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Suing for Deportation
Creating a private right of action for victims of criminal aliens

By Dan Cadman

Followers of immigration matters know all too well that under the Obama administration enforcement has been stymied, benefit programs created out of thin air, and the statutory and constitutional responsibilities of the executive branch to fully and fairly administer the law abandoned or flagrantly ignored. This report offers a potential answer to this problem; namely, amending the immigration statute to permit individuals who have suffered harm from aliens, such as crime victims or their families, to petition a federal judge to order the alien's deportation, thus overcoming an administration's negligent exercise of prosecutorial discretion.

Jon Feere, legal policy analyst at the Center, has most recently written about this abandonment in his *Backgrounder* "Why Hillary Clinton and John Kerry Share Responsibility for Criminal Alien Releases",[1] in which he makes the point that the Secretary of State has an affirmative obligation to cease issuing visas to countries that refuse or inordinately delay taking back their criminal citizens and nationals; a responsibility they did not/have not undertaken, a consequence of which is that criminals from several nations end up being released into the streets of American communities. However, as Mr. Feere has also noted,[2] Department of Homeland Security (DHS) Secretary Jeh Johnson, in recent testimony before the House Judiciary Committee, acknowledged that neither he nor his predecessor Janet Napolitano ever formally asked the State Department to suspend visas to any country, so there is clearly a shared failure between DHS and the State Department.

Jonathan Turley, a law professor at George Washington University, made the point of executive branch recalcitrance forcefully in testimony before a House of Representatives Committee on the Judiciary hearing held in December 2013.[3] Turley, a self-professed social liberal who voted for president Obama, stated:

> *I believe that President Barack Obama has crossed the constitutional line between discretionary enforcement and defiance of federal law. …*
>
> *The recent nonenforcement policies add a particularly menacing element to this pattern. They effectively reduce the legislative process to a series of options for presidential selection ranging from negation to full enforcement. The Framers warned us of such a system and we accept it — either by acclaim or acquiescence — at our peril. ...*
>
> *The current claims of executive power will outlast this president and members must consider the implications of the precedent that they are now creating through inaction and silence. What if a future president decided that he or she did not like some environmental laws or anti-discrimination laws? ...*
>
> *The current threat to legislative authority in our system is comprehensive — spanning from misappropriation of funds to the circumvention of appointments to negation of legislative provisions.*

Turley describes the present state of affairs as a "constitutional crisis with sweeping implications for our system of government".

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The Problems of Standing, Jurisdiction, and Lack of Redress

Stark proof of the failure of administration officials to faithfully execute the laws came into sharp relief in 2011, when the union that represents Immigration and Customs Enforcement (ICE) agents and officers held a referendum that resulted in a vote of no-confidence in then-director John Morton and one of his assistants due to the comprehensive dismantling of effective interior immigration enforcement under his — and the administration's — leadership.[4]

By August 2012, the frustrations bubbled over to the point that 10 ICE officers filed a lawsuit against then-Homeland Security Secretary Janet Napolitano, Morton, and Alejandro Mayorkas, director of U.S. Citizenship and Immigration Services, DHS's immigration benefits-granting agency, to stop the flagrant abuse of law and duty.[5]

A year later, the presiding judge dismissed the lawsuit, finding that he lacked jurisdiction to hear the case, despite the fact that he agreed with them that the underlying actions of the executive branch that had forced them to sue were illegal, saying in his ruling of dismissal that "Plaintiffs were likely to succeed on the merits of their claim that the Department of Homeland Security has implemented a program contrary to congressional mandate."[6]

One of the difficulties in attempting to rein in an out-of-control executive is that ordinary citizens are also generally held to lack standing to sue in court over matters of immigration policy and execution. The online version of *Black's Law Dictionary* defines the concept of "standing" quite simply. It is "a right of people to challenge the conduct of another person in a court".[7] The Free Legal Dictionary goes into more detail, stating that standing is:

> *The legally protectable stake or interest that an individual has in a dispute that entitles him to bring the controversy before the court to obtain judicial relief.*
>
> *Standing, sometimes referred to as standing to sue, is the name of the federal law doctrine that focuses on whether a prospective plaintiff can show that some personal legal interest has been invaded by the defendant. It is not enough that a person is merely interested as a member of the general public in the resolution of the dispute. The person must have a personal stake in the outcome of the controversy.*[8]

Tellingly, Turley noted in his testimony that the administration is keenly aware of these issues of standing and jurisdiction: "[The administration] appears to be relying on the expectation that no one will be able to secure standing to challenge such decisions in court."[9]

There is something pernicious about a notion of standing so limited that it construes United States citizens as having no definable, tangible personal interest in the future of their country, a future that will be inhabited by their children and their children's children. I can think of no more important personal interest to every American.

Even officers sworn to uphold the law find themselves boxed out of court while we as a citizenry watch our constitutionally guaranteed and all-important separation of powers slip away under the Obama administration.

The perverse consequence of such exclusory concepts of standing and jurisdiction is that, while ordinary Americans are said to lack standing, illegal and criminal aliens *are* deemed to have standing — and can litigate over and over again individually and collectively (often by means of organizations that represent them on a pro bono basis) in order to overcome denials of benefits or orders of removal that are adverse to *them* while at the same time chipping endlessly away at the foundations of the immigration laws — laws that define American sovereignty and help protect communities from the adverse cumulative effects of illegal immigration and crimes committed by aliens.

The administration's flagrant and willful abdication of its responsibility to faithfully execute the immigration laws has become even more clear since the court's dismissal of the officers' lawsuit, as evidenced by a couple of extraordinary reports published by the Center for Immigration Studies that have revealed ICE's systematic 2003 release of, or failure to take into custody, *more than criminal 100,000* aliens, including tens of thousands of alien criminals convicted of murder, sexual offenses, gang crimes, narcotics trafficking, and weapons offenses, among other felonies.[10]

Meanwhile, the administration continues to react with callous indifference to the pain and suffering of the surviving family members and victims of these criminals, while continuing to maintain an alien advocate position within ICE despite its having been specifically de-funded by Congress.[11]

Remedy

What, if anything, can be done to restore a modicum of balance to the system and provide an avenue of relief and redress for the common man?

Interestingly, in the United Kingdom, no such question would arise, because under British law prosecutions may be brought by private parties,[12] separate and apart from those brought by the Crown Prosecution Service,[13] even (or, perhaps, especially) against government officials who might otherwise feel that they can violate the law and their duties with impunity.[14]

Although the American legal system is derived from English common law, our system has never provided for private criminal prosecutions for violations of federal statutes. There are, however, private rights of civil action under federal law.

Some private rights of action are "implied", but they are quite narrow.[15] Congress has, however, specifically provided for private rights of action by statute in certain areas of jurisprudence where no implied rights exist. For instance, Title 7 of the U.S. Code outlines the right of private persons to seek damages for violations of commodity trading rules.[16] Even the federal racketeering statutes, which are primarily oriented toward criminal prosecution, provide for private rights of action.[17]

As presently written, immigration law overtly precludes private rights of action. The pertinent provision states in pertinent part:

> ***(D) No private right***
> *No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.*[18]

It can be said with near certainty, though, that when the above provision was written to prohibit private rights of action, no one, least of all Congress, could have envisioned a president and administration of any political party so thoroughly trampling the constitutionally mandated separation of powers, or so completely eviscerating the duly constituted legal system governing immigration enforcement and removal.

Under such circumstances, it may be time for Congress to re-think the wisdom of the prohibition, which relies on an assumption that a president will fulfill his duty to faithfully execute the laws of the United States, an assumption that can no longer be trusted when, as Professor Turley so vividly points out:

> *From Internet gambling to educational waivers to immigration deportations to health care decisions, the Obama administration has been unilaterally ordering major changes in federal law with the notable exclusion of Congress. Many of these changes have been defended as discretionary acts or mere interpretations of existing law. However, they fit an undeniable pattern of circumventing Congress in the creation of new major standards, exceptions, or outright nullifications.*[19]

Creation of a limited private right of action could be possible by amending the language of the existing provision. How might such an amendment be crafted so that it serves an appropriate purpose of opening the door to standing — and, therefore, redress — by those most adversely affected by the administration's clear breach of its constitutional duty to uphold the law, while not subjecting the existing statutory scheme for immigration enforcement to a multiplicity of frivolous and time-wasting federal lawsuits?

First, any provision permitting a private right of action should not be geared toward monetary fines or penalties. There is already a robust tort system in place to handle such claims — although they, too, are probably inadequate in many instances since lawsuits are expensive for the aggrieved citizen and illegal aliens are unlikely to possess any financial resources worth taking should the suit be successful.

Second, the provision should specify that the action should not be geared toward government officials — again, there is a system available for such lawsuits pursuant to the Federal Tort Claims Act (flawed though it may be) — but, rather, toward the alien. It might, for example, provide that any individual, or surviving family member of an individual, who has experienced harm in his person or property, could bring a private right of action to initiate removal proceedings (which, it is important to recall, are *civil* in nature) against the alien who caused the harm.

Third, such private removal proceedings should be conducted outside the ordinary venue of immigration courts, which are presided over by Justice Department employees of the Executive Office for Immigration Review (EOIR). This is key, since under the Obama administration, the attorney general would almost certainly issue an order prohibiting EOIR's immigration judge corps from presiding over such proceedings. Therefore, the provision might specify that they be held in federal district court instead, perhaps in front of a magistrate judge. There is already a precedent for orders of removal to be issued by the federal judiciary instead of EOIR's cadre of immigration judges, which states:

> ***(c) Judicial removal***
> *(1) Authority*
> *Notwithstanding any other provision of this chapter, a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.*[20]

Fourth, the provision should specify that removals in proceedings undertaken by means of a private right of action may only be ordered on the basis of existing laws and regulations governing the grounds for exclusion or deportation.

Conclusion

Granting a statutory private right of action for individuals to seek the removal of aliens who have harmed them establishes an avenue of relief and redress that does not currently exist in law. It also ensures that when the executive branch fails in its duty to appropriately institute removal proceedings, especially against dangerous and violent criminal aliens, those individuals among the citizenry who have been most adversely affected by the aliens' presence in the United States will have standing to ensure that the wheels of justice go forward.

It is well to remember that, under this president, we are not speaking of an aberrant one-time-only or statistically insignificant dereliction of duty: we are speaking of tens of thousands of criminal aliens against whom the administration has failed to act.

If even a tenth of the number of individuals harmed were to avail themselves of the avenue of a private right of action, it would have an impact far beyond the numbers. It would also potentially save other individuals from being victimized by alien recidivists who might otherwise be released both by local law enforcement organizations determined not to cooperate with ICE, and ICE itself. And it is entirely possible that, with the opening of an avenue of redress for ordinary citizens who have experienced harm, pro bono organizations would come forward to assist those citizens with the legal advice and counsel that they will need to proceed — just as is happening with aliens right now.

Finally, it must be remembered that a private right of action to institute removal proceedings under *existing* federal laws and regulations subjects no alien to extralegal processes; deprives no alien of due process of law; and imposes no sanction or penalty other than that to which he is already susceptible — and would be subjected to, had we an executive who comported himself pursuant to constitutional principles instead of imperial decree.

End Notes

[1] Jon Feere, "Why Hillary Clinton and John Kerry Share Responsibility for Criminal Alien Releases", Center for Immigration Studies, May 2014.

[2] Jon Feere, "DHS Secretary Johnson Not Doing Everything in His Power to Prevent the Release of Criminal Aliens", Center for Immigration Studies, May 2014.

[3] "The President's Constitutional Duty to Faithfully Execute the Laws", hearing before the House of Representatives, Committee on the Judiciary, testimony of Professor Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University, December 3, 2013.

[4] National ICE Council 118, American Federation of Government Employees, "Vote of No Confidence in ICE Director John Morton and ICE ODPP Assistant Director Phyllis Coven", June 25, 2010.

[5] See the January 2013 amended complaint in the case of *Crane, et al v. Napolitano et al*, Civil Action No. 3:12-cv-03247-O, United States District Court for the Northern District Of Texas, Dallas Division.

[6] See the dismissal order in *Crane v. Napolitano*.

[7] "What Is Standing?" The Law Dictionary, Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

[8] "Standing", The Free Dictionary by Farlex, The Legal Dictionary.

[9] Turley, *op. cit.*

[10] Jessica M. Vaughan, "Catch and Release: Interior immigration enforcement in 2013", Center for Immigration Studies, March 2014, and Jessica M. Vaughan, "ICE Document Details 36,000 Criminal Alien Releases in 2013", Center for Immigration Studies, May 2014.

[11] For examples of the government's callous disregard of citizens harmed by criminal aliens, as well as additional discussion of the ICE alien advocate position, see my CIS blogs "Public Advocacy, Victims, and Skewed Moral Compasses: U.S. government refuses to give U.S. citizen maimed by illegal alien information requested under FOIA", March 24, 2014, and "Another Look at Victims and Humane Treatment under the Law", March 27, 2014.

[12] See, for instance, McCue and Partners, LLP, "A Guide to Private Prosecution Procedure in England and Wales", September 2011.

[13] The Crown Prosecution Service itself maintains an online reference manual outlining private prosecutions in principle and practice.

[14] An example of such a private prosecution against a Scotland Yard official was described in an October 18, 2013, online article in the *The Independent*: "Private citizen wins right to prosecute Met police worker".

[15] An excellent, albeit somewhat dated, article describing in some detail private rights of action under American jurisprudence: Donna L. Goldstein, "Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?" *Fordham Law Review*, Volume 50, Issue 4, Article 5, 1982.

[16] See 7 U.S.C. Section 25.

[17] See 18 U.S.C. Section 1964(c).

[18] See 8 U.S.C. Section 1231(a)(4)(D).

[19] Turley, *op. cit.*

[20] See 8 U.S.C. Section 1228(c). Note, however, that through enumeration error, there are currently *two* subsections (c) extant in the law. The relevant subsection is the second iteration.