

# BROOKINGS

John Hudak | November 20, 2014 12:00pm

## Four Realities about Executive Actions; Moving Beyond the Rhetoric of Immigration Reform



President Obama’s anticipated executive order dealing with immigration in the United States has drawn the ire of the many conservatives. Names like “king” and “monarch” are being tossed about. “Impeachment” and “illegal” are the popular i-words du jour. Even before the order has been seen publicly, many are convinced that it is either a total subjugation of the Constitution or is perfectly legal, depending on one’s pre-existing views on immigration reform. In place of such certainty, it’s important to take a deep breath and discuss what we know about immigration and executive power, and what we *may* hear from the president tonight.

### **1. Executive action is not inherently illegal.**

This is difficult for some to hear. Executive action—orders, proclamations, signing statements, administrative directives, regulatory acts—that institutes policy change [is not a violation of](#)

the law nor an affront to the Constitution. Launching accusations of illegal executive overreach is a parlor game that the opposing party of any president plays—and those claims [are once again being shouted](#) from the DC rooftops. Just as President Bush's actions produced a breathless chorus of outraged Democrats, President Obama's exercise of executive power is criticized often before the actions are even issued.

Yes, there are limits to presidential power, and the co-equal branches have institutional powers to limit the president—powers that, by definition, nullify the charges of “monarchical” behavior. Often courts step in to clarify the lines of power, the boundaries of law, and the nuances of administrative discretion. As I noted to [Boston Public Radio this week](#): *Just because the president says it doesn't make it legal, but just because Congress doesn't like it doesn't make it illegal.*

## **2. Executive power is quite broad, even in immigration policy.**

We have a long history of presidents using executive power to address immigration reform from Franklin Roosevelt (see E.O. 7797), Dwight Eisenhower (see E.O. 10714), Lyndon Johnson (see E.O. 11188), Richard Nixon (see E.O. 11569), George H.W. Bush (see E.O. 12711), just to name a few.

The purpose of executive action is to make determinations about the proper implementation of law. It is easy to believe a few myths about acts of Congress. First, that Congress spells out all the details necessary for a law to be executed. The reality is that legislation is the product of compromise and compromise is often reached through vague provisions in law. It is ultimately up to the executive branch and/or courts to interpret the law in order to administer it. Second, congress provides the resources to enforce the law at all times, in every situation. Particularly in an era of budget cuts, administrators and presidents need to make choices about how to spend funds and enforce the law. Those choices have serious policy consequences, but reflect an often legitimate need in policy implementation.

Because of the needs of administration and implementation, courts—even the Supreme Court of the United States under its

current membership—have deferred to presidential and administrative discretion in how and when to enforce the law, or opt not to enforce it. In *Arizona v. United States* (2011), Justice Kennedy details the breadth of enforcement discretion that the Federal Government, the President, and the Officers of the United States wield, particularly in the context of the enforcement of immigration policy. Other cases such as *Heckler v. Chaney* (1985) assert such discretionary power, often relying on the *Administrative Procedures Act* as a basis for such determinations.

### **3. There remain real limits on what the president can do.**

Before passing judgment on the legality of the president's forthcoming executive order, it is important to wait until it is issued and we are able to see what it contains. Certainly, there are boundaries in the law that the president cannot cross. The president surely cannot implement his entire vision for comprehensive immigration reform—one that has stalled in Congress—simply by executive order. Indications from the White House suggest that the Order will fall far short of the Senate-passed bill, and that is a good thing because it recognizes the limits of the office.

If the president relies on enforcement discretion, regulatory powers, or any discretion offered in the law from the President, Secretary of State, Attorney General or other officers to make exceptions, he is likely acting in a manner wholly consistent with the law and in ways that would pass muster with courts.

As important as the executive order itself will be the legal justification for its provisions. By examining the legal justification—which the White House should issue simultaneously with the order—readers can be directed to the specific provisions of law and practice that the White House argues offers it legal justification. It then becomes easier to understand when the Administration is asserting concrete legal authority or whether it is stretching the law in ways that even courts may find too much to bear.

All of this remains hypothetical until the president issues documents, but the more information the White House provides,

the easier it will be to assess the reach, substance, and basis for the order.

#### **4. How can Congress respond?**

Congress, particularly congressional Republicans, will certainly be irate at this proposal, regardless of its contents; they have openly demonstrated that in the past few days. While this posturing is normal for a co-equal branch, unhappy with a policy change, complaining in the press and calling the president a king are wastes of time that advance nothing. Congress has a few paths forward to respond.

First, they can amend the law that will likely provide much of the legal basis for the order: the *Immigration and Nationality Act*.

This law governs much of the immigration policy in this country.

Clearer, more robust language from Congress that puts limits on presidential power can come through amendments to this Act.

The risks of a presidential veto are, of course, quite high.

However, approaching the amendments to the Act as a means of negotiating with the White House toward large-scale or piecemeal immigration reform may be possible.

Second, if Congress believes that some Americans or those on the pathway toward becoming Americans are harmed in any way by the executive order, they can encourage individuals to sue in order to test the legality of the executive order. A lawsuit from the House of Representatives will likely be insufficient. A legal test of the boundaries of presidential power in this arena is healthy for democracy and for the separation of powers. However, given courts' deference to the executive, Congress may be unhappy with the result.

Third, changing funding is always a consideration in responding to presidential action—though often one that proves minimally effective. Congress may consider how to affect funding for immigration-related agencies in ways that can limit the ability to enforce the new executive order. In reality, the politics of this is a challenge. It is easier to cut off funding for presidential action than it is to use funding to respond to presidential *inaction*. If the thrust of the president's order involves the choice not to deport

individuals who meet certain criteria, it is unclear how reducing a budget stops that. In areas where the executive order requires administrative *action*, Congress could put up funding roadblocks, while risking a presidential veto. The final option, defunding a whole agency would prove quite ineffective, rendering the US government unable to deport anyone and likely leading to serious backlash among supporters of Congressional Republicans.

There should be a robust debate about immigration policy and presidential power in this country. However, that debate should be held in a zone of reality that recognizes that presidents have broad, though not limitless, administrative power. Congress will be unhappy with whatever the White House issues this evening in an effort to deal with the immigration system's status quo. In a true irony, the best path Republicans may have to respond to the President's executive order is to win a presidential election, and the messaging and strategy around immigration that they employ over the coming months may have a real impact on their likelihood to do it.