libertarian Cato Institute, said Obama's future executive actions were left either unclear or unannounced.

"More details (and presumably more devils therein) presumably forthcoming," Shapiro wrote in an email.