



Constitutional and Political Storm Clouds Brewing

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Just before the Republican-led U.S. House of Representatives left for its late summer recess, remarkable gyrations took place. One day after they voted to sue President Barack Obama for exceeding his executive authority, Republicans refused to appropriate resources the Obama administration needs to cope with thousands of unaccompanied Central American child migrants arriving at the southern border – thereby leaving the President little choice but to take executive actions to deal with the humanitarian and legal issues at stake. Soon, the House Republican lawsuit featuring the claim that the Obama administration abused executive discretion by not implementing a minor part of the 2010 health reform law fast enough may give way to an epic constitutional showdown over Obama's uses of executive authority to deal with immigration matters. It is hard to escape the suspicion that, deliberately or not, Republican lawmakers have taken steps bound to provoke actions by Obama that will, in turn, lead to further challenges to his presidency.

Before leaving town, House Republicans not only refused to compromise with President Obama and Senate Democrats to appropriate some new resources to handle the immediate border problems, but they voted for two essentially symbolic bills that pleased Tea Party activists who favor tough responses to a full range of immigration issues. The first bill coupled far less emergency funding than the President requested with calls for expedited deportation of unaccompanied minors and funding for gubernatorial deployments of the National Guard to border areas. More provocatively, the second House bill sought to prevent the administration from continuing to implement a 2012 White House order, known as the Deferred Action for Childhood Arrivals, which put off deportation of up to 700,000 undocumented immigrants who arrived in the country as minors before 2007.

During the past year, the White House has been urged by immigration rights advocates to promise even broader deferrals of the threat of deportation, with pressures building from the Dreamer movement of undocumented young people to assorted civil rights, religious, labor, and Latino and Asian groups. Tellingly, the second House bill set about to prohibit the Obama administration from spending any more funds on the Deferred Action program and seeks to block it from renewing or expanding work permits to any undocumented immigrants. In essence, the House measure attempts to use the current border issues to roll back earlier Obama administration steps to regularize the status of some undocumented immigrants. This is, of course, a non-starter in the Democratic-controlled Senate, yet it signals the buildup of angry political and constitutional storm clouds – likely to unleash thunder and lightning in coming months should President Obama take actions amid the Congressional impasse.

As Congress failed to resolve immediate or more basic immigration issues, President Obama declared "I'm going to have to act alone." Congressional Republicans warn that Obama does so at his own legal peril, but historical perspective suggests otherwise, particularly if we are talking about a unilateral executive response to the 57,000 unaccompanied minors at the border. Bucking anti-Semitic views in Congress and the constraints of restrictive laws, President Harry Truman issued an executive order in 1945 that granted relief to roughly 23,000 refugees from war-ravaged Europe. During the Cold War, Presidents Dwight Eisenhower and John F. Kennedy claimed "parole power" to admit tens of thousands of refugees from Hungary, Cuba, and other countries above and beyond existing national origins quotas. At the time, anti-communists and conservatives in Congress like Nevada Senator Pat McCarran fulminated over these executive actions and protested their constitutionality. But their challenges went nowhere. Years later, presidents from Jimmy Carter through Bill Clinton exercised broad discretion in how they responded to Haitian, Cuban, Salvadoran and other asylum-seekers, especially when Congress failed to pass legislation on these issues.

The more provocative question, however, is how much authority President Obama has to protect millions of undocumented immigrants already rooted in the country from deportation.

Comprehensive immigration reform has always been a tall order in American politics. This is particularly true when Congress tackles unauthorized immigration, which traditionally unleashes painful conflicts that can only be solved when strange bedfellows scrape together narrow majorities in support of unpalatable, bipartisan compromises. Little wonder that our last sweeping legislation on this subject, the Immigration Reform and Control Act of 1986, was fourteen years in the making. These traditional hurdles remain, but an even more daunting roadblock has emerged: partisan polarization on steroids, with the base of each major party fervently committed to irreconcilable reform plans (legalization versus removal and exclusion). It was against this backdrop that the Obama administration debated internally about the legal and electoral implications of instituting Deferred Action for Child Arrivals back in 2012. Today the political calculations for the White House are even more troublesome, as immigration reformers press Obama to act unilaterally before the election to halt most deportations, even as Democratic incumbents seeking re-election in swing states urge him to show restraint.

Although Republican strategists know that taking a harsh stance on immigration is long-term electoral poison for their party, the short-run implications are less vexing because few 2014 Senate battlegrounds have large numbers of immigrant voters. What is more, quite a few Republican lawmakers relish a larger political and constitutional confrontation if Obama uses sweeping discretion to suspend deportations. Ironically, conservative prophets of “unitary” executive power during the Bush years like John Yoo insist that deferred action on immigrant deportations is unconstitutional because presidential “prerogative” is limited to national security in times of war.

Past precedents and most legal experts suggest otherwise. Certainly, no White House can legally grant permanent residence to large numbers of immigrants, extend welfare benefits to them, or ignore annual Congressional allocations to fund deportations. Yet given inadequate enforcement resources and absent Congressional action, Obama has broad discretion to adjust and redirect enforcement efforts. He can declare delays in deporting millions of undocumented immigrants that may fall into broad categories slated as low priorities for removal, so long as he does not extend deferrals to all undocumented immigrants.

If President Obama expands the reach of the 2012 Deferred Action measure to protect millions of additional law-abiding undocumented immigrants from looming threats of deportation, legal precedents may be on his side; yet such a step would certainly provoke what one staffer described as “a nuclear reaction” from congressional Republicans. It is almost sure to ramp up Republican conservative calls for impeachment or other legal steps challenging the President with “lawlessness.” At the same time, of course, expanding deferrals would allow the White House to deliver on an old campaign promise despite House intransigence and to potentially strengthen and mobilize the Democratic base.

By contrast, if Obama chooses a more cautious path, it will further splinter and diffuse his party's base while GOP lawmakers will continue to push forward with efforts to defund and kill Deferred Action as it now exists – essentially calling for undocumented young people brought to the United States as children to, once again, become subject to deportation. That stance would not be popular with Latinos or Asians, or with most voters not inclined to support Tea Party conservatism.

Whatever Obama decides in the face of congressional inaction, immigration policy has therefore become ground zero in our current state of political dysfunction. Not just the Obama administration, but the country as a whole, finds itself between a political rock and a hard place in the current immigration stand-off, and more travail seems certain to come.