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US IMMIGRATION & NATIONALITY LAW

A TIME FOR HONEST TRUTH: A PASSIONATE DEFENSE OF PRESIDENT OBAMA'S EXECUTIVE ORDERS ON IMMIGRATION

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You shall neither vex a stranger, nor oppress him: for you were strangers in the land of Egypt.

EXODUS 22:21

By Gary Endelman and Cyrus D. Mehta

November 20, 2014 was a historic night. The President announced a series of executive actions to expand enforcement at the border, prioritize deporting felons not families, and require millions of undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation. The authors welcome this development as they have been advocating for executive actions since 2010 to repair a broken immigration system in the face of Congressional inaction. In The Tyranny of Priority Dates we first advocated that the President had broad authority under the Immigration and Nationality Act to ameliorate the plight of many who were caught in the crushing immigrant visa backlogs, followed by many widely disseminated blogs thereafter that further fine-tuned and refined the proposals made in our original article. We were there at the very beginning and so the executive actions personally mean a lot to us just as they mean to the millions who will get relief from our harsh immigration laws. As we summarize the executive actions, we point to our blogs that may be helpful to further advance and develop these measures.

The most audacious and bold of these executive actions is to provide deferred action to at least 4 million immigrants who on the date of the announcement are parents of US citizens and lawful permanent residents and who have

continuously resided in the United States since before January 1, 2010. They also must have no lawful status on November 20, 2014, and must have also been physically present on that date and at the time of making the request for consideration of deferred action. They must also present no other factors that would make a grant of deferred action inappropriate and are not an enforcement priority. These individuals will be assessed for eligibility for deferred action on a case-by-case basis, and then be permitted to apply for work authorization, provided they pay a fee. Each individual will undergo a thorough background check of all relevant national security and criminal databases, including DHS and FBI databases. With work-authorization, these individuals will pay taxes and contribute to the economy. As bold as this policy seems, in a larger sense, it stands as a reaffirmation of a well-established tradition that affords the Executive Branch wide discretion in the enforcement of our nation's immigration laws.

Another bold move is to expand the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to young people who came to this country before turning 16 years old and have been present since January 1, 2010, and extending the period of DACA and work authorization from two years to three years. DACA will be expanded to include a broader class of children. DACA eligibility was limited to those who were under 31 years of age on June 15, 2012, who entered the U.S. before June 15, 2007, and who were under 16 years old when they entered. DACA eligibility will be expanded to cover all undocumented immigrants who entered the U.S. before the age of 16, and not just those born after June 15, 1981. The entry date will also be adjusted from June 15, 2007 to January 1, 2010. The relief (including work authorization) will now last for three years rather than two.

Critics have assailed these two executive actions in isolation as being unconstitutional and usurping the power of Congress. These arguments have been made before, especially after DACA was implemented. In Yes He Can: A Reply to Professors Delahunty and Yoo, we argued that even at the historically high levels of removal under President Obama, some 400,000 per year, this amounts to only 3-4% of the total illegal population. That is precisely why the Obama Administration has focused its removal efforts, which as stated in a letter by the former DHS Secretary Napolitano to Senator Durbin, on "identifying and removing criminal aliens, those who pose a threat to public safety and national security, repeat immigration law offenders and other

individuals prioritized for removal." The truth is that deferred action is neither recent nor revolutionary. Widows of US citizens have been granted this benefit. Battered immigrants have sought and obtained refuge there. Never has the size of a vulnerable population been a valid reason to say no. Critics fail to consider INA Section 103(a)(1), which charges the DHS Secretary with the administration and enforcement of the INA. This implies that the DHS can decide when to and when not to remove an alien. They also fail to consider INA section 274A(h)(3)(B) which excludes from the definition of "unauthorized alien" any alien "authorized to be so employed ...by the Attorney General." After all, 8 CFR 274a.12(c)(14), which grants employment authorization to one who has received deferred action, has been around for several decades.

Courts are loath to review any non-enforcement decisions taken by federal authorities. *See,e.g., Lincoln v. Vigil,* 508 U.S. 182, 191-92 (1993)*; Massachusetts v. EPA,* 127 S. Ct. 138, 1459 (2007). It is up to DHS, rather than to any individual, to decide when, or whether, to initiate any enforcement campaign. *Heckler v. Chaney,* 470 US 821, 835 (1985). *Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012) articulated the true reason why: "(a) principal feature of the removal system is the broad discretion exercised by immigration officials...Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all..." Furthermore, critics of the executive orders do not feel constrained by the wide deference that has traditionally characterized judicial responses to executive interpretation of the INA. Under the oft-quoted Chevron doctrine that the Supreme Court announced in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 US 837(1984), federal courts will pay deference to the regulatory interpretation of the agency charged with executing the laws of the United States when there is ambiguity in the statute. The courts will intrude only when the agency's interpretation is manifestly irrational or clearly erroneous. Similarly, the Supreme Court in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 US 967 (2005),while affirming *Chevron*, held that, if there is an ambiguous statute requiring agency deference under *Chevron*, the agency's understanding will also trump a judicial exegesis of the same statute. Surely the "body of experience" and the "informed judgment" that DHS brings to INA section103 provide its interpretations with " the power to persuade." *Skidmore v. Swift& Co.,* 323 US 134,140 (1944).

It is also worth mentioning that while there is no express Congressional authorization for the Obama Administration to implement such measures, the

President may act within a "twilight zone" in which he may have concurrent authority with Congress. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Unlike *Youngstown Sheet and Tube Co. v. Sawyer*, where the Supreme Court held that the President could not seize a steel mill to resolve a labor dispute without Congressional authorization, the Administration under through the executive actions is well acting within Congressional authorization. In his famous concurring opinion, Justice Jackson reminded us that, however meritorious, separation of powers itself was not without limit: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

While the focus of the criticism is on the two deferred action programs that will potentially cover 5 million people, there are also executive actions that include measures to strengthen Southern border security and to reorder removal priorities. Under this reordering top priority with respect to removal will be placed on national security threats, convicted felons, gang members, and illegal entrants apprehended at the border; the second-tier priority on those convicted of significant or multiple misdemeanors and those who are not apprehended at the border, but who entered or reentered this country unlawfully after January 1, 2014; and the third priority on those who are non-criminals but who have failed to abide by a final order of removal issued on or after January 1, 2014. Under this revised policy, those who entered illegally prior to January 1, 2014, who never disobeyed a prior order of removal, and were never convicted of a serious offense, will not be priorities for removal. This policy also provides clear guidance on the exercise of prosecutorial discretion. DHS will also end Secure Communities and replace it with the Priority Enforcement Programthat closely and clearly reflect DHS's new top enforcement priorities. The program will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies and will identify to law enforcement agencies the specific criteria for which we will seek an individual in their custody. The list of largely criminal offenses is taken from Priorities 1 and 2 of our new enforcement priorities. In addition, we will formulate plans to engage state and local governments on enforcement priorities and will enhance Immigration and Customs Enforcement's (ICE) ability to arrest, detain, and remove individuals deemed

threats to national security, border security, or public safety.

These measures relating to immigration enforcement can hardly be seen as a power grab by President Obama, and should further insulate him from legal actions such as law suits and even impeachment. Indeed, it would border on the ridicule, as suggested by a leading Yale scholar, if impeachment proceedings are commenced against President Obama for committing treason, bribery or other high crimes or misdemeanors. The enforcement measures in the executive actions show that they are balanced, and just like deferring the removal of low priority immigrants, the prioritization of removal of others is well within the authority of the President and are part of an overarching enforcement strategy. It is also worth reminding critics that the beneficiaries from these deferred action programs will be barred from the Affordable Care Act and will not be able to purchase health insurance or get any subsidies. These beneficiaries will also face the wrath of certain state governors who will deny them driver's licenses as Arizona did to DACA recipients in 2012. Fortunately, in *Arizona Dream Coalition v. Brewer*, the Ninth Circuit struck down Arizona's spiteful policy as being violative of the Equal Protection Clause. The decision hinged on Arizona's refusal to accept as proof of "authorized presence" in the U.S. an employment authorization document (EAD) based on DACA category (c)(33) work while they continued to accept EADs based on (c)(9) and (c)(10) categories, which respectively correspond to applicants for adjustment of status and applicants for cancellation of removal. This decision should hopefully persuade other circuit courts to also strike down discriminatory laws that deny such recipients driver's licenses.

There are other small bore benefits that will ensue from the executive action, but nevertheless make a meaningful and positive impact on people's lives and endeavor to repair a broken system. The nation demands and deserves action now; there is no need to wait. These operational adjustments are well within the President's legal authority and are summarized below. Their purpose and effect is not to thwart or frustrate the will of Congress. Rather, the President seeks to make it more effective by leavening the pernicious effects of legislative sclerosis through the injection of administrative flexibility that it so badly needs. In each of the initiatives listed below, the President does not create new law, which only Congress can do, but makes the current law relevant to the unique and emerging challenges of today and tomorrow:

• **Expanding the use of provisional waivers of unlawful presence to include**

the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens

The provisional waiver program DHS announced in January 2013 for undocumented spouses and children of U.S. citizens will be expanded to include the spouses and children of lawful permanent residents, as well as the adult children of U.S. citizens and lawful permanent residents. At the same time, DHS will further clarify the "extreme hardship" standard that must be met to obtain the waiver.

This can hardly be viewed as a power grab. The provisional waiver program allows those who are potentially inadmissible as a result of the 3 and 10 year bars to apply for the waivers in the United States prior to proceeding overseas for consular processing of their immigrant visas.

- **Modernizing, improving and clarifying immigrant and nonimmigrant programs to grow our economy and create jobs**

DHS will begin rulemaking to identify the conditions under which talented entrepreneurs should be paroled into the United States, on the ground that their entry would yield a significant public economic benefit. DHS will also support the military and its recruitment efforts by working with the Department of Defense to address the availability of parole-in-place and deferred action to spouses, parents, and children of U.S. citizens or lawful permanent residents who seek to enlist in the U.S. Armed Forces. DHS will also issue guidance to clarify that when anyone is given "advance parole" to leave the country – including those who obtain deferred action – they will not be considered to have departed. Undocumented aliens generally trigger a 3- or 10-year bar to returning to the United States when they depart.

In Through The Looking Glass: Adventures of Arrabally and Yerrabelly in Immigration Land, we advocated that *Matter of Arrabally*, 25 I.&N. Dec. 771 (BIA 2012) should be apply to every departure under advance parole, whether it was advance parole in the context of DACA or an adjustment of status application. We are pleased that the DHS has now directed its General Counsel to issue written legal guidance in this regard. We also encourage the DHS to use its parole authority under INA 212(d)(5) to parole entrepreneurs and other immigrants into the US, especially beneficiaries of approved I-130 and I-140 petitions, as we have previously done in Comprehensive Reform Through Executive Fiat. We also point to Two Aces Up President Obama's Sleeve To

Achieve Immigration Reform Without Congress: Not Counting Family Members and Parole in Place that advocate how parole in place, if applied retroactively, can also cure unlawful presence.

• Promoting citizenship education and public awareness for lawful permanent residents and providing an option for naturalization applicants to use credit cards to pay the application fee

To promote access to U.S. citizenship, DHS will permit the use of credit cards as a payment option for the naturalization fee, and expand citizenship public awareness. It is important to note that the naturalization fee is $680, currently payable only by cash, check or money order. DHS will also explore the feasibility of expanding fee waiver options.

• Supporting High-skilled Business and Workers

DHS will take a number of administrative actions to better enable U.S. businesses to hire and retain highly skilled foreign-born workers and strengthen and expand opportunities for students to gain on-the-job training. For example, because our immigration system suffers from extremely long waits for green cards, DHS will amend current regulations and make other administrative changes to provide needed flexibility to workers with approved employment-based green card petitions. Individuals with an approved employment-based immigrant petition who are caught in the quota backlogs will be able to pre-register for adjustment of status to obtain the benefits of a pending adjustment. This is expected to impact about 410,000 people.

We refer our readers to Waiting for Godot: A Legal Basis for Filing An Early Adjustment Application where we show a way for this to be done. It is well within the power of the Executive Branch to redefine what is meant by visa availability so as to allow those who are caught in the crushing visa backlogs to apply for work authorization and portability.

The "same or similar" definition will be clarified for adjustment applicants who wish to exercise job portability under INA 204(j) when their adjustment applications have been pending for more than 180 days. This is a welcome step as those who are promoted and take on higher levels of responsibilities should also be able to demonstrate that they are still in the "same or similar" occupation and thus keep their underlying green card applications valid. The length of time in Optional Practical Training for STEM graduates will be expanded and the relationship between the student and the school will be

strengthened for this period. The regulation that would authorize H-4 spouses to work will get finalized. Other changes, such as allowing STEM OPT post-master's degree where only the first degree is in a STEM field are under consideration. A full rulemaking will be undertaken to modernize the PERM labor certification program. There will also be greater consistency with the L-1B specialized knowledge program. It is hoped that in providing guidance on specialized knowledge the DHS take into account the holding interesting reinterpretation of specialized knowledge, as discussed in Fogo De Chao v. DHS : A Significant Decision For L-1B Specialized Knowledge Chefs And Beyond.

• **Visa Modernization**

A Presidential Memorandum has been issued directing the agencies to look at modernizing the visa system, with a view to making optimal use of the numbers of visa available under law. Issues such as whether derivatives should be counted and whether past unused visa numbers can be recaptured will be included in this effort.

Although the direction provided by the Presidential Memorandum has been left deliberately vague, it is hoped that the DHS seriously consider not counting derivatives separately in the employment and family-based preferences as that will significantly reduce the backlogs. In The Family That Is Counted Together Stays Together: How To Eliminate Immigrant Visa Backlogs and Why We Can't Wait: How President Obama Can Erase Backlogs With The Stroke Of A Pen, we advocated that there was no explicit authorization for derivative family members to be counted under either the Employment Based or Family Based preference in the Immigration and Nationality Act. The treatment of family members is covered by an explicit section of the Immigration and Nationality Act (INA), Section 203(d), which only states that derivatives shall be entitled to the same status and same order of consideration as the principal beneficiary and says nothing about whether they should be counted as one family unit or separately. Indeed, if the DHS does pay heed to our recommendation, which has gained national acceptance and has also been mentioned in a Congressional Research Report, it will make the executive actions more meaningful. If the family and employment preferences are cleared of their backlogs, and people can apply for green cards rapidly, the lack of H-1B visas should not be as hurtful to businesses as they are today. Indeed, this reinterpretation of the INA, again well within the authority of the President, will be as audacious for legal immigrants as the deferred action programs for the 5

million undocumented immigrants.

Needless to say, all of these executive actions are well within the President's authority whatever critics may say, and are much needed to repair a broken immigration system. Still, these executive actions are clearly no substitute for reform through Congress, and as indicated in The Fate of Executive Action After The Midterm Elections these actions should spur the Republican controlled Congress to pass better and more meaningful reforms. The President can only do so much through executive actions and cannot create new visa or green card categories, and many are bound to be disappointed. Parents of DACA recipients have also been left out. A tentative intention to study the possibility of counting derivative family members as an integral unit rather than on an individual basis was announced, but nothing more and certainly not definite. At the same time, these actions provide a blueprint for Congress to pass meaningful comprehensive immigration reform. They provide the template for legalizing a deserving group of immigrants who are not a priority for enforcement purposes and also seek to account for future flows by endeavoring to attract entrepreneurs, clarifying existing processes such as PERM labor certifications and the L-1B visa, and providing relief to those who are caught up in the crushing visa backlogs. The spirit of audacious incrementalism that animates the executive orders comes from the finest American tradition of liberal reform. Such an approach sets a problem on the road to solution in the belief and expectation that future progress will follow in a way that minimizes disruption and maximizes acceptance. Once the concepts enshrined in the executive orders are established, there can be little doubt that the scope of future operations and events will grow to bring other and more significant gains.

The problems that plague our immigration system are not beyond our ability to solve them. Their continued existence is testimony to a lack of will, a failure of imagination. If the President's critics and his supporters cannot agree on the legality or value of his executive orders, then let them agree on legislation to replace it. As Alfred Lord Tennyson's Ulysses so famously reminds us : " Come my friends, tis not too late to seek a newer world."

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