



Neither Deportation nor Amnesty

An Alternative for the Immigration Debate Building a Bridge Across the Deportation–Amnesty Divide

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Since 2010, the debate over immigration has seen the federal government sue states;¹ states sue the federal government;² cities sue states;³ and people sue the federal government, states, and cities.⁴ The recent cascade of federal court litigation related to past executive orders and actions, and the heated rhetoric surrounding it, could be damaging the United States' ability to address the issue of immigration in a civil and measured manner. This has certainly been true for the continuing debate over the fate of the government's Deferred Action for Childhood Arrivals (DACA) program, which involves approximately 700,000 people brought to the United States as minors and without lawful immigration status.⁵ Arguably, it is now a chronic aggravation that increases the polarization of the political process and American society. This Perspective outlines a possible first step toward a productive approach to immigration reform. It is designed to provide a new avenue for discussion on this contentious issue.

There is a clear need for the administration and Congress to address the estimated 11 million people unlawfully present in the United States.⁶ Taking an incremental step to solve this particular immigration issue could relieve some of the overall pressure in the immigration system itself. Ideally, this would then allow the President and Congress to move forward with more-comprehensive and bipartisan legislation to overhaul the Immigration and Nationality Act (INA)—the basic structure of which is now 65 years old.⁷

The Current Immigration Debate Landscape

The current argument pits the “rule-of-law” group against the “humanitarian” group. Unfortunately, to one degree or another, many in both of these groups use black-and-white rhetoric that paralyzes forward movement.

The position of the rule-of-law group is straightforward: The United States is a nation of laws. Thus, this group asserts, authorities must enforce the laws already on the books. If one enters the

country illegally or overstays the authorized period of stay, the person has violated the rule of law. The ultimate penalty for this violation is deportation from the United States (also referred to as *removal*). In the view of this rule-of-law group, imposing any punishment other than deportation would incentivize others to commit illegal entry or overstay, then never have to actually leave the United States. The rule-of-law argument can be appealing. It is simple, and it adheres to the core American belief that a democratic society can function only through a system of rules.

The position of the humanitarian group is less straightforward but has equal appeal, albeit to a different core value: The United States is a nation founded on the canon that all people are endowed with unalienable rights (a phrase that Thomas Jefferson did not limit to those with lawful status). Thus, authorities must enforce the laws in a manner that respects the human rights of the individual, even if that person violated the law. Deportation, the humanitarian group argues, is too severe a punishment for the vast majority of people unlawfully present. For those who have families in the United States, have been gainfully employed, and have otherwise abided by the rule of law, deportation is a draconian penalty, particularly for their spouses and children (many of whom are U.S. citizens). Therefore, this group asserts, some form of amnesty is warranted. This position evokes the collective American sense of fairness and mercy and appeals to the desire for a justice system in which the punishment always fits the crime.

Of course, both positions are righteous to the extent that they defend their respective core principles. Both are consistent with American values and current immigration laws. But, because neither side is likely to succeed at imposing its policy on the other, these positions can be mutually exclusive, thereby precluding any

chance for agreed-upon immigration reform legislation. It is this fact that necessitates that both groups work together to compromise on solutions. The existing INA, as old as it is, offers them an opportunity to do just that with just a few minor tweaks. The fact is that deportation is only one of the tools in the INA framework to address the problem posed by a large population of people lacking lawful status.

The Legal and Demographic Framework

A little-known section of the INA, 240A(b)—Cancellation of Removal—allows certain people unlawfully present in the United States to apply for and receive lawful permanent resident status (i.e., a “green card”). To qualify for this benefit, the person must (1) have been physically present in the United States for a continuous period of not less than ten years prior to application; (2) have been a person of good moral character during that period; (3) not have been convicted of certain crimes (as listed in the INA); and (4) establish that deportation would result in exceptional and extremely unusual hardship to his or her U.S. citizen or lawful permanent resident spouse, parent, or child.⁸ These are all criteria that both sides of the debate find relevant in at least some circumstances.

Estimates put the number of people who have been unlawfully present in the United States for more than ten years somewhere between 6 million and 8 million.⁹ Of this population, between 1 million and 2 million people are married to U.S. citizens or permanent residents.¹⁰ Additionally, estimates put the number of U.S. native-born children who have a parent who is unlawfully present at approximately 4.5 million.¹¹ The pool of potential applicants for this benefit, therefore, is very likely to be in the several millions.

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The reason this section of the law remains obscure is a statutory idiosyncrasy of the INA.¹² The section states that the “Attorney General” may grant cancellation of removal. This has come to mean that only an immigration judge (an employee of the U.S. Department of Justice) can adjudicate an application for cancellation of removal.¹³ One of the reasons for this idiosyncrasy has to do with the statutory history underlying cancellation of removal. Since 1940, Congress has provided the U.S. Attorney General with the discretionary power to “suspend” the deportation of people unlawfully present in the United States if they meet certain criteria.¹⁴ This was a defensive form of relief from removal for which the person could apply only after he or she had been apprehended and placed into the deportation process. A person unlawfully present in 1940 could not affirmatively file an application for suspension with the Immigration and Naturalization Service (INS).¹⁵

The purpose behind the suspension legislation was to recognize that removing an unlawfully present person could, under certain circumstances, be overly punitive. This would be particularly true for the person’s family members, who would face the extraordinarily difficult choice of either leaving the United States with their family member or being forced to suffer the loss (e.g., familial, social, financial) of a spouse, son, daughter, father, or mother. At that time (1940), the person needed only to have shown that deportation would result in a “serious economic detriment” to his or her U.S. citizen or legal resident spouse, parent, or minor child.¹⁶

Several iterations of the suspension statute followed as Congress made changes to the immigration laws in 1952, 1962, and 1996, when the current version of suspension—renamed *cancellation of removal*—was passed and signed into law.¹⁷ Throughout its history, however, suspension or cancellation has remained within the sole discretion of the Attorney General to grant or deny after deportation proceedings commenced against the person. Therefore, to apply for the benefit of cancellation, an applicant must be placed into proceedings before an immigration judge. However, to get before an immigration judge, a person must first be placed into immigration court proceedings by a DHS immigration agent or officer (an employee of ICE, CBP, or USCIS).¹⁸

There are several problems with this process, which is why millions who could be eligible for green cards have not applied. First, there are only about 330 immigration judges in the entire system.¹⁹ Currently, the backlog of cases before these judges now numbers more than 600,000.²⁰ The resulting average time before a case is even heard by a judge stands at nearly two years; in some jurisdictions, it is over three years.²¹

Second, when Congress enacted § 240A(b) of the INA in 1996, it imposed an annual cap of 4,000 people who could receive the benefit.²² What could seem to be a low cap number now was likely not perceived as low in 1996. In 1986, the Immigration Reform and Control Act (IRCA) had provided amnesty to approximately 3 million people unlawfully present in the United

States.²³ The total number of deportations in 1996 was 69,680²⁴ (far lower than the 240,255 removed in fiscal year 2016).²⁵ Therefore, in 1996, the number of people present in the United States who had not already received amnesty and who had acquired the requisite ten years of physical presence to be eligible for cancellation was likely much smaller. Furthermore, the cap itself is essentially notional. Once the cap is reached, additional people who apply are not denied and deported. Instead, pending applications are simply pushed to the next calendar year, further increasing the immigration court's docket backlog. While awaiting adjudication, the applicant may live and work in the United States lawfully.²⁶

Third, because of the court's backlog, in November 2014, DHS prioritized placing certain people into deportation proceedings, such as those who are apprehended at the border, those whom the INA requires to be before the court, or those who represent a public safety or national security risk.²⁷ This was a logical choice given the system's flow constraints. Targeting these populations for removal led many groups to refer to President Barack Obama as the "deporter-in-chief," given the high number of people removed from the United States during his two terms.²⁸ Although DHS under the Trump administration has no rank ordering of removal priorities, the January 25, 2017, executive order lists similar "enforcement priorities" for people who have engaged in certain categories of conduct related to national security, public safety, or other civil violations.²⁹

The result of this current system is that the longer a person has been in the United States illegally (assuming otherwise good moral character), the less sense it makes to expend precious law enforcement and court assets on that person for simply being unlawfully present. This could lead some to ask why authorities should seek

out, apprehend, (possibly) detain, and litigate a person's case over the course of years, at great cost, when he or she likely qualifies to live permanently in the United States and will gain that relief at the end of the process. Along the same lines, another question is whether it makes better sense to deploy the assets of the deportation system against those who have committed crimes or other serious violations of law or who pose some level of public safety or national security threat. These people are more clearly deportable from the United States under current law. It is also worth noting that they stand a much greater chance of actually being removed from United States after apprehension and litigation.³⁰

The end result of the current system has been, and continues to be, a large number of people who meet the four requirements for cancellation of removal listed earlier but who are least likely to come before an immigration judge authorized to determine their eligibility for this relief. They are currently eligible for permanent legal status in the United States under the rules already on the books but simply need a venue in which to have their cases determined. Instituting an adjudication process to provide that venue would not, therefore, be an amnesty as strictly defined (though, admittedly, some on the political spectrum would characterize it as such).

Amnesty is defined as a

sovereign act of forgiveness for past acts, granted by a government to all persons (or to a certain class of persons) who have been guilty of a crime or derelict, generally of political offenses . . . and often conditioned on their return to obedience and duty within a prescribed time.³¹

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In the immigration context, the 1986 amnesty provisions of IRCA generally typify the concept. Title II of IRCA created a new legalized status for the millions who benefited from its creation. So long as certain residency and admissibility conditions were met, these people could eventually become U.S. citizens.³² There were no penalty provisions in IRCA directed to punish the initial violation of illegally entering the United States or overstaying a permitted visa period of stay. These violations were, for all intents and purposes, forgiven as a matter of sovereign grace.

Updating the existing cancellation-of-removal statutory provision in order to apply it more readily to the population it was intended to address—as proposed below—is not a new act of forgiveness on the part of the government but rather an adjustment of procedure that permits those covered by it to access the benefits of the existing law more easily and at lower expense to the government. Unlike the 1986 amnesty provisions, such an update would not create a new type of legalized status out of whole cloth. Moreover, if deemed appropriate or necessary to update the law, cancellation could be amended to specifically punish the violations of law that resulted in the person’s unlawful status in the first instance. Possible punishments—such as a fine or a restriction on naturalization—would make it the antipode to an amnesty. Such an update might, in fact, be viewed as one means of efficient application and execution of the existing immigration laws.

A Path Forward: Compromise and the Statutory Fix

Given the current landscape, a solution between deportation and outright amnesty would be to adjust the existing statutory framework to allow more-immediate processing of people eligible for cancellation.³³ Congress, if it chooses to do this, could do so by amending the current section in three simple ways. First, it could give the Attorney General and the Secretary of Homeland Security equal jurisdiction over the application. Giving DHS adjudication authority would enable the secretary to deploy the assets of USCIS—the immigration benefits arm of the department—to determine who is and who is not eligible for cancellation of removal.³⁴ With approximately 19,000 employees,³⁵ USCIS is far better equipped than the immigration court’s 330 judges to tackle this problem from a human resources perspective. Disputed cases could still be referred to an immigration judge (as described below).

Moreover, USCIS adjudicators are already authorized to grant lawful permanent residence or green card status under a similar statutory provision and application. This is accomplished through a process called *adjustment of status*.³⁶ The application is very similar to the application for cancellation of removal and results in exactly the same benefit (i.e., a green card).³⁷ In fact, USCIS officers grant, on average, just over a half a million green cards a year by way of adjustment of status.³⁸ For these adjudications, USCIS officers

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analyze both legal and discretionary eligibility issues. As a result, they have long-standing expertise in weighing many of the same equitable factors that immigration judges must weigh when deciding cancellation cases.

Additionally, the process of adjudication before USCIS would be similar to the current hearing and trial process before the immigration court. Cancellation applicants would be required to file the application with USCIS; undergo a rigorous background check process; and report for a personal interview, during which their application and supporting evidence would be evaluated to determine eligibility. This would, however, shift the manner in which cancellation applicants enter the immigration system. It would no longer be a defensive filing before the immigration court in response to apprehension by ICE or CBP law enforcement officers and agents. Applicants would choose to file affirmatively with USCIS, thereby identifying themselves and their lack of lawful status to government officials. This affirmative choice to file could conserve law enforcement resources and appeal to the rule-of-law side of the argument.

With a shift to an affirmative filing system, people are more likely to take steps, such as obtaining legal advice, prior to filing to ensure that they meet the eligibility requirements. Doing so would reduce the risk of self-identifying, being deemed ineligible at adjudication, and being apprehended for removal as a result. Presumably, those who do not file affirmative applications will have made a similar calculation and determined that they are ineligible

and that the risk of self-identifying by way of the filing is too great. By incentivizing eligible people to come forward, law enforcement can focus its efforts more directly on the remaining population who are not eligible for relief from removal. A focused targeting of this population could also result in reduced detention and litigation costs because there may be no legal and practical basis for the person to dispute his or her deportation. This savings can then be reinvested in more-efficient and -effective border control, targeting, and removal of clearly ineligible or dangerous populations.

Another consideration that will need to be taken into account is the discretionary aspect of cancellation as an immigration benefit. In addition to the statutory requirements, cancellation is a discretionary form of relief: The statute states that the Attorney General “may” cancel the removal of the individual applicant. Precedent case law requires the immigration judge to weigh a number of positive and negative criteria to exercise discretion appropriately.³⁹ The positive factors include family ties in the United States, length of time in the United States, history of employment, property ownership, business ties, military service, community service, and good character. The negative factors include circumstances surrounding the grounds of removal, additional immigration violations, existence of a criminal record, and other evidence of poor character. As noted above, USCIS adjudicators already apply a similar set of factors in their adjudication of adjustment-of-status applications, which also result in the granting of lawful permanent residence status.⁴⁰ Thus, with some additional training, it would

not be difficult to adopt and apply the same standards currently applied by immigration judges.

If denied by a USCIS officer, the person could then seek review in a similar manner to other applications adjudicated by USCIS, such as adjustment of status. The appeals process generally includes review before the immigration court, which can then be appealed to the Board of Immigration Appeals, a unit within the Department of Justice. Board of Immigration Appeals decisions can then be appealed to the federal appellate courts. Thus, mechanisms already exist for many applications filed with USCIS for both the government to reinforce the rule of law and for people to exercise their statutory and due process rights. Although USCIS will likely need additional resources, workforce restructuring, and training to absorb what could be millions of new applications, when one considers that the agency already adjudicates approximately 3,700 family-based green card applications per day, it is clear that it has enormous capacity—dwarfing that of the immigration court.⁴¹

Second, Congress might also consider whether to remove or increase the cap on cancellations, in that the cap has no bearing on eligibility or deportability.⁴² Although some could argue that doing so would provide an incentive for illegal immigration, this must be balanced with the practical aspects of the problem outlined above and the possibility of improved border security. One approach for managing the number is for Congress to increase the

cap number to accommodate what it determines to be a reasonable number of new lawful permanent residents per year.⁴³ Once the new cap is reached, any subsequent application could be conditionally granted. The person would maintain conditional resident status until a cancellation number became available in a subsequent year. In this way, people conditionally granted lawful permanent residence would be required to maintain their eligibility for full status (e.g., good moral character) while they wait for a cap number to become available.⁴⁴

Last, Congress could consider whether to strike the “exceptional” aspect of the hardship requirement. In its place, lawmakers might, if they choose, opt to impose both an “extreme hardship” standard and, if deemed useful or just, a new penalty provision. Some in the rule-of-law group could view this easing of the hardship standard as backdoor “amnesty” because it will result in increased eligibility among the unlawfully present population. However, there are two significant benefits to this approach.

First, the “exceptional and unusual” requirement restricts the pool of applicants in a manner that is inconsistent with other long-standing immigration laws related to eligibility for benefits and relief from removal. Two specific immigration benefits stand as examples: the waiver of inadmissibility for certain criminal acts and the waiver for certain acts of fraud or willful misrepresentation.⁴⁵ These waivers currently allow people who would otherwise

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be inadmissible to the United States for various reasons to apply for admission either as immigrants or as nonimmigrant visitors. Both waivers require the applicant to prove extreme hardship to certain immediate family members who are U.S. citizens or lawful permanent residents. Equalizing the hardship standard between people who are inadmissible to the United States and people who are already in the United States but are removable creates one consistent standard for two similarly situated groups.

Statutory history also supports this position. As discussed above, in 1940, the hardship burden of proof for people to qualify for suspension of deportation was “serious economic detriment.”⁴⁶ With the passage of the 1952 INA, however, Congress tightened this standard to “exceptional and extremely unusual hardship.”⁴⁷ The legislative history indicates that Congress was concerned that the “serious economic detriment” standard was too lenient and incentivized the “flouting” of immigration law to take advantage of suspension as an administrative remedy to unlawful presence.⁴⁸ That said, Congress continued to recognize that certain people deserved protection from deportation despite being unlawfully present and that removing them would be “unconscionable.”⁴⁹

However, there was significant criticism of the adoption of the heightened standard, including from Presidents Harry Truman and Dwight Eisenhower.⁵⁰ In 1962, Congress amended the hardship standard again, retaining the “exceptional and unusual” language for people who committed certain criminal violations in addition

to their unlawful presence, but reducing the standard to extreme hardship for other applicants.⁵¹ This standard remained in place until the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in 1996.⁵² IIRAIRA reinstated the “exceptional and extremely unusual” standard as part of the measure that replaced suspension of deportation with cancellation of removal.⁵³ At the time, there was a view in Congress that the Board of Immigration Appeals, in reviewing immigration court determinations, had gone too far in watering down the “extreme hardship” standard.⁵⁴

Second, if Congress chose to strike the higher hardship burden and revert to the previous standard, it would enable the U.S. government to more directly address the immigration status question for a significantly larger population of people (likely in the millions) who have lived and worked in the country for more than ten years but are unable to fully integrate into their communities for fear of detection, apprehension, and deportation. Additionally, by expanding the opportunity to obtain legal status, rather than defaulting to a position of deportation only, the government will be able to impose what it determines to be a just punishment on a far greater number of people who entered the United States illegally or overstayed their visa periods.

Presumably, relaxing the hardship standard will lead to an increase in the number of people eligible to apply for cancellation of removal. When coupled with a new penalty provision, should

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Congress choose to enact one, individual applicants will be forced to accept a level of punishment for breaking immigration laws in the first place in exchange for the opportunity to obtain lawful permanent resident status. In this way, Congress can defend the rule of law with penalty provisions that could be better suited to serve as a punishment for the initial immigration violations (i.e., unlawful entry or overstay).

Although the proper penalties for those seeking cancellation of removal would require significant analysis and a political debate, some possible example categories of penalties include a requirement to pay all back taxes for the ten-year period or a civil fine (amount to be negotiated); limits on public benefits, such as education, housing, or other taxpayer-funded programs; restrictions on naturalization, such as a lifetime bar to obtaining citizenship or an extended period before naturalization is available (from the current three- or five-year periods to ten years or more); or other additional conditions, such as passing a civics and English exam, as determined by Congress.⁵⁵

In sum, amending cancellation of removal to make the procedural processes that permit it more effective and less expensive offers a potential modus vivendi to address one major aspect of the immigration dilemma. Should the status quo remain, those unlawfully present will continue to be incentivized to avoid detection for fear of deportation. This is a scenario in which neither the humanitarian nor the rule-of-law camp makes progress; it also does not vindicate either set of values. Even in cases of detection and apprehension, the current statutory scheme will add extensively to an already overburdened and backlogged immigration court docket. If the case is adjudicated before the court and the application is denied, the only available punishment is deportation—the sever-

est of immigration penalties that may or may not fit the totality of the circumstances. If the request is granted, the person receives lawful status without facing any form of punishment for the initial immigration violation. In many ways, the current framework is a win-or-lose situation for both sides of the issue. However, with the relatively minor statutory adjustments outlined above, Congress can address and balance both humanitarian concern over the severity of deportations and rule-of-law concern that violations of immigration statutes be punished appropriately.

Additionally, amending cancellation could be used by either side to further the debate and resolution of other areas of impasse, such as increasing funding for immigration enforcement and building additional infrastructure (i.e., “the wall”). One could posit that, as part of the negotiations, the humanitarian side could agree to additional funding for enforcement and infrastructure in exchange for agreeing to relax the hardship standard.⁵⁶ Such a compromise could assuage the rule-of-law side’s concern that granting cancellation to millions would incentivize further illegal immigration.

Conclusion

The current debate over immigration has been hopelessly deadlocked since 1996, which is when Congress last passed a bipartisan immigration reform bill (IIRAIRA). Even IIRAIRA, however, was quite limited in scope. It lacked the comprehensive aspects necessary to put to rest many of the contentious issues that continue to frustrate the U.S. immigration system and those who seek to revamp its legal requirements and processes. These issues tend to orbit around the fundamental functions of any immigration system, such as (but certainly not limited to) border security; public safety; national security; the status of visitors, refugees, and immigrants; questions of

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citizenship and naturalization; and the disposition and punishment of immigration violators, illegal entrants, and visa overstays. The continued deadlock over many of these issues is, in substantial part, rooted in the fact that an estimated population of more than 11 million people currently resides in the United States unlawfully.

The existence of this population has often been an insurmountable sticking point for leaders and policymakers on opposite ends of the immigration spectrum—those in favor of deportation of this population and those in favor of amnesty for the same. It is here that competing, and frequently conflicting, core American values—abiding by the rule of law and extending humanitarian consideration—have clashed in a dramatic and exasperating fashion. For either side, the prevailing assumption seems to be that the selection of either deportation or amnesty does permanent damage to one of these core American values. As a result, the debate has failed to move forward to produce viable, comprehensive legislation. In the absence of legislation, executive actions by both the Obama and Trump administrations have been delayed, altered, or barred altogether by the nation’s federal courts.

This Perspective offers a possible path toward compromise. Congress, should it choose to do so, could be able to traverse the razor’s edge between the rule-of-law and humanitarian sides by

making these three simple changes to one statutory section of the current INA. First, Congress could give DHS (specifically USCIS) concurrent jurisdiction over the cancellation application for relief from deportation and removal from the United States. Second, Congress could increase or strike the current cap of 4,000 grants of cancellation of removal per year. Third, Congress could strike the current “exceptional hardship” standard required to qualify for cancellation in favor of a lesser standard that is coupled with a penalty provision.

These three changes to the current immigration law would not constitute amnesty as that term is defined and would not constitute amnesty as the concept was applied by immigration legislation in 1986 (the IRCA). They are actionable statutory adjustments that would permit less onerous and expensive procedures that could potentially incentivize millions who are unlawfully present to affirmatively file (with USCIS) for an existing immigration benefit that offers relief from deportation—a benefit for which many are already eligible as a substantive legal matter. Implementing these changes would also help to alleviate the ever-increasing immigration court backlogs and resulting delays. As it stands, these delays make it extraordinarily difficult to marshal federal immigration law enforcement assets effectively and efficiently. They also encourage millions of unlawfully present people to live in the shadows to avoid detection and detention, despite the high likelihood of eligibility for relief from deportation if their cases could be adjudicated.

Finally, these changes would enable the U.S. government, if Congress so chooses, to account for and punish the unlawful conduct committed by these people in a manner that is realistic, executable, and measured. It also allows these people to move on as productive legal residents who can more fully contribute to their

communities and pay taxes. By meeting some of the demands of both the rule-of-law and humanitarian sides, it also could be possible to reduce rhetoric that impedes progress for both sides. In concert with other negotiations over border security, as well as immigration enforcement and benefits, this third approach could, in a perfect world, catalyze momentum for more-comprehensive immigration reforms both within Congress itself and between Congress and the executive branch.

A third core American principle, and one fundamental to democracy, is the ability of disparate “factions” (as James Madison referred to them) to forge political compromise.⁵⁷ This Perspective

would submit that compromise is long overdue in the immigration arena.⁵⁸ These minor statutory adjustments can result in at least one impactful solution within the current panoply of immigration dilemmas dividing the nation and polarizing its political process. The existing divisions have reached a point at which many now feel disillusioned, frustrated, and cynical as to U.S. government institutions. However, at least with respect to the immigration debate, if the rule-of-law and humanitarian sides were able to take a measured step toward each other to compromise, the American polity might be able to serve both core American principles well and possibly restore some faith in government.

Endnotes

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¹² INA § 240A(b)(1).

¹³ See Code of Federal Regulations, Title 8, Aliens and Nationality, Chapter V, Executive Office for Immigration Review, Department of Justice, Subchapter B, Immigration Regulations, Part 1240, Proceedings to Determine Removability of Aliens in the United States, Subpart A, Removal Proceedings, § 1240.1, Immigration Judges. As of February 19, 2018: <https://www.gpo.gov/fdsys/search/pagedetails.action?packageId=CFR-2011-title8-vol1&granuleId=CFR-2011-title8-vol1-sec1240-1&collectionCode=CFR&browsePath=Title+8%2FChapter+V%2FSubchapter+B%2FPart+1240%2FSubpart+A%2FSection+1240.1&collapse=true&fromBrowse=true>; Code of Federal Regulations, Title 8, Aliens and Nationality, Chapter V, Executive Office of Immigration Review, Department of Justice, Subchapter B, Immigration Regulations, Part 1240, Proceedings to Determine Removability of Aliens in the United States, Subpart B, Cancellation of Removal, § 1240.20, Cancellation of Removal and Adjustment of Status Under § 240A of the Act. As of February 19, 2018: <https://www.gpo.gov/fdsys/search/pagedetails.action?collectionCode=CFR&browsePath=Title+8%2FChapter+V%2FSubchapter+B%2FPart+1240%2FSubpart+B%2FSection+1240.20&granuleId=CFR-2007-title8-vol1-sec1240-20&packageId=CFR-2007-title8-vol1&collapse=true&fromBrowse=true>. These give specific jurisdictional authority solely to immigration judges to “determine” an application for cancellation of removal under INA § 240A(a) or (b).

¹⁴ Public Law 76-670, Alien Registration Act, June 28, 1940, Ch. 439, § 20. This act gave the Attorney General the power to suspend the deportation of people based on “serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such a deportable alien.”

¹⁵ INS was the legacy agency that performed most immigration functions in the United States (along with the Department of State). When the U.S. Department of Homeland Security (DHS) was created in 2003, these functions were divided into three DHS components: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). USCIS's primary mission is to adjudicate immigration benefits, while the primary function of ICE and CBP is to enforce immigration laws and regulations.

¹⁶ Public Law 76-670, 1940, Ch. 439, § 20.

¹⁷ Public Law 104-208, Omnibus Consolidated Appropriations Act, 1997, September 30, 1996, § 304, Removal Proceedings; Cancellation of Removal and Adjustment of Status; Voluntary Departure (Revised and New §§ 239 to 240C). As of February 19, 2018: <https://www.gpo.gov/fdsys/pkg/PLAW-104publ208/content-detail.html>

¹⁸ See Code of Federal Regulations, Title 8, Aliens and Nationality, Chapter I, Department of Homeland Security, Subchapter B, Immigration Regulations, Part 239, Initiation of Removal Proceedings, § 239.1, Notice to Appear. As of February 19, 2018: <https://www.gpo.gov/fdsys/granule/CFR-2012-title8-vol1/CFR-2012-title8-vol1-sec239-1>

¹⁹ U.S. Department of Justice, "EOIR Immigration Court Listing," webpage, January 2018. As of February 1, 2018: <https://www.justice.gov/eoir/eoir-immigration-court-listing>

²⁰ TRAC Immigration, "Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location," webpage, through December 2017. As of February 1, 2018: http://trac.syr.edu/phptools/immigration/court_backlog/

²¹ TRAC Immigration, through December 2017.

²² INA § 240A(e).

²³ Public Law 99-603, Immigration Reform and Control Act of 1986, November 6, 1986. See Joshua Linder, "The Amnesty Effect: Evidence from the 1986 Immigration Reform Control Act," *Public Purpose*, Spring 2011. As of February 1, 2018: <https://www.american.edu/spa/publicpurpose/upload/2011-public-purpose-amnesty-effect.pdf>

²⁴ See INS, *1999 Statistical Yearbook of the Immigration and Naturalization Service*, Washington, D.C.: U.S. Government Printing Office, March 2002. As of February 1, 2018: https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_1999.pdf

²⁵ ICE, "FY 2016 ICE Immigration Removals," webpage, last updated December 5, 2017. As of February 1, 2018: <https://www.ice.gov/removal-statistics/2016>

²⁶ Code of Federal Regulations, Title 8, Aliens and Nationality, Chapter I, Department of Homeland Security, Subchapter B, Immigration Regulations, Part 274a, Control of Employment of Aliens, Subpart B, Employment Authorization, § 274a.12, Classes of Aliens Authorized to Accept Employment. As of February 19, 2018: <https://www.gpo.gov/fdsys/granule/CFR-2012-title8-vol1/CFR-2012-title8-vol1-sec274a-12/content-detail.html>

²⁷ Jeh Charles Johnson, memorandum from Secretary of Homeland Security to directors of ICE, CBP, USCIS, and the acting Assistant Secretary of Homeland Security for Policy, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants," November 20, 2014. As of February 5, 2018: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

²⁸ Muzaffar Chishti, Sarah Pierce, and Jessica Bolter, "The Obama Record on Deportations: Deporter in Chief or Not?" Migration Policy Institute, January 26, 2017. As of February 1, 2018: <http://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>

²⁹ Donald J. Trump, "Enhancing Public Safety in the Interior of the United States," executive order, January 25, 2017, § 5, Enforcement Priorities. As of February 7, 2018: <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>

³⁰ INA § 237(a).

³¹ *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th ed., St. Paul, Minn.: West Publishing, p. 82.

³² Public Law 99-603, November 6, 1986.

³³ The general idea to expand cancellation of removal to a wider class of people unlawfully present in the United States is not new. Changes to the framework have been discussed among immigration practitioners. For example, see Margaret H. Taylor, "What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal," *Journal of Law and Politics*, Vol. 30, No. 4, 2015, pp. 527–554. As of February 1, 2018: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631638

³⁴ See Public Law 107-296, Homeland Security Act, November 25, 2002. § 451 vests USCIS with the authority to adjudicate immigration benefits.

³⁵ USCIS, “A Day in the Life of USCIS,” webpage, last updated June 29, 2017. As of February 1, 2018: <https://www.uscis.gov/about-us-0>

³⁶ See INA § 245 and its corresponding benefit application, USCIS Form I-485, “Application to Register Permanent Residence or Adjust Status,” undated. As of February 5, 2018: <https://www.uscis.gov/i-485>

³⁷ Compare the I-485 with the EOIR-42B form, “Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents,” undated. As of February 5, 2018: <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf>

³⁸ See DHS, “Lawful Permanent Residents (LPR),” undated. As of February 1, 2018: <https://www.dhs.gov/immigration-statistics/lawful-permanent-residents>

³⁹ See *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1982); and *Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998).

⁴⁰ See *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970), and *Matter of Lam*, 16 I&N Dec. 432 (BIA 1978).

⁴¹ USCIS, 2017.

⁴² INA § 240A(e) contains no language relating to eligibility or deportability or removability. It simply specifies an “aggregate limitation” of 4,000 grants of cancellation of removal or adjustment to lawful permanent residents in any fiscal year.

⁴³ INA §§ 201(c)–(e) currently cap the total number of annual admissions (or grants) of lawful permanent residence at 675,000. However, under § 201(b)(1)(D), this cap number does not apply to applicants who are granted cancellation of removal.

⁴⁴ Congress already imposes similar conditional status restrictions on other categories of permanent residence—e.g., immigrant spouses of U.S. citizens married less than two years—and immigrant entrepreneurs. See INA §§ 216(c) and 216A(c), respectively.

⁴⁵ See INA § 212(a)(9)(B)(v); Code of Federal Regulations, Title 8, Aliens and Nationality, Chapter I, Department of Homeland Security, Subchapter B, Immigration Regulations, Part 212, Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole, § 212.7(e)(3), Waiver of Certain Grounds of Inadmissibility. As of February 21, 2018: <https://www.gpo.gov/fdsys/granule/CFR-2012-title8-vol1/CFR-2012-title8-vol1-sec212-7> (waiver of inadmissibility for “alien[s] unlawfully present” for a period over 180 days); INA § 212(h) (waiver of inadmissibility for certain criminal offenses); and INA § 212(i) (waiver of inadmissibility for certain commissions of fraud or willful misrepresentation).

⁴⁶ Public Law 76-670, 1940, Ch. 439, § 20.

⁴⁷ Public Law 82-414, 1952, Ch. 47, § 244(a)(1). IIRAIRA § 308(a)(7) repealed former § 244. See new §§ 240A and 240B of IIRAIRA. IIRAIRA § 308(a)(7) redesignated former INA § 244A as §244.

⁴⁸ See H.R. Rep. No. 82-1365 (1952), as reprinted in 1952 U.S.C.C.A.N. 1653, 1718. Given the increasing numbers of illegal immigration since 1952 and 1996, when the “exceptional and extremely unusual” hardship standards were imposed, it is not clear that their adoption acted as a disincentive to entering the United States illegally or overstaying a visa period. This could be an area for further study by Congress and DHS.

⁴⁹ See S. Rep. No. 82-1137, 1952, p. 25:

[U]nder the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable.

⁵⁰ See William Underwood, “Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases,” *Indiana University School of Law Journal*, Vol. 72, No. 3, Summer 1997, pp. 885–926. As of February 1, 2018: <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1865&context=ilj>

⁵¹ Public Law 87-885, Aliens, Specialists and Relatives of U.S. Citizens, October 24, 1962, amending INA § 244(a). As of February 7, 2018: <http://uscode.house.gov/statutes/pl/87/885.pdf>

⁵² Public Law 104-208, 1996, § 304.

⁵³ See Public Law 104-208, 1996, Div. C, § 304(a)(3); 8 U.S.C. § 1229b(b)(1)(D) (these sections are also known as IIRAIRA).

⁵⁴ See Elwin Griffith, “Admission and Cancellation of Removal Under the Immigration and Nationality Act,” *Michigan State Law Review*, Vol. 979, Winter 2005, pp. 979–1064.

⁵⁵ The issue of a back-taxes penalty provision was addressed in the Senate’s last attempt at comprehensive immigration reform in 2013, the Border Security, Economic Opportunity, and Immigration Modernization Act, which expired when the House of Representatives failed to act on the bill (S. 744, 113th Congress, 1st Session, introduced April 16, 2013. As of February 19, 2018: <https://www.govtrack.us/congress/bills/113/s744>). Debate over the back-taxes provision centered on the difficulty of enforcement and on whether such a provision

would effectively create a financial bar to application for low-income applicants. See Dan Nowicki, “Reform Tied to Immigrant Taxes,” *Arizona Republic*, April 28, 2013. As of February 1, 2018: <https://www.usatoday.com/story/news/nation/2013/04/28/immigration-reform-taxes/2119353>. This issue could require further study.

⁵⁶ As part of the negotiation process, Congress could also request that DHS study the efficacy of additional enforcement and infrastructure measures as they relate to flows of illegal immigration.

⁵⁷ James Madison (Publius), “The Union as a Safeguard Against Domestic Faction and Insurrection (Continued),” *Federalist*, No. 10, November 23, 1787. As of February 5, 2018: http://avalon.law.yale.edu/18th_century/fed10.asp

⁵⁸ Polling data consistently show that a significant majority of Americans support policy efforts to address those unlawfully present in the United States and strongly favor bipartisan efforts to do so. See Jennifer Agiesta, “Poll: Most Oppose Trump’s Wall, Split on Who Is Best on Immigration,” CNN Politics, September 6, 2016. As of February 1, 2018: <http://www.cnn.com/2016/09/07/politics/2016-election-presidential-poll-immigration-donald-trump-hillary-clinton/index.html>; Jeffrey M. Jones, “More Republicans Favor Path to Citizenship Than Wall,” Gallup News, July 20, 2016. As of February 1, 2018: <http://www.gallup.com/poll/193817/republicans-favor-path-citizenship-wall.aspx>; Jonathan Easley, “Poll: Americans Want Democrats to Work with Trump,” Hill, February 18, 2017. As of February 1, 2018: <http://thehill.com/homenews/news/320229-poll-americans-want-democrats-to-work-with-trump>. It is also clear from past (2000–2013) efforts at immigration reform, both comprehensive and otherwise, that bipartisan compromise is essential for the issue to be resolved. The history of immigration enactments and legislative failures bears this out. See Rachel Weiner, “How Immigration Reform Failed, Over and Over,” Washington Post, January 30, 2013. As of February 1, 2018: <https://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/>; Muzaffar Chishti and Faye Hipsman, “U.S. Immigration Reform Didn’t Happen in 2013; Will 2014 Be the Year?” Migration Policy Institute, January 9, 2014. As of February 1, 2018: <http://www.migrationpolicy.org/article/us-immigration-reform-didnt-happen-2013-will-2014-be-year>

About This Perspective

This Perspective examines the current debate surrounding the issue of individuals present in the United States without lawful immigration status. Approximately 11 million individuals living in the United States lack the necessary immigration documentation to legally reside in the country and accept employment. The political, legal, and policy questions surrounding this population have provoked a divisive societal debate that has made compromise and progress challenging. This Perspective relies on the proposition that the primary obstacle to an immigration modus vivendi is the contending sides' unnecessary, damaging adherence to all-or-nothing solutions (either deportation or amnesty). The "rule-of-law" side insists on the deportation of anyone unlawfully present in the United States. The "humanitarian" side insists that most individuals unlawfully present should be eligible to remain permanently under some form of amnesty. This Perspective proposes that minor changes in existing immigration law, specifically in the statute called Cancellation of Removal, could offer a compromise solution for millions of individuals. This option would avert the necessity for either side to abandon its principles or to cross the Rubicon-like barrier that full-scale comprehensive legislation currently represents. In doing so, both the rule-of-law and humanitarian sides might forge a pragmatic political, legal, and policy compromise that could serve both positions and provide one potential solution to address this extremely difficult societal question.

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