



Testimony of
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On
*Shortfalls of the 1986 Immigration Reform
Legislation*

Before
The Subcommittee on Immigration, Citizenship,
Refugees, Border Security, and International Law

JUDICIARY COMMITTEE
U.S. House of Representatives

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Madame Chairwoman, Ranking Member King, Members of the Subcommittee, thank you for the opportunity to appear before you today to talk about the shortfalls of the 1986 Immigration Reform and Control Act (IRCA). I commend you for holding this hearing to examine the lessons we can learn from past legislation so that we may avoid the same mistakes in future legislation. We inside the beltway too rarely engage in this kind of exercise.

I have to admit that it had been several years since I last actually read the provisions of IRCA. Like most people involved in the immigration debate, I had come to think of IRCA as being comprised of three main elements: employer sanctions, the general amnesty, and the Special Agricultural Worker (SAW) amnesty. In fact, though, IRCA had all the same basic elements as the “comprehensive immigration reform” proposals we’ve seen coming out of the Senate, the White House, and even the House:

- **Enhanced enforcement**—In addition to employer sanctions, IRCA had several other enforcement provisions, including increased resources for the Border Patrol and for wage- and hour-law enforcement, restrictions on aliens’ eligibility for welfare, tougher penalties for alien smugglers, and a Sense of Congress that the President of the United States should consult with the president of Mexico on how best to implement IRCA.
- **Legal immigration increases**—IRCA included a new visa lottery for nationals of countries adversely affected by the 1965 Immigration Act, and it added a new category of Special Immigrants.

- **Guestworkers**—IRCA created the H-2A nonimmigrant designation for temporary agricultural workers.
- **Amnesties**—IRCA included two main amnesties: a general amnesty for those who had been illegally present since before January 1, 1982; and an industry-specific amnesty for those illegal aliens who claimed to have performed at least 90 “man days” of agricultural work during a specified period.

There seems to be almost universal agreement now on two key things: (1) IRCA was, in fact, an amnesty; and (2) IRCA failed to accomplish its purpose, which was to wipe the illegal immigration slate clean (through the amnesties) and deter future illegal immigration by removing the jobs magnet (through employer sanctions).

IRCA = Amnesty

Undoubtedly, the American public is more strongly opposed to amnesty for illegal aliens than it was in 1986 (though a majority opposed it even then). I imagine this is partly because more people today understand what amnesty entails and that the number of potential beneficiaries is now huge. I would suggest that the public also understands intuitively something that seems elusive here in Washington—what constitutes “amnesty.”

People understand that rewarding illegal behavior will inevitably produce more illegal behavior. If I were to steal a car, for example, and a highway patrol officer pulled me over and wrote me a \$2,000 ticket for stealing the car, but then told me I could keep the car, as long as I paid the ticket, there would be a lot more car thieves once the word got out about my good

fortune. The officer's actions would tell the public that the law against stealing cars is not taken seriously. The \$2,000 ticket is simply a cost of doing business that will be built into decisions to break the law in the future.

The most helpful definition of amnesty I've seen is: Pardoning immigration lawbreakers and rewarding them with the objective of their crimes. Thus, any legislation that rewards illegal aliens who came here for jobs by giving them a work permit is amnesty. It makes no difference whether they are granted temporary residence or green cards; whether they have to pay a fine or back taxes; whether they have to learn some English and civics; or whether they have to "touch back" across the border to launder their status. If the end result is that they get legal permission to work, it is amnesty.

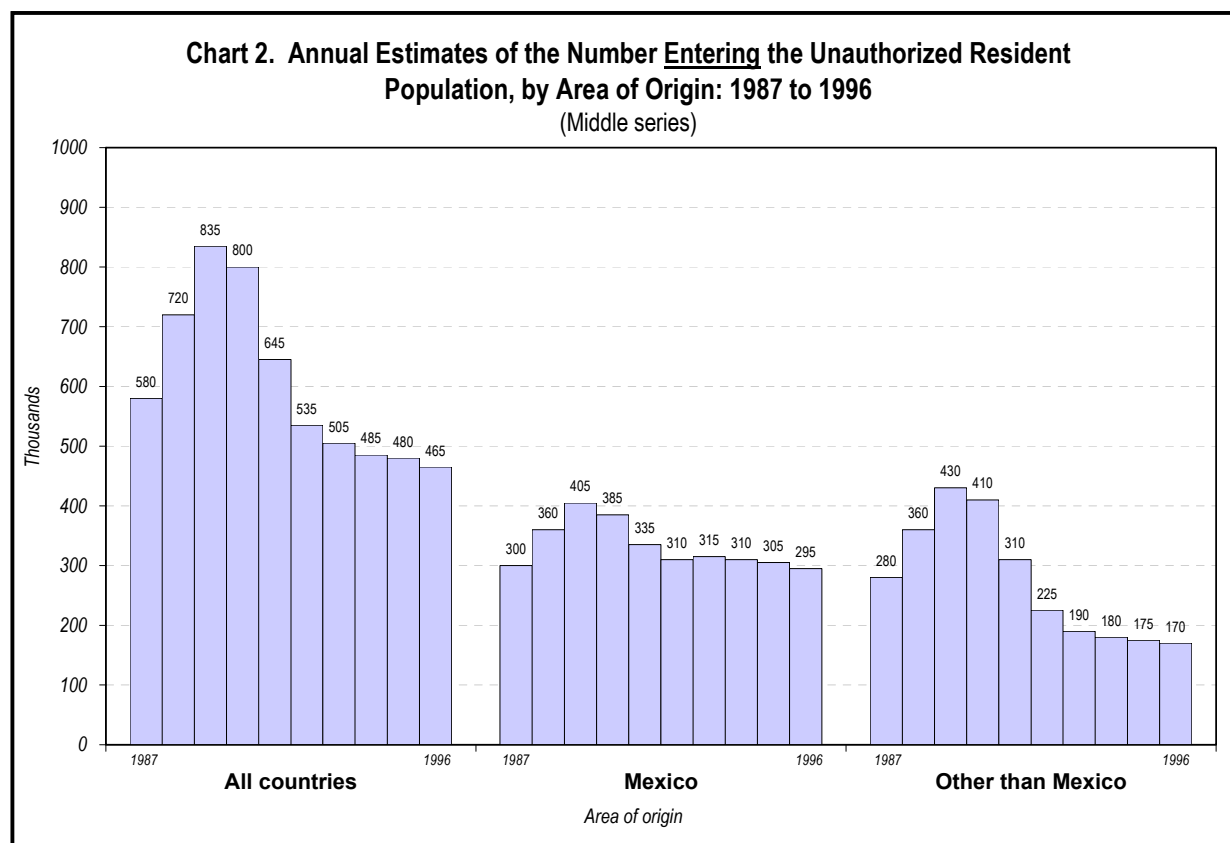
One of the more interesting twists in the debate inside the beltway is the fact that some elected officials hold out IRCA as the big, bad amnesty which they repeatedly insist that they oppose. In the next minute, though, they have signed onto or introduced a bill that is just as much an amnesty as IRCA. The White House's latest proposal is a good example of this.

The very first page of the document states that one of the "First Principles" is to "Bring illegal workers out of the shadows (offering them what we call a "Z visa") without amnesty." First, I would point out that the public no longer buys the "out of the shadows" argument since they saw huge groups of self-identified illegal aliens marching in the streets last year. More importantly, though, offering illegal aliens a "Z visa" or any other kind of visa is, by definition, amnesty – rewarding the lawbreaker with the objective of his crime -- and the American people know it.

In the end, it is all about perceptions. And it doesn't matter whether the law is called an "amnesty" or something else. If people outside the United States believe that Congress has changed the law in such a way that illegal aliens are legally permitted to stay—even if the stay is temporary—and work (or do whatever else they may have come here to do), the message to all of those people is that we are not serious about the laws prohibiting illegal immigration, so they may as well try their luck.

They will not be concerned with the details of the new law—whether it includes fines or English classes or a vacation across the border. Their perception is what will convince them to come illegally or, in the case of the bill the House passed last year, HR 4437, not to come illegally. We have seen this play out in real life over and over again.

IRCA was touted as the solution to the problem of millions of illegal aliens living and working in our country. Not only did it fail miserably on that score, it actually resulted in millions more foreign workers illegally settling in the United States. For example, the following chart, from an unpublished paper written by Robert Warren of the then-INS, shows a significant spike in illegal immigration immediately following passage of IRCA. Perhaps most notable in the post-9/11 world is the fact that the spike in “Other than Mexican” or OTM entries exceeded the spike for Mexico, even though Mexicans made up a majority of those actually legalized under IRCA. According to the provisions of IRCA, none of these illegal



Source: Warren, Robert, “Annual Estimates of the Unauthorized Immigrant Population Residing in the United States and Components of Change: 1987 to 1997” (draft), Office of Policy and Planning, Immigration and Naturalization Service.

entrants would have been eligible for either amnesty, and yet they clearly believed it would be in their best interest to come. Whether they believed they could use fraud to obtain amnesty or whether they were operating on misinformation is beside the point. They perceived an advantage in entering illegally immediately following passage of IRCA, and so they did.

Similarly, the Pew Hispanic Center found that the annual illegal alien flow exceeded the legal immigration flow to the United States for the first time in 1995. It is no coincidence that Section 245(i), another amnesty provision, was enacted for the first time in 1994. Enactment of Section 245(i) also marked the beginning of huge backlogs of pending applications for immigration status at INS and later at USCIS. Prior to 245(i), INS had had a steady, annual backlog of around 120,000 applications. By the end of 2003, the agency had six million pending applications.

In the past decade, we have seen sustained, high levels of illegal immigration that have not only replaced the entire estimated illegal population of 1986, but exceeded that population by more than two times over. Also during that time, Congress enacted five additional amnesties. The message these actions send is clear. And by focusing entirely on how it should change the law to accommodate illegal aliens, rather than on how to create a sensible and credible immigration policy, Congress continues to broadcast the message that illegal immigration will eventually pay off.

Amnesty cannot be our answer to illegal immigration, even in the short term, because it inevitably drives more illegal immigration. It happened with IRCA in 1986. It happened with the six additional amnesties in the 1990s. Congress has been using amnesty as its primary

solution for illegal immigration for more than 20 years now. After every amnesty, the illegal population has just grown more. The message has been clearly received throughout the world that if you can get into the United States, eventually you will be legalized.

If we are to deter future illegal entries, we have to change the message so that people around the world understand that we are serious about our immigration laws and that those who violate them will be penalized, not rewarded.

IRCA Failures

(1) Employer Sanctions

The most obvious reason why IRCA failed, and the one most often thrown around in Washington, is that the government failed to enforce the employer sanctions system and an ever-larger fraudulent documents industry has made it virtually impossible for employers to avoid hiring illegal aliens. This is undoubtedly true, and many of the Members of Congress who drafted and enacted IRCA were well aware of this potential outcome.

IRCA's drafters were right to focus the new enforcement efforts on the employers who hire illegal aliens. They understood that the availability of jobs in the United States served as a beacon to would-be illegal aliens. When aliens weighed the risks of getting caught or killed crossing the border or overstaying a temporary visa against the benefits of a U.S. job at U.S. wages, there was no contest for most. They knew that once they got into this country, there was almost no chance they would be caught and they were virtually guaranteed a job at significantly higher wages than they were making back home.

The fact that would-be illegal aliens are weighing the very same risks and benefits and coming to the very same conclusion more than 20 years after the enactment of IRCA makes clear that IRCA failed to remove the jobs magnet. By making it unlawful for an employer to hire an alien he knows to be illegal and by failing to give the employer the tools to determine accurately whether the alien is legal or illegal, Congress placed the burden on the government to prove that an employer has such knowledge. All the employer has to do is produce a filled-in I-9 form and say that the documents presented to him by the alien reasonably appeared on their face to be valid.

It did not take the Immigration and Naturalization Service (INS) long to decide that employer sanctions enforcement efforts were not cost effective for them. Of course, no administration and only a handful of Members of Congress objected strenuously to the lack of enforcement because it meant cheap labor for the business lobbies.

The provisions in IRCA that address fraudulent documents, including requirements for various studies by the Social Security Administration and others on how to reduce abuse of social security numbers and other identification documents, make it clear that Congress anticipated an increase in document fraud as a result of employer sanctions. Nonetheless, Congress failed to include a mandatory work eligibility verification system.

(2) Bureaucratic Incapacity and National Security Vulnerabilities

The next shortcoming of IRCA was that it suddenly and dramatically increased the workload of a Federal agency that was unprepared and ill-equipped to handle it. The INS was already under-funded and overworked when IRCA was passed. Like Congress, the INS

expected a significantly smaller number of amnesty applicants than it received. Even if the overall numbers had been smaller, though, the agency still would not have been prepared.

Like the amnesties being proposed today, IRCA required illegal aliens to go through a two-step process and meet a variety of criteria at each step. The steps were the same under the pre-1982 amnesty and the SAW amnesty. First, they had to fill out an application and pay a fee within 18 months. It would have taken the INS at least this long to hire and train sufficient staff to handle the applications properly. Instead, the agency had to begin accepting applications virtually immediately. Next, the applicants had to go to an INS office and submit fingerprints, which the agency was supposed to check against criminal and national security watch lists. Then, INS was required to grant “temporary resident status” and a work permit to all illegal aliens who met the criteria. Aliens with temporary resident status were required to maintain that status for 18 months, after which they had one year during which to apply for adjustment to permanent residence. In order to qualify for adjustment, the aliens had to submit another application, undergo another background check, and demonstrate a basic knowledge of English and Civics, which required an interview.

That means that each of the more than three million applicants had to meet with an INS employee at least twice, and the INS had to process two applications, do two background checks, and issue two sets of documents for each applicant, all within about three years. It should have come as no surprise that the agency bogged down almost immediately. When processing slowed down, applicants and their friends, relatives and attorneys began complaining to Congress, which in turn put pressure on the INS to figure out a way to speed

up processing. So the INS leadership put pressure on the field personnel, who found ways to speed up processing, mostly by taking shortcuts. The shortcuts led to widespread fraud and national security breaches.

For example, Mahmud Abouhalima, an Egyptian who entered the United States on a tourist visa and overstayed his authorized period of admission, was a cab driver in New York City when IRCA was enacted. He applied for the SAW amnesty and successfully convinced the INS that he had picked beans in Florida. Had a proper background check been done, the INS adjudicator would have learned that Abouhalima's New York license had been suspended at least once, which may have led the adjudicator to discover that the applicant was lying on his application. Instead, Abouhalima's application was approved. Once he received his green card, he used it to travel to Afghanistan for terrorist training. He returned to the United States to use his new skills in the 1993 bombing of the World Trade Center. He drove the getaway vehicle that followed the Ryder van carrying the explosives. Mahmud Abouhalima is currently serving a prison sentence of more than 108 years for his role in the attack.

Fares Khallafalla, who is currently in prison for his role in the plot to blow up New York City landmarks in 1993, also fraudulently used the SAW amnesty to obtain a green card. These and other examples of terrorists gaming our immigration system led the 9/11 Commission staff to conclude, "as the INS struggled, its inability to adjudicate applications quickly or with adequate security checks made it easier for terrorists to wrongfully enter and

remain in the United States throughout the 1990s.”¹ The overall fraud rate in the SAW program has been estimated by INS officials at around 70 percent.

US Citizenship and Immigration Services is in no better shape than INS to handle any increase in workload, let alone one that could involve three times the number of IRCA applicants. Fraud is still rampant in applications for immigration benefits and cutting corners is still the routine response to pressure to speed up processing.

Since USCIS is a fee-funded agency, revenues would not increase until applications began to be submitted. That is far too late for the agency to begin gearing up for a workload increase. Congress would have to appropriate hundreds of millions of dollars to USCIS well in advance of any application period to allow time for hiring and adequately training the new work force that would be required. Moreover, each adjudicator must undergo a background check in order to obtain the requisite security clearance to access the necessary terrorist and criminal databases that applicants must be checked against. It has been estimated that just the background checks on needed new employees would cost \$40 million.

Even if Congress were willing to appropriate sufficient money to allow USCIS to hire and train the necessary work force, there are yet other choke points that would bog down the entire process. For example, as of a couple of months ago, the FBI had a backlog of more than 400,000 immigration applicants awaiting name checks. Because USCIS is not a law enforcement agency, the FBI will not authorize USCIS employees to conduct the name checks

¹ *9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks Upon the United States* (Franklin, Tenn.: Hillsboro Press, 2004), p. 99.

themselves. Since each applicant presumably would need to undergo a name check, the FBI backlog would continue to grow and would stall the entire adjudication process unless it was addressed beforehand.

(3) Flawed Premises

Clearly, one can point to any number of specific shortcomings in IRCA. The most important shortcoming, however, is the fact that the entire law was based on two primary faulty premises. Despite overwhelming evidence that they were faulty, they persist in today's immigration debate.

Mass Roundups vs. Amnesty—The first faulty premise was the idea that the only choices for dealing with the 4 million illegal aliens present at the time were either to order mass roundups and deportations or to legalize most of them.

In fact, though, a third solution should have been obvious, especially since it is the only option that has proven itself effective again and again. That solution is comprehensive enforcement, which many have called “attrition through enforcement.” Everywhere enforcement has been seriously tried, we have seen predictable results: the message goes out to the illegal-alien community that a crackdown is underway, and behavior changes. Common sense tells us that enforcement of the law will result in modified behavior, just as non-enforcement of the law results in acceleration of illegal behavior.

This is the essence of the theory of attrition. If we steadily ramp up our enforcement efforts and, finally, take away the jobs magnet by making automated worksite verification

mandatory for all employers, would-be illegal aliens will decide not to come because the benefits no longer outweigh the risks. Those currently here illegally will begin to realize that the benefits of staying no longer outweigh the costs, inconveniences and separation from their home country, since they cannot work. They gradually decide to self-deport. Around 200,000 established illegal aliens each year already are deciding to move back home. Once again, the key to the success of the attrition theory is perception. Only if current and would-be illegal aliens believe that we are serious about enforcement and intend to sustain our enforcement efforts will they modify their behavior accordingly.

There is no question that some small share will find unscrupulous employers willing to hire them under the table for cash. The penalties for hiring illegal aliens under these circumstances must be severe to be a deterrent, and even then, they will not deter every employer. Any residual population of illegal aliens can be addressed as is appropriate at that point, though. The late Congresswoman Barbara Jordan had it right when she said:

The credibility of immigration policy can be measured by a simple yardstick: people who should get in, do get in; people who should not get in are kept out; and people who are judged deportable are required to leave.²

Part of the illogic of the 1986 amnesty can be found in these two contradictory assumptions:

² U.S. Commission on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility*. 1994. p. 3.

1. On the one hand, Congress assumed that after giving amnesty to all current illegal aliens, the enforcement provisions in the law would be powerful enough in the future to greatly reduce the number of new illegal aliens settling in the United States and would cause most future visa overstayers to decide to voluntarily go back home.
2. On the other hand, they assumed that such enforcement was not capable of creating those results with the illegal aliens living in the country in 1986, thus requiring that they receive amnesty.

The attrition through enforcement option that was rejected in 1986 was based on the logical premise that if enforcement will work in the future, it can work in the present. At the very least, the enforcement provisions passed in 1986 should have been fully implemented without any amnesty to find out how well they would work in reducing the illegal population.

Economic Collapse—The other faulty premise that drove the 1986 debate and drives the current debate is the idea that our economy is dependent on the illegal aliens who are here. There are several variations on this economic theme, mostly promoted by the cheap labor lobby that profits from cheap foreign labor. Some would have us believe, for example, that the only way to keep the U.S. economy growing is to continually add workers to the labor force. Others assure us that immigration will save the Social Security system.

The latest study by Robert Rector of the Heritage Foundation should dispel these simplistic notions once and for all. Rector examined all households in the United States that are headed by a high school drop-out—about 17.5 million households total, of which about 26 percent are immigrant households (both legal and illegal). He looked at all spending and all

revenue at the Federal, state and local levels and found that each of these households costs taxpayers a net average of about \$22,500 each year. That means a total, annual, net cost of almost \$394 billion for all of these households.

Rector is working now on a study that separates out the foreign-born households headed by a high school dropout. He has found that each foreign-born household costs taxpayers slightly less—\$18,500 per year—than native-born households. If we apply his numbers to the population that was legalized under IRCA, which had a 70 percent dropout rate among roughly 1.5 million households, taxpayers are paying \$19.4 billion each year for this population. These costs apply to all foreign-born high school dropouts, regardless of their immigration status.

Obviously, the illegal aliens who are high school dropouts are already here and are already costing us. An amnesty, however, would ensure that they will stay here permanently and cost us into the indefinite future. It would also ensure that they could bring over any additional family members, who are likely to be high school dropouts, as well.

The costs would apply to unskilled guestworkers, as well. A new guestworker program that brought in 400,000 unskilled workers and their families each year would carry an annual price tag for U.S. taxpayers of roughly \$7.4 billion.

For those who believe we could just further restrict welfare eligibility to eliminate these costs, Rector has calculated what it would take to make these households fiscally neutral. If we eliminated the Social Security system, eliminated the Medicare system, eliminated all

means-tested welfare programs, and then cut public education by about 50 percent, these households would be fiscally neutral. Alternatively, we could just ask the employers who hire these workers to pay the actual costs, rather than forcing taxpayers to subsidize their profit margins. If every employer who hires an illegal alien or who imports a foreign worker had to pay the full costs of that worker's presence in the United States, we would suddenly find that there are more than enough Americans to fill American jobs.

Conclusion

Clearly, there are a number of reasons why IRCA failed to solve the illegal immigration problem that existed in 1986. The failure to implement the enforcement provisions, the administrative overload caused by the amnesties, and so on certainly contributed to the law's failure. Primarily, though, IRCA failed because it was an amnesty. We will never solve illegal immigration by rewarding illegal aliens.