

# BACKGROUND

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## Encouraging Lawful Immigration and Discouraging Unlawful Immigration

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### Abstract

*America recognizes the importance of lawful immigration. Such immigration provides economic and cultural benefits both to the United States and to the immigrants. In contrast, unlawful immigration challenges America's ability to protect its borders and preserve its sovereignty. Congress should search for appropriate ways to encourage lawful immigration and prevent unlawful immigration, through careful step-by-step actions to address the wide variety of immigration issues, rather than through one-size-fits-all comprehensive legislation. Congress should not adopt failed policies of the past, such as an amnesty, which discourages respect for the law, treats law-breakers better than law-followers, and encourages future unlawful immigration. When Congress implements step-by-step the proper policies, American will benefit greatly from the resulting lawful immigration.*

From its inception, the United States of America has recognized the vital importance of lawful immigration to the nation. Such immigration brings important economic and cultural benefits both to the United States and to the immigrants. Americans rightly incorporate into their lives and celebrate the values of America, including individual freedom, limited government, and free enterprise, and beckon others to join us. Lawful immigration greatly benefits both America and the lawful immigrants, while unlawful immigration presents challenges to America's ability to protect its borders and preserve its sovereignty.

**Welcoming Lawful Immigration.** In 1776, the Declaration of Independence, in speaking of the tyranny the thirteen American colonies had suffered under King George III of Great Britain, said:

### KEY POINTS

- America recognizes that lawful immigration provides economic and cultural benefits both to America and to lawful immigrants
- America also recognizes that unlawful immigration presents challenges to America's ability to protect its borders and preserve its sovereignty.
- Congress should pursue a measured set of approaches tailored to a wide variety of immigration issues, rather than comprehensive, all-or-nothing, and one-size-fits-all legislation.
- Congress should not adopt failed policies of the past, such as amnesty, which discourages respect for the law, treats law-breakers better than law-followers, and encourages future unlawful immigration.
- When Congress implements step-by-step the proper policies, America will move closer to having the economic and cultural benefits and rewards of lawful immigration, without the burdens and challenges of unlawful immigration.

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The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

The Declaration’s submission of facts about the king’s tyrannical conduct included that:

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for the Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

After the representative of George III stated in the Treaty of Paris in September 3, 1783, that “His Britannic Majesty acknowledges the said United States . . . to be free sovereign and independent states,” the victorious Revolutionary War commander in chief General George Washington wrote on December 2, 1783, to an association of Irish immigrants in New York City:

The bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations And Religions; whom we shall wellcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment.

When the delegates of the states met in Philadelphia in the summer of 1787 to draft the Constitution that conventions of the people of the several states later ratified, they included among the enumerated powers of the federal Congress the power “[t]o establish an uniform Rule of Naturalization,” which would set forth the conditions under which immigrants could become citizens of the United States. Thus, at its very beginning, the United States of America recognized the importance to the nation of lawful immigration.

America continues to recognize the vital importance of lawful immigration. As President Ronald Reagan said in 1986:

Since 1820, more than 52 million immigrants have come to the United States from all over the

world. They have sought and found a new and better life for themselves and their children in this land of liberty and opportunity. The magnet that draws them is freedom and the beacon that guides them is hope. America offers liberty for all, encourages hope for betterment, and nurtures great expectations. In this free land a person can realize his dreams—going as far as talent and drive can carry him. In return America asks each of us to do our best, to work hard, to respect the law, to cherish human rights, and to strive for the common good.

The immigrants who have so enriched America include people from every race, creed, and ethnic background. Yet all have been drawn here by shared values and a deep love of freedom. Most brought with them few material goods. But with their hearts and minds and toil they have contributed mightily to the building of this great Nation and endowed us with the riches of their achievements. Their spirit continues to nourish our own love of freedom and opportunity.<sup>1</sup>

In contrast to lawful immigration, which benefits America greatly, unlawful immigration challenges the ability of the United States to protect its borders and preserve its sovereignty.

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**Lawful immigration greatly benefits both America and the lawful immigrants, while unlawful immigration presents challenges to America’s ability to protect its borders and preserve its sovereignty.**

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**Congress Should Proceed Carefully, Step-by-Step, Instead of with One-Size-Fits-All Comprehensive Legislation.** The complexities involved in encouraging lawful immigration and deterring unlawful immigration call for a measured set of approaches tailored to a wide variety of immigration issues, rather than comprehensive, all-or-nothing, and one-size-fits-all legislation.<sup>2</sup> Those approaches “can move forward on many fronts at the same time, focusing on some commonsense initiatives that begin to address the practical challenges

of our immigration system.”<sup>3</sup> The U.S. should reform its immigration system through a careful, step-by-step process that welcomes lawful immigrants, encourages their full participation in American life, and expands opportunity. The process also must prevent unlawful immigration, encourage respect for law, secure America’s borders, and preserve America’s sovereignty.<sup>4</sup> The Heritage Foundation has described this step-by-step process for a problem-solving approach to immigration issues, such as reform of the lawful immigration system, visa reforms, lawful temporary worker arrangements, and strong border and interior enforcement.<sup>5</sup>

The Congress of the United States has the power to determine by law whether and on what terms citizens of other countries may enter the United States. The Supreme Court has held that the power to admit or exclude such aliens is an incident of the sovereignty and independence of the United States. The Congress may exercise that power, by enactment of civil and criminal laws, and has done so. Despite U.S. efforts to enforce its laws, substantial numbers of aliens are unlawfully in the United States.

**Congress Has Broad Power to Address both Lawful Immigration and Unlawful Immigration.** Congress possesses plenary authority to regulate entry of aliens into the United States. In 1977, the Supreme Court said:

This Court has repeatedly emphasized that “over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens. Our cases “have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government’s political departments largely immune from judicial control.”<sup>6</sup>

Congress has broad authority to enforce the policies it sets by law on whether and on what conditions aliens may enter the United States.<sup>7</sup> All civil or criminal proceedings must afford the requisite due process of law.<sup>8</sup>

**Amnesty Is Not the Answer to Unlawful Immigration.** On occasion, proposals arise that would grant amnesty to aliens who have entered the country unlawfully, or who entered lawfully but whose authorization to remain has expired. The term “amnesty” is often used loosely with reference to aliens unlawfully in the United States. Sometimes

it refers to converting the status of an alien from unlawful to lawful, either without conditions or on a condition such as a payment of a fee to the government. Sometimes it refers to granting lawful authority for an alien unlawfully in the U.S. to remain in the U.S., become a lawful permanent resident, or even acquire citizenship by naturalization, either without conditions or on a condition such as payment of a fee to the government or performance of particular types of work for specified periods. Amnesty comes in many forms, but in all its variations, it discourages respect for the law, treats law-breaking aliens better than law-following aliens, and encourages future unlawful immigration into the United States.

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Presidents may issue pardons for offenses against the United States, whether issued to an individual for an offense or to a class of people for an offense they have in common.<sup>9</sup> Although the President may pardon for crimes, including immigration crimes, aliens unlawfully in the U.S., the pardon does not constitute a grant of authority to remain in the United States, and the alien would remain subject to removal.<sup>10</sup> Congress, however, has the power to enact laws that both forgive an alien’s past crimes and change an alien’s immigration status from unlawful to lawful.<sup>11</sup> For example, when Congress enacted the Immigration Reform and Control Act (IRCA) of 1986 to deal with the large numbers of aliens unlawfully in the U.S. at that time, Congress included two broad amnesty programs.

The first IRCA amnesty program generally required the Attorney General to adjust to the status of lawful temporary permanent residence aliens unlawfully in the U.S. who had been in the U.S. since January 1, 1982, with subsequent adjustment to lawful permanent residence.<sup>12</sup> The second IRCA amnesty program generally required the Attorney General to adjust to the status of lawful “special agricultural workers” aliens unlawfully in the U.S.

who performed 90 days of qualifying agricultural work during the 12 months preceding May 1, 1986, and who could qualify for immigrant status, with subsequent adjustment of their status to that of lawful permanent residence.<sup>13</sup> Over 2.5 million aliens unlawfully in the U.S. availed themselves of the IRCA amnesties to attain legal status.<sup>14</sup>

With respect to the IRCA amnesty programs, the House committee originating the legislation said “a one-time legalization program is a necessary part of an effective enforcement program . . . .”<sup>15</sup> When the Senate considered the final legislation, a Senator from Texas asked the floor manager of the legislation, a Senator from Wyoming, a question about amnesty:

. . . [O]ne of the things that has concerned me having looked at the problem on our borders, is that there may be those in other countries who will say that since we granted amnesty once maybe we will do it again. And rather than sign up to be on this list of 1.9 million people that have the dream of someday being able to come here, maybe people will just come on across the border thinking it will happen again.

So I ask my colleague, as one who has worked 6 years on this bill, and who clearly is going to have much to say about changes that will occur in the future, is it the clear position of the distinguished chairman that under no circumstances will there be another blanket amnesty in the future?

The Senator from Wyoming responded:

. . . I can assure the Senator from Texas that as long as I am involved in it that will be exactly the message that will be sent, that this is it. This is a generous Nation responding; instead of going hunting for you and going through the anguish of that in the cities and communities of America, this is it. It is one time.<sup>16</sup>

When Congress enacted the IRCA amnesty programs in 1986 for aliens unlawfully in the U.S., the population of aliens unlawfully in the U.S. was an estimated 3.2 million.<sup>17</sup> In January 2011, that population was an estimated 11.5 million.<sup>18</sup>

Grants of amnesty, regardless of the form of the reward they give to aliens who knowingly entered

or remain the U.S., discourage respect for the law, treat law-breaking aliens better than law-following aliens, and encourage future unlawful immigration into the United States. If America suddenly awards legal status to aliens unlawfully in the United States, it will treat them better than aliens abroad who follow America’s immigration procedures and patiently await their opportunity to get a visa authorizing them to come to the United States. And, of course, if America suddenly awards legal status to aliens unlawfully in the U.S., it will, as the IRCA amnesty proved, spur more aliens to enter or remain unlawfully in the United States, in the confident expectation that Congress will continue enacting future amnesties that provide aliens unlawfully in the U.S. a shortcut to legal status. The government should pursue a measured set of approaches to a wide variety of immigration issues, but in all events exclude amnesty for aliens unlawfully in the United States.

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**Conclusion: Congress Should Encourage Lawful Immigration and Prevent Unlawful Immigration.** For more than two centuries, America has encouraged and benefitted from lawful immigration. Congress should continue to search for appropriate ways to encourage lawful immigration, reducing the burdens of the immigration process on both the government and lawful immigrants, and making it easier for both America and the lawful immigrants to enjoy the economic and cultural benefits that result from lawful immigration. Congress also should continue to search for appropriate ways to prevent unlawful immigration and secure America’s borders. As Congress moves forward, it should not adopt failed policies of the past, such as amnesty, which discourages respect for the law, treats law-breakers better than law-followers, and encourages future unlawful immigration. When Congress implements step-by-step the proper

policies, America will benefit greatly from the arrival on America's shores of lawful immigrants who, as Ronald Reagan said, will find "a new and better life for themselves and their children in this land of liberty and opportunity."

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## Endnotes

1. President Ronald Reagan, Proclamation 5510 (July 2, 1986).
2. See Matthew Spalding, Jessica Zuckerman, James Jay Carafano, *Immigration Reform Needs Problem-Solving Approach, Not Comprehensive Legislation*, Issue Brief No. 3833, The Heritage Foundation (January 17, 2013), available at <http://report.heritage.org/ib3833>; James Jay Carafano, *Amnesty Legislation Still the Wrong Answer for Responsible Immigration Reform*, The Heritage Foundation, WebMemo No. 3327 (July 27, 2011), available at <http://report.heritage.org/wm3327>.
3. Matthew Spalding, ed. *America's Opportunity for All*, The Heritage Foundation (2013), p. 112, available at <http://opportunity.heritage.org/americas-opportunity-for-all/>.
4. See, for example, Edwin Meese III and Matthew Spalding, *Where We Stand: Essential Requirements for Immigration Reform*, Backgrounder No. 2034, The Heritage Foundation (May 10, 2007), available at [http://s3.amazonaws.com/thf\\_media/2007/pdf/bg2034.pdf](http://s3.amazonaws.com/thf_media/2007/pdf/bg2034.pdf).
5. See, for example, Edwin Meese III and Matthew Spalding, *The Principles of Immigration*, Backgrounder No. 1807, The Heritage Foundation (October 19, 2004), available at [http://s3.amazonaws.com/thf\\_media/2004/pdf/bg1807.pdf](http://s3.amazonaws.com/thf_media/2004/pdf/bg1807.pdf); Meese and Spalding, *Permanent Principles and Temporary Workers*, Backgrounder No. 1911, The Heritage Foundation (March 1, 2006), available at [http://s3.amazonaws.com/thf\\_media/2006/pdf/bg1911.pdf](http://s3.amazonaws.com/thf_media/2006/pdf/bg1911.pdf); Meese and Spalding, *Where We Stand: Essential Requirements for Immigration Reform*, Backgrounder No. 2034, The Heritage Foundation (May 10, 2007), available at [http://s3.amazonaws.com/thf\\_media/2007/pdf/bg2034.pdf](http://s3.amazonaws.com/thf_media/2007/pdf/bg2034.pdf); Matthew Spalding, Jessica Zuckerman, and James Jay Carafano, *Immigration Reform Needs Problem-Solving Approach, Not Comprehensive Legislation*, Issue Brief No. 3833, The Heritage Foundation (January 17, 2013), available at [http://thf\\_media.s3.amazonaws.com/2013/pdf/ib3833.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/ib3833.pdf); and Jessica Zuckerman, *Senate Immigration Reform: Another Misguided Call for Comprehensive Legislation*, Issue Brief No. 3845, The Heritage Foundation (January 30, 2013), available at [http://thf\\_media.s3.amazonaws.com/2013/pdf/ib3845.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/ib3845.pdf).
6. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citations omitted) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) and *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). Recently, in *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012), the Supreme Court identified the source of the power of Congress to control the admission or exclusion of aliens as follows: "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish a uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations." (citations omitted).
7. Congress has, for example, specified criminal penalties for entering the U.S. at any time or place other than as designated by immigration officers (8 U.S.C. 1325(a)) and for re-entering the U.S. without prior permission after having been denied admission, excluded, deported, or removed (8 U.S.C. 1326(a)). The U.S. government can prosecute aliens who commit either of these crimes, subject to a statute of limitations that generally requires their prosecution within five years after the date of the crime (18 U.S.C. 3282(a)). There is no federal statute making an alien's mere presence within the United States, without authorization to remain, a crime. So, for example, an alien who entered lawfully on a temporary visa, and remains in the country after expiration of the visa, is in the country unlawfully, but is subject only to civil exclusion proceedings and not criminal prosecution, unless the alien engages in some other way in criminal conduct. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain in the United States."); *Ortego-Melendres v. Arpaio*, 836 F. Supp.2d 959, 971 (D. Ariz. 2011) ("Being present in the country without authorization to remain 'is only a civil violation.' . . . An alien who 'overstays a valid visa or otherwise remains in the country after the expiration of a period authorized by the Department of Homeland Security,' therefore, although he may be subject to deportation, has violated no criminal statute."), *affirmed* 695 F.3d 990, 1000 (9th Cir. 2012) ("We have long made clear that, unlike illegal entry, mere unauthorized presence in the United States is not a crime.").
8. The Fifth Amendment to the U.S. Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." That constitutional protection extends to all persons present in the United States, including aliens. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." (citations omitted)).
9. Section 2 of Article II of the Constitution grants to the President the "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." When a President grants pardons to a class of people for an offense they have in common, the grant is often referred to as an "amnesty," although the term is an informal one without legal consequences separate from the term "pardon." To illustrate, in his Christmas Day proclamation in 1868, President Andrew Johnson granted "to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war . . ." The Supreme Court concluded that the word "amnesty" used in the Johnson proclamation was surplusage, as "[a]ll the benefits which can result to the claimant from both pardon and amnesty would equally have accrued to him if the term 'pardon' alone had been used in the proclamation of the President." *Knote v. United States*, 95 U.S. 149, 152-53 (1877).

10. *U.S. ex rel. Brazier v. U.S. Commissioner of Immigration at Port of New York*, 5 F.2d 162, 164 (2d Cir. 1924) (“They were not, and could not be, pardoned from deportation. A pardon is for a crime . . . ; *inter alia*, it avoids or terminates punishment for that crime, but deportation is not a punishment, it is an exercise of one of the most fundamental rights of a sovereign . . . , a right which under our form of government is exercised by legislative authority.”) Under 8 U.S.C. 1182(a)(6)(A)(i), “[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” And, under 8 U.S.C. 1227(a)(1)(A) “[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.” Further, under 8 U.S.C. 1227(a)(1)(B) “[a]ny alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.” For aliens lawfully in the United States who are convicted of certain crimes, such as crimes involving moral turpitude, that make them subject to removal, a federal statute (8 U.S.C. 1227(a)(2)(A)(vi)) provides that a presidential pardon for those convictions waives removal based on those convictions.
11. *Brown v. Walker*, 161 U.S. 591, 601 (1896) (“The act of congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England (2 Tayl. Ev. § 1455, where a large number of similar acts are collated) or in this country. Although the constitution vests in the president ‘power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,’ this power has never been held to take from congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this court in *Ex parte Garland*, 4 Wall. 333, 380, ‘it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.’”).
12. 8 U.S.C. 1255a.
13. 8 U.S.C. 1160. See *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 483 (1991).
14. Ruth Ellen Wasem, “Unauthorized Aliens Residing in the United States: Estimates Since 1986,” Congressional Research Service, Report No. RL33874 (December 13, 2012), p. 1.
15. Report to Accompany H.R. 3810 of the 99th Congress, the Immigration Reform and Control Act of 1986, Report 99-682 (Part 1), Committee on the Judiciary, U.S. House of Representatives, (July 16, 1986), reprinted in 1986 U.S. Code Cong. & Ad. News 5649, 5653, 1986 WL 31950.
16. 132 Cong. Rec. S16879-01, 1986 WL 788854 (October 17, 1986) (colloquy between Senator Gramm of Texas and Senator Simpson of Wyoming during consideration of conference report on IRCA).
17. Ruth Ellen Wasem, “Unauthorized Aliens Residing in the United States: Estimates Since 1986,” Congressional Research Service, Report No. RL33874 (December 13, 2012) (Summary).
18. Michael Hofer, Nancy Rytina, and Bryan Baker, “Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011,” Office of Immigration Statistics, Department of Homeland Security (March 2012), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).