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OBAMA'S PARADOXICAL DEPORTATION POLICIES

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President Obama has been called the Deporter in Chief as he has presided over nearly 2 million deportations during his presidency – higher than that of any other President. On the other hand, President Obama has also rolled out some of the most innovative prosecutorial discretion policies, which include granting deferred action to hundreds of thousand immigrants who came to the United States when they were young.

A revealing article in the Los Angeles Times shows that the high number of deportations is largely misleading. The likelihood of an undocumented individual already in the United States who has developed ties being deported has lessened considerably under President Obama. Even people with removal orders can seek a stay of removal if they establish that they are deserving of prosecutorial discretion under the Morton June 17, 2011 Memo. Young immigrants who arrived in the United States prior to the age of 16 and who meet other conditions can apply for deferred action, along with work authorization, under the Deferred Action for Childhood Arrivals (DACA) program.

The people who are being deported, and are part of the increased statistics, are those who recently crossed the border without inspection and are apprehended within 100 miles from the border. Under previous administrations, such people were informally bused back outside the United States in what was known as “voluntary returns.” Under the Obama administration, these people are fingerprinted and issued formal deportation orders. INA section 235(b)(1), which was enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, granted authority to expeditiously remove persons at the border who are deemed inadmissible under INA sections 212(a)(6)(C) for making a material misrepresentation or 212(a)(7) for not possessing valid visa documents. On August 11, 2004, DHS

promulgated a rule to expand expedited removal to persons who are present in the United States without having been admitted or paroled and who are apprehended within 100 miles from the southern border and who also cannot prove that they were physically present in the country continuously for the preceding 14 days. This rule was expanded to all borders on January 30, 2006.

This is not to suggest that the increased use of expedited removal to recent border crossers does not have devastating effects and should not be remedied through immigration reform measures, since many of these crossers are entering the United States to join family members. Still, it is the expanded use of expedited removal that has resulted in an increase of deportations, when under prior administrations, such persons were informally returned from the United States without terming them as deportations. Once a recent border crosser is expeditiously removed, a reentry into the United States also carries severe criminal penalties unlike a 'voluntary return." On the other hand, a person who has been in the United States for a longer period is less likely be placed in the removal proceedings, and even if this person is issued a Notice to Appear before an Immigration Judge, he or she can have a shot at requesting prosecutorial discretion under President Obama's administration than before, which will result in either administrative closure or termination of the case. Unfortunately, the majority of people who came to the attention of the immigration enforcement authorities within the interior, resulting in deportation proceedings, are those who got arrested for minor offenses.

As an aside and consistent with the topic of this article, there are instances when it can be more beneficial for a person to be placed in removal proceedings than not. Pursuant to INA section 240A(b), an individual who meets 10 years of physical presence, good moral character for this entire period and can demonstrate exceptional and extremely unusual hardship to qualifying relatives who are either citizens or permanent residents can obtain cancellation of removal, leading to lawful permanent resident status. The hardship standard is extremely high and needs to be substantially beyond the hardship that would ordinarily be expected to result from the alien's deportation, as demonstrated in cases such as Matter of Monreal, 23 I&N Dec. 53 (BIA 2001); Matter of Andazola, 23 I&N Dec. 319 (BIA 2002) where cancellation was denied; and Matter of Recinas, 23 I&N Dec. 467 (BIA 2002) where it was granted. Another advantage of being in removal proceedings is to escape the 3 year bar based on unlawful presence of more than 180 days but

less than 1 year pursuant to INA section 212(a)(9)(B)(i)(I). Departing the United States under a grant of voluntary departure, which is issued prior to the alien accruing 1 year of unlawful presence, and after the commencement of proceedings, may allow this alien to reenter the United States without being subject to the 3-year bar. Finally, another tactical advantage to being placed in removal proceedings is when an application for adjustment of status is denied, and the best way to get a second chance is to have an Immigration Judge review the adjustment application de novo in proceedings. The irony is that ICE is often reluctant to put a person under these circumstances in removal proceedings because it is does not have the resources, and is also of the view that as an enforcement agency, it is contrary to the agency's mission to place someone in removal so that he or she can ultimately secure an immigration benefit. One note of caution is that those who came into the United States on a visa waiver should not consider requesting a removal proceeding as they have waived their right to a removal hearing under INA section 217(b).

President Obama used the increased deportation statistics to show that he was enforcing the law, but this has backfired among his critics. Those who favor stricter enforcement are not satisfied with the record increase in deportations by pointing to the Administration's expanded prosecutorial discretion policies that has resulted in the deferring of thousands of deportations. Enforcement advocates in Congress use the President's expanded prosecutorial discretion policies, while conveniently ignoring the spike in deportations, as an excuse to delay immigration reform and cooperating with the President. At the same time, immigration advocates and allies have criticized President Obama for increasing deportations without truly bringing about genuine immigration reform. After the passage of the S. 744, the Senate's immigration reform bill last year, there is now a stalemate where the prospects of immigration reform in the House have almost evaporated despite unanimous agreement that the immigration system is broken.

If President Obama desires to cement his legacy with respect to immigration reform, he may not be able to achieve it through this Congress. In the past, President Obama has indicated that he does not have the authority to further expand prosecutorial discretion, but this may have to change. The only way for the President to fulfill the promise he has made to so many who voted for him is to go about it on his own through administrative policy changes. The Executive branch can expand deferred action to a broader group of people,

which could include family members of DACA recipients and those who have US citizen children. The prosecutorial discretion guidelines under the Morton Memo ought to be further strengthened to ensure that they are not ignored by ICE officials, as many are wont to do. The parole in place policy for relatives of military personnel can be expanded to benefit those who are on the pathway to permanent residency if they are beneficiaries of employment and family immigrant visa petitions. In an eloquent New York Times editorial entitled Yes He Can, On Immigration, the following is worth extracting:

Mr. Obama may argue that he can't be too aggressive in halting deportations because that will make the Republicans go crazy, and there's always hope for a legislative solution. He has often seemed like a bystander to the immigration stalemate, watching the wheels spin, giving speeches and hoping for the best.

It's hard to know when he will finally stir himself to do something big and consequential.

The President must no longer fear doing something big and consequential on the immigration front. Some may justifiably fear that if the President ameliorates the plight of undocumented people through administrative reform measures, another President can quickly undo them; and therefore it is best for Congress to enact immigration reform. Administrative remedies are clearly no substitute for comprehensive immigration reform passed through Congress, but it would be hard for a future President to undo wise administrative reform measures that provide a fix to a broken immigration system. For example, DACA benefits have already been granted to hundreds of thousands of young immigrants who have been able to graduate from college and find jobs. It would be politically imprudent for a future President to undo DACA. Indeed, S. 744, the bipartisan reform bill that was passed by the Senate, incorporates DACA and places DACA recipients on a faster track to permanent residency. If President Obama implements bold administrative measures, it would be difficult for a future administration to undo them, and it is likely that a future Congress will have no choice but to readily adopt them into law.