



THE FATE OF EXECUTIVE ACTION ON IMMIGRATION AFTER THE MIDTERM ELECTIONS

Posted on November 10, 2014 by Cyrus Mehta

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For courage--not complacency--is our need today--leadership--not salesmanship. And the only valid test of leadership is the ability to lead, and lead vigorously. Senator John F. Kennedy's [speech](#) accepting the 1960 Democratic nomination for President

Ever since the Democrats got a drubbing in the midterm elections, questions remain about the fate of immigration reform. President Obama had promised to reform the system through executive action after the election. The question is whether he will still do it despite the Republican Party gaining decisive control over both the Senate as well as the House. Last Friday, November 7, 2014, President Obama defiantly said that he would take executive action on immigration despite [howls of protests](#) from Republican leaders. They threatened that Obama's unilateral action in the face of defeat in the midterm election would derail reform immigration legislation.

The authors believe that executive action ought not "poison the well, a term that has been oft repeated by the GOP against Obama's proposed executive action, although it dare be said that the well no longer contains any water! If the President has authority under the Immigration and Nationality Act to take executive action in order to improve the decrepit immigration system, we do not see how it would usurp on Congress's authority or violate the Separation of Powers doctrine. We have shown in [Two Aces Up President Obama's Sleeve To Achieve Immigration reform Without Congress: Not Counting Family Members And Parole In Place](#) that the President can comprehensively reform the immigration system as part of his inherent authority. There is also sufficient ambiguity in many provisions of the Immigration and Nationality Act that beg

reinterpretation so that they can bring ameliorative relief to millions. A government agency's interpretation of an ambiguous statute is entitled to deference under [*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 \(1984\)](#)—often abbreviated as “Chevron deference”. When a statute is ambiguous in this way, the Supreme Court has made clear in [*National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 \(2005\)](#), the agency may reconsider its interpretation even after the courts have approved of it.

Thus, there is no need for the Republicans to feel threatened by Obama's proposed executive actions. If they do desire to pass immigration reform legislation, they can always do so and can even improve on the administrative measures that Obama can possibly implement. After all, executive action will always be limited and is no substitute for legislation. The President would only have the authority to defer the deportation of non-citizens who meet certain deserving criteria; he cannot issue them green cards or create new visa categories without Congressional action. The President may also have authority to reinterpret ambiguous provisions, such as INA section 203(d) so that family members are all counted as a single unit rather than separately, thereby reducing or even eliminating much of the crushing backlogs in the family and employment-based preferences. Indeed, Obama's executive action could be conditioned on Congress passing meaningful immigration reform legislation, upon which such action can be withdrawn. Subsequent immigration legislation from Congress can also incorporate some of the administrative measures, such as not counting family members separately. The notion of not counting family already exists in S. 744, which was passed by the Senate in a bipartisan manner in June 2013, and which the House has never taken up. Indeed, the House can still vote on this measure today and can pass comprehensive immigration reform even before Obama acts.

The question is whether the GOP is ready to pass immigration legislation. The real reason that S. 744 was not taken up in the GOP controlled House, even prior to the midterm elections, was the dislike that many House members in legalizing millions of undocumented people who have deep ties with the United States and who are also part of American families. This dislike is grounded in nativist tendencies that many GOP House members have shown, and who receive support from xenophobic organizations such as NumbersUSA and Federation for American Immigration Reform. Even if President Obama gives the new GOP Congress time to enact immigration legislation, they may never be able to do so

because of the nativist element within the party that will always be opposed to any immigration measures save border security and tough immigration enforcement.

[Executive action on immigration is hardly novel](#). After Castro took power in Cuba, Presidents Eisenhower, Kennedy and Johnson paroled in more than 900,000 Cubans. Seven years later, Congress signified its approval through enactment of the Cuban Adjustment Act in 1966. In recent decades, when emergencies erupted and humanitarian crises presented themselves, Presidents of both political parties have not hesitated to act on their own initiative outside the customary channels of legislative activity, often to protect large numbers of vulnerable immigrants from deportation. This has happened over 20 times since the mid-1970's. In almost all such instances, the Congress subsequently ratified such executive orders with appropriate legislation. This is, for example, what happened at the close of World War II when President Truman allowed 250,000 European refugees to enter or remain in the United States; three years later, in 1948, Congress enacted the Displaced Persons Act, allowing 400,000 additional admissions. In April 1975, at the end of the Vietnam War, President Ford asserted his parole authority to sanction the evacuation of 200,000 South Vietnamese. Further congressional approval of President Ford's executive order came in 1980 with enactment of the Refugee Act making possible the resettlement of 1.4 million Indochinese people. That same year, President Carter took in 130,000 Mariel Cubans who eventually obtained "Cuban-Haitian entrant status" under President Reagan. Six years later, the Immigration Reform and Control Act made these Cuban-Haitian entrants lawful permanent residents of the United States. The next year, Attorney General Meese ordered the legacy INS not to remove some 200,000 Nicaraguans and, a little after that, extended similar protection to 190,000 Salvadorans seeking to escape from the horrors of civil war. Ten years after Attorney General Meese first acted, Congress made possible their adjustment of status. In 1989, following Tiananmen Square, the Bush Administration granted Deferred Enforced Departure to 80,000 Chinese students studying here; three years later, Congress paved the way for their green card status through the Chinese Student Protection Act. The point is always the same and remains instructive today: Executive Action in immigration is always a prelude to congressional legislation, not a substitute for it nor a barrier to its enactment.

President Obama is also in a bind now and of his own doing. He had promised to take executive action well before the midterm elections, but delayed doing so

after being persuaded by Democratic Senators who were facing defeat such as Mark Pryor and Kay Hagan, and who in any event lost on November 2, 2014. Obama's delay in reforming the broken immigration system through executive action thus backfired. The authors believe that had he taken immigration action prior to the election, it may have energized some of his base who could have turned up in the election. Perhaps, Mark Udall of Colorado [may not have lost](#) if he had been less ambivalent about immigration, and if Obama had been able to implement a major historic immigration initiative. The deferred action initiative for immigrant youth prior to the Presidential election in 2012 certainly helped Obama's victory. Obama had promised immigration reform to the Hispanic community and has to live up to that promise in order to secure his legacy, and to improve the chances of Democratic Presidential candidates in 2016. It would be harder for him to implement administrative immigration reform now that his party has lost control of the Senate, but he still has the authority to do so and he must.

The political imperative for executive action is undeniable. According to an [analysis of census data by the Center for American Progress](#), the Latino population in America increased by 43% in the first decade of the 21st century. This year, 24.8 million Latinos were eligible to vote; in terms of eligible voters, they accounted for 11.3% of the entire population. Over the next four years, experts anticipate that more than 4 million Latino voters will be added to the rolls. This is a 17% increase in time for the 2016 election. The potential impact in key battleground states could be decisive. In Florida alone, [projections by the Center for American Progress](#) are that 600,000 Hispanics (as compared to 125,000 new Anglo voters) will be eligible to vote in the next presidential election. In Texas, a state without which it would be virtually impossible for the GOP to win the White House, roughly 900,000 new Hispanic voters are expected to join the electorate by 2016, washing away the projected Anglo voter increase of 185,000. Remember also that more than 90% of Latinos under age 18 are US citizens and that 800,000 Latinos become voter eligible each year as the Anglo share of the American electorate continues to fall each election cycle.

There is a political opportunity here for the Republicans if they can recognize it. The re-election of two Hispanic Republican Governors - Susan Martinez in New Mexico and Brian Sandoval in Nevada - show that [the Hispanic vote can no longer be taken for granted](#). Texas Attorney General Greg Abbott won 44% of the Hispanic vote in thumping Democratic State Senator Wendy Davis by 30 points.

In Georgia, Republican Governor Nathan Deal rode to re-election in no small part on the basis of 47% of the Hispanic vote while Senator-elect David Perdue defeated his Democratic challenger Michelle Nunn, daughter of former Senator Sam Nunn, having earned 42% of the Hispanic vote. In an election eve poll [by Latino Decisions](#), some 67% of those surveyed revealed that immigration was either the most or one of the most important issues. For those political junkies interested in a [state by state breakdown](#), we offer this also for their reading pleasure. If the Republicans recognize that they can woo the Hispanic electorate in their favor in light of these recent trends, it would be in their best interest to focus on passing comprehensive immigration legislation even while Obama takes executive action.

In 1924, in a vain effort to tap down the anticipated political influence of surging Jewish and Catholic immigrant populations from Southern and Eastern Europe, the Republican Party created a national origins quota using 1890 as a baseline population year to increase Protestant migration from Northern and Western Europe. This remained in effect until its abolition in 1965. But, it did not work. The children and grandchildren of those disfavored ethnic and religious groups who had already made it to the New World before the gates closed did not forget this slap in the face and became the cornerstone of a New Deal coalition that swept the Democratic Party to national victory in 5 straight presidential elections. For the Republican Party to block President Obama now would be to repeat that historic mistake and consign itself to minority status on the presidential level for decades to come. It would be a political miscalculation of epic proportions. The stakes are no less high for the Democrats. No longer competitive in the states of the Old Confederacy, if they want to retain the electoral college advantage and popular vote majority they have enjoyed in the last 6 presidential elections, the Democratic Party must seize and hold the high ground in the key states of Florida, Arizona, Nevada, Colorado, New Mexico as well as retain their dominant position in California. Much as civil rights has spelled their political irrelevance in the Old South, immigration can be their salvation in the battleground swing states where the Hispanic vote is and will remain the path to power. Both political parties have a vested interest in a robust embrace of immigration reform. For America's sake, let us devoutly wish that they realize it.

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