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THE LAZARUS EFFECT: HOW COMPREHENSIVE IMMIGRATION REFORM CAN SURVIVE THE HOUSE GOP AND COME BACK TO LIFE

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"The only true test of leadership is the ability to lead and lead vigorously"

President John F. Kennedy

The Republican National Committee passed a resolution on Friday calling on Congress to pass immigration reform by the end of the year. Unlike the Senate Bill, s. 744, the Border, Security, Economic Opportunity and Immigration Modernization Act, which grants a path way to citizenship, the RNC resolution contemplates legalizing immigrants who came to the US above the age of 18, but only by granting them 2 year renewable work permits. For those who came to the US as minors, they would get a renewable 5 year permit. There is no pathway to citizenship in the RNC's resolution.

This tepid resolution is completely at odds with BSEOIMA, which will dramatically reform the immigration system. Although the bill does not have everything that everyone wants, S. 744 offers a pathway to legalization for the 10 million undocumented, a new W visa to allow for future flows of lower skilled immigrants and attempts to clear up the backlogs in the employment and family preferences. It also reforms the existing system in many ways by removing the 1 year bars to seeking asylum, creating a startup visa for entrepreneurs, clarifying a contentious provision under the Child Status Protection Act, providing greater discretion to both Immigration and Judges to terminate removal proceedings, among many other beneficial provisions.

Therefore, it remains uncertain whether any measure that the House passes

can get reconciled with BSEOIMA, which truly reforms the immigration system. The intransigence in the GOP controlled House, while frustrating the hopes and aspirations of all those who believe that a reformed immigration system will benefit America, also further foreshadows doom for the party in future elections. What caught our attention was a statement by Senator Rubio on the anniversary of the Deferred Action of Childhood Arrivals (DACA) program, one of the main Republican architects of BSEOIMA, when he warned his party members in Congress that if they did not pass a reform bill then President Obama could extend the administrative relief for young people to everyone through administrative action.

The authors have since 2010 been advocating the ability of the President to ameliorate the plight of non-citizens trapped in a broken system through administrative measures. We have also proposed that the President can resolve the crisis in the backlogs in the employment and family based preferences by not counting derivative family members. It was thus heartening to know that Rubio also acknowledged the President's ability to pass an executive order, although he sees this more as a threat for his party. First, if Obama provides ameliorative relief to millions of immigrants, it will benefit the Democrats in future elections, just as DACA benefited the President in his reelection in November 2012. Second, if the President were to expand DACA to a broader group of undocumented people, and allow them to apply for work authorization and travel permission, this might be better than the GOP immigration reform proposal, if it got passed into law as part of a compromise with the Senate. Such an executive order will not be accompanied by a needless and expensive militarization of the border (which is also a feature of S. 744), along with mandatory E-Verify that will bog down business large and small. It will not include draconian provisions that the House might likely pass in exchange for legalization, such as authorizing enforcement of immigration law by state police or criminalizing undocumented status.

This is not to say that a Presidential executive order is a substitute for comprehensive immigration legislation. The President will not be able to grant permanent residence to the undocumented, only work authorization and travel permission, and the family and employment based preferences will continue to have a limited supply of visas. Still, in the absence of Congress passing a comprehensive bill to reform the broken system, something is better than nothing. As we have already commented, if we do not count family members,

that in itself would dramatically reduce waiting times in the family and employment preferences. Many of the people who will be legalized under an executive order may be able to ultimate get permanent residence through existing pathways. It is true that the President will not be able to increase badly needed H-1B visas through executive fiat, but it may be possible to give employers greater access to the unlimited O-1 visa by broadening the definition of "extraordinary ability" to allow many more accomplished foreign nationals to work in the US. While an executive order will not include a new start up visa, if the current Entrepreneurs Pathways initiative is implemented faithfully, many entrepreneurs can start companies in the US under existing work visa categories.

While the authors support the passage of S.744, it is tempting to add that executive action can avoid the economic illiteracy that plagues the H-1B wage provisions embraced by the Senate as the price of passage and avoid the misguided tendency of House Republicans to extend this inflationary regime to other categories such as the TN. Unlike S. 744, it will not discourage employers from hiring foreign nationals by mandating artificially inflated wages for foreign nationals, a feature of S. 744 that sharply conflicts with expanded H-1B quotas and more generous provisions for employment-based migration. It will not cripple start-up companies who badly desire key foreign personnel but will under the new law be unable to afford them. It will not price American companies out of the green card sponsorship market, divert precious funds that would otherwise be invested in cutting-edge research or dry up surplus capital that would be better spent on equipment modernization. Executive action will be devoid of the hugely inflationary wage rules adopted by the Senate as part of the deal making that resulted in the passage of S. 744, thereby encouraging more employers to refrain from moving jobs offshore or to low wage labor markets out of the United States. As a result, when compared to S. 744, action now by President Obama might make it more, not less, likely that companies will sponsor foreign workers for green cards.

The President always has this ace up his sleeve, which is the ability to grant relief through an executive order, to force Congress to pass immigration reform. If Congress in fact fails to pass immigration reform, the President can actually bring about immigration reform, which may look better than any of the reform proposals being floated by the GOP in the House. Of course, a future President can get rid of such administrative measures, but this usually does not

happen as it would be politically too dangerous to further alienate the Latino vote. It is more likely that a future Congress will bless such administrative measures like the way BSEOIMA did with DACA recipients. So, in light of all the uncertainty regarding the passage of a comprehensive immigration bill, a Presidential executive order, or the potential for one (as Rubio presciently realized) may not be such a bad thing.

The invocation of executive action would allow the undocumented to remain in the United States with the opportunity for employment authorization and seek to utilize existing avenues for transition to lawful permanent resident status. It puts them in the same position as everyone else who seeks the green card. From this perspective, executive action would be consistent with the compromise proposal advocated by House Judiciary Committee Chair Robert Goodlatte (R-Va.). Many of the undocumented already have, or will, over time, acquire adult US citizen children; others may marry American citizens and still others could attract employer sponsorship. Keep them here, allow them to come in from the shadows, and let the undocumented regularize their status through the disciplined utilization of existing remedies. Not only is this a solution that does not require the House GOP to abandon dysfunctionality as their prime governing philosophy, something they are manifestly loath to do, but, even if Congressional ratification subsequently is felt necessary or desirable, this is precisely the path to legalization that Represenative Goodlatte has already outlined.

The President cannot grant more L-1 intra-company transferee visas but he can restore the relevancy of those that now exist by ending the war on claims of specialized knowledge. No new allowances for extraordinary ability can come through the stroke of a pen but an enlightened decision to banish the suffocating *Kazarian* final merits determination would give new hope to aliens who now have none but otherwise satisfy what the law requires. Only Congress can exempt green card categories from the tender mercies of PERM but no legislative sanction is required to halt the use of audits as a tool of intimidation. The need for change should not blind us to the ample opportunities for remediation that the present law affords. As valuable as comprehensive reform is, as badly needed as the benefits it will bring most surely are, no law will succeed if those who enforce and interpret it lack the moral courage and political will to usher in a newer world. As that fan of Tudor prerogative told us long ago in no less contentious times, “the fault dear Brutus

is not in our stars but in ourselves."

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