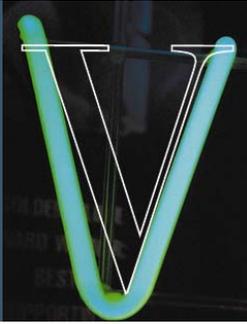




Chief Executive Obama: An Analysis of President Obama's Use of His Authority to Manage the Executive Branch in His First Month in Office



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Summary:

In his first month in office, President Obama has invoked his unilateral authority to manage the Executive Branch to revoke a significant number of Bush Administration policies, without having new principles ready to replace the discredited provisions.

The programs in which the President intervened provide a strong first approximation of his policy priorities.

The manner in which the President acted indicates that he will attempt to exercise a greater degree of centralized policy control and management than most recent Democratic Administrations.

Policy formulation in the Obama Administration will, initially, be dominated by White House policy "czars" in areas of particular importance to the President, such as energy and the environment.

Discussion:

Since Ronald Reagan took office, each new President has issued unilateral directives shortly after entering office to establish his policy priorities and differentiate his Administration from that of his predecessor. In his first month in office, President Obama has reversed many decisions by President Bush, in a series of Executive Orders and Memoranda to agency heads that provide important signals about his management style. He also has organized his White House in a manner that suggests that the current statutory structure is obsolete and not helpful in addressing the issues facing the country. Taken together, these developments indicate that President Obama will attempt to impose a greater degree of centralized authority and management than has been typical of Democratic Administrations.

Initial Policy Decisions.

1. Unilateral Presidential Actions. President Obama has exercised his authority to manage the Executive Branch to overturn Bush Administration policies in four priority areas.

a. Openness in Government. The President has issued Executive Orders or Memoranda establishing procedures for limiting assertion of executive privilege on his own behalf or on behalf of former presidents; encouraging disclosures by agencies in response to FOIA requests; directing agencies to act in a transparent, participatory, and collaborative manner; restricting involvement in government projects by appointees who previously had served as lobbyists; and imposing mandatory, contractual post-employment constraints that will prohibit senior officials from lobbying the Executive Branch for the remainder of his Administration.ⁱ

b. Labor Relations. The President exercised his power over federal procurements to overturn four Bush Executive Orders and facilitate union organizing. He issued Executive Orders requiring federal agencies to insert in all government contracts a clause requiring the contractor to notify employees of their rights to organize under federal labor laws, under pain of debarment; declaring unallowable the costs incurred by government contractors in persuading workers not to unionize; preventing termination of workers upon replacement of one service contractor by another; and requiring use of project labor agreements for federal construction projects.ⁱⁱ

c. Energy and the Environment. The President issued policy Memoranda directing the Secretary of Transportation to accelerate the issuance of required auto fuel economy standards so that they may be imposed on model year 2011 vehicles; directing the Secretary of Energy to issue appliance energy efficiency standards promptly and to prioritize required future standards according to the expected energy savings; and “requesting” the Administrator of EPA to reconsider its prior decision to deny a request for a Clean Air Act waiver by the State of California. The requested waiver would permit California and 13 other States to attack global warming by issuing tailpipe emissions standards for new motor vehicles that are more stringent than those required by federal law.ⁱⁱⁱ

d. National Security. The President issued Executive Orders overturning highly controversial Bush Administration policies by ordering closure of the Guantanamo detention facility within one year; banning the use of torture or other enhanced interrogation techniques not permitted by the Army Field Manual; and revoking all Executive Branch directives, including those issued by the CIA, concerning detention or interrogation of detainees that were inconsistent with his policies.^{iv}

These Bush Administration policies had, for the most part, been created by confidential Presidential orders issued through classified National Security Council processes. President Obama chose to revoke these policies through Executive Orders, which are both non-classified and published, to demonstrate publicly the high priority he attaches to the abandonment of the Bush approach.

2. Revocation of Midnight Regulations. Beginning with President Reagan, when the White House changes parties, incoming Presidents have ordered their appointees to suspend, where possible, midnight regulations issued by the prior Administration in the weeks after the election. Within hours of his swearing in, President Obama's Chief of Staff issued a Memorandum to the heads of Executive departments and agencies directing that they consider extending the effective date of any final rule that had been published in the Federal Register but had not yet taken effect, for the purpose of reviewing questions of law and policy it may present.^v Obama appointees at EPA and the Department of the Interior acted promptly to suspend a series of actions by their predecessors.

– Environmental Protection Agency. The agency suspended the effective date of a rule on the “aggregation” policy, which would permit grouping of multiple, related physical changes into a single project for purposes of evaluating the application of the New Source Review program. The Administrator also notified the States that in making decisions on air emissions permits, they “should not assume” that a December 2008 Bush EPA Memorandum instructing the States that they may not limit carbon dioxide emissions from coal-fired power plants “is the final word on the appropriate interpretation” of the Clean Air Act. The agency also informed the Supreme Court that it was abandoning defense of a Bush Administration rule creating a cap and trade system for air mercury emissions.^{vi}

– Department of the Interior. Foreshadowing an Obama initiative to revitalize an agency that became dysfunctional during the Bush Administration, Interior has moved aggressively to roll back Bush policies in a number of areas. In the energy extraction field, the Secretary suspended the effective date of a Bush rule that accelerated a new five year plan for offshore oil and gas leasing on the outer continental shelf. The agency also decided to withdraw 77 oil and gas leases that the Bush Administration had offered for lands in Utah near two National Parks.^{vii}

Stricter enforcement of the Endangered Species Act is an Obama Administration priority. On March 3, 2009, the President directed the Secretary of the Interior to conduct a new rulemaking to consider revoking a Bush midnight rule that expanded the circumstances in which scientists in other departments could determine not to consult with Interior scientists concerning agency actions that might affect threatened or endangered species. The President also directed the heads of all agencies that, until the new Interior process is complete, they should “exercise their discretion” to continue following the longstanding prior practice of consulting Interior on these actions.^{viii} Finally, the Administration also supported adoption of legislation that would provide Interior with special authority to withdraw a controversial rule concerning designation of the Polar Bear as a threatened, but not endangered, species without having to go through a prior notice and comment process for the revocation.^{ix}

3. Presidential Review of Agency Regulations. Since 1981, the conduct of centralized regulatory review by the Office of Management and Budget has been one of the most controversial aspects of Presidential management of the Executive Branch. President Bush did not revoke President Clinton's Executive Order on regulatory review. He did, however, changing the process substantially by issuing supplemental Executive Orders that eliminated the role of the Vice President in the regulatory review process; required covered agencies to submit "guidance" for White House review; required the agencies to appoint Chief Regulatory Officers; and required the agencies to identify the market failures that justified regulatory intervention.

President Obama issued an Executive Order that stripped away the Bush additions and reinstated the text of the Clinton Order. The President also issued an accompanying Memorandum that instructed the Director of directed OMB to consult with the regulatory agencies and to submit within 100 days recommendations for a new Executive Order on regulatory review.^x

Implications of the Obama Orders. Two important points can be drawn from the initial Obama management decisions. First, several Orders contain detailed micro-implementation provisions of a type that most Presidents have reserved to the implementing agencies. In particular, the Orders on Executive Branch ethics, notification of worker rights, and non-displacement of service employees contain detailed contractual provisions to which persons seeking to work with the government must subscribe. Utilization of the contract approach allowed the White House to exert maximum control over implementation while avoiding questions about its legal authority to impose these provisions.

Second, many of the Obama Orders repealed Bush Administration policies without specifying new provisions to take their place. For example, the President repealed the Bush Orders on regulatory review and reverted to the Clinton process, while directing OMB to submit recommendations for process changes. He ordered Guantanamo closed without having a plan in place for dealing with the remaining detainees; instead, he created a Special Interagency Task Force on Detainee Disposition and directed it to submit recommendations for a substitute policy within 180 days.^{xi} In particular, the Order prohibiting enhanced interrogation techniques provided that no federal employee may rely upon any legal opinion issued by the Bush Department of Justice between September 11, 2001 and January 20, 2009; however, no replacement Obama opinions were available to fill the void. To fill this gap, the President created a separate Special Interagency Task Force on Interrogation and Transfer Policies to make recommendations on interrogation practices within 180 days.^{xii} In the interim, any questions about interrogation techniques will have to be resolved by the Attorney General on a case-by-case basis.

The incomplete nature of these policymaking processes suggests that the President's principal concern has been to demonstrate publicly his Administration's abandonment of discredited policies. The details of the replacement policies have been a somewhat lesser concern at the outset.

Restructuring the White House.

President Obama has made significant changes in the organization of the White House by giving officials on his personal staff lead responsibility for policy formulation in critical areas, in disregard of the statutory structure of his office. In corporate terms, the President has reduced his direct reports to concentrate power in his own office.

The President has appointed a series of "czars" over specific policy areas. Carol Browner will coordinate energy and environmental policy, at the expense of the statutory authority of the Council on Environmental Quality. Larry Summers will determine economic policy through the National Economic Council, ignoring the Council of Economic Advisers. The President also has created a new White House Office of Health Reform and a White House Office of Urban Affairs to take the policy lead in these broad areas.

The concentration of policy making responsibility in White House officials who cannot normally be called to testify before Congress and who are not directly subject to the Legislative Branch's power over appropriations has raised eyebrows on Capitol Hill but has not as yet drawn concrete objections.^{xiii} There are other problems with this approach to managing the President's office. For example, President Obama originally sought to give Senator Daschle a dual appointment as Secretary of Health and Human Services and health reform czar on his White House staff. This combination of functions inevitably would have generated difficult executive privilege battles. The President was spared a problem of his own making when the Senator withdrew.

In appointing these policy czars, President Obama has ignored the existing institutional structure to centralize policymaking on a functional basis. This functional approach to policymaking is most apparent in his announced intention to reconfigure the National Security Council by adding agencies on an issue-by-issue basis and establishing new directorates to deal with department-spanning issues such as cybersecurity, energy, climate change, nation-building, and infrastructure.^{xiv}

The President's desire to reshape the Executive Office of the President to facilitate functional policymaking, and his acute understanding of the operation of the Executive Branch, are best demonstrated by his combination of energy and environment under a senior adviser on his personal staff. The White House regulatory review process has always concentrated on EPA rules, because they present greater costs, potential benefits, and political controversy than any other regulations. Opponents of EPA rules typically have recruited the Department of Energy to champion objections within the White House inter-agency policy dispute resolution process. By concentrating policy responsibility for energy and environment in a single official and appointing a former EPA Administrator to the position, President Obama has exercised direct political control over the issues and substantially reduced the ability of EPA's opponents to block its rules in the White House.

The President's intention to exercise authority on a centralized basis is also manifested by gratuitous statements in multiple Executive Orders that nothing in the directives shall be construed to impair or otherwise affect the functions of OMB “relating to budget, administrative, or legislative proposals.” For example, the President already has directed OMB to make recommendations how he should review draft rules proposed by Executive agencies and to develop and issue Government-wide guidance to identify existing contracts that are wasteful, inefficient or ineffective and to restrict the use of sole-source and other types of non-competitive contracts.^{xv}

The concentration of authority directed by President Obama is common for Republican Administrations but not for Democratic Presidents. Recent Democratic Administrations have been staffed by policy entrepreneurs who thrive under a more distributed allocation of authority.

The statutory design of the Executive Office of the President has not changed significantly since OMB was created in 1974. President Obama’s initial preference to appoint policy czars, and to downgrade White House offices formally established by Congress, appears to reflect a conclusion that the domestic policy problems facing his Administration are broader and more complicated than those faced by his predecessors and that the White House needs to be reorganized to discharge those responsibilities in a more effective manner.

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ⁱ Presidential Records, Executive Order No. 13489, 74 Fed. Reg. 4669 (January 26, 2009); Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (January 26, 2009); Transparency and Open Government, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (January 26, 2009); Ethics Commitments by Executive Branch Personnel, Executive Order No. 13490, 74 Fed. Reg. 4673 (January 26, 2009).

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- ⁱⁱ Notification of Employee Rights under Federal Labor Law, Executive Orders No. 13496, 74 Fed. Reg. 6107 (February 4, 2009); Economy in Government Contracting, Executive Order No. 13494, 74 Fed. Reg. 6101 (February 4, 2009); Nondisplacement of Qualified Workers under Service Contracts, Executive Order No. 13495, 74 Fed. Reg. 6103 (February 4, 2009); Use of Project Labor Agreements for Federal Construction Projects, Executive Order No. 13502, 74 Fed. Reg. 6985 (February 9, 2009).
- ⁱⁱⁱ The Energy Independence and Security Act of 2007, Memorandum for the Secretary of Transportation, 74 Fed. Reg. 4907 (January 26, 2009); Appliance Efficiency Standards, Memorandum for the Secretary of Energy, 74 Fed. Reg. 6537 (February 9, 2009); State of California Request for Waiver under 42 U.S.C. § 7543(b), the Clean Air Act, 74 Fed. Reg. 4905 (January 28, 2009).
- ^{iv} Closure of Guantanamo Detention Facilities, Executive Order No. 13492, 74 Fed. Reg. 4897 (January 27, 2009); Ensuring Lawful Interrogations, Executive Order No. 13491, 74 Fed. Reg. 4893 (January 27, 2009); Review of Detention Policy Options, Executive Order No. 13493, 74 Fed. Reg. 4901 (January 27, 2009).
- ^v Regulatory Review, Memorandum of Chief of Staff Emanuel to the Heads of Executive Departments and Agencies (January 20, 2009).
- ^{vi} Press Release, EPA To Further Consider New Source Review Final Rule (February 9, 2009); Press Release, Review of Key Clear Air Document (February 17, 2009), accompanied by letter dated February 17, 2009 from Administrator Jackson to David Bookbinder.
- ^{vii} Speech by Secretary Salazar, Statement on Offshore Energy Strategy (February 10, 2009); News Release, Last Minute Oil and Gas Lease Sale near Utah National Parks (February 4, 2009).
- ^{viii} The Endangered Species Act, Memorandum for the Heads of Executive Departments and Agencies (March 3, 2009).
- ^{ix} The Omnibus Appropriations Act of 2009, H.R. 1105, Division E, § 429(b) provides that Interior may withdraw the Special Rule for the Polar Bear, promulgated on December 10, 2008, "without regard to any provision of statute or regulation that establishes a requirement for such withdrawal."
- ^x Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, Executive Order No. 13497, 74 Fed. Reg. 6113 (February 4, 2009); Regulatory Review, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5977 (February 3, 2009).
- ^{xi} Executive Order No. 13493, § 1(g).
- ^{xii} Executive Order No. 13491, §§ 3(c), 5(g). As part of the same policy impulse, on March 2, 2009, Attorney General Holder disclosed publicly nine prior opinions in the national security area that had been issued by the Bush Administration's Office of Legal Counsel and that have been disavowed by the Obama Administration.
- ^{xiii} See Letter dated February 23, 2009 from Senator Robert C. Byrd to President Obama urging that assertions of executive privilege for senior White House personnel be made only by the President or with his specific approval.
- ^{xiv} Obama's NSC Will Get New Power, Washington Post A1 (February 8, 2009).
- ^{xv} Government Contracting, Memorandum for the Heads of Executive Departments and Agencies (March 4, 2009).