

JONATHAN TURLEY

Res ipsa loquitur ("The thing itself speaks")

Fifth Circuit Rules President Obama Violated Constitution On Unilateral Immigration Changes

© 1, November 11, 2015, November 11, 2015 👤 [jonathanturley](#) 📁 [Uncategorized](#)

A federal appeals court said President Obama's own words claiming powers to "change the law" were part of the reason it struck down his deportation amnesty, in a ruling late Monday that reaffirmed the president must carry out laws and doesn't have blanket powers to waive them.



(<https://jonathanturley.files.wordpress.com/2013/12/us-court-of-appeals-5th-circuit-seal.png>) The United States Court of Appeals for the Fifth Circuit has ruled that President Barack Obama violated the Constitution in order unilateral changes to immigration laws in the latest such ruling against executive overreach by the President. The President's own words were used by the panel to rule that he intended to unilaterally change the law.

Some 26 states sued to stop the amnesty as violative of the Immigration and Nationality Act. President Obama ordered Deferred Action for Parental Arrivals, or DAPA, to grant up to 5 million illegal immigrants a proactive three-year stay of deportation and to give them work permits. To qualify, illegal immigrants had to be parents of U.S. citizens or legal permanent resident children.

(<https://jonathanturley.files.wordpress.com/2015/11/jerryedwin-smith.jpg>) Judge Jerry E. Smith, writing for himself and Judge Jennifer Walker Elrod, The 2-1 ruling by the 5th Circuit Court of Appeals quoted from Obama's remarks in Chicago just days after his Nov. 20, 2014, announcement detailing his executive actions. In response to a heckler who was criticizing him for boosting the number of deportations, Obama said "But what you are not paying attention to is the fact that I just took an action to change the law."

Smith added that the Justice Department seemed to stumble over the remarks: "At oral argument, and despite being given several opportunities, the attorney for the United States was unable to reconcile that remark with the position that the government now takes."



Deferred action, however, is much more than nonenforcement: It would affirmatively confer “lawful presence” and associated benefits on a class of unlawfully present aliens. Though revocable, that change in designation would trigger (as we have already explained) eligibility for federal benefits—for example, under title II and XVIII of the Social Security Act⁹⁹—and state benefits—for example, driver’s licenses and unemployment insurance¹⁰⁰—that would not otherwise be available to illegal aliens.



(https://jonathanturley.files.wordpress.com/2015/11/judge_carolyn_dineen_king.jpg) Writing in dissent on Monday, Judge Carolyn Dineen King rejected the arguments that the change was effectively changing federal law and dismissed Mr. Obama’s words as just the type of loose talk that comes from politicians and not a real legal argument.

I testified ([here](https://jonathanturley.org/2013/12/03/house-judiciary-committee-to-hear-testimony-on-president-obamas-authority-to-suspend-or-change-federal-laws/) (<https://jonathanturley.org/2013/12/03/house-judiciary-committee-to-hear-testimony-on-president-obamas-authority-to-suspend-or-change-federal-laws/>) and [here](https://jonathanturley.org/2012/02/15/turley-testimony-on-the-constitutionality-of-recess-appointments/) (<https://jonathanturley.org/2012/02/15/turley-testimony-on-the-constitutionality-of-recess-appointments/>) and [here](https://jonathanturley.org/2014/02/26/congress-considers-legislation-to-respond-to-executive-nonenforcement-of-federal-law/) (<https://jonathanturley.org/2014/02/26/congress-considers-legislation-to-respond-to-executive-nonenforcement-of-federal-law/>)) and wrote a column (<https://jonathanturley.org/2014/03/10/the-constitutional-tipping-point/>) on President Obama’s increasing circumvention of Congress in negating or suspending U.S. laws. I [ran another column](https://jonathanturley.org/2014/05/21/a-question-of-power-the-imperial-presidency/)

(<https://jonathanturley.org/2014/05/21/a-question-of-power-the-imperial-presidency/>) listing such incidents of executive over-reach. My prior testimony has discussed unilateral actions in the immigration field that do raise separation issues.

Major changes in these areas should not be the result of unilateral action in my view. The Madisonian system is designed to allow different constituencies to come to bear in the bicameral system to take factional disputes and convert them into majoritarian compromises. The result has greater legitimacy as the result of the legislative process and often constitutes a better process after being put through the difficult drafting and amendment process. During times of division, less may get done. Both sides must either compromise or seek to change the balance of power in the next election. If the country and Congress is too divided to reach a compromise, unilateral action will only deepen the questions of legitimacy and over-reach.

Here is the opinion: [Texas v. United States](http://www.ca5.uscourts.gov/opinions/pub/15/15-40238-CV0.pdf) (<http://www.ca5.uscourts.gov/opinions/pub/15/15-40238-CV0.pdf>)

60 thoughts on “**Fifth Circuit Rules President Obama Violated Constitution On Unilateral Immigration Changes**”

1. [richardswarthout](#) says:
1, November 17, 2015 at 3:10 pm

I’m rather late to this thread; came here because of an overriding question regarding the 5th’s opinion. Almost all discussions I’ve seen on the opinion are about side issues. The matter before the court was not about constitutionality of the executive action, but rather should the court affirm the district court’s temporary injunction. The issues it had to address did not include constitutionality. It first addressed the requirements needed when affirming a temporary injunction; do the states have standing, is the executive action reviewable, and is it exempt from review and comment.

The 5th court of appeals merely affirmed the temporary injunction. The lawsuit has not yet gone to trial. Will the Supreme Court accept this case? Related only to a temporary injunction, with the lawsuit still pending?

[Reply \(https://jonathanturley.org/2015/11/11/fifth-circuit-rules-president-obama-violated-constitution-on-unilateral-immigration-changes/?replytocom=1507581#respond\)](https://jonathanturley.org/2015/11/11/fifth-circuit-rules-president-obama-violated-constitution-on-unilateral-immigration-changes/?replytocom=1507581#respond)

2. **richardswarthout** says:

1, November 18, 2015 at 1:10 pm

To offer credence to my comment above I offer a reference to the district court's opinion, specifically section C Remaining Claims on pgs 121-122:

http://c8.nrostatic.com/sites/default/files/pdf_corner_021515_immigrationinjunction.pdf (http://c8.nrostatic.com/sites/default/files/pdf_corner_021515_immigrationinjunction.pdf)

Note that the issue of constitutionality was specifically omitted from the opinion because it was not needed, at that time. There appears to be a formality; during the preliminary injunction phase, avoid the constitutionality issue if possible. The issue would unnecessarily complicate the process during early stages of a lawsuit.

Richard

[Reply \(https://jonathanturley.org/2015/11/11/fifth-circuit-rules-president-obama-violated-constitution-on-unilateral-immigration-changes/?replytocom=1507868#respond\)](https://jonathanturley.org/2015/11/11/fifth-circuit-rules-president-obama-violated-constitution-on-unilateral-immigration-changes/?replytocom=1507868#respond)

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