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My “Reason” op ed on US v. Texas and Obama’s immigration order

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Reason has just published an op ed I did on *United States v. Texas*, the important immigration case argued before the Supreme Court yesterday. Here is an excerpt:

The Obama administration’s policy of deferring deportation for over four million undocumented immigrants is the focus of *United States v. Texas*, a major case currently before the Supreme Court, in which numerous state governments challenge the president’s order. While Obama’s action highlights the alarming extent of executive discretion in the modern state, it is not unconstitutional.

The most fundamental reason why Obama’s policy is legal is one that has not been raised in the litigation over it: The immigration laws whose enforcement it restricts are themselves unconstitutional. The detailed list of congressional powers in Article I of the Constitution does not include any general power to restrict migration....

Obama’s policy is constitutional even aside from the dubious nature of the immigration restrictions it affects. Most of his order is simply an exercise of longstanding executive discretion in deciding when to enforce federal laws.... A majority of Americans have violated federal criminal law at some point in their lives. Only a small fraction are ever prosecuted. The executive has unavoidably broad discretion to decide which suspected lawbreakers to pursue and which to ignore...

Obama’s exercise of discretion in this area highlights the enormous power enjoyed by the modern executive in a world where nearly everyone is guilty of violating some federal law.... This reality creates numerous opportunities to abuse executive power by means of selective enforcement.

The way to address that danger, however, is not to attack Obama’s effort to protect immigrants, but to work to reduce the enormous scope of federal law that created such vast discretion in the first place.

The op ed is paired with a thoughtful column by Ilya Shapiro of the Cato Institute, arguing the opposite position. We will be doing an “Ilya vs. Ilya” debate about this issue at the Reason Foundation in Washington, DC on Thursday night.