



## Experts debate: Will Biden's student loan action survive a court challenge?

By Nick Papantonis

August 26, 2022

The euphoria of having significantly less student loan debt was short-lived in some circles.

Shortly after President Biden announced he would forgive up to \$20,000 of student loans per borrower, lawyers, constitutional analysts and politicians began weighing in on whether his executive action was legal.

"I think it's going to get rejected," Gov. Ron DeSantis said during a press conference early Thursday. "Clearly, it is unconstitutional to be doing that."

Anticipating some pushback, the Biden administration carefully released legal opinions from attorneys that cited the law they believed gave the executive branch the power to issue such broad-based forgiveness.

The memo cited the HEROES Act, which Congress passed in 2003 in the wake of 9/11 and the beginning of the Afghanistan war. Lawmakers at the time allowed the White House to grant relief to students in any way it "Deems necessary in connection with a war or other military operation or national emergency."

President Trump's education department cited the HEROES Act when it paused interest on student loan payments as the economy shut down in 2020 to little controversy. Fiscal conservatives said there was a difference between that pause — made in the chaos of the early days of the pandemic — and what Biden is attempting now.

"I'm going to take something that Congress authorized to be loans money that go to people with the expectation they will repay the government, and I'll essentially turn them into grants," Neal McCluskey, an education analyst with the libertarian-leaning think tank CATO Institute, described. "That is, for all intents and purposes, an appropriation and a violation of the separation of powers. It is only Congress that appropriates money."

McCluskey's opinion fell in line with the unconstitutional crowd. Biden, they said, was using power that the Constitution specifically grants to the legislature, leading to a broader argument about the immense power Congress has handed to Pennsylvania Avenue over the centuries.

The pro-constitutional crowd counters that Biden's actions were a continuation of a series that started during a national emergency, using power that the legislature intentionally handed to his predecessors.

However, McCluskey said people who received loan relief this week likely don't have a reason to worry about a drawn-out court battle that could see Biden's actions reversed.

"The problem that seems to exist is that it's hard for anybody to establish standing to bring a lawsuit to show that they have been harmed by debt cancellation," he mused. "A taxpayer can't sue the federal government and say I don't like how you're spending money."

The only group that had good standing, he said, was Congress, which could sue over the separation of powers. Since both chambers are in the hands of the Democrats, he said that situation was unlikely.

"It's actually very hard to think of who could sue and not get thrown out of court," he said.

McCluskey provided three solutions he would've advised the president to take had he been in the decision room. First, he said, student debt should be like other debt, in that it's possible to offload when a person declares bankruptcy.

Second, he said the current student loan process should be streamlined to two payment plans: one that is paid off in 10 years, and another that is income-based.

"There are numerous loan programs and repayment programs that get extremely confusing for anybody who's trying to use them," he said. "We should have one standard repayment."

Finally, he said the amounts offered to the student population as a whole should be reduced to incentivize colleges and universities to lower their tuition rates.