PANEL IV: IMPLEMENTATION AND IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: WHO CARRIES THE BURDEN OF THE BILL

STEVEN C. BELL,* MODERATOR

STEVEN BELL: In discussing the Immigration Reform and Control Act of 1986 ("IRCA"),[1] our panel will explore some of the policy considerations underlying the new law, as well as the issue of whether the law is beneficial to the various groups that it affects. To begin, I would like to say a few words about the role of the Immigration and Naturalization Service ("INS") vis-à-vis IRCA. As the administrative agency charged with implementing the law, the INS is both guided by and bound by the rather complex provisions of IRCA. As we have heard from the prior panels, there are some areas that remain open to interpretation. In these areas the INS must look to congressional intent, to the extent it is available, in interpreting the more complicated provisions of IRCA. But in large measure, what the INS may do in implementing any law is governed by what Congress has mandated must be done. With that in mind, Mr. Slattery will speak about the provisions of the new law, focusing on legalization issues and employer sanctions.

WILLIAM SLATTERY:** Since 1972, Congress and the various administrations have made numerous attempts to pass immigration reform legislation. In October of 1978, President Carter established a Select Commission on Immigration and Refugee Policy ("SCIRP"). SCIRP was created primarily for three reasons: to review immigration policy issues, to assess the impact of legal and illegal immigration, and to recommend changes in policy and practice. In 1981, SCIRP made several recommendations, including the imposition of employer sanctions to control illegal immigration.[2] During 1981 and 1982, there were twenty-eight hearings on immigration reform by the House and Senate Immigration Subcommittees. On November 6, 1986, after fourteen years of legislative effort, President Reagan signed the Immigration Reform and Control Act of 1986.

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1. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) [hereinafter IRCA].

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2. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT (1981).

The most comprehensive reform immigration package in the last thirty-five years, IRCA is built upon the three essential cornerstones of employer sanctions, increased enforcement, and legalization. For the first time in history, Congress has passed a law which renders notice to employers that they cannot continue to employ unauthorized aliens. I can assure you that the INS will place a high priority on enforcement of this law.

Our goal is that the employer sanctions will remove the "pull" from the "push-pull" factors leading to immigration. Untold numbers of aliens, with families to support and little hope for the future, leave their native lands each year because factors such as high unemployment and a severe lack of job opportunity force them out of their local environment. These people are pulled or lured to the United States by the hope of a better life through the opportunity to work. Employer sanctions will eliminate that opportunity to work. IRCA imposes civil and criminal penalties for violations of its employer sanctions provisions.[3] An individual or entity determined to hire or to recruit an unauthorized alien for employment in the United States, or to knowingly continue to keep such an individual employed, will be initially subject to civil penalties.

The INS intends to look for those notorious employers of illegal aliens. We will not be out knocking on doors looking for persons harboring an illegal maid or an illegal butler. Instead, we are looking at major employers. Our focus should not suggest that we condone the hiring of illegal maids or butlers but that we plan to prioritize our enforcement efforts.

With respect to the civil penalties, the first infraction of IRCA will result in a cease and desist request or order. The second penalty will be a civil fine of not less than $250 and not more than $2000 for each alien. The third penalty will be not less than $2000 and not more than $5000, and the fourth penalty will not be less than $3000 and not more than $10,000 for each alien. IRCA requires employers to complete an I-9 employer verification form for any individual hired after November 6, 1986.[4] Failure to complete the form will result in a civil fine of anywhere from $100 to $1000.[5]

Form I-9 is a simple form which need only be completed for individuals who are hired, recruited, or referred for a fee after November 6, 1986.[6] The employer must examine the individual's documents to establish the applicant's identity, as well as her employment eligibility.[7] Certain documents will satisfy both needs.[8] For example, either a United States passport, or a certificate of naturalization, or a foreign passport with a stamp indicating that the individual was a permanent United States resident will suffice to establish both iden-

3. IRCA, §§ 101(e)(4), (5), 101(f)(1), 101(g)(2), 8 U.S.C. §§ 1324a(e)(4), (5), 1324a(f)(1), 1324a(g)(2)(Supp. IV 1986).

4. *Id.* at § 101(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A).

5. *Id.* at § 101(e)(5), 8 U.S.C. § 1324a(e)(5).

6. *Id.* at § 101(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(a).

7. *Id.*

8. *Id.* at § 101(b)(1)(B), 8 U.S.C. § 1324a(b)(1)(B).

tity and employment eligibility. Absent one of these forms of documentation, other evidence must be presented in combination in order to satisfy IRCA.[9] For example, a state driver's license with a photo may be enough to establish identity, but the license must be coupled with a second document, such as a social security card, establishing employment eligibility. The I-9 form lists the appropriate documents so that an employer may easily check them off. The hiree, the employer, and the recruiter must complete an attestation on the form, under the penalty of perjury.[10]

STEVEN BELL: I think it is worth making a few more comments about SCIRP and the conclusions it reached. This will polarize everyone's views about the policy underpinnings of the new law. SCIRP began with the premise that United States immigration policy was essentially spiralling out of control. The policy, such as it was, was being decided by the course of events rather than by a reasoned consideration of both the numbers of people the United States should be admitting as immigrants and the types of people who should be admitted as immigrants.

SCIRP put forward a series of proposals intended to bring immigration policy back under control. The United States would first reassert control of the borders by limiting the number of people who could enter the country and then determine, in a reasoned debate, which people should be admitted from which areas, which countries, and in what proportions. At the time of SCIRP's report, literally millions of people were entering the country across the borders, yet the government did not consider either the identity of those immigrants nor whether the United States could realistically handle such large numbers of immigrants.

Employer sanctions and legalization came into the law as a pair of proposals to deal with this problem of immigration control. The employer sanctions provision sought to remove the incentive for illegal immigration. The legalization provision sought to create an equitable form of relief for those persons who had already entered the United States prior to the establishment of a clear immigration policy. SCIRP believed that legalization would bring illegal aliens into the mainstream of American life since they presumably had established roots in the country. It is on that basis that IRCA moved forward.

Over the course of six years of debate, many political considerations brought in a whole new genre of proposals dealing with the agricultural industry and its concerns. But the basic shape of immigration reform developed as a result of the President's Select Commission Report.

VIRGINIA LAMP:* One cannot begin to formulate immigration policy without understanding the forces that affect illegal immigration, the extent to which

9. *Id.* at § 101(b)(1)(A)(ii), (C), (D), 8 U.S.C. § 1324a(b)(1)(A)(ii), (C), (D).

10. *Id.* at § 101(b)(1)(A), (b)(2), 8 U.S.C. § 1324a(b)(1)(A), (b)(2).

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the United States can and should effectively absorb immigrants, and the limits our country imposes to control immigration despite our being a free and open society. Although the problem of illegal immigration is concentrated primarily in nine states, efforts to curtail the problem are not confined to any one region. Instead, the nation as a whole takes an active interest in the ramifications of increased illegal immigration.

In Washington, D.C., public perception of a problem is often far more important than reality when it comes to formulating policy. If the public believes, albeit wrongly, that the borders are out of control, then the government must do something to persuade the public that the country's borders are intact. If the public perceives that the level of immigration is escalating to the point beyond which the economy can no longer tolerate the volume of influx, we have to do something to alter that perception. If the public fears that immigrants displace native workers and create lower wages, we in Washington need to do something to address that fear. If the public thinks immigrants drain tax revenues through their receipt of welfare and other social benefits, we have to do something about that belief. Perhaps I sound a bit cynical, but my cynicism is the product of my involvement in the political process.

Historically, the United States Chamber of Commerce has opposed any immigration reform proposal that included employer sanctions. Faced with a law which incorporates sanctions to which we object, we are striving to obviate the burden which IRCA imposes on employers while ensuring that as many employers as possible comply with IRCA's requirements. In an effort to achieve this balance, we have been working with the INS and with the different advocacy groups to inform employers about practical strategies for achieving compliance with the law without becoming swamped by burdensome regulatory procedures.

Immigration reform, like tax reform, may be a necessary and worthy endeavor. However, the business community bears a substantial portion of the burden associated with immigration reform. Employers must assume responsibility for mandatory record-keeping and verification, or face sanctions for non-compliance with the provisions of IRCA.

According to the provisions of IRCA, employers must be able to prove that each employee hired after November 6, 1986, is entitled to live and work in this country. Requiring that employers first check all new hirees may reduce the amount of discrimination directed against people who look or sound foreign. However, the Small Business Administration has estimated that the transaction cost for a simple verification procedure ranges between ten to fourteen dollars.

Whereas the threat of employer sanctions provides perhaps the most graphic illustration of the extent to which the business community bears a disproportionate share of the burdens imposed by IRCA, the new civil rights provisions contained in the law provide further support for the proposition that IRCA burdens employers. Title VII of the Civil Rights Act of 1964 ex-

empts from its provisions any employer with less than fifteen employees.[11] However, the new national origin and alienage discrimination civil rights provisions contained in IRCA extend to employers who hire between four and fourteen employees as well as to the larger employers.[12]

To ensure the proper investigation of charges and issuance of complaints, the President must appoint a Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice.[13] According to the provisions of IRCA, no charge respecting employment discrimination based on immigration status may be brought before both the Equal Employment Opportunity Commission ("EEOC") under Title VII and the Special Counsel under IRCA.[14] Yet, can any of us explain why a non-citizen should be granted more extensive civil rights in some cases than those given to citizens who happen to be black or female or Jewish or elderly or a member of another protected group?

What is the best advice to give to an employer who currently employs an individual who appears to be eligible for the legalization process? The answer is not clear. Should the employer fire the employee, the employer may face potential litigation by the Special Counsel. Alternatively, the employer risks stiff civil fines or possible criminal penalties for retaining the individual.

As a parting thought, one wonders why the business community bears so disproportionate a share of the burden associated with IRCA. In assigning burdens, it appears that Congress operated on the faulty assumption that increased immigration necessarily produces undesirable economic consequences. In essence, Congress responded to a pervasive public fear, based on a type of selfish nationalism, that unmitigated waves of immigration would harm the nation.

The business community itself was split on the issue of immigration reform. Some business trade associations supported the broad measures embodied in IRCA, believing that those who employed low-wage, illegal immigrant workers engaged in unfair competition. The position taken by the Chamber of Commerce, eschewing employer sanctions, gained little popularity. We could not persuade the small business operators that make up an overwhelming majority of our membership to write, call or visit congressional representatives on the issue of immigration reform. Many perceived the proposed reform measures as being border-state oriented rather than having any impact on small businesses nationally.

Initially, the Senate immigration bill would have imposed upon unions an equal responsibility for checking employment eligibility. However, the formulators of the final version focused on the major elements of the legislation:

11. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 42 U.S.C. § 2000e(b) (1982).

12. IRCA § 102(a)(2)(A), 8 U.S.C. § 1324b(a)(2)(A) (Supp. IV 1986).

13. *Id.* at § 102(c), 8 U.S.C. § 1324b(c).

14. *Id.* at § 102(b)(2), 8 U.S.C. § 1324b(b)(2).

sanctions, amnesty, the guest worker provisions, the new civil rights, and reimbursement for state and local governments. Forgotten in the chaos, the unions had been quietly exempted.

Ironically, then, the business community will bear not only the heaviest burdens of IRCA, but also the blame if and when immigration reform fails to stop the flood of illegal aliens.

LUCAS GUTTENTAG:* I intend to focus on the discriminatory impact of IRCA, the statutory background against which the Frank Anti-discrimination Amendment was added to the bill, and the amendment's potential for remedying the discrimination that will inevitably be caused by this bill.

As Representative Frank explained earlier in this Colloquium, employer sanctions for non-compliance with employee verification procedures constitute a logical element of immigration reform given that the United States is an attractive place for persons from other parts of the world, that undocumented immigrants come to the United States to work, and that the United States will or must impose some limitations on immigration from other parts of the world. Since work provides the attraction for undocumented immigration, then we ought to limit that attraction.

However, employer sanctions are likely to increase ethnic divisiveness in our society. Perhaps Congress recognized this when it decided to adopt the anti-discrimination provisions proposed by Representative Frank. By encouraging the judging of persons on the basis of appearance and ethnic origin, employer sanctions may create an environment where whole ethnic communities in our society are treated with suspicion.

Although the American Civil Liberties Union, the Mexican-American Legal Defense and Education Fund, and other civil rights groups will be working vigorously to enforce the anti-discrimination provisions, the extent to which the provisions are effective will depend in large part on whether those who advocated employer sanctions also take responsibility for combatting the discrimination generated by employer sanctions. The Reagan Administration, unfortunately, cannot be relied upon to enforce these sanctions. Any employer seeking to avoid sanctions may be less likely to hire persons who do not fit the stereotype of an American citizen. Clearly, not every employer will be subjected to enforcement activities by the INS. If past experience offers any guidance, employers targeted for enforcement will include those who hire large numbers of Hispanics. In order to avoid raids, and to avoid record checks, employers may endeavor to minimize the ethnic diversity in their workforce.

The penalty structure of the new act punishes violations of employer verification requirements far more severely than it punishes violations of the anti-

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discrimination provision. The maximum penalty for repeated violations of employer sanctions is up to $10,000 per violation plus potential criminal penalties.[15] By contrast, the maximum penalty for violations of IRCA's anti-discrimination provision is only $2000 per violation for repeat offenders.[16]

Aside from the protections available under union contracts and the National Labor Relations Act,[17] only three potential sources of protection against employment discrimination based on national origin or alienage existed prior to the passage of IRCA: the equal protection clause of the fourteenth amendment,[18] section 1981 of the Civil Rights Act enacted immediately following the Civil War,[19] and Title VII of the Civil Rights Act of 1964.[20] However, all of those provisions have some shortcomings.

The equal protection clause applies only where there has been state action but provides virtually no limitation against the *federal* government's decision to discriminate in employment on the basis of alienage. Further, the equal protection clause does not guard against state employment discrimination based on non-citizen status where the state has the power to define and therefore restrict the job — for example, police or probation officers, teachers — to citizens only.[21]

Section 1981 of the Civil Rights Act, enacted pursuant to the thirteenth amendment immediately following the Civil War prohibits racial discrimination in private employment. In 1945, the Supreme Court announced that § 1981 prohibits discrimination on the basis of alienage where the state engages in such discrimination.[22] And in the early 1970s, the Fifth Circuit held that § 1981 applied to discrimination in private employment based on alienage.[23] However, other courts continue to limit the application of § 1981 to private employers to situations involving racial discrimination.[24]

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15. IRCA, § 101(e)(4)(A)(iii), (f)(2), 8 U.S.C. § 1324a(e)(4)(A)(iii), (f)(1) (Supp. IV 1986).

16. *Id.* at § 102(g)(2)(B)(iv)(II), 8 U.S.C. § 1324b(g)(2)(B)(iv)(II).

17. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982)).

18. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

19. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (codified as amended at 42 U.S.C. § 1981 (1982)).

20. Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e(z) (1982)).

21. Foley v. Connelie, 435 U.S. 291 (1978) (police officers); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (probation officers); Ambach v. Norwick, 441 U.S. 68 (1979) (public school teachers).

22. *See* Graham v. Richardson, 403 U.S. 365, 377 (1971) ("The protection of this statute has been held to extend to aliens as well as to citizens.") (citing Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 n.7 (1945)).

23. Guerra v. Manchester Terminal Corp., 498 F.2d 641, 653-54 (5th Cir. 1974), *reh. denied en banc*, 503 F.2d 567 (1974); Ramirez v. Sloss, 615 F.2d 163, 167 n.5 (5th Cir. 1980).

24. *See, e.g.*, De Malherbe v. International Union of Elevator Constructors, 438 F. Supp. 1121, 1139-42 (N.D. Cal. 1977) (§ 1981 does not prohibit private discrimination on the basis of

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, national origin, and other grounds. In *Griggs v. Duke Power Co.*,[25] the Supreme Court held that discrimination on the basis of national origin was unlawful under Title VII and that, unlike § 1981, Title VII does not require a showing of intentional discrimination.[26] Employment practices which appear neutral, but which have the effect of discriminating against a protected group, violate Title VII.[27]

The Equal Employment Opportunity Commission ("EEOC"), which administers Title VII, recently issued an opinion letter outlining some of the grounds on which discrimination arising under IRCA would be unlawful. In particular, it indicated that discrimination by employers on the basis of accent might constitute discrimination on the basis of national origin. Moreover, requiring employees to have fluency in English may violate Title VII unless the employer can show that those requirements are clearly necessary for performance on the job.

Notwithstanding its potency, Title VII suffers from a number of flaws which the Frank Anti-discrimination Amendment sought to rectify. First, Title VII does not protect illegal aliens and thus does not provide a *per se* bar against discrimination on the basis of citizenship status.[28] Second, Title VII applies only to those who consistently employ more than fifteen employees over the course of a calendar year. Consequently, employers with small workforces, particularly those with seasonal workforces, do not fall within the rubric of Title VII. And finally, because the EEOC is enormously overburdened with a significant backlog of cases, it is unable to prosecute claims aggressively. Thus, vindicating one's rights under Title VII may prove to be an expensive, slow and difficult process.

The Frank amendment prohibits national origin discrimination to the extent that an employer is not already covered by the prohibitions prescribed by Title VII. Thus, it applies to employers maintaining a workforce of between three and fourteen employees as well as to employers maintaining a larger but seasonal workforce. With respect to citizenship status discrimination, the Frank amendment expressly excludes unauthorized alien workers but does protect "intending citizens," such as, legal permanent resident aliens, refugees, asylees, or persons granted temporary residence status under the new legalization provisions of IRCA. But despite its protections, the Frank amendment permits an employer to favor a citizen over an intending citizen, provided the employer can demonstrate that both applicants were equally qualified for the contested position.

The promise of the Frank amendment is threatened by the approach the

alienage); Ben-Yakir v. Gaylinn Associates, Inc., 535 F. Supp. 543, 545 (S.D.N.Y. 1982) (claims that attack private acts under § 1981 must allege racial discrimination).

25. 401 U.S. 424 (1971).

26. *Id.* at 432.

27. *Id.*

28. Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

Reagan Administration has already taken towards its implementation. When President Reagan signed IRCA, he issued a several page statement which outlined the administration's interpretation of the act. A large portion of that statement sought to limit the scope of the Frank amendment, asserting that the disparate impact analysis utilized in Title VII claims should not apply to discrimination claims brought under the Frank amendment. According to the Reagan administration, the Frank amendment prohibits only intentional discrimination. Yet, in light of Congress's concern that Title VII did not cover a sufficient numbers of employers, it is hard to understand why the scope of the Frank amendment should be narrower than the scope of Title VII.

Vigorous enforcement of the Frank anti-discrimination provision depends on a significant role being played by the Special Counsel. Neither the private bar nor public advocacy groups can enforce all incidents of discrimination.

LAWRENCE KLEINMAN:* Thank you, Steve. As you are all so painfully aware by now, I am the twenty-fourth speaker. Yet before I go into my presentation, allow me to tell you a bit about who we are, since I am sure that the Northwest Tree Planters and Farm Workers United does not enjoy household familiarity here in New York City.

Since its establishment in 1985, the Northwest Tree Planters and Farm Workers United has dedicated itself to representing the farm workers and tree planters who reforest America's deforested land. The majority of our members are Hispanic foreign nationals from Mexico and Central America, who do not speak English and who have not received any formal education beyond three to four years of schooling.

From the perspective of organizations such as ours, immigration laws and policies reflect the government's attempt to regulate the flow of various peoples into the country. Although purporting to regulate employers, immigration laws are actually designed to control labor and the unskilled immigrant workers comprising a significant segment of the nation's work force. However, immigration laws do absolutely nothing to deal with the sources or root causes of immigration.

Earlier in this Colloquium, Representative Frank asserted that the primary impetus driving immigration was an individual's desire to attain a more prosperous or stable position in life. While that characterization may be true for some groups of immigrants, it is not true for our membership. In deciding to immigrate, our membership decides not between that which is desirable and that which is more desirable, but between death from starvation due to an extreme lack of employment and survival. Given a choice between such desperate conditions at home or the hope of new life elsewhere, no immigrant will be daunted from leaving her homeland because of a law extant here.

To illustrate the severity of conditions forcing able-bodied people to im-

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migrate, consider that in 1986, the official rate of inflation in Mexico was 105 percent. This is the worst annual rate in Mexico's history. The consumer price index in Mexico has risen 1500 percent since 1980, while real wages for those who are fortunate enough to be employed, have dropped thirty percent in four years. The composite rate of economic growth since 1981 is negative 2.9 percent. Unemployment and underemployment statistics range from forty to eighty percent. Against this reality, we believe that sanctions against employers will not succeed in stemming the tides of immigration.

Prior to the passage of IRCA, the INS instituted a program called "Operation Cooperation," which endeavored to get employers to voluntarily screen their workforces via the threat of raids or other *de facto* sanctions. "Operation Jobs" was a similar, albeit much more dramatic, almost paramilitary, activity. Neither program worked well. In May 1982, the INS arrested 4500 alien workers in nine cities around the country. Although the INS invited United States citizens and lawful permanent resident workers to come and take those jobs, fifty percent of the arrestees returned to their original jobs within two weeks. In some cases, many potential employees showed up to take the jobs but very few lasted more than a few days, if they accepted employment at all.

Our organization has seen similar *de facto* employer sanctions in the reforestation industry for the past five years. Because employers bid on government contracts for the reforestation of federally-owned land, the INS developed an inter-agency task force to impose sanctions on employers who hired alien workers. In some cases, the task force seized vehicles of labor contractors. Seizing vehicles serves as a much greater sanction in some respects than those now contemplated by IRCA because the impounding of a vehicle worth $8000 equates with $8000 in fines. Nevertheless, this system of sanctions did not curtail the employment of undocumented workers.

Despite IRCA'S imposition of sanctions on employers hiring or retaining undocumented workers, one of its major objectives was to guarantee an adequate supply of labor for agribusiness. Prior to the passage of IRCA, members of Congress debated the effect the new law would have on California growers. Ultimately, growers became the only employer group to be singled out for special treatment. Not only does IRCA exempt growers from employer sanctions until November 1988,[29] an exclusive agricultural worker legalization program exists for those who have worked in the fruits or vegetables industry (or some other perishable commodities industry) for ninety or more days between May 1, 1985, and May 1, 1986.[30] Furthermore, IRCA authorizes the possible importation of replenishment agricultural workers (RAWs) between 1990 and 1993. These RAWs would be required to work for at least ninety days in each of three consecutive years, commencing upon their admission to the United States.[31]

29. IRCA, § 101(i)(3), 8 U.S.C. § 1324a(i)(3) (Supp. IV 1986).
30. *Id.* at § 302(a)(1)(B), 8 U.S.C. § 1160(a)(1)(B).
31. *Id.* at § 303(a)(1), 8 U.S.C. § 1161(a)(1).

Growers also benefit from the subdivision of the temporary worker program, H2, into an H2A.[32] H2A, affecting farm workers only, creates a fast track process for certifying the importation of such workers. Finally, IRCA imposes a warrant requirement on the INS for entry onto open fields.[33] Growers lobbied long and hard for a warrant requirement, investing millions of dollars on the best lobbying firms they could find.

The special treatment IRCA affords growers provides some protection against sanctions. Unlike other sectors of the economy, agriculture cannot export jobs abroad because they simply cannot move their operations elsewhere.

Whereas the growers enjoy some measure of security, the farm workers themselves will suffer because of IRCA. Because the SAW program and the RAW program give the growers a great degree of control over the destiny of their workers, exploitation is sure to occur. Workers will hesitate to unionize or to improve their status for fear of having their papers revoked by irate employers.

Organizations such as the Northwest Tree Planters and Farm Workers United cannot help but believe that the INS will selectively enforce IRCA, targeting non-agricultural businesses as well as unions and hiring halls for sanctions. But protections for workers will, we predict, be scandalously underenforced. Thank you.

DISCUSSION

AUDIENCE COMMENT: My question is for Ms. Lamp. You are right about the confusion, uncertainty and misperception that govern much of the immigration debate in Washington. Why don't the Chamber of Commerce and other business organizations do more to publicize the fact that every non-partisan study on the economic impact of immigration, by the Rand Institute, the Urban Institute, and so forth, indicates that immigrants, including illegal immigrants, have a net positive impact on the economy?

VIRGINIA LAMP: We did try. In our testimony before Congress, we often alluded to the possible positive effects of immigration. Calling ourselves the Rainbow Coalition, the Chamber of Commerce worked very closely in a coalition with the ACLU, MALDEF, and a number of advocacy groups with which we do not typically work. Unfortunately, our endeavors did not succeed, because individual businesses across America did not contribute to the effort. Ours was a Washington-based lobbying effort.

AUDIENCE COMMENT: Mr. Slattery, I would like you to address the invitation that the INS made to the Roman Catholic, Episcopal, and Lutheran Churches, to interview and screen the undocumented and to process legalization-related paperwork. Do these churches qualify as designated entities?

32. *Id.* at § 301(c)(a), 8 U.S.C. § 1186(a).
33. *Id.* at § 166, 8 U.S.C. § 1357(d).

WILLIAM SLATTERY: Yes. The churches across the nation have been asked to submit their proposals by March 20, 1986.

AUDIENCE COMMENT: But this puts the burden on the churches to carry out the duties of the INS.

WILLIAM SLATTERY: Enlisting the aid of the churches provides an opportunity for those organizations which have been working with refugees in the past to expand their work into the legalization program. An organization need not apply to be a qualified designated entity if it chooses not to do so.

At this juncture, permit me to comment on the role of the INS, for we seem to be wearing a black hat here today. The INS admits approximately 600,000 to 800,000 *lawful* immigrants every year into this country. However, in 1986 we apprehended 1.8 million *unlawful* immigrants on the Mexican border. For the past several years, *illegal*, rather than legal, immigration has been the primary method of getting into the United States. Whether we should allow illegal aliens to remain and work in this country is an issue which Congress has the power to address. Congress can raise the immigration quota and allow a million legal immigrants in each year, should it so decide. Efforts to stop illegal immigration, like "Operation Cooperation," admittedly have not worked in the past because the INS did not have the force of sanctions. Employers who are willing to subject illegal workers to the most arbitrary and unsafe conditions, for the lowest of wages, would not be apt to voluntarily comply with "Operation Cooperation." Those employers want to save money.

Sometimes illegal aliens make as little as one to three dollars a day in this country. American citizens or legal aliens cannot or will not compete with them for jobs at that wage level. Recall that the United States once permitted the employment of minor children under abhorrent conditions. It took child labor laws to stop businesses from hiring children. Yet the INS regularly catches eleven- and twelve-year-old Mexican children picking crops along the southern border. Employers hire them, for only one to three dollars a day. Unless the employers face sanctions, these practices are going to continue.

Growers are upset with IRCA because legalized aliens will no longer be forced to work in agriculture. Instead, legalized aliens will have the option of moving into the cities where employers will pay the prevailing wage.

AUDIENCE COMMENT: The panel seems to disagree as to the application of the employer discrimination rules. In the case of union hiring halls, the union said one thing and the Chamber of Commerce said another. I wonder if Mr. William Slattery would tell us what the INS feels about it.

WILLIAM SLATTERY: The union position was correct. The unions will be required to fill out the I-9 if they refer or recruit for a fee.

AUDIENCE COMMENT: I have a question for Mr. Guttentag about the effectiveness of the anti-discrimination provisions in § 274B. As I understand them, no mention is made in that provision of the factors required to prove discrimination. In a recent hearing in December of last year, the committee

had a dispute regarding whether President Reagan's statement of IRCA indicated that proof of intent to discriminate would suffice or whether some kind of disparate impact standard would be followed. I am wondering how you interpret that.

Secondly, the provision incorporates the reasonable necessity requirement or bona fide occupational qualifications provisions of Title VII. I wonder when citizenship status would be a reasonable basis, given a business necessity for an employer, to discriminate against an alien.

LUCAS GUTTENTAG: The law provides that a certain citizenship status may serve as requisite for employment when it is required by federal or state law, or by federal or other governmental contracts. For example, Department of Defense contractors, who are required by federal law to hire only citizens, can require citizenship as a bona fide occupational qualification.

As for the intent versus disparate effect dispute, under Title VII, any employment practice that has the effect of discriminating is unlawful.[34] Clearly Congress intended that the Frank amendment would expand the protections of Title VII to small employers and that that same standard should govern. The Department of Justice has taken the contrary position. The basis for the President's argument was a statutory interpretation of Title VII which notes that the effect standard of Title VII is derived from particular statutory language in Title VII but that that same statutory language does not appear in the Frank amendment. But, Title VII prohibits effects discrimination because of the *purpose* of the statute, not because of particular statutory language. The Frank amendment is designed to serve the same purpose. So it should seem clear to any fair observer of the recent court decisions interpreting Title VII that the Frank amendment is supposed to have the same standards of reliability that Title VII does.

AUDIENCE COMMENT: Are there no other examples of what would be a bona fide occupational qualification? For example, if a person would be, according to the employers, likely to be deported if their legalization application was not processed with a positive result, would that be a reason? Or are there any other circumstances under which the alien's status as an intended citizen would impair the business and thus would impair the employability of that alien?

LUCAS GUTTENTAG: There are a host of particular examples where an employer may be able to show that some particular qualification is required. Title VII also makes exceptions. It says where an employer can meet a very high burden of proof, they may discriminate on an otherwise prohibited basis. Presumably that same standard would apply, but in very narrow circumstances.

AUDIENCE COMMENT: My question concerns the government's obligations regarding enforcement of this law primarily with respect to § 245A. The underlying congressional intent is generally conceded to be one of ameliorating

34. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

the unlawful underground existence of so many of our neighbors who have lived here prior to 1982. Could you explain how the government is carrying out its enforcement obligations with respect to that congressional mandate, particularly regarding some of the draft and working regulations? It seems to me that the government's current policies contradict Congress's ameliorative intent. For example, § 245A is supposed to be an ameliorative provision, but it requires certain periods of continuous residence. Persons affected by § 245A previously had no reason to believe that they would be held to such strict time periods. Why do we see the regulations as offering an opportunity to disprove excludability under public charge grounds given Congress's inclusion of a new public charge test? If persons under the poverty line can prove a continuous steady work history and no public cash assistance during that period, we will also allow them to meet that qualification. Why, for instance, has the INS interposed receipt of unemployment benefits? With respect to rights of appellate and judicial review of the establishment of one's qualifications for these benefits, why is it that it appears the INS wishes to draw back and not provide due process hearings, with opportunities to present testimony and cross-examine witnesses, to persons who are seeking these benefits?

WILLIAM SLATTERY: In terms of continuous residence, the Senate version of the immigration reform bill provided for numerical criteria of thirty days for any single departure and 150 days in aggregate. The Senate committee met with the House conference committee but could not come to a conclusion as to the proper number of days to set for continuous residence requirements. Ultimately, the House and Senate committees passed the issue to the INS. They gave us a hot potato. The number we have come up with now in the regulations is 45 days for any single absence and 180 days for the aggregate. That is *more* generous than what the Senate proposed when they went in to confer with the House.

To address your second question, unemployment insurance is not an issue and will not be in the proposed regulations. Admittedly, due process difficulties exist because of confidentiality requirements. Those individuals who apply for legalization are protected by a bubble of confidentiality that we cannot use to enter into traditional enforcement arenas. We cannot institute deportation proceedings when we deny a case. The alien whose application is denied will remain in the United States until we encounter her under traditional methods. She will have an opportunity to appeal through an administrative appeals process, but she will not face deportation proceedings based upon the denial of her legalization application.

AUDIENCE COMMENT: I understand your last point. But I believe that the reverse will occur with respect to the review provisions. You will force people to surrender themselves only so that they can have their cases go up to the circuit court of appeals through the vehicle of a deportation proceeding and up to the BIA. But you are still not really responding to my question. Why could you not set up an Administrative Law Judge type proceeding rather

than simply have a paper review by the AAU in Washington, D.C.? If you are in fact trying to give life to this ameliorative provision and to give the most expansive rights, why not create the most expansive opportunity for people to actually obtain the benefits who are entitled to them?

WILLIAM SLATTERY: We have done that. I disagree with you on your point, that we want more hearings for a vast number of aliens. We expect to deal with four million aliens in one year. Whomever we deny will have an appeal route available to them. The INS certainly will not enforce their departure from the United States. If they are encountered, they will be able to raise that issue in deportation proceedings. They have more protections than any other group of aliens we have ever dealt with before.