

The Obama Amnesty Program: Systematic Disregard for the Constitution and the Laws

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Background

During his 2008 campaign for president, Barack Obama firmly pledged that he would push through Congress a bill to grant amnesty to many of the illegal aliens residing in the United States.¹ This was in accordance with the 2008 Democratic Platform which promised to bring illegal aliens “out of the shadows”, granting them legal status and putting them on the path to citizenship.² Such a pledge was no surprise since using an increased number of Hispanic voters in order to build a permanent Democratic majority had been and continued to be an openly discussed Democratic strategy.³

Obama won the election and Democrats increased their majorities in both houses of Congress. However, Obama chose to focus on an agenda of spending increases, health care, climate change and paying off his political debts to labor unions, putting amnesty for illegal aliens on the back burner.⁴

Perhaps Obama believed that, after getting votes on the stimulus, ObamaCare, and energy suppression, he should not ask politically vulnerable Democrats in Congress to cast yet another vote that would weaken them when running for reelection in 2010. Perhaps he was unsure whether he could even count on endangered Democrats to support an amnesty bill that was certain to anger many voters in a lower-turnout midterm election. Whatever his thinking, he passed up his best chance at obtaining Congressional passage of amnesty. The Republican landslide of 2010 brought a large Republican majority to the House and more than enough Republican senators to filibuster an amnesty bill to death.

Faced with the impossibility of legislative approval for amnesty, Obama began to exercise what he claimed to be his legitimate executive powers to provide at least temporary protection to illegal aliens. He no doubt hoped that this would be merely a short-term expedient until a more favorable Congress elected in 2012 gave him the full and permanent amnesty he demanded.

The first step was taken in a low-key manner without a major public announcement. John Morton, Director of US Immigration and Customs Enforcement, issued a June 17, 2011 memo to the leadership of his agency on the subject of “Exercising Prosecutorial Discretion”.⁵ It claimed to build on previous memos going back as far as the Carter and Clinton administrations, while rescinding two Bush-era memos.

¹ “Election Guide 2008”, *The New York Times*, May 23, 2013 online at <http://elections.nytimes.com/2008/president/issues/immigration.html> as of October 28, 2015.

² *Renewing America's Promise*, adopted August 25, 2008, in the section on Immigration, online at <http://www.presidency.ucsb.edu/ws/?pid=78283> as of October 27, 2015.

³ Teixeira, Ruy and Judis, John, “*The Path to 270: Demographics Versus Economics in the 2012 Presidential Election*” (Center for American Progress, 2011), pg. 10.

⁴ Alter, Jonathan, *The Promise: President Obama, Year One* (Simon and Schuster, 2010), pg. 79; Cost, Jay, *Spoiled Rotten: How the Politics of Patronage Corrupted the Once Noble Democratic Party and Now Threatens the American Republic* (Broadside Books, 2012), pg. 253-270.

⁵ Morton, John, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens”, June 17, 2011 memo to “All Field Office Directors, All Special Agents in Charge, All Chief Counsel” of US Immigration and Customs Enforcement.

The policy has often been described as concentrating deportation efforts on criminals (but not counting the crimes of illegal border crossing, illegally holding a job, using false documents, and failing to pay taxes). Secretary of Homeland Security Janet Napolitano said that it prioritized “criminals who pose a threat to public safety”.⁶ The excuse given for this narrow approach to deportation was that ICE had only limited resources, could not locate and deport all illegal aliens, and therefore must set priorities.

However, the Morton memo did not clearly address the question of what would be done if the resources available were more than adequate to deal with the prioritized criminals. It appeared to mean that ICE would not use any surplus resources to go after lower-priority illegal aliens. Morton even advised his subordinates that if they found a lower-priority illegal alien in their custody, they should consider turning him loose “without waiting for an alien or alien’s advocate or counsel to request a favorable exercise of discretion.” There was no mention of evaluating available resources as part of the decision.⁷ The Obama administration has also chosen to reinterpret Federal law requiring ICE to have 34,000 beds for detained illegal aliens. While the law had been understood since its passage in 2009 to require the actual holding of 34,000 prisoners (not a difficult goal to meet since the lowest estimate of illegal aliens is about 11 million), DHS policy now allows many of those beds to remain vacant while known illegal aliens walk the streets.⁸

The Obama administration gave further evidence of its bias for release over deportation by failing to request additional resources that would allow ICE to step up its deportations. In fact, the President’s requested budget for FY 2012 called for reducing ICE salaries and expenses by \$92 million.⁹

If the first use of “prosecutorial discretion” had begun quietly, step two was a 2012 campaign tactic carried out with maximum publicity. Concerned that Hispanic voters were turned off by his failure to push through amnesty in 2009 or 2010 and might decide to stay home on election day, Obama decided to implement some of the features of the DREAM (Development, Relief, and Education for Alien Minors) Act by executive action.¹⁰ Officially announced by Secretary Napolitano on June 15, 2012, this Deferred Action for Childhood Arrivals (DACA) granted exemption from deportation to students, graduates and veterans below the age of 30 who had been in the US illegally for at least five years, arriving when they were 15 years old or younger, and had not committed a felony. Those eligible would officially register with DHS for a renewable 2-year term of amnesty.¹¹

The 2012 election, with Obama getting both an increased turnout and an increased share of the Hispanic vote,¹² at first appeared likely to break the deadlock in Congress and give Obama an amnesty bill meeting his requirements. Obama’s victory and the Democratic gains in both

⁶ “Written Testimony of U.S. Department of Homeland Security Secretary Janet Napolitano for a Senate Committee on the Judiciary hearing titled ‘Comprehensive Immigration Reform’”, February 13, 2013, pg. 2-3.

⁷ Morton memo, June 17, 2011, pg. 5.

⁸ Ye Hee Lee, Michelle, “Clinton’s Inaccurate Claim That Immigrant Detention Facilities Have a Legal Requirement to Fill Beds”, *The Washington Post Fact Checker*, May 15, 2015.

⁹ *Fiscal Year 2012 Appendix: Budget of the U.S. Government* (Office of Management and Budget, 2015) pg. 513.

¹⁰ Halperin, Mark and Heilemann, John, *Double Down: Game Change 2012* (The Penguin Press, 2013), pg. 293-94, 327.

¹¹ “Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities”, Department of Homeland Security, June 15, 2012; Napolitano, Janet, “Exercising Prosecutorial Discretion with Regard to Individuals Who Came to the United States as Children”, June 15, 2012 memo to David V. Aguilar, Alejandro Mayorkas, and John Morton.

¹² Halperin and Heilemann, *Double Down*, pg. 468-69.

houses of Congress created a conventional wisdom which proclaimed that the Republican Party was dead unless it could win more Hispanic votes, and that amnesty would be an essential step towards satisfying those Hispanic voters.¹³ An election “autopsy” by the Republican National Committee declared that “Hispanic voters tell us our Party’s position on immigration has become a litmus test” and pointed to pro-amnesty George W. Bush as a model for Republicans.¹⁴ Sen. Marco Rubio announced that he would take the lead in preparing an immigration reform bill that would include amnesty. He was expected to bring large numbers of Republican legislators with him, making the legislation unstoppable.¹⁵

However, the conventional wisdom was wrong. Voters deluged Congress with negative feedback on amnesty. Most Republicans refused to put their careers at risk by following Rubio. Even Rubio eventually began backing away from his bill, talking about the need for further amendments or piecemeal rather than comprehensive legislation.¹⁶ Although the bill passed the Senate following a long and bitter fight, it never had a chance in the House where members were looking nervously ahead to the 2014 election. Despite predictions that Republicans could not win in 2014 unless they joined in passing an amnesty bill, the Republicans won another huge victory as the anti-amnesty party. They gained control of the Senate while making their House majority the largest since the 1920’s. It was now highly unlikely that an amnesty bill could pass either house of Congress. Given the mood of the voters, it seemed unlikely that amnesty legislation would be possible even after future elections.

Obama responded within days of his party’s defeat, making his boldest move toward a broad amnesty. He was ready to give up on Congress and extend his *de facto* amnesty to the furthest extent that his legal advisors thought might be possible. Announced on November 20, 2014, it offered a guarantee of residence to those who had avoided deportation for at least five years and whose children were citizens or legal residents. (It also expanded DACA by revising the age limit).¹⁷ This more extensive program was named Deferred Action to Parents of Americans (DAPA).¹⁸ It was estimated that DAPA would apply to four million illegal aliens.¹⁹

DACA and DAPA, taken together, have offered a *de facto* temporary amnesty to approximately five million illegal aliens. The 2011 promise of no deportations applies to millions more who do not fall under DACA and DAPA.

¹³ Bush, Jeb and Bolick, Clint, *Immigration Wars: Forging an American Solution* (Threshold, 2013), pg. 97-115; Ferraro, Thomas and Cowan, Richard, “Prominent Republicans Back Major Immigration Reforms”, *Yahoo News*, March 19, 2013.

¹⁴ *Growth and Opportunity Project* (Republican National Committee, May 2013), pg. 15.

¹⁵ Werner, Erica, “Rubio Seeks to Boost Border Language in New Bill”, *Yahoo News*, May 2, 2013; Viser, Matt, “Timeline: Marco Rubio on Immigration”, *Boston Globe*, June 21, 2015, online at <https://www.bostonglobe.com/news/nation/2015/06/20/timeline-marco-rubio-immigration/6JZySKjwA175pBi3oyoMAN/story.html> as of October 28, 2015.

¹⁶ King, Ledyard, “Rubio’s Switch on Immigration Not Winning Fans”, *USA Today*, Oct. 31, 2013 online at <http://www.usatoday.com/story/news/politics/2013/10/31/rubio-shifts-on-immigration/3330141/> as of October 28, 2015.

¹⁷ “Remarks by the President in Address to the Nation on Immigration”, November 20, 2014; Memo of Jeh Johnson, Secretary of the Department of Homeland Security to Leon Rodriguez, Thomas Winkowski, and R. Gil Kerlikowske, “Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U. S. Citizens or Permanent Residents”, November 20, 2014.

¹⁸ “Fixing Our Broken Immigration System Through Executive Action – Key Facts”, DHS website as of December 14, 2014.

¹⁹ Nakamura, David, “Obama Acts on Immigration, Announcing Decision to Defer Deportations of 4 Million”, *The Washington Post*, November 20, 2014.

This patchwork scheme is not permanent, relying as it does on the orders of the president rather than any law. Neither is it a full amnesty, since it offers only a hazy sort of legal residence and does not qualify its beneficiaries to begin the process of citizenship. Still, it provides a strange sort of protection from American law, guaranteeing that they will not be deported and are allowed to take jobs as if they had entered the United States legally. The laws relating to illegal residence in this country now exist in a sort of Twilight Zone, still on the books, sometimes enforced, but usually ignored by the very officials who have been entrusted to carry them out under the direction of a president whose constitutional responsibility is to see that the laws are “faithfully executed”.²⁰

Results of Amnesty

The effect of this amnesty can easily be seen in the number of deportations each year.²¹ By the last few years of the Bush administration, the flood of illegal immigrants had led to a law enforcement crackdown and deportations rose sharply. This continued briefly into the early Obama administration before leveling off. Since Obama’s reelection, deportations have been declining.²² *The Washington Post* reported that “The United States’ massive dragnet is shrinking rapidly, because of the new enforcement policies Deportations, for example are dropping. The Obama administration is on pace to remove 229,000 people from the country this year, a 27 per cent fall from last year and nearly 50 per cent less than the all-time high in 2012.”²³ Estimates are that 2015 deportations will be the lowest since 2006²⁴ when the Bush-era increase was just beginning. Even those numbers may be misleadingly high, since there is evidence that DHS has begun including in its count some of those returned after being apprehended at the border.²⁵

The Secure Communities program was criticized by new DHS Secretary Jeh Johnson for arresting for deportation too many illegal aliens. Johnson abolished the program.²⁶ Border Patrol agents have complained that they are not being allowed to do their job, and have even filed suit against DHS.²⁷

Knowing that deportation is unlikely has emboldened potential border-crossers since they know that their chances of being sent home are small.²⁸ While economic conditions have greatly reduced the number of Mexican attempting to enter the United States, illegal entry by

²⁰ US Constitution, Article II, Section 3.

²¹ This paper will use the term “deportation” since it is commonly used in public discourse. Technically, the Federal government has adopted new terms for different types of removals of illegal aliens.

²² Nakamura, David, “With an Immigration Deal Possible, Advocates Mount New Push to End Deportations”, *The Washington Post*, February 3, 2014. See the chart labeled “Deportations from the United States”.

²³ Markon, Jerry, “Obama Administration Scales Back Deportations in Policy Shift”, *The Washington Post*, July 2, 2015.

²⁴ Caldwell, Alicia A., “Immigrant Removals Continue to Decline Under Obama”, *Yahoo News*, April 29, 2015.

²⁵ “Smith: Administration Cooks the Books to Achieve Deportation Numbers”, news release from Rep. Lamar Smith, August 24, 2014.

²⁶ Caldwell, “Immigrant Removals Continue to Decline Under Obama”.

²⁷ Dinan, Stephen, “Immigration Agents Sue to Stop Obama’s Non-deportation Policy”, *The Washington Times*, August 23, 2012 online at <http://www.washingtontimes.com/news/2012/aug/23/immigration-agents-sue-stop-obamas-non-deportation/print/> as of November 5, 2012.

²⁸ Caldwell, Alicia A., “Immigrants Caught at US Border Think Families Can Stay in US”, Associated Press story in *Yahoo News*, October 30, 2015.

Central Americans has been surging upward.²⁹ Although border protection has been somewhat strengthened during the Bush and Obama years, the border is far from secure and those who make it across and into the interior can now expect to be allowed to stay. There are also indications that the Obama administration is dragging its feet on improvements to border security, permitting more illegal crossings.³⁰

The Obama policy has lent legitimacy to the “sanctuary city” movement, in which local governments provide sanctuary to illegal aliens by deliberately refusing to cooperate with the Federal government in immigration matters if cooperation might lead to deportation. The most notorious instance of this policy was the decision of San Francisco to protect Juan Francisco Lopez-Sanchez from deportation by releasing him despite a request that he be transferred to Federal custody for deportation. Soon after his release, Sanchez killed Kathryn Steinle.³¹ While the Obama administration has sometimes claimed to oppose such noncooperation policies, it also opposed a House bill to cut off some Federal funding to sanctuary cities. By threatening a veto, Obama publicly encouraged the continuation of sanctuary cities.³²

Failing to deport illegal aliens also involves a cost to the taxpayer. A 2013 study concluded that the taxpayer expense was \$113 billion. The bulk of this was paid by the states, meaning that the Federal government bears much less of the financial burden when it allows a large population of illegal aliens to reside here.³³ Another study found that the average illegal alien household used \$14,387 more in government services each year than it paid in taxes.³⁴ The cost would be increased by Obama’s amnesties, especially DAPA, by making illegal aliens “eligible to receive Social Security, Medicare, and a wide array of other federal benefits” according to an official Obama administration announcement.³⁵

The Department of Homeland Security has estimated that the cost of deporting an illegal alien is \$8,661.³⁶ If correct, then deportation would pay for itself in less than a year. If we take into account that the Federal share of the cost for services is much less than the state share, even then the Federal government would be financially ahead in three years.

Finally, there is the effect of this unilateral executive branch amnesty on our system of Constitutional government, which includes the separation of powers as a foundational element. Article I of the Constitution states that “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” There is no mention there of the President, who instead is vested with “the executive Power” in

²⁹ *ICE Enforcement and Removal Operations Report, Fiscal Year 2014*, Department of Homeland Security, December 19, 2014, pg. 4.

³⁰ *Border Security: Progress and Challenges in DHS’s Efforts to Implement and Assess Infrastructure and Technology* (Government Accountability Office, May 2015), especially pg. 3-4, 6-8, 12-14.

³¹ Pearson, Michael, “Suspect Tells TV Station He Killed San Francisco Woman”, CNN, July 7, 2015, online at <http://www.cnn.com/2015/07/06/us/san-francisco-killing/> as of November 5, 2015.

³² Fabian, Jordan, “WH Threatens to Veto Sanctuary Cities Bill”, *The Hill*, October 20, 2015.

³³ *The Fiscal Burden of Illegal Immigration on United States Taxpayers* (Federation for American Immigration Reform, 2013) online at <http://www.fairus.org/publications/the-fiscal-burden-of-illegal-immigration-on-united-states-taxpayers> as of November 5, 2015.

³⁴ Rector, Robert and Richwine, Jason, *The Fiscal Cost of Unlawful Immigrants and Amnesty to the US Taxpayer* (The Heritage Foundation, 2013), pg. vi, 13.

³⁵ Tumulty, Karen, “Illegal Immigrants Could Receive Social Security, Medicare Under Obama Action”, *The Washington Post*, November 25, 2014.

³⁶ “Deporting Undocumented Immigrants Could Cost as Much as \$25 Billion, Report Says” Fox News Latino, February 10, 2015.

Article II. Congress has the lawmaking power and the President, as head of the executive branch, is assigned responsibility of carrying out those laws.

However, President Obama has frequently chosen to encroach on the legislative power of making, amending, and repealing laws by failing to carry out the laws as written. With the possible exception of ObamaCare, which he has repeatedly changed without the sanction of Congress, this has been most obvious in his treatment of immigration and illegal aliens. Federal 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” President Obama and his appointees have openly refused to carry out this law in a thorough manner, giving most illegal immigrants what amounts to *de facto* immunity from deportation for the remainder of Obama’s time in office.

The fact that Congress has failed to pass the amnesty laws desired by the President does not empower him to do it himself. The refusal of Congress to enact or amend the law makes any such action by the president even more clearly illegitimate since he lacks any legislative power. The Constitution says that the president should “recommend to their Consideration such Measures as he shall judge necessary and expedient”,³⁷ but it is exclusively the choice of Congress whether to act on such recommendations. If Congress says no, that is the end of the matter.

Before proceeding with DAPA, Obama obtained a legal opinion from the Justice Department’s Office of Legal Counsel (OLC) which claimed that DAPA was within his executive powers. The Conservative Caucus Foundation has already published an examination and rebuttal of the OLC memo.³⁸ Briefly put, the OLC relied on precedents which are not comparable to DAPA. Not only were the number of people covered much smaller, but they were people who had arrived legally, lost legal residence through no fault of their own, and were expected to soon regain legal status either by changes in the law or by their own actions. Furthermore, these previous deferrals were temporary programs, intended to last only for a brief period until legalization could be completed. They were not intended as an open-ended exemption from the immigration laws.

By usurping the legislative power, President Obama has undermined the separation of powers set forth in our Constitution. In the long run, that could be the most harmful effect of his amnesty program. It sets a dangerous example for every future president, encouraging him to bypass Congress and rule by his own decrees.

Solutions

Can this *de facto* amnesty be reversed? As long as Obama is president, only Congress and the Federal courts offer any opportunity. DAPA has already been blocked in Federal Court by an injunction which was upheld on appeal, and now awaits a decision on the merits of the lawsuit filed by 26 states.³⁹ Given that this case will likely go all the way to the Supreme Court

³⁷ U.S. Constitution, Article II, Section 3.

³⁸ “Is the DAPA Amnesty Legal Under the U.S. Constitution?”, The Conservative Caucus Foundation, 2015.

³⁹ Preston, Julia, “Federal Panel Lets Injunction Against Obama’s Immigration Actions Stand”, *The New York Times*, May 26, 2015.

for a final ruling, it is possible that DAPA will remain in limbo until after Obama has left the White House. However, it is possible that Obama will attempt to provide DAPA protection to some illegal aliens despite the injunction, which has already happened at least once.⁴⁰

Congressional action offers the possibility of overturning Obama's actions more quickly than the courts. Congress could pass a law such as the Repeal Executive Amnesty Act (HR 191 and S 129). It could also include in appropriations bills a prohibition on using any funds for implementation of the amnesty programs. However, while the House has already voted for this course of action, Senate Democrats proved that they would unite to block any anti-amnesty legislation through the filibuster. While there has been some talk of eliminating the filibuster, the long-term implications will probably prevent such drastic action.

In the absence of a decisive court ruling against amnesty, the future of the amnesty programs will rest with the decisions of the president who takes office on January 20, 2017. He could order that the program be immediately halted, refusing to register any new DACA (and DAPA if it has been implemented) applicants and also not renewing anyone already covered by DACA. This would gradually phase out DACA as the number of people covered dwindles to zero over two years.

A quicker approach would be to declare DACA and DAPA null and void, leaving all those registered immediately vulnerable to deportation. There would no doubt be lawsuits as aliens claim that they have a legal right to a two-year exemption from deportation. However, the 2012 memo implementing DACA contains the following standard boilerplate.

“This memorandum confers no substantive right, immigration status, or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law.”⁴¹

This language appears to contradict any claim that DACA has provided a legally enforceable exemption from deportation while also affirming the right of the executive branch to change Obama's policy at any time.

The earlier 2011 policy on prosecutorial discretion could easily be changed since Obama has been deporting fewer illegal aliens than resources allow. The policy could begin going after not only those who commit serious crimes but also those who are easily located or are identified through normal law enforcement actions. The president could expand this effort by a request for additional funds for deportation, a more effective e-verify system, and increased efforts to identify and raid businesses using a large amount of illegal labor.

Conclusion

The amnesty programs of President Obama, both implemented and delayed, rest on a weak legal foundation and can be completely eradicated by a president willing to take action. In the absence of presidential action, it is possible but not certain that the Federal courts will overturn some or all of these programs.

⁴⁰ Dinan, Stephen, “DHS Broke Judge's Order, Approved Amnesty Applications, Despite Injunction”, *The Washington Times*, May 8, 2015.

⁴¹ Napolitano, “Exercising Prosecutorial Discretion . . .”, June 15, 2012, pg. 3.