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COMPREHENSIVE IMMIGRATION REFORM THROUGH EXECUTIVE FIAT

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While the Obama administration struggles to get votes to overhaul our dysfunctional immigration laws in Congress, http://tinylink.com/?Pky1KrfcfI, and Arizona passes its shameful immigration bill, SB 1070, which legalizes racial profiling, http://tinylink.com/?a2IUa39ATc, there is a growing yearning for Congress to pass Comprehensive Immigration Reform (CIR) that would provide more pathways to visas and permanent residency and legalize the millions who remain undocumented. But do we need to wait endlessly for Congress to Act? We demonstrate in our article *Tyranny of Priority Dates*, http://scr.bi/i0Lqkz, that it is possible for the Executive to legalize the status of non-citizens without Congressional intervention to achieve something close to CIR.

Work Authorization and Parole

For instance, there is nothing that would bar the USCIS from allowing the beneficiary of an approved employment based I-140 or family based I-130 petition, and derivative family members, to obtain an employment authorization document (EAD) and parole. The Executive, under INA § 212(d)(5), has the authority to grant parole for urgent humanitarian reasons or significant public benefits. The crisis in the priority dates where beneficiaries of petitions may need to wait for green cards in excess of 30 years may qualify for invoking § 212(d)(5) under "urgent humanitarian reasons or significant public benefits." Similarly, the authors credit David Isaacson who pointed out that the Executive has the authority to grant EAD under INA §274A(h)(3), which defines the term "unauthorized alien" as one who is not "(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General" (emphasis added). Under sub paragraph (B), the USCIS may

grant an EAD to people who are adversely impacted by the tyranny of priority dates.

Likewise, the beneficiary of an I-130 or I-140 petition who is outside the U.S. can also be paroled into the U.S. before the priority date becomes current. The principal and the applicable derivatives would enjoy permission to work and travel regardless of whether they remained in nonimmigrant visa status. Even those who are undocumented or out of status, but are beneficiaries of approved I-130 and I-140 petitions, can be granted employment authorization and parole. The retroactive grant of parole may also alleviate those who are subject to the three or ten year bars since INA § 212(a)(9)(B)(ii) defines "unlawful presence" as someone who is here "without being admitted or paroled." Parole, therefore, eliminates the accrual of unlawful presence.

While parole does not constitute an admission, one conceptual difficulty is whether parole can be granted to an individual who is already admitted on a nonimmigrant visa but has overstayed. Since parole is not considered admission, it can be granted more readily to one who entered without inspection. On the other hand, it is possible for the Executive to rescind the grant of admission under INA §212(d)(5), and instead, replace it with the grant parole. As an example, an individual who was admitted in B-2 status and is the beneficiary of an I-130 petition but whose B-2 status has expired can be required to report to the Department of Homeland Security (DHS). who can retroactively rescind the grant of admission in B-2 status and instead be granted parole retroactively.

Historic Role Of Executive In Granting Immigration Benefits

While the authors have proposed the use of parole and EAD benefits to those who are beneficiaries of approved immigrant petitions and are on the path to permanent residency, but for the crushing backlogs in the employment and family quotas, parole and EAD can also be potentially granted to other non-citizens such as DREAM children or those who have paid taxes and are otherwise admissible. The Executive's use of parole, sua sponte, in such an expansive and aggressive fashion is hardly unique in post-World War II American history. The rescue of Hungarian refugees after the abortive 1956 uprising or the Vietnamese refugees at various points of that conflict comes readily to mind. While these were dramatic examples of international crises, the immigration situation in America today, though more mundane, is no less of a

humanitarian emergency with human costs that are every bit as high and damage to the national interest no less long lasting. Even those who are in removal proceedings or have already been ordered removed, and are beneficiaries of approved petitions, will need not wait an eternity for Congress to come to the rescue.

The government has always had the ability to institute Deferred Action, which is a discretionary act not to prosecute or to deport a particular alien. Like our proposal, Deferred Action is purely discretionary. They are both informal ways to allow continued presence in the United States. The INA never mentions deferred action. Neither does deferred action depends upon regulation. Deferred action is not mentioned in Title 8 of the Code of Federal Regulations ("8 C.F.R.") but only in the old, and now inapplicable, Operations Instructions. Both, our proposals and deferred action, are the products of limitations. The exercise of prosecutorial discretion to grant deferred action status is an expression of limited enforcement resources in the administration of the immigration law. Our advocacy of EAD and Parole outside the adjustment context is an expression of limited EB quotas and the impact of visa retrogression. Since both are inherently discretionary, they are not proper subjects for judicial review since, in both cases, there is no law to apply.

Deferred Action has also been applied to battered spouse and children self-petitioners who had approved I-360 petitions under the Violence Against Women Act, so that they could remain in the United States and obtain work authorization. In 2006, Congress, in recognition of this informal practice, codified at INA § 204(a)(1)(k) the grant of employment authorization to VAWA self-petitioners. Deferred Action has also been granted to U visa applicants. More recently, the DHS provided interim relief to surviving spouses of deceased American citizens and their children who were married for less than two years at the time of the citizen's death. Mr. Neufeld's memo, issued on June 15, 2009, provides extraordinary relief to spouses whose citizen spouses died regardless of whether the I-130 petitions were approved, pending or even not filed. Such beneficiaries may request deferred action and obtain an EAD. Then, on October 28, 2009, Congress amended the statute to allow, inter alia, a widow who was married less than two years at the time of the citizen's death to apply for permanent residence. See Pub. L. No. 111-83, 123 Stat. 2142 (2009).

Even more recently, on November 30, 2009, USCIS announced in a press release that certain affected persons in the Commonwealth of the Northern

Mariana Islands (CNMI) would be granted parole under INA § 212(d)(5). The Consolidated Natural Resource Act of 2008 (CNRA) extends most provisions of the United States immigration law to the CNMI beginning on November 28, 2009. As of this date, foreign nationals in the CNMI will be considered present in the United States and subject to U.S. law. In order to avoid their removal from the CNMI, the grant of parole will place individual members of CNMI groups in lawful status under the United States immigration law and permit employment authorization. Parole status will also allow for the issuance of advance parole when the individual seeks to depart the CNMI for a foreign destination.

In another display of Executive legerdemain, in March of 2000, a former INS official Mr. Cronin, in a Memo, http://www.boulettegolden.com/H_and_L_Travel_and_Advance_Parole.pdf, allowed nonimmigrants holding H-1B or L status to travel overseas while their adjustment of status applications were pending and be admitted on advance parole and still be able to work as if they were in H-1B or L status without first obtaining an EAD. The following Q&A extract in Mr. Cronin's memo is worth noting:

4. If an H-1 or L-1 nonimmigrant has traveled abroad and reentered the United States via advance parole, the alien is accordingly in parole status. How does the interim rule affect that alien's employment authorization?

A Service memorandum dated August 5, 1997, stated that an 'adjustment applicant's otherwise valid and unexpired nonimmigrant employment authorization...is not terminated by his or her temporary departure from the United States, if prior to such departure the applicant obtained advance parole in accordance with 8 CFR 245.2(a)(4)(ii).' The Service intends to clarify this issue in the final rule. Until then, if the alien's H-1B or L-1 employment authorization would not have expired, had the alien not left and returned under advance parole, the Service will not consider a paroled adjustment applicant's failure to obtain a separate employment authorization document to mean that the paroled adjustment applicant engaged in unauthorized employment by working for the H-1 or L-1 employer between the date of his or her parole and the date to be specified in the final rule.

A close examination of this astonishingly creative policy reveals that the Executive presumably allowed such an individual to continue working without

any formal work document. Admitting an H-1B on advance parole (and thus presumably as a parolee rather than as an H-1B nonimmigrant), and allowing him or her to extend H-1B status subsequently, while permitting this individual to continue working for the employer without an EAD, required creative thinking on the part of the government. These are a few examples of how the Executive has creatively found ameliorative solutions within the four corners of the INA.

No Violation of Separation of Powers

While some may argue that there is no express Congressional authorization for the Executive to enact 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 Executive under our proposal 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." *Id.* at 635. Although President Truman did not have authorization to seize the mill to prosecute the Korean War, Justice Jackson laid a three-pronged test to determine whether the President violated the Separation of Powers clause. First, where the President has express or implied authorization by Congress, his authority would be at its maximum. Second, where the President acts in the absence of congressional authority or a denial of authority, the President may still act constitutionally within a "twilight zone" in which he may have concurrent authority with Congress, or in which its distribution is uncertain. Under the second prong, Congressional inertia may enable, if not invite, measures of independent presidential authority. Finally, under the third prong, where the President acts in a way that is incompatible with an express or implied will of Congress, the President's power is at its lowest and is vulnerable to being unconstitutional.

Under our proposal, the President is likely acting under either prong one or two of Justice Jackson's tripartite test. We have shown that INA § 212(d)(5), which

Congress enacted, authorizes the Executive to grant interim benefits for "urgent humanitarian reasons" or "significant public benefits." Moreover, INA § 274A(h)(3)(B) provides authority to the Executive to grant employment authorization. Even if such authority is implied and not express, Congress has not overtly prohibited its exertion but displayed a passive acquiescence that reinforces its constitutional legitimacy. Operating in Justice Jackson's "twilight zone," such constructive ambiguity creates the opportunity for reform through Executive initiative. From this, we must conclude that, had Congress not enacted INA § 212(d)(5), the President could not act by fiat to broaden or diversify its application beyond the adjustment context. In terms of EAD issuance, Congress has rarely spoken on this except via INA § 274A(h)(3)(B), so that many instances of EAD issuance are purely an act of executive discretion justified by that one statutory provision. Furthermore, INA § 103(3) confers powers on the Secretary of Homeland Security to "establish such regulations, prescribe such forms or bonds, reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."

The President is not divorced from lawmaking; that is the very reason why the Framers provided an executive veto power. If the President was totally divorced from the making of laws, why give such a weapon to limit congressional prerogative? Once we accept the fact that the Executive is a junior partner in lawmaking, then the use of executive initiative to promulgate implementing and interpretative regulations, as we propose be done in the grant of parole and EAD benefits, becomes a valid extension of this well settled constitutional precept.

Chevron and Brand X Doctrine

We proffer yet another legal theory to support our proposal. When the Service extended Occupational Practical Training from twelve months to twenty-nine months for STEM students, the Programmers Guild sued DHS. in *Programmers Guild v. Chertoff*, 08-cv-2666 (D.N.J. 2008), challenging the regulation, and initially seeking an injunction, on the ground that DHS. had invented its own guest worker program without Congressional authorization. The court dismissed the suit for injunction on the ground that DHS was entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*. 467 U.S. 837 (1984). Under the oft quoted Chevron doctrine, 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 step in only when the agency's interpretation is irrational or in error. The Chevron doctrine has two parts: Step 1 requires an examination of whether Congress has directly spoken to the precise question at issue. If Congress had clearly spoken, then that is the end of the matter and the agency and the court must give effect to the unambiguous intent of the statute. Step 2 applies when Congress has not clearly spoken, then the agency's interpretation is given deference if it is based on a permissible construction of the statute, and the court will defer to this interpretation even if it does not agree with it. Similarly, the Supreme Court in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005), while affirming *Chevron*, held that if there is an ambiguous statute requiring agency deference under *Chevron* Step 2, the agency's interpretation will also trump a judicial decision interpreting the same statute. *Brand X* involved a judicial review of an FCC ruling exempting broadband Internet carrier from mandatory regulation under a statute. The Supreme Court observed that the Commission's interpretation involved a "subject matter that is technical, complex, and dynamic;" therefore, the Court concluded that the Commission is in a far better position to address these questions than the Court because nothing in the Communications Act or the Administrative Procedure Act, according to the Court, made unlawful the Commission's use of its expert policy judgment to resolve these difficult questions.

The District Court in dismissing the Programmers Guild lawsuit discussed the rulings in *Chevron* and *Brand X* to uphold the DHS's ability to extend the student F-1 OPT regulation. Programmers Guild appealed and the Third Circuit also dismissed the lawsuit based on the fact that the Plaintiffs did not have standing. *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239 (3rd Cir. 2009), *petition for cert. filed*, (U.S. Nov. 13, 2009) (No. 09-590). While the Third Circuit did not address *Chevron* or *Brand X* – there was no need to – it interestingly cited *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), which held that Congress is presumed to be aware of an administrative interpretation of a statute and to adopt that interpretation when it reenacts its statutes without change. Here, the F-1 practical training regulation was devoid of any reference to the displacement of domestic labor, and Congress chose not to enact any such reference, which is why the Programmers Guild lacked standing.

Brand X tells us that federal agencies and Congress have a commingled role to play in making new law: "*Chevron's* premise is that it is for agencies, not courts,

to fill statutory gaps." Is there a more effective constitutional answer to the charge that our argument violates separation of powers? If the FCC can use its policy expertise to exempt broadband Internet carriers from mandatory regulation under the Communications Act, why can't the USCIS use its policy expertise to extend Parole and broaden EAD issuance, especially since the latter is entirely a creature of regulation? The raison d'être for the *Chevron* defense that federal agencies are owed deference when they seek to execute the law through regulatory interpretation suggests, if not compels, the conclusion that, while only Congress can enact laws, the executive agencies charged with their enforcement can say what these laws mean, this in turn, determines how they are applied or enforced. Those who argue that we seek to violate the separation of powers doctrine take an artificially cramped view of what lawmaking involves and ignore the fact that, like the idea of judicial review itself, no law can live apart from interpretation that, by its very nature, inevitably changes the law itself.

Chevron and *Brand X* are more than just constitutional justifications of agency action but an invitation to action where the Congress has stayed its hand. Until now, Brand X has been feared by the immigration bar and immigration advocates for its negative potential as a legitimization of government repression. Yet, it has a positive potential by enabling the Executive to expand individual rights and grant benefits sua sponte. We do not need to live in fear of *Brand X*. We can make it our own.

While Arizona has restored the relevance of CIR and provided its advocates within the Democratic Party with a new political imperative, the prospects for ultimate passage remain as uncertain as ever. Spurred by their triumph in Arizona, advocates of state immigration laws are moving ahead on a broad front all across the land. We need action now. Set against such a turbulent backdrop, there is a clear and present need for moving forward through executive action to combat the Arizona law and the many copycat versions that are and will continue to appear in other states. Only through such agency initiative can the nativist surge be checked until CIR becomes a reality.