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How Barack Obama is expanding presidential power — and what it means for the future

By Andrew Prokop | andrew@vox.com | Sep 9, 2014, 7:30am EDT

On a hot day in late July, members of the House of Representatives took to the chamber's floor to make a momentous decision: whether to file an unprecedented lawsuit against the president of the United States. The charge was electric. President Obama, they said, had violated his constitutional duty to faithfully execute the law.

When the voting closed, the House was 225 to 201 in favor of filing suit. All but 5 Republicans voted in favor — those opposed believed the lawsuit didn't go far enough. Speaker John Boehner chided the Democrats: "Are you willing to let any president choose what laws to execute and what laws to change?"

The substance of the lawsuit was soaked in irony: Republicans, taking a break from trying to repeal Obamacare wholesale, were now suing Obama for not implementing the law fast enough. They held that when the administration **delayed** the law's employer mandate last year, it violated congressional will — and the president's own oath to uphold and enforce the laws of the United States.

The lawsuit was limited to the delay of the employer mandate because Boehner's lawyers believed the narrow charge had the best chance of success in the courts. But House Republicans made clear they believed Obama's overreach was far broader. Rep. Andy Harris (R-MD) said the mandate delay was "only one of the many areas he has abused his executive authority." And Rep. Doug Lamborn (R-CO) argued that the worst was yet to come, citing news reports that Obama was planning new executive actions on immigration. "These are not lawful actions," Lamborn said. "These are the power-hungry actions of a president who refuses to work with Congress."

"THE CURRENT ARGUMENT IS ABOUT FAITHFUL EXECUTION OF THE LAW, AND HOW MUCH DISCRETION THE PRESIDENT HAS"

It was a charge that, a few short years before, would have sounded perfectly natural coming from Senator Barack Obama. "I taught constitutional law for 10 years," Obama said in March 2008. "I take the Constitution very seriously. The biggest problems that we're facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all. And that's what I intend to reverse when I'm president of the United States of America."

But interviews with academic, legal, and policy experts make clear Obama has done little to roll back Bush's expansion of executive power — and that, instead, he's added a few innovations of his own. "The consensus is that he's not the disruptor in terms of presidential power that he purported to be," says Mitchel Sollenberger, a political scientist at the University of Michigan. "Instead, he's largely continued consolidating and strengthening it."

Many of Obama's own controversial contributions cluster around one main theme: waiving, modifying, or refusing to enforce key provisions in laws dealing with domestic policy. And as he weighs a new executive action on immigration, he seems set to go further yet. In doing so, he'll set new precedents that future presidents can cite for even more expansive action. As Congressional dysfunction keeps getting worse and worse, presidents will keep filling the policymaking vacuum left by the legislative branch — and Congress won't be able to stop them.

"Faithful execution of the law"





Obama is sworn into office, January 20, 2009 (Timothy A. Clary, AFP/Getty)

Some liberal commentators have scoffed at the idea that Obama has expanded presidential power. They point to a **chart** showing the president is issuing executive orders at the lowest rate of any president in the past century. But the raw number reveals little — a single executive order can be extremely consequential, or practically meaningless. Regardless, as Kenneth Mayer of the University of Wisconsin says, "Most of the Obama actions that have so exercised Republicans have not been executive orders."

In the foreign policy and security realm, Obama has continued many of Bush's most controversial programs — but those actions, like controversial NSA surveillance programs and detention powers, have since been authorized by statute. "Bush had grabbed these powers unilaterally, but it was then more or less ratified by Congress," says Andrew Rudalevige, a professor at Bowdoin College. "So Obama can say with a straight face, 'I'm working within statutory authority.' He can also say 'I'm working within the laws of war and the AUMF'" — the Authorization for Use of Military Force Against Terrorists, passed three days after 9/11 and not yet repealed. Obama's escalation of drone strikes, and his legal justification for targeting Americans abroad, are his unique contributions to presidential power here. But GOP leadership has shied away from confronting him on those issues — likely because they think a president should in fact have broad war-on-terror foreign policy powers.

It's the domestic front where House Republicans have leveled their harshest objections. Article II of the **Constitution** states that the president must "take Care that the Laws be faithfully executed," in what's known as the Take Care Clause. Many House GOP committee hearings, and much conservative commentary, have honed an argument that Obama has failed to faithfully execute the laws in three key areas: waivers to the No Child Left Behind education law, the delay of Obamacare's employer mandate, and the deferral of deportations for young unauthorized immigrants. "The current argument is about faithful execution of the law, and how much discretion the president has," says Rudalevige.

Each issue's legal and political specifics are different — and for all three, even some nonpartisan experts note that Obama's actions have gone further than those of past presidents. "There are some ways here," says William Howell, a political scientist at the University of Chicago, "in which Obama has made kind of unique contributions, and really extended his executive authority in ways his predecessors haven't done."

No Child Left Behind waivers: "A new frontier"



Obama and Education Secretary Arne Duncan, February 9, 2012. (Saul Loeb, AFP/Getty)

The authors of the No Child Left Behind Act, signed into law in January 2002, took the law's title quite literally. By the year 2014, the law states, 100 percent of every school's students would have to score as proficient in reading and math on state tests. Schools where this didn't occur for two years would be marked as underperforming and face serious sanctions.

Most education experts viewed the "100 percent" goal as aspirational, and perhaps motivational, but not remotely realistic. It was widely expected that this provision of the law would be modified or abandoned by Congress before the 2014 deadline actually kicked in. But that never happened. The Democrats never got around to it when they controlled both chambers, and when the GOP took the House in 2010, NCLB reforms weren't able to break through the gridlock. States were starting to get nervous. "As it exists now, No Child Left Behind is creating a slow-motion train wreck for children, parents and teachers," Arne Duncan, the Secretary of Education, said in June 2011.

So Duncan offered states a way out. The No Child Left Behind Act **allowed** the Secretary of Education to waive "any statutory or regulatory requirement" of the law for states, local agencies, or school districts that applied. This power was intended to allow for some experimentation on the local and state levels, and the Bush administration used it **many times**. Since the power was so broad, the Secretary could waive the "100 percent proficiency" requirement, and save states from the penalties.

But the administration went further than simply waiving the requirements. Inspired by

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its experience with Race to the Top — a \$5 billion pot of stimulus money that it asked states to compete for by adopting various administration-preferred reforms — it decided to use the waivers to spur further change. Adopt the reforms we want, Obama and Duncan said, or we won't rescue you from the NCLB penalties.

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States eagerly applied for the waivers, and by 2014, 42 had gotten them. The New York Times **asked** whether the widespread granting of waivers meant No Child Left Behind had been "essentially nullified." The Obama administration took the conditions it was setting seriously. Earlier this year, when Washington state's legislature failed to approve one of the administration's waiver requirements, Duncan **announced** that the state's waiver would be revoked. The law's penalties would kick in, and what Duncan earlier called a "train wreck" would ensue — because the state didn't do what the administration wanted.

Several experts agreed that the waivers alone would have been unremarkable, but that Obama using them to force policy reforms with no basis in the law is something new. "He used what was, in my view, a waiver provision for modest experiments and transformed it into a platform for the redesign of the statute," says Bruce Ackerman, a professor at Yale Law School. Ackerman believes the NCLB waivers were Obama's "most troubling" use of executive power on the domestic front. Howell agrees, saying, "This strikes me as a new frontier."

But it's also important to note that Obama isn't asserting any new formal powers here. The waiver power was inarguably granted to him by Congress — he's just using it in a way they didn't expect. Furthermore, he's using it to fix a problem that the original law left unsolved. And if members of Congress find this offensive, they have the power to change or eliminate the waiver provision.

The problem is that a gridlocked and polarized Congress is unlikely to be able to make this happen. So here, as with other issues, the paralysis of the legislative branch lets the president step in and take new actions that look a lot like writing law.

An inconvenient Obamacare mandate





(Win McNamee / Getty)

"In 2013, the president changed the health care law without a vote of Congress," Speaker John Boehner **said** in a statement this July. "That's not the way our system of government was designed to work. No president should have the power to make laws on his or her own." And so the bizarre spectacle of the House GOP suing the president to enforce a mandate they oppose within a law they keep trying to repeal began.

The employer mandate was included in Obamacare out of fear that, under the new system, employers could drop their coverage and let taxpayers pick up the tab for their workers. To help counteract this, the law charged a penalty to employers whose workers did this. Businesses with less than full-time 50 employees were exempt. Over ten years, this employer mandate was expected to raise at least tens of billions of dollars — over \$100 billion, according to an **estimate** by the RAND Corporation.

The text of the law is clear. Section 1513 of the Affordable Care Act **plainly states** that the employer mandate "shall apply to months beginning after December 31, 2013." But as that date drew nearer, businesses' **complaints** grew louder. Stories of business owners who said they would cut back their employees' hours to avoid qualifying for the mandate began to appear in the media.

On July 2, 2013, a Treasury Department official posted an **announcement** that the employer mandate would be delayed entirely for a year. Seven months later, it was delayed **another year** for businesses with 50 to 100 employees — for them, now the mandate is set to go in effect only at the beginning of 2016, two years later than the law's text states. The Obama administration's modifications to Obamacare don't end with the employer mandate. There are 32 other delays and tweaks in total, according to a **count** kept by South Texas College of Law professor Josh Blackman.

Unlike with No Child Left Behind, the Affordable Care Act doesn't grant the president waiver power over the employer mandate — intentionally so, because if it did, a Republican president could

"WHERE CONGRESS IS

simply refuse to enforce it. So what was Obama's legal authority? Jackie Calmes of the New York Times asked him: "People questioned your legal and constitutional authority to do that unilaterally — to delay the employer mandate. Did you consult with your lawyer?"

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But Obama wouldn't engage with legal specifics, saying instead, "Where Congress is unwilling to act, I will take whatever administrative steps that I can in order to do right by the American people." He downplayed the delay, saying his actions were "routine," and that "in a normal political atmosphere," they'd "draw a yawn from everybody."

Indeed, there are arguments that Obama's actions are perfectly appropriate. Yale Law professor Akhil Reed Amar notes that the Constitution calls on the president to make sure the laws are "faithfully executed" — that they work. "Who do you trust to make Obamacare work? Obama, or the guy who's voted against it 3,000 times who doesn't want it to work?" says Amar.

As for legal precedent, the administration cites various examples of previous administrations delaying certain new rules and taxes during a transition period. And a Treasury spokesman has cited the department's "longstanding authority to grant transition relief when implementing new legislation" changing the tax code. Liberals have also pointed to the Bush Administration's 2006 decision to waive Medicare Part D penalties for some seniors who signed up late. And here again, the administration argues that a less polarized Congress would be able to make minor patches to Obamacare, as past Congresses have repeatedly done with big new laws — yet the GOP refuses to do so, demanding only a full repeal of the law.

But in a recent article, University of Michigan professor Nicholas Bagley questioned whether these were really so routine. "At what point does a decision not to enforce the law ripen into a decision to dispense with it? The answer is not always clear," Bagley wrote. He concluded that the ACA delays "appear to exceed the scope" of the presidency's traditional executive power.

For all the drama of Boehner's suit, most legal experts believe it's likely to be dismissed because the House lacks standing to sue the president. This has been the fate of nearly all lawsuits filed by members of Congress against the executive.

Still, changing a date plainly specified in a law's text is a striking move that could set a troubling precedent. "The Obama administration's claim of enforcement discretion, if accepted, would limit Congress's ability to specify when and under what circumstances its laws should take effect," wrote Bagley. That, he argued, "would mark a major shift of constitutional power away from Congress, which makes the laws, and toward the President, who is supposed to enforce them."

Immigration: "A nation of laws"





A protest in front of the White House, July 31, 2014 (Karen Bleier, AFP/Getty)

On November 25, 2013, President Obama arrived at the Betty Ong Recreation Center in San Francisco to give a speech on immigration. It had been 5 months since the Senate passed a bill for bipartisan, comprehensive reform — and 5 months without any action from the GOP-controlled House of Representatives. The president spoke for several minutes about how the time had come for Congress to finish the job. But as he neared the end of his speech, he was **knocked off-script** by an activist in the audience.

"Mr. President, please use your executive order to halt deportations for all 11.5 [million] undocumented immigrants in this country right now," said Ju Hong, himself an **unauthorized immigrant** whose Korean parents had come to the US 12 years ago, but overstayed a tourist visa. "We agree that we need to pass comprehensive immigration reform. At the same time, you have a power to stop deportations for all—"

"Actually, I don't," Obama said. As activists in the crowd chanted "Stop deportations! Stop deportations!" Obama quieted them down, and when security tried to escort them out, he said they could stay. "If in fact I could solve all these problems without passing laws in Congress, then I would do so," he said. "But we're also a nation of laws."

Obama's response left a lot out. While he's always maintained that he can't simply stop all deportations, as Hong urged, he had stopped them for hundreds of thousands of people just the previous year. After Congress failed to pass the DREAM Act — a bill that would have legalized the status of many young unauthorized immigrants who came to the US as minors and had been here for several years — Obama acted on his own, announcing the Deferred Action for Childhood Arrivals (DACA) program.

DACA permitted DREAMer immigrants to apply for deferral of deportation and a work permit lasting for two years. Their legal status is not permanent, but must be renewed after a new application, and it can be revoked if the program is ended by a future president. (Some wondered why Obama didn't use his pardon power, but it doesn't seem to apply

here — as Suzy Khimm **wrote** at the Washington Post, "Unauthorized presence in the U.S. is a civil violation, not a criminal one. Presidential pardon power applies only to federal crimes.")

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The administration maintains that its authority for DACA comes from two separate sources. Its authority to defer deportations is based on prosecutorial discretion. With only limited resources, it's impossible to deport every single unauthorized immigrant. So, the argument goes, the president can set policy guidance on what top priorities should be. In the area of immigration, presidents have issued "blanket or categorical deferrals of deportation numerous times over the years," according to a Congressional Research Service report. But, the report continues, "most of these discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters." The Obama administration's use of this power to temporarily enact a policy change that Congress weighed and rejected is novel.

The second part of DACA — the affirmative granting of work permits — needs a separate source of legal authority. This authority stems from the **1986 immigration reform law**, which gave the Attorney General the power to authorize certain unauthorized immigrants to work. (This power was later moved to the Secretary of Homeland Security in the post-9/11 Cabinet reorganization.) Again, this power both clearly belongs to the executive and has never been used so broadly. "It seems very unlikely that Congress intended to grant the president the authority to allow millions of unauthorized immigrants the right to full participation in the U.S. labor market," **wrote** Reihan Salam of National Review. But, he conceded, "The statute says what the statute says."

Now, Obama is planning a new series of executive actions that will go even further in deferring the deportation of many more unauthorized immigrants — though the administration has not said quite how far. Advocates are saying the expansion could apply to as many as 5 million people — nearly half of the entire unauthorized population. But it could also be much narrower, for instance, granting temporary legal status to just parents of DACA beneficiaries.

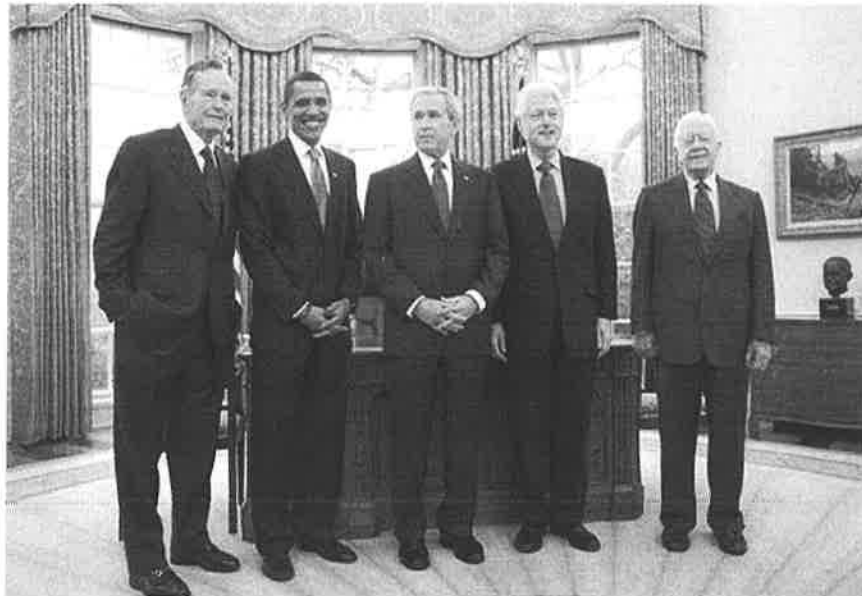
Though the White House recently announced that no action would be taken before November's elections, they've said an announcement would take place soon afterward. "Obviously anything we do will come under intense legal scrutiny," a White House official told me. "So we don't shrug off the responsibility to make sure that it's within the confines of the law, and to be ready to explain how it is."

However, the true controversy will likely be political rather than legal. It's widely believed on the right that Obama's DACA program helped cause this year's influx of child migrants from Central America. Even Sen. Marco Rubio (R-FL), who co-authored the Senate's bipartisan immigration reform bill, said that DACA "sent a message to invite people to come." Opposition to DACA is now widespread within the party, and this summer's Congressional business ended with House Republicans overwhelmingly voting to end the program. Rep. Steve King (R-IA) has said that if Obama expands deferred action, impeachment hearings should begin "immediately."

Even some more moderate conservative commentators have argued that an executive action on deportations would be a shocking abuse of power. This "could well be the most extreme act of executive overreach ever attempted by an American president in peacetime," wrote Yuval Levin of National Review. "It would be lawless, reckless, a leap into the antidemocratic dark," wrote Ross Douthat of the New York Times, adding that Obama would be practically daring the GOP to impeach him.

But Obama argues that he is using executive authority to ameliorate a crisis that Congress refuses to fix. "My preference would be an actual comprehensive immigration law," Obama said in an August 6 press conference. "Until that happens, I'm going to have to make a choice. That's what I was elected to do." And, again, a Congress that's polarized and gridlocked likely won't be able to stop him.

"Building precedent upon precedent"



(Pete Souza / Obama-Biden Transition Project)

Several of the scholars I interviewed referred to presidential power as if it were a construction project that nearly all presidents collaborate on and contribute to. Every time a president claims a new power, another brick is laid down. Some presidents build entire

wings. Others attempt to construct an addition, but see it demolished by Congress. Overall, though, the building grows larger and larger over the years. "This has been a bipartisan project of building precedent upon precedent," says Bruce Ackerman, the Yale Law professor.

When Obama's administration is asked why it believes it has the authority to take a certain executive action, it often cites a list of precedents — similar actions taken by past administrations. Yet these precedents are usually more limited and less consequential than the proposal at hand. Presidents often cite precedents as a justification for going *further* than previous administrations have done — arguing that since several more minor actions happened previously, a major new one is justified as well.

"I THINK DEMOCRATS ARE GOING TO RUE THE DAY THEY DID NOT PUSH BACK AGAINST OBAMA ON THESE THINGS"

When Obama was unambiguously given waiver powers by No Child Left Behind, he launched the pioneering project of attaching his own conditions before he'd grant waivers. When he had no waiver power at all over the employer mandate, he suspended it anyway. And where previous presidents have suspended deportations and offered work permits to unauthorized immigrants in certain limited circumstances, Obama's already done so for hundreds of thousands of people, with, apparently, many more to come. Future presidents could cite all of these precedents to justify their own, even more wide-ranging actions.

Howell, the University of Chicago professor, cited one example of how presidents can stretch their powers over time. "The president's commander in chief powers started off as a limited authority. What we've seen over the last 50 or 60 years is presidents interpreting that authority broadly, and getting away with it. As a result, we now say, 'Of course, the president can do all of these things as commander in chief!' It may be 50 years hence that we say, 'Of course, the president can issue waivers as he sees fit.'"

The problem for liberals is that there are many laws out there that conservative presidents dearly wish weren't enforced. Indeed, the precedents Obama is setting "probably benefit conservative presidents who want to stop regulations and have a smaller agenda, to the extent it helps them gain control of the wider executive branch," says Rudalevige, the Bowdoin professor.

So future Republican presidents will inevitably cite the new precedents Obama is setting to justify actions of their own. "I think Democrats are going to rue the day they did not push back against Obama on these things," says Sollenberger, the University of Michigan professor. "Just as Republicans regretted the same thing when they didn't push back against Bush."