



Countering Executive Amnesty, Part 3

Options for a counter strategy

By Stanley Renshon

The president's executive immigration amnesties have been formally announced and their implementation begun before being stayed by a federal court.¹ They represent a formidable assault on the rule of law and the traditional understanding of the separation of powers between the executive and legislative branches. They also represent a full-scale effort to dismantle ordinary immigration enforcement. In so doing, they attempt to create facts on the ground that will lead to far more open American borders for any illegal alien who can enter the United States and avoid being convicted of terrorism or serious felonies. All of these initiatives are in direct conflict with what Americans have said, repeatedly, that they want — the same levels or less of immigration and effective enforcement of the country's immigration laws.

The president's unilateral immigration amnesties represent constitutional, policy, and political breaches of substantial magnitude with enormous implications. President Obama has stretched his office's executive powers well past any traditional or historical limits when the country is not in the midst of a severe crisis. In his wish to further his transformational ambitions and historical legacy, the president has scorned political restraint. And in so doing he has thrown down a policy, political, and constitutional gauntlet to Congress and the courts to stop him, if they can.

One question is: Can they? Another is: Will they?

The president's determination to protect what he sees as his accomplishments and legacy should not be underestimated. Moreover, even if effective tools are available and there is a willingness to use them, there will be no quick or easy victories. All of the tools available for use against the president's unilateral actions are politically demanding, will take time to bring to fruition, and therefore require a continuing effort. Yet, individually and as a group they will have an impact.

This is the third of a four-part series. The first, "The President's Nullification of Immigration Enforcement", outlines the key amnesty memos and analyzes their contributions to the nullification of immigration enforcement. The 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. This, the third part, "Options for a Counter Strategy", evaluates 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.

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Countering Executive Amnesty, Part 3: Options for a Counter Strategy

After equivocating for his first six years in office, the president has moved decisively to transform America's immigration system. The Department of Homeland Security has issued 10 executive memos that mandate many changes, but none more dramatic than making illegal migration to the United States a penalty-free act. Through the vehicles of "prosecutorial discretion" and "deferred action", the president and his administration have essentially nullified the enforcement of American immigration law for all illegal aliens except those engaging in terrorism or convicted of serious felonies. Or, as the *New York Times* characterized it in a recent headline, "Obama's Move to Dismantle Apparatus of Deportation".²

The effort to counter the president's unilateral and sweeping transformation of American immigration laws will be long and arduous. There are the inherent difficulties in reversing presidential initiatives, in general. This is even more the case in the arena of immigration policy where Congress has, over the years, ceded significant discretion to the executive branch. Yet that is only part of the difficulty.

In countering the president's efforts to dismantle ordinary immigration enforcement, opponents face not only the difficulties of the substantial powers that the American system of government gives to the president, but also the nature of this president himself.

Mr. Obama is a conviction president. He has very strong views, has held them for a long time, and they are uniformly liberal. He is no moderate.

He is also a very determined president, and that determination should not be underestimated. Twice the president has been politically chastised by midterm election results and twice he has continued on undeterred. His executive immigration amnesties are the strongest evidence to date, if more were needed, that he will not simply fold his tent and go home. Part-time or retired president memes to the contrary,³ this president will use every tool available to him, and they are considerable, to protect in his last two years in office what he sees as his accomplishments and legacy.

And that includes his executive immigration amnesties. The president and his senior advisors apparently believe that along with a slightly improving economy, "some of the president's improved standing [is due] to his willingness to eschew Congress and instead wield his executive powers."⁴ He may have a point. One recent study of presidential power concluded that whenever the president makes a dramatic move, of almost whatever nature, his public stock rises.⁵

As a result, the president is not likely to give up the immigration "gains" he thinks he has achieved, unless the new Republican Congress can send him an immigration bill that is ultimately very difficult for him not to sign.

The president may well enjoy his celebrity status among some groups, his "roughly 1,000 hours playing 214 rounds" of golf since he has been elected,⁶ and thousand-dollar dinners at clubs where membership can run up to \$500,000.⁷ The president alone is not the presidency, however, and as the federal government's chief executive officer, Mr. Obama commands the time, energy, and work focus of thousands.⁸ Their full workday is dedicated to furthering the president's policy and political goals, even if he spends a great deal of time in other pursuits. And those goals will now include preserving his executive amnesties.

To counter the president, opponents will have to use a variety of tools, but one thing that must frame their efforts is an understanding that while they may use legislative, judicial, and executive means, all of their efforts will be in the most basic sense political.

Political Tools

One essential element of a political tool is the nature of its political impact. That impact can be accomplished in several ways. A primary and most obvious impact is when a political tool is successful in moving policy in one direction or another. In the present case, the metric of success is clear: anything that has the effect of containing, narrowing, reshaping, and ultimately replacing the president's administrative amnesties should count.

The Importance of a Counter Narrative. However, that is not the only measure of success. There are indirect successes as well. For example, another important purpose of political tools is to put a point, or point of view, on record. Doing so makes a declarative statement about the nature of the issue being addressed that can affect policy, but also provides a counterpoint

to an uncontested or dominant understanding of a policy debate. That can lead others to a fuller understanding of the issue, and in so doing affect what policies they will or will not support.

This is a critically important element to those opposed to the president's immigration actions. The political debate about immigration is, and has been for some time, decidedly one-sided. Immigration reform has come to be equated with "comprehensive" legislation, and comprehensive legislation has come to be equated with the Senate bill that passed in 2013 (which had the support of a minority of Senate Republicans, but was largely crafted by the Democrats). No other formulation of "comprehensive" immigration reform is part of the debate, although there are many ways legislation could be "comprehensive" and still be real reform that did not resemble the version that passed in the Senate in 2013.

To give but one option, comprehensive immigration reform legislation could consist of (1) real border/workplace and interior enforcement as a precondition for; (2) legalization for some groups of illegal aliens who might merit it, after serious evaluation of their applications; coupled with (3) real consequences for having broken immigration laws such as, but not limited to, an inability to sponsor anyone other than one's spouse and/or young children, and an inability to receive means-tested welfare or tax benefits for a specified period; and (4) a recalibration of the relative weight of family reunification and education and skills as the basis for legal immigration.

Those four items would be considered substantial in almost anyone's evaluation and would be addressing major, core immigration issues, even if they did not attempt to "fix" every problem. Yet, as it stands now the version of comprehensive immigration legislation endorsed by the White House and congressional Democrats is the starting and ending point of almost every public discussion of reform.

One very important accomplishment of any effort to counter executive amnesties would be to provide other models of immigration reform to consider. They are desperately needed and long overdue, and are the basis of the proposed "American Immigration Reform Act of 2015" that will be the focus of the final paper in this series.

From Resignation to Hope. There is another political consequence of efforts to counter the president's executive amnesty. Such efforts signal that there is a group — members of Congress, governors, and presidential candidates — who care about the rule of law, maintaining the constitutional systems of separation of powers and checks and balances, and keeping faith with the repeatedly expressed wishes of ordinary Americans. The extremely troubling collapse of trust in government reflects a distance between what the American people want and what the government does, but it has a more pernicious consequence — hopelessness and resignation.⁹

Recently, the *New York Times* published a story with the title, "On Immigration, the Hard Lines Start to Blur".¹⁰ The story's theme is that, "For many Americans, attitudes about the immigrants themselves, including those in the country illegally, have essentially shifted toward a begrudging pragmatism summed up with an often-heard phrase: 'They're here, we have to deal with it.'" Yet underneath that resigned pragmatism lies other feeling captured in the words of one woman quoted as saying, "I think we're having to give in to things that we might have wanted to take a little stronger stance to, I feel resigned."

Resignation is a disheartening route to "begrudging pragmatism", but it reflects an opening for reform-minded immigration advocates. Ordinary Americans will feel they have someone that appears to be listening to them and taking their concerns seriously, and therein lies hope, appreciation, and ultimately political support.

The Importance of Playing Offence. In 1986, conservatives and Republicans accepted a "grand bargain" of immigration reform and supported the Immigration Reform and Control Act.¹¹ The underlying trade-off of that bill was support for legalization of a substantial number of illegal aliens in return for workplace verification and enforcement measures that were supposed to keep the problem from reoccurring. The legalization preceded the workplace enforcement, which proved illusory. As long as employers went through the required motions, they didn't have to really check on the status of those they employed. Democrats and liberals (plus their corporate allies) got what they wanted — legalization, first. Conservatives and Republicans were left with a hard lesson.

Ironically, since that time conservatives and Republicans have been playing defense and gradually losing ground. The presence of an extraordinarily large number of illegal aliens, estimated to be between 11 and 12 million persons, has again motivated Democrats and liberals (with allies on the right) to solve the problem through legalization, and offer in return increased "border enforcement".

This is even a more one-sided “grand bargain” than the IRCA legislation because the enforcement offer covers only a portion of the problem. The 2013 Democratic immigration bill left mandatory workplace enforcement and a working entry-exit controls until after legalization occurred, if then. And this was occurring as the president’s nullification of general immigration enforcement through his “discretion” memos were being put into place.

The hackneyed phrases — “out of the shadows”, “our broken immigration system”, and “the best and the brightest” — are endlessly repeated, although like many slogans they are as misleading as they are shallow. To these the adjectives “comprehensive” is added, allowing proponent’s legislation to double the number of green cards issued ever year to well over two million.

No other country in the world, ever, has had such a substantial influx of immigrants every year, year after year. This doubling of legal immigration was put forward in 2013-14 with almost no discussion of the advisability or viability of such a plan.

Can vs. Will

Opponents of the president’s executive amnesties have a range of potential tools available to them. On obvious question though is: How effective are they likely to be? As the analysis that follows makes clear, some are more likely to be successful than others.

Having effective tools, however, is only one part of countering the president’s unilateral immigration actions. Those with access to those tools must be willing to use them. Most Republicans are understandably outraged at the president’s sweeping executive amnesties.¹² However, some say they agree with some of the president’s goals, though not his methods.¹³ It is clear that some Republicans are not fully acquainted with the real consequences of the president’s actions whose collective impact is to essentially to nullify ordinary immigration enforcement for all but serious national security threats and felons. It is to be sincerely hoped that they have simply not yet realized what the president has done. Nullifying ordinary immigration enforcement is a very big deal — politically, culturally, and economically — beyond the critical question of whether the president did or did not overstep his constitutional boundaries.

While strong opponents of the president’s actions place countering them the top of their lists, others, including the new House and Senate majority leaders and some new Republican governors,¹⁴ have different lists and priorities. Sen. McConnell (R-Ky.) has said, “I think the message from the American people is they’d like to see a right-of-center, responsible conservative governing majority. ... That’s what the speaker and I tend to provide.”¹⁵ Then there is this in the same interview:

BASH: What’s your top goal as Senate majority leader?

MCCONNELL: Well, I think jobs and the economy are clearly what the voters are concerned about.

McConnell is on firm ground here; the economy has been a top concern of Americans. However, according to Gallup, 2014 was also the first year since 2007 that the economy was not the top-ranking issue, and it was the first year ever in Gallup records that dissatisfaction with government topped the list.¹⁶ That last item included dissatisfaction with: “President Barack Obama, the Republicans in Congress, and general political conflict.” So Americans want Congress to focus on the economy and get along with the president and Democrats in Congress. The two might ultimately prove irreconcilable.

Mr. McConnell has said that one of his main goals is for Republicans not to be “scary”. His concerns make some sense:

I don’t want the American people to think that if they add a Republican president to a Republican Congress, that’s going to be a scary outcome. I want the American people to be comfortable with the fact that the Republican House and Senate is a responsible, right-of-center, governing majority.¹⁷

That’s an obvious and important goal for him in his new role, but is unclear exactly how that squares with the need to counter the president’s executive amnesties. It is not hard to envision that a “responsible right-of-center government” would include and be reinforced by taking a position and actions against the president’s executive amnesties.

Mr. McConnell’s worry, expressed in the same interview that, “I think that’s the single best thing we can do, is to not mess up the playing field, if you will, for whoever the nominee ultimately is,” sounds like a recipe for caution and passivity. Caution is understandable and prudent. Passivity in response to the president’s executive amnesties would be a large mistake.¹⁸ That

path runs the risk of not only alienating and disappointing members of his own caucus, but maybe even more importantly in the long run is what it will do to ordinary Americans; hopes of having someone in their corner on this and other issues.

Mr. McConnell believes three issues have the potential for finding common ground with Democrats: international trade deals, an overhaul of the tax code, and new revenue streams for infrastructure projects. He is “very skeptical of ... bargains with Democrats on tough issues such as *immigration* and entitlement reform.”

And, as to the president, he says, “there’s no way you can overcome a reluctant president on something really large.” The best he can do on some of those bigger issues is force Obama to break out his veto pen so there is a clear set of Democratic policy stances Republicans can campaign against in 2016.

In this view, he is, I think, mistaken; there is much more that can be done. That includes the under appreciated congressional tool of oversight and its relationship to the case-by-case requirement to keep the president’s amnesties even in the ballpark of being “constitutional.”

Immigration has become an obvious legacy issue for the president, and it is not at all clear that Democrats and the president would not accept a Republican immigration bill that consisted of (1) real border/workplace and interior enforcement as a precondition to; (2) legalization for some groups of illegal aliens who might merit it, after serious evaluation of their applications; coupled (3) with real consequences for having broken American immigration laws like, but not limited to, an inability to sponsor anyone other than spouses or young children; and (4) a recalibration of the relative weight of family reunification and education and skills as the basis for legal immigration, among other things.

Specific superseding of the president’s executive amnesties could be accomplished by including some of the specific language contained in the “Repeal Executive Amnesty Act of 2015”, introduced in the House of Representatives by Robert Aderholt (R-Ala.) on January 7, 2015.¹⁹ That bill is unlikely to gain any traction whatsoever among Senate Democrats, but it might well as part of a larger reform effort.

Comparing Options

Those who seek to contain, narrow, reshape, and ultimately replace the president’s executive amnesties have a range of tools available to them. Broadly speaking, they can be divided into political, judicial, and legislative approaches. Within each of those categories there are several different sets of tools available, and there is some overlap among the categories. For example, every tool, no matter what its origins, has a political dimension. What follows are brief explications of those tools, and an analysis of their possible usefulness and limitations.

Impeachment

Impeachment of President Obama, were it to happen, would be the most psychologically satisfying outcome of the effort to counter his executive amnesties for many who not only oppose this set of initiatives in particular, but his policies and leadership more generally. What more fitting outcome could there be, they would ask, than to have a president so self-enamored, so overweening and ambitious that it is impossible for him to adhere to the legal restraints of the system he took an oath to defend and preserve and be held accountable by the very Constitution he violated?

Regrettably, that’s not going to happen, and shouldn’t.

Impeachment is reserved for presidents who commit “treason, bribery, or other high crimes and misdemeanors.”²⁰ The first two bases of impeachment are seemingly straightforward, the last two much less so. As befits an ambiguous phrase, “high crimes and misdemeanors” has many interpretations, some enormously broad,²¹ and therefore not very helpful.

That term has no specific constitutional definitions and the two modern presidents (Nixon and Clinton) for whom charges of impeachment have been voted in the House have faced different allegations. President Nixon faced three charges: (1) Obstruction of justice; (2) Abuse of power; and (3) Contempt of Congress.²² President Clinton faced four charges: (1) Perjury before Independent Counsel Ken Starr’s grand jury; (2) Perjury in the Paula Jones civil case; (3) Obstruction of justice related to the Jones case; and (4) Abuse of power by making perjurious statements to Congress in his answers to the 81 questions posed by the Judiciary Committee.²³

Nixon's impeachment was a bipartisan decision. On the first article of impeachment, the House Judiciary Committee voted 27-11, with six of the 17 Republicans joining all 21 Democrats in voting for the article. The second impeachment article was voted by the same 27-11 margin, and the third by a 21-17 margin.²⁴ Mr. Nixon resigned before the full House could vote on the three articles of impeachment.

The Clinton impeachment started on firmer bipartisan grounds than it ended. The original House vote to authorize an open-ended impeachment inquiry was 258-176, with 31 Democrats joining the Republicans in voting for the investigation. The actual votes for each article in the judiciary committee and the full vote on each charge in the full house were pretty much along party lines.²⁵

The Senate began considering the articles of impeachment on January 7, 1999, but widely distributed informal straw polls of the 55 Republican senators, and especially the 45 Democrats, made clear that the two-thirds vote need to convict would not be achieved, and it wasn't.

On Article 1, the charge of perjury, 55 senators, including 10 Republicans and all 45 Democrats, voted not guilty. On the Article 3, the obstruction of justice count, the Senate split evenly, 50 for and 50 against the president.

Impeach President Obama? The Nixon and Clinton impeachments offer some lessons for the question of whether Congress should move to impeach President Obama. The very first point to consider is whether the president's behavior rises to the level of a "high crimes and misdemeanors". That phrase, as noted, has no specific definition and so might well lead to the view that, as Justice Potter Stewart said of pornography, "I know it when I see it."²⁶

The Nixon and Clinton cases suggest that some kinds of presidential behavior do pass the impeachment threshold and are clear transgressions to most whose role is to answer that question. For President Nixon the specific charges included:

1. Withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States.
2. Approving, condoning, and acquiescing in, the surreptitious payments of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of witnesses, potential witnesses, or individuals who participated in such unlawful entry and other illegal activities.
3. Acting personally and through his subordinates and agents, endeavoring to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigation to be initiated or conducted in a discriminatory manner;
4. Disregarding of the rule of law by knowingly misusing the executive power by interfering with agencies of the executive branch, including the Federal Bureau of Investigation, the Criminal Division, and the Office of Watergate Special Prosecution Force of the Department of Justice, in violation of his duty to take care that the laws be faithfully executed.

The Clinton impeachment articles contained the following specific charges:

1. On August 17, 1998, William Jefferson Clinton swore to tell the truth, the whole truth, and nothing but the truth before a federal grand jury of the United States. Contrary to that oath, William Jefferson Clinton willfully provided perjurious, false, and misleading testimony to the grand jury concerning one or more of the following; and
2. Beginning on or about December 7, 1997, and continuing through and including January 14, 1998, William Jefferson Clinton intensified and succeeded in an effort to secure job assistance to a witness in a federal civil rights action brought against him in order to corruptly prevent the truthful testimony of that witness in that proceeding at a time when the truthful testimony of that witness would have been harmful to him.

The Nixon impeachment articles describe raw and obvious abuses of power that are not only illegal, but also criminal. The Clinton impeachment articles also describe abuses of power that are clearly illegal and criminal (witness tampering and perjury), but the result was quite different. Why?

One can begin with the fact that the Nixon articles described an enormous number of illegal and criminal behaviors. Their accumulated impact was overwhelming and caused even Republicans who supported his presidency not to do so on the impeachment articles. The president's behaviors were also so egregious that the public, like House and Senate leaders on both sides of the aisle, could make no mistake about their seriousness.

Mr. Clinton's impeachment articles described behavior that was consistent with both perjury and the abuse of power. However, his were arguably different in degree, although similar in kind. One can also argue that in a highly charged partisan atmosphere, as Clinton's time in office was, and as Mr. Obama's is now, any set of impeachment articles has a somewhat higher threshold to cross — what might be aptly called the Nixon Impeachment Standard.

Clinton partisans in the House and Senate accepted the Clinton defense that he was the victim of a vast right-wing conspiracy, who would stop at nothing to keep this popular and duly elected president from implementing his policy agenda. The public, too, was ambivalent. The mantra that “it's only about sex” and the salacious details that seemed to support that charge made Americans uneasy and anxious to get the issue behind them since it was clear very early on that there were not enough votes to convict in the Senate.

And what would be the charges again President Obama? That he lied repeatedly to the public about being able to keep their doctors and insurance? Although that is an egregious example of presidential lying, it is not the only time he has done so, or that other presidents have. This is likely to stimulate the somewhat cynical, but not wholly inaccurate, response that they all do it.

Will one of the impeachment articles detail the fact that the president and his administration manipulated statistics to make it appear that they were tough on immigration enforcement when the opposite was true?²⁷ Other presidents have tried to put the best possible face on their accomplishments, even if they weren't strictly true, a circumstance that led to a whole new news undertaking — fact checking — for which you can win a Pulitzer Prize.²⁸

What of the lawsuit that the House has filed against the president and his administration “over unilateral actions on the health care law that they say are abuses of the president's executive authority”?²⁹ And what if, as Republicans have considered doing, they add to that suit the president's amnesty programs and use of “prosecutorial discretion”³⁰ and use that as well for the basis of impeachment articles?

That would have the result of bring impeachment proceedings against a president who would have a substantial case as outlined by the Office of Legal Counsel memo to the president providing justification for his actions,³¹ based on a long history of “prosecutorial discretion”, and the long history of congressional ceding of power to the executive branch in these matters, including the actual writing of regulations.³²

There are obviously many and strong views on each side of whether the president was within his constitutional rights³³ or not.³⁴ And the president's legal rationale for his behavior, as I pointed out, goes well beyond ordinary understanding and historical practice of the rationales that he relies on.

However, that may not be the relevant point in any impeachment proceeding. The question is: Does it meet the Nixon Standard for being unambiguously criminal and illegal, and easily understood by Americans as being so? The chair of the House Judiciary Committee thinks that the president's action “clearly violates the Constitution”,³⁵ but also believes that it does not by itself yet rise to the level of an impeachment offense.³⁶ That nuanced interpretation is consistent with the conclusion of the 1974 Judiciary Committee, “Not all presidential misconduct is sufficient to constitute grounds for impeachment.”³⁷

As one observer thoughtfully noted, “We are close to uncharted constitutional territory.”³⁸ And that very ambiguity and lack of a clearly passed Nixon Standard, operates in the president's favor.

If that is true, it is entirely possible that the public will believe that this particular constitutional battle is a by-product of two opposing views of the legitimate exercise of executive vs. legislative powers. Should either the state lawsuit filed against the president's immigration actions³⁹ and/or Congress's lawsuit against the president (over Obamacare) fail to gain judicial traction, it would more likely lead to the public view of asking the claimants to try to settle and work it out, rather than for any clarion calls for impeachment.

And you can bet that you will hear direct and indirect accusations regarding a “nativist trend in the Republican Party”,⁴⁰ and worse from the more egregious race-baiters. The *New York Times* story headlines write themselves: “Majority White Republican Party Seeks to Impeach Nation’s First African-American (or Black) President”.

Another obvious response among Democrats defending the president, and among many in the public, will be why not wait until the courts have made their decision on the congressional lawsuit before deciding to subject the country (during this period of heightened international danger) to the turmoil of an impeachment hearing and trial. Of course, by the time any court decides and appeals are made and heard, the president’s remaining time in office will be very limited, or even completed. Then the refrain will be “what’s the point?”

And then there is this: Does anyone believe that with the Senate in Republican hands by a margin of 54-46, Republicans will find the 12 Democratic votes for conviction of any articles of impeachment, assuming they can be drafted and approved? No? Then what exactly is the point? Is it to hold the president accountable by the most severe tool given to the county by the Constitution? Is it to make sure that his transgressions, as seen by those who want to pull the impeachment trigger, are part of the historical record? Is it to lay down a marker on behalf of the Constitution?

All of these are legitimate and understandable feelings and views. Yet, are there no other options that would be so emotionally satisfying and legitimate and yet not be so politically fraught and counterproductive than impeachment?⁴¹

Yes. There are other, better ways.

In Lieu of Impeachment: “Articles of Censure”

A House, Senate, or joint congressional statement of “censure” literally means “The formal resolution of a legislative, administrative, or other body reprimanding a person ... for specified conduct.”⁴² As an expression of disapproval of the president, censure does *not* have “an express constitutional basis”, unlike a congressional punishment of one of its own members, or an impeachment and trial of the president in the legislature.⁴³ On the other hand, “there is also no express constitutional impediment for the Congress, or either House of Congress, to adopt a resolution expressing its opinion, reproof, disapprobation or censure of an individual in the government, or of the conduct of the individual, and, in fact, each House of Congress has on infrequent occasions adopted such resolutions in the past.”⁴⁴

The country’s foremost authority on the subject concludes, “The truth is that censure — understood as a resolution critical of the president passed by one or both houses of Congress — is plainly constitutional.”⁴⁵ Moreover, “every conceivable source of constitutional authority — text, structure, original understanding, and historical practices — supports the legitimacy of the House’s and/or the Senate’s passage of a resolution expressing disapproval of the president’s conduct.”⁴⁶ Indeed, “Both the House and the Senate have, however, in fact adopted resolutions or statements in the past expressing their opinion, disapproval, or censure of a government official other than a member of Congress.”⁴⁷

In his article “The Constitutionality of Censure”, Michael J. Gerhardt concludes that, “Congress in the nineteenth century did not doubt that censure — or rebuke or condemnation by means of resolution — was available as an option for condemning official misconduct, particularly in the circumstance in which members believed that the misconduct did not rise to the level of an impeachable offense. In the latter part of the twentieth century, the House and the Senate each failed to take formal votes on censure; but censure itself failed for political, not constitutional, reasons.”⁴⁸

In reality, “Simple or concurrent resolutions disapproving of conduct or censuring the president or other executive official, like similar ‘sense of the Congress’ resolutions, or sense of the House or Senate resolutions, would have no particular legal or constitutional consequence, but may have political and/or historical import.”⁴⁹ Indeed, a subsequent Congress may expunge the censure, as happened with Andrew Jackson.⁵⁰

It is considerations such as these that have led some observers to characterize censure as “impeachment-lite”,⁵¹ although censure has nothing to do with the constitutional process of impeachment. Censure affects no presidential powers. It affects no presidential policy initiatives, except in so far as a president would be deterred from doing more of the things that brought on the censure. As a result, no separation of powers argument against censure would be likely be dispositive.⁵²

This may raise the question for some: Why bother? One answer to that question is that, “a carefully crafted resolution of censure could lend a certain formality to the process and help shape the debate over Obama’s abuses of power.”⁵³ That would

put the House, Senate, or Congress as a whole (such resolutions can be any of these three possibilities) as being “on record” as opposing some specific presidential behavior, or as is possible with President Obama, a specific set of behaviors. It will be an important element of the president’s historical record.

There is also the attention that will be paid to the fact-finding hearings that should precede the drafting of any set of particulars. In the case of President Tyler, “Although not a resolution, a statement of very strong criticism finding abuse of power ... was issued by a select House Committee in the form of a *report*, which was then formally adopted by the full House of Representatives in 1842.”⁵⁴

That historical precedent is worth examining for possible use.

As noted, there is no required form for expressions of censure. They may be undertaken by either house, or both houses with the proviso that they not be done as “joint resolutions of Congress” because those are normally “lawmaking vehicles and require passage of both houses of Congress and presentation to the President.”⁵⁵ President Obama would of course, immediately veto any such joint resolution and the votes would then have to be found to override that — an unlikely outcome.

The lack of any specific requirements in either the language or the process of expressing censure leaves open many possibilities and opportunities. Either house of Congress could appoint a select committee. Or any proceedings could go through either the House or Senate Judiciary Committees, or both. Witnesses could be called, Q & A’s conducted, resolutions could be made and voted on, and reports issued.

The final form of any such censure would not need be predetermined.

It is in that context that the phrase “articles of censure” used in the title of this section comes into play. The term borrows from impeachment terminology to help convey the seriousness of what is being assessed. Such articles would be a wholly different level of seriousness than those proposed by Republicans before Richard Nixon’s “smoking gun” tapes emerged and destroyed his support in Congress,⁵⁶ or the censure proposed by Democrats, in the form of a Joint Resolution of Congress that the president would agree to sign, to keep Bill Clinton from being impeached.⁵⁷

Somewhere between impeachment, broad generalization, and partisan euphemism lies a serious process of fact-gathering, evidence, public education, and stated congressional conclusion that would be hard to ignore.

A serious congressional assessment of presidential censure will not reverse this president’s expansion of power beyond the conventional political and constitutional boundaries, but it can be an important vehicle, along with other efforts, for holding him accountable.

Defunding the President’s Amnesties: Harder Than You think

If there is one thing that those opposed to the president’s executive amnesties agree upon it is that if Congress has any chance whatsoever to reverse these orders, it will derive from its power of the purse. The details differ, but the instrument remains the same. And indeed, that has been the focus so far.

For Dick Morris, a former advisor to President Clinton, the GOP plan should be to “Use the Immigration and Customs Enforcement appropriation to overturn Obama’s executive order.”⁵⁸ Karl Rove, chief advisor to George W. Bush, had similar advice when he was asked to respond to the president’s executive order on Sean Hannity’s Fox News show, “Put riders on appropriations bills that say no money shall be spent to execute this policy.”⁵⁹ The Heritage Foundation asks: “Can Congress Use Spending Bills to Address President Obama’s Executive Actions on Immigration?” and answers, “Whether by explicitly prohibiting the use of USCIS funds to implement the administration’s policies, by amending the statutory fee schedule, or by reducing direct appropriations for USCIS, Congress’s power of the purse gives it authority over all aspects of federal governmental activity.”⁶⁰

All of these and similar ideas flow from Congress’s power of the purse, contained in the Constitution’s requirement that, “All bills for raising revenue shall originate in the House of Representatives.”⁶¹ What Congress gives, the Congress can take away, or so the thinking goes.

Actually, as Republicans have found, it is not so easy to defund the president's executive amnesties.

Can Congress defund the DHS? Yes, No, Maybe. The first idea put forward was that in order to avoid a general government shutdown for which the Republicans would surely be blamed, the House would simply defund the parts of the DHS implementing the president amnesty.

That idea soon floundered on the following realization:⁶²

If funding for the Department of Homeland Security runs out at the end of February, it is unlikely that it would slow the Obama administration down. Instead, the federal government would have little difficulty proceeding to implement the president's executive action on immigration as planned. U.S. Citizenship and Immigration Services, the agency responsible for processing applications related to the president's amnesty, is fee-based. This means it's not beholden to the hotly contested annual appropriations, as are other agencies within DHS, such as Border Patrol and Immigration and Customs Enforcement.

On November 20, 2014, the House Appropriations Committee Chairman Hal Rogers (R-Ky.) confirmed this and said that lawmakers lacked the authority to defund Obama's order to defer deportations. His office said, in a statement,

*This agency is entirely self-funded through the fees it collects on various immigration applications, Congress does not appropriate funds for any of its operations, including the issuance of immigration status or work permits, with the exception of the "E-Verify" program. Therefore, the appropriations process cannot be used to 'defund' the agency.*⁶³

Five days later, a *Breitbart* news story contended that, "The Congressional Research Service (CRS) has concluded that House Appropriations Committee chairman Rep. Hal Rogers (R-Ky.) is wrong, and that Congress can in fact block funding for President Barack Obama's executive amnesty order."⁶⁴ Several other news outlets picked up the item,⁶⁵ but in the rush lost sight of what the original report had said.

The CRS report stated:

*A fee-funded agency or activity typically refers to one in which the amounts appropriated by Congress for that agency or activity are derived from fees collected from some external source. Importantly, amounts received as fees by federal agencies must still be appropriated by Congress to that agency in order to be available for obligation or expenditure by the agency. In some cases, this appropriation is provided through the annual appropriations process. In other instances, it is an appropriation that has been enacted independently of the annual appropriations process (such as a permanent appropriation in an authorizing act). In either case, the funds available to the agency through fee collections would be subject to the same potential restrictions imposed by Congress on the use of its appropriations as any other type of appropriated funds.*⁶⁶ (Emphasis added.)

A follow-up analysis prepared for Rep. Pete Sessions (R-Texas), found that to change DHS's ability to spend the money it collects through fees,⁶⁷

An enactment of law would be required to alter these existing statutory provisions concerning the collection of the fees in the Immigration Examinations Fee Account, their availability for expenditure, or to prohibit their use for certain purposes. Provisions of a bill or joint resolution to accomplish these purposes would be subject to the constitutional requirements associated with the lawmaking process, which include that the measure be presented to the president for his approval. (Emphasis added.)

Legislation: The Real Problem with the Defunding Strategy. And what are those "same restrictions" referred to the CRS analysis? They refer to the fact, noted in the analysis that, "Where Congress has done so, 'an agency is not free simply to disregard statutory responsibilities.' Therefore, *if a statute were enacted which prohibited appropriated funds from being used for some specified purposes, then the relevant funds would be unavailable to be obligated or expended for those purposes.*"⁶⁸ (Emphasis added.)

Note the italicized words, if a statute were enacted, "then the relevant funds would be unavailable to be obligated or expended for those purposes." *If* Congress passed a law specifying what its DHS funds could and could not be used for, *then* DHS would be required to comply.

Of course, the hard, almost insurmountable part is contained in the first part of that sentence. “If Congress passes a bill” means that both houses of Congress must pass that bill, and if they do so, the president must sign it in order for it to become effective.

To sum, up what is involved in passing a law that keeps DHS from implementing the president’s executive amnesty includes: (1) the number of votes needed to pass legislation in the House; (2) the number of votes needed to pass legislation in the Senate; (3) the number of votes need to overcome a minority filibuster in the Senate; (4) whether the president will sign or veto the bill; and the number of votes needed in both (5) the House and (6) the Senate to overcome a presidential veto.

The numbers that Republicans need to pass immigration legislation depend on its content, but are certainly doable as they have majorities in both houses. The real question here is what kind of bill.

It cannot be simply assumed that because Republicans are in the majority any immigration bill will pass. That was obvious when “26 Republicans — including several new members from suburban districts around Chicago, Las Vegas, Miami, and Philadelphia — joined Democrats in voting against a proposal to end Obama’s Deferred Action for Childhood Arrivals program.”⁶⁹ A bill that excluded rescinding the DACA program, “passed 236 to 191 with the support of two moderate Democrats. But 10 Republicans voted against the final bill.”⁷⁰

In short, the content of any Republican-based bill counts, not least of all to Republicans. As one observer’s tart, but true headline read, “On immigration, it’s GOP v. GOP”⁷¹

Only when they have agreed on a bill that will gain maximum Republican support will they then face the legislative gantlet of finding the votes to overcome minority filibusters and presidential vetoes.

Indeed, this is the basic problem with *any* legislative effort to restrict or roll back the president’s executive amnesties, including the possible use of the Congressional Review Act,⁷² attaching special riders to spending bills,⁷³ and passing bills that directly negate the president’s executive amnesties.⁷⁴

And in the meantime, the president’s legislative amnesties will continue to be implemented creating “political facts” that will be harder to overcome as they become more entrenched in the fabric of political life.

Yet there is another way. Sometimes finding a way does not require a silver bullet, secret weapon, or even the political equivalent of a holy grail. Sometimes the answer is hidden in plain sight.

Hidden in Plain Sight: An Unlikely Centerpiece for Countering the President’s Executive Amnesties

Republicans and their allies among real immigration reformers have been frantically searching for some method to roll back and ultimately rescind the president’s actions. This has proved to be more fervently desired than easily accomplished. Attempts to defund DHS in the original “lame-duck” appropriations bill in late 2014 ran directly into the threat of a presidential veto that would have easily been sustained or a Republican filibuster leading to the shutdown of the government.⁷⁵ A number of Republicans were against this strategy.⁷⁶

Then came the effort to take up DHS funding after the new Congress had been sworn in and Republicans were in the majority in both houses. Republicans considered several bills that would defund the president’s immigration amnesties. That effort was undermined by the Paris terrorist attacks that, as one headline aptly put it, “raise [the] stakes for looming immigration fight.”⁷⁷ As expected, administration officials pressed the point with DHS Secretary Jeh Johnson saying, “I do not want to see the budget of Homeland Security used as a political football. For the homeland security of this nation, we need an appropriations bill and we need it soon.”⁷⁸

A defunding bill did pass the House by a vote of 236 to 191 with the support of two moderate Democrats but, as noted, 10 Republicans voted against the final bill.⁷⁹

The *Wall Street Journal* dryly noted, “The House plan is unlikely to have the 60 votes necessary to clear the Senate,” and that is even before the president, “vowed to veto a proposed Republican funding plan for the Department of Homeland Security that seeks to tie administration changes on immigration policy to departmental spending.”⁸⁰

Defund What, Exactly? The question that frames this section seems like an odd one, until you recall that the president’s executive amnesties contain a number of core elements.⁸¹ They include:

1. The ability to grant “parole,” or “parole in place” and then allow adjustment to nonimmigrant status, lawful permanent resident status, or to obtain work authorization;
2. The number of “prosecutorial discretion” and “deferred action” memos put into place by John Morton and consolidated and expanded by DHS Secretary Jeh Johnson’s 10 memos issued on November 20, 2014;
3. The Deferred Action for Childhood Arrivals memo issued on June 15, 2012, and renewed and expanded by Secretary Johnson in the November 2014 memos;
4. The administrative decision to process unaccompanied alien children according to its interpretation of the William Wilberforce Trafficking Victims Protection reauthorization Act of 2008,⁸² which resulted in few being deported,⁸³ and many being quietly released into many parts of the United States⁸⁴ with instructions to appear for court dates, which many,⁸⁵ perhaps most, did not;⁸⁶
5. Allowing those who are legalized through “prosecutorial discretion” and “deferred action” or who achieve the status of “qualified alien” by being administratively legalized for the purposes of receiving federal and state benefits, to receive them;
6. Proscribing state-federal immigration enforcement cooperation for all but the highest priority national security threats and convicted felon aliens; and
7. Expanding the waiver of the 3- and 10-year bars to adjustments in status by illegal aliens still living in the United States.

That’s a substantial list and goes well beyond the legalization of those illegal aliens who, in the words of the Johnson memo, “have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident; have continuously resided in the United States since before January 1, 2010; are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS; have no lawful status on the date of this memorandum; are not an enforcement priority as reflected in the November 20, 2014, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants Memorandum; and present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”⁸⁷

As noted, the focus of almost all the department’s resources on Priority I aliens consisting of those who are national security threats and convicted of serious felonies *essentially provides de facto legalization to almost the entire illegal immigrant population, minus terrorists and convicted felons, and multiple misdemeanants.*

That is why the phrase “The President’s Nullification of Immigration Enforcement” seems apt.

Choosing a Focus. Going through the list it is clear that there are a number of pernicious elements in the president’s various executive amnesty initiatives. They are not all of one kind and so do not lend themselves to a single solution.

At least initially, any legislative-based strategy will have to make choices, giving higher priority to some items and lower priority to others. In my view, there are two equally high priorities among the many damaging presidential initiatives that must be addressed and somehow rescinded:

1. The potential legalization of up to five million illegal aliens covered by Mr. Johnson's November 20 memo, noted above; and
2. The series of memos codifying the nation's enforcement priorities into a three-tier system in which only a portion of the Priority I illegal aliens are in danger of being removed from the country.

The first is critical because it sets into motion a usurpation of congressional authority and attempts to codify it so that it becomes a *fait accompli*. If that happens, the pressures to formally legalize this group and provide a pathway to citizenship, with all the attending implications (and there are many) will be harder to resist the more time that passes. That is one reason why all the efforts, legislative and otherwise, even if they don't come to an immediate and successful conclusion, are very important. They stake out an important position that says in effect: Time may be passing, but this does not make the president's actions any more legitimate or acceptable.

The second is critical because even if the president's amnesty for the up to five million illegal immigrants were to magically and immediately be rescinded, the country would still be left with the nullification of its immigration enforcement procedures because of the president's three-tiered enforcement priority system. In that system, ordinary immigration enforcement ceases to exist for all intents and purposes.

Neither of these two core problems can be addressed, given the distribution of power in the House and Senate, by any strategy of legislative defunding. Yet there is a way to deal with at least the first that centers on the most mundane of congressional functions — oversight.

Congressional Oversight. Oversight is not a flashy congressional function, although it can sometimes produce fireworks. Its essential features derive from Congress's legislative function and division of expertise reflected in the committee system. Congressional oversight may be thought of as the nation's ongoing policy seminar, in which public issues and possible legislation to address them are examined and debated. As part of this process, and in keeping with the modern emergence of the president and White House as a source of policy entrepreneurship, Congress now routinely examines executive policies. This is not a matter of stretching the limits of the separation of powers, but rather reflects the fact that Congress and the executive branch share a number of powers as well as interests in the domestic and foreign policy domains.

Since Congress is the source of most of the nation's laws, and the president is the country's chief executive officer charged with carrying them out, there is a built-in interest in seeing how well the president is performing that central constitutional function. That is uniquely a matter of congressional oversight, and in the case of this president's abuse of his constitutional role in issuing his executive amnesties, a necessary one.

The ordinary routine of congressional oversight involves calling and hearing witnesses testify, developing leads for committee investigations, and developing or obtaining written materials relevant to either investigations or hearings. All of these functions have obvious relevance to examining the president's administrative amnesties, but there is one line of inquiry that makes the oversight potentially devastating to the constitutional basis of the president's executive orders — the Achilles Heel of the case-by-case requirement.

The Achilles Heel of President Obama's Executive Amnesties. If you read through the memos issued by Secretary Johnson and the legal rationale prepared by the Office of Legal Counsel as the constitutional justification for the president's actions you will see four words used repeatedly, almost repetitively: "case-by-case basis."

So, for example, consider the following, all drawn from one of the secretary's 10 memos:⁸⁸

- "They [rules for prosecutorial discretion] are not designed to be blindly enforced without consideration given to the *individual circumstances* of each case."
- "Deferred action is a form of prosecutorial discretion by which the secretary deprioritizes an *individual's case* for humanitarian reasons, administrative convenience, or in the interest of the department's overall enforcement mission."
- "Most recently, beginning in 2012, Secretary Napolitano issued guidance for *case-by-case deferred action* with respect to those who came to the United States as children, commonly referred to as 'DACA.'"

- “As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a *case-by-case basis*.”
- “By this memorandum, I am now expanding certain parameters of DACA and issuing guidance *for case-by-case use of deferred action* for those adults who have been in this country since January 1, 2010.”
- “DACA provides that those who were under the age of 31 on June 15, 2012, came to the United States before reaching their 16th birthday, and have continuously resided in the United States since June 15, 2007, up to the present time, and who meet specific educational criteria are eligible for deferred action *on a case-by-case basis*.”
- “*Case-by-case exercises* of deferred action for children and long-standing members of American society who are not enforcement priorities are in this nation’s security and economic interests and make common sense.”
- “I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, *on a case-by-case basis*, to those individuals who...”
- “ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for *case-by-case determinations*.”
- “As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a *case-by-case basis*, and it may be terminated at any time at the agency’s discretion.”
- “Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, *but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis*.”
- “Historically, deferred action has been used on behalf of particular individuals, and *on a case-by-case basis*.”

The emphasis on individual and case-by-case assessment is obvious. The question is: Why is that phrase repeated 11 times in a five-page memo? The answer has to do with the constitutional requirements of exercising “prosecutorial discretion”, namely that:

Individual and case by case assessment are absolutely essential to establishing the constitutional validity of the use of “prosecutorial discretion” and “deferred action”.

The Office of Legal Counsel’s Analysis of the President’s Constitutional Obligations. The Office of Legal Counsel’s rationale for the president’s executive amnesties is worth a close reading for what it sets out as the basis for constitutional legality and political legitimacy regarding the president’s actions.⁸⁹ Like Secretary Johnson’s November 2104 memos, the OLC’s analysis makes repeated use of the individual and case-by-case assessment wording,⁹⁰ but that is not our main concern here. Rather, we are interested in *why* individual and case-by-case wording is so important.

What follows are excerpts from the OLC brief, arranged in order of appearance, that make absolutely clear the mandatory constitutional requirement that any grant of “prosecutorial discretion” or “deferred action” be individualized.

There is certainly a recognized exercise of discretion, both in general and in particular with respect to immigration enforcement:

- “With respect to removal decisions in particular, the Supreme Court has recognized that ‘the broad discretion exercised by immigration officials’ is a ‘principal feature of the removal system’ under the INA.” (p. 5)
- “Immigration officials’ discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution’s allocation of governmental powers between the two political branches.” (p. 5)

However, the limits of “discretion” are vague and have been defined in the past through the political process:

- “These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause — whether a particular exercise of discretion is ‘faithful’ to the law enacted by Congress — does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds.” (pp. 5-6)
- “Rather, the political branches have addressed the proper allocation of enforcement authority through the political process.” (p. 6)

Congress has a role in setting limits to executive discretion:

- “As the Court noted in *Chaney*, Congress ‘may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.’” (p. 6)

Moreover, there are clearly recognized limits to executive discretion:

- “[T]he Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.” (p. 6)
- “Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, ‘consciously and expressly adopt a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” (p. 7)
- “Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws.” (p. 7)

How does the executive branch keep from overstepping its constitutional boundaries in exercising discretion?

- “Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as *judicially unreviewable exercises of enforcement* discretion when they are made on a case-by-case basis.” (p. 7, emphasis added.)
- “That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above.” (p. 7)
- “Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute ‘general polic[ies] that [are] so extreme as to amount to an abdication of [the agency’s] statutory responsibilities.’” (p. 7)

Do “general policies” violate constitutional restraints? No, not if they operate on a case-by-case basis:

- “That does not mean that all ‘general policies’ respecting non-enforcement are categorically forbidden: Some ‘general policies’ may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency’s use of ‘reasonable presumptions and generic rules; is not incompatible with a requirement to make individualized determinations). *But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses special risks; that the agency has exceeded the bounds of its enforcement discretion. Crowley Caribbean Transp.*, 37 F.3d at 677.” (p. 7, emphasis added.)
- “The policy would instruct that resources should be directed to these priority categories in a manner ‘commensurate with the level of prioritization identified.’ It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases.” (p. 8)

- “In our view, DHS’s proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws.”(p.9) [Because] “... , although the proposed policy is not a single-shot non-enforcement decision, neither does it amount to an abdication of DHS’s statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676–77. *The proposed policy provides a general framework for exercising enforcement discretion in individual cases*, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases.” (p.10, emphasis added.)
- “And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances.” (p. 11)
- “Accordingly, the policy provides for case-by-case determinations about whether an individual alien’s circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials.” (p. 11)
- “For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.” (p. 11)

The OLC reports that when it was asked about expanding a DACA-like program to new groups of illegal aliens, it advised that a case-by-case procedure was constitutionally required:

We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. (p. 18, fn. 8)

and

*The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief.” See *Crowley Caribbean Transp.*, 37 F.3d at 676–77; see also *Chaney*, 470 U.S. at 833 n.4.” (p. 23)*

One indication of the legality of the president’s executive amnesties is that Congress has afforded similar support or acted in accordance with similar principles before:

Congress’s apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary’s broad authority to enforce the immigration laws and the President’s duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. (p. 24)

and

Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency’s expertise, and that it does not seek to effectively rewrite the laws to match the Executive’s policy preferences. (p. 24)

and

And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. (p. 24, emphasis added.)

While there is precedent for “prosecutorial discretion” and deferred action” in the history of congressional lawmaking and executive discretion, this is not sufficient to establish the constitutional legitimacy of any new program:

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. (p. 24)

and

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. (p. 28)

and

The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities — thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make the grant of deferred action inappropriate." (pp. 28-29)

The new exercise of "prosecutorial discretion" and "deferred action" programs resemble aspects of past congressional and executive actions:

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. (p. 29)

However, in certain very material respects they do not:

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. See Shahoulian E-mail. 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. (pp. 30-31)

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. (p. 31)

Why does the OLC conclude that the president's executive amnesties are legal? Because:

The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. (p. 31, emphasis added.)

Case-by-Case Assessment and Congressional Oversight

There is no real way to know how many illegal aliens will apply for amnesty under the president's executive orders. The number that is frequently used is "up to five million,"⁹¹ although other numbers — four million⁹² and 3.7 million⁹³ — have been used.

What is clear is preparation for the president's executive amnesty is up and running, unless judicial decisions permanently enjoin their implementation. Immigrations officials have been telling potential applicants "not to worry" about their status when applying.⁹⁴ Illegal aliens are flocking to information sessions.⁹⁵

If and when the courts allow, the White House "is planning a quick start, according to officials familiar with the plans."⁹⁶ The administration,

*[P]lans to begin accepting applications in late February under an expanded program for those who came to the U.S. illegally as children (Deferred Action for Childhood Arrivals, or DACA). And the agency is looking to May to implement the biggest, and most controversial, plank of Obama's plan — effectively legalizing potentially millions of parents of U.S. citizens and legal residents.*⁹⁷

The Department of Homeland security is already hiring 1,000 new employees to process the applications.⁹⁸ They will work in newly leased office space in the Crystal City neighborhood of Arlington, Va., conveniently located within easy distance of congressional hearings.⁹⁹

The potential vastness of the applicant pool coupled with the effort to quickly ramp the program up has raised concerns, namely: "Nearly two months after President Obama announced his immigration executive actions, questions remain over whether the Department of Homeland Security can be ready to process millions of additional immigrants through an already-burdened system."

That's one question: but there is a far more important question: How can the DHS reconcile its constitutional responsibilities to conduct an individual, case-by-case assessment with the reality of an applicant pool of up to five million applicants?

The Office of Legal Counsel analysis makes clear that individual case-by-case assessment of individual applications for the administrative relief that the president's executive amnesties provide is absolutely essential to its constitutional legality and legitimacy. It is highly unlikely, indeed almost impossible, for it to do so in any meaningful way.

Applications must be processed, documents examined, biometric examinations conducted, and interviews undertaken. Assume for the sake of discussion that four million applications are received, and not the five million number that is most frequently given. Further assume that each application takes three to five hours to process, check, and approve. Assume that all 1,000 new hires process one case in a four-hour period. With four million cases to evaluate that would equal 16 million hours of time. Then, assuming a 40-hour work week, that would make 400,000 weeks of work to process. With 1,000 workers, that would mean that each worker would spend 400 weeks processing their share of the applicant pool. Assuming no weeks off, that would mean that each of the 1,000 workers would spend approximately 7.6 years processing these applications!

This back of envelope calculation makes abundantly clear that nothing resembling a real individualized, case-by-case evaluation of an applicant is likely or even possible. Interviews can be curtailed or cut out almost altogether, as with DACA. Suspect documents could be simply accepted. Follow-up questions could not be asked. (In fact, background checks of DACA applicants were abbreviated for just such reasons.¹⁰⁰)

In these and many other ways, the individual, case-by-case assessment of applicants could be winnowed down to a quickly completed check-list abrogating the agency's constitutional responsibilities and legitimacy. It is here, at this exact point of constitutional requirement and DHS procedure, that the oversight of the process by the House and Senate Judiciary Committees and other relevant committees is likely to have its greatest impact.

There are reports that the administration is beefing up the Justice Department with a hiring spree of pro-amnesty attorneys in anticipation of the forthcoming legal battles with Congress.¹⁰¹ The relevant Senate and House committees should hire their own attorneys skilled in asking and getting answers to the kind of questions that will directly address whether the DHS is carrying out its constitutional mandate to really provide individual, case-by-case assessments of applications.

Line employees and supervisors should be brought before Congress to answer, under oath, questions about the procedures being used. There are many questions that can and should be asked, among them:

- How are the 1,000 hires being trained?
- What are they being told to do?
- How much time are they spending on each applicant?
- How will that time be spent?
- What problems have they encountered?
- How have those problems been resolved, if they have?
- What will they be told to look for?
- How will they assess the value and the accuracy of the materials they are evaluating?
- What questions will be asked for all applicants?
- What materials will be used for documentation?
- What safeguards will there be to prevent fraud, and what penalties?
- How many interviews will be done?
- What will be asked?
- How will they be followed through on?

Information can be gathered. Reports made. Congressional preferences asserted and monitored. Legislation prepared, and acted upon.

Needless to say, any substantial deviation from the constitutional requirement of individual, case-by-case assessment of applicants would be a grave matter, and perhaps be the basis of an emergency application to the federal courts, legislation designed to remedy the constitutional breach attached to a must-sign bill, a vote of censure along with Articles of Censure, or any combination of these.

In the end, the most powerful weapon against the president's constitutional breach may be a simple, honest set of questions. And no institution is more constitutionally situated and functionally entitled to ask them than House and Senate oversight committees.

Next: Countering Executive Amnesty, Part 4

Prologue: "The American Immigration Reform Act of 2015"

and

Proposed Legislation: "The American Immigration Reform Act of 2015"

End Notes

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- ²⁰ United States Constitution, Article II, Sec. 1
- ²¹ See Jon Roland, [“Meaning of ‘High Crimes and Misdemeanors’”](#), The Constitutional Society, January 16, 2015: “The impeachment and removal process should be a debate on the entire field of proven and suspected misconduct by federal officials and agents under this president, and if judged to have been excessive by reasonable standards, to be grounds for removal, even if direct complicity cannot be shown.”

²² The specific details underlying these charges, and a useful factual narrative of the impeachment can be found at [“Presidential Impeachment Proceedings - Richard M. Nixon”](#), The History Place, 2000.

²³ The specific details underlying these charges, and a useful factual narrative of the his impeachment can be found at [“Presidential Impeachment Proceedings - Bill Clinton”](#), The History Place, 2000.

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²⁵ Republicans controlled the House with 228 members to 206 Democrats and one Independent who normally sided with them. The votes on each article and the follow house vote are as follows:

Article 1 Approved 21-16 by the House Judiciary Committee; passed 228-206 in the House of Representatives.

Article 2: Approved 20-17 by the House Judiciary Committee; failed 229-205 in the House of Representatives.

Article 3: Approved 21-16 by the House Judiciary Committee; passed 221-212 in the House of Representatives.

Article 4: Approved 21-16 by the House Judiciary Committee failed 285-148 in the House of Representatives)

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⁴² Jack Maskell, [“Censure of the President by the Congress”](#), Congressional Research Service, December 8, 1998 , p.1.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

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⁴⁶ Gerhardt, “The Constitutionality of Censure”, p. 34.

⁴⁷ Maskell, “Censure of the President by the Congress”, p. 3.

⁴⁸ Gerhardt, “The Constitutionality of Censure”, p. 39.

⁴⁹ Maskell, “Censure of the President by the Congress”, p. 2.

⁵⁰ Maskell, “Censure of the President by the Congress”, p. 5.

⁵¹ Terry Eastland, [“Call It Impeachment-Lite”](#), *Weekly Standard*, September 8, 2014; Maskell, “Censure of the President by the Congress,” pp. 14-15.

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⁵⁵ Jack Maskell and Richard S. Beth, [“No Confidence Votes’ and Other Forms of Congressional Censure of Public Officials”](#), Congressional Research Service, June 11, 2007, p. 6.

⁵⁶ H.R.93-1288, 93rd Congress, 2d Session. See discussion at 120 *Congressional Record* 26820, August 5, 1974. The resolution stated:

Whereas the people have the right to expect from the President of the United States high moral standards and personal example, as well as great diligence In the exercise of official responsibilities and obligations; And whereas, Richard M. Nixon, in his conduct of the office of President - despite great achievements in foreign policy which are highly beneficial to every citizen and indeed to all people of the world - (1) has shown insensitivity to the moral demands, lofty purpose and ideals of the high office he holds in trust, and (2) has, through negligence and maladministration, failed to prevent his close subordinates and agents from committing acts of grave misconduct obstruction and impairment of justice, abuse and undue concentration of power, and contravention of the laws governing agencies of the Executive Branch; Now, therefore, be it resolved by the House of Representatives that Richard M. Nixon should be and he is hereby censured for said moral insensitivity, negligence and maladministration.

Note the mixture of praise and euphemism. The resolution was not acted upon.

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