



CONSTITUTIONAL ACTION REPORT

THE CONSERVATIVE CAUCUS FOUNDATION, INC.
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PETER THOMAS, PRESIDENT

Obama Threatens Another Unconstitutional Amnesty

Twice President Obama has granted exemption from deportation to many illegal aliens, actions amounting to a de facto (though temporary) amnesty. Now he has promised that he will announce a third such program before the end of the year.

These amnesties are a violation of the President's duty under the U.S. Constitution. Obama's conduct is legally indefensible.

Among the most important responsibilities entrusted to the President is that "he shall take Care that the Laws be faithfully executed . . ." (Article II, Section 3). This is reinforced by the oath of office (Article II, Section 1) in which the President swears to "faithfully execute the office of President" and to "preserve, protect and defend the Constitution of the United States."

Given that the Constitution is crystal clear in its statement that "all legislative Powers herein granted shall be vested in a Congress", constitutional fidelity demands that the president not encroach on that authority by exercising legislative powers himself. If the president is allowed to act as an alternative Congress, enacting or amending laws, it destroys the separation of powers that was carefully written into our Constitution.

If the President believes that the law needs to be changed, the Constitution directs him to go to Congress and "recommend to their Consideration such measures as he shall judge necessary and expedient" (Article II, Section 3). He is given no power to change the law on his own.

President Obama has repeatedly recommended that Congress enact an amnesty for illegal aliens. However, Congress has been firm in its refusal. It has passed neither the broad amnesty of a Comprehensive Immigration Reform bill, nor the narrower DREAM Act. According to the Constitution, the President must accept the decision of Congress and continue to enforce the law as written.

That law (8 U.S.C. 1325) clearly makes it a crime to enter the United States without going through a border checkpoint, or by going through a checkpoint using a "false or misleading representation." Those who illegally enter but are later caught are then subject to court proceedings which will result in a deportation order. Once that order has been issued, 8 U.S.C. 1321 says that "the Attorney General shall remove the alien from the United States within a period of 90 days . . ."

Unfortunately, President Obama has twice chosen to act on his own, granting what amounts to amnesty (though a temporary one, lasting only as long as his instructions are not withdrawn) to many illegal aliens.

This began on June 17, 2011. James Morton, the Director of US Customs and Immigration Enforcement (acting at the direction of the President), sent a memo to all “Field Office Directors”, “Special Agents in Charge”, and “Chief Counsel”, announcing a new policy. Most illegal aliens would no longer be considered eligible for deportation, giving them something close to amnesty. They could live openly, illegally hold jobs that would otherwise go to Americans, and have no fear that the US government would do anything about it.

One year later, on June 15, 2012, Secretary of DHS Janet Napolitano sent a memo to the appropriate agencies within DHS instructing them to act, in some respects, as if the DREAM Act had passed Congress. The memo defended this as enforcing the law in a “sensible manner”, rather than being “blindly enforced”.

If the President keeps his promise to deliver yet a third round of amnesty, he will be compounding his violation of the Constitution and making a mockery of his oath of office.

What About Executive Orders?

President Obama’s belief that he is above the law, and may change or ignore it at his pleasure, has provoked well-justified concern that he may do permanent harm to the constitutional foundation of our republic, which relies on the separation of powers between the legislative, executive, and judicial branches. However, some of the criticism has focused to an improper degree on executive orders, claiming that Obama has customarily used these orders to carry out his illegal policies. Some of Obama’s critics have even gone so far as to say that all executive orders are inherently unconstitutional. Obama’s defenders have replied by pointing out that other presidents have issued executive orders and some have issued more than Obama.

The most important point overlooked in this debate is that Obama’s violations of the Constitution have rarely, if ever, been done by executive order. His suspensions and revisions of ObamaCare have been carried out by regulations issued by the IRS and the Department of Health and Human Services. The same was true of the illegal birth-control rules that were overturned in the Hobby Lobby case.

Refusal to enforce the immigration and deportation laws was handled by internal directives within the Department of Homeland Security. For example, the deferred action program (DACA) was implemented by a memo from Janet Napolitano, then Secretary of DHS, to the heads of Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement.

In the case of his unconstitutional recess appointments, Obama used his nomination authority. The illegal war against Libya involved an abuse of his power as commander-in-chief, and did not involve an executive order authorizing war. (He did issue an executive order, number 13566, imposing sanctions on certain Libyans, but he based that on the authority granted by Congress through the International Economic Emergency Powers Act and the National Emergencies Act.)

In at least two instances, failing to cut off aid to Egypt and failing to notify Congress in advance about trading five Taliban leaders for Bergdahl, Obama’s crime was that he did nothing

even though the law required action. Had he issued an executive order ending aid to Egypt, he would have been doing his duty.

Knowing the truth about exactly how Obama's is violating our Constitution is vitally important, since otherwise his defenders have an easy rebuttal by comparing Obama's executive orders to those of other presidents. Criticism must focus on Obama's failure to obey the law rather than the method used.

Conservatives also need to understand that executive orders, when kept within the law, have a legitimate place in our constitutional system. As chief executive of the U.S. government, the President has the authority to give orders to his subordinates, and may do that through a formal written document. However, such orders are only legitimate if they are in accordance with the law and the Constitution.

For example, the Social Security Act requires an annual cost-of-living adjustment in benefits. To enforce this, each year the President issues an executive order increasing Social Security benefits to match inflation. There is nothing wrong with such an executive order, carrying out the express will of Congress. Similarly, presidents often issue executive orders proclaiming a national emergency in order to invoke certain powers which the law grants them only in case of such an emergency. (The legitimacy of this assumes that Congress has granted only such powers as are permitted by the Constitution.)

However, in 1952 President Truman used an executive order to seize control of privately-owned steel mills in order to curry favor with the steel workers union. The Supreme Court overturned that executive order (*Youngstown Sheet & Tube Co. v. Sawyer*) and instructed Truman to return the steel mills to their rightful owners. There was nothing in U.S. law which granted Truman the authority for such a seizure.

Likewise, a Federal court struck down President Clinton's executive order 12954 that prohibited Federal contractors from hiring replacements for striking workers (*US Chamber of Commerce v. Reich*). The court found that rather than upholding U.S. law, "the Executive Order is regulatory in nature and is pre-empted by the NLRA which guarantees the right to hire permanent replacements."

However, the courts have usually been reluctant to block executive orders, preferring to defer to the President in almost all cases. More vigilant oversight by the courts would be an important step in defending the Constitution.

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TCCF Members Are Unanimous Against Obama's Illegal Alien Policy

The poll in the September issue of the *Constitutional Action Report* asked TCCF members for their opinion on President Obama's policy of amnesty for illegal aliens. The response was an unusually clear – in fact, unanimous – rejection of the President's approach.

Do you support President Obama's policy of granting amnesty to illegal aliens?

Yes 0%

No 100%

Do you believe that President Obama has the constitutional authority to change immigration law without any action by Congress?

Yes 0%

No 100%

Cover-up of IRS Scandal Continues to Unravel

Though the IRS is attempting to cover up its targeting of conservative groups, new revelations continue to destroy the agency's credibility. Claims that the IRS cannot recover the email of additional employees involved in the targeting indicate either massive incompetence (and the failure to follow Federal law concerning back-ups) or a deliberate destruction of key documentation. Wiping out the memory of Lois Lerner's Blackberry shortly after the beginning of the Congressional investigation points in the same direction.

If the IRS has nothing to hide, why does important information keep "disappearing"?

Meanwhile, witnesses testifying before the House Oversight and Government Reform Committee offered many suggestions to prevent a repeat of the scandal. These ranged from abolishing the IRS to reducing its power and making its employees personally liable for illegal actions and lying to the public. The full testimony of these witnesses can be found online at <http://oversight.house.gov/hearing/irs-abuses-ensuring-targeting-never-happens/>.

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