Executive Action for Long-Term Illegal Aliens

By Dan Cadman and Jessica Vaughan

This is the second report to examine the characteristics of populations that have been suggested as potential beneficiaries for legalization through the executive action reportedly being planned by the Obama administration. This action could shield hundreds of thousands, perhaps millions, of illegal aliens living in the United States, as a substitute for the formal legislative amnesty that the president and his allies were unable to push through Congress.

Since almost the beginning, the Obama presidency has distinguished itself through the number and expansive nature of its executive actions taken on immigration matters. Many of them have been created out of whole cloth as a way of circumventing the legislative prerogatives of our Congress, thus rendering them both constitutionally and legally suspect. In our view, they have also harmed the national interest and public safety — not only by eroding the rule of law and disadvantaging those using the legal immigration system, but also more specifically by legalizing illegal aliens who have harmed others.[1]

Pro-amnesty organizations have suggested a number of ways the president might unilaterally implement "programs" within the executive branch to shield selected portions of the illegal alien population, along with estimates of how many individuals each method (or combination of methods) might affect. These options were outlined in a report issued by the Migration Policy Insitute.[2]

One of the options discussed was an expansion of the "prosecutorial discretion" limits on ICE officers to excuse illegal aliens who were convicted solely of traffic crimes. We specifically outlined the categories of traffic crimes in the same dataset and found that such an executive action would have protected from deportation 258,689 illegal aliens convicted of traffic offences during federal fiscal years (FFYs) 2004 to 2013. We also pointed out that significant numbers of these offenders had been convicted of violent crimes such carjacking, vehicular homicide, driving while drugged or drunk, hit-and-run (including some in which the victims were killed or maimed), and other serious offenses. And we found that, even among so-called "minor" traffic offenders, the number of aliens that were prior deportees who had returned illegally — only to be identified and re-arrested by federal immigration authorities as the result of the traffic infractions — was extremely high: 60 percent.[3]

This report looks at another potential group of beneficiaries of executive action: aliens described as "people with 10-year-old removal orders."

Key findings:

- Proponents of executive action to legalize aliens who are the subject of 10-year-old removal orders use benign-sounding language to describe it, but in fact this action would benefit some of the most egregious immigration scofflaws, including the man recently arrested for killing two sheriff's deputies in northern California.[4]

- ICE records show that currently nearly 900,000 illegal aliens who have been ordered removed are still residing here. About 174,000 of these are convicted criminals.

- The law already provides for the granting of relief to long-resident illegal aliens, but only those who can demonstrate good moral character and a compelling humanitarian reason for relief. Proposals based

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solely on an illegal alien's length of time in the country regardless of individual circumstances or merit should be viewed with great skepticism because they risk rewarding individuals who will endanger the public safety in American communities.

- The target population for this executive action includes a large number of convicted criminals. We found that, over the last 10 years, approximately 60 percent of the aliens removed by ICE who had 10-year-old outstanding removal orders were convicted criminals.

- In 2012 and 2013, nearly 80 percent of aliens removed who had 10-year-old outstanding removal orders were convicted criminals.

- Forty-three percent of aliens in this target population had multiple deportations on their record. This percentage has grown over time, and in 2013, 66 percent of aliens in this group had multiple deportations on their record.

What We Examined and Why

We undertook this examination to learn more about the characteristics of those who meet the definition of aliens "with 10-year-old removal orders", which is not further described or delimited in the MPI report.

First, a note is in order on the language that advocates have chosen to use in describing this proposal: They describe it in a way that sounds benign — "people with 10-year-old removal orders", as if such removal orders should now be considered stale and unworthy of enforcement. This description seems deliberately vague and misleading about who could benefit. In practice, such a program would benefit some of the most egregious immigration scofflaws in the entire illegal alien population. As described, it would cover those aliens who were ordered removed 10 or more years ago, but who either 1) failed to depart as ordered — a form of contempt of immigration court — but who managed to escape the notice of authorities; or 2) were removed, but re-entered illegally at some point after that deportation (even recently), which is a felony offense, and who have escaped the notice of authorities.

One illegal alien who, by this definition, could have benefited from such an executive action is Luis Enrique Monroy-Bracamontes, the man recently arrested for killing two sheriff's deputies in northern California.[5] Monroy-Bracamontes was twice removed by ICE in 1997 and 2001, and twice returned by the Border Patrol in between those years, but each time re-entered shortly after deportation and ultimately managed to avoid detection for 13 years, in part by using a false identity. This is a common scenario. Identity theft and use of false documents is how many deported aliens have evaded apprehension and referral to ICE. Since the widespread implementation of electronic status verification through E-Verify and SAVE and the nationwide deployment of the Secure Communities program, more illegal aliens are stealing and using the identities of U.S. citizens or legal residents to lessen scrutiny of their status.

Illegal alien advocacy groups also have called for amnesty or exemption from deportation for a similar-sounding population of aliens, those who have been in the United States illegally for 10 years. This proposal is much broader than what MPI has suggested and presumably would include the very large number of illegal aliens who have lived here for 10 years, but who have never come to the attention of immigration authorities. The size of this population is estimated to be 5.7 million aliens.[6]

Superficially, each of these two variants on the same suggestion appears to mirror an already existing, and longstanding, provision of immigration law called "cancellation of removal". Section 240A(b) of the Immigration and Nationality Act (INA) states that aliens who are not lawful permanent residents may have their [order of] removal cancelled, provided that certain conditions apply.[7]

They must:

- Have been continuously physically present in the United States for a minimum of 10 years;

- Show that they are persons of "good moral character" — a phrase having a specific meaning in the context of the INA;[8]

- Not be inadmissible or deportable under the criminal and national security grounds of the INA; and

- Establish that their removal from the United States would cause "exceptional and extremely unusual hardship" to their U.S. citizen or resident alien spouse, parent, or child.

It is important to emphasize the superficiality of the two proposals for executive action, when compared to existing law. Neither proposal suggests that "executive action" protection would apply *only* to aliens who are of good moral character, who have no convictions, and whose presence is needed to avoid causing exceptional and extremely unusual hardship to their nuclear family. After all, if that were their proposal, they would simply be replicating existing law.

Because there is already a statute regarding cancellation of removal, it stands to reason that the aliens in either 10-year proposal for "executive action" outlined above are unlikely to meet the criteria.[9] Else, they would be better off seeking cancellation under the statute, since it is permanent and whatever this president does may not last beyond his administration if the next president orders otherwise.

That being the case, it seemed to us possible that the population being put forward would have a significant statistical incidence of adverse histories in at least two key areas: criminality and reentry to the United States after deportation. One of the reasons for conducting our analysis was to test that hypothesis.

Who Would Benefit?

As discussed above, it is clear that MPI and others are proposing that the president take "executive action" that is different and significantly broader than existing statutory provisions of forgiveness and, by implication, might include alien felons, reentrants after deportation, and others living in the United States illegally who have adverse criminal and immigration histories.

For this reason, understanding something about the likely characteristics of these populations is important so that the American people will be fully informed about the consequences to public safety and national security, not to mention the continuing erosion such a constitutionally suspect presidential action will have on full, fair, and impartial enforcement of the nation's immigration laws.

There is one other important point that needs to be made: Advocates are suggesting that the president should afford relief to aliens who have successfully evaded the law. They have not only been in the United States illegally, but have actually had expulsion hearings (usually in front of an immigration judge), and been ordered removed from the United States. In other words, in addition to the possibility that they might have criminal records and have previously been deported, under this proposal aliens who have been fugitives from removal for at least 10 years or who have re-entered illegally after deportation (a felony) would benefit from presidential largesse.

It seems curious to us to reward scofflaws. We suspect that advocates' response would be that federal immigration agents had 10 years to locate and remove these aliens, but did not do so. That might be true. But it conveniently overlooks the fact that our immigration hearing system is in such disrepair and experiencing such near-fatal dysfunction that there are nearly 900,000 aliens right now who are under unexecuted final orders of removal. Of these, 174,000 are convicted criminals. There are, quite simply, too many fugitives per officer for the responsible agencies to be as effective as they should be at locating them. What is more, this administration has substantially added to their burden by dismantling existing fugitive apprehension efforts, defunding ICE fugitive teams, and, through unwillingness to use detention as a tool to ensure the appearance of aliens for their hearings and removal, substantially increased the pool of fugitives.

Three short years ago, there were somewhat more than 500,000 absconders — a staggering number, but nowhere near the almost one million that agents now face.[10] Cynics might reasonably arrive at the conclusion that the administration is deliberately trying to crash the immigration due process system so as to force the "comprehensive reform" that they could not otherwise achieve.

What We Found

A preliminary word about data quality is in order. We found anomalies within the datasets that gave us reason to question the adequacy of oversight being given to removals data at all levels within DHS. For instance, with particular reference to aliens with unexecuted orders of removal more than 10 years old, there were instances where the reported date of the final order was so old as to be suspect. In one case, the order allegedly had been issued in 1955, although the alien was only 44 at the time of his deportation in 2013; this is obviously a data entry error.

We also found many instances where the final order date field was simply left blank, leaving us unable to make any determinations at all about the length of time the final order of removal had been in effect before it was executed. (This was, however, a data shortcoming MPI also faced when it issued its report.)

But even more disturbing was the fact that the datasets repeatedly reflected that some of the deported individuals were United States citizens (USCs) — something of doubtful accuracy given that these individuals were being deported, and hopefully the result of input error. But we cannot fathom in this day and age why the system does not have the electronic equivalent of alarm bells and flashing lights when processing agents attempt to key in such data, and refuse to accept it, unless and until there has been a supervisory review and approval within the system. The USC data entry phenomenon (error?) occurred repeatedly throughout the 11 federal fiscal years represented in the dataset, as indicated below:

- FFY 2003: 10 USCs
- FFY 2004: 18 USCs
- FFY 2005: 9 USCs
- FFY 2006: 8 USCs
- FFY 2007: 16 USCs
- FFY 2008: 15 USCs
- FFY 2009: 7 USCs
- FFY 2010: 10 USCs
- FFY 2011: 18 USCs
- FFY 2012: 7 USCs
- FFY 2013: 3 USCs

We found a similar anomaly in the "Citizenship" data field among all 11 years of the dataset with use of the entry "unknown". It seems to us unlikely that the federal government did not know the citizenship of aliens who were being removed from the United States, since it would have needed the permission of the country of nationality to repatriate each one of these individuals.

Collectively, the repetitive errors and anomalies lead us to question why the Department of Homeland Security (DHS) officials responsible for maintaining the data (headquarters elements of Immigration and Customs Enforcement, or ICE) are not routinely vetting such errors to provide timely and important feedback to the DHS agency components and, ultimately, the first line supervisors and agents responsible for the mistakes.

Orders of Removal Unexecuted for 10 Years or More. To determine the likely characteristics of aliens who might receive the right to remain and work in the United States while within any executive action program ordered by the president, we examined (as in the prior analysis of traffic offenders) the ICE removals dataset for a full decade, consisting of spreadsheets for every FFY from 2004 through 2013.

To meet the criteria of 10 years with an unexecuted order, we established a floating date, depending on the FFY being examined (and keeping in mind that federal fiscal years begin each October 1, and end each September 30). For instance, for FFY 2013, our pool consisted only of aliens whose orders of removal were dated October 2004 or earlier. Similarly, our FFY 2012 pool consisted of aliens whose orders of removal were dated October 2003 or earlier; and so on, for each year of the data set. Because our interest was in determining the *characteristics* of aliens with outstanding orders of deportation for 10 years or longer, the fact that the cutoff date was adjusted for each FFY was immaterial.

Table 1 reflects our findings for the 10 years of data we examined.

Table 1. Aliens with Unexecuted Orders of Removal for 10 Years or More*

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	10-Year Totals by Offense
Number of Aliens	687	708	868	1,404	4,576	8,282	9,124	12,716	12,379	11,854	62,598
Number with Criminal Histories	118	115	122	175	1,394	3,883	5,480	7,543	9,092	9,262	37,184
(Percent)	17%	16%	14%	12%	42%	47%	60%	59%	78%	78%	59%
Number Who Were Prior Deportees	46	38	42	79	592	2,247	3,486	5,469	7,232	7,806	27,037
(Percent)	7%	5%	5%	6%	13%	27%	38%	43%	58%	66%	43%

Source: ICE deportation records through 2013.
* Note that there is overlap between the number of aliens with criminal histories and the number of aliens who have been previously deported, as some aliens fall into both categories simultaneously.

Criminal Histories. Not surprisingly, and as we surmised, there is in fact a high incidence of aliens with criminal histories (overall average: 59 percent) in the pool of aliens whose orders of removal were at least 10 years old at the time they were taken into custody and then removed. More disturbing, though, is that the trend is distinctly upward over the course of the past decade.

Reentrants after Prior Removal. Also unsurprising, at least to us, was the high incidence of aliens who, despite the 10-year unexecuted order of removal, had been deported at least once previously (overall average: 43 percent). And, like the pool of aliens with criminal histories, the trend over the last decade has been distinctly and sharply upward.

Conclusion

As we stated in our prior paper on executive action for alien traffic offenders, we believe that in the area of immigration policy, executive action under this presidency has reached the tipping point of unconstitutionality.

It is clear that aliens who have criminal histories and/or are recidivists who consistently flout our immigration laws by returning to the United States after being deported (a federal felony) are not "persons of good moral character" and do not merit any kind of relief that would permit them to reside and work in the United States under color of law, however long or short that period of time might prove to be. As our analysis shows, that is a majority of individuals within the pool of "people with 10-year-old removal orders" that have been put forward as potential candidates for executive action.

It is also clear to us that executive action for broad swathes of the illegal alien population, such as proponents have urged on the president — including this not-so-innocuous pool of aliens who have managed to avoid outstanding orders mandating their removal from the United States — is not in the national interest and endangers public safety.

End Notes

[1] See, for example, the testimony of ICE officer Sam Martin in *Crane v. Napolitano*, and the case of an illegal alien approved for Deferred Action for Childhood Arrivals (DACA) who killed two young girls in a reckless driving incident, but was able to avoid deportation due to her status granted by executive action.

[2] Randy Capps, Marc R. Rosenblum, and James D. Bachmeier, "Executive Action for Unauthorized Immigrants: Estimates of the Populations that Could Receive Relief", Migration Policy Institute Issue Brief, September 2014.

[3] Dan Cadman and Jessica Vaughan, "Executive Action to Benefit Alien Traffic Offenders", Center for Immigration Studies *Backrounder*, September 2014.

[4] See Jessica Vaughan, "Lax Immigration Policies May Have Shielded Killer of California Deputies", Center for Immigration Studies blog, October 27, 2014.

[5] *Ibid.*

[6] MPI report, *op cit.*

[7] Section 240A of the INA is codified at 8 U.S.C. 1229b.

[8] A definition of "good moral character" for immigration purposes can be found in Section 101(f) of the INA, codified at 8 U.S.C. 1101(f):

> *(f) For the purposes of this Act-No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is or was —*
>
> *(1) a habitual drunkard;*
>
> *(2) [Stricken by Sec. 2(c)(1) of Pub. L. 97-116.]*
>
> *(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana); if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;*
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> *(4) one whose income is derived principally from illegal gambling activities;*
>
> *(5) one who has been convicted of two or more gambling offenses committed during such period;*
>
> *(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;*
>
> *(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;*
>
> *(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)); or*
>
> *(9) one who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).*

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

To understand the practical application of the definition, in the context of bars to granting benefits to aliens found *not* to be of good moral character, refer to Volume 12, Part F, of the U.S. Citizenship & Immigration Services Policy Manual, specifically, Chapters 4 and 5.

[9] For an understanding of exactly how much is required for an alien to establish a basis for cancellation of removal in the course of a hearing before an immigration judge, see the exacting and detailed Form EOIR-42B that must be prepared and submitted in the course of that hearing.

[10] See Jessica Vaughan, "ICE Enforcement Collapses Further in 2014", Center for Immigration Studies *Backgrounder*, October 2014; "Catch and Release: Interior immigration enforcement in 2013", Center for Immigration Studies *Backgrounder*, March 2014; and "The Alternative to Immigration Detention: Fugitives", Center for Immigration Studies blog, October 18, 2011.