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Obama turning to executive power to get what he wants

By: Anita Kumar – March 19, 2013

President Barack Obama came into office four years ago skeptical of pushing the power of the White House to the limit, especially if it appeared to be circumventing Congress.

Now, as he launches his second term, Obama has grown more comfortable wielding power to try to move his own agenda forward, particularly when a deeply fractured, often-hostile Congress gets in his way.

He's done it with a package of tools, some of which date to George Washington and some invented in the modern era of an increasingly powerful presidency. And he's done it with a frequency that belies his original campaign criticisms of predecessor George W. Bush, invites criticisms that he's bypassing the checks and balances of Congress and the courts, and whets the appetite of liberal activists who want him to do even more to advance their goals.

While his decision to send drones to kill U.S. citizens suspected of terrorism has garnered a torrent of criticism, his use of executive orders and other powers at home is deeper and wider.

He delayed the deportation of young illegal immigrants when Congress wouldn't agree. He ordered the Centers for Disease Control and Prevention to research gun violence, which Congress halted nearly 15 years ago. He told the Justice Department to stop defending the Defense of Marriage Act, deciding that the 1996 law defining marriage as between a man and a woman was unconstitutional. He's vowed to act on his own if Congress didn't pass policies to prepare for climate change.

Arguably more than any other president in modern history, he's using executive actions, primarily orders, to bypass or pressure a Congress where the opposition Republicans can block any proposal.

"It's gridlocked and dysfunctional. The place is a mess," said Rena Steinzor, a law professor at the University of Maryland. "I think (executive action) is an inevitable tool given what's happened."

Now that Obama has showed a willingness to use those tactics, advocacy groups, supporters and even members of Congress are lobbying him to do so more and more.

The Center for Progressive Reform, a liberal advocacy group composed of law professors, including Steinzor, has pressed Obama to sign seven executive orders on health, safety and the environment during his second term.

Seventy environmental groups wrote a letter urging the president to restrict emissions at existing power plants.

Sen. Barbara Mikulski, D-Md., the chairwoman of the Appropriations Committee, sent a letter to the White House asking Obama to ban federal contractors from retaliating against employees who share salary information.

Gay rights organizations recently demonstrated in front of the White House to encourage the president to sign an executive order to bar discrimination based on sexual orientation or gender identity by companies that have federal contracts, eager for Obama to act after nearly two decades of failed attempts to get Congress to pass a similar bill.

“It’s ridiculous that we’re having to push this hard for the president to simply pick up a pen,” said Heather Cronk, the managing director of the gay rights group GetEQUAL. “It’s reprehensible that, after signing orders on gun control, cybersecurity and all manner of other topics, the president is still laboring over this decision.”

The White House didn’t respond to repeated requests for comment.

In January, Obama said he continued to believe that legislation was “sturdier and more stable” than executive actions, but that sometimes they were necessary, such as his January directive for the federal government to research gun violence.

“There are certain issues where a judicious use of executive power can move the argument forward or solve problems that are of immediate-enough import that we can’t afford not to do it,” the former constitutional professor told *The New Republic* magazine.

Presidents since George Washington have signed executive orders, an oft-overlooked power not explicitly defined in the Constitution. More than half of all executive orders in the nation’s history – nearly 14,000 – have been issued since 1933.

Many serve symbolic purposes, from lowering flags to creating a new military medal. Some are used to form commissions or give federal employees a day off. Still others are more serious, and contentious: Abraham Lincoln releasing political prisoners, Franklin D. Roosevelt creating internment camps for Japanese-Americans, Dwight Eisenhower desegregating schools.

“Starting in the 20th century, we have seen more and more that have lawlike functions,” said Gene Healy, a vice president of the Cato Institute, a libertarian research center, who’s the author of “The Cult of the Presidency: America’s Dangerous Devotion to Executive Power.”

Most presidents in recent history generally have issued a few hundred orders, and hundreds more memorandums and directives.

Jimmy Carter initiated a program designed to end discrimination at colleges. Ronald Reagan overturned price controls on domestic oil production. George H.W. Bush stopped imports of some semi-automatic firearms. Bill Clinton set aside large tracts of land as national monuments. George W. Bush made it easier for religious groups to receive federal dollars.

“The expectation is that they all do this,” said Ken Mayer, a political science professor at the University of Wisconsin-Madison who wrote “With the Stroke of a Pen: Executive Orders and Presidential Power.” “That is the typical way of doing things.”

But, experts say, Obama’s actions are more noticeable because as a candidate he was critical of Bush’s use of power. In particular, he singled out his predecessor’s use of signing statements, documents issued when a president signs a bill that clarifies his understanding of the law.

“These last few years we’ve seen an unacceptable abuse of power at home,” Obama said in an October 2007 speech.. “We’ve paid a heavy price for having a president whose priority is expanding his own power.”

Yet Obama’s use of power echoes that of his predecessors. For example, he signed 145 executive orders in his first term, putting him on track to issue as many as the 291 that Bush did in two terms.

John Yoo, who wrote the legal opinions that supported an expansion of presidential power after the 2001 terrorist attacks, including harsh interrogation methods that some called torture, said he thought that executive orders were sometimes appropriate – when conducting internal management and implementing power given to the president by Congress or the Constitution – but he thinks that Obama has gone too far.

“I think President Obama has been as equally aggressive as President Bush, and in fact he has sometimes used the very same language to suggest that he would not obey congressional laws that intrude on his commander-in-chief power,” said Yoo, who’s now a law professor at the University of California at Berkeley. “This is utterly hypocritical, both when compared to his campaign stances and the position of his supporters in Congress, who have suddenly discovered the virtues of silence.”

Most of Obama’s actions are written statements aimed at federal agencies that are published everywhere from the White House website to the Federal Register. Some are classified and hidden from public view.

“It seems to be more calculated to prod Congress,” said Phillip J. Cooper, the author of “By Order of the President: The Use and Abuse of Executive Direct Action.” “I can’t remember a president being that consistent, direct and public.”

Bush was criticized for many of his actions on surveillance and interrogation techniques, but attention has focused on Obama’s use of actions mostly about domestic issues.

In his first two years in the White House, when fellow Democrats controlled Capitol Hill, Obama largely worked through the regular legislative process to try to achieve his domestic agenda. His biggest achievements – including a federal health care overhaul and a stimulus package designed to boost the economy – came about with little or no Republican support.

But Republicans took control of the House of Representatives in 2010, making the task of passing legislation all the more difficult for a man with a detached personality who

doesn't relish schmoozing with lawmakers. By the next year, Obama wasn't shy about his reasons for flexing his presidential power.

In fall 2011, he launched the "We Can't Wait" campaign, unveiling dozens of policies through executive orders – creating jobs for veterans, adopting fuel efficiency standards and stopping drug shortages – that came straight from his jobs bills that faltered in Congress.

"We're not waiting for Congress," Obama said in Denver that year when he announced a plan to reduce college costs. "I intend to do everything in my power right now to act on behalf of the American people, with or without Congress. We can't wait for Congress to do its job. So where they won't act, I will."

When Congress killed legislation aimed at curbing the emissions that cause global warming, Obama directed the Environmental Protection Agency to write regulations on its own incorporating some parts of the bill.

When Congress defeated pro-union legislation, he had the National Labor Relations Board and the Labor Department issue rules incorporating some parts of the bill.

"The president looks more and more like a king that the Constitution was designed to replace," Sen. Charles Grassley, R-Iowa, said on the Senate floor last year.

While Republicans complain that Obama's actions cross a line, experts say some of them are less aggressive than they appear.

After the mass shooting in Newtown, Conn., in December, the White House boasted of implementing 23 executive actions to curb gun control. In reality, Obama issued a trio of modest directives that instructed federal agencies to trace guns and send information for background checks to a database.

In his State of the Union address last month, Obama instructed businesses to improve the security of computers to help prevent hacking. But he doesn't have the legal authority to force private companies to act.

"The executive order can be a useful tool but there are only certain things he can do," said Melanie Teplinsky, an American University law professor who's spoken extensively on cyber-law.

Executive actions often are fleeting. They generally don't settle a political debate, and the next president, Congress or a court may overturn them.

Consider the so-called Mexico City policy. With it, Reagan banned federal money from going to international family-planning groups that provide abortions. Clinton rescinded the policy. George W. Bush reinstated it, and Obama reversed course again.

But congressional and legal action are rare. In 1952, the Supreme Court threw out Harry Truman's order authorizing the seizure of steel mills during a series of strikes. In 1996, the District of Columbia Court of Appeals dismissed an order by Clinton that banned the

government from contracting with companies that hire workers despite an ongoing strike.

Obama has seen some pushback.

Congress prohibited him from spending money to move inmates from the Guantanamo Bay U.S. naval base in Cuba after he signed an order that said it would close. A Chinese company sued Obama for killing its wind farm projects by executive order after he said they were too close to a military training site. A federal appeals court recently ruled that he'd exceeded his constitutional powers when he named several people to the National Labor Relations Board while the Senate was in recess.

But Obama appears to be undaunted.

"If Congress won't act soon to protect future generations," he told Congress last month, "I will."