



Countering Executive Amnesty, Part 2

Foundations of a counter strategy

By Stanley Renshon

Overview

The president has now set into motion his sweeping executive amnesties. He has done so through a series of memoranda issued by the Department of Homeland Security that will provide legalization and working papers for as many as five million illegal migrants. That action and number is without precedent in American history.

No sacrifice or penalty will be asked for in return as a condition of legalization. Indeed, with working papers and Social Security numbers, these newly legalized aliens will be eligible for certain federal welfare benefits.

In addition, the president's executive amnesty memos provide a vehicle to circumvent past immigration laws and penalties. In the past, those who broke immigration laws were barred from changing their status without first leaving the country and reapplying for admission, triggering a 3/10-year bar to return. Now, a new "provisional waiver" allows illegal aliens to gain that waiver before they leave. This additional act of amnesty will put those former illegal aliens in a position to gain Legal Permanent Resident status (LPR) and eventual citizenship, allowing them to receive more welfare support and make use of their status to sponsor family members for green cards.

The president's executive amnesty memos have also essentially done away with a program that helped develop and implement partnerships between federal, state, and local government agencies in enforcing American immigration law. The administration had earlier abandoned its 287(g) program, which was then replaced by the Secure Communities Program. That program, too, has now been abandoned by the administration. There is no partnership program currently operational, but the administration does promise a new revamped program, the "Priority Enforcement Program" (PEP).

The president's executive amnesty memos permanently and unilaterally recast the immigration enforcement system, independent of congressional agreement or intent. They essentially suspend enforcement for almost all illegal migrants who are not terrorists or felons convicted of the most serious crimes. That exempt category includes most of the 11-12 million illegal aliens now living in the country and the substantial numbers that are certain to take advantage of these enforcement priorities in the future since they can now break the country's immigration laws without fear of consequence. The president's memos misleadingly are presented as being focused on providing legalization to one group of illegal aliens, those with children who are American citizens or LPRs. Yet in reality, the president's executive amnesty memos provide a blanket amnesty for almost all illegal aliens.

In that very basic and accurate respect, the president's executive amnesty memos represent a nullification of ordinary immigration enforcement, accomplished through the administrative vehicles of "prosecutorial discretion" and "deferred action".

Public sentiment is against the president's actions, and is likely to become more so if people learn more of exactly what he has done and what it means. However, the public is not in a position to act on its own to reverse these initiatives. Public sentiment is a source of great potential political power, but the public is not in a position to use the actual constitutional, legislative, administrative, and political levers of power available to contain, narrow, reshape, and ultimately replace the president's constitutionally suspect and politically damaging unilateralism.

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Reversing the president's action will neither be a short nor an easy task. The president's allies are already trying to make his actions a *fait accompli* and warn of dire political consequences for those who would try to overturn them.

Those opposed to the president's executive amnesties have their work cut out for them. They must not only be familiar with the specifics of what he has actually done in order to counter them. They also need to understand the political and narrative nature of the battles they will be waging. They will have to understand and master the public themes that are necessary to succeed and those that have to be rebutted. They need a strategy for the short term and the long haul. And they will have to think seriously about providing a real immigration reform alternative to the president's politically expedient effort to gain traction on his historical legacy at the expense of the American people.

This is the second in a four-part series. The first, "The President's Nullification of Immigration Enforcement", outlined the key amnesty memos and analyzed their contributions to the nullification of ordinary immigration enforcement. This second analysis, "Foundations of a Counter Strategy" frames and analyzes the most important basic elements on which to build an effective counter strategy to contain, narrow, reshape, and ultimately replace the president's administrative amnesties. The third, "Options for a Counter Strategy", will evaluate the specific legal, political, administrative, and legislative choices available to those opposed to the president's actions. The fourth and final analytic paper will present a detailed alternative comprehensive immigration reform model for legislation, "The American Immigration Reform Act of 2015", that can serve as the basis for finding common ground.

Foundations of a Counter Strategy

The president announced his extensive executive amnesty on November 20, 2014. His secretary of Homeland Security immediately began implementing the president's orders with 10 sweeping administrative memos that unilaterally and fundamentally alter and recast American immigration enforcement policy.¹

The administration rationalizes its actions with a "limited resources" argument that ultimately casts responsibility for the president's actions on Congress' failure to provide enough funding. As a result, the administration says, it is forced to make choices and set priorities.

The Limited Resources Rationale Redux

The administration argues that it does not have the resources to deport all or most of the 11-12 million illegal immigrants now living in the United States, and that is correct. It is also misleading.

Deportation proceedings are expensive and time-consuming, and on such a mass scale would be politically unsustainable. However the choice is not, as the administration presents it, between deporting all 11-12 million illegal migrants or enforcing the law only against an extremely limited subset of the total illegal population. Nor is it between enforcing immigration law and effectively reducing the illegal population by many millions of persons, against whom enforcement laws are directed, by the simple expedient of developing administrative categories into which whole classes of illegal aliens are arbitrarily placed.

Moreover, the choices that the president says he is now forced to make are, in reality, partially a result of decisions he and his administration consciously made. For example, highly tamper-resistant work permit cards could be made available to every legal immigrant or a national system of electronic employment verification could be put into place. Either or both would go a long way toward reducing the benefits that accrue to illegal migrants in breaking American immigration laws. In its first six years in office the Obama administration proposed neither of these options.

Nor did the administration ask Congress for additional money for ordinary immigration enforcement even when it had a large majority in both houses of Congress in its first two years, or at any time thereafter. It has never justified its limited resources argument with a detailed accounting of its budget expenditures and where it might gain other funds for enforcement. Nor, as Robert Delahunty and John Yoo have pointed out in connection with the constitutionality of the DACA amnesty, the president has never presented a detailed accounting of how, if at all, that program is cost-effective and doesn't use up resources that could otherwise be applied to enforcement.² The same is true of the president's more recent set of administrative amnesties.³

While mass deportation is clearly not the best answer to the problem of illegal migration, the possibility of deportation acts to some degree as a deterrent. By not asking for and insuring that it had additional money for “ordinary enforcement” the administration forfeited, without any congressional approval, the deterrent effect of engaging in at least some ordinary immigration enforcement.

In its choices, both of commission and omission, the administration has tipped its hand on its real immigration strategy. That was reflected early on in the Morton “discretion” memos and can be fairly characterized as an effort to nullify ordinary immigration enforcement through the vehicle of the increasingly robust use of “prosecutorial discretion”.

The question is: What can be done about it?

The Basic Foundations of a Counter Strategy

The president’s actions have been controversial and deeply unsettling to a large portion of the American public. They feel the president’s actions lack basic political legitimacy. And, as they learn more about them, it is entirely likely they will think them unfair. These views will become part of an already existing package of public views about the president and his policies that include a lack public trust and support.⁴ And it is precisely this fact that provides the foundation for an effective counter strategy to contain, narrow, reshape, and ultimately replace the president’s executive amnesties.

The major focus of that counter strategy must be political. That is, an effective counter strategy must make and win its arguments in the court of public opinion to sustain public support for any legislative, legal, or administrative steps. Understanding the sources and the nature of that foundation is imperative and the focus of this, the second part of a four-part analysis.

Framing Counter Arguments

Framing is the term given to the conceptual foundation into which facts are placed and transformed into understanding. Because framing is, in ordinary politics, so often associated with developing partisan narratives, “talking points”, and “spin”, it is easy to be skeptical about the term.⁵

However, the term framing itself simply denotes that an understanding must bear the burden of being consistent with evidence, able to hold its own with other different understandings of a set of circumstances, and prove useful in a practical way — which is to say that the theory that underlies the narrative provides a useful guide to effective action.

What follows are some very basic framing understandings of the president’s executive amnesties that are fundamental to any effective counter strategy:

I: Several Clocks Are Ticking

The first ticking clock is tied to his supporters’ expectations . That started when the president promised action after the midterm elections, surged as soon as he announced his executive amnesties, and is now driven by the start of the actual application process and the time it takes to implement it. The expanded DACA program component program was scheduled to start accepting applications in mid-February and in mid-May for the parent segment, but has temporarily been put on hold.⁶

Already supporters of the president’s executive amnesty are mobilizing.⁷ About two dozen mayors, including those of Detroit, Los Angeles, San Francisco, Atlanta, Baltimore, and Philadelphia plan to meet to lay the groundwork for the president’s executive amnesty.⁸ In Los Angeles, a large information session was held, “not just to give out information, but to galvanize their supporters.”

At the same time, “Hundreds of activist leaders also converged here [Los Angeles] for a three-day strategy conclave to plot how to enroll a maximum number of people in order to create momentum among immigrants and Latinos so they will defend the president’s actions and try to stop Republicans from canceling the programs before they get off the ground.” Another activist is quoted as, “telling all our families to get ready to apply if they qualify, because the more families apply, the harder it is for Republicans to take it away.”⁹

This activist has a point. The president's amnesties have created supporters who benefit from them. The president and those beneficiaries also have supporters both as a matter of policy agreement or sympathy. You can bet that advocates and their supporters in the press and media will feature many heartwarming stories of formerly illegal aliens, carefully selected by executive amnesty advocates to portray characteristics with which Americans can empathize and ultimately approve. As a result, once the registration process gets started and the first group of applicants is vetted and approved, that approval will be difficult to rescind. It can be, however, be narrowed and slowed.

This is *not* the precursor of a suggestion for quick or repeated votes to rescind the president's directives. That strategy, as has become clear with the fight over the budget for the Department of Homeland Security, will be difficult to implement since Republicans do not have the votes to overcome a Democratic Senate filibuster much less a presidential veto.¹⁰ There are more effective legislative strategies that can be used. (I take up specific ways to counter and neutralize supporters' stratagems in Part 3).

The second clock officially started on January 3, 2015,¹¹ when the new Congress convened with Republicans in the majority of both Houses. That was the point at which some of the counter strategies that depend on a congressional majority, and the legislative power that comes with it, could be put into play. These include the specific legal, political, administrative, and legislative opportunities available to those oppose the president's executive actions that will be taken up in detail in Part 3.

Public Sentiment: A Foundation of a Counter Strategy

The third public sentiment clock is, in many ways, the most important because it is the foundation on which effective counter measures can be mounted and sustained. Almost every poll shows that the public generally disapproves of the president's unilateral executive immigration actions. A CNN poll showed a 56-41 disapproval/approval divide.¹² Pew found a 50-46 disapproval/approval divide.¹³ A *USA Today* poll found that a 46/42 disapproval/approval split.¹⁴ Gallup showed a 51-41 disapproval/approval split.¹⁵ And the *Washington Post* found that 49 percent believe the president acted beyond his authority, while 47 percent said he acted within it. When asked, "Do you think Congress should try to block this immigration program, or let it go forward?", 47 percent wanted to block it and 49 percent wanted it to go forward.¹⁶

These are not generally wide gaps, and they suggest that the public has mixed feelings about the president's actions. Their ambivalence is captured in the title for the *Washington Post* article: "People like Obama's immigration action. They also think he shouldn't have done it."¹⁷

These general results also mask a more complicated picture. Unsurprisingly, there is a strong partisan divide in most of the results. So, for example, 80 percent of Democrats think the president acted within his authority, while 80 percent of Republicans think that he didn't.¹⁸ This partisan split permeates public response to the president's executive amnesties, as it does for many other areas of policy debate.

More interesting is the position of "independents". In the above question, they break 51-45 against the president. The same percentage of independents thinks that blaming Republicans for the president's actions is not a "good enough reason". And on the question of whether Congress should block the president's executive amnesties or let them go forward, 51 percent of independents voted for the former and 46 percent for the latter.

On the very important question of "Who do you trust to do a better job handling immigration issues, [Obama] or [the Republicans in Congress]?", independents break 47-37 in favor of the GOP. A *Wall Street Journal* poll also found the public trusted Republicans more than the president on immigration.¹⁹

This suggests that Republicans and independents are going to form the core of any public coalition to contain, narrow, reshape, and ultimately replace the president's executive amnesties. Both groups will need effective factual counter-arguments and perspectives to overcome the strong support that the president will receive from his allies.

Interestingly, counter arguments may find a receptive audience in the most unlikely of places — among Hispanics. Some polls, like the Latino Decision polls, using tendentiously worded questions,²⁰ find overwhelming support among Hispanics for the president's actions. Yet a more carefully phrased and conducted poll, by Gallup, finds a very different landscape.

It found that the president's actions will "likely help him politically with the growing Hispanic population in the United States because Hispanics favor the proposal by a better than 2-to-1 margin." However, for Hispanics born in the United States the

gap narrows quite a bit, with 51-42 in favor and “More generally, those of all racial and ethnic backgrounds who were born outside the United States are far more supportive of Obama’s proposed actions than those born in this country.”²¹ As a *Washington Post* analysis put it, “Basically, Obama’s move is hugely popular *among only one particular Hispanic group: foreign-born Hispanics — a.k.a. immigrants.*” (Emphasis added.)²²

These figures suggest that fact-based and reasonable counter arguments to the president’s executive amnesties will find open ears where it counts — among Republicans, obviously, but also among independents and even surprisingly among some Hispanic groups.

What arguments to make about executive amnesty is clearly a central question. They cannot just be any arguments. The counter arguments must take into account American sympathy for the plight of some illegal migrants, their support for immigration enforcement, and their wish to get the immigration problem behind them in a way that does not cause it to reappear five or 10 years down the road.

II: Sweeping Executive Amnesties Are a Seminal, Defining Political Event

The *National Journal’s* Ron Fournier has written that, “Depending on how far Obama extends presidential authority ... this [executive amnesty] could be a political nuclear bomb.”²³ It is. To take but one example, “President Obama’s recent overhaul of his deportation rules has electrified the largely partisan debate over immigration policy heading into the next Congress.”²⁴ Or consider this piece of conventional anodyne analysis, “Heading into 2016, much will depend on the Republicans’ legislative response to Obama’s deportation policies.”²⁵ And of course every 2016 presidential candidate will be forced to stake out their views, in detail, of the president’s actions.²⁶

Fournier’s concern however, lies elsewhere. His chief worry is expressed in the article’s sub-title: “Even if reform is needed and legal, endowing the presidency with new, unilateral powers is a dangerous precedent.” Of course, no one is “endowing the president with new unilateral powers” except the president himself.

Among Mr. Fournier’s other concerns is that the president’s actions may not be legal, a point that the president himself acknowledged more than once.²⁷ He further worries that the president’s actions will bring about “*exponentially* more polarization, gridlock, and incivility”, especially at a time when “Americans “are more polarized along partisan lines than at any point in the past 25 years.”²⁸ That seems very likely to happen, although some Americans may view this as “more of the same”.

A far more damaging consequence of the president’s actions is that it represents another assault on the public’s trust and confidence in the government and its institutions.

In 1958, a Gallup poll found that 73 percent of the public believed you could trust the federal government to do what’s right “most” or “all of the time”; by 2006, that figure had fallen to 28 percent. It is now down to 19 percent and has affected almost every major governmental organization, including the CDC, VA, IRS, INS, and FBI.²⁹ The view is widespread according to Pew: “Majorities of all typology groups express low levels of trust in government.”³⁰

The president’s executive amnesties will further damage the public’s trust that is the invisible psychological glue that helps hold this diverse country together. That decline of trust and efforts to restore it focused on immigration reform would be a powerful counter strategy theme.

Who Governs?

A current meme among Democrats and their allies is that Republicans must “transition from being the opposition party to being one that has to show it can govern.”³¹ The purpose of this meme among Obama allies is to protect the president’s initiatives. Yet, as a matter of politics and constitutional principles, it profoundly misunderstands the American political system.

No political party can govern the country from Congress by itself, nor is the American constitutional system set up to allow that. And Republicans certainly do not have “prove that they can govern” by saying yes to a president whose actions go well beyond what the Constitution allows him to do by himself. Nor do they have to validate what prudent political judgment

would never recommend, especially for a president who repeatedly has described himself as a “New Democrat” moderate,³² “not that partisan,”³³ and even a “moderate Republican.”³⁴

Instead, Republicans and those opposed to the president’s immigration actions have to demonstrate that they stand with ordinary Americans for the rule of law and a government that honors its commitment to carry it out. In short, they must act consistently, reasonably, and responsibly — in a way that will demonstrate that they should be given a chance to govern.

Real immigration reform and a commitment to ordinary immigration enforcement is an important vehicle to accomplish this purpose.

III: Executive Immigration Actions Will Be Considered Within the Context of the Public’s Disapproval of the President

The president’s overall approval has been stuck at or near 40 percent for some time,³⁵ although it has begun to rise somewhat with more signs of an economic recovery.³⁶ Although there has been a modest uptick in the president’s approval rates, most analyses of the results conclude that November 2014 was a “rejection election” of the president and his policies³⁷ or, as the *Washington Post* put it, “reflecting widespread unease about the nation’s direction and the electorate’s disenchantment with President Obama.”³⁸ This “disenchantment” is very likely the result of a series of administration missteps, misrepresentations, and outright falsehoods. They include both foreign (Syria, Russia, and others) and domestic policies mistakes (health care roll-out, the continued unpopularity of the health care legislation itself, the VA fiasco, the IRS auditing of conservative groups, and others).

The net result is that the public questions the president’s competence.³⁹ The decline has been striking. In December 2008, three-quarters of Americans thought that the president “can manage the government effectively.”⁴⁰ By December 2010, that number had dropped to 43 percent.⁴¹

A recent CNN/Opinion Research Corporation poll asked whether the phrase “can manage the government effectively” applies to Obama. Just 42 percent said that it does, while 57 percent said it does not.⁴² In the words of the *Washington Post* headline, “President Obama’s competence problem is worse than it looks.” Said the article:

*Back in December 2009, more than three quarters of respondents in a CNN/ORC poll said that Obama was an effective manager of the government. By early November 2009 that number had dropped to 58 percent. It dipped below 50 percent for the first time in June 2010 and in the three polls in which CNN has asked the question since mid-November 2013, 40 percent, 43 percent, and now 42 percent, respectively, have said that he is a good manager.*⁴³

An obvious question to ask is whether the government, and more specifically the Obama administration, is competent to vet and process the millions of new illegal migrants that are likely to be covered. Americans are likely to be skeptical, and rightly so. It is not only the numbers, in the multiple millions, of illegal aliens that the DHS will have to evaluate for amnesty, but their demonstrated lack of interest in careful, fraud-free (to the extent possible) evaluations of eligibility.

The approval rate of DACA temporary legalization applicants has run at more than 90 percent. Almost no one gets rejected. Added to this are the president’s most recent efforts to nullify ordinary immigration enforcement through the vehicles of “prosecutorial discretion” and “deferred action”. These precedents create little confidence that the administration will evaluate the applicants for its extensive amnesty in a fair, non-political, and in-depth way.

Rubber-stamping millions of applications is a real and present danger; but paradoxically, and perhaps ironically, also the Achilles’ heel of the president’s executive amnesties (see Part 3).

More than Competence; It’s a Matter of Trust

Among the most powerful primary arguments against the president’s executive amnesty is his well-deserved reputation for being untruthful.

The most powerful single example of this was the president's false claim that, "if you like your health insurance, you can keep it," a claim he publicly repeated numerous times. This false claim received Politifact's "Lie of the Year Award" from the Pulitzer Prize-winning website.⁴⁴

In fact, the public view that the president lies is widespread. A 2013 Pew Research Center report noted that, "The steepest declines in Obama's personal ratings come with respect to his honesty and effectiveness." More specifically, "The drop in the share who see Obama as "trustworthy" is ... from 66 percent in January to 52 percent today. Meanwhile, the share saying he is not trustworthy is up from 30 percent to 45 percent."

More recently, an April 2014 Fox News poll found that 37 percent of the public thinks that the president "lies to the country on important matters" "most of the time", and 24 percent believe he does so "some of the time". Only 20 percent believe he lies only "now and then", and 14 percent that he "never" lies.⁴⁵ In March 2008, Gallup found that only 29 percent thought the president was not "honest and trustworthy", but by June 2014 that figure had reached 51 percent.⁴⁶

One national journalist has written: "Too often, the Obama administration has peddled bad information — knowingly (a lie) and unknowingly (incompetence and recklessness), because the president and his team have determined that, in Washington's toxic environment, the unmitigated truth is a vulnerability."⁴⁷

The president's serial lies, evasions, misrepresentations, and avoidance of any personal responsibility make his credibility for any of the rationales he will use for instituting his executive amnesty highly suspect at the start, and must be publicly and repeatedly analyzed and challenged on that basis.

IV: Executive Amnesty Will Focus and Frame Immigration Enforcement in a New Way

Immigration is an important issue for Americans. It is part of American national identity and reflects a view of ourselves as a country where everybody's family has someone who came here from somewhere else.

It also reflects America's general openness in the last 50 years to unprecedented numbers of legal permanent residents entering the country each year at levels that no other single country, or even group of countries, matches. Yet that openness is also coupled with a concern of the cumulative effects of adding millions and millions of new immigrants while, at the same time, an enormous number of illegal aliens enter, live, and work in the United States. There is a widespread sense in the American public that the government is unable or unwilling to do very much about illegal migration.

The public's views are easily discernible from the numerous immigration polls that are done on a regular basis, and the almost daily polls that take place when the issue heats up for any reason. Ordinarily, immigration is not at the top of Americans' immediate list of concerns when, as has been the case for the last six years, economic worries top that list.

However, that absolutely does not mean that Americans don't care about immigration. They do.

A Problem that has Quietly Grown Step by Step

With other things on their minds, it is no wonder that the daily unfolding of the Obama administration's immigration choices that were instrumental in helping to cause the very circumstances we now face have received little attention. How, exactly, did we get to the state of having 11-12 million illegal migrants living and working here? Why is it alright for liberal and progressive groups to pour over \$300 million to groups that lobby against almost any enforcement of our immigration laws and in favor of amnesty for almost any illegal migrant already here or who wishes to come?⁴⁸ How is it possible for John Sandweg, who until last year was the acting director of Immigration and Customs Enforcement, to say, truthfully, "If you are a run-of-the-mill immigrant here illegally, your odds of getting deported are close to zero — it's just highly unlikely to happen."⁴⁹

Over the years, the public catches glimpses of the decisions that their civic and political leaders have taken without their consent or agreement, but these decisions are lost, or more likely put aside in the daily press of more central events. Yet every once in a while — when a major piece of immigration legislation is being debated in Congress or when thousands of illegal

migrants present themselves at our Southern border and overwhelm our country's capacity to deal with them — Americans cannot help but take notice.⁵⁰ And they don't like what they see.

So, while Americans expressed natural sympathies for many of those who presented themselves at the border this past summer, over half of those polled wanted “to send child migrants home.”⁵¹

The president's executive order will be the equivalent of a very large bomb going off in every part of the country. Moreover, unlike debates in other areas, like environment regulations, in which the president is also acting by executive order,⁵² immigration has a much more direct and immediate public impact. It will be impossible not to notice.

The Republican House and Senate leadership should not act as if they don't notice. Senate majority leader McConnell and House Speaker Boehner have quite a long to-do list,⁵³ which is very understandable. It must continue to include immigration.

Ordinary Americans do not want their immigration laws nullified. They do not want ever-higher levels of immigration. And they want to do something compassionate and fair with the illegal immigrants already here so long as they don't have to face the very same problem in the near future.

There is only one political party whose rank-and-file views give it any chance of responding to this clearly expressed public need. However, Republicans have to see this need for the opportunity that it is and act on it.

V: Executive Amnesties Will Have the Force of Law Until They Are Reversed or Modified

The presidential amnesty directives will be implemented with the full resources of the administration and its allies proclaiming the necessity, legitimacy, and reformist nature of the president's actions.⁵⁴

They will exist as official government policy and will remain in effect after the president leaves office — January 20, 2017 — unless otherwise delayed or changed, a long period in which the orders can “take root”, a period of well over a year.

As noted, government officials and workers in the Department of Homeland Security have been tasked with putting them into effect and have already started doing so.⁵⁵

Civic and religious organizations that support the president's executive orders have already begun to work to make sure they stay in place. Immigration advocacy groups associated with the administration will begin to amplify the president's directives to the audiences affected by them, and this will have several intended consequences. Large numbers of affected illegal aliens and others affected by the president's directives will immediately have a vested interest in their continued and successful application. They will understand this as a government commitment, and the president's allies will doubtless buttress that view.

Chasing Fool's Gold

The president has said that if an immigration bill is passed by the House and Senate, he will “roll back” his executive order.⁵⁶ That promise, however, is apparently conditional, according to the president, on any Republican bill solving what he sees as resolving the problems that need to be addressed.⁵⁷

What immigration problems does the president feel “need to be addressed” before he can sign any new congressional immigration bill and roll back his executive orders? He gave his answer at a press conference,

*If Congress passes a law that solves our border problems, improves our legal immigration system, and provides a pathway for the 11 million people who are here. ... Give me a bill that addresses those issues — I'll be the first one to sign it and, metaphorically, I'll crumple up whatever executive actions that we take and we'll toss them in the wastebasket, because we will now have a law that addresses these issues.*⁵⁸

Note what the president is saying. He once thought it legal to provide executive amnesty for only those who had children who were American citizens or legal permanent residents. Now, however, as a condition of his signing any new immigration bill, it must specifically include all 11-12 million illegal aliens. That would include the parents who brought their children

here illegally, all who have overstayed their visas, and those who have entered the United States after having been caught and returned a number of times.

Moreover, the president doesn't mention the strategy that is at the core of his executive amnesties. That is, his decision to essentially suspend enforcement for all those illegal aliens who are not a "top priority". Even if Congress were to legalize every illegal alien, unless ordinary immigration enforcement (beyond deporting those who are terrorists or are convicted of major felonies) were also reintroduced, the country would face the same wrenching immigration problems again down the road.

The president has also said, misleadingly, that, "the minute they [Congress] pass a bill that addresses the problems with immigration reform, I will sign it and it *supersedes whatever actions I take*."⁵⁹ (Emphasis added.)

Actually, even if Congress wants to and does pass a bill, that is not how it is likely to work. The president's executive actions would remain in effect until both houses of Congress passed immigration legislation and the president signed it into law. That process might take some time.

Measures passed by the House would have to be passed in identical form by the Senate, and if not a House-Senate conference would have to take place to adjudicate any differences in the legislation. Only then, if they were ironed out, would the bill be sent to the president, who might sign it — or most likely not, at least not the first time around.

Moreover, the president could, and most likely would, insist that any bill considered by Congress adopt his executive amnesty measures. The president could well veto any bill that did not meet his criteria for a "bill that addresses the problems with immigration reform". And if that happened, the bill, legislatively, would be back to square one. To overcome any presidential veto, the override would have to be passed by two-thirds of both houses in order to be sustained — an unlikely event given that Republicans, in spite of their massive midterm victories, do not control the requisite 67 Senate seats or 290 House seats. The same numbers apply to any congressional attempt to overturn the president's executive actions through legislation.⁶⁰

Recall that Bill Clinton vetoed the Republican Congresses' welfare reform bill twice, before a looming election and public support for the reform forced the president to sign it the third time around. That would be an obvious tactic for a president determined to get the largest possible legalization programs and other Democratic immigration measures passed into law.

All of this would of course take time. In the meantime, DHS would be formulating its legalization rules and implementing them while advocacy groups would be pushing for large registration numbers and affected groups would become invested. While this was happening, the president's executive amnesties would remain in place with all the administrative wheels and political expectations set in motion by the president's actions marching on.

The implications of these basic facts is that that it would be better to try and supersede the president's executive amnesties then try to wholly negate them. There are legislative ways to do this that do not involve trying to overturn anything, at least at first. There is absolutely no constitutional doubt whatsoever that Congress has dominion over America's immigration laws. It can set the standards of executive enforcement. It could repeatedly attach those standards to bills the president wants and would sign.

Yet trumping the president's unilaterally made immigration enforcement priorities with congressional mandates, and thus reshaping them, is only part of an effective counter strategy. Reshaping enforcement priorities is one important step, replacing the 2013 Senate immigration bill with a real immigration reform bill is another.

VI: You Can't Beat Something with Nothing

Saying no to the president's executive amnesty is legitimate and necessary, but it is not enough.

Any effective counter strategy to the president's executive amnesties must take into account several critical facts. His actions will generally be supported, and in some case strongly supported, not just by the National Council of La Raza, but also by ordinary Hispanics.

The reasons are straightforward. Although the "Hispanic" community is in reality very diverse, covering a great many countries with different cultural, political, economic conditions, and historical experiences, they are not understood or treated

that way in the United States. Here, every person from a Spanish-speaking background is considered “Hispanic”. As a result, most persons from Spanish-speaking backgrounds have had decades in which to absorb the lesson, and the identity, that in the United States at least, they are part of one group.

Used to thinking of themselves, in part, as “Hispanics”, they are more attuned to the many debates they care about through that lens. This includes the intense efforts of Democrats to bind this group to their party and the less intense efforts, so far, of the Republicans to make inroads in gaining their support.

Whatever the party, the question is phrased the same way: What can we do to reach “Hispanics”? Whether it is ugly and untrue accusations about Republicans being “anti-immigrant” or debates about Republican outreach strategies, much of the public discussion reinforces the idea of group membership and identity. People from Spanish-speaking backgrounds are not the only immigrants, either legal or illegal, but you would never know that fact from the public discussions.

It is true that legal and illegal migration from Spanish-speaking countries do contribute substantial numbers to America’s foreign-born population. Forty-two percent of America’s 40,738,000 foreign-born residents come from Spanish-speaking countries.⁶¹ That is a very large potential group with an interest in a particular public policy — immigration — which affects them and their families. And they are interested.

Hispanics, like other Americans, are primarily interested in jobs and education.⁶² Immigration is not their first concern. However, it is a concern. For example, Pew found that, “Immigration is as important to all Latinos (33 percent) as it is to Latino registered voters and ranks ahead of public finance issues such as the federal budget deficit (28 percent) and taxes (27 percent), which are identified as “extremely important” by lower shares of all Latinos.”⁶³

The issue is “personal” for Hispanics in another major way. “One-in-four (26 percent) Hispanic adults say they personally know someone who has been deported or detained by the federal government for immigration reasons in the past 12 months. Among Hispanic registered voters, 22 percent say the same.” And “Three-in-ten (31 percent) Hispanic adults say they know someone who has applied for the new deferred action program [DACA]. Among Hispanic registered voters, 26 percent say they know someone who has applied for the program.”⁶⁴

What other ethnic group could this be true of? Italians? Indians? Africans? No, in this specific respect Latinos stand apart, for now, from other groups and any effective counter strategy to the president’s executive amnesty will have to take that fact into account.

The very fact that one group, Hispanics, is singled out in an ongoing and often contentious public debate on immigration is bound to stimulate a circle-the-wagons psychology regardless of how strong that group’s movement toward an American identity is progressing. That feeling is further reinforced by the highest levels of the country’s political leadership.

When the president of the United States says to Latinos in an interview aired on Spanish-language radio, “If Latinos sit out the election instead of saying ‘We’re going to punish our enemies and we’re gonna reward our friends who stand with us on issues that are important to us,’”⁶⁵ he is engaging in the worst form of demagoguery. And when that concern is stroked to fever pitch by fervent advocates on both sides of the immigration policy dividing lines, it is hard for “Hispanics” to ignore that they and their group are the subject of America’s most contentious immigration arguments.

The president, however, has done more than simply demonize Republicans, although he has done plenty of that.⁶⁶ He has championed and tried to make legal policies that specifically address Hispanic immigration concerns. In 2012, 89 percent of adult Latinos said they approved of President Obama’s recently announced policy that allows unauthorized immigrants who were brought to the United States as children to remain in the country and apply for temporary work permits if they meet certain conditions.⁶⁷

In December 2014, after the president initiated his executive amnesties, 67 percent of Hispanics approved of his handling of immigration.⁶⁸ A December 11, 2014, *Wall Street Journal* poll reported that support for the president on immigration was at 56 percent, up from 45 percent in May 2010. In addition, “66 percent said the president was doing ‘very’ or ‘somewhat’ well addressing the concerns of the Hispanic and Latino community, compared to just 30 percent who said the same when asked about ‘Republican elected officials.’”⁶⁹

Any counter strategy to the president's executive amnesties that avoids these facts is doomed to failure. However, recognizing them still leaves open many choices.

This, I want to emphasize, is not the precursor of any suggestion to try to out-pander the president and his allies. That would be an odious and counterproductive response.

An effective overall counter strategy to the president's administrative amnesties must begin with a very basic, but powerful, fact: You can't beat something with nothing. Something legislatively substantive needs to be put on the table to counter the president's executive amnesty.

Some Republicans recognize this, although their suggestions have been somewhat scattershot. One recently suggested strategy is for Republicans to pass a border enforcement bill only and dare the president to veto it,⁷⁰ which he will. Another is to make a "down-payment" on immigration reform.⁷¹ Other possible plans include "bills offering additional visas both for low-skilled and high-tech workers" and a bill to "revamp the visa program for farm workers".⁷²

Many of these and other ideas for a GOP-sponsored set of immigration reform bills may have merit. However it is important to keep focused on the reforms that will address the basic issues that underlie any real immigration reform measures.

In the fourth and final paper of this series I will propose a framework for immigration reform that I believe addresses the five basic pillars of any immigration reform. I call it "The American Immigration Reform Act of 2015" and it consists of five basic elements: (1) a strategy of robust and effective border and workplace enforcement, and a functioning entry-exit system to track those who overstay their visas that must be substantially realized before the next step is completed; (2) an orderly, multi-year process of registration for potential legalization of some currently illegal aliens according to clearly defined and appropriate set of criteria — along with fair and legitimate penalties for having broken the law and substantial penalties for any fraud committed during the process of determining eligibility; (3) a multi-year transition from extended family reunification to a more education- and skill-based set of standards so that the current 66 v. 12 percent split in favor of family reunification can be more adequately balanced between the two;⁷³ (4) a realistic strategy of immigration enforcement throughout the country that expedites the removal of those breaking America's immigration laws; and (5) the setting up an Immigration Commission, modeled after the Jordan Commission to examine at least three major questions: (a) What is a reasonable number of legal immigrants to take in every year, and on what bases should that question be considered? (b) How many farm and high-tech workers are needed and what is the best way to handle that need? and (c) What can be done within and throughout our major political, cultural, and economic institutions to further the development of a primarily, but not necessarily exclusively American, identity as opposed to narrower ones.

VII: Confrontation vs. Containing, Narrowing, Reshaping, and Ultimately Replacing the President's Executive Amnesties

The president's executive amnesties have made conservatives livid, and many moderate Republicans angry. Republicans of all stripes have made it clear, in the words of the *Washington Post*, "that if Obama goes forward, it would be the equivalent of giving the middle finger to their incoming majority, and by extension, the American public that helped the GOP gain seats in the house and Senate November 4."⁷⁴ And he has done just that.

The president's executive amnesty is provocative and meant to be so. The understandable impulse is to act on that anger, but it is better to channel it. Anger is a poor guide to good judgment, and Americans don't generally like it as a response to a president.

This president is extremely good at conveying "reasonableness." His speaking style conveys seriousness of purpose and thoughtfulness, often speaking slowly, carefully, and with frequent pauses as if he is considering what he is about to say. His deliberate style is one of his most important, but underappreciated, leadership resources because many people mistake it as a sign of reasonableness. Mr. Obama is a highly ideological "conviction president," not a reasonable one.

Therefore any effective counter strategy can and must be authentic in its beliefs and heartfelt in its views, but not shrill, not angrily accusatory, and not disrespectful of the office — while wholly disagreeing with the president's policies.

There is some debate within the Republican Party as to whether to respond in kind to the president. One suggestion was to not invite the president to Congress to give his State of the Union Address.⁷⁵ The anger is entirely understandable; however the snub would have been self-defeating. Americans distinguish between the president and the presidency. They respect the later even when they don't approve of the former. Any action that could be interpreted, or that Mr. Obama's allies can portray, as a snub of the president in his role as the holder of this still-esteemed office is likely to be counterproductive. You can get a sense of the tack that his allies would take in the accusation that Israeli Prime Minister Netanyahu was disrespecting President Obama by addressing Congress without his formal invitation.⁷⁶

Another idea is making the rounds is to refuse "to confirm the president's nominees, like Loretta E. Lynch, Mr. Obama's pick to replace Eric H. Holder Jr. as attorney general."⁷⁷ The Republican Congress has every right to give the president's nominees close scrutiny. However, a blanket policy of "no votes" would allow the president and his allies to loudly complain that they cannot accomplish the nation's business because of Republican obstruction. That kind of complaint will have some public traction.

Beyond these more specific suggestions there is a larger political and policy question that has to be addressed. There is debate in the Republican Party about whether the president's executive amnesties will or should "poison the well", not only for immigration reform,⁷⁸ but also for any cooperation with the president on other matters.⁷⁹ Part of this question has to do with the emotional after-effects of the president having turned his back on the public's 2014 midterm election message. As noted, many Republicans are angered by the president's behavior, and legitimately so.

The feelings associated with that anger are a disinclination to give the president any political rewards in the form of passing policies that he might want to punish him for his behavior. This, too, is an understandable, perhaps emotionally satisfying, but ultimately counter-productive strategy.

The power of a Republican majority in both houses of Congress, when the president would like to see a bill passed that he can sign, is exactly the leverage that comes with that fact.

That means that the Republican Congress will be able to pass bills that reflect its policy perspectives. For that reason, it would ultimately be in the GOP's best interests to work on areas of common interest like taxes and trade, if that can be managed.

Finding common ground with a president who has treated you shabbily and worse will not be easy. However, the public doesn't care very much about Republicans' hurt feelings; they are much more likely to want the president and Congress to "work together."⁸⁰ The advantage of such a strategy is at least two-fold. It signals that the GOP can and will act responsibly, and it gives the public a preview of the Republican perspective on America's problems and how to address them. That will be very helpful in the 2016 presidential race.

At the same time, the Republican Congress should resist the president's immigration directives with every real and non-self-defeating measure available — and there are a number of them. In so doing, whatever else it accomplishes with the president, it shows that it will vigorously stand up for important legal, political, and fairness principles on behalf of ordinary Americans.

In short, it is in the best interests of the country and for the GOP to adapt a dual response strategy: bipartisanship where possible, strong and principled opposition where necessary, as it is in the case of the president's executive amnesties.

It is also important to keep in mind that the president's plans will take some time to unfold regardless of his efforts to get them off to a fast start. Registering and vetting millions of people will take a substantial amount of time, more so if it is done right. And the process of accepting applications for the larger amnesty, for illegal parents of U.S. citizens and legal residents, won't begin until May. (The expanded DACA amnesty was to begin in February, but was temporarily halted by a federal judge.)

As a result, Congress can insist that any registration and vetting conform to its expressed wishes.

VIII: A Strong, United Response Is Necessary

Republicans disagree among themselves on many issues. They differ in some respects on how forward leaning to be in foreign policy,⁸¹ or what domestic issues to emphasize in building a new, more modern Republican Party.⁸²

However, the president's executive amnesties should be one issue that every single Republican, regardless of differing views on immigration or any other issue, can and should unequivocally condemn. Expressed individually, collectively, and repeatedly, such condemnation would send a very powerful message: The president's behavior is wrong — for immigration reform, for the office he holds, and for the American people.

Every Republican member of Congress should be on record opposing the president on this matter — in Washington, on their websites, in their media appearances, in visits to their home states.

It should include, as it has in the case of Ileana Ros-Lehtinen (R-Fla.)⁸³ and David Valadao (R-Calif.),⁸⁴ those Republicans who supported a House version of the Senate immigration bill.⁸⁵ And that should carry over to any House or Senate bills that express disapproval of the president's actions. It was not helpful when Republicans like Ros-Lehtinen and Florida's Mario Diaz-Balart voted with Democrats to oppose the GOP-led immigration bill disapproving the president's executive action.⁸⁶ Nor is it helpful when Republicans like governor elect of Illinois, Bruce Rauner calls the president's amnesty "a great start."⁸⁷

Every Republican senator should be doing the same thing, This applies particularly to the four Republicans who helped the Democrats draw up and pass their immigration bill in 2013, and those Republican senators who voted for it when it came to the floor.

Illustrative of the kinds of things that need to be publicly done more than once is the following, "In a letter to Obama Thursday, Sens. John McCain (R-Ariz.), Lindsey Graham (R-S.C.), and Marco Rubio (R-Fla.) urged Obama not to offer amnesty to illegal immigrants until the southern border is secure and immigration law is effectively enforced."⁸⁸ It is to be hoped that Senator Jeff Flake (R-Ariz.), another original member of the Gang of Eight⁸⁹ will add his name to that list, if he has not already.

Republican Senator Mario Rubio (Fla.) has a special role to play in this effort, and an obligation to do so as an early member of the Gang of Eight who subsequently came to reject that approach.⁹⁰ In a December interview he was asked:⁹¹

Q: What about members of Congress who say they cannot vote for anything that would allow a pathway to citizenship?

Rubio: We might prohibit people who came here illegally and got green cards under this process from ever becoming citizens. And if that's what we have to do to get this thing passed, I would be open to it. But I don't think that's a wise thing to do.

Every Republican governor should be doing the same, and every past Republican presidential candidate should be doing the same. That should, if possible, include George W. Bush, who has made an understandable and principled decision not to second-guess Mr. Obama.⁹²

And, very importantly, every 2016 Republican presidential candidate should be saying the same thing.

While candidates may differ regarding elements of what they would propose and accept, it would enormously helpful if every candidate could coalesce around a commitment to instituting border controls, entry-exit matching systems to deter those who overstay their visas, workplace verification, a robust system of interior enforcement that doesn't just make a priority of the least numerous immigration violators before any legalization processes are finalized, and a change in the relative weight of family reunification and education levels and work skills in selecting legal immigrants.

This formulation leaves a great deal of space for candidates to fill in with their own views and policies. They may favor legalization for some groups, but not others. They may argue for or against a pathway to citizenship. They may reweight the family reunification or education and works skills equation differently. Yet whatever the specifics of each candidate's views on these matters, a public conversation about these elements will help move the discussion in the direction of real immigration reform.

IX: The Office of Legal Counsel’s Flawed Analysis of the President’s Executive Amnesties

Americans are likely to believe that the legal analysis from the Department of Justice explaining the source and justifying the scope of the proposed executive amnesty is both authoritative and wholly independent of any political considerations.

That is simply inaccurate.

As noted in the first part of this four-part analysis,⁹³ the White House initiated DHS Secretary Johnson’s three-month review of immigration policy with an order “to use our legal authorities to the fullest extent on a new deportations policy.” Further, “In five White House meetings over the summer, Mr. Johnson and Mr. Obama, both lawyers, pored over proposed changes, eventually concluding that the president had the authority to enact changes that could affect millions of people and significantly alter the way immigration laws are enforced.” When Secretary Johnson gave the president the results of his review of possible executive actions in May 2014, the president rejected them because, in the president’s view, he did not go far enough. The effort only sought to sharpen the guidance for immigration agents, but did not provide work permits or directly shield anyone from deportation.”⁹⁴

This is hardly objective, non-political analysis. It is simply caving in to presidential pressure.

It is also case that the Office of Legal Counsel’s analysis depended substantially on the information it was given. It conducted no independent assessment of the accuracy of that information. For example, the analysis says “DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals.”⁹⁵ The analysis makes no mention of the failure of the administration to request more money or to justify its current use of resources, as already noted above. It simply accepts the administration’s position as accurate.

The Office of Legal Counsel’s analysis is full of questionable claims, for example its treatment of what other presidents have done. Contrary to their analysis, no president has ever attempted anything of comparable scope.⁹⁶

The Office of Legal Counsel’s analysis depends on its own reading of inferred congressional intent. Its approach seems to be that if Congress has ever passed a law that included some limited form of “prosecutorial discretion” or “deferred action”, then the president’s expansive use of these vehicles must, *ipso facto*, be legal. For example, the analysis states, “Finally, the proposed deferred action program would *resemble* in material respects the kinds of deferred action programs Congress has *implicitly approved in the past*, which provides *some indication* that the proposal is consonant not only with interests reflected in immigration law as a *general matter*, but also with congressional understandings about the permissible uses of deferred action.”⁹⁷ (Emphasis added.)

By my count that is a quadruple conditional, four places where in that single sentence the analysis hedges its bets and introduces its own expansive interpretation.

The thinness of the Office of Legal Council’s analysis is nowhere demonstrated more forcefully than in its treatment of the vast size and scope of the president’s executive amnesties:⁹⁸

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. ... We have thus considered whether the size of the program alone sets it at odds with congressional policy or the executive’s duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program’s potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS’s proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS’s proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA.

Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States *each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens — approximately four in 10 — potentially eligible for discretionary extended voluntary departure relief.* (Emphasis added.)

Translation: The OLC has received no statutory guidance from Congress regarding the size of the amnesty, but we conclude anyway that it is within the president's legal authority because: (1) Congress granted a "prospective entitlement," that we have inferred by looking at past programs that Congress has "implicitly" approved; (2) while the president's amnesty is large, "it is only a fraction [NB: 36 percent by the OLC's own numbers] of the approximately 11 million undocumented aliens" in the United States; and (3) the size of the amnesty will not interfere with those who would unlikely to be removed because of the amnesty (!). Having essentially nullified ordinary immigration enforcement through its use of "discretion", the administration's last point is precisely right, but delegitimizes the analysis.

The OLC is mute on the practical impact of the president's enforcement-priority amnesties that mean, in effect, that illegal aliens who are not national security threats or convicted felons are not at risk for enforcement proceedings. When these numbers are included in the size and scope of the president's executive amnesties, the 36 percent figure, already rather large, is much more likely to surpass 90 percent. That is not only a change in degree, but also a categorical change.

When the OLC analysis concludes by saying, "We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute,"⁹⁹ it is exactly that — *a belief*, and a politically inspired one, not a legal fact.

X: Themes and Counter Themes

The president will tell the public he had his reasons for acting as he did. They will include, but not be limited to (1) Our immigration system "is broken" and I couldn't wait; (2) I gave the Republicans time but they refused to act; and (3) It's the right thing to do.¹⁰⁰ These explanations are already being echoed by the president's supporters and are, and will be, reflected in questions that the news media asks of Republicans and those opposed to the president's plan.

It is essential to be prepared for this. Principled opposition to the president's plans rest on a very firm foundation, of which the following are meant to be illustrative:

1. The president is taking the law into his own hands through an amnesty program that largely breaks the boundaries of traditional understandings and practice of "prosecutorial discretion". It has never, in the history of the country, been done on such a large scale and without consultation with Congress. These are not my views or narratives designed for a counter argument; they are widely reported facts. The Associated Press called it "the most sweeping changes to the nation's immigration laws in nearly three decades."¹⁰¹ *Politico* described it as "the single largest unilateral action on immigration policy in history."¹⁰² And another report noted that, "shielding five million people from deportation is the largest single unilateral move any president's ever taken."¹⁰³
2. As a result, the president's actions are more akin to "legal nullification on a mass scale."¹⁰⁴ That is not the proper behavior of an elected leader in a democracy.
3. The president is setting a dangerous precedent. As David Brooks notes, "To do something this seismic with the stroke of one man's pen is dangerous." Moreover, "If President Obama enacts this order on the transparently flimsy basis of 'prosecutorial discretion,' he's inviting future presidents to use similarly flimsy criteria."¹⁰⁵
4. The president has said in the past, repeatedly,¹⁰⁶ that he just can't act unilaterally to change immigration laws and their enforcement. So, "When immigration activists first urged him to halt deportations of many illegal immigrants, for instance, Obama said he didn't have the authority to do so."¹⁰⁷ And, in response to a heckler who wanted the president to issue executive amnesty orders, the president said, "The easy way out is to try to yell and pretend *like I can do something by violating our laws.*" (Emphasis added.)¹⁰⁸ Why is what he is now doing not "violating our laws"?

5. The granting of such an extensive amnesty is almost certain to stimulate the building up of the next large group of illegal aliens, who will reasonably surmise that they will be next to receive amnesty. A policy that reduces internal deportations to only those convicted of the most serious felony crimes encourages the view that if you can get to the United States, and don't get convicted of a major crime, you are, for all intents and purposes, free to stay.
6. The administration has made the argument that its use of administrative discretion is the result of Congress having allocated money enough for only 400,000 deportations a year. As noted, the administration has never specifically asked Congress to provide more money for that purpose, and has fudged its immigration counting so that it can reach that 400,000 figure.¹⁰⁹ Moreover, in reality a substantial number of illegal migrants are not "removed" or deported, but simply caught at the border and sent back without penalty — i.e., "returned".¹¹⁰ The "not enough money" excuse is simply not credible or truthful.¹¹¹
7. The president's executive amnesty will be very costly financially for the country. All of those granted amnesty will become eligible for certain government welfare programs, and since most of those granted amnesty will not be skilled professionals, highly educated, or wealthy, they will need to use means-tested programs as well. It is not widely appreciated that, "Wittingly or not, U.S. immigration policy has hugely multiplied the number of poor people living in the United States."¹¹² The groups being considered for amnesty under the president's executive orders will exacerbate those trends.
8. The president's frustration with the American political process is no excuse for taking the law into his own hands.
9. The president's frustration with Republicans, and his petulance because of it, is no excuse for taking the law into his own hands.
10. The president's executive amnesty for millions of illegal migrants will further divide the country and the president seems not to care, but is instead focused only on his political legacy.
11. The president's executive amnesty will further erode Americans' confidence in government with undesirable and avoidable consequences for the country and all Americans.
12. The president's new amnesty for millions of illegal migrants is a policy payoff to the special interests that have been bankrolling amnesty efforts for years.
13. The president and his senior staff met behind closed doors, repeatedly, with big money, special interests, and ethnic advocacy groups, but no ordinary Americans were asked or invited. Why are the wishes of the liberal and progressive money groups that have poured over \$300 billion into supporting the president's amnesty push repeatedly invited into the White House to plan strategy, while the wishes of ordinary Americans that our immigration laws be fairly enforced are ignored?¹¹³
14. The president's new amnesty for millions of illegal migrants is not what the American people mean when they say they want immigration reform.
15. The president's "do it my way or else" approach is not what Americans have in mind when they say they want the parties to try and work together.
16. The president's new amnesty for millions of illegal migrants is unfair to the millions of legal immigrants who have abided by the rules.
17. The president's executive amnesty giving legal status and work permits to millions of illegal migrants is unfair to ordinary Americans seeking jobs and now thrown into a competition that makes their prospects even worse.
18. The president's executive amnesty for millions of illegal migrants is unfair to the millions of legal applicants for immigration who are patiently waiting their turn.
19. The president's executive amnesty for millions of illegal migrants is unfair to ordinary American taxpayers because with legal status, illegal migrants can now apply for a variety of government benefits.

20. The president's executive amnesty for millions of illegal migrants rewards the breaking of the law by giving those who broke the law legal status and work permits.
21. The president's executive amnesty for millions of illegal migrants not only rewards those who broke our immigration laws, but it requires nothing from them in return — no fines, no penalties, no giving up of any advantages as some form of restitution and balance.
22. The president's executive amnesty for millions of illegal migrants sets back the cause of real immigration reform that the president says he believes in.
23. The president's executive amnesty provides only temporary help to those affected by it, leaving their eventual status open to question and revision.
24. The president's executive amnesty creates a class of people whom many Americans will now feel benefited from a president's inappropriate actions. One consequence of that may be to undermine Americans' support for legal immigration and to create resentment toward those who are perceived to have gotten something through an illegitimate process.

XI: Presidential Executive Amnesties in 2014 Will Affect the 2016 Presidential Election

The president's executive amnesty stands on its own as a provocative, unnecessary, overtly political, manifestly self-interested, public- and Constitution-disregarding lunge to secure a legacy in spite of the damage it inflicts on the country or ordinary Americans.

But it is also without doubt the first major marker of the 2016 presidential campaign. This raises two core questions for Republicans:

1. What will its presidential candidates say (as they campaign) and do (should they win office)? and
2. How can Republican candidates address what ought to be their strong opposition to the president's actions, while acting in a way that does not further alienate a voting block with whom they have had their troubles and whom they would, at minimum, like to keep from becoming permanent members of the Democratic Party?

The two questions are different, but obviously related.

The White House believes that the president's executive actions, "would drive Latino voters further away from the GOP, damaging its chances of winning the presidential election in 2016,"¹¹⁴ and they have a point. The question is what to do about it.

Possible Responses to Question 1

Every Republican presidential candidate will be asked about the president's executive amnesties. They will all, I assume, condemn it. Then comes the hard part: What do they plan to do about it?

Any new Republican president can, on day one, overturn his predecessor's executive orders. However, "the White House is planning a quick start, according to officials familiar with the plans. It is breaking eligible immigrants into staggered groups, some of which will begin applying for deportation deferrals within a few months."¹¹⁵ That means by the time any Republican president gets into office the amnesty program will be well along in implementation unless a legal challenge is sustained.

Telling people who have been legalized for almost two years that they are no longer legal would prove difficult. It is also quite possible, and needs to be considered, that the public upset with the president's actions in the heat of this moment will cool somewhat over two years. If it does, some public sympathy might be found for the plight of those who have been given temporary legality.

The new Congress could draft and pass its own immigration legislation, which would be a very smart move since they are likely to get much more of what they want for real immigration reform while they are in the majority than they will as a minority.

However, it is clear that the president and Congress have very different ideas of what exactly is broken and how to fix it, so it is doubtful that any real immigration reform bill passed by this Congress would be one the president would want to sign, but legacy is a powerful presidential motivator, for Mr. Obama especially. Any real reform immigration bill that passed would also lay out a GOP template for any Republican presidential nominee.

The president's veto threats should not deter Congress from going ahead and passing its view of an immigration reform bill, even if the president threatens to and does veto it. They will at least be on record as having made a thoughtful and considered effort, and they can then argue a Republican president would sign their bill.

That would be enormously helpful to any Republican presidential candidate. It would also be an enormous plus for many Americans who would like to see the immigration impasse ended in a way that both does justice to the rule of law and reflects compassion for those whose records merit it. And it would provide a convincing platform from which to reach out to all Americans, including Latinos.

If a new Republican president must act, it is better that he have a legislative plan that will supersede the president's executive amnesty, and do so in way that is fair and appropriate. I have sketched such a plan (see section "V: You Can't Beat Something With Nothing", above) and will add more specifics in Part 4 of this four-part *Backgrounder*.

There is however, one other possible intervention for the new Congress to make that could be accomplished as part of an immigration reform bill or as a stand-alone measure. That would be to take a strong legislative hand in writing new rules for "Adjustment of Status" requirements for all those who are formerly "out of status" and wish to become legalized.¹¹⁶

Congress has the absolute power to write these rules, and should do so with a view to making absolutely clear its criteria. And they should reflect Congress's rewriting of the president's DHS memos that effectively make every illegal alien who is not a terrorist or convicted felon eligible to adjust his status from illegal to legal. In the past it has written general frameworks that have allowed the executive branch to fill in the details that matter. Congress could write these rules very specifically and use the oversight process to ensure that they are being followed. Whether these new rules would have to take the form of legislation is unclear. If so, they would have to pass Congress and the president might well veto them, and have his veto upheld.

However, the fair and appropriate rules of the kind that I would suggest are likely to find a positive reception in the American public, and would if necessary become the basis for a new Republican president's executive order or signature on entering office.

I will take up some specific content of such rules in Part 3 of this four-part analysis.

Possible Responses to Question 2

The president is counting on his executive amnesty to cement Latino ties to the Democratic Party, and as noted his efforts have been well received within that group. This is a fact and the Republicans need to have a viable response.

- Doing nothing legislatively is not a viable response to the Latino issue.
- Only criticizing the president in all the different ways he deserves to be criticized is not a viable response to the Latino issue.
- Making clear the many ways in which the president's actions are unfair, on the many grounds noted above in Section X (Themes and Counter-Themes), may be helpful.
- Making it clear that the president's actions threaten to derail America's long acceptance of legal immigration might have some traction.
- Making clear to Latinos and every other American that the president's executive amnesty goes well beyond constitutional boundaries might get hearing.

Yet, all of these possibilities will only go so far if they are unaccompanied by actions (see above) or promises to take legislative steps to begin the processes of changing the status of those who records would make them eligible.

Next: "Countering Executive Amnesty-Part 3: Options for a Counter Strategy"

End Notes

¹The paragraphs that follow draw on the first part of this four-part series. See Stanley Renshon, “Countering Executive Amnesty, Part 1: The president’s nullification of immigration law”, Center for Immigration Studies, 2015.

²Robert Delahunty and John Yoo, [“Dream On: The Obama Administration, The DREAM ACT, and the Take Care Clause”](#), *Texas Law Review*. 2013, Vol. 91:781, pp. 845-851.

³See John Morton, [“National Fugitive Operations Program: Priorities, Goals, and Expectations”](#), U.S. Immigration and Customs Enforcement, December 8, 2009, and those that followed thereafter.

⁴*Washington Post*–ABC News poll, [“The President and the Midterms”](#), September 9, 2014. The poll headline reads: “Obama Hits a New Low for Leadership, With Criticism on ISIS & Immigration Alike.” One key sentence reads: “With the midterm elections looming, Americans by a 10-point margin, 52-42 percent, see his presidency more as a failure than a success.”

⁵See George Lakoff, [《The Little Blue Book: The Essential Guide to Thinking and Talking Democratic》](#), New York: Simon and Schuster, 2012.

⁶Julia Preston, [“Undocumented Immigrants Line Up for Door Opened by Obama”](#), *The New York Times*, December 14, 2014. It appears to be the case that eligibility for both programs would be on a rolling basis, that is, on a first-come-first-served basis, with no limits to the time frame within which applicants might apply. As a result DHS is likely to have to maintain a permanent number of hires to address this ongoing review process.

⁷Mike Lillis, [“Immigration advocates shift to defense”](#), *The Hill*, December 12, 2014.

⁸[“U.S. mayors form coalition, plan summit to roll out executive action on immigration”](#), Fox News Latino, December 2, 2014.

⁹Preston, “Undocumented Immigrants Line Up for Door Opened by Obama”.

¹⁰Erica Werner, [“Frustrated Republicans taste limits of majority control”](#), Associated Press, February 13, 2015.

¹¹Judy Schneider and Michael L. Koempel, [“The First Day of a New Congress: A Guide to Proceedings on the Senate Floor”](#), Congressional Research Service, December 5, 2014.

¹²Eric Bradner, [“Poll: Obama’s immigration policy popular, but approach isn’t”](#), CNN, November 26, 2014.

¹³[“Immigration Action Gets Mixed Response, But Legal Pathway Still Popular”](#), Pew Research Center, December 2014.

¹⁴Susan Page, [“Poll: Resistance to Obama order on immigration”](#), *USA TODAY*, November 17, 2014.

¹⁵“Americans overall say they disapprove (51%) rather than approve of (41%) the executive actions President Barack Obama plans to take to deal with undocumented immigrants living in the U.S.” See Jeffrey M. Jones, [“U.S. Hispanics Back Obama Immigration Actions”](#), Gallup, December 10, 2014.

¹⁶[《Washington Post–ABC News poll》](#), December 11-14, 2014. Dan Balz and Scott Clement, [“Republican party gets a boost after midterm victories”](#), *The Washington Post*, December 17, 2014.

¹⁷Aaron Blake, [“People like Obama’s immigration action. They also think he shouldn’t have”](#), *The Washington Post*, December 19, 2014.

¹⁸The data here and in the next two paragraphs are drawn from the *Washington Post*–ABC News poll noted above in end note 16.

¹⁹Laura Meckler, [“Americans Now Favor GOP on Immigration — WSJ/NBC Poll”](#), *Wall Street Journal*, September 9, 2014.

²⁰ See [Presente.Org / NALACC / Mi Familia Vota Poll on Executive Action](#), “1. For the past six years President Obama has said the federal government needs to reform our immigration system yet an immigration reform bill has not passed both houses of Congress. Who do you think is most to blame for the lack of progress on immigration reform? [ROTATE: Republicans in Congress or President Obama and the Democrats?]. ... 2. President Obama has said that Congress had many chances to pass an immigration bill and they failed. Now Obama has enacted executive action to provide relief from deportation for any undocumented immigrant who has not committed a crime, has lived here 5 or more years and is a parent of a U.S. citizen or legal resident child here in the U.S., and providing them with temporary work permits to they have legal status. Do you support or oppose President Obama taking this executive action? Is that strongly or somewhat...”

²¹ Jeffrey M. Jones, [“U.S. Hispanics Back Obama Immigration Actions”](#), Gallup, December 10, 2014.

²² Aaron Blake, [“Obama’s immigration executive action is less popular with Hispanics than you think”](#), *The Washington Post*, December 10, 2014.

²³ Ron Brownstein, [“The Case Against the Nuclear Option”](#), *National Journal*, August 7, 2014.

²⁴ Mike Lillis, [“Immigration action jolts ‘16 races”](#), *The Hill*, December 24, 2014.

²⁵ *Ibid.*

²⁶ Ronald Brownstein, [“Obama’s Recent Bold Actions Shape the Contest for 2016”](#), *National Journal*, December 23, 2014.

²⁷ White House, [“Remarks by the President on Immigration Reform — San Francisco, California”](#), November 25, 2013. See also Philip Rucker, [“Obama responds to heckler on immigration reform: ‘It won’t be as easy as shouting”](#), *The Washington Post*, November 25, 2013.

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²⁹ [“Trust in Government-Historical Trends”](#), Gallup, 2014.

³⁰ [“Beyond Red and Blue: The Political Typology”](#), Pew Research Center, June 26, 2014, p. 37.

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³⁷ Charles Lipton, [“Big Post-Midterm Choices for Obama — and Republicans”](#), *Real Clear Politics*, November 6, 2014.

³⁸ Jerry Markon, Robert Costa, and David Nakamura, [“Republicans win Senate control as polls show dissatisfaction with Obama”](#), *The Washington Post*, November 4, 2014.

- ³⁹ Chris Cillizza, [“Americans are starting to doubt President Obama is a good boss”](#), *The Washington Post*, June 3, 2014.
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- ⁴⁷ Ron Fournier, [“Counting Lies: How Obama Deepens Distrust in the Presidency”](#), *National Journal*, June 22, 2014.
- ⁴⁸ Julia Preston, [“The Big Money Behind the Push for an Immigration Overhaul”](#), *The New York Times*, November 14, 2014.
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- ⁵² Andrew Restuccia and Erica Martinson, [“The coming climate onslaught”](#), *Politico*, November 11, 2014.
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