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Three New Ways for Congress to Legalize Illegal Immigrants

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A critical element of any future immigration reform will be the legalization of illegal immigrants. Previous immigration reform proposals have failed, largely because policymakers disagreed over whether and how to legalize illegal immigrants. Future immigration reform proposals must be different from previous proposals if there is any hope of them becoming law.

Presently, there are about 10–12 million illegal immigrants who reside in the United States, are unable to legally work, and are thus uncertain about their futures. Almost 17 million people live in families with at least one illegal immigrant in the household, representing 4.6 percent of the U.S. population.¹ Because of labor market regulations that outlaw the employment of illegal immigrants, they face an estimated wage penalty of 11.3 percent relative to legal immigrants.² Granting legal status to illegal immigrants will help solve these and other issues.

Past legalization reforms introduced by members of Congress were too similar to one another. They all failed, so it is time for Congress to propose new means of legalizing immigrants who are living here illegally. Our proposals provide three such means for legalizing illegal immigrants that will overcome some of the main political objections in the past. These proposals are very different from past proposals, and will create a better system:

1. Legalizing immigrants through a tiered system, whereby illegal immigrants can choose to either be legalized quickly and cheaply without the ability to gain citizenship in the future or begin a lengthier and expensive path toward citizenship;
2. Rolling legalization by allowing long-term illegal immigrant residents to legalize their status on an ongoing basis without an application cutoff date; and
3. Slowing chain immigration by limiting legalized immigrants' ability to sponsor family members from overseas for lawful permanent residency (LPR) or green cards.

These proposals address the issue in different ways, but all do so from the perspective that the majority of the 10–12 million illegal immigrants should be legalized. These proposed policies are also not mutually exclusive because Congress could enact all of them together to form a coherent policy. None of these proposals are ideal, and they are all compromises, but neither side in this political debate is going to get everything it wants, so middle-ground proposals are necessary if either side is going to receive some partial resolution to this pressing problem. We write this brief with the hope that at least one of these proposals will be innovative and effective enough to break the congressional logjam over legalization.

BACKGROUND

There are three main components of any immigration reform that would resolve most of the issues with illegal immigrants.³ The first component would create a legal channel for more future immigrants to enter, work, and live in the United States. The second component would increase immigration enforcement to deter future illegal immigrants from coming to the United States or overstaying visas. The third component would grant legal work and residency status to illegal immigrants who are already here if they are not a menace to public safety. Every comprehensive immigration reform proposal debated since 2002 has contained those three proposals presented in very similar legislative ways. The last immigration reform bill, debated in Congress in 2013, contained a one-size-fits-all path toward citizenship with many expensive hurdles that would have left at least three to four million illegal immigrants without legal status.⁴

Future immigration reform bills will have a better chance of becoming law if they convince some opponents of legalization and satisfy current supporters.

OPTION ONE: TIERED LEGALIZATION

Whether legalized immigrants should receive a path to citizenship was a main point of contention during the 2013 debate over comprehensive immigration. Most Democrats and other liberal proponents wanted illegal immigrants to become citizens, while some Republicans and conservatives supported legalization that would not lead to citizenship. Many others on the political right opposed any kind of legalization.⁵ Instead of trying to push through a one-size-fits-all program, policymakers should consider a two-tiered legalization process for otherwise law-abiding illegal immigrants to be legalized. The first path would be cheap and fast and result in a permanent work permit that could not lead to citizenship. The second path would be long and expensive, but it could lead to citizenship.

A work permit earned under the first path would allow the formerly illegal immigrant to work and live in the United States legally, travel abroad and return to the United States, and legally participate in American life. It would require a small initial fee and an even smaller renewal fee, and it would be rapidly approved. The restrictions for this work permit should be straightforward: those on it could not sponsor family members to immigrate, they could not access means-tested welfare benefits or entitlement programs, they would have to pay all taxes to support those programs, and they could not adjust to LPR status or citizenship except through

marriage or military service.⁶ Those who chose this type of lawful status path would be treated by the criminal justice system as if they had a green card, which means that they could be deported for committing some types of crimes.

The second path would lead to LPR status and eventual citizenship. Earning LPR status under this program would be more expensive than earning the work permit presented in the first option, and it would take much longer. The legalization provisions of the 2013 comprehensive immigration reform bill could serve as a model for this citizenship tier.⁷ After earning LPR status, the immigrant should be on the same track toward citizenship as others with LPR status.

The one-size-fits-all path to citizenship that Congress considered in 2013 would have left roughly three to four million illegal immigrants remaining in the United States a decade after passage.⁸ Our proposed two-tiered legalization would have allowed virtually all those uncovered three to four million remaining illegal immigrants to be legalized more cheaply and easily, and it would have allowed those who wanted citizenship to pursue that option after paying a higher price.

This compromise will satisfy many conservatives because most illegal immigrants would choose the cheaper path toward a work permit rather than citizenship, if naturalization rates after the 1986 Reagan amnesty are any guide. By 2009, only about 41 percent of those legalized under the 1986 amnesty had naturalized.⁹ This strongly indicates that most illegal immigrants do not desire citizenship but merely legal work status. Many liberals will be satisfied because illegal immigrants who desire citizenship can earn it, while the majority who only want work rights will be able to work and live in the United States legally at a much lower cost.

OPTION TWO: ROLLING LEGALIZATION

There have been successful attempts to legalize immigrants in the past. Reforming and expanding elements of these past legalization attempts would go some of the way toward reducing the illegal immigrant population. Illegal immigrants who entered the United States prior to 2012 would have been able to apply for legal status under the 2013 immigration reform bill debated in Congress, assuming they met the other requirements.¹⁰ The 1986 Reagan amnesty applied to illegal immigrants who entered prior to 1982.¹¹ But since 1940, permanent provisions of U.S. law also grant LPR status to some illegal immigrants on a rolling basis without a hard cutoff date. Congress could expand these provisions to guarantee that the illegal immigrant population will not grow unmanageably larger over time.

The law currently provides for cancellation of removal (deportation) for illegal immigrant spouses, parents, and minor children of U.S. citizens or green card holders who have lived continuously in the United States for at least 10 years if they can show that “exceptional and extremely unusual hardship” would befall their U.S.-citizen or LPR spouse, parent, or unmarried child under the age of 21 as a result of the deportation.¹² Illegal immigrants who have committed serious criminal offenses in the United States may not apply, but successful applicants receive LPR status, which allows them to apply for U.S. citizenship after five years. The law limits the number of cancellations in a year to no more than four thousand.¹³ But notwithstanding this cap, immigrants receive deportation deferrals and work authorization based on a pending application.¹⁴

Unfortunately, this pathway is too narrow for most otherwise eligible illegal immigrants to access because of the onerous standard of exceptional and extremely unusual hardship. Because this high standard renders this option unavailable to almost all illegal immigrants who have immediate family who are U.S. citizens, attorneys will only use it if an immigrant client is already in deportation proceedings.¹⁵ Thus the standard of exceptional and extremely unusual hardship prevents illegal immigrants from stepping forward to be legalized.

There were lower standards for stopping a deportation in the past that could be reapplied today. Starting in 1952, the law permitted “suspension of deportation” for illegal immigrant spouses, parents, and children of U.S. citizens or legal permanent residents who had lived continuously in the United States for at least seven years.¹⁶ From 1962 to 1996, the law required illegal immigrant applicants to prove that “extreme hardship” would befall their U.S.-citizen or LPR spouse, parent, or unmarried child who was under the age of 21.¹⁷ The standard of extreme hardship was still narrow, though significantly less so than the standard of exceptional and extremely unusual hardship that the law requires today.

The United Kingdom also provides an excellent example. It has similar but more expansive policies whereby the government grants “limited leave to remain” (i.e., temporary residence) to illegal immigrants under certain conditions that can lead to “indefinite leave to remain” (i.e., permanent residence).¹⁸ The UK will not remove illegal immigrants and will not grant limited leave to remain to

1. any adult non-UK citizen who would have “very significant obstacles” to “integration into the country to which he would have to go”;

2. children who have lived continuously for at least seven years in the UK and for whom it would not be “reasonable” to expect them to leave the UK;
3. non-UK citizens ages 18–25 if they have lived continuously for at least half their life in the country; and
4. any non-UK citizen who has lived continuously for at least 20 years in the UK.¹⁹

Limited leave to remain provides for two and a half years of temporary residence without access to public benefits, but immigrants may renew it. Following 10 years with limited leave to remain, legalized immigrants may apply for indefinite leave to remain if they “demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom.”²⁰

Congress could adopt the UK model or simply remove the standard of exceptional and extremely unusual hardship for those who meet the 10-year residency requirement for cancellation of removal under current U.S. law, and return to the standard of extreme hardship for those who meet the older 7-year requirement. Congress should also consider a suspension of deportation policy for any illegal immigrant—even those without U.S. family—if they have resided in the United States for 15 years or more, a more generous version of the 20-year residence requirement in the UK.

A rolling legalization policy would put a hard limit on the size of the illegal immigrant population. Making it easier for long-term illegal residents to be legalized could incentivize some illegal immigrants to come to the United States who would not have otherwise, but enforcement would necessarily only be aimed at recent arrivals and not long-term residents. Focusing future enforcement solely on recent arrivals—not people with strong ties to this country—would limit political backlash against those enforcement efforts.²¹

Today, two-thirds of the illegal immigrant population has resided for at least 10 years in the country.²² A hard and fast rule against removing those long-term residents would result in stricter and more targeted enforcement against people who have recently crossed the border or overstayed their temporary visas. Greater odds of deportation earlier in residency would decrease the incentive to overuse the backstop. Thus, a rolling legalization policy would keep the illegal population small in two ways. First, it would surge deportations of people who recently entered the United States, limiting the growth of new illegal residents. Second, it would legalize those who have lived for many years in this country, limiting growth of long-term illegal residents.

A permanent legislative solution would also obviate the

need for Congress to continually revisit this issue, and it would limit the humanitarian case for executive actions designed to limit deportations in compelling cases.

OPTION THREE: AMNESTY WITH LIMITED FAMILY SPONSORSHIP

Every year, about two-thirds of immigrants who earn LPR status are sponsored by family members. Under this system, American citizens or those with LPR status can sponsor certain close relatives for their own green cards, but these sponsorships are subject to numerical caps, the relatives' countries of origin, and other restrictions (Table 1).²³ Illegal immigrants who earn LPR status or eventual citizenship under amnesty would be able to sponsor some of their family members, and they could in turn sponsor some of their other family members and create a chain of legal immigrants from their home countries to the United States.

Some opponents of legalization or amnesty fear that family sponsorship, or the “chain-migration system,” is either unfair or would unreasonably expand legal immigration.²⁴ There is a long-running debate over the family sponsorship portion of the immigration system, but limiting the ability of legalized immigrants to sponsor their family members addresses this fear. In 1982, Congress passed the Virgin Islands Nonimmigrant Alien Adjustment Act to allow some temporary immigrant workers in those islands to earn LPR status.²⁵ Congress inserted a unique provision in that law that prevented the immigrants affected by this bill from using their LPR status or eventual citizenship from sponsoring additional relatives.²⁶ The risk of that type of ban on a larger population is that preventing family reunification in the United States could incentivize more illegal immigration in the future as family members seek to reunify with their legalized relatives here. The risk of increased illegal immigration could be reduced substantially by allowing the amnestied immigrants to sponsor their spouses and minor children only.

Restricting the ability of U.S. citizens to sponsor their

Table 1

Immigration preference categories and numerical caps

Immigration preference categories	Numerical cap
Immediate relatives of U.S. citizens	None
All family preferences	226,000
F1: Unmarried adult child of U.S. citizen	23,400
F2A: Spouse or minor child of lawful permanent resident	87,900
F2B: Unmarried child of lawful permanent resident	26,300
F3: Married child of U.S. citizen	23,400
F4: Siblings of adult U.S. citizen	65,000

Source: Immigration and Nationality Act, Sections 201 and 203.

family members if they were legalized under amnesty is likely unconstitutional, according to the Equal Protection Clause of the Fourteenth Amendment.²⁷ Thus Congress would likely have to grant amnestied immigrants a legal-but-less-than-citizenship permanent status for this provision to pass constitutional muster. Another option would be for Congress to prevent amnestied immigrants from sponsoring their family members for a visa while they are on LPR status, and then to extend that LPR status longer than the current five years of residency that are required before applying for naturalization. Since Congress already restricts noncitizen sponsorship of immigrants, this would likely not violate the Equal Protection Clause.

CONCLUSION

Although Congress has passed several amnesties for illegal immigrants since the early 20th century, not one of its major efforts to legalize or amnesty illegal immigrants has succeeded in recent decades.²⁸ Part of the reason for their failure is that proponents of legalization and immigration reform have not presented new or innovative ways to legalize this population while accounting for the criticisms and worries of opponents. The three proposals included in this brief—tiered legalization, rolling legalization, and limiting chain migration for legalized immigrants—are all compromise policies that are less than ideal, but they are an attempt to supply new ideas so that Congress will be able to break the reform deadlock and legalize illegal immigrants.

NOTES

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