

## IRCA IN RETROSPECT

### Guideposts for Today's Immigration Reform

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*THE ISSUE: The Immigration Reform and Control Act of 1986 (IRCA) was an important milestone in the immigration history of the United States, representing the first and most comprehensive legislation to take on the issue of illegal immigration to the United States with a mix of enforcement mechanisms to deter new unauthorized entries and legalization to regularize unauthorized immigrants already in the country. Contemporary policymakers are fortunate to have the experience of IRCA, documented in a rich research literature, to offer guideposts for crafting a new immigration law. They would do well to heed the lessons of 1986—both positive and negative—to maximize the potential promise of immigration reform and avoid repeating past mistakes or sparking consequences that, while unintended, could have been foreseen.*

### I. Introduction

The *Immigration Reform and Control Act of 1986* (IRCA) was an important milestone in the immigration history of the United States, representing the first major attempt by Congress to address the problems of illegal immigration. Its passage was many years in the making, building from the recommendations of a high-profile, congressionally appointed Select Commission on Immigration and Refugee Policy (SCIRP) presented in 1981, and similar proposals developed during the Ford and Carter administrations. Though various versions of IRCA were passed by the Senate in 1982, 1983, and 1985, and twice by the House (1984 and 1986), the legislation won final approval only during the closing days of the 99th Congress, earning it a reputation as the “corpse that would not die.”<sup>1</sup>

IRCA sought to counter illegal immigration via a trio of components, referred to by the bill’s sponsors as a “three-legged stool”: (1) sanctions for employers who hired unauthorized workers; (2) increased border security to deter unauthorized entries; and (3) a legalization program for long-term unauthorized immigrants. The legislation aimed to wipe the slate clean on illegal immigration, although even its strongest proponents acknowledged substantial uncertainty regarding its efficacy. One supporter noted that, “I do not know that this bill is going to work;” another described IRCA as “better than no change from current law but not much;” yet another commented that the legislation “gives some promise of helping us to control our borders [and] on that basis, it deserves a try.”<sup>2</sup> Rep. Charles

Schumer, the New York Democrat who was chief architect of a key compromise that paved the way for enactment, characterized the legislation as “a gamble, a riverboat gamble. There is no guarantee that employer sanctions will work or that amnesty will work. We are headed into uncharted waters.”<sup>3</sup>

Twenty-six years after the law’s passage, the unauthorized immigrant population in the United States has grown almost threefold, from an estimated 4 million in 1986 to the most recent estimate of 11.5 million.<sup>4</sup> The country has poured ever-increasing dollars into border security since IRCA’s passage—with the level of immigration enforcement spending in 2012 nearly 15 times the level it was in 1986, even after accounting for inflation<sup>5</sup>—but until the recent recession, the net unauthorized population was growing by roughly 5 to 10 percent annually. Evidence suggests that many employers continue to hire unauthorized immigrants, some unknowingly, others quite willfully, with impunity. As a result, a quarter century after IRCA’s enactment, the country faces an unauthorized population far larger than that which the 1986 law sought to reduce.

Like all major legislation, IRCA was based on imperfect knowledge of the conditions it sought to address and a limited understanding of how the law would play out in the future; reflected a number of political compromises; and faced challenges in implementation—all of which diluted its effectiveness. Thus, although IRCA deserves to be recognized as a historic piece of legislation, its shortfalls have contributed to today’s dilemmas in U.S. immigration policy.

While many IRCA flaws are attributable to regulatory challenges and to program implementation by the administrative agencies, its major inadequacies are rooted in its statutory design. This brief first examines the critical drawbacks of the statute’s enforcement provisions, both in terms of employer sanctions and border security. It then outlines the lessons—positive and negative—that can be drawn from the IRCA legalization programs, and concludes with the argument that IRCA’s fundamental flaw was its

exclusive focus on illegal immigration, neglecting to provide for future U.S. social and labor market needs.

As Congress grapples with immigration legislation anew, lessons from the failings of the 99th Congress and the context of a deeper understanding that now exists regarding the complex factors affecting migration can be useful.

## II. IRCA’s Employer Sanctions Provisions: Major Gaps and Collateral Damage

Through IRCA, U.S. law for the first time sanctioned employers for hiring unauthorized immigrants, in hopes of reducing the jobs magnet. The employer sanctions provisions of the law were a critical element of the long-debated legislation. Their goal was to reduce illegal immigration by eliminating the job market for unauthorized labor and in so doing improve the wages and labor standards of U.S. workers. More than 25 years of experience with employer sanctions, however, have shown that these promises have not been met, for reasons explored below: the unauthorized immigrant population has grown more than threefold since 1986.

### A. Major Gaps

#### 1. Use of Fraudulent Documents

Effective enforcement of employer sanctions was compromised by the emergence of a growth industry in fraudulent documents almost immediately upon IRCA enactment. This was predictable given the statutory language itself: it is not unlawful for an employer to hire an unauthorized worker, but only to *knowingly* hire an unauthorized worker. Employees are required to attest on a Form I-9 that they are eligible to work in the United States. And employers must attest that they have examined

documents that establish their workers' identity and eligibility to work lawfully. However, there is no requirement that employers verify the authenticity of the documents presented, and the statute and regulations provided for acceptance of more than two dozen types of identification documents, ranging from passports and driver's licenses to student IDs and tribal documents.<sup>6</sup>

As a result, employers inclined to hire unauthorized immigrants find it easy to comply with the letter of the law, and unauthorized workers find employment by procuring fraudulent documents. Even employers who fully intend to comply may lack the training and expertise to detect fraudulent documents, and the law imposes no requirement on them to do so.<sup>7</sup> Thus, at least in the formal sectors of the labor market, there is a high degree of compliance on paper alongside rampant use of fraudulent documents.

## 2. Outsourcing Employment

Post-IRCA, employers also shielded themselves from sanctions by turning to middlemen entities to actually hire workers, such as temporary employment firms, and by reclassifying workers as independent contractors. A RAND Corporation and Urban Institute study found that soon after IRCA's enactment, agricultural employers increased their reliance on farm labor contractors to hire workers.<sup>8</sup>

Recent research suggests that this practice of outsourcing the hiring process has grown far beyond agriculture to office building and garment workers and computer programmers, among others.<sup>9</sup> In fact, while the Bureau of Labor Statistics formally counts 2.7 million temporary workers in its surveys, some industry sources estimate that as much as one-tenth of workers (or as many as 15 million workers) are hired annually as temporary or contingent workers.<sup>10</sup>

Businesses rely on temp firms and subcontracting for a wide variety of legitimate reasons, including the desire to reduce benefits

costs and for short-term or limited-purpose projects that do not require permanent employees. But a major driver of the growth of this practice has unmistakably been to shield the ultimate employer from responsibility for the subcontractors' employment practices, including the hiring of unauthorized workers.

## 3. Lack of Labor Protections

Some employers have not only evaded the law's requirements but have used employer sanctions as a tool to retaliate against workers who assert their rights under various labor protection statutes.<sup>11</sup> Since employers can only be sanctioned if they knowingly hire unauthorized workers, some employers choose to acquire that "knowledge" by verifying—or re-verifying—a worker's status only when the worker asserts rights such as those related to wage, hour, health, and safety standards or to join a union.<sup>12</sup> The newly acquired knowledge then justifies the termination of the worker.

To be sure, some employers terminated workers in the middle of a labor dispute in pre-IRCA days. However courts have historically maintained that such terminations were unfair labor practices. IRCA has not changed that. All labor protection laws continue to apply to all workers, without regard to status. What has changed are remedies available to aggrieved workers. Pre-IRCA, determination of unfair labor practice would result in an order of reinstatement; post-IRCA, employers cannot be ordered to reinstate an unauthorized worker.

In this regard, a 2002 Supreme Court decision represents an important reversal in the ability of unauthorized workers to pursue claims against their employers. In *Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, the court held that a worker unlawfully terminated in retaliation for labor organizing activities is not eligible for back pay under the *National Labor Relations Act* if the worker is unauthorized.<sup>13</sup> The Supreme Court ruled that the IRCA employer sanctions provisions prevail over a conflicting labor protection statute like the *National Labor Relations Act*. Thus, certain labor protections—historically guaran-

ted to all workers in the United States—may not apply to unauthorized workers because of IRCA.

Although the *Hoffman Plastic* case related to eligibility for back pay, the decision has been cited by some courts to justify denial of other worker benefits such as workers’ compensation.<sup>14</sup> If it was not already the case pre-*Hoffman Plastic*, certainly post-ruling, employers may have a new, perverse incentive to hire unauthorized workers.

## B. Collateral Damage

### 1. Impact on Wages and Working Conditions

Since the inception of employer sanctions, wages and working conditions for low-wage workers have stalled. Today, 10.4 million U.S. workers are classified as “working poor,” i.e., in the labor force but earning below the federal poverty level.<sup>15</sup> A growing body of research—government and academic reports and industry and region-specific studies—have documented that a large number of employers in the agriculture, poultry processing, construction, day labor, landscaping, caregiving, and other service occupations routinely violate federal wage, overtime, and safety laws.<sup>16</sup> Employer sanctions alone have not led to this phenomenon: increased competition from a global workforce, a liberal trade regime, decline in unionization, and tepid enforcement of U.S. labor protection statutes have all contributed to it. But IRCA’s employer sanctions regime is almost certainly an important contributing factor, for reasons discussed above regarding the lack of labor protections.

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### 2. Discrimination in the Workplace

In the aftermath of IRCA, a congressionally mandated study by the General Accounting Of-

fice (GAO) concluded that employer sanctions resulted in a “widespread pattern” of discrimination against “foreign-appearing” or “foreign-sounding” workers attributable “solely to IRCA.”<sup>17</sup> Concerned about possible penalties, some employers used national origin and ethnic background as a proxy for unlawful status; others implemented “citizens-only” hiring policies. Much of this discrimination was attributed to employers’ lack of understanding of the new law: even three years after enactment GAO found that more than one-fifth of employers were confused about its key provisions.<sup>18</sup>

### 3. Variation in Employer Practices

IRCA’s employer sanctions regime failed to recognize that there is a strong divergence among employers in their attitudes toward the hiring of unauthorized workers. Some clearly

do not want to hire such workers and don’t have to. Others—either because of the nature of their industry or by business model choice—have become reliant on hiring unauthorized immigrants.

For those inclined to obey the law and for whom employment of an unauthorized person was both rare and purely accidental, employer sanctions have been and could be reasonably effective. And for employers merely open to hiring such workers while technically complying with the letter of the law, the widespread availability of false documents undermined the effectiveness of the sanctions regime.

These two groups comprise the vast majority of employers in the United States. For them, the employer sanctions regime—augmented by improved verification procedures such as E-Verify, the electronic verification system used voluntarily by nearly 500,000 employers<sup>19</sup>—is likely to be quite effective in reducing unauthorized employment.<sup>20</sup> However, IRCA’s experience demonstrates that any major changes to the verification system, such as making it mandatory for all employers, should include sustained employer education campaigns and systematic oversight to promote effective

compliance and minimize confusion that could result in employment discrimination.

But for the relatively small number of employers that knowingly hire the vast majority of unauthorized workers precisely *because* they are cheaper and more exploitable than those with legal status, even such improved verification systems will be insufficient. This is true in part because even highly sophisticated verification systems are vulnerable to gaming by bad-actor employers, and because such employers use immigration enforcement as leverage against their unauthorized workers.

Furthermore, these employers and others already outsource their potential liability to third parties, such as labor contractors and temp firms, or convert workers previously classified as employees into independent contractors. Since employers are not required to verify the immigration status of contractors, misclassifying workers as independent contractors is a major, and growing, loophole in the employer sanctions regime. To deal with this group in particular, robust strategies explicitly harmonizing worksite-focused immigration and labor law enforcement that targets misclassification and off-the-book practices would be required.<sup>21</sup>

It is also notable that in contrast to the enormous increases in funding for border security and other immigration enforcement since 1986, resources for wage-and-hour and other forms of labor standards enforcement largely stagnated after IRCA, and were reduced in the 2001-09 period.<sup>22</sup> Even with recent increases, total funding for labor standards and occupational safety and health enforcement in 2011 was under \$541 million, or about 3 percent of the federal immigration enforcement budget.<sup>23</sup>

In sum, the employer sanctions constructed in IRCA have been notoriously ineffective. They have not substantially reduced hiring of unauthorized immigrants, in part because the sanctions have been undermined by widespread use of fraudulent documents, but also because IRCA's verification system is easily evaded through use of third-party hiring con-

tractors and/or reclassification of employees. Employer sanctions have weakened important workplace rules and, in so doing, created perverse incentives to hire unauthorized workers. Employer sanctions may have played a role alongside globalization and other macro-economic trends in reducing U.S. workers' wages and working conditions. The sanctions also produced collateral damage in the form of employment discrimination against Latino, Asian, and other "foreign-looking" workers, many of whom already faced substantial discrimination in the labor market.<sup>24</sup>

### III. IRCA's Border Enforcement Provisions: A Gradual Buildup

Although there was a 50 percent increase in staffing for the Border Patrol soon after the passage of IRCA, the major border enforcement buildup didn't begin in earnest until the mid-1990s. In an era of considerable budget constraints, the executive branch did not request border security appropriations that were authorized under IRCA; therefore Congress did not fully fund the buildup that IRCA envisaged in the early years after the law's enactment.<sup>25</sup>

Total border control spending was under \$700 million in 1986; by 1996, it had more than doubled to \$1.46 billion; yet in that period, it is likely that the unauthorized population itself doubled from perhaps 3 million at the end of IRCA's legalization programs to over 6 million.<sup>27</sup> Border control funding was on track to nearly double again to \$2.84 billion by 2002, when the 9/11 attacks and their aftermath stimulated an even greater ratcheting up of border and other immigration enforcement spending.<sup>28</sup> A decade after 9/11, border enforcement spending had increased to over \$11 billion, while overall immigration enforcement climbed from \$1.2 billion in 1986 to nearly \$18 billion in 2012.<sup>29</sup>

## IV. IRCA's Legalization Program: A Qualified Success

In retrospect, the IRCA legalization programs were the most successful element of the law, in what remains the largest legalization effort conducted to date. Nearly 2.7 million people were legalized under provisions of IRCA, via its general legalization and Special Agricultural Worker (SAW) legalization.<sup>30</sup> About three-fourths of those estimated to have been eligible applied for legalization, and close to 90 percent were approved.<sup>31</sup> Legalization had profound, positive economic effects for its beneficiaries. Wages of those legalized increased by as much as 15 percent within five years and 20 percent over the long run, while educational attainment, occupational status, and homeownership markedly increased, and poverty rates declined.<sup>32</sup>

### A. IRCA's Cautionary Lessons

Despite the successes of the 1986 legalization, important lessons from that experience are relevant for any future effort. The first lesson is the most fundamental: for any legalization to be truly successful, it must be as inclusive and as simple as possible. Congress in 1986 created a restrictive program that became complicated in its implementation. The law established a 1982 cutoff date for eligibility—five years prior to the beginning of the program—making it the most restrictive legalization timeframe adopted by any country up to that time.<sup>33</sup> Because of the five-year cutoff, IRCA excluded about half of the unauthorized population, leaving the goal of wiping the illegal immigration slate clean well short of reality. The program also complicated the application and adjudication processes substantially, since assembling sufficient documentary proof of presence in the United States prior to the cutoff date was difficult for many eligible applicants, and discerning real from fake documents was challenging for program officials. Those remaining in unlawful status—about 2 million

who were excluded by the cutoff date and perhaps 500,000 who were eligible but didn't legalize—became the nucleus of today's large unauthorized population.<sup>34</sup>

IRCA offers several other cautionary lessons:

#### ***Family Unity Not Factored into the Law.***

Perhaps the most significant omission in IRCA's legalization design was the failure to recognize that the statute's cutoff date would exclude a large number of immediate family members of those who did qualify. This anomaly may have deterred some eligible people from applying, and left a number of families in a mixed lawful-unlawful status. The issue was highly controversial, subject to a number of tentative regulatory changes, and the U.S. Immigration and Naturalization Service (INS) eventually granted "indefinite voluntary departure"—a semi-legal status—to many such family members, allowing them to stay and work in the United States. The statutory oversight was resolved only when Congress, through the *Immigration Act of 1990*, created the "family unity" program and extended the semi-legal status of these family members until they could receive green cards through the normal family preference categories.<sup>35</sup>

***Planning Period for Implementation Too Brief.*** IRCA provided only a six-month planning period for INS to implement the law's legalization provisions—a brief timeline designed to balance the competing needs of allowing sufficient time to plan while reducing the opportunities for new illegal entries. Despite a widely lauded, open process, the implementing regulations were not finalized until a few days before the start of the program.

Furthermore, many aspects of those regulations were vigorously contested and amended over time, causing confusion. For example, the statute prescribed that in order to be eligible for legalization a person had to have "resided continuously" in the United States since before 1982 and to have been "continuously physically present" since the

date of enactment, except for “brief, casual and innocent absences.” How each of these clauses was defined and interpreted was the subject of extensive negotiations, intense advocacy, and ultimately litigation, as were other aspects of the rules. The regulations were amended several times mid-course, with final rules issued only a few weeks before the application period for legalization was to end. The ambiguity about the meaning of these terms and frequent rules changes left many potential applicants in doubt about their eligibility, while others who were denied or turned away by INS pursued their claims in court. A number of class-action lawsuits were brought to challenge the implementing regulations, the last of which was not settled until 22 years after IRCA’s passage.<sup>36</sup>

***Application Period Too Short.*** The 12-month statutory hard deadline for submitting applications proved unrealistic, especially given the numerous mid-stream regulation changes. Confusion regarding program rules, combined with an inadequately funded outreach and public education program, prevented a number of qualified applicants from coming forward. The deadline also denied many so-called “late amnesty” filers—applicants initially turned away who later were determined to be eligible by the courts—the opportunity to apply.

The issue was sufficiently serious that the House passed legislation to extend the deadline, although the companion measure failed in the Senate. There was a last-minute scramble as the deadline approached, underscoring the need in any future legalization to grant the administering agency the flexibility to extend the deadline if circumstances demand it.

***Outreach and Public Education Limited.*** IRCA’s public education campaign was both inadequate in size and too narrow in scope. INS allocated \$10.7 million for outreach and public education (equivalent to about \$22 million in 2013 dollars), equally divided for campaigns to apprise relevant publics about the new employer sanctions regime and legalization. Moreover, the program was initiated too late in the application process, likely another casu-

ality of the brief pre-implementation planning period.

Once underway, the public education campaign relied almost exclusively on mainstream media, failing to reach distinct immigrant communities. IRCA’s experience suggests that a major, sustained, multimedia, multilanguage outreach program is essential to encourage eligible applicants to apply.

***Fee-Based Program Financing Restricted Infrastructure.*** IRCA also provides some important lessons regarding legalization program financing. The program was self-funded through the application fees. INS paid for significant legalization program planning and start-up costs by borrowing against this budget. Although the application fees ultimately generated more revenue than was needed to administer the program, fewer applications were received than expected in the early stages of the effort. This led INS to begin to scale down its legalization infrastructure in the program’s third quarter, only to be nearly overwhelmed by a surge of applications at the end of the application period.<sup>37</sup> Any future legalization program, even if completely self-funded, should be structured to avoid such problems.

***Impact Assistance Funding to the States Delayed and Uncertain.*** IRCA created a \$4 billion State Legalization Impact Assistance Grant (SLIAG) to help defray anticipated costs that states would incur in terms of health care, public assistance, and English/civics classes for the newly legalized. But cumbersome federal reporting requirements led to significant delays in disbursement of SLIAG funds to states. Because so many legalization applicants waited until late in the process to apply, Congress twice earmarked apparently “unexpended” SLIAG funds for other uses. Although these funds were later restored, the resulting cycle of uncertainty wreaked havoc with states’ efforts to plan anything resembling a long-term immigrant integration strategy.<sup>38</sup> In part as a result, states concentrated those resources on short-term, basic English/civics courses, with little or no attempt to connect immigrants those completing basic levels with more

advanced and/or vocational coursework. This represented a major lost opportunity to more effectively advance the legalizing population's human-capital skills and greater English proficiency. Future efforts should be more carefully designed to maximize this rare opportunity.<sup>39</sup>

## B. IRCA's Successes

That IRCA's legalization mandate was generally successful despite the considerable flaws detailed above can be attributed in large part to canny INS management decisions and the efforts of community-based organizations that assisted applicants. INS created a parallel structure to implement legalization, consisting of separate offices to accept legalization applications, regional units to adjudicate applications, and a special administrative unit to consider appeals of application denials. Many of the newly minted legalization offices became known as islands of civility and openness within an agency that previously had a reputation of projecting only its enforcement mandate.

The INS sought volunteers from within its ranks to supervise many aspects of the legalization implementation, and waived personnel rules to permit the hiring of recently retired INS and other federal staff. For the first time, the agency hired adjudicators from outside, and not from traditional enforcement ranks. The INS thus benefited from this mix of "old hands" and "new blood" that brought a new outlook and culture, not just for IRCA implementation but beyond.

Finally, high-level INS managers, including both political appointees and senior civil servants, were clearly committed to legalization program success. The fact that almost 80 percent of IRCA's legalization applicants filed directly with INS rather than through community-based organizations attests to the success of this approach, as well as the statute's confidentiality provisions, which assured that applicants would not be targeted

by enforcement efforts as a result of applying.<sup>40</sup>

Among IRCA's other successes, with qualifications, were:

***Effective Partnerships with Community-Based Organizations.*** IRCA also demonstrated the importance of community-based organizations to successful legalization. Congress authorized the designation of Qualified Designated Entities (QDEs), mainly not-for-profit church groups, community organizations, and unions, to be a buffer between INS and legalization applicants. The QDEs provided public education and outreach, encouraged those eligible to apply, assisted in the application process, provided expert legal representation in complex cases, and engaged in regular coordination with INS.

Notwithstanding often-strong tensions between these organizations and INS over many policy questions, in general coordination between QDEs and the government was quite successful. Although only one-fifth of IRCA's legalization applicants filed through QDEs, both government and private-sector sources estimated that about half of applicants received some form of assistance from community groups.

The effectiveness of IRCA's legalization compared to those in other countries, most of which had far more generous eligibility rules, is one illustration of the strength of the U.S. nonprofit sector. Any future legalization program should exploit this strength by explicitly including a formal role and significant funding for the nonprofit sector to participate in outreach and application assistance.

However, the IRCA experience also illustrated the critical need to regulate and monitor agencies and individuals purporting to assist legalization applicants. A few QDEs, and a larger number of non-regulated entities, proved to be "legalization entrepreneurs" who exploited vulnerable applicants and facilitated fraud, especially in the SAW program. In any future legalization program,



organizations designated to assist applicants should either be accredited with the Board of Immigration Appeals or have an established track record of providing social services. Bar associations and enforcement agencies should aggressively monitor and punish fraudulent or exploitative practices, which seem certain to proliferate if a legalization program is enacted.

***The Special Agricultural Worker Program.*** IRCA's ultimate passage was facilitated by the inclusion of the SAW program, a last-minute compromise that allowed for legalization of those who could demonstrate requisite levels of agricultural work in previous years. The compromise was required to break a logjam between agricultural interests that had demonstrated the ability to win amendments providing for a major guestworker program to replace previously unauthorized farm laborers, and House Judiciary Committee Chairman Peter Rodino (D-NJ), who declared "I would rather see no bill than one which could jeopardize the wages and working conditions of American farmworkers."<sup>41</sup>

However, both contemporary observers and scholars who studied the SAW program afterwards attributed a significant portion of the higher-than-expected level of applications to fraudulent activity—both from applicants who had never performed agricultural work and from eligible or potentially eligible unauthorized farmworkers who were unable to legitimately document the requisite agricultural employment and resorted to purchasing fraudulent pay stubs or letters, typically from farm labor contractors.<sup>42</sup> This phenomenon was complicated because even bona fide farm work performed years earlier was extremely difficult for both workers and employers to document, the statute provided a higher standard for INS disapproval of SAW applications than for the general legalization, and the SAW program financing structure provided strong incentives to INS to accept the highest volume of applications possible.<sup>43</sup>

None of these studies found significant levels of fraud in IRCA's general legalization program.

## V. IRCA's Fatal Flaw: Failure to Provide for Future Labor Needs

From a broader policy perspective, the deeper failure of IRCA was the narrowness of its focus on illegal migration. Since the legislation was framed by the findings and the recommendations of the Select Commission on Immigration and Refugee Policy, its logic was frozen by the commission's dominant concern: the challenge of illegal immigration. As a result, the legislation devoted only modest attention to questions of legal immigration policy and realities.

As such, IRCA failed to anticipate or make provisions for continuing and increased demand for workers in the United States, especially in the low-skill labor market. Without a plan for managing future legal immigration and labor market needs, the "three-legged stool" solution to illegal immigration collapsed under the weight of economic and demographic forces largely unseen, but well underway, at the time of IRCA's passage.

The irony is that the very problem of the unauthorized immigrant population that the Select Commission was trying to grapple with in the late 1970s was rooted in important changes introduced to the legal immigration system in the mid-1960s. In addition to ending the Bracero program that for more than 20 years had admitted temporary workers from Mexico for agricultural employment in 1964, Congress abolishing the national-origin quota system through the landmark *Immigration Act of 1965*.

Both changes were laudable, driven by principles of nondiscrimination and equal treatment embodied in the spirit of the civil-rights movement. However, the termination

of the Bracero program, combined with the first-ever introduction of limits on Western Hemispheric migration, led to what in retrospect should have been a predictable rise in illegal migration, especially from Mexico.<sup>44</sup> IRCA's limited and exclusive focus on illegal immigration disregarded the country's future labor market needs and overlooked evidence that had begun to emerge as Congress was writing the last chapter on IRCA.

Given the context of the times—the Select Commission began its deliberations in the midst of the “stagflation” of the 1970s and IRCA's passage followed closely on the heels of severe recessions in the early 1980s—assuring sufficient numbers of visas to accommodate future job growth was understandably the last thing on the minds of many policymakers of the era.<sup>45</sup> Even when Congress shifted its attention to legal immigration soon thereafter, the resulting *Immigration Act of 1990* maintained the primarily family-based system established in the mid-1960s with only modest expansion of worker visas.

Even as enactment of IRCA neared, however, there were hints of an improving jobs picture. According to data collected by the Bureau of Labor Statistics (BLS), the job growth that had fallen in the beginning of 1986 had picked up by the end of the year, and remained healthy until the recession of 1990-91. BLS projections from late 1985 predicted employment growth rates into the mid-1990s that were expected to outpace historical trends, particularly in some important sectors such as the services sector. Such growth was the predicted result of both a continued structural shift from a manufacturing to an information-and-service economy and the early impacts of an aging society. Occupations with the highest projected growth included not only the high-tech occupations, like computer and scientific positions, but also health care-related jobs in hospitals and nursing homes, service occupations in the restaurant and hospitality industries, janitorial and cleaning services, and the construction trades—the latter all sectors that have experienced significant immigrant employment.<sup>46</sup>

After a shallow recession in 1991, the economy grew at record levels for the rest of the decade, if anything producing even greater numbers of lower-skilled jobs than predicted at the time of IRCA's passage. Since Congress did not enact changes to the legal immigration system to accommodate this job growth in IRCA itself or the follow-on 1990 legislation, market forces predictably trumped official government policy.<sup>47</sup>

Given the diminishing number of U.S. workers available or interested in meeting jobs in the fast-growing service, construction, and other lower-skill sectors, foreign workers filled the gap; and in the absence of legal avenues to enter the labor market, workers and employers took the easier path available to them. The unauthorized population began to swell. According to the best available estimates, the unauthorized immigrant population dropped to 2.5 million by 1989 following the IRCA legalization, but then rose to 6.2 million in 1996, and then increased annually by roughly 500,000 until a peak in 2007, when the unauthorized population hit 12.2 million.<sup>48</sup>

### Future Labor Market Needs

Though the level of illegal immigration essentially stalled after the onset of the recession in 2008,<sup>49</sup> basic facts about the U.S. labor market remain fundamentally unchanged. BLS projections suggest that from 2010 to 2020, the U.S. economy will add 20.5 million new jobs. The fastest growth is expected to occur in health care, personal care, and other service occupations. But other occupations such as construction and transportation, which were especially affected by the recession, will also show substantial job gains. While job growth will be faster for occupations that typically require postsecondary education, occupations that require a high school diploma or less will account for more than half of all new and replacement jobs.<sup>50</sup>

It is also estimated that even as the economy will create these new jobs, 33.7 million U.S. workers will leave the workforce. With baby boomers fast retiring, 36.6 percent of the U.S.

population will be 55 or older by 2020.<sup>51</sup> The labor market thus will have to rely on foreign-born workers to help meet its demands. The primary question will be whether these workers will enter through legal permanent and temporary channels, or illegal ones.

Illegal immigration was and remains primarily a response to laws of supply and demand that have proven more powerful and adaptable than the enforcement programs drafted by Congress, beginning with IRCA and augmented by a range of federal and state laws since then.<sup>52</sup>

## VI. Conclusion

The *Immigration Reform and Control Act of 1986* represented a historic attempt to address a set of complex problems confronting the country in the late 1970s and 1980s. Today, the United States faces similar challenges, but with illegal immigration at a much larger scale and with economic and labor market forces all the more complex in an increasingly globalized world.

Policymakers confronting these challenges also have two things at their disposal that IRCA's sponsors did not: Access to a wealth of immigration labor market research and policy analysis, and the knowledge of IRCA's consequences, anticipated as well as unintended.

It remains to be seen how well this contemporary Congress has absorbed the lessons of IRCA. At this writing, the path for immigration reform remains an uncertain one amid keen philosophical and strategic differences between the House and Senate, and between congressional Democrats and Republicans. A sweeping immigration overhaul that passed the Senate in June 2013 has been declared a nonstarter by House Speaker John Boehner (R-OH), and House Republicans are contemplating piecemeal legislation to address discrete parts of the immigration; some have passed House committees, others await introduction.

Contemporary policymakers are fortunate to have the experience of IRCA, documented in a rich research literature, to offer guideposts for crafting a new immigration law. They would do well to heed the lessons of 1986—both positive and negative—to maximize the potential promise of immigration reform and avoid repeating past mistakes or sparking consequences that, while unintended, could have been foreseen.

## Endnotes

- 1 Lawrence H. Fuchs, quoting former Rep. Daniel E. Lungren (R-CA), a key architect of the *Immigration Reform and Control Act of 1986* (IRCA), who said on the day of passage of the legislation that “it was a corpse going to the morgue, and on the way to the morgue a toe began to twitch and we started CPR again.” In “The corpse that would not die: The Immigration Reform and Control Act of 1986,” *Revue européenne de migrations internationales* 6, no. 6-1 (1990): 111-27, [www.persee.fr/web/revues/home/prescript/article/remi\\_0765-0752\\_1990\\_num\\_6\\_1\\_1230](http://www.persee.fr/web/revues/home/prescript/article/remi_0765-0752_1990_num_6_1_1230).
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- 3 Robert Pear, quoting Rep. Charles Schumer (D-NY), in “President Signs Landmark Bill on Immigration,” *New York Times*, November 7, 1986, [www.nytimes.com/1986/11/07/us/president-signs-landmark-bill-on-immigration.html](http://www.nytimes.com/1986/11/07/us/president-signs-landmark-bill-on-immigration.html).
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- 6 U.S. Citizenship and Immigration Services (USCIS), “Instructions for Employment Eligibility Verification,” OMB No. 1615-0047, [www.uscis.gov/sites/default/files/files/form/i-9.pdf](http://www.uscis.gov/sites/default/files/files/form/i-9.pdf).
- 7 There is a strong, rational basis for not requiring employers to determine that the documents presented by job applicants are genuine. Since the vast majority of employers lack the expertise to distinguish legitimate papers from false ones, IRCA’s drafters feared that some employers would decline to hire legal residents and U.S. citizens based on inaccurate perceptions of the authenticity of documents presented by “foreign-looking” job applicants. Specifically, the statute provided that employers will be deemed in compliance if the document they examined “on its face appears to be genuine.” See extensive discussion in *Immigration Reform and Control Act of 1982*, Report of the House Committee on the Judiciary, House Report No. 97-890, Part 1: 39-45.
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- 11 Muzaffar Chishti, “Employer Sanctions Against Immigrant Workers,” *WorkingUSA, The Journal of Labor and Society*, vol. 3, no. 6 (2000): 71-6.
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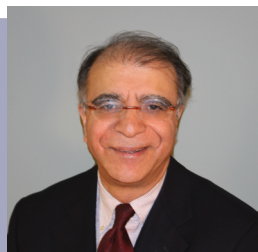
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52 For example, the *Immigration Act of 1990* expanded grounds for exclusion and deportation. The *Antiterrorism and Effective Death Penalty Act (AEDPA)* and *Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)*, both enacted in 1996, expanded the number of crimes that constitute aggravated felonies with the consequence of automatic removal, criminalized immigration offenses previously considered to be civil violations, and created the opportunity for states and localities to take on immigration enforcement roles. Meanwhile, since 2006, various states have taken an activist stance on immigration enforcement laws and restricting immigrants' access to state benefits. Passage of such legislation in the states peaked in 2011. See National Conference of State Legislatures (NCSL), *2013 Report on State Immigration Laws (Jan.-June)* (Washington, DC: NCSL, 2013), [www.ncsl.org/issues-research/immig/immigration-report-august-2013.aspx](http://www.ncsl.org/issues-research/immig/immigration-report-august-2013.aspx).

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## Acknowledgments

The authors thank Doris Meissner for her considerable substantive contributions to this piece; Michael Fix, Randy Capps, Stephen Yale-Loehr, and Claire Bergeron for their expert review; Faye Hipsman for her research assistance; and Michelle Mittelstadt for her expert editing.

This is one in a series of issue briefs examining issues that are arising in the context of the current debate over immigration reform in the United States. Additional briefs and other research and resources from the Migration Policy Institute can be accessed at [www.migrationpolicy.org/cir](http://www.migrationpolicy.org/cir).

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Cover Design: April Siruno

Typesetting: Marissa Esthimer, MPI

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Suggested citation: Chishti, Muzaffar and Charles Kamasaki. 2014. *IRCA in Retrospect: Guideposts for Today's Immigration Reform*. Washington, DC: Migration Policy Institute.

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With the politics and policy issues of immigration more complex and contentious than ever, it is vitally important that policymakers and the American public have solid information, fact-based analysis, and sound policy ideas on which to base their discussions, and, ultimately, their decisions. Through its U.S. Immigration Policy Program, MPI is providing careful analysis of existing policies and articulating a series of pragmatic, workable policy proposals to overhaul an outdated U.S. immigration system so it can better reflect current realities and needs for U.S. society, employers, communities, and native-born and immigrant residents alike.