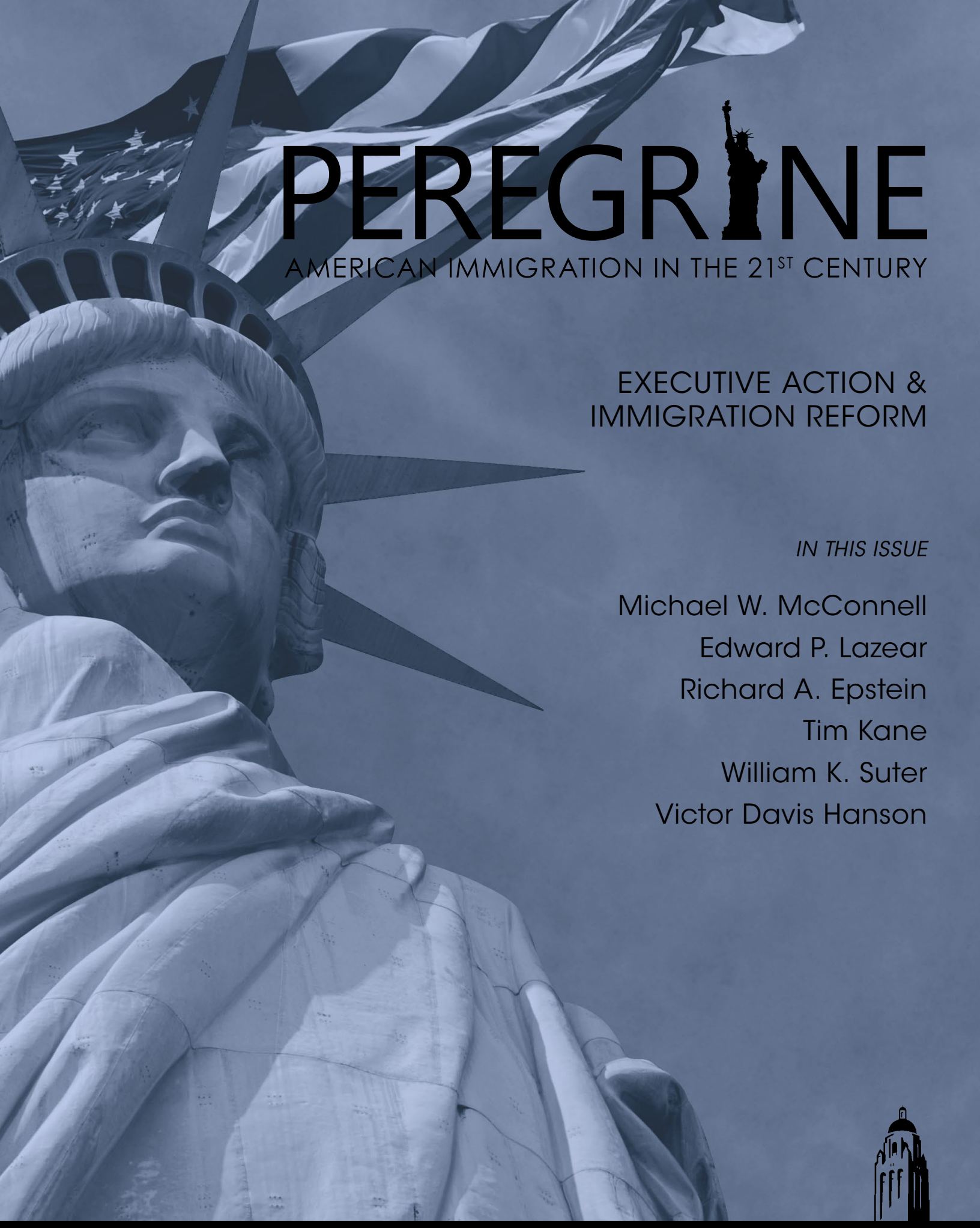

PEREGRINE

AMERICAN IMMIGRATION IN THE 21ST CENTURY

EXECUTIVE ACTION & IMMIGRATION REFORM

IN THIS ISSUE

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A Publication of the Hoover Institution

Issue 1403

LETTER FROM THE EDITOR

Two weeks after the midterm election of 2014, President Obama announced a series of executive actions on immigration policy in a fifteen-minute televised speech from the White House. The centerpiece was announcing "deferred action" for up to five million undocumented immigrant adults, including work permits and driver's licenses for those who register.

These actions did not resemble the comprehensive legislation passed by the Senate in 2013 and have never been offered as incremental legislation. Still, many advocates of immigration reform are elated because those actions seem to resolve the long-standing impasse in Congress: yet changing US law without legislative authority is controversial. Indeed, there is some concern that this executive action has made legislative progress even more difficult.

The justification for taking action now is that "America can't wait," yet it was made to wait until after the November elections by the White House, which saw a historic sweep of Republicans in federal and state roles. The timing was also notable because it comes six years after the president was first elected and with only two years remaining in his presidency. He might have announced the actions before the elections, when the Democratic Party was in the majority in the Senate, or he might have announced them six years ago, when his party controlled the House of Representatives as well.

The Hoover Institution conducted a rapid survey of immigration scholars to gauge their reaction to the November 20 announcement and also published a series of reactions by Hoover fellows. These were published online in December but have been collected here in PDF format, supplemented by a few additional essays written with more time to reflect on the consequences.

This issue includes essays by Eddie Lazear (co-chair of the Conte Initiate on Immigration Reform), Victor Davis Hanson, Michael McConnell, Richard Epstein, William Suter, and Tom Church.

Immigration remains strong in America, with millions of legal migrants welcomed to the United States every year. Yet the controversy over *illegal* immigration continues to rage. This most recent executive action will undoubtedly add more intensity for one simple reason: President Obama announced that his deferred action on deporting older undocumented immigrants will require them to register for temporary status lasting three years. The next US president will have to figure out a way to find a permanent fix.

Tim Kane
Editor

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Michael W. McConnell

Last November, the Obama Administration announced that it will cease enforcement of the immigration laws with respect to some four million undocumented persons. Instead, it will award them legal status and work authorizations. Quite apart from whether this is good policy, it is almost certainly bad law. The Constitution vests Congress—not the executive—with authority to make uniform laws on naturalization. Congress has passed laws. It is the executive's duty to enforce them.

Congress can do little to defend its constitutional prerogatives because the immigration service is self-funded, and the President is likely to hold the Department of Homeland Security hostage to prevent a funding cut-off. Fortunately, in this instance there is a judicial remedy.

The U.S. District Court for the Southern District of Texas heard arguments on January 15 from the State of Texas, on behalf of roughly half of the states, who have sued to block implementation of the immigration directive. The states plausibly claim standing under the precedent set in *Massachusetts v. EPA* (2007). If liberal states had standing to object to the Bush Administration's failure to regulate greenhouse gases, Texas and the other states in this case have standing to object to the Obama Administration's failure to enforce the immigration laws. In both cases, the failure to enforce the law imposes serious costs on the states. The states have submitted evidence indicating that the availability of work permits will stimulate more illegal immigration, and with it higher costs for education, crime control, health care, driver's licenses, and other programs.

The states are not asking the courts to require the Administration to deport anyone—or even to employ resources to enforce the law. It may be a breach of executive duty for the President to refuse to enforce a law because of policy disagreements with it, but the courts are ill-suited to compel enforcement. Instead, the states are asking the courts to prevent the Administration from taking affirmative steps in violation of the immigration laws, such as handing out work authorizations. Enjoining the executive from taking actions that violate the law is a routine exercise of judicial power.

These affirmative steps are the principal point of the President's immigration directive. Even before the directive, almost no one was deported who had not committed some other crime. The real change wrought by the directive is to give the covered persons a legal status and the right to work in this country. And those are precisely the steps the courts are likely to invalidate. The district court

BACKGROUND ON THE FACTS

by Tom Church

On November 20th, 2014, President Obama issued a series of memoranda to the various cabinet secretaries responsible for overseeing the nation's immigration system. The actions were expressly not changes in law, although the President proclaimed he had taken actions affecting naturalization, deferred action, parole-in-place, and border security. Some of the actions are permanent, others are explicitly temporary (notably the 3-year status of deferred action on deportations), but all will affect millions of undocumented immigrants in the United States.

Two of the largest administrative changes concern so-called DREAMers and undocumented immigrant parents of U.S. citizens or Legal Permanent Residents (commonly called Green Card holders). Under the first change, the current Deferred Action for Childhood Arrivals (DACA) program is extended from two-year renewable relief period to three years, allowing adults who arrived illegally as children to gain temporary permission to remain in the United States. The established precedent is that individuals given "deferred action" are also granted work authorizations during their term. The previous maximum age of 31 for receiving a relief was also eliminated. The extension is estimated to affect an estimated 235,000 to 290,000 individuals.

The second administrative action provides similar deportation relief to undocumented immigrants who are parents of U.S. citizens or green card holders, sometimes known as DAPA. Individuals qualify if they have resided in the U.S. continuously since January 1, 2010, but must register to receive three-year temporary permits to live and work here. The change will affect an estimated 3.9 million adults. Parents will have to pass a background check

can issue a preliminary injunction against these measures before the administration can begin processing applications. That will give the courts time to decide—all the way up to the Supreme Court, if necessary—whether the President can alter the law of the land without action by Congress.

The administration's immigration directive cannot possibly be excused under the rubric of "prosecutorial discretion." Prosecutorial discretion is a practical concept based on the reality that there are not enough officers to enforce every law in every case. But giving out work permits is not mere inaction, and it does not save resources. Indeed, the President has announced the hiring of a thousand new agents to process applications for the new status.

Nor can these actions be defended on the basis of precedents set by past presidents. The Administration has cited five prior occasions when a president granted "deferred action" status to small cohorts of undocumented aliens who otherwise would face removal. In each of these instances, however, Congress had explicitly granted legal status to the affected persons, and the President's action was solely a temporary bridge to legal status approved by Congress. One example: when Hurricane Katrina forced the closure of colleges in the Gulf, President Bush extended "deferred action" status to foreign students on student visas to give them time to enroll elsewhere. This was not in defiance of congressional will, but in service of it.

Throughout this process, President Obama has asserted the power to act because Congress has not taken his suggestions for statutory change. This has it backwards. Congress has no obligation to pass laws the President wants passed, and its failure to enact his desired program gives him not one iota of authority to act on his own. In our system of government, statutory change can be effected only by the legislative branch. No matter how frustrated President Obama may be with the failure of his political agenda in Congress, he has no constitutional alternative. As the Supreme Court has stated: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution and entirely inadmissible." [(*Kendall v. United States* (1838).]

Michael W. McConnell

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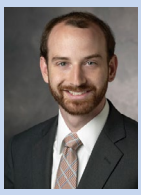
and pay an application fee for the provisional waiver.

According to the Department of Homeland Security, "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."

The White House rationale for these actions is that "Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States." According to one memorandum, such deferred actions are a "long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time." DHS "deprioritizes" an individual's case (of residing illegally in the United States) for humanitarian reasons, administrative convenience, or the interest of DHS' mission.

President Obama made several other changes to the way the immigration system operates. His executive orders granted work authorization to spouses of H-1B visa holders who have been approved for green cards but are waiting to receive them, expanded portability for current temporary worker visas, extended work authorizations for newly graduated foreign workers, expanded provisional waivers for undocumented immigrants applying for green cards, and subsidized naturalization for low-income green-card holders eligible to become U.S. citizens.



Tom Church

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An Immigration Game Plan for the New Congress

by Edward P. Lazear

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This essay appeared in the Wall Street Journal *on December 4, 2014.*

President Obama's unilateral action on immigration angered many in Congress and among the public. With Republicans taking control of Congress, it is tempting to respond aggressively. Instead, a more measured and constructive approach would move the country forward and address the concerns that the voters expressed in the recent election.

To fix a system that the president admits is "broken," Congress can pass legislation to deal with three issues. First, use market indicators to award green cards that favor immigrants in needed occupations and industries. Second, create a new class of visa that carries an annual fee, available to some of the undocumented, and provide for a guest-worker program. Third, use employer-based incentives to deal with illegal immigration, past and future.

Right now most immigrants come to the U.S. on the basis of family ties, not on the basis of their skills. Family reunification considerations are important, but they should not trump all others. Typically, fewer than one-sixth of immigrants each year obtain green cards based on their skills, according to the Department of Homeland Security.

More slots should be allocated on the basis of occupational needs. The easiest way to determine which industries and occupations are experiencing labor shortages is to identify those with rapid wage growth. When labor demand rises relative to supply, wages go up. According to Bureau of Labor Statistics data, information services, management and pipeline transportation saw the most rapid wage growth from 2006 to 2014. Data on industry and occupation vacancy and unemployment rates can also be used to determine labor-market demand.

Congress could allocate perhaps half of the annual number of green cards issued on a statistics-determined skill basis, where priority is given to skills for which demand is growing most rapidly relative to supply. Green-card entry criteria could be adjusted periodically to reflect labor-market conditions.

This reform would help the economy but several studies over the years show that it would not significantly depress domestic wages. One study by Zvi Eckstein and Yoram Weiss on the massive Soviet migration to Israel (*Journal of the European Economic Association,* 2004) revealed that immigration had at most small effects on the wages of the native-born. Robert LaLonde and Robert H. Topel (*American Economic Review,* 1991) and Giovanni Peri (*Institute for the Study of Labor,* 2014) provide evidence that immigrants have negligible effects on those already in a country—wage pressure, if any, is primarily on immigrants who came earlier. Using labor-market data to determine labor-market tightness will mitigate any adverse impact on wages.

In addition, perhaps 250,000 temporary worker visas can be issued annually to enhance already existing H-1 and H-2 foreign-worker visa programs. The new visa would allow workers to stay for up to two years and be concentrated in industries with shortages.

Most Americans accept that those who have entered illegally or overstayed their visas have committed a crime. Complete amnesty seems inappropriate and would encourage illegal entry in the future. As an alternative to deportation, however, one reasonable approach is to fine undocumented immigrants rather than deport them.

Congress could create a "Z" visa, to be issued to undocumented immigrants who can demonstrate that they have been in the U.S. for five years or more and have no criminal record. The visa would allow them, their spouses, and children to stay, provided that they pay an annual visa fee of, say, a few hundred dollars. Anyone with a Z visa could apply for a green card, but would go to the end of the queue, continuing to

have Z status during the waiting period, as long as the annual visa fee was paid.

Holders of the Z visa would be able to work while they wait for their green cards. A useful and equitable extension of the Z-visa system would be to allow a limited number of those who are not already in the country, but have been waiting patiently, to obtain Z visas and pay the visa fee while they await regular green-card status.

Finally, Congress should create appropriate incentives to apply for legal status. Employer enforcement is essential to ensure that the undocumented do not choose to stay in the shadows rather than pay the fee for a Z visa. Programs like E-Verify are necessary and should be enhanced. Firms should be fined heavily for hiring those who are here illegally, but given safe harbor as long as they check the status of new employees.

A system that penalizes employing those without legal status in the U.S. is also the best way to keep new illegal immigrants out. Border enforcement is necessary and uncontroversial, but immigrants who cannot work cannot afford to live in the U.S. According to the Pew Hispanic Center, nearly half of all illegal immigrants in the U.S. entered the country legally and overstayed their visas. The only way to close that avenue is to eliminate their employment possibilities.

Obama's Amnesty Problem

by Richard A. Epstein

Richard Epstein is a senior fellow at the Hoover Institution and a professor of law at New York University.

This essay appeared in Defining Ideas *on November 24, 2014.*

On Thursday November 20, President Obama delivered a controversial address to the nation on the contentious subject of immigration. In it, he outlined his plan to grant amnesty to some 3.5 million illegal immigrants in the United States. Recent polling data suggests that the President is sailing in choppy waters. The opposition stems in part from concern about the abuse of presidential prerogatives and in part from the unpopularity of his pro-immigration policies. Democrats have remained relatively silent on the matter. Republicans, meanwhile, have decried his unilateral executive action, which bypasses Congress, and are now considering the political and legal options to either block or slow down the President's initiative.

The stars are aligned for a major shake-up of immigration policy. Without question, the pressures on immigration policy are intensified by the forces that shape the global economy. As a nation we face the unenviable situation of trying to keep out illegal aliens on the one hand, and trying to give some measure of stability and protection to the immigrants, many of whom are here illegally, on whom the operation of the economy depends.

I wish I knew how to best resolve these issues, but like most people I am torn by two conflicting impulses. On the one hand, I am generally supportive of policies that allow people to come to America to start a better life for themselves and their families. On the other, I am afraid that immigration, if left unchecked, could generate massive burdens that could overwhelm our already fragile social and political structure.

The President reflected this conflict in sentiments by stressing how hard he was working to keep new immigrants from entering illegally, while simultaneously hoping that amnesty would make life better for the illegal immigrants already in the United States, many of whom are parents of citizens of the United States. But it will be hard to apply sticks to would-be illegal immigrants outside the United States while offering carrots for those inside.

The tensions so apparent on the policy front are matched by the difficulties in deciding whether the President has exceeded the constitutional powers of his office, on which there is a hopeless division of opinion. The relevant text of the Constitution is the "take care" clause of Article II, Section 3, which states: The President "shall take care that the Laws be faithfully executed." The hard task is figuring out what that short sentence means in the context of an ever expanding administrative state, which has the potential to make

a mess of immigration policy. It is easy to say that the President acts in conformity with the law when he or his subordinates enforce the law as written in all cases to which it applies. But at a minimum, executive branch officials have to make hard choices to decide whether the benefits of amnesty outweigh the costs, especially in light of other options that are foreclosed. No level of Congressional oversight can answer that question, which for better or worse necessarily resides with the President.

In this context, the word "faithfully" takes on two contradictory meanings. In the first sense, to be faithful to law is to follow its commands no matter what. But alternatively, like any prudent corporate CEO, the President also has to know when to back off, which means that some major use of discretion is an inseparable feature of holding the office. Some commands are literally impossible to implement within a congressional time frame, so that delay or partial enforcement are the only available alternatives. At other times, national emergencies require a reordering of priorities. Congress sometimes makes the President's life easier by allowing him to waive particular deadlines or requirements, a power all too easily abused. Running a national economy is not quite like stopping at red lights and going on green ones.

So just how far can the President deviate from the letter of the law? One answer to that question is found in the detailed and carefully crafted legal memorandum from Karl R. Thompson in the Office of Legal Counsel which blessed key components of the President's "deferred action program" that would expand amnesty for at least 3.5 million illegal immigrants, plus about 235,000 persons eligible on the Deferred Action for Childhood Arrival Program.

A policy of amnesty goes far beyond a simple decision to not prosecute illegals, which the President could have made in piecemeal fashion, without making any grand declaration. But his amnesty makes the designated illegal immigrants eligible to receive work permits, Social Security numbers, and driver's licenses, at least on a temporary basis. Thompson carefully points out that the presidential decisions do not put these immigrants on the path to citizenship, as amnesty need not be extended and could be canceled at any time. But the politics plays out the other way. Once expectations become settled, undoing a decision of this magnitude would surely disrupt the lives of millions of people who have paid little attention to the fine print.

So just how good a case has Thompson made? As an advocate, he has done a first-class job of marshaling the available precedents in support of his position. But unfortunately, he overstates the scope of presidential power. As Thompson repeatedly notes, the limited resources of the ill-named Immigration and Customs Enforcement (ICE) allow for the removal annually of just 400,000 thousand of the 11.3 million illegal aliens estimated to be in the United States. Hence hard choices have to be made on where to spend ICE's limited budgetary resources.

But Republican howls of protest against the President's unilateral decision would have been reduced to whimpers if the President had simply announced that he would use those resources to chase after hardened criminals first, minor criminals next, and other cases third. Obviously the President's unilateral decision has gone far beyond those modest contours. Yet the Thompson memo never explains why the resources now available to ICE are exhausted by pursuing persons in the first two categories. Putting serious cases first does not justify wholesale disregard of lesser forms of illegality that everyone agrees are clearly subject to a statutory duty.

Unfortunately, the President can take little comfort from either of the two standard justifications for presidential discretion. His wholesale amnesty is not required by novel or unanticipated circumstances: this problem has been brewing for years. Nor can the President claim that it is "impossible" to discharge the statute. All he needs to do is continue on the same course he has taken throughout his term. Keep the priorities set, but deport illegal immigrants in the third category to the extent that resources permit. A wholesale amnesty goes rather far in the opposite direction, especially when coupled with the first steps toward the incorporation of illegal aliens into the American population.

Nor does it help that President Obama has on previous occasions expressed his frustration to cut a deal with Congress to revise immigration policy. To my knowledge, no president has ever put forward his inability to persuade the Congress to adopt his position as a reason to act alone, especially when the system of

checks and balances is intended to limit the scope of unilateral presidential action.

The cases in the Thompson memo contain language that recognizes the need for presidential discretion in the application of the law, but none of them deal with anything like the present situation. Thompson leads off with the difficult case of *Heckler v. Cheney,* which stands for the general proposition that the courts do not have the power to require the President to take enforcement action in any particular set of cases. But *Heckler* dealt with the refusal of the Food and Drug Administration to intervene on behalf of convicted prisoners facing death sentences who demanded that the FDA block the use of unapproved lethal drugs to achieve their executions. It is hard to see how the general FDA mandates to insure the safety and effectiveness of prescription drugs relate to this case. And furthermore, no one is asking the President to do anything at all.

Similarly, little comfort can be obtained from *United States v. Armstrong,* in which the defendant in a crack cocaine case was denied discovery on the claim that he had been "singled out" for prosecution on the grounds of race. The case only deals with the usual vicissitudes of litigation; it did not deal with a categorical refusal to prosecute in any and all crack cocaine cases. Closer to the mark is a case like *Knauff v. Shaughnessy,* which held that the Attorney General did not have to give a hearing to the alien wife of an American citizen who had served honorably during World War II before deciding to exclude her from the country. The case shows the few individual rights that aliens have against the United States. But the case did not involve any conflict between the President and the Congress because the government's action had full statutory authorization. There was, quite simply, no conflict between the executive and legislative branch.

In terms of overall scale, perhaps the most dramatic case is the 2012 decision in *Arizona v. United States,* which struck down key provisions of an Arizona law intended to discourage the economic activities of illegal immigrants within the state. But here again, the case presented no conflict between the President and the Congress, so that the sole question in the case was whether Congressional legislation preempted state activity within the field. The case was not a fight about how far the President can go against the will of Congress.

As a general matter, I think that the precedents do not support the President's position, but on this issue, the courts may be willing to give the President more leeway in light of his key position in overseeing the entire immigration complex. But for the moment at least it is not certain who has standing to challenge the decision in court. The short game lies with Congress, and the situation will change dramatically come 2015 when the Republicans take over both houses of Congress, at which point the President will have to rely on his veto power to keep the program in place. How the two sides will tangle politically is hard to predict in advance.

In the final analysis, the President will get a lot of credit for taking the lead on an issue with a strong humanitarian dimension. But he deserves a lot of blame for moving unilaterally to alter the uncertain boundary between executive and legislative action. Anyone who has worked with constitutional law knows that the Constitution solves only the first tier of key questions, leaving the remainder to be worked out by inter-branch custom and common practice. Institutional stability is key. But now that the President has pulled these institutional threads asunder, who in the current political environment can put them back into place?

The Economic Effect of Immigration

by Tim Kane

Tim Kane is an economist, entrepreneur, and veteran air force officer. He is currently a research fellow at the Hoover Institution at Stanford University, and serves as co-chair of the Conte Initiative

Critics of the president's executive actions on immigration reform go too far when they claim that immigrants are harmful to the US economy. Simplistic appeals to economic logic, gilded with nativist assumptions, hint that the arrival of millions of immigrant workers cannot help but compete for a finite number of American-based jobs. When labor supply rises, Econ 101 says that wages fall, right? Wrong. The problem with this

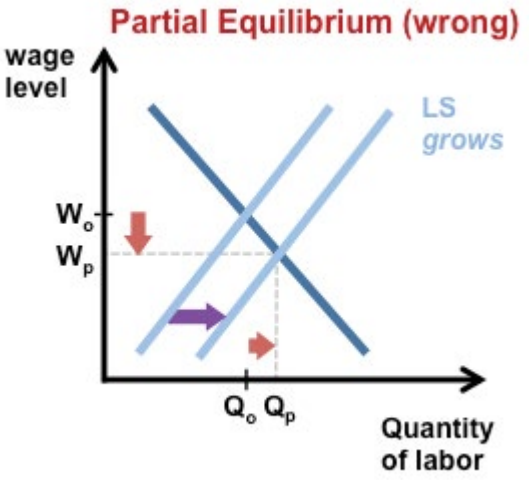
kind of approach is that it ignores the dynamic nature of the US economy.

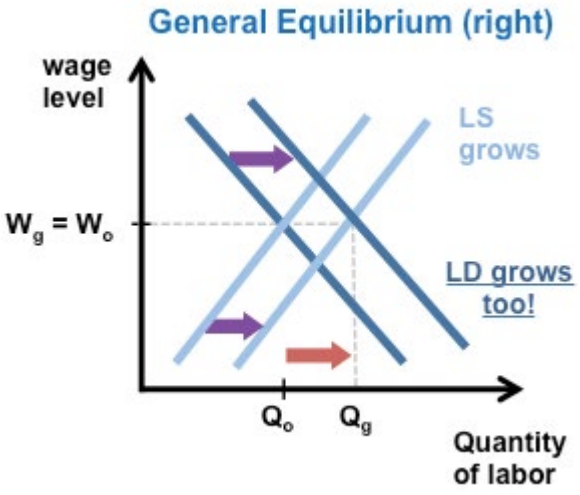
Consider the following three charts. The first shows the original labor market, where the equilibrium defines the wage level (W_O) and the number of jobs (Q_O) in the national economy.

The second chart shows the naïve interpretation of immigration: labor supply grows, pushing the LS curve to the right. By looking at only part of the impact of immigration (the LS shift) the result is partial equilibrium analysis. This new partial equilibrium assumes everything else stays the same (such as demand for goods and thus demand for labor), yielding lower wages (W_P) and higher net jobs (Q_P). Note that the increase in LS represented by the purple arrow is larger than the increase in quantity of labor employed. That implies that the number of jobs held by the original workers went down, even though total employment went up.

The correct analysis using general equilibrium – immigrants increase labor supply and demand for goods (and labor)–shows the wage level unchanged and that the amount of new jobs is equal to the amount of migrants. Here the size of the LS shift is matched by the size of the net new jobs, implying no displacement effect.

There are many more subtleties to consider, but the third chart gets the basic point across. The mix of goods and skill levels matter, but two nuances bear consideration. First, many immigrants send a portion of their income out of the domestic economy in the form of remittances, but it is hard to know if this is materially different from domestic purchase of imports, and besides, ultimately those cash flows circulate back to demand for US goods in the form of exports. Second, migrants are paid their marginal product (as is any worker), meaning that much if not most of their value added to production directly benefits the native population. Finally, if you believe that a growing economy leads to faster real wage growth due to increased productivity—a standard free-market principle established by Adam Smith's 1776 *Wealth of Nations*—then it is natural to predict a general equilibrium *increase* in the wage level because of immigration.





Empirical studies of immigration's effect on national economies confirm the general impact shown in the third chart. A review by David Card in 2007 concluded that "more than two decades of research on the local labor market impacts of immigration have reached a near consensus that increased immigration has a small but discernible negative effect on the *relative* (emphasis in original) wages of low-skilled native workers" but also a small, positive overall effect.[1]

Two 2009 studies by Giovanni Peri and Chad Sparber found that "total immigration to the United States from 1990 to 2007 was associated with a 6.6% to 9.9% increase in real income per worker."[2] In the face of the reality that average wage levels are not negatively affected, one counterpoint is that the impact differs among skill levels (i.e., that low-skill migrants depress wages for native low-skill workers), but that is not how the world works. National and even state economies are much more dynamic than simple theory; it thus seems that immigration tends to complement native skill levels.

The bottom line is that one can oppose the Obama administration's executive actions as lawless and even harmful to long-term reform and still favor more legal immigration. When immigration reform is done right, it will use the fact-based reality that immigrants of all skill levels are good for the native economy, including wages, jobs, and economic growth.

1 http://www.cream-migration.org/publ_uploads/CDP_11_07.pdf

2 Peri, Giovanni, "The Effect of Immigrants on U.S. Employment and Productivity," FRBSF Economic Letter 2010-26, August 2010.

Immigration—The President Has Again Tried to Circumvent the Constitutional System of Lawmaking

by William K. Suter

William Suter is a visiting fellow at the Hoover Institution. He served as Clerk of the Supreme Court for over twenty years and as acting Judge Advocate General in the US Army.

President Obama is not the first president to use his executive power aggressively. President Lincoln used an Executive Order in 1861 to suspend the writ of habeas corpus. The Supreme Court held that his action was unconstitutional. President Franklin D. Roosevelt attempted to change the composition of the Supreme Court of the United States in 1937 in order to gain favorable votes for his New Deal legislation. His "Court packing" plan was rejected by Congress and the voters. President Truman seized steel mills in 1952 to avert a strike because the mills were needed to support the Korean War. The Supreme Court held that his takeovers were unconstitutional. Previously, Truman acted courageously by issuing an Executive Order in 1948 that desegregated the armed forces. In that instance, he was on solid legal ground because the Constitution states that the President is the "commander in chief of the Army and Navy." President Obama attempted to make three recess appointments to the National Labor Relations Board in 2012 when the Senate clearly was not in recess. His reason for doing this was that the Senate would not confirm his nominees. He acted as though he was the first president to be treated rudely by the Senate. Not so! His crude attempt was an insult to the Constitution. The Supreme Court, in a unanimous decision, held that his appointments were void.

Congress also uses its power aggressively. An example is the Senate's late-night manipulation of rules to pass the Patient Protection and Affordable Care

Act ("Affordable Care Act" or "Obamacare") in 2010. That embarrassing episode rivaled the famous 1972 Olympic Gold Medal basketball game when three seconds were mysteriously added to the clock, enabling the Soviet Union to defeat the United States.

The Judiciary is not blameless concerning excessive use of power. In 2005, the U.S. Supreme Court essentially rewrote the "takings clause" of the Constitution ("[N]or shall private property be taken for public use, without just compensation."). The Court held that the words "public use" also mean "public purpose" and upheld a municipality's plan to take, through eminent domain, the homes of private citizens and turn the land over to a private corporation for development. The progressive idea behind the scheme was to improve the economic condition of the municipality. It did not work. Nevertheless, as noted above, the Supreme Court has proved its value and honesty by coming to the rescue when presidents overreach.

President Obama, emboldened by his record of changing laws—including provisions of the Affordable Care Act—decided in November 2014 to bring about his vision of immigration reform, not through Congress, but by use of executive fiats. For years, he maintained that he had no legal authority to change immigration laws. The sweeping election wins by Republicans a few weeks earlier apparently caused the President to change his mind. The largest category of people affected by the President's executive "Presidential memos" is an estimated population of five million illegal immigrants who have been in this country for five or more years and have children who are U.S. citizens or permanent legal citizens. If they pass a background check and pay their taxes, the President offers a 3-year temporary status of "deferred action" regarding deportation along with work permits. The President's purported legal authority to do this is his power of prosecutorial discretion. Prosecutors have such authority in individual cases, but no one can seriously think that authority is applicable on such a grand scale. What the President is doing is refusing to execute the law. He has no more authority to do this than he would to exempt corporations from paying income taxes. He cannot change the law.

As one writer put it, "This move by President Obama is not a sign of righteous impatience; it is proof that he has failed at that most basic of tasks—working with Congress." The President has created a constitutional crisis when there was no need to do so. That is regrettable.

Class, Race, and Illegal Immigration

by Victor Davis Hanson

Martin and Illie Anderson, Senior Fellow, the Hoover Institution

The driving forces behind three decades of de facto non-enforcement of federal immigration law were largely the interests of elites across the political spectrum.

Employers in agriculture, construction, the hospitality industry, landscaping, and food processing wanted access to cheap, industrious foreign national laborers. So do the well-off households of the American Southwest, whose current aristocratic reliance on immigrant nannies, housekeepers, gardeners, and handymen rivals something out of *Downton Abbey*. Such facts were why Cesar Chavez and the United Farm Workers were known once to have patrolled the border to keep out illegal aliens and thus not depress wages of American workers and thereby ruin their own efforts at unionization. Large employers like open borders; entry-level and poor American workers obviously do not.

Identity politics elites are the other advocates of open borders. Since the 1970s they have became self-appointed spokespeople for group rather than individual grievances. Without a large and constant pool of 11 to 20 million unassimilated foreign nationals, the Mexican-American and generic Latino communities would follow closely the Italian-American assimilated experience of the 19th and early 20th centuries. Indeed many do.

But unlike the case with recent past immigrants, millions of illegal alien residents increasingly warp federal and state statistics, from health to education, that guide

policy. The result can be often surreal: a third-generation American, such as a typical middle-class suburbanite named Jason Lopez, now has grounds for preferential treatment in hiring and college admissions, as if his mere patronymic resonates solidarity with the plight of poorer illegal aliens and thereby earns him all sorts of offsets. Apparently because huge yearly influxes of terribly poor people cross the border each year illegally from Latin America and Mexico, lots of American citizens of Hispanic heritage, who have never been to Mexico and cannot speak Spanish, suddenly are felt to be deserving of special compensation to help rectify statistical imbalances among those with Latino heritages.

There are other mythologies about illegal immigration. Many who favor open borders are either helped economically by the influxes or avoid in the concrete the ramifications of their own ideology. A community like Silicon Valley is emblematic of the hypocrisy: the louder wealthy elites call for border relaxation and amnesties, the more likely they are to yank their children out of public schools that border the Redwood City or San Jose areas, which are struggling with second-language students, gangs, and the usual problems of adjustment arising from hundreds of thousands migrating from an impoverished central Mexico to barrios bordering an affluent Menlo Park or Palo Alto. California's expenditures on infrastructure as a percentage of its yearly budget have dived, as medical, law enforcement, legal, educational, and social welfare expenses have soared—a phenomenon that falls largely on the middle classes through higher state taxes and reduced services.

Ethnicity is terribly misunderstood in the immigration debate. Racism, xenophobia, and nativism are the usual slurs leveled as supporters of immigration enforcement. In fact, they and the public in general favor generous legal immigration, based on ethnically blind meritocratic criteria, rather than family ties, political pressure, and mere proximity to the border.

In contrast, ethnic chauvinism drives too much of Latino support for amnesties: if there were small numbers of Hispanic illegal aliens, but large numbers of Chinese or Nigerian aliens residing in the U.S. illegally, the issue would largely disappear from the concerns of most Latinos, or, rather, they would likely favor strict immigration enforcement. Indeed, one reason why there has not been so-called comprehensive immigration reform is that Latino elites quietly, but vehemently, oppose any serious effort at making legal immigration meritocratic, and based on considerations other than ethnic ancestry—a fact the Democratic Party, which benefits from open borders and periodic amnesties, likewise prefers to keep silent about.

Illegal immigration, embraced by liberals and many affluent conservatives, is illiberal to the core. Take away the ethnic, economical, and political self-interests of our elites, and illegal immigration is mostly about ethnic chauvinism (*La Raza* is a fossilized racial rubric first given currency by Francisco Franco in fascist Spain), the exploitation of cheap labor, higher taxation on the middle class to pay for the social costs of labor for the well off, and a callous indifference shown the unemployed and low-wage American worker. The solution is to close the border, enforce existing laws, remove immigration policy from the political arena, and adopt a generous, legal immigration protocol that in ethnically blind fashion evaluates all potential immigrants on meritocratic criteria such as education and work skills.

PRESIDENT OBAMA ANNOUNCED EXECUTIVE ACTIONS ON IMMIGRATION ON NOVEMBER 20, 2014. WHAT IS YOUR ASSESSMENT OF ITS ECONOMIC, LEGAL, AND POLITICAL IMPACT?

"We can't have a circumstance in which we are going after a problem as meddlesome, as potentially divisive as immigration by executive action only. This has to go through the people's representatives, that's our system, that's the Congress."

Condoleezza Rice
Hoover Institution

Richard Vedder
Ohio University

I am not a constitutional lawyer, but I have **strong reservations about the legality of the President's executive actions**, even though the content of the actions is **mostly justifiable on both economic and humanitarian grounds**.

I don't know about the politics, could have negative reverberations in the future. Permanent amnesty would be better. But **temporary amnesty will have positive economic impacts**. Very minor compared to what real reform would have.

Adam Ozimek
Modeled Behavior

The executive action will likely have a relatively small, but positive impact on the U.S. economy. However, the move is only **a modest solution for an immigration system in need of reform**. S&P said earlier this year that it believes revamping the U.S. immigration system could contribute to the country's gross domestic product, particularly with a focus on much needed skilled workers. We estimated that a reworking of the country's immigration policy, with an emphasis on employment-based immigration, could add about 3.2% to real GDP in the next 10 years. The legal implications are unclear.

Beth Ann Bovino
Standard & Poor's

Lynn Tramonte
America's Voice

President Obama's immigration plans are truly a game-changer. Soon, immigrants who have lived in this country for decades, raising American families, will be able to do many of the things the rest of us take for granted: get a driver's license, purchase a home, plan for the future. In addition to bringing a measure of security to people's lives, the **policy will be good for America** as it levels the playing field in the workplace and will force more employers to pay their fair share of taxes.

"**The President's executive action on immigration is a temporary approach to fixing the U.S. immigration system** that is full of wounds. Congress needs to work with the President to take legislative action to stitch the deeper wounds of the immigration system for a much longer-term, permanent fix."

Neil Ruiz
Brookings Institution

"The President's actions **do not represent a long-term, permanent fix** to the broken immigration system, which can only come from Congressional legislation."

Theresa Brown
Bipartisan Policy Center

"We can evaluate the president's announcement on three levels. It looks like a winning strategy with respect to immigration policy: doing less was unlikely to result in a Republican CIR bill, and bold executive action offers significant short-term gains to the president's constituents and possibly even shuffles the legislative deck in a useful way. **It also further highlights differences between the parties, and therefore probably helps Democrats politically**. My reservations about the announcement are with respect to long-term and big-picture institutional issues: how will future presidents build on Obama's precedent when Confronted with gridlocked Congresses of their own?"

Marc Rosenblum
Migration Policy Institute

"**The President's executive actions on immigration will have far reaching impact, almost all of which will be negative**. The legal impact of his unilateral action arguably puts those directly impacted in a worse position than before: even more in limbo and a permanent and legal solution is even less likely and perhaps further off into the future."

John Shadegg
Former Member of Congress

"Obama's actions are **completely lawless**, undermine federal law, and reward not just foreigners who believe they are above the law but also employers who will now see their illegal work force granted work permits."

Jon Feere
Center for Immigration Studies

Alex Nowrasteh
CATO Institute

"Economic: Positive.
Legal: Ambiguous.
Political: Ambiguous, leaning negative."

The economic impact will be modest. Obama's action effectively returns interior enforcement policy to where it was before 2005. Undocumented workers will likely enjoy more job mobility, raising efficiency and their pay. **Politically the impact is explosive**. It puts Republicans in a difficult position of having to respond without either offending their base or offending Latinos. It thus raises the odds of Congress taking action on immigration.

Gordon Hanson
UC San Diego

"Economic impact: trivial
Legal impact: unclear.
Political impact: negative."

Douglas Holtz-Eakin
American Action Forum

"The executive action is **unquestionably good for covered unauthorized immigrants and their families**. Having legal permission to work in the US allows them to move into better jobs, boosting their incomes. However, it is likely to encourage larger inflows because of confusion or hopes of another such program in the future. It also reduces the near-term likelihood of meaningful reform of the legal immigration system, including much-needed overhauls of temporary worker programs and the allocation of green cards. The few changes announced regarding legal immigration are only the beginning of the reforms needed to increase immigration's economic contribution."

Madeline Zavodny
Agnes Scott College

"The change will have a **limited, but positive economic impact**. Immigrant workers will be able to come out of the shadows. This should mean they get better jobs and higher wages. And the government will collect more tax revenue. Hard to see any serious legal issues. The Republicans will have to decide the political impact depending on whether they accept or oppose it."

Dean Baker
Center for Economic & Policy Research

"On the economic front, **it should bring some stability to the bottom end of the labor market**, with positive consequences. Legally, my guess is that it will be sustained, barely, but only years from now. Politically, it hurts Obama. A lot of constitutional unease, and a distaste of personal arrogance in a beleaguered president."

Richard Epstein
Hoover Institution

The actions struck me as **reasonable policy, petulant politics, and dangerous precedent**. As policy, they signal the final nail in the "comprehensive" stalemate, and good riddance. If offered as legislation, these would be described as incremental compromises: legal status rather than path to citizenship. Which begs the question: Why did the President never offer this as legislation? I do worry about the long-term incentives set in place and anticipate more illegal immigration as a consequence. For all the furor, this also means President Obama is now irrelevant to legislation going forward, which is a golden opportunity for Republicans.

Clint Bolick
Hoover Institution
Goldwater Institute

Obama's order is a **huge setback for comprehensive Immigration reform**. Its legality is dubious as the Constitution assigns no power over immigration to the President. It encourages illegal immigration while doing nothing to permanently address the problems in our immigration policy, such as chain migration and inadequate numbers of work and skill-based visas.

Tim Kane
Hoover Institution

Economic impact: **a substantial positive for those directly affected. Little otherwise**. Legal impact? None. Political impact? Who can say. I find the pull-up-the-ladder rhetoric of Obama's opponents very unAmerican, and the relative silence of Republican believers in immigration disappointing

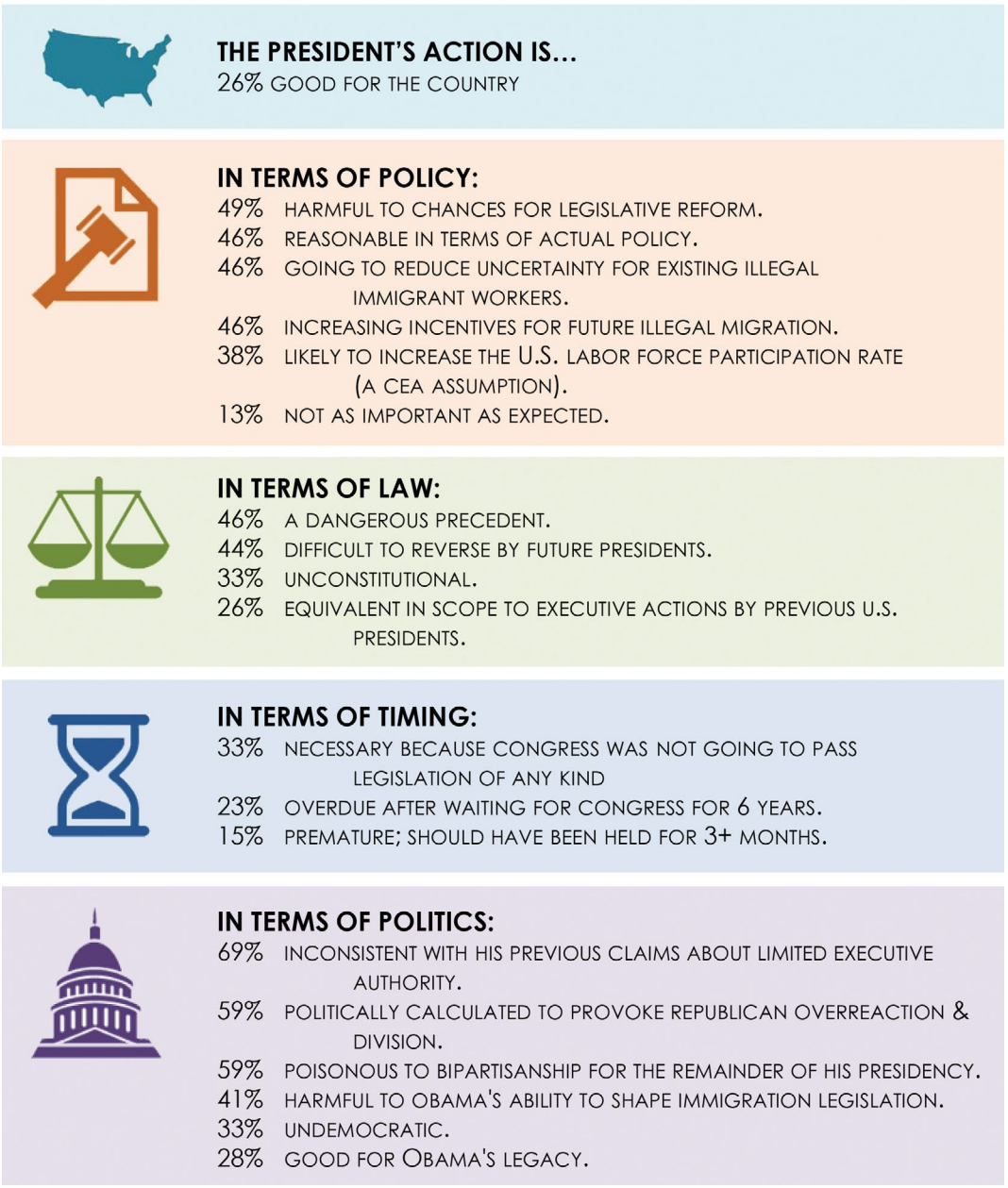
J. Bradford DeLong
UC Berkeley

20 Things to Know about Obama's Immigration Action

President Obama announced executive action about how the U.S. would enforce immigration law on November 20, 2014. Reactions were farranging, often contradictory. We asked a panel of 39 immigration policy experts to review 20 different statements about Obama's executive action. While just a third of respondents think the policies are unconstitutional, reactions to the way it was handled were strongly negative.

Only a third of respondents thought the action was necessary given legislative inaction, but just 23 percent said it was overdue while 15 percent said it was premature. In short, the panel doesn't agree with comments critical of the timing. The affiliation of surveyed experts is split equally among Republicans, Democrats, and Independents. However, the panelists tend to be economists who are generally in favor of greater levels of immigration.

REACTIONS TO PRESIDENT OBAMA'S NOVEMBER 20, 2014 EXECUTIVE ACTION ON IMMIGRATION POLICY?



Immigration Action: Bad Law, Good Policy?

President Obama announced executive action about how the U.S. would enforce immigration law on November 20, 2014, accompanied by multiple official memos from the Department of Homeland Security and other executive branch agencies responsible for enforcement. While much attention has focused on the President's most visible action to defer deportation of a class of illegal immigrants by granting a 3-year temporary status to those who register, he actually took nearly a dozen distinct actions.

We asked a panel of 39 immigration policy experts to review the legal, economic, and political implications. Our first question highlighted seven of the actions that seem the most important and/or contentious. The second question put to the panel asked them to assess whether these exact same policies "would be good for the United States *if they were passed by congressional legislation.*" (emphasis original).

QUESTION: IN YOUR ESTIMATION, WHICH OF THE ANNOUNCED ACTIONS DID PRESIDENT OBAMA HAVE CONSTITUTIONAL AUTHORITY TO TAKE? (THE PERCENTAGES OF EXPERTS THAT AFFIRM EXECUTIVE AUTHORITY ARE NOTED NEXT TO EACH ACTION).

49% EXPAND NUMBER OF IMMIGRANT "INVENTORS, RESEARCHERS, AND FOUNDERS OF START-UP ENTERPRISES."

First, an expanded number of EB-2 employment-based green-card "waivers" will be granted to individuals with an advanced degree or "exceptional ability" in their field. Second, a new program will grant parole status to entrepreneurs with high potential for job creation and/or secure financing (but would not be legal status or a pathway to citizenship).

67% DEFER DEPORTATION ACTIONS AGAINST A CLASS OF ILLEGAL IMMIGRANTS.

This program grants temporary deportation relief for parents of U.S. citizens or lawful permanent residents, an estimated population of 3.9 million. Applicants for the temporary 3-year status must pay a fee and pass a background check. This action does not technically grant legal status or a pathway to citizenship.

51% WORK PERMITS FOR UNDOCUMENTED IMMIGRANTS.

Beyond deferring deportation, a new Homeland Security memo directs U.S. Citizenship and Immigration Services (USCIS) to "Issue all work authorization documents valid for three years" to those undocumented immigrants who are parents of U.S. citizens or lawful permanent residents. With the work permit, these individuals are allowed to apply for and receive Social Security cards and driver's licenses (in most states).

64% EXPAND DACA ELIGIBILITY AND PERIOD OF PROTECTION.

The Deferred Action for Childhood Arrivals (DACA) program was initially a 2-year status limited to undocumented immigrants under the age of 31 who as children had been brought to the United States before June 15, 2007. The expanded DACA removes the age cap, adjusts the entry date to 2010, and increases the relief to a 3-year status.

69% DE-PRIORITIZE REMOVAL OF MOST UNDOCUMENTED IMMIGRANTS.

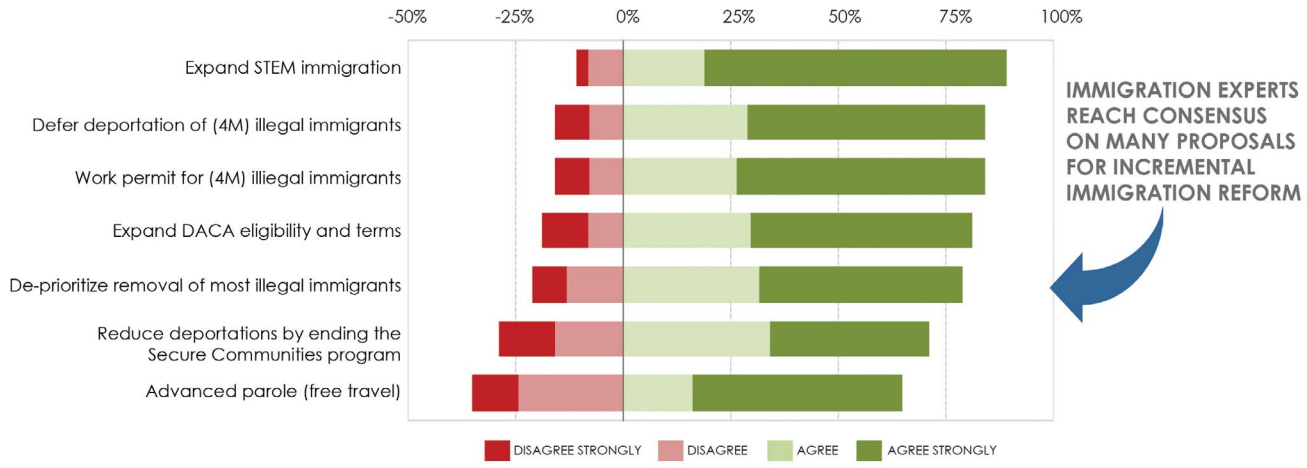
A new DHS enforcement and removal policy will set priorities for deportations ("removals") on national security threats and criminals. "Under this revised policy, those who entered illegally prior to January 1, 2014, who never disobeyed a prior order of removal, and were never convicted of a serious offense, will not be priorities for removal." Although not a pathway to citizenship, this memorandum seems to establish a permanent new status quo.

69% REDUCE DEPORTATIONS BY ENDING THE SECURE COMMUNITIES PROGRAM.

DHS will end the Secure Communities program, and replace it with the Priority Enforcement Program (PEP) that reflects new priorities. The program will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies, but will no longer mandate deportation of undocumented immigrants considered lower priority.

54% ADVANCED PAROLE WHICH ALLOWS SOME UNDOCUMENTED IMMIGRANTS TO TRAVEL ABROAD AND FREELY RETURN.

One of the new memos from DHS directs USCIS 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, making travel effectively impossible, but this action creates a de facto travel visa.



All seven of the policy actions are deemed by a majority of our scholars to be "good for country," but the policy scores are significantly higher than the responses recognizing presidential authority in three cases. Ironically, the policy considered most beneficial was considered the least legal when passed by executive memorandum.

It should be noted that the legal precedents developed over decades around deferred action on deportations are based on individual cases, not as applied here to classes of millions of people. However, deferred action has been coupled by precedent with authority to work inside the United States, and very recently by allowing individuals to travel outside the United States and return as if on a legal visa. We decoupled those three functions in the survey, and found a clear distinction in the perceptions of legal authority.

Long-Term impact of Obama's Immigration Action

President Obama announced executive action about how the U.S. would enforce immigration law on November 20, 2014. We asked a panel of 39 immigration policy experts to review the long-term impacts.

THE LIKELY LONG-TERM EFFECTS OF PRESIDENT OBAMA'S EXECUTIVE ACTION IF NOT OVERTURNED

The economic effects of the President's executive actions on immigration are likely to muted. That opinion was expressed in multiple comments by our panel, but the mixed effects are revealed in our survey's fifth question. Although the effect on GDP is considered positive by more than two-thirds of respondents, and the effect on immigrant wages will likely increase, the biggest impact may well be that the actions will lead to even more—not less—illegal immigration in the long term. The effect on unemployment overall will still be neutral according to two-thirds of the panel.

Would the President's actions lead to a higher labor force participation rate? The Council of Economic Advisors made that assumption as the key to its projection that the actions would enhance the U.S. economy. Only 38 percent of our experts agree that labor force participation would be improved.

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ABOUT *PEREGRINE*

Peregrine is an online journal about US immigration policy that provides background facts, surveys, and opinion essays by scholars from a variety of perspectives. Each issue of *Peregrine* addresses a different aspect of immigration, looking to educate as well as identify areas of agreement among experts and the public on incremental policy changes. This free publication will be published online and in print and will also be available as a downloadable PDF.

The starting point for *Peregrine* is an awareness of America's unique status as a nation of immigrants. From pilgrims to pioneers to huddled masses yearning to breathe free, Americans are a peregrine people. The country's pathway to citizenship has been open for centuries and even now welcomes more than one million foreigners as permanent, legal residents every year. The United States is also a nation of laws, balancing natural rights with sovereign democracy. To maintain America's strengths as a nation of immigrants and a democracy of laws, *Peregrine* provides an arena in which the best reform ideas will be published, discussed, and analyzed.

Peregrine is led by Tim Kane, editor, and Tom Church, managing editor, as part of the Hoover Institution Conte Initiative on Immigration Reform. The journal relies on contributions from the membership of Hoover's Working Group on Immigration Reform, co-chaired by Edward Lazear and Tim Kane.

CONTE INITIATIVE ON IMMIGRATION REFORM

The Hoover Institution's Conte Initiative on Immigration Reform is the result of significant scholarly workshops and conversations among academics, politicians, and Hoover fellows who are concerned with America's current immigration system.

The current system is complicated, restrictive, and badly in need of reform. It is ineffective at its stated goals of allowing sufficient immigration and punishing transgressors who overstay their visas or cross our borders illegally. A working group has been formed under this initiative that aims to improve immigration law by providing innovative ideas and clear improvements to every part of the system—from border security to green cards to temporary work visas. Our efforts are provided by Hoover scholars and leading affiliated thinkers and reformers from both sides of the aisle. Our membership is united by only one common theme: Our current system is broken and needs to be reformed.

Edward Lazear and Tim Kane co-chair the project as part of Conte Initiative on Immigration Reform with management
and research support from Tom Church. For more information about the Conte Immigration Initiative, visit us online at
www.hoover.org/research-teams/immigration-reform.