



Lawful or Awful? Scholars comment on Obama's immigration action

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President Obama's executive orders about immigration have sparked a lively debate among constitutional scholars. Here is what 10 noted scholars have been saying about executive powers and their use to redefine immigration policies.

On Thursday night, the President said he will use this executive order power to direct executive agencies to emphasize border security and deemphasize the deportation of as many as 4 million unauthorized immigrants from the United States.

The President's political critics called the moves a broad overreach of his constitutional powers. His supporters counter with arguments that President Obama hasn't differed from other Presidents in his immigration moves.

Here is a relatively balanced sampling of what 10 constitutional scholars think. And if you want to listen to a detailed discussion, we have a [post-Obama-speech podcast we hosted on Friday](#) featuring Louis Fisher and Chris Edelson that covers the constitutional arguments from all angles.

1. A group of 10 law professors [who filed a letter supporting Obama's legal powers](#) to make immigration policy decisions by executive order

"While we differ among ourselves on many issues relating to Presidential power and immigration policy, we are all of the view that these actions are lawful. They are exercises of prosecutorial discretion that are consistent with governing law and with the policies that Congress has expressed in the statutes that it has enacted."

2. [Jonathan Adler on the Volokh Conspiracy blog](#)

"Immigration law is an area in which — for good or ill — Congress has given the executive wide latitude. Under some other laws, including the PPACA, Congress was not so generous. In evaluating claims of executive overreach it is important to consider the relevant statutes, as whether the President is exceeding his bounds largely depends on the nature and scope of the power Congress delegated in the first place."

3. Nicholas Quinn Rosenkranz in an [interview with the website The Blaze](#)

“Pre-emptively announcing that you will not enforce the law against a population of millions — this is several orders of magnitude beyond traditional case-by-case prosecutorial discretion,” Rosenkranz said. “In this case, the president is reportedly considering affirmative actions — issuing of papers and so forth — that would purport to confer some legal status. This is a giant step beyond traditional prosecutorial discretion.”

4. **Elizabeth Price Foley in a [New York Times op-ed prior to Obama’s speech](#)**

“While several presidents — both Republican and Democrat — have used prosecutorial discretion to temporarily delay deportation in the face of wars (Nicaragua, Kuwait), hurricanes or earthquakes (El Salvador, Nicaragua, Honduras) and other discrete natural and political catastrophes, no other president has claimed the constitutional authority to ignore immigration law because he believes it’s unfair as a matter of permanent national policy. At some point, the discretion not to prosecute a law becomes a failure to faithfully execute it. Whether President Obama’s immigration policies have crossed that line will be a matter for both courts and the American people to judge.

5. **[Walter Dellinger on The Slate website](#)**

“The president is not acting contrary to any statutory mandate. Nothing in the president’s action sets a precedent for unbridled executive action (as Marty Lederman sets out in a [post](#) for *Balkinization*). To note one example, although a president can cut back on enforcement of tax laws, no president can relieve any one American of a statutory obligation to pay taxes. The next president can come collecting—and interest and penalties will be accruing until he or she does.”

6. **Erwin Chemerinsky [on the New Republic website](#)**

“The federal courts, too, have recognized that presidents inherently have the power to choose not to enforce immigration laws in a particular instance and thus to not initiate deportation proceedings even when a person is not lawfully in the country. In a famous case involving John Lennon, the United States Court of Appeals for the District of Columbia Circuit held that the president could issue an “an informal administrative stay of deportation” to allow Lennon to remain in the country. The case, *INS v. Lennon*, allowed the executive branch to halt the deportation of Lennon and expressly recognized president’s constitutional power to exercise prosecutorial discretion in the immigration context.”

7. **[Shannen W. Coffin to the New York Times](#)**

“This action certainly looks a lot more like, ‘I’m changing the rules of the game,’ rather than ‘I’m just choosing not to exercise my discretion,’ and that runs counter to Congress’s power to decide what the law is,” said Coffin, who in the George W. Bush administration was a Justice Department lawyer. “It’s highly questionable as a constitutional matter.”

8. **[Ilya Somin on the Volokh Conspiracy blog](#)**

“If you believe that the Constitution should be interpreted in accordance with its original meaning, and that nonoriginalist Supreme Court decisions should be overruled or at least viewed with suspicion, then you should welcome the use of presidential discretion to cut back on enforcement of laws that themselves go against the original meaning. I am no fan of the Obama administration’s approach to constitutional interpretation. In too many instances, the president really has acted illegally and undermined the rule of law – most notably by [starting wars without congressional authorization](#). But today’s decision isn’t one of them.”

9. [Ilya Shapiro on the Cato Institute website](#)

“Accordingly, while the applicable immigration laws give the president discretion that’s quite broad, either (1) this executive action goes beyond even that broad grant of power, or (2) the laws themselves are an unconstitutional delegation of legislative power. After all, Congress could not constitutionally pass a law saying, “The president is now dictator and can make any laws he wishes”—even temporarily or regarding but one area of policy. So if the administration’s defenders are right that President Obama is toeing but not crossing the letter of the law, then that letter is invalid and the president’s actions are still unconstitutional.”

10. [Eric Posner on the Slate website](#)

“Thus, the president’s discretion to enforce the immigration laws has always been the cornerstone of a de facto guest-worker (or, if you want, caste) system from which most Americans have greatly benefited. That’s why Republicans’ claim that the president is shredding the Constitution sounds so odd to people knowledgeable about immigration law. He’s just doing what countless Congresses have wanted him to do, and have effectively forced him to do, so that Congress itself could avoid charges that it has created a two-tier system of citizenship where the bottom tier is allowed to stay in this country and work, but is not allowed to vote, to benefit from welfare programs, to travel freely, or to enjoy the full protection of workplace laws. Of course, you might say that the whole illegal immigration system, with its two-tier system of rights, violates the Constitution or at least constitutional values, but the fault for that lies with Congress, not with the president.”