

Yes, He Can: Twenty Ways Obama Can Use Executive Power to Push a Progressive Agenda

The Editors

January 23, 2013

When President Obama announced his sweeping new plan for preventing gun violence on January 16, it included no fewer than twenty-three “executive actions,” in addition to a series of legislative proposals. The message was clear: in the face of congressional intransigence—on gun control and beyond—Obama will push changes through the executive branch that he believes to be for the good of the country. “Congress too must act, and Congress must act soon,” Obama said, while making it clear that the White House will not wait for the GOP-controlled House.

It was not the first time the president has flexed his executive muscle. Obama deployed such power during his first term on a number of notable occasions. The “Mini-Dream Act” executive action, for example, was hugely successful, both in terms of public policy and progressive politics. It helped people in an immediate and tangible way, was enormously popular with Latinos and Asian-Americans, and may well have won him re-election.

Others, like raising the CAFE standards to demand better fuel efficiency from carmakers and capping student loan payments, were part of the Obama administration’s “We Can’t Wait” initiative, launched in the fall of 2011, following the debt ceiling fiasco and the House Republicans’ refusal to seriously consider the American Jobs Act. “We can’t wait for an increasingly dysfunctional Congress to do its job,” Obama said at the time. “Where they won’t act, I will.”

The president has also acted through the appointment process. He made a recess appointment of Richard Cordray to head the Consumer Financial Protection Bureau, despite intense congressional opposition, and another three recess appointments to the five-member National Labor Relations

Board, putting it back in action after the Republicans refused for months to confirm any new members. Obama also handed down the Health and Human Services Department contraception mandate—a critical fulcrum point in the GOP’s politically costly “war on women.”

Less high-profile measures have included utilizing the 1906 Antiquities Act, first used by Theodore Roosevelt to protect historic or beautiful public land, to preserve a few areas, including Fort Monroe in Virginia and Fort Ord in California. Last fall, Obama also named Colorado’s Chimney Rock Archaeological Area as a national monument, and dedicated the César E. Chávez National Monument in California.

The president can do much more. So can the cabinet departments and federal regulatory agencies. As Barack Obama begins his second term, and weighs his overall legacy, it will be crucial for progressives to push him to act on a broad range of issues for which there is an absence of congressional will (or a concerted effort to block progress). Pressing for reforms through executive action—using both “street heat” and “suite heat”—should be a serious focus of our work in the coming months.

An executive order, briefly defined, is a presidential directive that carries the force of law. Such actions have a long and checkered history in American politics: Abraham Lincoln’s Emancipation Proclamation was enacted via executive order, as was the internment of Japanese-Americans during World War II (one of a flurry of orders handed down by FDR). Executive orders were used sparingly, for the most part, until the presidency of Bill Clinton, who vastly expanded their use, handing down more than even George W. Bush. Obama has continued this broader trend, issuing 144 executive orders in his first four years. Less binding are executive actions, presidential recommendations that cannot be carried out by the executive branch unilaterally.

In the era after 9/11, the consolidation of executive authority has led to a number of dangerous policies [see David Shipler, in this issue], and we strongly oppose the extreme manifestations of this power, such as the “kill lists” that have already defined Obama’s presidency. Yet executive power, when properly deployed, can and has played a legitimate role in helping to realign the country with its values and the needs of Americans—as Obama attempted to do when he ordered the closing of Guantánamo and an end to torture just days into his first term.

With this goal in mind, The Nation has compiled a list of executive actions that the president should take across a broad range of issues—and asked our readers to submit their own. Many pointed to the excessive military, intelligence and police powers they would like to see rolled back, at home and abroad. Richard Nixon declared the “war on drugs” and created the Drug Enforcement Administration via executive order; Obama, some readers suggested, could finally end the “war on drugs”—or at least direct the DEA to stop enforcing disproportionate crackdowns on drug crimes—using the same power.

Indeed, in addition to ratcheting back the “war on drugs,” the executive branch could also—at least in theory—end the war in Afghanistan; help close some of our hundreds of overseas bases; follow through on its pledge to close Guantánamo; cut back on the use of drones; stop jailing whistleblowers; end the official harassment and surveillance of Muslims and activists; and even pardon Leonard Peltier.

Obviously, the president is unlikely to act on a number of these suggestions. But it is also obvious that our nation is facing multiple crises, many of which will not wait until an obstinate GOP House has evolved enough to act. Wherever possible, the president should act on his own to implement good public policies that can break the gridlock and ease

at least some of our most serious crises, such as the heating of the earth's atmosphere and the dangerous storms like Hurricane Sandy that result; our overextended and bloated military empire; and the corporate corruption of our political system, among many others.

We believe that aggressive and progressive executive action will bring political benefits as well, because the public is tired of waiting for results from Washington. And even if it doesn't, taking action is still the right thing to do—for the planet, for the jobless and the homeless, for the loyal voters who stood in long lines to make history with Barack Obama twice. Besides, what's a second term for if you can't use your presidential power for the good of the many?

What follows is a list of ways that Obama can act to achieve progressive goals in his second term. Some, like taking nuclear weapons off "hair-trigger alert" status, are long overdue—a relic of another age that nonetheless bears correcting. Others, like a plan to modernize voting protocols, are tied to our current political landscape. By no means is this an exhaustive list—it was designed to inspire and encourage further brainstorming along these lines, as well as action-building strategies on how to explicitly pressure the White House over the next four years.

* * *

Environment

Assemble a Commission on Climate Change

In his first press conference since winning a second term, President Obama said, "I am a firm believer that climate change is real, that it is impacted by human behavior and carbon emissions. And as a consequence, I think we've got an obligation to future generations to do something about it." He should start by assembling a blue-ribbon Climate Change National Security Commission to take stock of the most pressing dangers posed by climate change. The commission would be composed of experts like Dr. James Hansen and Bill McKibben, and its members would outline a schedule for analyzing and making recommendations on how best to tackle this enormous and wide-reaching national security issue.

Direct the EPA to Regulate All Greenhouse Gases

In 2007, the Supreme Court ruled that the Environmental Protection Agency has the authority to regulate all greenhouse gases, yet it has not done so. It is long past time for Obama to order the EPA to exert this authority—not just when it comes to carbon dioxide, but methane gas and black carbon as well. Specifically, the president should direct the EPA to apply the approach advocated by NASA scientist James Hansen and the Center for Biological Diversity, which would set a national pollution cap of no more than 350 parts per million of carbon dioxide in the atmosphere. If that standard sounds overly ambitious, the president should bear in mind that regulations issued under the Clean Air Act are supposed to be "technology forcing"—inducing the private sector to develop and deploy superior technologies that will safeguard the health of the public and the planet.

Reject the Keystone Pipeline and 'All of the Above'

With climate change already battering the nation's great cities and ravaging our Farm Belt, it is unconscionable for federal policy to make things worse by encouraging major expansions in coal, oil and natural gas consumption. The president should reject the Keystone XL tar sands pipeline from Canada and replace his "All of the Above" energy strategy with a "Green Growth" one that rapidly phases out fossil fuels while scaling up energy efficiency and wind, solar and other renewable sources.

Foreign Policy And National Security

Take Nuclear Weapons Off 'Hair-Trigger' Status

To this day, the United States and Russia have several hundred missiles ready to launch at a moment's notice. In 2000, George W. Bush called this "another unnecessary vestige of Cold War confrontation," and eight years later, Barack Obama vowed to undo it. Yet nothing has changed since then. As Joe Cirincione, president of the Ploughshares Fund, points out, handing down an order to do so would not be unprecedented. "George H.W. Bush ended the practice of having our nuclear-armed bombers on strip alert as part of his unilateral 1991 nuclear initiatives," he says. "He also took hundreds of missiles off alert." Obama should make good on his promise and lay whatever diplomatic groundwork is necessary to issue this long-overdue executive order, which could make

our planet a lot less dangerous.

Take Cuba Off the 'State Sponsors of Terror' List

In another relic of the Cold War, Ronald Reagan placed Cuba on the State Department's list of terror-supporting countries to demonize its support for revolution in Central America. "This was, and continues to be, a grave injustice," says Peter Kornbluh, director of the National Security Archive's Cuba Documentation Project. "Rather than a terrorist advocate, Cuba has been, historically, a victim of terrorism, much of it shamefully emanating from US territory. The written justifications for keeping Cuba on the list over the last several years actually read like arguments to take Cuba off the list." Kornbluh cites Cuba's efforts to mediate a cease-fire and peace accord between the Colombian government and the FARC rebels as proof that Cuba, in fact, is "playing a fundamental and constructive role in seeking to end conflicts that breed terrorism in the region."

Audit the Pentagon

Almost every federal agency routinely passes the yearly financial audit required by the Chief Financial Officers Act of 1990. The major exception is the Pentagon, which is "unauditable," according to the Governmental Accountability Office (GAO). The Pentagon has broken every promise to Congress about when the audit would be done, even as Congress doubled Pentagon spending. It's time to get serious, but no new laws are needed. "President Obama should request significant reductions in the Pentagon budget until the Pentagon can pass the audit," said Rafael DeGennaro, a former taxpayer group leader who is starting the nonprofit Audit the Pentagon.

Economy

Create a National Development Bank

The president often invokes the need to invest in "nation building at home." As he told a crowd in Virginia on the campaign trail last summer: "Let's rebuild our roads and our bridges.... Let's build broadband lines and high-speed rail. Let's expand our ports and improve our airports. That's what's going to keep us at the cutting edge of a twenty-first-century economy. And we've got tens of thousands of construction workers ready to be put back to work." To this end, a National Development

Bank could provide the funding for such ambitious projects—and serve as a source of funding for reconstruction projects following Sandy-scale natural disasters.

Labor

Implement ‘High Road’ Contracting

In fiscal year 2009, according to the GAO, the government awarded more than \$6 billion in contracts to companies that had violated federal labor laws. Obama should instruct the Labor Department to implement a policy of rewarding and punishing potential contractors based on their labor, environmental and other records. In the absence of a congressional minimum-wage increase, Obama could mandate living-wage standards for federal contractors as well.

Grant Wage and Overtime Protections to Homecare Workers

In December 2011, as part of his “We Can’t Wait” initiative, Obama promised to extend federal minimum wage and overtime protections to homecare workers. “One year later, we are still waiting,” a number of homecare workers wrote to the president in December. According to the National Employment Law Project, “the long-delayed rules change would close a loophole—known as the companionship exemption—that allows most of the nation’s 2.5 million homecare workers to be shut out from basic minimum wage and overtime protections. The rules change would provide a rapidly growing workforce with the same basic wage guarantees that other workers have relied on for decades.”

Criminal Justice

Challenge the School-to-Prison Pipeline

Of the president’s twenty-three executive actions addressing gun violence—several of which were quite important—one was particularly troubling: his promise to “help schools hire more resource officers,” a euphemism for putting more police in schools. This will only accelerate what advocates call the “school-to-prison pipeline,” a phenomenon so catastrophic that the Senate held its first hearing on how to address it just two days before the Newtown massacre. Before following through on this action, the president should

direct the Justice Department to draw up a racial impact statement to analyze how such a policy might disproportionately affect children of color, and take steps to ensure that it does not.

Pardon Prisoners and Commute Unjust Sentences

As Sasha Abramsky recently wrote in our pages, President Obama has been stingy in exercising his considerable pardon power, even for prisoners serving clearly unjust sentences. The New York Times has reported that he has granted a pardon for one out of every fifty applicants, “compared with 1 out of 33 for George W. Bush, 1 of 8 for Bill Clinton and 1 of 3 for Ronald Reagan”—and this despite the scores of federal nonviolent drug offenders ensnared by the drug war. Obama should not only hand down pardons to men and women serving time disproportionate to their crimes; he should also order the Federal Bureau of Prisons to regularly send the White House names of potential candidates for commutations and early release.

Tell the Justice Department to Focus on High-Level Offenses

To prevent such miscarriages of justice, Marc Maurer of the Sentencing Project suggests that “the president and/or attorney general could issue a policy recommendation asking United States attorneys to prosecute only high-level cases or those in which there is a clear federal interest.” This could include ordering the DEA to cease its raids on medical marijuana growers, which result in outrageous miscarriages of justice—as in the case of Chris Williams, arrested in Montana for growing then-legal medical marijuana, who at one point was facing more than eighty years in prison.

Immigration

Stop Deporting Undocumented Parents

On January 2, the Department of Homeland Security released a rule aimed at reducing the amount of time “US citizens are separated” from family members seeking legal residency status. This is a positive development, but it does not change the fact that Obama’s staggering number of deportations—1.5 million people in his first term—has left thousands of children in foster care after their parents were deported. A study by the Applied Research

Center estimates that at least 5,100 kids are in foster care in twenty-two states—a number that could rise to 15,000 by the end of Obama’s second term if deportation levels continue apace. Given the hints that Congress will take up comprehensive immigration reform, Obama should take steps to halt the deportation of parents until this comes to pass.

Reproductive Rights

Tell HHS to Approve Over-the-Counter Plan B for All Women

In December 2011, Secretary of Health and Human Services Kathleen Sebelius made the unprecedented decision to overrule a decision by the Food and Drug Administration to make the “morning-after pill” available over the counter to women of all ages. The president, much to the dismay of many American women, supported the move and went so far as to invoke his two daughters in doing so. Obama should reverse this decision, which was clearly born of political calculation: studies have shown that the emergency contraception pill known as Plan B has no adverse effects on young women and girls under 17.

Reinterpret the Helms Amendment

In 2009, President Obama fulfilled a campaign pledge and repealed the global gag rule, “one of the most ludicrous and paternalistic U.S. foreign policies in history,” in the words of RH Reality Check. Yet the “last stronghold of America’s oppressive overseas reproductive health policies, the Helms Amendment, is still alive and well.” This forty-year-old law prohibits any foreign aid that might be used for abortion, regardless of the law in those countries and in spite of supposed exceptions to accommodate cases of rape, incest and risk to the woman’s life. “Even our colleagues who oppose abortion rights regularly carve out these minimal exceptions to the harsh anti-abortion bills and amendments they introduce,” twelve members of Congress wrote to Obama in December 2011. “Conforming implementation of the Helms Amendment to the actual meaning of the law should not be controversial and, in any case, would be eminently defensible.”

Civil Liberties

Rewrite FBI Guidelines for Spying on Americans

In 2009, The New York Times revealed new post-9/11 powers bestowed on the FBI that lowered the bar for targeting certain communities as possible terrorists. “One section lays out a low threshold to start investigating a person or group as a potential security threat,” the paper reported. “Another allows agents to use ethnicity or religion as a factor—as long as it is not the only one—when selecting subjects for scrutiny.” The result, as Center for Constitutional Rights president emeritus Michael Ratner points out, has been to criminalize communities and entrap individuals simply because of their religion, ethnicity or political activities. “Obama could protect our right to dissent and protest by ordering the FBI to curb surveillance and entrapment of activists and others not engaging in criminal activity.”

Release the Legal Memos on Targeted Killings

In this era of the so-called “disposition matrix,” Obama is not likely to reverse the dangerous course he has taken on targeted killings. But at the very least, he must stop ignoring the transparency pledge he made upon taking office in 2009, to “hold myself as president to a new standard of openness.” As Vicki Divoll, former deputy legal adviser to the CIA’s Counterterrorism Center, wrote in an impassioned op-ed for The New York Times, Obama “has refused to tell Congress or the American people why he believes the Constitution gives, or fails to deny, him the authority to secretly target and kill American citizens who he suspects are involved in terrorist activities overseas. So far he has killed three that we know of.” The president should release the secret memos that outline his administration’s rationale for targeted killings.

Voting Rights

Modernize Voting

When a newly re-elected President Obama thanked Americans for voting him back into office, he acknowledged that some had “waited in line for a very long time” to do so. “By the way,” he added, in an unscripted aside, “we have to fix that.” Although the

states are in charge of administering their own voting practices, the Brennan Center for Justice has identified one way the president can unilaterally move to modernize voting methods across the country. “Several states have requested agreements to designate certain federal agencies as voter registration agencies, meaning that registration materials should be offered to all citizens when they directly interact with those agencies,” explains Nicole Austin-Hillery, director and counsel at the Brennan Center’s Washington office. “Where it is within his authority, we would like to see the president direct agencies to accept these designations. This will encourage other states to make additional designation requests and should significantly increase registration rates among those directly served by the agencies.”

Money in Politics

Appoint New Federal Election Commissioners

“The FEC is the most dysfunctional agency in government, thanks to partisan deadlock,” says Robert Weissman of Public Citizen. “Five of the six members are serving past their terms—including the former chair, who has announced she will step down February 1—because the president has not made new appointments.” It’s past time for Obama to appoint new commissioners to better equip this critical agency to do its job.

Make Government Contractors Reveal Political Donations

Congress has repeatedly failed to pass the DISCLOSE (Democracy Is Strengthened by Casting Light On Spending in Elections) Act. But the president could address this by requiring federal contractors to open the books on their campaign spending. As Public Citizen has pointed out, “among the 50 largest contractors, nearly all contractor political spending was disclosed to the public until 2010, when [an FEC] loophole and a Supreme Court decision combined to permit unlimited secret spending in elections.” In the post–Citizens United era, the president should take all actions necessary to rein in such secretive, uncontrolled spending.