

Is It Unconstitutional for the President to Implement Major New Policies by Regulation? | 1

The short answer is a resounding **No**. Some domestic initiatives obviously do require Congressional approval because they are clearly outside the authority conferred by existing law. But Congress has given the executive branch broad discretion to regulate in many areas, and the executive branch can use that authority for major policy initiatives. The only real restriction is that the actions have to fall within a reasonable interpretation of the statute.

Obviously, not everyone agrees. As [Politico](#) explains, Republicans have argued that using executive powers for new purposes is an abuse of presidential power:

[Republicans] have called the president's tactics abusive and arrogant, a brazen end run around the checks and balances built into the Constitution.

"This president's use of executive power in areas where he has failed to build a necessary consensus for legislative action has been unprecedented," said Rep. Darrell Issa (R-Calif.), chairman of the House Oversight and Government Reform Committee. "This disregard for the rule of law and lack of transparency sets a dangerous precedent."

For example, Paul Ryan said, "We have an increasingly lawless presidency where he is actually doing the job of Congress, writing new policies and new laws without going through Congress. Presidents don't write new laws, Congress does." Of course that's true, but if something is authorized by an old law, a new law isn't required. And the Supreme Court has given the President broad authority to interpret old laws so as to implement his own view of policy.

Some people have argued that laws should be interpreted narrowly so that really big policy initiatives have to go through Congress. The basis for this argument is a case called [FDA v. Brown & Williamson](#), where the Supreme Court rebuffed an effort by the FDA to use existing statutory authority to regulate cigarettes. This holding never made sense to me in the first place. Some people said it was democracy-enhancing to require new policy initiatives to come from Congress, but to me it seemed only to enhance the power of special interests like cigarette companies to block reform. The Supreme Court later made it clear, in another case called [Massachusetts v. EPA](#), that the earlier decision wasn't based on democracy-forcing but on the long history of FDA's explicit refusal to regulate cigarettes, combined with Congressional reliance on that stance. Anyway, no one ever thought it was unconstitutional for the President to try to make aggressive use of statutory power, just that

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it might exceed statutory authority.

Another Supreme Court opinion, [Chevron v. NRDC](#), emphasizes executive discretion in interpreting the law. According to *Chevron*, when a statute is ambiguous, resolving the ambiguity involves a policy judgment, and it is up to the executive branch to make that policy judgment. A court will only intervene when the executive's interpretation of an ambiguous statute is unreasonable, and the Court has only found that to be true in a single [case](#) (dealing with the relatively obscure issue of deadlines for controlling ozone pollution).

The bottom line is that particular actions by Obama might or might not hold up in Court, but there's nothing wrong with the executive branch using regulations to make new policy.

According to the Supreme Court, that's exactly what the executive's job. If Congress is unhappy, it should amend statutes to provide tighter limits on executive authority.