

# A Brief Introduction to the IRCA Legalization Experience and the Role of Judicial Review

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## I. OVERVIEW

If the possibility of “comprehensive immigration reform” re-emerges next year, a central element of any proposal will be to regularize the status of some or many of the millions of undocumented immigrants in the United States. The contours of such a “legalization” program will be hotly debated and the complexities will be daunting. In 1986 a similar debate culminated with the Immigration Reform and Control Act (IRCA) and its legalization programs for undocumented residents and agricultural workers.

The experience with the 1986 Act shows that the courts were critical to ensuring that the program enacted by Congress was actually implemented as intended by the law and as required by Due Process. After IRCA’s enactment, a number of key lawsuits challenged rules, regulations, policies and practices adopted by the Immigration and Naturalization Service (INS). In most cases, the Justice Department promptly changed or soon abandoned its challenged interpretations or policies once litigation was initiated or the district courts issued preliminary rulings against the INS. Yet, without lawsuits, the policies would have remained intact. Among the key legal actions that ordered or precipitated significant reform of the administration of IRCA’s legalization program (fuller discussion, *infra*) are the following:

- *Haitian Refugee Center v. Nelson*, 872 F.2d 1555 (11th Cir. 1989), *aff’d sub nom McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (successful class action challenge to denial of SAW applicants’ due process right to fair adjudication process)
- *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C.Dir. 1989); *Ayuda, Inc. v. Reno*, 7 F.3d 246 (D.C. Cir. 1993) (class action challenge INS restrictive interpretation of “known to the government” requirement)
- *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992) (successful class action challenge to “special rule” regarding the “public charge” ground of bar on eligibility)
- *Legalization Assistance Project v. INS*, 976 F.2d 1198 (9th Cir. 1992); *Immigrant Assistance Project v. INS*, 306 F.3d 842 (9th Cir. 2002) (class action challenge overturning INS’s “known to the government” requirement).
- *LULAC v. INS*, No. CV-87-4757 WDK (C.D. Cal.), consolidated on appeal with *Catholic Social Services v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992) (successful class action challenge to INS’s position on “continuous residence” requirement)
- *Catholic Social Services v. Meese*, 685 F.Supp. 1149 (E.D. Cal. 1988) (successful class action challenge to “continuously physically present” requirement)

- *United Farm Workers of America v. INS*, Civ. S-87-1064-JPM (E.D. Cal. Sept. 18, 1990)(settlement date) (successful class action to INS practice or policy of denying SAW applicants due process right to fair hearing)
- *Maca-Alvarez v. INS*, CIV S-1824 EJH/PAN (E.D. Cal. Mar. 31, 1995) (successful challenge and settlement to INS against imposing improper “continuous residence” requirement under post-IRCA family unity provision for spouses and children of individuals granted IRCA legalization)

In today’s immigration debate, the lesson of IRCA has been largely forgotten. But if new legislation is actually enacted, the numbers who will benefit will depend critically on countless substantive and procedural intricacies adopted through formal rules or informal practices by the agency charged with implementation. Hence, the question is whether litigation to enforce systemic compliance will be possible as it was in 1986.

Today, IRCA-type lawsuits to require proper implementation of a new legalization program would be difficult to bring. Since 1986, the jurisdictional limits enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) combined with justiciability impediments have severely constrained class action injunctions and effective pattern-and-practice suits.

Therefore, before the contours of new legislation are cemented, it is important to recall the IRCA legalization experience, to recognize that proposals made during the 2007 debates sought even harsher jurisdictional limitations, and to assess and address the serious impediments to judicial review that now exist. A contemporary comprehensive legalization program must be crafted to overcome these barriers and to provide clear and affirmative guarantees of meaningful judicial review of the implementation of the program by the Department of Homeland Security (DHS) are included.

## **II. IRCA EXPERIENCE**

### **1. Implementation is Key.**

With any legalization program, “the devil is in the details.” The specific policies, practices and regulations adopted by the agency charged with carrying out the program are critical to ensuring its success and to fulfilling the intent of Congress. Absent faithful implementation, a program can be eviscerated in practice by restrictive rules, unfair adjudication practices, impermissible eligibility criteria or broad interpretations of grounds for denial. The best program on paper can be negated in practice if DHS implementation is improper or unfair.

### **2. 1986 Judicial Review under IRCA**

After the enactment of IRCA, judicial review and targeted litigation proved essential to remedying the improper rules, regulations, policies and practices adopted by INS that violated the IRCA statute and due process. The Justice Department and INS consistently rejected formal and informal efforts (through consultations, liaison meetings and comments to proposed regulations) urging them to abandon improper policies and practices. Judicial review and class action lawsuits became the only means for challenging INS’s improper interpretations and implementation of the legalization programs. And after the suits were filed, the INS did not

defend its challenged policies or accepted initial district court rulings. Yet, without this litigation, the policies would have remained in effect. In all the cases, access to prompt judicial review was both the tool of last resort and the essential mechanism for compelling the agency to implement the statute as Congress intended.

Despite the government's prompt substantive retreat, it consistently contested the courts' jurisdiction over the claims and the courts' power to grant effective relief. As a result, the government's *jurisdictional* arguments over remedies and availability of review caused some of the litigation to last for many years.

The Supreme Court ultimately rejected the government's principal argument and upheld federal court review of some implementation practices with regard to one legalization program in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). A subsequent decision, however, held that different legal claims regarding IRCA's implementation failed under doctrines of administrative exhaustion and ripeness and hence could apparently be brought only *after* individual applicants were denied legalization, subjected to deportation proceedings and actually ordered deported. *Reno v. Catholic Social Services*, 509 U.S. 43 (1993). That decision arose long after the district court ruling that had caused the INS to change course. Had it issued earlier, many of the legal challenges to IRCA's implementation could have been pursued only years after the application period had closed.

### **3. Judicial Review of New Program?**

The jurisdiction-stripping provisions of IIRIRA would likely be interposed by DHS to resist legal challenges to systemic violations, policies and practices related to implementation of a legalization program. In addition, the exhaustion/ripeness ruling in *Catholic Social Services* could delay adjudication of essential eligibility and coverage issues for many years and until well beyond the conclusion of any application period. These barriers to judicial review would themselves lead to protracted litigation.

To provide for effective judicial review, ensure mechanisms for compelling agency compliance with law, and reduce complex jurisdictional litigation, a new legalization program should contain explicit judicial review procedures. These procedures should authorize prompt review of policies, practices, rules, regulations, decisions and – importantly -- actual implementation under provisions that allow for development of a full factual record of agency practice.

### **4. The Bush Administration Approach.**

In 2007, the Bush Administration was seen as a champion of immigration reform. Yet, it married its legalization proposals to suggestions that judicial review of DHS's legalization decisions be further restricted. Former DHS Secretary Chertoff testified in support of the principle of judicial review but then asserted that IRCA had “jammed” the federal court system “with a huge backlog of legalization cases.”

He then further argued that legalization applicants should not have “greater access to our courts” than visa applicants from “*outside* the country” (emphasis added).<sup>1</sup> Such a restriction

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<sup>1</sup> Chertoff's testimony, at [http://judiciary.senate.gov/testimony.cfm?id=2555&wit\\_id=66](http://judiciary.senate.gov/testimony.cfm?id=2555&wit_id=66), states on page x::

- Second, we should carefully design judicial review of application decisions to ensure that applications are treated fairly and objectively but do not become a source of never-ending litigation. As a result of IRCA, judicial review provisions have jammed the federal court system with a huge backlog of legalization cases. Some of this litigation continues even today, 20 years later. Excessive litigation will break any immigration

would be tantamount to denying all review. Visa applicants outside the country are largely precluded from access to U.S. courts under the doctrine of “consular non-reviewability.” The effect of treating legalization applicants like overseas visa applicants would effectively negate access to the courts.<sup>2</sup>

Importing the consular review standard to deny judicial review would raise grave constitutional questions. These issues would in themselves lead to prolonged and complex litigation. Rather than limiting DHS’s accountability, a legalization program should affirmatively provide for federal court jurisdiction over (1) policies, practices and regulations; and (2) individual denials.

Further, the evidence does not support the claim that judicial review of legalization denials has “jammed the federal court system.” In fact, relatively few legalization cases have actually reached the federal courts. While a few class action suits lasted many years, they did so because the Justice Department litigated issues of jurisdiction, class membership and the courts’ remedial powers for many years. Those are the very issues that should be avoided by clear and affirmative judicial review provisions ensuring effective oversight of implementation issues and prompt review of individual denials.

### III. CONCLUSION

The lesson of IRCA demonstrates the essential role that judicial oversight of the legalization program played to ensure proper, fair and legal systemic implementation. Recent limitations on judicial review threaten that critical judicial role. Legalization legislation should restore judicial review to ensure that a remedial program enacted by Congress will not be eviscerated in practice by unreviewable agency implementation.

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### APPENDIX OF IRCA JUDICIAL REVIEW CASES

Following are some of the key legal challenges evidencing the role of litigation to ensure a proper implementation of the 1986 IRCA legalization provision.

- *Haitian Refugee Center v. Nelson*, 872 F.2d 1555 (11<sup>th</sup> Cir. 1989), *aff’d sub nom McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991)

This class action challenged INS policies and practices in the adjudication of applications for legalization under the Special Agricultural Worker (SAW) program. The district court ruled that the INS practices violated the applicants’ due process rights. Among the challenged practices that were ruled unconstitutional were INS failing to provide proper notice of

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system.

- Third, we should not give illegal aliens who have already broken the law greater access to our courts than those who have legitimately applied for a visa or green card from outside our country. There is no reason to grant special treatment to those who flouted our laws to get here.

<sup>2</sup> A limited exception for visa denials based on First Amendment claims, *see Kleindienst v. Mandel*, 408 U.S. 753 (1972), is insufficient for multiple reasons, including because of the “facially legitimate and bona fide reason” standard of review that is often toothless. For a recent summary of cases and measure of judicial scrutiny, *see American Acad. Of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009). This decision and other cases do not diminish the reality that consular decisions are much more insulated from judicial review than immigration adjudications in the United States.

interviews; failing to make a record of its adjudications or explain its denial of applications; failing to give applicants an opportunity to present witnesses; relying on adverse evidence without the applicant's knowledge; failing to afford language interpretation; and using an improper burden of proof. The court issued a preliminary injunction to prohibit such abuses. The INS appealed only a few of these issues, and the court of appeals upheld the district court's injunction. On appeal to the Supreme Court, the INS did not contest *any* of the bases for the injunction except jurisdiction.

- *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C.Dir. 1989); *Ayuda, Inc. v. Reno*, 7 F.3d 246 (D.C. Cir. 1993)

The statute entitled aliens with facially valid non-immigrant status to apply for legalization if they had violated their non-immigrant status and the violation was "known to the government." The INS took the position that "government" meant only the INS itself. A class action lawsuit was brought by five immigrants and four supporting organizations in district court in Washington, DC challenging the INS's limited interpretation of the statute as a violation of the plain language of IRCA and the intent of Congress. In response to a series of district court rulings, the INS revised its interpretation to accept proof from any federal agency – typically Social Security Administration or Internal Revenue Service evidence of unauthorized employment -- to demonstrate that an applicant had violated his or her status. On appeal, the government did not defend its original interpretation of the statute to exclude other federal agencies from "government." INS made only jurisdictional arguments, that prevailed *after* the INS changed its policies, and defended its position on a separate point of contention on which the plaintiffs had lost (*i.e.*, whether an individuals' failure to file address reports established unlawful presence "known to the government").

- *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992)

IRCA enacted a "special rule" regarding the "public charge" ground of inadmissibility to allow such aliens to be eligible for legalization if they could "demonstrate a history of employment in the U.S. evidencing self-support without receipt of public cash assistance."

In disregard of this provision, the INS issued regulations instructing that *any* past receipt of public cash assistance would bar eligibility and that defined receipt of cash assistance to include receipt by family members – typically U.S. citizen children.

After plaintiffs filed suit, the INS abandoned its regulation and modified it to properly track congressional intent and to allow persons to apply who had been deterred by the improper interpretation. The INS appealed the district court's extension of the application deadline, and the litigation continued over jurisdictional issues.

- *Legalization Assistance Project v. INS*, 976 F.2d 1198 (9th Cir. 1992); *Immigrant Assistance Project v. INS*, 306 F.3d 842 (9th Cir. 2002)

This case also challenged the INS's interpretations of the "known to the government" requirement. The INS lost on the merits in district court and the court of appeals upheld those rulings, reversed some limitations that the district court put on relief, and remanded the case for the district court to reconsider the plaintiffs' request that the court extend the application deadline. While the remand was pending the U.S. Supreme Court issued its decision in *CSS/LULAC*, and thereafter the litigation continued on jurisdictional issues.

- *LULAC v. INS*, No. CV-87-4757 WDK (C.D. Cal.), consolidated on appeal with *Catholic Social Services v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992)

The INS took the position that IRCA's "continuous residence" requirement could not be satisfied by immigrants who departed the U.S. and returned using a "facially valid" during the relevant period (*i.e.*, between Jan. 1, 1982 and IRCA's enactment date). Plaintiffs filed a class action lawsuit. The government did not defend its policy, and after suit was brought modified the regulation to acknowledge the eligibility for legalization of immigrants who reentered the U.S. on nonimmigrant visas to return to an unlawful residence in the U.S. The plaintiffs obtained a nationwide injunction to enforce class members' eligibility.<sup>3</sup>

The litigation continued on appeal only over whether the district court had authority to extend the legalization application deadline to allow individuals to apply who had been deterred from applying by the INS's restrictive interpretation and other jurisdictional issues (namely claims that jurisdictional provisions in the INA deprived the court of jurisdiction).

- *Catholic Social Services v. Meese*, 685 F.Supp. 1149 (E.D. Cal. 1988)

IRCA required applicants to be "continuously physically present" in the U.S. after the Nov. 6, 1996 date of the law's enactment. The statute expressly provided that such continuous physical presence would not be interrupted by "brief, casual, and innocent absences" from the U.S. INA § 245A(a)(3). Despite the existence of longstanding precedent regarding the meaning of this "brief, casual, and innocent" language, INS restricted this exception to absences that the agency had authorized in advance through grants of advance parole.

After a class action lawsuit was brought and the district court issued a nationwide injunction, the INS abandoned its position. It first limited its interpretation and then abandoned completely the advance parole requirement. Litigation continued only over whether the court could extend the legalization application deadline to allow individuals to apply who had been deterred from applying by the INS's restrictive interpretation of the requirement and other jurisdictional issues.

- *United Farm Workers of America v. INS*, Civ. S-87-1064-JPM (E.D. Cal. Sept. 18, 1990) (settlement date)

This class action challenged an INS practice or policy of denying Seasonal Agricultural Worker ("SAW") applications based on the mere assertion by the government that the applicants' employer had issued fraudulent documents or declarations on behalf of *other* SAW applicants. The applicant denied legalization on this ground was never given an opportunity to demonstrate that he or she had in fact satisfied the SAW seasonal work requirement. After the litigation was brought, the INS settled the litigation, agreeing to provide applicants with a meaningful opportunity to present evidence that they met the eligibility requirements and to confront and rebut any adverse evidence.

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<sup>3</sup> The district court had rejected plaintiffs' challenge to the INS's requirement that applicants apply for a fraud waiver, which the plaintiffs did not appeal.