

## LEARNING FROM IRCA: Lessons for Comprehensive Immigration Reform

by Jimmy Gomez  
and Walter A. Ewing, Ph.D.\*

### EXECUTIVE SUMMARY

If the current political stalemate over immigration reform is any indication, many U.S. policymakers have yet to heed the lessons of recent history when it comes to formulating a realistic strategy to control undocumented immigration. In 1986, lawmakers passed the Immigration Reform and Control Act (IRCA) in an attempt to reign in undocumented immigration through heightened worksite and border enforcement, combined with legalization of most undocumented immigrants already in the country. Unfortunately, IRCA failed to offer a long-term solution to the problem of undocumented immigration because: (1) it did not expand avenues for legal immigration to match the U.S. economy's continuing demand for immigrant workers; (2) it did not create an effective system through which employers could verify that their employees are authorized to work in the United States; and (3) the employer sanctions provisions of the bill were weakly enforced. Lawmakers should take care not to make the same mistakes in crafting new immigration reform legislation.

Among the findings of this report:

➤ Over the past 20 years, the Government Accountability Office (GAO) has recommended numerous times, without success, that Congress and the immigration service reduce the number of identity documents acceptable for proving work eligibility and make those documents fraud and tamper resistant.

- Although the immigration enforcement budget as a whole rose from \$1 billion in 1985 to \$4.9 billion in 2002, the share devoted to investigations, which was responsible for worksite enforcement and sanctions, fell from 11 percent to 9 percent during that time.
- Since 1997, the annual number of arrests of undocumented workers has fallen from 17,552 to 445, cases completed from 7,537 to 2,194, and notices of intent to fine issued to employers from 862 to 3.
- Border enforcement, which today has become the primary means of controlling undocumented immigration, only had a secondary role under IRCA.
- The shortcomings of IRCA and its implementation over the past 20 years illustrate that: (1) no amount of immigration enforcement can compensate for the inadequacy of existing legal limits on immigration; (2) employers will not be able to accurately determine whether or not their employees are authorized to work until a reliable employee verification process is created; (3) once an effective verification process is in place, policymakers must be willing to expend the resources needed to crack down on employers who continue hiring undocumented workers; and (4) immigration reform must address the status of the 12 million undocumented immigrants now living in the country.

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## INTRODUCTION

If the current political stalemate over immigration reform is any indication, many U.S. policymakers have yet to heed the lessons of recent history when it comes to formulating a realistic strategy to control undocumented immigration. A number of lawmakers have become fixated on the notion that border fences and other enforcement measures are the most promising means of stemming undocumented migration into the country, even though the past two decades of escalating border enforcement have witnessed unprecedented growth in the size of the undocumented population. Lawmakers remain divided over key questions such as whether or not to grant legal status to some or all of the 12 million undocumented immigrants now living in the United States, and whether or not new enforcement measures should be accompanied by an expansion of legal avenues for temporary or permanent immigration as well.

Although these and many other questions surrounding immigration reform are complex and controversial, the answers already have been suggested by the 20 years of experience garnered since the last time Congress implemented comprehensive immigration reform legislation. In the 1980s, lawmakers confronted an immigration quandary very similar to that which we confront today: a growing number of undocumented immigrants crossing the border, settling in the United States, and joining the workforce. Lawmakers of the time eventually agreed upon a remedy, the Immigration Reform and Control Act of 1986 (IRCA), that combined heightened worksite and border enforcement with legalization of most undocumented immigrants then in the country.

However, IRCA failed to offer a long-term solution to the problem of undocumented immigration for 3 principal reasons: (1) it did not expand avenues for legal immigration to match the U.S. economy's continuing demand for workers; (2) it did not create an effective system through which employers could verify that their employees are authorized to work in the United States; and (3) the employer sanctions provisions of the bill have been weakly enforced. As a result, undocumented immigration not only continued after the passage of IRCA, but increased. Lawmakers should take care

not to make the same mistakes in crafting new immigration reform legislation. Comprehensive reform must address the status of undocumented immigrants already here, expand legal channels of immigration to accommodate future migratory flows, create a mechanism by which employers can readily ensure that they are not hiring undocumented workers, and crack down on employers who knowingly hire undocumented immigrants.

## A THREE-PRONGED APPROACH

IRCA represented a three-pronged approach to undocumented immigration: legalization of most undocumented immigrants currently in the United States; creation of a new system of employee verification and employer sanctions to make it more difficult for undocumented immigrants to find jobs; and enhanced border enforcement to reduce the flow of undocumented immigrants into the country. However, the primary provisions of IRCA were those related to employee verification and employer sanctions. The authors of the bill, Representative Romano Mazzoli of Kentucky and Senator Alan Simpson of Wisconsin, as well as leading immigration experts, believed that the only way to effectively reduce undocumented immigration was to curtail the ability of undocumented immigrants to find employment.

Employer sanctions were intended to limit the demand for undocumented workers by imposing fines on employers who (1) did not verify a person's eligibility to work in the United States; (2) continued to employ persons not authorized to work in the country; or (3) knowingly hired undocumented immigrants. The House Judiciary Committee underscored the importance of employer sanctions in IRCA by writing in its report on the bill that "the principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions."<sup>1</sup> In addition, employer sanctions were presumed to have budgetary and economic benefits. The fines collected through employer sanctions were expected to cover a growing share of immigration enforcement costs. And jobs once held by undocumented immigrants would, in theory, become available for unemployed Americans, thus reducing public assistance costs.<sup>2</sup>

<sup>1</sup> U.S. House of Representatives, Committee on the Judiciary, *Report on the Immigration Control and Legalization Amendments ACT of 1986*, Report 99-682, July 16, 1986, p. 46.

<sup>2</sup> *ibid.*, p. 127.

Proponents of IRCA recognized that the large undocumented population in the country could not be ignored and that worker verification and employer sanctions alone would not deal adequately with the problem. However, both sides of the immigration debate agreed that “attempting mass deportations would be costly, ineffective, and inconsistent with our immigrant heritage.”<sup>3</sup> Legalization thus was seen as the most politically and fiscally palatable means of reducing the size of the undocumented population, which numbered about 5.5 million in 1986. Moreover, it was presumed that legalization would allow the Immigration Naturalization Service (INS) to free up resources and “target its enforcement efforts on new flows of undocumented immigrants and, in conjunction with the proposed employer sanctions, help stem the flow of undocumented people into the United States.”<sup>4</sup>

Border enforcement, which today has become the primary means of controlling undocumented immigration, had a secondary role under IRCA. The House Judiciary Committee report did not provide guidance as to the strategic role of border enforcement, but simply stated that “the Committee has consistently supported increased resources for the Border Patrol to stem the massive illegal entry of aliens and this bill specifically authorizes additional enforcement funds for this purpose.”<sup>5</sup> Some supporters of IRCA argued—correctly, it turns out—that border enforcement would only be effective in reducing undocumented immigration in combination with an effective system of employee verification and employer sanctions.

## A FLAWED SYSTEM OF EMPLOYEE VERIFICATION

Despite the key role of employee verification in IRCA’s immigration control strategy, the federal government never devoted the resources needed to create an effective verification system. As early as 1989, employee verification was hindered by the prevalence of counterfeit and fraudulent identity documents. Congress required the U.S. General Accounting Office (GAO), now the Government Account-

ability Office, to issue reports on the worker verification and employer sanctions provisions of IRCA for each of the first 3 years after passage of the bill. Although these reports were designed to determine if the provisions put an undue burden on employers or caused discrimination against workers, they also provided a first glimpse of what would become a growing problem. The reports found that the sheer number of documents which employees could use to verify their identity and authorization to work (29 at the time) created confusion for employers and provided ample opportunity for fraud. Furthermore, many employers faced the dilemma of either blindly accepting documents submitted by would-be employees or turning them away and potentially discriminating against lawful workers. To comply with the anti-discrimination component of IRCA and avoid potential discrimination lawsuits, employers started to assume that most, if not all, documents submitted by workers were authentic. The relatively small number of employers who intended to subvert the law understood that as long as they properly filed the required Employment Eligibility Verification (I-9) forms for their workers, it would be difficult for the INS to prove that they had “knowingly” hired or continued to employ undocumented workers.

The GAO and immigration experts agreed that employer discretion to determine the authenticity of documents undermined the deterrent effect of the verification process and the ability of the INS to impose sanctions. In the last of its 3 congressionally mandated reports, the GAO quoted the 1981 Select Commission on Immigration and Refugee Policy, which stated that “an effective employer sanction system must rely on a reliable means of verifying employment eligibility.”<sup>6</sup> Over the past 20 years, the GAO has recommended numerous times that Congress and the immigration service reduce the number of documents acceptable on the I-9 form and make them tamper and fraud resistant. As recently as June 2005, the GAO, echoing the findings of the U.S. Commission on Immigration Reform and other studies, concluded that “the single most important step that could be taken to reduce unlawful migration is the

<sup>3</sup> *ibid.*, p. 49.

<sup>4</sup> *ibid.*, p. 49.

<sup>5</sup> *ibid.*, p. 49.

<sup>6</sup> U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62, March 29, 1990, p. 16.

development of a more effective system for verifying work authorization.”<sup>7</sup>

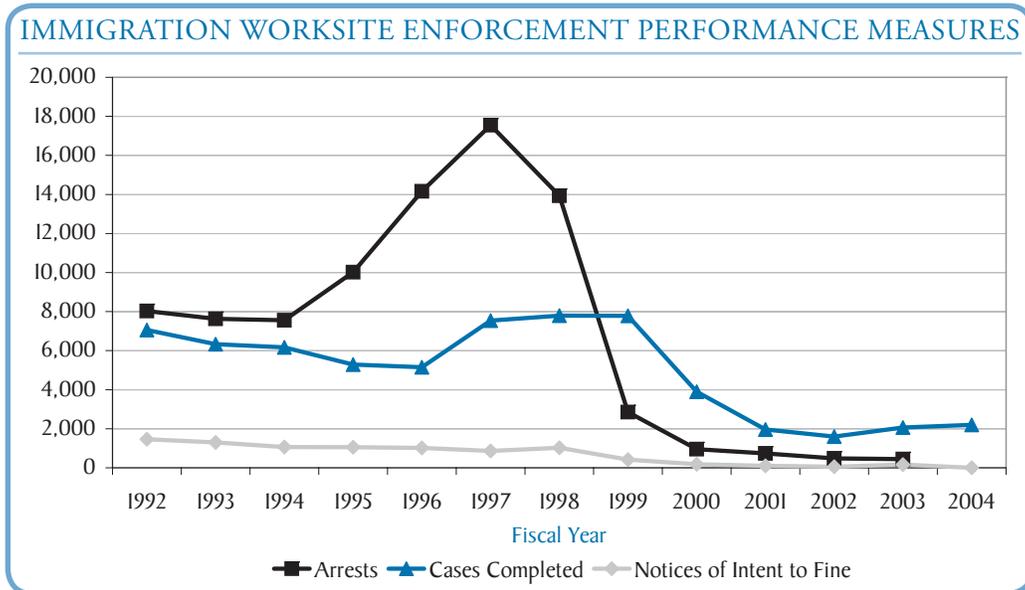
**HALF-HEARTED EMPLOYER SANCTIONS**

Given that the flawed employee verification system created by IRCA was both unreliable and costly, federal budgetary and bureaucratic support for worksite enforcement and employer sanctions never materialized. Although the immigration enforcement budget rose from \$1 billion in 1985 to \$4.9 billion in 2002, the investigations program, which was responsible for worksite enforcement and sanctions, saw its budget remain “relatively constant between 1985 and 2002, growing from 11 percent of the (enforcement) budget in 1985 to a high of 13 percent and decreasing to 9 percent by 2002.”<sup>8</sup> Moreover, administrative decisions allocated most of the few new resources to other investigative activities (e.g., removing criminal aliens). Funding for employer sanctions activity actually decreased from 1988 until 1994.<sup>9</sup> Barbara

Jordan, Chair of the U.S. Commission on Immigration Reform, testified before the Senate Judiciary Committee in August of 1994 that “both employer sanctions and labor standards enforcement had suffered resource losses, and that neither had received sufficient priority.”<sup>10</sup>

The waning effectiveness of the employer sanctions program is reflected in the shrinking number of cases completed, as well as declining numbers of “notices of intent to fine” and final orders issued to employers, and fewer arrests of undocumented workers. The number of completed cases decreased 25 percent between FY 1992 and FY 1996, from 7,053 to 5,149, then rose to a high of 7,788 in FY 1998. But between FY 1998 and FY 2001, the number of completions decreased 80 percent, to 1,595. By 2003 the number of completed cases had risen to 2,195. Similarly, worksite enforcement arrests declined from 1992 until 1994, and then increased by 132 percent to 17,554 in FY 1997, followed by a 6-year, 97 percent plummet to 445 arrests in FY 2003. The

Figure 1:



Source: 2000 Statistical Yearbook of the INS, Table 62; U.S. Government Accountability Office, GAO-05-813, August 2005, p. 35-36.

<sup>7</sup> U.S. Government Accountability, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts*, GAO-05-822T, June 21, 2005, p. 1.

<sup>8</sup> David Dixon & Julia Gelatt, *Immigration Enforcement Spending Since IRCA* (Independent Task Force on Immigration and America’s Future, Fact Sheet #10). Washington, DC: Migration Policy Institute, November 2005, p. 4.

<sup>9</sup> U.S. General Accounting Office, *Employer Sanctions: Comments on H.R. 3362—Employer Sanctions Improvement Act*, GAO/T-GGD-94-189, September 21, 1994, p. 3.

<sup>10</sup> *ibid.*, p. 2.

most dramatic decrease occurred in the issuance of “notices of intent to fine,” from 1,461 in FY 1992 to 3 in FY 2004, a decrease of 99.8 percent in 11 years {Figure 1}.<sup>11</sup>

The undermining of worksite enforcement efforts occurred over many years, but it was not until the integration of the former INS into the new Department of Homeland Security (DHS) in 2003 that we witness its almost complete collapse. This occurred after DHS and one of the INS successor agencies, U.S. Immigration and Customs Enforcement (ICE), made several key administrative decisions that reinforced the low priority of worksite enforcement and employer sanctions. First, ICE realigned the agency in accord with the mission of DHS as a whole, directing its investigative resources toward “identifying and removing unauthorized workers from critical infrastructure sites, such as airports and nuclear power plants.”<sup>12</sup> Second, ICE implemented policies consistent with the 1999 Interior Enforcement Strategy of the INS, which placed as fifth in a list of five agency priorities “the strategy to block or remove employers’ access to undocumented workers.”<sup>13</sup> Finally, in 2003, ICE “issued a memo requiring field offices to request approval from ICE headquarters prior to opening any worksite enforcement investigations not related to the protection of critical infrastructure sites.”<sup>14</sup> The cumulative effect of these decisions was to gut worksite investigations and the employer sanctions program.

## NEGLECTED PROBLEMS

The problems associated with the worker verification and employer sanctions programs were known for years, but Congress and successive administrations failed to implement effective solutions. It was not until 1996, ten years after the passage of IRCA, that Congress attempted a partial fix through the Illegal Immigration Reform and Immigrant

Responsibility Act (IIRIRA). IIRIRA had several provisions meant to improve the verification and sanctions programs, but has had little impact to date.

One provision of IIRIRA mandated that the INS make changes to the list of documents acceptable for proving work eligibility. In 1997, the INS issued an interim rule that reduced the number of documents from 29 to 27. This interim rule was intended as a “temporary measure until the INS issues final rules on the modifications to the Form I-9.” In 1998, the INS recommended further reducing the number of work eligibility documents to 14, but the proposed reduction never took place.<sup>15</sup> IIRIRA also authorized the INS to test 3 voluntary programs over a 4-year period that could be used to strengthen the employment eligibility verification process. The programs were the Basic Pilot Program, Citizen Attestation Verification Pilot Program, and Machine Readable Document Pilot Program. After the initial 4 years, the programs were reauthorized for another 2 years in 2002 and again for another 5 years in 2003. Shortly after the extension of the programs, DHS ended the Citizen Attestation Verification Pilot Program and the Machine Readable Document Pilot Program because of “technical difficulties and unintended consequences, such as increased fraud and discrimination.”<sup>16</sup>

Under the Basic Pilot Program, participating employers can check the names and social security numbers presented by employees against Social Security Administration and DHS databases. According to the GAO, more than 50,000 queries were run in FY 2004 for more than 150,000 federal, state, and local agencies and only 2,300 of the nation’s 5.8 million employers.<sup>17</sup> The GAO found that “[a]lthough the majority of pilot program queries entered by participating employers are confirmed via the automated SSA and DHS verification checks, about 15 percent of queries authorized by DHS required

<sup>11</sup> U.S. Immigration & Naturalization Service, U.S. Department of Justice, *2000 Statistical Yearbook of the Immigration and Naturalization Service*, September 2002, Table 62 - Principal Activities and Accomplishments of the INS Investigations Program, Fiscal Years 1992-2000; U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, GAO-05-813, August 2005, p. 35-36.

<sup>12</sup> U.S. Government Accountability Office, *Immigration Enforcement: Preliminary Observations*, p. 4.

<sup>13</sup> U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses*, p. 30.

<sup>14</sup> *ibid.*, p. 31.

<sup>15</sup> *ibid.*, p. 16.

<sup>16</sup> *ibid.*, p. 9.

<sup>17</sup> *ibid.*, p. 10, 20-21, 26.

manual verification by immigration status verifiers....” That is, a DHS staffer has to run the name and social security number of the employee against other databases that are not part of the program. Some of these cases take as long as 2 weeks to process.<sup>18</sup> Expanding the Pilot Program to all employers, without dramatically increasing wait times in the process, would require a massive infusion of new resources. The GAO cited a study by Temple University’s Institute for Survey Research and Westat which found that “a mandatory dial-up version of the pilot program for all employers would cost the federal government, employers, and employees about \$11.7 billion total per year, with employers bearing most of the costs.”<sup>19</sup>

Beyond the failings of employee verification and employer sanctions, the legalization provisions of IRCA succeeded in reducing the number of undocumented immigrants living in the United States only temporarily. Of the estimated 5-6 million undocumented immigrants in 1986, over 3 million acquired legal status through IRCA.<sup>20</sup> The rest were ineligible for legalization because they had not resided continuously in the country for at least 5 years. Many proponents of IRCA did not see this as a problem, assuming that ineligible undocumented immigrants would return to their home countries, since they would not be able to find jobs in the face of a new worker verification process and employer sanctions. However, this proved not to be the case since the employee verification process was ineffective, employer sanctions were seldom enforced, and legal limits on immigration were not raised to reflect the U.S. economy’s growing need for immigrant workers to supplement the native born workforce.

## MISPLACED RELIANCE ON BORDER ENFORCEMENT

As the employee verification and employer sanctions programs have withered, border enforcement has become

the primary focus of immigration control efforts. During the vast expansion of INS resources since 1986, budgetary and political support for the Border Patrol has translated into dramatic funding and personnel increases. According to a 2002 study by the Public Policy Institute of California, “the INS budget for border enforcement increased sevenfold between 1980 and 1995, and then almost tripled between 1995 and 2001.”<sup>21</sup> Subsequently, the number of Border Patrol positions increased to 10,752 in 2004, with about 90 percent of agents assigned to the southern border.<sup>22</sup>

The greatest shift of resources and political support to border enforcement occurred after the INS adopted an operational strategy of “prevention through deterrence,” under which Border Patrol resources were redeployed to heavily trafficked portions of the border to deter unauthorized entry. The first two operations that implemented this strategy, “Hold the Line” in 1993 and “Gatekeeper” in 1994, relied on an unprecedented increase in Border Patrol agents along the El Paso and San Diego sections of the U.S.-Mexico border. Early analysis of both operations pointed to an increasing number of undocumented immigrants apprehended at the El Paso and San Diego points of entry, leading many to believe that the operations had been a success. Consequently, in 1996 Congress enthusiastically embraced the prevention through deterrence strategy by appropriating funds for the “INS to hire new agents, reallocate USBP [Border Patrol] agents stationed in the interior to front line duty, and staff the interior offices with investigative staff instead.”<sup>23</sup> The INS followed up with two other operations focused on less traditional points of entry: operations “Rio Grande” (1997) in the McAllen and Laredo sectors of Texas, and “Safeguard” (1999) in Tucson, AZ.

The prevention through deterrence strategy achieved its goal of diverting flows of illegal immigrants to less populated areas of the border and increasing the number of apprehen-

<sup>18</sup> *ibid.*, p. 23-24.

<sup>19</sup> *ibid.*, p. 29.

<sup>20</sup> Douglas S. Massey, Jorge Durand & Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration*. New York, NY: Russell Sage Foundation, 2002, p. 90.

<sup>21</sup> Belinda I. Reyes, Hans P. Johnson, & Richard Van Swearingen Holding the Line? *The Effect of the Recent Border Build-up on Unauthorized Immigration*. San Francisco, CA: Public Policy Institute of California, July 2002, p. v.

<sup>22</sup> Blas Nuñez-Neto, *Border Security: The Role of the U.S. Border Patrol*. Washington, DC: Congressional Research Service, U.S. Library of Congress, May 10, 2005, p. 5, 10.

<sup>23</sup> *ibid.*, p. 3.

sions. However, it did not slow the pace of undocumented immigration overall. Rather than forgo their journey to the United States in the face of new border-enforcement measures, more undocumented immigrants simply hired people smugglers to guide them around fortified sections of the border. As a result, the undocumented population had grown to about 12 million as of March 2006.<sup>24</sup>

## CONCLUSION

There are several lessons to be drawn from the shortcomings of IRCA and its implementation over the past 20 years. First of all, no amount of enforcement, either at the border or in the workplace, can compensate for the inadequacy of existing legal limits on immigration to the United States. Unless legal channels of immigration are revamped

to accommodate the actual demand for immigrant labor in the United States, enforcement efforts will continue to be undermined by economic reality. Secondly, employers will not be able to accurately determine whether or not their employees are authorized to work in the United States until the employee verification process is based upon just a few fraud and tamper resistant identity documents. Third, once an effective verification process is in place, policymakers must be willing to expend the resources needed to crack down on employers who continue hiring undocumented workers. And, finally, immigration reform must address the status of the 12 million undocumented immigrants now living in the country. Unless policymakers want to continue with the *status quo* or undertake mass deportations, the only alternative is for those undocumented immigrants who are already here to have the opportunity to earn legal status.

<sup>24</sup> Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey*. Washington, DC: Pew Hispanic Center, March 7, 2006, p. 2.

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