

IMMIGRANTS OR VISITORS?

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The immigration quagmire in Congress may be a consequence of misplaced authority. Is immigration a domestic policy or a foreign policy? A purely legislative, domestic approach has simply not worked.

Am I suggesting that President Trump bypass Congress with executive action, as President Obama did in 2012? Not at all. Obama authorized dozens of executive actions on immigration that were domestic policy by fiat whose legality was always dubious. Trump was right to put the DACA issue back in Congressional hands. However, I am suggesting that President Trump could negotiate an international agreement with Mexico.

For a host of reasons, our national conversation about immigration has mixed up three classes of foreign visitors. The apples are legal *immigrants*. The oranges are legal *visitors*: the 181 million tourists, students, and business travelers that came and went last year. The mystery category is the undocumented. Are they apples/immigrants or oranges/visitors?

The essential distinction is that legal migrants are, by definition, in the process of naturalization as US citizens. Authority over a “uniform rule of Naturalization” is expressly enumerated in Article 1, Section 8 of the Constitution as solely that of Congress. The House and the Senate can write whatever naturalization laws they want, but they have not wanted to naturalize undocumented visitors, hence the quagmire. The pragmatic alternative is not deportation. Rather, the President has the authority to regulate foreign visitors, and that authority has been neglected.

Congress has modified the laws governing naturalization dozens of times since 1789, so that today the U.S. welcomes one million new legal permanent residents annually. That may seem large, but it pales next to the number of what are technically called “nonimmigrant” admissions (tourists, students, and business travelers). In 2015, there were 181 million visits made to the US. These are people who spend billions of dollars at American restaurants, hotels, and more. Roughly 4 million of these foreign visitors are also adding value to the American economy in another way, as workers. Temporary workers are busy from the fields of California to the factories of Georgia and the startups of Silicon Valley.

The dilemma for immigration reform that Congress is fundamentally unable to resolve is the status of 11 million illegal immigrants living inside the country, a number that has held remarkably steady for eight years. President Trump might well consider a bilateral executive agreement with Mexico – instead of a bipartisan legislative effort with Congress – that grants legal status as visitors to those 11 million people. Skeptics might wonder why Donald Trump would do something positive in this area that improves the situation of “criminals” rather than simply deporting and punishing them. Maybe the skeptics are right. But maybe the President would see that an agreement is good business as well as good for law & order.

The purpose of the agreement would be to grant *mutual* rights to work and invest across borders, rights that would enhance economic growth in both countries. Such executive agreements are distinct from treaties in that they are not ratified by the Senate and thus lack permanence from one presidency to another, but they have been ruled constitutional in numerous Supreme Court rulings and have equal weight of law.

The Iran deal is one example: an agreement made by Obama that is not binding on Trump or any future president because it is not a treaty. But there are literally hundreds of agreements that serve as precedent. FDR's agreement with Great Britain in 1940 traded navy destroyers for basing rights. Scholars Glen Kurz and Jeffrey Peake recently chronicled the rise of agreements and showed that 95 percent of international dealing by the US in the modern era are agreements covering fishing rights, arms control, and trade, compared to only 5 percent that are treaties.

Unlike immigration legislation, a US-Mexico labor agreement would not and could not grant citizenship to any temporary worker. That fact alone should alleviate concerns of restrictions such Attorney General Jeff Sessions, and may in fact be considered a feature not a flaw. It would not allow any illegal immigrant to "skip the line" to citizenship, nor would it penalize them either. Indeed, once this group was granted legal status, it would allow Congress to move forward on internal security items such as E-Verify without crippling agricultural and construction industries.

Is this a crazy new idea? Actually, current law already allows the President to issue an *unlimited* number of agricultural guest worker visas, known as H-2As. What we are really talking about here is streamlining the bureaucracy, not capping or expanding something that is already unlimited by law. An agreement would appeal to conservatives who worry about amnesty, taxpayers who dislike abuse of US welfare by foreigners, and liberals who want to give opportunity to those 11 million people who are stuck in the shadows. Congress has a dozen immigration items on its agenda, and resolving this roadblock may free them to get moving.

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BACKGROUND

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