

BACKGROUND

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Administrative Amnesty: Unjust, Costly, and an Incentive for More Illegal Immigration

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Abstract

Leaders in Congress have called for greater enforcement of U.S. immigration law, while President Barack Obama continues to call for legalization of millions of illegal immigrants. Deportations, particularly interior enforcement, have decreased dramatically under President Obama, who has made clear his support for granting legal status to those who are in the country unlawfully. Recent press reports indicate that the President is inclined to issue a memo like the Department of Homeland Security's June 15, 2012, Deferred Action for Childhood Arrivals (DACA) memo for a large subset of the illegal immigrant population, perhaps up to 5 million. That would be a mistake for three primary reasons: It is unjust, it is costly, and it will not work to stop illegal immigration.

President Barack Obama is considering using prosecutorial discretion to effectively legalize millions of illegal immigrants. Doing so would be unjust and costly and would encourage more illegal immigration.¹ Congress should discourage the Administration from considering this divisive and unproductive step, which would only make it more difficult to implement suitable, feasible, and just immigration reforms and more robust and effective border security.

Background

Current U.S. law, written and passed by Congress and signed by the President, makes it unlawful for foreign nationals to enter or stay in the country without authorization.² Despite this clear provision of law, the Department of Homeland Security (DHS) estimated that about 11.4 million people lived in the United States without

KEY POINTS

- President Obama should not pursue an unpopular, polarizing administrative amnesty that is unfair, is costly, and will encourage more illegal immigration.
- If the President does pursue administrative amnesty, Congress should consider (1) legislation forbidding the use of funds and fees to implement the new amnesty order and any further determinations under DACA and (2) a resolution expressing its sense that the administrative amnesty can be reversed and that any information gleaned from participants could be used in future deportation proceedings.
- If President Obama pursues an administrative amnesty of millions of people, potential future illegal immigrants might think (wrongly) that they could qualify under this grant of amnesty or (rightly) that another amnesty is likely in the future if they can avoid deportation in the meantime. The end result will be more illegal immigrants crossing our borders.
- Congress should send a clear signal that reforms without Congress are a disservice to the nation.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2944>

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Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

authorization in January 2012.³ Deportations, particularly interior enforcement, have decreased dramatically under President Obama,⁴ and he has made clear his support for granting legal status to those who are in the country unlawfully.⁵

The Department of Homeland Security issued the Deferred Action for Childhood Arrivals (DACA) memorandum on June 15, 2012. DACA purported to set prosecutorial priorities and grant relief to each individual who (1) came to the U.S. under the age of 16; (2) continuously resided in the U.S. for at least five years before the date of the memo; (3) is currently in school, has graduated from high school, has a GED, or is an honorably discharged veteran; (4) has not been convicted of a felony, significant misdemeanor, or multiple misdemeanors or otherwise poses a threat; and (5) is not above the age of 30.⁶

In early 2013, debate began on a comprehensive immigration bill that would include an amnesty for

most of the unlawful immigrant population. The U.S. Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) in June 2013.⁷ In January 2014, the leadership of the House of Representatives issued “principles” for immigration reform⁸ that included a general legalization much like S. 744.⁹

Since the issuance of the DACA memo and during debate over a larger amnesty, the number of people unlawfully crossing the U.S. border has increased significantly.¹⁰ Many are turning themselves in, believing that they could qualify for deferred action even though the memorandum requires continuous residence since at least June 15, 2007.¹¹ Even if they do not qualify for DACA, lax enforcement in general means that most illegal immigrants will not be deported once they enter the interior of the U.S.¹² President Obama and some in Congress sought to advance a comprehensive bill, but momentum for

1. David Nakamura, “Obama Readies Executive Action on Immigration,” *The Washington Post*, August 1, 2014, http://www.washingtonpost.com/politics/obama-readies-executive-action-to-legalize-millions-of-undocumented-immigrants/2014/08/01/222ae2e8-18f8-11e4-85b6-c1451e622637_story.html (accessed August 7, 2014).
2. 8 U.S.C. § 1151 (2009).
3. U.S. Department of Homeland Security, Office of Immigration Statistics, “Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012,” March 2013, pp. 1–8, http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf (accessed August 8, 2014).
4. U.S. Department of Homeland Security, Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2012*, July 2013, p. 103, Table 39, <http://www.dhs.gov/yearbook-immigration-statistics-2012-enforcement-actions> (accessed August 11, 2014).
5. Barack Obama, “Time for Congress to Pass Commonsense Immigration Reform,” *The White House*, June 22, 2013, <http://www.whitehouse.gov/the-press-office/2013/06/22/weekly-address-time-congress-pass-commonsense-immigration-reform> (accessed August 11, 2014).
6. Janet Napolitano, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” memorandum to David V. Aguilar, Alejandro Mayorkas, and John Morton, U.S. Department of Homeland Security, June 15, 2012, pp. 1–3, <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (accessed August 8, 2014).
7. Cloture vote on the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., 1st Sess., June 27, 2013, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00167 (accessed August 8, 2014).
8. “Text of Republicans’ Principles on Immigration,” *The New York Times*, January 30, 2014, <http://www.nytimes.com/2014/01/31/us/politics/text-of-republicans-principles-on-immigration.html> (accessed August 8, 2014).
9. Derrick Morgan, “House Immigration Reform Standard Take Amnesty-First Approach,” *The Daily Signal*, January 30, 2014, <http://dailysignal.com/2014/01/30/house-standards-immigration-reform-amnesty-first-senate-like-approach/> (accessed August 8, 2014).
10. U.S. Border Patrol, “U.S. Border Patrol Fiscal Year Monthly Apprehension Statistics,” p. 3, <http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY1999-FY2013.pdf> (accessed August 11, 2014), and “Southwest Border Unaccompanied Alien Children,” <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (accessed August 11, 2014).
11. “Individuals will not be eligible if they are not currently in the United States and cannot prove that they have been physically present in the United States for a period of not less than 5 years immediately preceding today’s date.” Press release, “Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities,” U.S. Department of Homeland Security, June 15, 2012, <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low> (accessed August 8, 2014).
12. Jessica M. Vaughan, “Deportation Numbers Unwrapped,” Center for Immigration Studies, October 2013, <http://cis.org/ICE-Illegal-Immigrant-Deportations> (accessed August 11, 2014).

such a measure has collapsed, in part as a result of the massive influx of illegal immigrants crossing the southern border of the United States.

Leaders in Congress have called for greater enforcement of the law, while President Obama continues to call for legalization. Recent press reports indicate that he is inclined to issue a memo like DACA for a large subset of the illegal immigrant population, perhaps up to 5 million.¹³ That would be a mistake for three primary reasons: It is unjust, it is costly, and it will not work to stop illegal immigration. Before addressing these concerns, it is important to consider why we have immigration laws.

Why Do We Have Immigration Laws?

America has always welcomed immigrants. In fact, the Declaration of Independence took note of King George III's abuse in the form of "obstructing the laws for Naturalization of Foreigners [and] refusing to pass others to encourage their migrations hither." Immigration can help a nation economically and socially, as it has the United States. As President Ronald Reagan said:

The magnet that draws [immigrants] 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.¹⁴

A sovereign country is fully entitled and wise to determine who can and cannot enter or stay in the country. Open borders are particularly unwise because of the threat of global terrorism.¹⁵ There are reports that recent illegal migrants across the U.S. southern border have included individuals from countries on the terrorist watch list, such as Yemen.¹⁶

Unlimited immigration is also a concern in a constitutional republic like the United States that is ultimately governed by the people. America's newest arrivals, particularly those who become citizens, must be instructed in our democratic customs, which make America an exceptional nation. Of particular importance are the rule of law, private property rights, freedom from corruption, free markets, tolerance, and equality under the law. In other words, immigration should be at a pace to allow beneficial assimilation.¹⁷ No matter what one believes about the level of immigration, it should be a matter of debate among the people and decided by our elected representatives.

Administrative Amnesty Is Unjust

The United States currently admits about 1 million legal permanent immigrants every year,¹⁸ more than any other nation in the world.¹⁹

The level of legal immigration is a topic of worthy debate. One recent Reuters poll finds that only 16 percent of Americans want increased immigration.²⁰ In any event, the level of immigration should be determined democratically through our elected representatives, particularly Congress, which has authority to "establish an uniform Rule of Natural-

13. Nakamura, "Obama Readies Executive Action on Immigration."
14. Ronald Reagan, "National Immigrants Day, 1986," Presidential Proclamation No. 5510, July 2, 1986, <http://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg4474.pdf> (accessed August 8, 2014).
15. James Jay Carafano and Richard Weitz, "Enhancing International Collaboration for Homeland Security and Counterterrorism," Heritage Foundation *Backgrounder* No. 2078, October 18, 2007, <http://www.heritage.org/research/reports/2007/10/enhancing-international-collaboration-for-homeland-security-and-counterterrorism>.
16. Brandon Darby, "Leaked CBP Report Shows Entire World Exploiting Open US Borders," Breitbart, August 3, 2014, <http://www.breitbart.com/Breitbart-Texas/2014/08/03/Leaked-CBP-Report-Shows-Entire-World-Exploiting-Open-US-Border> (accessed August 8, 2014).
17. William E. Simon Jr., "Immigration and Americanization," Heritage Foundation *Commentary*, August 12, 2005, <http://www.heritage.org/research/commentary/2005/08/immigration-and-americanization> (accessed August 8, 2014).
18. U.S. Department of Homeland Security, "Yearbook of Immigration Statistics: 2013 Lawful Permanent Residents," June 16, 2014, <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> (accessed August 8, 2014).
19. Organisation for Economic Co-operation and Development, "International Migration Database," <http://stats.oecd.org/Index.aspx?DataSetCode=MIG> (accessed August 12, 2014).
20. Ipsos, "Ipsos Poll Conducted for Reuters: Attitudes Towards Immigration Topline 7.29. 2014," July 29, 2014, <http://www.ipsos-na.com/download/pr.aspx?id=13859> (accessed August 11, 2014).

ization.”²¹ The President disregarded the separation of powers in the DHS’s inappropriate DACA memorandum, and any further legalization would raise even more serious concerns.²² It is unjust for the President to override the people’s determination (expressed through Congress) of how many people are welcome as residents of the United States.

President Thomas Jefferson wrote, “Born in other countries, yet believing you could be happy in this, our laws acknowledge, as they should do, your right to join us in society, conforming...to our established rules.”²³ Such positive support for legal immigration—including insistence that it be done through proper channels—has been the hallmark of our nation’s immigration policy.

A just government applies the law equally as much as is possible, with special exceptions made only rarely and for extraordinary circumstances. Presidential nullification of our immigration laws for entire classes of people—for millions of people who deliberately violated our laws—is unjust. It involves arbitrary and unequal application of congressionally enacted immigration law. By so doing, it fundamentally runs counter to the rule of law, which lies at the core of our constitutional republic.

Such presidential nullification of established immigration law is unjust to those who decided not to come to the United States because they would be doing so without authorization. Millions of people would fit into this category in Mexico alone.²⁴ Granting amnesty for another class of people who violated our laws treats those who respect our laws with contempt.

It is also unjust to the millions of Americans and resident legal immigrants who followed the rules. Many had to follow our sometimes lengthy process

as relatives or spouses of those here legally. Others simply wanted to come to study or work in the United States and followed the rules to do so legally. Granting blanket amnesty to those who neglected to follow our law is a slap in the face to those who are following the rules.

Moreover, it is more difficult to apprehend dangerous criminals at the border if the Border Patrol has to deal with an increasing number of illegal immigrants crossing the border. That will increase the cost and/or decrease the effectiveness of protecting the American people—an unjust result.

Refusing to uphold the law equally by making special exceptions for favored groups fits the pattern of unfairness emanating from Washington. Citizens and lawful residents in the states (especially border states) bear the brunt of the irresponsible federal abdication of immigration law, while those who are favored by Washington reap windfalls not due to them under the law and normal democratic process.

Administrative Amnesty Is Costly

S. 744 would have legalized unlawful immigrants if they met certain conditions, such as continuous residence in the United States for a period of time and undergoing background checks. Such policies, however, wrongly presume that the DHS has the capability to process additional cases. For example, when DACA was implemented, background checks were supposed to be run on each applicant. The DHS, however, abandoned rigorous checks and opted for minimal, “lean and lite” background checks as it was overwhelmed by applications or simply decided to ignore such requirements.²⁵ Furthermore, U.S. Citizenship and Immigration Services has struggled to replace its existing paper-based application system

21. U.S. Constitution, art.1, § 8.

22. Elizabeth H. Slattery and Andrew Kloster, “An Executive Unbound: The Obama Administration’s Unilateral Actions,” Heritage Foundation *Legal Memorandum* No. 108, February 12, 2014, <http://www.heritage.org/research/reports/2014/02/an-executive-unbound-the-obama-administrations-unilateral-actions>.

23. Thomas Jefferson, letter to Hugh White, May 2, 1801, in Matthew Spalding, ed., *The Founders’ Almanac* (Washington, DC: The Heritage Foundation, 2004), p. 163.

24. Pew Research Center, “Most Mexicans Would Not Move to the U.S.,” June 21, 2012, <http://www.pewresearch.org/daily-number/most-mexicans-would-not-move-to-u-s/> (accessed August 8, 2014).

25. Press release, “Documents Reveal DHS Abandoned Illegal Alien Background Checks to Meet Amnesty Requests Following Obama’s DACA,” Judicial Watch, June 11, 2013, <http://www.judicialwatch.org/press-room/press-releases/homeland-security-documents-reveal-dhs-abandoned-required-illegal-alien-background-checks-to-meet-flood-of-amnesty-requests-following-obamas-deferred-action-for-childhood-arrivals-directive/> (accessed August 12, 2014).

with a web-based one, and S. 744 would make the system worse by requiring the DHS to accept paper-based application for years to come.²⁶

Given the government's past difficulties with immigration enrollment programs and an existing backlog of at least 4.3 million people waiting for green cards, an administrative amnesty of up to 5 million individuals would have significant costs and cause major difficulties.²⁷ At least some of the costs could be offset with fees (DACA imposed a fee of nearly \$400).

An amnesty-today policy would encourage more illegal immigrants to come in hopes of a future amnesty. The cost of the policy is therefore larger than just the administrative cost. From an economic theory standpoint, illegal immigration may seem beneficial because labor is being used more productively, but many costs are associated with unlawful immigrants. As Nobel prize-winning economist Milton Friedman put it, free immigration to jobs is one thing, but free immigration to welfare is quite another.²⁸ Illegal immigrants who reside in the United States pay some taxes but consume more in government benefits, such as education.²⁹

An amnesty policy will be costly to taxpayers at the local, state, and federal levels. An administrative amnesty would be the latest example of Washington benefiting some (illegal immigrants) at the cost of others (lawful residents).

Administrative Amnesty Won't Work

Just as talk of amnesty and the issuance of DACA encouraged more border crossings, an expanded administrative amnesty will encourage even more

unlawful immigration in the years ahead. In 1986, Congress passed and the President signed a general amnesty of an estimated 3 million unlawful immigrants. Today, more than 11 million unlawful immigrants reside in the United States. Sponsors of the legislation promised that the amnesty would be "a one-time only" measure³⁰ and was being done in exchange for a secure border and interior enforcement measures. Yet nearly three decades later, the promised enforcement and border security are lackluster, and amnesty is being pursued again.

If President Obama pursues an administrative amnesty of millions of people, potential future illegal immigrants might think (wrongly) that they could qualify under this grant of amnesty or (rightly) that another amnesty is likely in the future if they can avoid deportation in the meantime. The end result will be more illegal immigrants crossing our borders.

What the U.S. Should Do

The President should not pursue an unpopular, polarizing administrative amnesty that is unfair, is costly, and will encourage more illegal immigration. If the President does pursue administrative amnesty, Congress should consider:

- **Limiting funds.** Congress could pass legislation forbidding the use of funds (and fees) to implement the new amnesty order and any further determinations under DACA. (The House has passed such a limitation but the Senate has not.)

26. David Inserra, "Expanding Government: Beware of the Senate's Immense, Obamacare-Style Immigration Bill," Heritage Foundation *Backgrounder* No. 2909, May 12, 2014, <http://www.heritage.org/research/reports/2014/05/expanding-government-beware-of-the-senates-immense-obamacare-style-immigration-bill>.

27. U.S. Department of Justice, Office of the Inspector General, *An Investigation of the Immigration and Naturalization Service's Citizenship USA Initiative*, July 2000, Chap. 5, "Criminal History Checking Procedures," http://www.justice.gov/oig/special/0007/criminal.htm#_Toc489261228 and <http://www.justice.gov/oig/special/0007/listpdf.htm> (accessed August 12, 2014), and U.S. Department of State, "Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2013," <http://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf> (accessed August 12, 2014).

28. Milton Friedman, "Illegal Immigration," Part 1, video, LibertyPen.com, <https://www.youtube.com/watch?v=3eyJlbSgdSE> (accessed August 8, 2014).

29. Robert Rector and Jason Richwine, "The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer," Heritage Foundation *Special Report* No. 133, May 6, 2013, <http://www.heritage.org/research/reports/2013/05/the-fiscal-cost-of-unlawful-immigrants-and-amnesty-to-the-us-taxpayer>.

30. David S. Addington, "Encouraging Lawful Immigration and Discouraging Unlawful Immigration," Heritage Foundation *Backgrounder* No. 2786, March 27, 2013, p. 7, notes 15 and 16, <http://www.heritage.org/research/reports/2013/03/encouraging-lawful-immigration-and-discouraging-unlawful-immigration>.

- **Passing a sense of Congress resolution.** Congress could pass a resolution that expresses its sense that the administrative amnesty can be reversed and that any information gleaned from participants could be used in future deportation proceedings.

Congress should send a clear signal that reforms without Congress are a disservice to the nation.

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