**Shift on Executive Power Lets Obama Bypass Rivals**

**By** [**CHARLIE SAVAGE**](http://topics.nytimes.com/top/reference/timestopics/people/s/charlie_savage/index.html?inline=nyt-per)April 22, 2012

WASHINGTON — One Saturday last fall, [President Obama](http://topics.nytimes.com/top/reference/timestopics/people/o/barack_obama/index.html?inline=nyt-per) interrupted a White House strategy meeting to raise an issue not on the agenda. He declared, aides recalled, that the administration needed to more aggressively use executive power to govern in the face of Congressional obstructionism.

“We had been attempting to highlight the inability of Congress to do anything,” recalled William M. Daley, who was the White House chief of staff at the time. “The president expressed frustration, saying we have got to scour everything and push the envelope in finding things we can do on our own.”

For Mr. Obama, that meeting was a turning point. As a senator and presidential candidate, he had criticized [George W. Bush](http://topics.nytimes.com/top/reference/timestopics/people/b/george_w_bush/index.html?inline=nyt-per) forflouting the role of Congress. And during his first two years in the White House, when Democrats controlled Congress, Mr. Obama largely worked through the legislative process to achieve his domestic policy goals. But increasingly in recent months, the administration has been seeking ways to act without Congress. Branding its unilateral efforts “[We Can’t Wait](http://www.whitehouse.gov/economy/jobs/we-cant-wait),” a slogan that aides said Mr. Obama coined at that strategy meeting, the White House has rolled out dozens of new policies — on creating jobs for veterans, preventing drug shortages, raising fuel economy standards, curbing domestic violence and more.

Each time, Mr. Obama has emphasized the fact that he is bypassing lawmakers. When he announced a cut in refinancing fees for federally insured mortgages last month, for example, he said: “If Congress refuses to act, I’ve said that I’ll continue to do everything in my power to act without them.” Aides say many more such moves are coming. Not just a short-term shift in governing style and a re-election strategy, Mr. Obama’s increasingly assertive use of executive action could foreshadow pitched battles over the separation of powers in his second term, should he win and Republicans consolidate their power in Congress.

Many conservatives have denounced Mr. Obama’s new approach. But William G. Howell, a University of Chicago political science professor and author of “Power Without Persuasion: The Politics of Direct Presidential Action,” said Mr. Obama’s use of executive power to advance domestic policies that could not pass Congress was not new historically. Still, he said, because of Mr. Obama’s past as a critic of executive unilateralism, his transformation is remarkable.

“What is surprising is that he is coming around to responding to the incentives that are built into the institution of the presidency,” Mr. Howell said. “Even someone who has studied the Constitution and holds it in high regard — he, too, is going to exercise these unilateral powers because his long-term legacy and his standing in the polls crucially depend upon action.”

Mr. Obama has issued signing statements claiming a right to bypass a handful of constraints — rejecting as unconstitutional Congress’s attempt to prevent him from having White House “czars” on certain issues, for example. But for the most part, Mr. Obama’s increased unilateralism in domestic policy has relied on a different form of executive power than the sort that had led to heated debates during his predecessor’s administration: Mr. Bush’s frequent assertion of a right to override statutes on matters like surveillance and torture.

“Obama’s not saying he has the right to defy a Congressional statute,” said Richard H. Pildes, a New York University law professor. “But if the legislative path is blocked and he otherwise has the legal authority to issue an executive order on an issue, they are clearly much more willing to do that now than two years ago.”

The Obama administration started down this path soon after Republicans took over the House of Representatives last year. In February 2011, Mr. Obama directed the Justice Department to stop defending the Defense of Marriage Act, which bars federal recognition of [same-sex marriages](http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html?inline=nyt-classifier), against constitutional challenges. Previously, the administration had urged lawmakers to repeal it, but had defended their right to enact it.

In the following months, the administration increased efforts to curb greenhouse gas emissions through environmental regulations, gave states waivers from federal mandates if they agreed to education overhauls, and refocused deportation policy in a way that in effect granted relief to some illegal immigrants brought to the country as children. Each step substituted for a faltered legislative proposal.

But those moves were isolated and cut against the administration’s broader political messaging strategy at the time: that Mr. Obama was trying to reach across the aisle to get things done. It was only after the summer, when [negotiations over a deficit reduction deal broke down](http://www.nytimes.com/2011/07/23/us/politics/23fiscal.html?pagewanted=all) and House Republicans nearly failed to raise the nation’s borrowing limit, that Mr. Obama fully shifted course.

First, he proposed a jobs package and gave speeches urging lawmakers to “pass this bill” — knowing they would not. A few weeks later, at the policy and campaign strategy meeting in the White House’s Roosevelt Room, the president told aides that highlighting Congressional gridlock was not enough.

“He wanted to continue down the path of being bold with Congress and flexing our muscle a little bit, and showing a contrast to the American people of a Congress that was completely stuck,” said Nancy-Ann DeParle, a deputy chief of staff assigned to lead the effort to come up with ideas.

Ms. DeParle met twice a week with members of the domestic policy council to brainstorm. She met with cabinet secretaries in the fall, and again in February with their chiefs of staff. No one opposed doing more; the challenge was coming up with workable ideas, aides said. The focus, said Dan Pfeiffer, the White House communications director, was “what we could do on our own to help the economy in areas Congress was failing to act,” so the list was not necessarily the highest priority actions, but instead steps that did not require legislation.

Republican lawmakers watched warily. One of Mr. Obama’s first [“We Can’t Wait” announcements](http://www.whitehouse.gov/the-press-office/2011/10/25/we-cant-wait-obama-administration-lower-student-loan-payments-millions-b) was the moving up of plans to ease terms on [student loans](http://topics.nytimes.com/top/reference/timestopics/subjects/s/student_loans/index.html?inline=nyt-classifier). After Republican complaints that the executive branch had no authority to change the timing, it [appeared to back off](http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=38520).

The sharpest legal criticism, however, came in January after Mr. Obama bypassed the Senate confirmation process to install four officials using his [recess appointment](http://topics.nytimes.com/top/reference/timestopics/subjects/r/recess_appointments/index.html?inline=nyt-classifier) powers, even though House Republicans had been forcing the Senate to hold “pro forma” sessions through its winter break to block such appointments. Mr. Obama declared the sessions a sham, saying the Senate was really in the midst of a lengthy recess. His appointments are facing a legal challenge, and some liberals and many conservatives have warned that he set a dangerous precedent.

Senator Harry Reid of Nevada, the Senate Democratic leader, who essentially invented the pro forma session tactic late in Mr. Bush’s presidency, has not objected, however. Senate aides said Mr. Reid had told the White House that he would not oppose such appointments based on a memorandum from his counsel, Serena Hoy. She concluded that the longer the tactic went unchallenged**,** the harder it would be for any president to make recess appointments — a significant shift in the historic balance of power between the branches.

The White House counsel, Kathryn Ruemmler, said the Obama administration’s legal team had begun examining the issue in early 2011 — including an internal Bush administration memo criticizing the notion that such sessions could block a president’s recess powers — and “seriously considered” making some appointments during Congress’s August break. But Mr. Obama decided to move ahead in January 2012, including installing Richard Cordray to head the new consumer financial protection bureau, after Senate Republicans blocked a confirmation vote.

“I refuse to take ‘no’ for an answer,” [Mr. Obama declared](http://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html?pagewanted=all), beneath a “We Can’t Wait” banner. “When Congress refuses to act and — as a result — hurts our economy and puts people at risk, I have an obligation as president to do what I can without them.”

The unilateralist strategy carries political risks. Mr. Obama cannot blame the Republicans when he adopts policies that liberals oppose, like when he [overruled the Environmental Protection Agency’s proposal](http://www.nytimes.com/2011/11/17/science/earth/policy-and-politics-collide-as-obama-enters-campaign-mode.html) to strengthen antismog rules or [decided not to sign an order](http://www.nytimes.com/2012/04/12/us/politics/obama-wont-order-ban-on-gay-bias-by-employers.html) banning discrimination by federal contractors based on sexual orientation. The approach also exposes Mr. Obama to accusations that he is concentrating too much power in the White House. Earlier this year, Senator [Charles E. Grassley](http://topics.nytimes.com/top/reference/timestopics/people/g/charles_e_grassley/index.html?inline=nyt-per), Republican of Iowa, delivered a series of floor speeches [accusing Mr. Obama](http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=39011) of acting “more and more like a king that the Constitution was designed to replace” and imploring colleagues of both parties to push back against his “power grabs.”

But Democratic lawmakers have been largely quiet; many of them accuse Republicans of engaging in an unprecedented level of obstructionism and say that Mr. Obama has to do what he can to make the government work. The pattern adds to a bipartisan history in which lawmakers from presidents’ own parties have tended not to object to invocations of executive power. For their part, Republicans appear to have largely acquiesced. Mr. Grassley said in an interview that his colleagues were reluctant to block even more bills and nominations in response to Mr. Obama’s “chutzpah,” lest they play into his effort to portray them as making Congress dysfunctional.

“Some of the most conservative people in our caucus would adamantly disagree with what Obama did on recess appointments, but they said it’s not a winner for us,” he said.

Mr. Obama’s new approach puts him in the company of his recent predecessors. Mr. Bush, for example, failed to persuade Congress to pass a bill allowing religiously affiliated groups to receive taxpayer grants — and then issued an executive order making the change. President Bill Clinton increased White House involvement in agency rule making, using regulations and executive orders to show that he was getting things done despite opposition from a Republican Congress on matters like land conservation, gun control, tobacco advertising and treaties. (He was assisted by a White House lawyer, Elena Kagan, who later won tenure at Harvard based on [scholarship analyzing such efforts](http://www.harvardlawreview.org/issues/114/june01/Article_7038.php) and who is now on the Supreme Court.)

And both the Reagan and George Bush administrations increased their control over executive agencies to advance a deregulatory agenda, despite opposition from Democratic lawmakers, while also developing legal theories and tactics to increase executive power, like issuing signing statements more frequently. The bipartisan history of executive aggrandizement in recent decades complicates Republican criticism. In February, two conservative advocacy groups — Crossroads GPS and the American Action Network — sponsored a [symposium](https://february14.eventbrite.com/) to discuss what they called “the unprecedented expansion of executive power during the past three years.” It reached an awkward moment during a talk with a former attorney general, Edwin Meese III, and a former White House counsel, C. Boyden Gray.

“It’s kind of ironic you have Boyden and me here because when we were with the executive branch, we were probably the principal proponents of executive power under President Reagan and then President George H. W. Bush,” Mr. Meese said, quickly adding that the presidential prerogatives they sought to protect, unlike Mr. Obama’s, were valid.

But Jack L. Goldsmith, a Harvard law professor who led the Justice Department’s Office of Legal Counsel during the George W. Bush administration, said the Obama administration’s pattern reflects how presidents usually behave, especially during divided government, and appears aggressive only in comparison to Mr. Obama’s having been “really skittish for the first two years” about executive power.

“This is what presidents do,” Mr. Goldsmith said. “It’s taken Obama two years to get there, but this has happened throughout history. You can’t be in that office with all its enormous responsibilities — when things don’t happen, you get blamed for it — and not exercise all the powers that have accrued to it over time.”

<http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html?_r=1&pagewanted=print>