



Written by [Jack Kenny](#) on September 8, 2014

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## Obama as “Emancipator” of Illegal Immigrants

“Not since Abraham Lincoln pondered his Emancipation Proclamation in 1862 has a president considered ordering a more sweeping adjustment to membership in the American community than the mass relief for illegal immigrants that President Obama is said to be contemplating.”

So wrote editorial writer Charles Lane in the *Washington Post* of August 6. Lane acknowledged, of course, that the comparison of Lincoln’s predicament in the Civil War and Obama’s battle with House Republicans over immigration reform is more than a little strained. “Among many other differences,” he wrote, “the undocumented arrived voluntarily, searching, often successfully, for a better life. Also, they established residence unlawfully, for which there must be some reckoning.”

But the “reckoning” Obama is “said to be contemplating” is an executive order or “policy directive” that will allow up to five million illegal immigrants the freedom to remain here, free of the fear of deportation, while obtaining work permits enabling them to pursue that “better life” they sought by surreptitiously entering and remaining in their unlawfully adopted homeland. Some reckoning.

A reckoning of a different sort will follow such executive action, one that surely is anticipated by the constitutional lawyer in the White House. Our Constitution simply does not permit the president to make up or amend laws at his own discretion. The first sentence of the first article of that document says, “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” Congress has at various times been remarkably eager to accommodate the legislative wishes of a president, especially when the president’s party is a heavy majority in both houses. Obama’s situation is quite different. He is faced with a divided Congress that won’t pass the “comprehensive immigration reform” legislation that he has hoped to make the signature accomplishment of his second term in office, as ObamaCare is (in liberal eyes) the crowning achievement of his first term.

In the Senate, where Democrats are in the majority, the “Gang of Eight” — four Democrats and four Republicans — managed a year ago to avert a filibuster and persuade a majority of their Senate colleagues to pass a “bipartisan comprehensive immigration reform” bill to provide legal status and a “path to citizenship” to an estimated eight million of the 11 million or more people now living illegally in the United States. The leadership of the Republican-controlled House has refused to take up the measure, however, a “failure” for which Obama pledged to compensate through executive action.





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“The failure of House Republicans to pass a darn bill is bad for our security, is bad for our economy, is bad for our future,” an obviously angry and frustrated Obama said on June 30, the same day he met with Latino and Hispanic activists pushing for a loosening of immigration laws. “America cannot wait forever” for the House to act, the president said, promising “a new effort to fix as much of our immigration system as I can on my own, without Congress.” Attorney General Eric Holder and Homeland Security Secretary Jeh Johnson would “identify additional actions my administration can take within my existing legal authorities, to do what Congress refuses to do,” he said.

## **DACA and the DREAMers**

Two years earlier, Obama’s policy of Deferred Action for Childhood Arrivals (DACA) was the DREAM come true for advocates of greater leniency in immigration law. The DREAM Act (Development, Relief and Education for Alien Minors) had been languishing in Congress since 2001, when it was introduced as a Senate bill by Dick Durbin (D-Ill.) and Orrin Hatch (R-Utah) and in the House by Illinois Democrat Luis Gutierrez. While the bill has undergone some modifications over the years, it essentially would allow young illegal immigrants who were brought here as children the opportunity to apply for permanent residence, provided they had committed no crimes, were in school or had either graduated high school or earned a GED, and had lived in the United States for five consecutive years before the bill’s enactment.

Though the bill was reintroduced several times, was incorporated into the Comprehensive Immigration Reform bills of 2006 and 2007, and was even offered by Durbin as an amendment to the 2008 Department of Defense Authorization bill, Congress never passed the DREAM Act. But on June 15, 2012, Obama announced his “deferred enforcement” policy, saying illegal immigrants who were brought here before their 16th birthday could apply for a two-year renewable residency shielding them from deportation and allowing them at the same time to apply for work permits. To be eligible, applicants would have to be 30 years old or younger and have lived in the United States since 2007. In effect, Obama had adopted the essential features of the DREAM Act as a matter of “prosecutorial discretion.” Opponents of the DREAM Act said the bill would reward illegal immigration and encourage more of it. Critics of its DACA equivalent now point to numbers that suggest that’s exactly what happened.

“If you look at the history of this issue,” said Republican Senator Ted Cruz of Texas, “in 2011 there were roughly 6,000 children apprehended coming in illegally.” That was before the president announced the DACA policy. “The direct foreseeable consequence of that was the number of unaccompanied children skyrocketed so that this year the Obama administration is estimating 90,000 kids will come, next year 145,000. That’s up from just 6,000 three years ago.”

## **“They’re Here and They’re Staying.”**

This spring and summer brought continued reports of some 57,000 people, most said to be children from Central America, who have illegally crossed the Texas border since last fall. A federal law, written to protect children from human trafficking, requires that each minor from anywhere but Mexico and Canada be given a hearing to determine eligibility for asylum as refugees. The backlog of cases in immigration courts has reached the level where the new arrivals, hailing mostly from Guatemala, Honduras, and El Salvador, may have months or years to wait before their hearings. While some remain



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in detention centers, others have been placed with relatives or in foster homes in several states, leaving governors, mayors, and school officials in a state of uncertainty over how many undocumented children will be added to their communities and what impact they will have on state and local budgets.

Tennessee Governor Bill Haslam protested in a July 25 letter to President Obama that no one in his state government had received notice of the unaccompanied minors who had been relocated in the Volunteer State.

“It is unacceptable that we became aware via a posting on the HHS website that 760 unaccompanied children have been released by the Office of Refugee Resettlement to sponsors in Tennessee without my administration’s knowledge,” Haslam wrote. “Not only was our state not informed prior to any of the children being brought here, I still have not been contacted and have no information about these individuals or their sponsors other than what was posted on the HHS website and subsequently reported by media.”

Six governors signed a letter to the president expressing similar concerns about the impact the relocation of the illegal immigrant minors will have on their states.

“We are concerned that there will be significant numbers who will end up using public schools, social services and health systems largely funded by the states,” said the letter signed by Governors Robert Bentley of Alabama, Scott Walker of Wisconsin, Sam Brownback of Kansas, Pat McCrory of North Carolina, Tom Corbett of Pennsylvania, and Gary Herbert of Utah. The governors said they were troubled to learn the federal government is not requiring that relatives taking in the undocumented minors be citizens themselves.

“This raises real questions as to whether these children will maintain appropriate contacts with our legal system and will follow necessary procedures designed to protect both them and the American public,” the governors wrote. Nearly half of the immigrant children who are sent to live with relatives fail to show up for immigration proceedings, they said.

“They’re here, and they’re staying, and whatever else might happen to them is at least a year or more away,” Doris Meissner, a former Immigration and Naturalization Service commissioner, told the *Wall Street Journal*. “Until people’s experience changes, more are going to continue to come, because they’re achieving what they need: safety and reunification with their families.”

## **Warning Signs Ignored**

Unlike previous waves of illegal border crossers, those now crossing into McAllen, Texas, show no fear of being caught, said Mayor Jim Darling.

“They get across, wave to Border Patrol and say, ‘I’m here,’” Darling said at a July hearing of the Homeland Security and Public Safety Committee of the Texas House of Representatives. The flood of arrivals has overwhelmed Border Patrol facilities in McAllen and El Paso, David Lakey, commissioner of the Texas Department of State Health Services, told the committee. In McAllen, children have been crowded 45 to a cell with a single toilet, he said. In El Paso, Border Patrol agents have used their own money to buy diapers and milk for children. “None of us want that one-year-old to die in any of our facilities,” said Darling, reporting McAllen had already spent \$1.5 million to deal with the crisis. “What I’m here about is, I want to know how we’re going to sustain this.”

While the “humanitarian crisis” at the border seemed to spring up overnight in media accounts of tens



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of thousands of unaccompanied children arriving in a new wave of unauthorized immigration, the Obama administration had been aware of the developing crisis well before it became the stuff of headlines and TV talk-show topics. A posting on the government's Federal Business Opportunities website said Immigrations and Customs Enforcement, a division of Homeland Security, was seeking the services of a "responsible vendor" to transport up to 65,000 "Unaccompanied Alien Children (UAC) from U.S. Border Patrol and other Federal agencies ... to Office of Refugee Resettlement (ORR) shelters located throughout the continental United States." The posting was dated January 29, 2014.

On average 66 foreign children were apprehended at the border each day last year and "more than 24,000 were cycled through Texas patrol stations in 2013," the *Washington Post* reported in a recent account of warning signs the Obama administration missed or ignored on the way to the current crisis. Among them was a 41-page report a team of researchers from the University of Texas-El Paso sent to the federal Department of Homeland Security warning of the limited capacity of the federal government to manage a situation at the border that was likely to grow worse.

Cecilia Muñoz, the president's domestic policy advisor, said federal officials realized by May of this year that the numbers of minors illegally entering the country this fiscal year would exceed the anticipated 60,000, a projection since revised to 90,000. "This trend was more like a hockey stick, going up and up and up," she told the *Post*. "Nobody could have predicted the scale of the increase we saw this year. The minute we saw it, we responded in an aggressive way."

Yet it was not until July 8 that Obama declared a humanitarian crisis on the border and asked Congress for an emergency appropriation of \$3.7 billion to deal with it. And that was more than two years after Texas Governor Rick Perry, in an April 2012 letter to Obama, told of a 90-percent increase over the previous year in the arrival of unaccompanied minors from Central America. Without "immediate action to return these minors to their countries of origin and prevent and discourage others from coming here, the federal government is perpetuating the problem," Perry wrote. "Every day of delay risks more lives. Every child allowed to remain encourages hundreds more to attempt the journey."

As to why they are coming, the reason most often given is that the young émigrés are fleeing lawlessness in their own Central American countries, including murder, sexual molestation, and human trafficking. Teenage and young adult gangs, often involved in drug dealing, are contributing to an overall climate of violence and terror. Kevin Appleby, migration policy director for the United States Conference of Catholic Bishops, told CBS News that many of the children are targeted by networks of organized crime and thus have valid claims to asylum under international refugee law. Before adjourning this summer, the House passed a bill to shorten the process for adjudicating such claims, a strategy Obama at first supported, then opposed. To dispose of such claims "without the benefit of an immigration judge or legal representation," would reduce the children's chances of receiving U.S. protection, Appleby said. "It is akin to sending a child back into a burning building and locking the door."

## **Gang Members Turned Loose**

But the present situation might be likened to an open door that allows the flames from that burning building to follow the children across the border. Border Patrol agent Chris Cabrera, the vice president of the National Border Patrol Council Local 3307 in the Rio Grande Valley, told Fox News that violent gang members are among the youths who are coming across the border and being released to family



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members in various parts of the United States.

“We’ve had a couple that had admitted to murders in their home country,” Cabrera said. “They were 17 years old, 16 years old, and the United States government thought it fit to release them to their parents here in the United States.” Other reports have surfaced of members of the Mara Salvatrucha (MS-13) gang apprehended at Arizona’s Mexican border.

“If [the] Border Patrol is overwhelmed, what consideration is being given — and what is being done — to determine if any of these illegal aliens have criminal histories or gang affiliations?” asked Arizona Governor Jan Brewer in a June 12 letter to Speaker of the House John Boehner (R-Ohio) and Senate Majority Leader Harry Reid (D-Nev.). “The administration’s refusal to properly verify that violent criminals are not among those entering the United States shows an alarming lack of concern for our homeland’s security.”

A Breitbart News story on August 3 cited a leaked Customs and Border Patrol intelligence analysis showing that illegal immigrants attempting to enter the United States from 2010 to July of this year have come from more than 75 countries. While Central America is the source of much of the illegal immigrant traffic, it is also on the route of human smuggling from Syria and Albania, the report said. In this year alone, border-crossers who either turned themselves in or were apprehended by the Border Patrol include more than 3,200 from China, 239 from Pakistan, and 181 Egyptians. A total of 38 came from the al-Qaeda stronghold of Yemen, along with 294 from Somalia, a hotbed of Islamic terrorism. Many might have come simply seeking a better life for themselves and their families in the United States. Others might have come to escape murder and terror in their own lands. And some might have come to spread deadly terror and chaos here. While the analysis raises obvious safety and security issues, there are also public health concerns. At least 71 individuals from the three nations affected by the current Ebola outbreak have either turned themselves in or were caught attempting to illegally enter the United States, according to the Breitbart report.

## **“Removals” or “Returns”?**

It’s not as though the Obama administration has abandoned deportations altogether. In fact, the *Post* reported, the administration has been averaging nearly 400,000 returns a year, the number for which Congress has provided the necessary funding. But in December 2010, the *Post* called into question the administration’s claim to have deported a record number of immigrants in the fiscal year just ended, noting the 392,862 “deportations” included more than 19,000 who had exited the previous fiscal year and that another 6,500 would have normally been classified as returns by the U.S. Border Patrol. An undetermined number of others exercised a “voluntary return” option as an alternative to facing charges ranging from drunk driving to domestic violence to misdemeanor assault.

But it might also be the case that more illegals are coming here because, given the administration’s announced policy of selective enforcement of immigration laws, word has spread that those who make their way into the United States and lie low, not engaging in criminal activity while here, will probably not be troubled by immigration officials coming after them. In 2011, a series of memos from Immigration and Customs Enforcement chief John Morton and Homeland Security Secretary Janet Napolitano advised ICE agents to use “prosecutorial discretion” regarding non-criminal illegal residents or those who had been here for several years.



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## **“The People Will Not Stand for It.”**

Obama did not get the \$3.7 billion emergency appropriation he requested. The House passed a much more modest \$694 million bill, while the Senate deadlocked and went off on its summer recess without passing anything. Before leaving town, some members of Congress warned against the type of executive action the president has promised. Representative Steve King (R-Iowa) spoke of impeaching the president if he attempted to make de facto changes in immigration law without the approval of Congress. Sen. Jeff Sessions (R-Ala.) did not use the “I-word,” but he did warn of a “constitutional crisis” if Obama attempts to implement immigration reform by executive fiat.

“Such calculated action strains the constitutional structure of our republic,” Sessions said in an impassioned speech on the Senate floor. “Such unlawful and unconstitutional action, if taken, cannot stand. No Congress, Republican or Democrat, can allow such action to occur or to be maintained. The people will not stand for it. They must not stand for it.”

Reports have surfaced nonetheless of White House meetings in which the president’s advisors have been questioning immigration lawyers and advocates in an effort to identify a broader population of immigrants that might be eligible for the type of immunity from prosecution and work opportunities that has been granted to childhood arrivals by the DACA program. Speculation has centered around the estimated four million to five million illegal immigrants whose children are either U.S. citizens or current beneficiaries of the 2012 deferred action program. Since the Hispanic population tends to vote overwhelmingly Democratic, the political considerations are never far behind the policy recommendations.

“The president is going to get the same amount of grief from the right no matter what he does, whether it’s small or whether it’s bold,” AFL-CIO President Richard L. Trumka told the *Washington Post*. “The difference is, if it’s small, it’s not going to energize his base. If it’s bold, it will.”

## **Can He Be Stopped?**

Obama has tested the limits of his constitutional authority before. In 2011, he conducted an air war against the Libyan government without either seeking or obtaining congressional approval. Despite Congress’ refusal to pass an increase in the minimum wage, Obama has ordered companies contracting with the federal government to pay a minimum wage of \$10.10 an hour. In June, the Supreme Court ruled, 9-0, that the president had exceeded his constitutional authority in making a “recess appointment” to the National Labor Relations Board when the Senate was not in recess. Before the summer recess, the House of Representatives voted to sue the president over twice postponing the implementation of the employer mandate in the Affordable Care Act (ObamaCare), though the effective date is in the law that Congress passed and the president signed in 2010.

It is not clear, however, what Republicans in Congress can do to stop the president if he decides to forge ahead with his immigration reform plan. They can pass a bill to bar it, as the House on August 1 passed a bill to repeal DACA, but in either case the Democratic majority in the Senate will kill the bill and the president would veto it even if it passed. The House could, again, sue the president, but it has yet to be determined if Congress can persuade the Supreme Court that it is itself a victim of the president’s executive actions and thus has standing to sue.

Impeachment is always a possibility, but there appears to be little public support for it, especially in



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light of the embarrassingly futile 1999 Senate trial of the impeached President Clinton.

There is nothing in the U.S. Constitution that denies states the power to enact legislation of their own to deal with illegal immigration, though federal courts have generally upheld the primacy of federal law in that regard. The U.S. Supreme Court in 2012 struck down provisions of a 2010 Arizona law that required immigrant non-citizens to carry their registration papers, made it a crime for illegal aliens to seek employment, and allowed police to arrest persons believed to be subject to deportation. Justices Antonin Scalia, Clarence Thomas, and Samuel Alito dissented in the 6-3 decision. The Arizona statute was “not in contradiction to the federal law, but in complete compliance with it,” wrote Scalia. “If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign state.”

## Obama vs. Obama

The president insists he must act because Congress — or more specifically, the Republican House — chooses not to. But that is a choice the Constitution gives the Congress. To not act on a bill is as much a decision as to pass or defeat legislation. Other presidents have been denied what they wanted by Congress. Theodore Roosevelt was the first president to ask Congress for a national healthcare plan. He didn't try to implement one by executive order. Woodrow Wilson didn't send an ambassador to the League of Nations after the Senate rejected membership.

It shouldn't take, in any case, a battery of lawyers arguing or a roomful of witnesses to prove the president has no authority to change immigration law on his own. Obama has already given eloquent witness to that point on a number of occasions, including his following statement from a March 28, 2011 Univision telecast: “There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as president.”

— Photo of fence along U.S.-Mexican border: AP Images





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