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What to Do About the Unlawfully Present Population? A Fair and Practical Strategy

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One of the most contentious issues in the debate over immigration reform is how to deal with the estimated 12 to 15 million illegal aliens in the United States. Supporters of “comprehensive” reform often falsely present the issue as a choice between permanent legalization and the forced deportation of each and every illegal immigrant. As the latter is unacceptable, the only reasonable position, they contend, is legalization, the approach adopted by the amnesty provisions of the Senate’s immigration legislation. This approach is deeply flawed; it has been tried before and failed miserably. The better solution is to rely on law enforcement and market forces to end America’s addiction to undocumented labor and to create legitimate opportunities for immigrants to continue their contributions to keeping America safe, free, and prosperous.

The Past as Prologue. The Immigration Reform and Control Act of 1986 employed a two-step approach much like that in the Senate’s current reform proposal. First, it granted legal status to individuals who had resided illegally in the United States. Second, it tried to enforce the law. That strategy failed to solve the problem. After a six-month slowdown following passage of the legislation, illegal immigration returned to normal levels. A failure of political will in enforcing new laws against employers, along with six additional amnesties between 1994 and 2000, led to an influx of illegal immigrants that forms the nucleus of today’s unauthorized population.

America’s experience is not unique. Spain, for example, offered five amnesties for illegal immigrants between 1985 and 2005. None of them slowed the flow of undocumented migrants.

A general amnesty for immigration violations sends the signal that this nation does not hold everyone to the rule of law. As a practical matter, amnesties fail because subsequent additional measures to enhance border security and improve immigration services are overwhelmed by a continued or increased flow of both illegal border crossings and overstays (individuals who enter legally but remain in the country past the period authorized by their visa).

An Ill-Considered Solution. Despite amnesty’s unbroken record of failure, the legislation being considered in the Senate adopts the same flawed approach. This new bill offers a three-step process: granting legal status to the millions already in the United States illegally; then improving border security and immigration enforcement; and finally, creating a new legal alternative to the undocumented workforce—a temporary worker program. In this way, the proposed law would accommodate individuals who have already broken the law (by imme-

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diately issuing probationary Z visas) before strengthening security or providing a legal avenue for those who wish to work in the United States but choose to abide by the law.

Because it grants amnesty to the current undocumented population, this approach would encourage illegal migration and so would compromise and likely overwhelm any subsequent efforts to reduce illegal flows. One result would be that follow-on security measures would be more expensive and less effective and thus face greater political opposition. This, in turn, would reduce the likelihood that triggers would be met leading to the establishment of a real temporary worker program that offers a credible and economically flexible alternative to the illegal workforce.

A Market-Based Answer. A better alternative is to reject amnesty for those who have broken the law, create a powerful deterrent against further illegal migration, and insist that those who wish to live and work in the United States first return to their countries of origin and then apply, without partiality or prejudice and in line and on par with other applicants, for legal entry into the United States.

Some backers of the Senate bill have decried such an “attrition” strategy as wildly impractical or a “silent amnesty.” But it is the only strategy that offers a fair and reasonable alternative between the extremes of legal amnesty and forced deportation. Unlike those alternatives, it relies on the marketplace and incentives to resolve over time this seemingly intractable situation in accord with core principles of governance and the interests and individual choices of a very large and diverse unlawful population.

This solution is analogous to the policy success of welfare reform in the 1990s. The use of incentives and disincentives to encourage work reduced the welfare rolls over time by 60 percent, through the decreased entry and increased exit of welfare program participants.

Indeed, the demand for labor and the response of individuals to marketplace signals have traditionally been the most significant factors in South–North migration patterns. Illegal border crossings drop more in response to downturns in the U.S.

economy and the availability of employment than in response to stepped-up border enforcement. Likewise, when the U.S. economy grows and there are inadequate paths for legal employment, the undocumented workforce swells.

Shifting South–North migration patterns from illegal to legal requires, as a very first step, aligning the behavior of the marketplace with the rule of law. The way to do that is to enforce the laws of the nation, thereby discouraging unlawful employment, and to create a market which rewards and values lawful labor over illegal workers.

If Congress adopts a no-amnesty approach to immigration reform, measures that offer the right incentives to address the unlawfully present population could subsequently be introduced. These might include:

- **Create a Real Temporary Worker Program.** A balanced and well-constructed temporary worker program—one that allows for a reliable and market-driven source of labor provided by a dynamic and rotating temporary workforce—would diminish the incentives for illegal immigration by providing an additional option for legal temporary labor and, in combination with other reforms, gradually reduce the population of illegal aliens. This would foster better national security and serve a growing economy.
- **Improve Existing Programs.** The United States already has several programs (including an unrestricted visa classification for temporary or seasonal agricultural workers) that could be streamlined and adapted to grant other non-immigrant work visas. Immigration legislation should also restructure and enlarge existing programs for highly skilled foreign workers, such as the H-1B program, creating opportunities for illegal immigrants to leave and apply to participate in a legal program.
- **Establish Employment Sponsorship.** An employment sponsorship system, as part of a practical and realistic temporary worker program, would be a flexible alternative to government management of the supply of migrant labor. Many existing undocumented workers would be sponsored by their current employers, so

having to leave the country and apply for re-entry would neither discourage their compliance nor come at the expense of other legal migrants also waiting in line.

- **Create a National Trust for Voluntary Return.** Once the United States has operationally secure borders and reasonable legal opportunities for visas, green cards, and access to a true temporary worker program, many of those who are unlawfully present would leave willingly, return to their countries of origin, and take steps to return to the United States to live and work legally. To assist them, immigration reform legislation should establish a program of financial assistance to help illegal aliens return to their home countries. This should be a privately run, community-based volunteer program administered by a private commission with government oversight and funded by private donations. The trust's funds could be drawn on by accredited NGOs that would use the funds to assist individuals to return voluntarily to their places of origin.

There are other alternatives as well that might be considered, as explained in various other Heritage studies. Additional options may become reasonable, and prudent, once these incentives are allowed to operate over time, reducing the illegal inflow and the size of the existing unlawful population. Policymakers should consider those options at a later date.

Undertaken together, these initiatives are a credible alternative to a mass amnesty that would indiscriminately permit every unlawfully present person to remain legally in the United States. Enforcing the law and quickly establishing significant and practi-

cal legal opportunities for migrant temporary workers could significantly reduce America's addiction to illegal labor. At the same time, this would encourage individuals who are unlawfully present to accept the responsibility for the consequences of the decisions they have made in the past and make the choice to redress their status.

Time to Choose. Implementing a market-based strategy will take time and patience. The alternatives, however, are stark. Simple solutions, such as granting legal status to the millions unlawfully in the United States (as proposed in the Senate immigration reform bill) and tracking down and deporting each illegal alien in the country (an unacceptable policy that would require a massive expansion of law enforcement), offer costly, unfair, and inefficient answers that, by relying on the blunt instrument of government, would only make immigration enforcement and border security more difficult in the future.

Allowing individual choice while encouraging individual responsibility for those choices is the foundation of a free society. A sound immigration and border security strategy recognizes that foundation by upholding and respecting—and fairly and equitably enforcing—the rule of law.

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