

Research Perspectives on Migration

A joint project of the International Migration Policy Program of the Carnegie Endowment for International Peace and the Urban Institute

Non-Citizens & the Rule of Law: the 1996 Immigration Reforms

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In 1996, the United States Congress remade immigration law. The first tremor was felt in April, when Congress enacted anti-terrorism legislation that contained provisions concerned specifically with non-citizens. This law was followed, in August, by major welfare reform legislation that imposed far-ranging new restrictions on immigrants. The big quake, however, did not hit until September. In that month Congress passed, and the President signed, a bill that radically reduces immigrants' access to a vast range of protections. That law, the Illegal Immigration and Immigrant Responsibility Act of 1996 [IIRAIRA], raises fundamental questions about how the rule of law is to operate, and to what extent its beneficiaries should include non-citizens.

While the new law addresses a host of disparate issues, its byzantine provisions manifest several underlying values and policy choices. Collectively, they profoundly alter the ways in which our nation accommodates the various individual and national interests that our immigration policy affects.

The only meaningful way to discern these patterns is to carefully analyze IIRAIRA's most significant provisions. Given the breadth of the new law, this article will be highly selective. It will examine three broad (and overlapping) subjects that IIRAIRA addresses — illegal immigration, asylum adjudication, and judicial review. The choice of subtopics is deliberate. In each of them, IIRAIRA has exceptional practical impact, and Congress's policy choices have implications not just for immigrants but for the rule of law.

Illegal Immigration

Most of IIRAIRA's provisions deal with illegal immigration, broadly conceived. IIRAIRA seeks to attack illegal immigration on several fronts — at the border, in the interior, in prosecutors' offices, and elsewhere — and invests in additional law enforcement resources to ensure that the assault stands a good chance of success.

In recent years the INS has been directing most new enforcement resources to the border and only more gradually adding resources to interior enforcement [See Figure 1]. Initiatives like "Operation Hold the Line" in El Paso and "Operation Gatekeeper" in San Diego have made more intensive use of Border Patrol personnel and physical barriers (higher fences, high-intensity lights, etc.). The results of these efforts are hard to evaluate. The INS, citing lower apprehension rates at these border points compared to others, such as Tucson, AZ, considers the new strategies highly successful [See Figure 2]. At the least, supporters point out, the diversion measures have been associated with substantial drops in certain types of crime in both El Paso and Imperial Beach near San Diego, and, by facilitating legal border crossings, have greatly reduced the incidence of "gate running." Critics, however, often argue that these operations have merely diverted the illegal entries to other crossing points or induced those who succeed in achieving illegal entry to remain longer rather than go back and forth. In IIRAIRA, Congress implicitly endorsed the INS strategy. Believing an

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Research Perspectives on Migration

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Research Perspectives on Migration (RPM) is a bimonthly newsletter bridging the worlds of research and policy to bring timely, reliable information about migration issues to a broad audience of policymakers, scholars, journalists, and advocates.

Immigration has emerged as one of the most pressing issues on the nation's domestic agenda. Like race or crime, immigration arouses deep economic and cultural anxieties and can provoke fierce political debate. Internationally, migration has the potential to pose serious challenges for democratic order and stability. The movement of people, whether voluntary or forced, is implicated in some of the great conflicts of our time.

RPM will provide a solid basis of fact and objective analysis to debates that have too often been marked by emotion, questionable or anecdotal evidence, and occasional demagoguery. Each issue of RPM will focus on a specific topic dealing with immigrants and refugees: welfare use; educational attainment and economic progress; population growth and the environment; entrepreneurship; crime and health.

RPM is a joint product of the International Migration Policy Program of the Carnegie Endowment for International Peace and the Urban Institute. Its editorial board includes distinguished academics, researchers, policy analysts, and journalists.

RPM's purpose is to synthesize the best research on current issues in a timely and accessible manner, to enhance public understanding of migration, and to contribute constructively to today's ongoing policy debates.

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Support for this newsletter is generously provided by
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ISSN: 1090-3666

Editor's Note

It is a pleasure to write the editor's note for this issue of *Research Perspectives on Migration*—and not just because this is the first issue not primarily written and researched in-house. Aably fulfilling that task is Stephen Legomsky, a member of RPM's editorial board and one of the country's most distinguished scholars on immigration law.

In his careful and even-handed analysis of the Illegal Immigration and Immigrant Responsibility Act of 1996 [IIRAIRA], Legomsky concludes that our best hope for attaining a proper balance between compassion, fairness, and self-interest is to rely on the goodwill and judgment of all three branches of government.

Implicit in this conclusion is a criticism of the new law that has been voiced by many within the broader community of scholars, practitioners, and lawyers active on immigration matters: namely, that the new law demonstrates far too aggressive a determination to restrict judicial oversight of Congressional policies and INS performance.

These restrictions are part of a broader trend in recent legislation on immigrants, which, in a word, has been to treat them as aliens rather than as prospective citizens. Collectively, the anti-terrorism, welfare, and immigration laws of 1996 redefined what it meant to be a member of U.S. society, shrinking the circle of those who would be granted the full complement of protections afforded by civil liberties, the social safety net, and judicial oversight.

Yet an odd thing keeps happening on the way to full implementation of these measures. As their human costs become clear, and sympathetic accounts begin to appear in the press putting individual faces to the abstractions targeted by the bills, lawmakers have backtracked. It happened with the welfare provisions that would have cut off aid to elderly immigrants; it is happening as we go to press with Central American immigrants who have lived here under temporary protection from deportation and might otherwise be required to return to their home countries.

Perhaps there is a lesson here: although Americans can be stingy toward abstractions, we find it hard to be anything but generous towards people. One hopes it is a lesson Congress is willing to learn.

**Immigration and Naturalization Service Summary of Resources by Program
(Dollars in thousands)**

Program	Border patrol		Investigations		Deportation & Detention	
	PERM POS	AMOUNT	PERM POS	AMOUNT	PERM POS	AMOUNT
1992*	4,948	\$325,784	1,972	\$130,969	1,519	\$158,821
1993*	4,863	354,473	1,949	136,932	1,466	160,641
1994*	5,434	374,450	1,951	157,937	1,686	171,334
1995*	5,423	393,985	1,984	156,230	1,683	188,090
1996*	6,383	479,168	2,591	183,563	2,436	264,852
1997†	7,383	630,560	2,652	225,809	2,274	277,835

Source: INS President's Budget Request to Congress, Summary of Resources by Program, 1992, 1993, 1994, 1995, 1996, 1997.

*Actual expenditures

†Anticipated appropriation

Figure 1

(continued from page 1)

expanded border presence to be an effective tool in stemming illegal immigration, Congress authorized the Border Patrol to add 1,000 new agents a year for the next five years. At the same time, it mandated the construction of a fourteen mile long triple fence eastward from the Pacific Ocean in Imperial Beach, the nation's busiest crossing point for clandestine entries.

*Most of IIRAIRA's provisions deal with
illegal immigration*

Still, only about 60 percent of today's undocumented aliens entered the United States illegally [EWIS]. The other 40 percent entered the country on temporary visas and then overstayed [See Figure 3—but note that a forthcoming GAO study argues that the percentage of overstayers is substantially lower]. As all sides concede, a bulked-up border effort does nothing to deter the latter group. With overstayers in mind, therefore, IIRAIRA authorizes an increase in the number of INS overstay investigators by 300 in FY 97 and further authorizes the Attorney General to deputize state law enforcement officers to perform immigration control functions. In addition, IIRAIRA requires the INS to systematically record every alien's departure from the United States. By comparing each alien's actual departure

date with his or her date of entry and permitted duration of stay, the hope is that the INS will be able to identify overstayers. That information will be important because IIRAIRA also bars for varying lengths of time the future readmission of certain aliens who have previously overstayed.

IIRAIRA attacks both clandestine entries and overstays through other means as well. It establishes pilot projects designed to strengthen the prohibitions on employment of unauthorized aliens. It increases the number of employer sanctions investigators by at least 150 in each of the next three years. It introduces measures to deter and impede immigration fraud. These include the development of counterfeit-resistant social security cards, inducements to the states to enhance the integrity of drivers' licenses, and the expansion of the list of civil and criminal offenses concerned with specific types of immigration fraud. At least 25 additional federal prosecuting attorney positions were authorized for FY 97 as well.

In various ways, IIRAIRA makes the penalties for unlawful presence much harsher. Subject to limited exceptions, an alien who is unlawfully present for more than 180 days as of April 1, 1997, the effective date for most of the law's provisions, and who then leaves the United States will be inadmissible for three years. If the person is unlawfully present for a year or more, the inadmissibility period increases to ten years.

Total Apprehensions, Border Apprehensions and Southwest Border Apprehensions

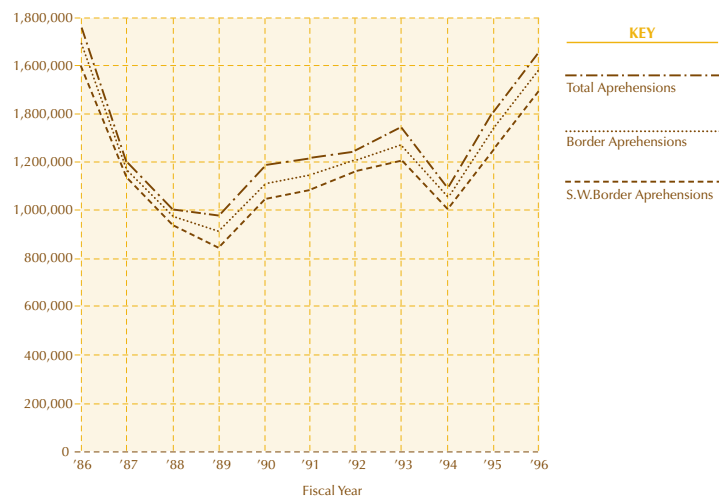


Figure 2a (Source: Statistics & Demographics, INS)

In similar fashion, IIRAIRA greatly restricts the discretion of immigration judges to waive deportation in certain compassionate cases. Before IIRAIRA, the law allowed the immigration judge to refrain from deporting some illegal entrants, overstayers, and certain other deportable aliens under prescribed conditions and to grant them lawful permanent resident status. The alien had to prove that (1) he or she was continuously physically present in the United States for at least seven years; (2) he or she was of good moral character during that period; and, most importantly, (3) deportation would cause “extreme hardship” either to the alien or to the alien’s citizen or permanent resident spouse, child, or parent. If all those requirements were met, the immigration judge had the discretion not to deport [See Figure 4].

IIRAIRA also strengthens the ten-year-old employer sanctions program

IIRAIRA substantially constrains that discretion. It lengthens the threshold physical presence and good moral character requirements to ten years, and it changes “extreme hardship” to “exceptional and extremely unusual hardship.” Perhaps most significantly of all, IIRAIRA requires that the hardship be incurred by one of the qualifying family members. Hardship to the alien himself or herself, no matter how severe, is no longer a basis for the immigration judge’s discretion.

At the same time, IIRAIRA limits relief under this provision to 4,000 applicants per fiscal year. The statutory language leaves

Total Southwest Border and Selected Sector Apprehensions: Percent Change of Each Year to FY86

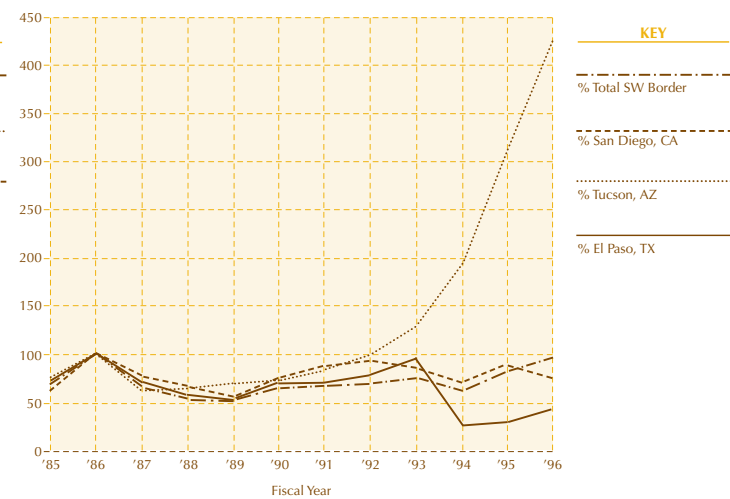


Figure 2b (Source: Statistics & Demographics, INS)

unclear whether this provision limits only the number of people per year who may affirmatively receive permanent resident status, or whether it also limits the number of people whose removal orders may be canceled. Nor, if the former interpretation is adopted, is it clear what is to happen once the 4,000 limit is reached.

The issue is of practical importance, because, by February 1997 (less than halfway through the fiscal year), the Justice Department had canceled the removal, and adjusted the status, of over 3,900 aliens. The Chief Immigration Judge and the Chairperson of the Board of Immigration Appeals wrote memoranda instructing that no further cancellations of removal were to be granted until the Attorney General had decided how to proceed. One federal district court has found the legality of the memoranda questionable.

How the courts will ultimately come out on this issue is hard to predict. On the one hand, at least part of the statutory language implies that the 4,000 cap was directed only at the adjustment of status component of this remedy. Under that interpretation, once the limit is reached, the removal of an otherwise eligible alien could be canceled but adjustment of status would be deferred at least until the next fiscal year. On the other hand, such an interpretation would leave that person’s immigration status in limbo in the interim.

As noted earlier, IIRAIRA also attempts to strengthen the ten-year-old employer sanctions program. Legislation enacted in 1986 had prohibited the knowing employment of an alien who was not authorized to work. The same law had made it a sepa-

rate offense to hire any individual — citizen or alien — without performing certain paperwork requirements designed to verify the person’s immigration status. The aim was to deter illegal immigration by denying them employment, the principal magnet.

The widespread use of counterfeit and fraudulently obtained documents has seriously impeded the success of employer sanctions. To address that problem, the United States Commission on Immigration Reform in 1994 proposed testing the feasibility of requiring every employer to access a computerized registry and type in the applicant’s name and social security number. In IIRAIRA, Congress adopted several four-year pilot programs along the general lines of the Commission’s proposal. Most significantly, the new law states that:

The Commissioner of Social Security ... shall establish a reliable, secure method ... which compares the name and social security account number provided in an inquiry against such information maintained by the Commissioner in order to confirm the validity of the information provided regarding an individual whose identity and employment eligibility must be confirmed, the correspondence of the name and number, and whether the individual has presented a social security account number that is not valid for employment.

Collectively, these measures are drastic medicine. Will they work, or will they prove futile? Are they proportionate to the problem, or are they excessive? Are they tough, or are they just plain mean?

Responses to those questions are unavoidably colored by the degree of harm one associates with illegal immigration. The more serious one perceives the problem to be, the more resources one will be willing to invest and the more hardship one will be willing to inflict on aliens and their citizen family members to combat it. But even on the assumption that illegal immigration is a serious social ill, are IIRAIRA’s prescriptions warranted?

Only about 60 percent of today’s undocumented immigrants entered the U.S. illegally

With respect to the provisions for enhanced law enforcement capabilities, the debate has been largely about effectiveness. Few have argued with anything resembling passion that the additional resource investment is too great a fiscal burden or

that more personnel or higher fences are unfair to aliens. Some believe that given the wealth disparity between Mexico and the United States and the length of the land boundary, no infusion of law enforcement resources within economically and politically acceptable limits will significantly reduce illegal immigration. Those who hold that viewpoint out that the undocumented alien population in the United States has steadily increased even as the nation has invested progressively greater resources in border and interior enforcement. Others respond that many variables influence the scale of illegal immigration and that there is no way to know how much greater the levels would be today without the expanded enforcement efforts of the last several years.

Tradeoffs

Most of the law’s anti-fraud measures entail analogous tradeoffs. It is hard to quibble with the use of available technology to make documentation more secure. The main questions are how much the new technology will cost, how effective it will actually be in reducing fraud, and what dangers it poses to civil liberties.

The development of a system that would give employers electronic access to certain information from the Social Security database is one of the most controversial of IIRAIRA’s responses to immigration fraud. The Congress believes that such a system

Estimated Undocumented Resident Population: Oct. '96			
	TOTAL	OVERSTAYS	EWIs
NATIONAL TOTAL	5,000,000	2,060,000	2,940,000
SELECTED STATES:			
California	2,000,000	405,000	1,595,000
Texas	700,000	110,000	590,000
New York	540,000	490,000	50,000
Florida	350,000	235,000	115,000
Illinois	290,000	135,000	155,000
New Jersey	135,000	120,000	15,000
Arizona	115,000	40,000	75,000

Source: Statistics Branch, INS.

Figure 3

Applications, Grants, and Denials of Suspension of Deportation, 1989-1996

YEAR	GRANTS	DENIALS	OTHER*
1989	276	331	205
1990	472	459	294
1991	896	576	774
1992	1181	771	508
1993	1597	939	509
1994	2405	1155	694
1995	3752	1780	1052
1996	7475	2541	1604

*Other includes an array of miscellaneous outcomes, from death of applicant to abandonment of application.

Source: Executive Office for Immigration Review.

Figure 4

holds the greatest promise for neutralizing and therefore deterring document fraud. The U.S. Commission on Immigration Reform, which proposed pilot tests on the feasibility of using a central database, has argued that a registry would also reduce employment discrimination. That is because the employer, rather than have to distinguish citizens from aliens and authorized workers from unauthorized, would merely perform the mechanical process of phoning in to the national computer, typing the applicant's name and social security number, and waiting for a response. (Obtaining a new hire's social security number is, of course, already required under current tax law.)

The concerns about a national registry, however, run deep. Opponents question its reliability. What happens when the computer provides a false negative? Employees, not employers, are responsible for following up with inquiries to the Social Security Administration. Will personnel officers and other supervisors find it is less of a hassle simply to terminate the employee and hire someone else? How expensive will the system be to construct both for employers and for the government—and how diligent will the government be in maintaining it? How will a system designed to provide fast, simple answers to lay employers cope with the subtleties of immigration law, which frequently grants work authorization that is either temporary or subject to other restrictions like type of employment or hours per week? As time goes on, will Congress be tempted to add further information to the system—criminal convictions, medical data, welfare use, and other confidential information? If so, can the government employees who have access to the

system be trusted not to leak information either inadvertently or for profit? Andrew Strojny, the former Acting Special Counsel for Unfair Immigration-Related Employment Practices, has voiced these and other concerns.

Balancing Acts

Those reforms that stiffen the consequences for people who enter or remain unlawfully require a different sort of balancing—deterrence versus compassion. Drawing the line requires personal judgment. How severe a penalty is appropriate? The 3-year and 10-year bars on the readmission of those who have remained unlawfully for 180 days or one year, respectively, are severe penalties. While many undocumented aliens have no legitimate expectation of future readmission, many others—particularly the large number who are waiting to reunite with United States citizen or lawful permanent resident spouses, children, or parents—will face prolonged separation. The new restrictions on immigration judges' discretionary power to grant relief to long-term aliens when deportation would result in extreme hardship are likewise severe. Particularly harsh is the elimination of all dispensing authority to respond to even the most extreme hardship *suffered by the alien*; under the new law, only hardship to the alien's citizen or permanent resident family members may be considered.

Are these measures good or bad? Defenders hope that the prospect of severe consequences will dissuade large numbers of people from entering or remaining unlawfully in the first place. Opponents consider such extreme penalties disproportionate to the transgressions.

Asylum Adjudication

Generally, the Attorney General has the discretion to grant asylum to any person who can prove that he or she is a "refugee," defined as a person who is outside his or her own country and, owing to a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion," is unable or unwilling to avail himself/herself of that country's protection. A grant of asylum allows a person to remain in the United States, in most cases permanently. Under both U.S. and international law, a person may not be returned to a country where he or she would be threatened with persecution—a fundamental obligation known in legal parlance as "nonrefoulement."

The United States admits refugees in two ways. First, it selects from among refugees overseas those who meet certain criteria (for example, that they are of special humanitarian interest to

the U.S., or that they are recommended for resettlement by a U.S. embassy or an international agency) and helps them resettle in the U.S. Second, it allows refugee claimants who arrive in the U.S. on their own to apply for asylum or nonrefoulement.

The U.S. has sought to maintain an asylum system that provides fair procedures without inviting abuse. The balance is difficult to strike. For the Congress that enacted IIRAIRA, concern with the substantive and procedural costs of asylum procedures were paramount. Responding to perceptions that large numbers of aliens were filing frivolous asylum applications in order to prolong their stays in the United States, Congress restricted asylum in several ways. Space does not permit an exhaustive catalog, but a few of the recent changes are especially noteworthy.

The debate about border enforcement has been largely about effectiveness

Before IIRAIRA, there was no requirement that an asylum claim be filed within any particular time period after entry into the United States. IIRAIRA now bars the filing of an asylum claim more than one year after arrival in the United States, unless there are changed circumstances or “extraordinary circumstances.” The premise seems to be that someone who does not file the application soon after arrival is unlikely to be a genuine refugee. However, as leading refugee advocates Philip Schrag and Michele Pistone have pointed out, genuine refugees frequently fail to file their claims early on for many reasons. Upon reaching safety in the United States, their immediate priorities are more likely to be locating family or friends, and finding food, shelter and work. Moreover, many genuine refugees labor under a combination of great trauma, language and cultural barriers, and other disorienting handicaps. With little in the way of funds, finding counsel to assist them in filing asylum claims—which require a myriad of supporting documents—is difficult. Once counsel is procured, it takes additional time to prepare a serious application. One group that helps immigrants and refugees found that only 38 percent of bona fide asylum applicants applied during their first year in the country. (Earlier legislative proposals would have imposed an even more onerous 30-day deadline; in the past, only 0.5 percent of applications were filed within that time frame.)

Will the new deadline result in the U.S. returning refugees to their persecutors? While the new deadline will no doubt push many more asylees to quickly file their applications, others, for a variety of reasons, may not get their applications in on time. They might believe that circumstances in their home country are about to change for the better; or they might have difficulty

gathering the relevant supporting documentation from their countries of origin. The United Nations High Commissioner for Refugees has stated that a failure to “submit an asylum request within a certain time limit should not lead to an asylum request being excluded from consideration,” and pointed out that such a policy is contrary to an international consensus of which the U.S. is part (specifically, UNHCR Executive Conclusion No. 15 ([1979])).

IIRAIRA also bars the grant of asylum to those applicants who had been convicted of, or in some instances are simply believed to have committed, certain serious crimes, and has greatly expanded the definition of what constitutes a serious crime—now including any crime that draws a sentence of one year or more. Before IIRAIRA, a criminal record had been a negative discretionary factor but not a legal bar.

To deter abuse, Congress also made anyone who knowingly files an asylum claim that is found to be “frivolous” permanently ineligible for any benefits under the Immigration and Nationality Act. Here, there is potential for exceptional harshness. A person who filed a frivolous application at a young age, for example, would be permanently barred from joining his or her United States citizen spouse or child in the United States even decades later.

Perhaps the most controversial of the new asylum restrictions is the provision for “expedited removal.” If an arriving asylum



Cara Lise Metz, ILCWU

Halloween at a Day Care Center in New York

The New Immigration Law and the Old A Side-by-Side Comparison

Pre-IIRAIRA	Post-IIRAIRA	Pre-IIRAIRA	Post-IIRAIRA
<p>Title I</p> <p>Border & Interior Enforcement</p> <ul style="list-style-type: none"> • <i>INS added 1,000 border patrol agents from 1993 to 1996, raising the total to 6,000. In FY 1996, the administration requested an additional 700 new agents, to be deployed at areas with greatest number of illegal crossings.</i> • <i>Would use new technology to track repeat crossers, and deport them to the interior of Mexico.</i> 	<ul style="list-style-type: none"> • Adds 1,000 new agents per year for 5 years, raising total to 11,000, to be deployed at areas with greatest number of illegal crossings. • Mandates construction of barriers, including 14-mile triple fence in Imperial Beach from Pacific Ocean eastwards. • Establishes new civil penalties for illegal entry. • Authorizes fingerprinting all illegal aliens apprehended in U.S. Enhances preinspection of passengers to U.S. at foreign airports. Improves security features on border crossing identification card. Adds 900 new INS investigators to enforce laws against alien smuggling and employment, and 300 new investigators to track down visa overstayers. 	<p>Title III (continued...)</p> <p><i>held in detention pending a decision on their claim. Asylum seekers already in U.S. may apply directly at one of nine asylum offices nationwide, or by asserting a fear of persecution after deportation hearings have begun.</i></p>	<ul style="list-style-type: none"> • review • The r • Sever • order
<p>Title II</p> <p>Smuggling & Document Fraud Enforcement</p> <ul style="list-style-type: none"> • <i>New Provisions.</i> 	<ul style="list-style-type: none"> • Extends RICO (racketeering) law and enhances criminal and civil liability to alien smuggling and document fraud offenses. • Establishes criminal penalties for employers who knowingly hire 10 or more aliens not authorized to be employed in the U.S., whom the employer also knows to have been brought into the U.S. illegally. 	<p>Title IV</p> <p>Restrictions Against Employment</p> <ul style="list-style-type: none"> • <i>Employers required to have employees fill out I-9 forms and show identification proving eligibility to work.</i> • <i>Employers may ask employee for certain documents to prove identity and work authorization. If documents appear to be valid, employers must accept them, and can be sued if they ask for additional documents.</i> 	<ul style="list-style-type: none"> • Estab • to co • One • on a • empl • use o • opera • mate • Redu • sente • work • Limit • lation • Requ • asks f • estab
<p>Title III</p> <p>Apprehension & Removal of Deportable Aliens</p> <ul style="list-style-type: none"> • <i>Visa overstayers are deportable. Once deported, they are barred from re-entering the U.S. for a period of five years.</i> • <i>In limited cases, immigration judge may suspend deportation of aliens who have entered illegally, if they have been continuously present for seven years and their deportation would be an extreme hardship to them or to their U.S. citizen or permanent resident family members.</i> • <i>Qualified aliens unlawfully present may "adjust" to permanent resident status by paying a fine, without returning to their country of origin.</i> • <i>At entry, asylum seekers have an opportunity to present a case for political asylum before an immigration judge, and are routinely</i> 	<ul style="list-style-type: none"> • Aliens unlawfully present for 180 to 365 days who leave voluntarily before removal proceedings begin are inadmissible for three years from date of departure. • Aliens unlawfully present for one year or more are inadmissible for 10 years. • Aliens may qualify for suspension of deportation only if they have been continuously present for ten years or more and "exceptional and extremely unusual" hardship would result to a qualifying relative, and not to themselves. • Mandates detention of most criminal aliens pending removal proceedings. • Increases INS detention space to 9,000 beds. • Broadens definition of "conviction" for purposes of immigration law to include all aliens who have admitted or been found to have committed crimes. • Requires removal of criminal aliens and expands types and number of crimes that render alien deportable. • Provides for exclusion without hearing for people with no or fraudulent documents on arrival unless they state a credible fear of persecution (defined as "a significant possibility" that the alien could establish eligibility for asylum) or an intention to apply for asylum. If a credible fear is not found, the alien will be removed without further 	<p>Title V</p> <p>Restrictions on Benefits</p> <ul style="list-style-type: none"> • <i>Individuals not allowed to immigrate if they are likely to become dependent on public benefits.</i> • <i>Sponsors must sign affidavit promising to support immigrant, and must earn at least 100 percent of the poverty level.</i> <p>Title VI</p> <p>Miscellaneous Provisions</p> <ul style="list-style-type: none"> • <i>No time restrictions.</i> 	<ul style="list-style-type: none"> • Requ • ably • grant • or gov • of me • Requ • of at • perce • \$19,5 • Requ • arriva • or ex

Sources: P.L. 104-208. National Immigration Forum, *Comparison of Current Law 5/20/96; IIRAIRA Section-by-Section Summary*; IIRAIRA Overview, by Austin Fragomen, Jr.; Interpreter Releases, 14-part series on IIRAIRA.

Old

Post-IIRAIRA

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review unless they request such by an immigration judge. The review must take place within seven days of the asylum officer's decision.

- Severely limits judicial review and appealability of removal orders.

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- Establishes three voluntary pilot programs for employers to confirm the employment eligibility of new workers. One is based on a telephone verification system; one on a waiver of certain paperwork requirements if a new employee attests to being a U.S. citizen; and one on the use of machine-readable documents. Programs would operate in at least five of the seven states with highest estimated population of undocumented aliens.
- Reduces number and type of documents that may be presented to employers to confirm identity and eligibility to work.
- Limits liability to employers for certain paperwork violations.
- Requires showing of intention to discriminate if employer asks for more or different documents than is necessary to establish work eligibility.

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- Requires sponsors of immigrant to sign a legally enforceable affidavit to provide financial support to the immigrant if needed. Affidavit authorizes government agencies or government-funded agencies to sue for reimbursement of means-tested public benefits provided to immigrants.
- Requires sponsors of immigrants to demonstrate an income of at least 125 percent of poverty level. In FY 1996, 125 percent of poverty line is \$9,675 for an individual and \$19,500 for a family of four.
- Requires asylum claims be presented within one year of arrival in U.S. unless applicant can demonstrate changed or extraordinary circumstances.

Section Summary with Analysis, Mailman, Yale-Loehr, et als;

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Stanford Review Ad



Day care for immigrant children

applicant lacks proper documentation (and asylum claimants at the border usually do), the asylum procedure will consist of an immediate interview, typically without counsel. Only if the person can demonstrate then and there that he or she has a “credible fear” of persecution will full hearing and appeal rights be accorded.

With expedited removal, Congress hopes to dissuade those who are not genuine refugees from traveling to the United States without papers and filing frivolous claims that would enable them to stay in the U.S. for years before having their claim heard. However, this concern had already been successfully addressed by regulatory changes in 1994, which increased the number of asylum officers from 178 to 377. These and other changes gave the INS the capacity to render decisions within 180 days and greatly reduced the backload of cases.

In any case, one might question why Congress has singled out the particular group it has, for there is no obvious correlation between the lack of a valid travel document and the likelihood that a refugee claim is frivolous. On the contrary, people fleeing persecution are typically in no position to assemble supporting documentation on the run. Additionally troubling to refugee advocates is the difficulty of establishing a credible fear of persecution without the benefit of preparation or counsel.

Generally, the asylum provisions of IIRAIRA flow in one direction. Congress was intent on deterring and quickly denying unfounded claims. There was no analogous effort to assure that genuine claims are recognized and quickly granted. (The only significant liberalization in the asylum area was a provision facilitating the claims of up to 1,000 applicants per year who fear forced abortion or sterilization.)

Judicial Review

Each year, administrative agencies make thousands of decisions that affect the lives of individuals. Generally, people who are adversely affected by such decisions in significant ways may go to court when they believe the decisions are contrary to law. Until IIRAIRA, the decisions of the immigration authorities were generally reviewable in this way.

The U.S. has sought to maintain an asylum system that provides fair procedures without inviting abuse

Most immigration decisions still are reviewable, but IIRAIRA creates numerous exceptions, some of which are currently under constitutional challenge as discussed below. An alien who is found deportable for almost any crime-related reason will now be barred from testing the legality of the deportation order in court. So too will nearly all aliens who contest immigration officers’ denials of their applications for discretionary relief. As already noted, aliens ordered removed through the new “expedited removal” procedure are similarly barred from the nation’s courts. There are severe new restrictions on class actions and on actions seeking injunctions—devices commonly used by lawyers to challenge widespread agency practices—and possible new restrictions on the use of habeas corpus. Some IIRAIRA provisions even purport to bar courts from examining the constitutionality of other IIRAIRA provisions.

Poor drafting has generated several large interpretation issues that are starting to work their way through the courts: To what extent are the various restrictions retroactive to administrative orders issued, or to judicial proceedings commenced, before the date of enactment? Did Congress intend to abolish habeas corpus in most removal cases? Did Congress intend to make general federal question jurisdiction, which is the usual statutory basis for federal court power to decide federal law questions, unavailable in immigration cases? When a removal order is based on a criminal conviction, did Congress intend to bar review of the determination that the alien fits within the partic-

ular removal ground, or just the decision to deny discretionary relief? For that matter, which parts of the discretionary decision, if any, are still reviewable, and which are not?

Depending on the resolution of these interpretation issues, the court-stripping provisions also raise complex constitutional issues concerned with due process, separation of powers, and the guarantee of habeas corpus. Under what has come to be known as the “plenary power doctrine,” the Supreme Court has all but insulated immigration legislation from constitutional scrutiny. Legal scholars have relentlessly attacked this notion of special judicial deference to Congress in immigration matters, but the doctrine stubbornly persists.

IIRAIRA now bars the filing of an asylum claim more than one year after arrival

Still, the Supreme Court has recognized one clear exception to the principle that congressional power over immigration is virtually unreviewable: the due process clause applies to deportation cases. The courts have applied that exception broadly. In contrast, however, aliens who are turned away when seeking initial admission have generally encountered a brick wall; thus, due process challenges to the new expedited removal provisions might prove difficult to sustain. Moreover, even if the due process clause is held to be applicable, language in older Supreme Court decisions (*Nishimura Ekiu v. U.S.A.*, 1892) suggests that due process does not necessarily require an opportunity for judicial review. Unfortunately, there is little modern guidance on this key issue.

The legislation might also be incompatible with the separation of powers. Significantly, the only case in which the Supreme Court has ever invalidated a provision of an immigration statute is a 1983 decision in which the Court held that legislative vetoes violate the principle of separation of powers. The issue pitted Congress against the executive branch; in the present context, the conflict would be between Congress, exercising its power to regulate immigration, and the Judiciary, deprived of its usual responsibility for monitoring the legality of both congressional and executive branch actions.

The Constitution also prohibits suspensions of the writ of habeas corpus. If IIRAIRA is ultimately interpreted to bar aliens in removal proceedings from applying for habeas corpus, serious constitutional issues will arise. Highly respected scholars have long argued, and the Supreme Court itself has assumed with little discussion, that habeas corpus is available to aliens challenging the legality of deportation orders. But whether the

Supreme Court’s assumptions have been firmly grounded on the habeas clause in the Constitution, rather than on general statutory habeas provisions, is not clear. And even if the constitutional habeas clause does extend to the deportation context, it is unclear whether it can be used to challenge the deportation order itself or merely to challenge the alien’s detention pending deportation.

Constitutionality aside, are these restrictions good policy? Like most of the other reforms already discussed, the judicial review restrictions reflect Congress’s belief that significant numbers of aliens are manipulating the system, in this case by seeking judicial review simply to delay deportation. Indeed, judicial review carries real costs. It does delay removal. It adds a further step to an already lengthy process. Moreover, judicial review costs money; judges, government lawyers, and other court personnel all have to be paid.

Less tangible, but still significant, are other objections to the judicial review of administrative officials’ decisions. Judges are not politically accountable, and yet their decisions sometimes unavoidably rest on values and policy preferences that differ from those of the administrators. Judges lack the specialized knowledge of the officials whose decisions they review. And when geographically dispersed courts review the decisions of a centralized administrative tribunal (as they do in immigration), coherent and uniform interpretations of law are more difficult to achieve.

If an arriving asylum applicant lacks proper documentation, he or she will have to demonstrate a “credible fear” of persecution

But in a country founded on and proud of its adherence to the rule of law, judicial review serves crucial functions. Probably most importantly, it brings independence to the process — an essential component when great individual interests are at stake. Courts also provide the *appearance* of independence, a vital characteristic of a system that wants not only to *do* justice but to be *seen* as doing justice. Judges’ generalist knowledge enables them to draw on broad principles established in other cases. Since there are many reviewing courts, the power to pronounce important principles of law is not dangerously concentrated in a single administrative tribunal. Finally, even in that vast majority of cases in which judicial review is never sought, the mere prospect of judicial review can have a sobering influence on administrative officials, encouraging them to approach their decisions carefully and explain their reasons intelligibly.

What to Make of IIRAIRA?

At first blush, IIRAIRA seems easy to explain. It reflects the demands of a public that has become increasingly restive about illegal immigration and increasingly willing to direct its anger against immigration generally.

But IIRAIRA reflects more than simple public hostility to immigration — and in turn has consequences that transcend immigration. Many of IIRAIRA's specific provisions and broader titles raise fundamental questions about the rule of law and its beneficiaries.

Law loses its significance when it is widely ignored. At one level, therefore, IIRAIRA breathes new life into the rule of law. By authorizing additional law enforcement resources, and by raising the penalties for lawbreakers, Congress has taken steps to assure that the laws enacted by the people's representatives are respected and obeyed.

In a similar vein, many of IIRAIRA's provisions reflect a preference for a rule-oriented system over a case-by-case approach in which administrative officials possess broad discretion. IIRAIRA restricts the discretion of the immigration authorities to cancel deportation in compassionate cases, prohibits them from granting asylum to aliens convicted of specified crimes, and mandates the detention of certain aliens pending deportation proceedings. In each of those instances Congress opted for a blanket rule rather than the exercise of administrative discretion. The benefits include consistency, certainty, and speedier adjudication. The major cost is the loss of opportunity to take individual circumstances into account.

If the enforcement provisions of IIRAIRA lend support to the rule of law, and if the emphasis on blanket rules vis-à-vis individualized discretion arguably does the same, other provisions militate in the opposite direction. The procedural short-cuts introduced by IIRAIRA increase the probability of erroneous results. The expedited removal procedures, under which asylum claimants who arrive at ports of entry without documents will be processed on the spot — normally without counsel and without realistic opportunity to prepare their cases — are the leading example.

Of greatest concern, however, are the provisions that preclude judicial review of various administrative decisions that have immense impact on people's lives. The benefits and the costs of judicial review were discussed earlier. In a highly politicized climate, the courts' traditional role as guardians of the rule of law assumes unusual significance. The court-stripping provisions of IIRAIRA possibly reflect nothing more than a desire

to conserve judicial resources and avert delay. More likely, however, they also reflect a congressional wariness of unelected judges whose levels of sympathy for immigrants and whose concerns for procedural fairness frequently exceed those of Congress, and frustration with lawyers who have successfully challenged INS interpretations of various statutory provisions. Perhaps too, Congress does not regard immigrants as possessing enough attributes of community membership to warrant what might otherwise be seen as threshold levels of procedural protection.

Our society will never be united on the subject of immigration. Nor will we ever be united in our views on the best way for a democratic society to implement the rule of law. Ultimately, to attain a proper balance between compassion and self-interest, between fair procedure and efficient use of resources, and between fixed rules and administrative discretion, we are left to rely on the good judgment and the good will of all three branches of government. There is really no other choice. 🌐



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Naturalizing may no longer be an option for some

IIRAIRA's Criminal Provisions

Among the new immigration law's most severe provisions are those targeting non-citizen criminals. The relevant provisions vastly expand the definition of "aggravated felony"—the type of crime activating immigration proceedings, including deportation—and also broaden the definition of "conviction" for such purposes.

Aliens found deportable for almost any crime-related reason will be barred from contesting the deportation order

Introduced in the Anti-Drug Abuse Act of 1988, "aggravated felony" has become one of the most amended terms in the Immigration and Nationality Act. Originally referring to such crimes as murder and drug or firearms trafficking, the term's meaning has been consistently broadened by lawmakers keen to demonstrate that they are "tough on crime." In some circumstances it now extends to such crimes as minor drug possession, turnstile-jumping and graffiti-making—even if these crimes occurred years ago. "Conviction" has undergone a similar metamorphosis, and now includes many state deferred adjudication or diversion programs that previously had little or no immigration consequences. Finally, the new law sharply curtails the possibility of the immigrant receiving a waiver of deportation based on mitigating circumstances.

Critics of these changes argue that the new law is overly severe and will have unfortunate and perverse effects. A family tragedy that caused a temporary relapse of a recovering drug addict will, if that person is convicted of possession, now result in his or her becoming mandatorily deportable without any opportunity to apply for a waiver based on such favorable factors as long residence, work history or family ties, including dependent U.S. citizen children. (In the past, approximately 50 percent of resident immigrant applicants facing deportation because of criminal convictions were granted waivers.)

Furthermore, because there are strong incentives for accused individuals to plead guilty to a minor charge (for example, in return for time served), rather than to fight their accusations



Cara Lise Metz, ILGWU


Immigrant child

in court, many immigrants have criminal records that will now come back to haunt them in ways they could not have foreseen. In addition, the diversity of state criminal codes and the different ways they interrelate with IIRAIRA's national criteria will result in anomalous (and unfair-seeming) outcomes. For example, immigrants found guilty of casual drug use in states with particularly strict drug laws may be permanently expelled, while immigrants convicted of more serious drug offenses in other, more tolerant states may not face such severe consequences.

Will the new deadline result in the U.S. returning refugees to their persecutors?

How aggressively the INS will enforce these new provisions is unclear. The costs involved in arresting, detaining, and returning all immigrant criminals now residing in the U.S. have not, to our knowledge, ever been estimated. Indeed, it remains uncertain just how many more immigrants the new law, if fully enforced, would require be deported. One thing is clear, however: in today's strict law-and-order climate, immigrants guilty of an offense, no matter how minor, are unlikely to find a sympathetic audience. And that, in turn, makes this portion of the law unlikely to be amended. 🌐

Suggested Reading

- ◆ Public Law 104-208. Available on the World Wide Web at: <http://thomas.loc.gov/cgi-bin/cpquery/1?cp104:./temp/~cp104jNAs:e1790346>:
- ◆ American Immigration Lawyers Association. "What the New Immigration Law Means for You." Available at: <http://aila.org/nlsumry.htm>.
- ◆ Fragomen, Austin Jr., "IIRAIRA Overview," *International Migration Review*, Summer 1997, Vol. 31, No. 2.
- ◆ House Judiciary Subcommittee on Immigration and Claims. "Highlights of P.L. 104-208."
- ◆ Mailman, Yale-Loehr, et als. *IIRAIRA Section-by-Section Summary with Analysis*, Unpublished paper.
- ◆ National Immigration Forum, "Comparison of Current Law 5/20/96" & "Summary of IIRAIRA."
- ◆ U.S. Commission on Immigration Reform. *U.S. Refugee Policy: Taking Leadership*.
- ◆ Various Authors. 14-Part Series on IIRAIRA, *Interpreter Releases*, issues dated 11/4/96 through 3/17/97.
- ◆ Plenary Power Court Challenges: Chae Chan Ping v. U.S.A. (1889), Fong Yue Ting v. U.S.A. (1893), Harisiades v. Shaughnessy (1952). 

RPM is looking for book reviewers. Reviews should be between 600 and 900 words long, and should focus on recently published material relating to immigration. Email queries to daronson@ceip.org.

Books & Events

Book Review:

Isbister, John. *The Immigration Debate: Remaking America*. West Hartford, Connecticut: Kumarian Press, 1996. 262 pp. Cloth: \$38.00; Paperback: \$21.95.

John Isbister begins his thoughtful new book by providing a brief analytical overview of three areas in the immigration debate: demographics, economics, and culture. After familiarizing the reader with current controversies, he chronicles the history of immigration to America and compares the composition—ethnic makeup, education, and skills—of today's immigrants with those who arrived at the beginning of the century. Isbister argues that current immigration policy has inadvertently produced a workforce of predominately third world, low-skilled, poorly educated laborers who not only do not possess the desire or capacity to assimilate into American society, but also displace native workers in the unskilled labor market.

The next two chapters complement one another, explaining why immigration occurs and speculating about whether it will continue at current levels into the next century. The U.S. has always attempted to curb immigration unilaterally, most recently by increasing border patrol and reducing immigrants' access to economic benefits and opportunities. However, this effort has only resulted in increased *illegal* immigration. Without understanding why immigrants come, Isbister argues, American efforts to reduce overall immigration will continue to fall short. In the following chapter, Isbister looks at the possible demographic consequences of various levels of immigration. Isbister predicts that if immigration continues at current levels, America "will approach a situation in which it is a country of minorities." He notes one "small" possibility that immigrant assimilation could neutralize any of the problems associated with this demographic shift in population, but argues that historically this has not proven to be the case.

Chapter six examines the effects of immigration on wages, employment, and public finances. It is here that the novice reader will come to understand why there is such an abundance of complex and conflicting information surrounding the immigration debate. The author discusses two types of models, economic and statistical, which are used to measure the impact of immigrants on the economy. The former model measures the impact on a theoretical level, concluding that overall, immigration "has had a serious negative effect on ... the decline in relative economic prospects for the least-skilled workers." In contrast, the findings of the statistical model suggests that "immigration has little or no effect on the wages and employment opportunities of natives, even on the wages

and employment of disadvantaged subgroups." Isbister argues that because the jury is still out on which model is more reliable, opponents and proponents of immigration alike will continue to utilize the evidence which lends support to their arguments.

This chapter also looks at the hotly debated question of whether immigrants are a fiscal burden on the American economy. This issue became a vote-getter for politicians during the last recession, and the momentum that it generated is partly responsible for recent welfare reform that has had profound effects on immigrants. Isbister presents findings from a number of studies on the state and national level, and concludes that "in the country as a whole, immigrants probably impose no burden on resident taxpayers and may even contribute more than they use." However, at the state and local level, where there are high concentrations of immigrants, the findings suggest that, indeed, immigrants are an economic burden.

In the next chapter, the author turns to another controversial topic within the debate—how immigration has and will continue to change the face of America. In contrast to the immigrants who landed on our shores at the turn of the century, newcomers in the most recent wave are predominately from Latin America and Asia. They look, act, and speak differently than their predecessors. The author suggests that this will inevitably result in a movement away from a 'melting pot' society towards an American 'mosaic.' He concludes the chapter by proposing an American agenda for peaceful multicultural integration of its newcomers.

In the final chapter, Isbister looks at the question of how American immigration policy should be formulated. He argues that an ethical approach should be the basis of America's immigration policy. He suggests that the only fair and ethical solution to our immigration dilemma would be a greater redistribution of wealth among Americans, as well as an increased U.S. commitment to improving the lives of people beyond our borders through foreign aid and immigration. Unfortunately, these recommendations have a utopian cast.

Isbister concludes by pointing out the contradictions inherent in America's immigration policy. Although America is a country that has been built on immigration, its people want to limit, if not halt future immigration in order to maintain a viable 'American' culture. And while the United States was founded on the premise that "all men are created equal," the very act of restricting entrance to our borders entrenches a system of inequality.

Overall, Isbister has written a cogent, informative, and well researched book that does an excellent job of presenting both

sides of the argument on numerous topics within the immigration debate. It will not only serve as excellent background reading for anyone unfamiliar with the subject, but also as a good reference for those already knowledgeable in the area.

— Deborah Ho

Books Noted:

Order the following three books from: Center for Migration Studies, 209 Flagg Place, Staten Island, NY 10304. Tel: 718-351-8800; Fax: 718-667-4598; E-mail: cmslft@aol.com.

Patricia R. Pessar, ed. *Caribbean Circuits: New Directions in the Study of Caribbean Migration*. Focuses on return migration in case studies from Jamaica and the Dominican Republic. \$19.95


Alan B. Simmons, ed. *International Migration, Refugee Flows and Human Rights in North America: The Impact of Free Trade and Restructuring*. Concerns the ways in which the Caribbean and North and Central America are responding to globalization and associated patterns of inequality, social conflict, and international migration.

Lydio F. Tomasi, ed. *In Defense of the Alien*, Volume XVIII. Proceedings of the 1995 Annual National Legal Conference on Immigration and Refugee Policy. \$19.95.

Events:

XXIIIrd IUSSP General Population Conference: Beijing, China, October 11-17, 1997. Focuses on international migration; economic integration; comparative migration surveys in developing countries; and international migration policies. The program also includes an informal session on Asian-American Migration Flows. Contact: IUSSP, 34, rue des Augustins, B-4000 Liege, Belgium.

International Migrations: Geography, Politics, and Culture in Europe and Beyond: 1997-98 European Forum of the European University Institute. Three themes will receive special attention: 1) The Phenomenology and History of Migrations; 2) Migrations in the Modern State System; and 3) The Rights of Migrants and Immigrant Integration. Contact: The European Forum, European University Institute, Villa Schifanoia, Via Boccaccio 121, I-50133 Florence, Italy. Fax: (39.55) 4685-575. E-mail: Forinfo@datacomm.iue.it

METROPOLIS: An International Forum for Research and Policy on Migration and Cities. Second Annual Conference, Copenhagen, Denmark, September 25-28, 1997. Contact: Deborah Ho, Carnegie Endowment 1779 Mass. Ave., N.W., Washington, DC 20036. (202) 939-2272. 

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We invite the submission of books and articles for possible review and/or mention in the newsletter. We also welcome information about forthcoming conferences, events, and research opportunities. We would be particularly grateful for news about research/grant opportunities offered by private and public sector agencies, and relevant studies and data sources from these agencies.

The Urban Institute is a non-profit, non-partisan policy research organization established in 1968 to investigate the social and economic problems confronting the nation and assess the means to alleviate them. Two programs at the Urban Institute focus on migration issues: the Immigrant Policy Program, which examines the integration of newcomers into the United States, and the Program for Research on Immigration Policy, which focuses on immigration flows and impacts.



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