



OBAMA WINS AND SO DOES IMMIGRATION REFORM

Posted on November 9, 2012 by Cyrus Mehta

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Since President Obama's decisive re-election victory, there has been a growing realization, mainly among Republicans, that the party will continue to be decimated in future elections if it does not take action on reforming the broken immigration system. It is clear that Romney's [comments on self-deportation](#), along with his embrace of Kris Kobach, the architect of the anti-immigrant laws of states like Arizona and Alabama, hurt him terribly among Hispanic voters in his quest for the White House. Recently, House majority leader John Boehner has pledged to work with the President and the Senate, which is controlled by the Democrats, to [reach a deal on immigration](#). This would have been unthinkable before the election results on Tuesday, November 6 and is like music to the ears of immigration advocates who have been complaining for years about the need to fix the immigration system.

This bonhomie among GOP leaders and pundits for positive immigration reform may be short lived. Rancor may soon set in, as it is already happening, with regards to preventing the "fiscal cliff." The country is still divided evenly, and a foreign newspaper, the Times of India, after the 2012 elections, astutely called us "The Divided States of America." We still ardently hope that Congress can bring about comprehensive immigration reform (CIR), which would include an expansion of green card categories and temporary visas, along with the legalization of the 12 million or so undocumented people living here and contributing to the US. In order to prevent a buildup of the undocumented population in the future, reform must also allow for visas that would facilitate future flows of legal workers.

While all this is achievable, and a deal can be struck, it could also come apart if the bottled up enmity between the two parties flares up again. Notwithstanding

the likes of [Sean Hannity moving over to the side of CIR](#), there is bound to be rebellion in the rank and file of the Republican party, which considers CIR anathema. In his [stirring victory speech](#) Obama said, "We believe in a generous America, in a compassionate America, in a tolerant America, open to the dreams of an immigrant's daughter who studies in our schools and pledges to our flag." But Obama still has the ability to deliver his promise to the Hispanics, Asian Americans and others who voted him in and routed Romney in the event that Congress enters into another stalemate. He has a powerful card up his sleeve, and this is his ability to provide relief through administrative action.

Administrative action is not a perfect alternative, as the President does not have the power to give green cards without Congressional authorization. But he does have the power to defer the deportation of large groups of undocumented immigrants, as he did through the Deferred Action for Childhood Arrivals (DACA) program, [which we have shown can withstand judicial scrutiny](#). He can expand DACA to a broader group of undocumented immigrants who have lived in the US for say 5 years, and have not been convicted of a felony or three misdemeanors. As we have shown in our prior blog, [Issues Ripe for Rulemaking: Some Modest Proposals](#), there is no prohibition anywhere that would bar USCIS from allowing the beneficiary of an approved I-140 or I-130 petition to apply for an employment authorization document (EAD) and advance parole. No action by Congress would be required. This could be done purely by act of regulation or even through a policy memo. For those who want a statutory basis, the USCIS can rely on its parole authority under INA 212(d)(5) to grant such interim benefits for "urgent humanitarian reasons" or "significant public benefit." This we have explained previously in [Comprehensive Immigration Reform Through Executive Fiat](#).

Knowing the power of the President to take action on his own, Congress will want to remain relevant and protect its institutional prerogative by enacting legislation so as to avoid creating the opportunity for the exercise of presidential initiative. That is why Obama might want to enlarge DACA to other groups, not as an alternative to CIR but to make it more likely. If he announces broader initiatives, he can use them as a bargaining chip to withdraw if and when Congress acts. The President remains the First Officer of our Government and, as the Republicans are beginning to realize, the political saliency of the immigration issue can no longer be denied or deferred. By keeping the pressure on through the sustained but disciplined assertion of executive

initiative, the President makes it more likely, not less, that CIR will make the bumpy transition from rhetoric to reality.