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September 11, 1981

Dear Colleague:

The Institute for Public Representation is a public interest law firm with extensive experience in civil rights advocacy and immigration policy. We have completed several major policy papers concerning proposals to impose sanctions on employers who hire undocumented workers. Much of our work has focussed on the potential discriminatory aspects of an employer sanctions system. We have prepared the enclosed paper which sets forth our conclusions that such a system will exacerbate existing discrimination against minorities.

The Institute is presently preparing written testimony in opposition to the imposition of employer sanctions to submit to the Subcommittee on Immigration and Refugee Policy of the Senate Judiciary Committee. In order to provide additional support for our conclusions, we would like to present concrete examples of discrimination that have occurred as a result of state employer sanction laws. In particular, we would like to obtain, if available, information regarding actual incidents in which citizens, lawful residents, or naturalized citizens seeking employment have been subjected to special scrutiny or other unequal treatment on the basis of their racial or ethnic characteristics.

We would appreciate learning of any accounts or incidents of which you may be aware where the following may have occurred:

(A) Where minority persons have undergone lengthy and intrusive pre-employment inquiries because of their appearance or language abilities.

(B) Where employment has been denied to minority persons because an employer has suspected that they are in the United States without proper documentation.

(C) Where an inquiry by an employer about a person's immigration status has actually been a subterfuge for intentional racial or ethnic discrimination.

(D) Where the hiring of a minority person was delayed as a result of the need to obtain additional documentation to prove to an employer an applicant's entitlement to work.

(E) Where a minority person has found it more difficult than a non-minority person to obtain adequate documentation of his/her status (such as a driver's license, birth certificate, etc.).

As you read over the enclosed paper, additional examples of the type of discrimination we describe may occur to you. Please provide any information you may have which would support our position on this critical issue.

The Subcommittee hearings on employer sanctions are scheduled for September 21. It is therefore imperative if you wish to assist us that you send us any information you have as soon as possible. While we would like to have this information in written form, we would be happy to talk to you by telephone. Please do not hesitate to call us.

Very truly yours,

Felipe Flores

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Enclosure

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SUMMARY OF STUDY CONCERNING THE DISCRIMINATORY EFFECTS OF EMPLOYER SANCTIONS

The Institute for Public Representation, a public interest law firm affiliated with Georgetown University Law Center, has undertaken a study to determine the discriminatory effects of employer sanctions schemes under consideration by the Select Commission.*/ We have concluded that such schemes cannot be effected without severe discriminatory impacts upon Hispanic, Asian, black, and other minority Americans and legally resident aliens. As an organization committed to the elimination of discrimination in our society, we are deeply concerned over the inadequacy and superficiality of the consideration that this issue has received so far.

We set out in the attached study a detailed description of the ways in which employer sanctions schemes will encourage discrimination in employment and law enforcement.

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*/ The focus of our analysis has been on the potential discriminatory impact of such schemes; we have only incidentally studied the other economic and social implications of employer sanctions. While the great likelihood of discrimination should be sufficient reason in itself to reject employer sanctions, the inconclusive nature of the economic and sociological dialogue on this question is an additional reason for refusing to incur the risks of discrimination inherent in the employer sanctions proposals.

While the systems which have been proposed for implementing employer sanctions purport to consider the possibility of discrimination, none is free of severe dangers of discriminatory impact upon minorities, who will be handicapped because they look or sound "foreign". As the attached study explains, the discriminatory potential in these programs is far more subtle and pervasive than has previously been recognized.

We also argue that there is no clear showing that employer sanctions will accomplish their intended purpose, or that they are the most effective way to stem the flow of unauthorized entrants and to reduce displacement of American workers or depression of their working standards. The flow of unauthorized workers to the United States is the result of a complex set of factors. These include the contours of economic development in the source countries, ease of access, cultural and family ties, and the availability of jobs. It is not clear to what extent reducing the number of jobs available will stem the flow of people who seem willing to take great risks in entering illegally and to work in whatever marginal economy may exist. Further, there is some reason to fear that employer sanctions will merely drive the marginal economy further underground or to third-world countries, thus producing no benefit for American workers to offset the disadvantages of increased discrimination.

We do not believe that such a scant showing of the necessity for and effectiveness of employer sanctions justifies the very real dangers to equal employment opportunity and to civil rights and

liberties that they entail. The attached study sets forth in detail our concerns with the discriminatory potential of each of the alternative proposals under consideration by the Commission. Those concerns are summarized at pages 1 - 6. Particular attention should be directed to the following problems:

a) Statement of Eligibility System

While the system labeled variously "Statement of Eligibility", "Affidavit", or "New Hires Reporting" is designed to reduce the likelihood of discrimination resulting from employer liability, it leaves intact some of the most discriminatory features of all such systems. (See Section III(C)).

This system seems to relieve employers of the responsibility for determining eligibility. However, as the proponents of this system admit, the employer may still discriminate (either because of racial or ethnic animus or out of a fear of sanctions) against persons with foreign characteristics at the moment when such persons present documentary proof of eligibility along with their affidavits, by questioning the adequacy of the proferred documentation. Moreover, as its proponents also admit, monitoring of affidavits and related enforcement are essential to the effectiveness of the system. Workers with foreign names or other features suggesting foreign identity will have their affidavits subjected to particularly exacting scrutiny. Employers who are legitimately concerned that their operations not be disrupted, or that the training of a particular worker not be wasted as a result of a later finding of that worker's ineligibility, will insulate themselves from such effects by refusing to hire or promote "workers who might be undocumented";

i.e., aliens, Hispanics, Asians, blacks, etc.

b) I.D. Card System

In order for the counterfeit-proof I.D. card to be a meaningful means of identification, an employer would have to make an assessment of whether the person presenting it matched the person described on it.*/ This would have several undesirable results. (See Section III(B) 2). The authority to match the description on the card with physical characteristics could become a pretext for hiring discrimination; in cases of a "questionable match", it would be extremely difficult to prove an employer actually intended to discriminate against an applicant. Even an employer not predisposed to discriminate would nevertheless have a strong incentive to avoid the disruptive effects of a future determination of eligibility. He could most easily do this by refusing to hire any worker whose I.D. card was questionable.

Moreover, employers may fear that recordkeeping errors will inevitably occur, but believe that prosecution for such errors will be unlikely unless an employer has actually hired undocumented workers. Such employers are likely to try to diminish the risk of liability for inadvertent errors by refusing to hire workers who "might be undocumented aliens", regardless of whether an individual worker proferred a plausible I.D. card. (See Section III(B)(3)).

The existence of the I.D. card will also produce a pattern of law enforcement which will result in severe discrimination. (See Section IV). The availability of a ready method of determining

*/ We note that some variants of this scheme call for further information to be stored in a data bank and for an employer to match such information with the person applying for a job. This merely enlarges the scope of the employer's discretion.

national status will encourage harassment of foreign-looking workers by all law enforcement agencies. The legal prohibition of such conduct is little protection to minority members who must daily face over-zealous, racist or xenophobic law enforcement. One may expect particular burdens to fall upon those adult minority members who are unemployed or self-employed and have therefore not applied for cards that they are entitled to. The present practices of local police with respect to Hispanic citizens who cannot immediately present proof of citizenship create great cause for concern.

Finally, and perhaps most importantly, it will be considerably more difficult for poor and marginal workers to establish their right to an I.D. card in the first place. (See Section III(A)). The I.D. system will thus tend to perpetuate employment patterns which have led to the exclusion of minority workers from equal employment opportunity.

c) Social Security Card

The proposal for a variant of the present social security card is also unacceptable, in part because such cards are so easily counterfeitable. Since it requires potentially liable employers to determine eligibility with the knowledge that use of such a card is subject to fraud, it encourages employers to either refuse to hire all minority workers or at least to resolve "close calls" against them.

d) Data Bank

The data bank scheme raises unique problems. It creates severe dangers to civil liberties without in any way eliminating capricious determinations of eligibility. An employer may use

his discretion in matching data bank information with the applicant before him. Caution will dictate that an employer disfavor "foreign-looking" applicants even if he has no racial animus. Furthermore, the system is subject to errors in transmission of information between employee and employer and employer and data bank officials. Such errors are highly likely to be interpreted favorably in the case of white workers and unfavorably in the case of minority workers. Such a discrepancy will discourage employers from hiring types of workers who will be subject to questions or scrutiny likely to disrupt the smooth operation of the employer's business.

All of these risks of increased employment and law enforcement discrimination are unacceptable, particularly since there are better alternatives for raising working conditions in problematic sectors of the economy and for discouraging unauthorized entry. (See Section VII). Expanded coverage and enforcement of the National Labor Relations Act, the Federal Farm Labor Contractor Registration Act, the Occupational Safety and Health Act and the Fiar Labor Standards Act will accomplish the former. A redefinition of development aid and investment priorities will address the latter question, as will a law enforcement program directed at the operations of "coyotes" or alien-smugglers. Each of the sanctions proposals will require expenditures for enforcement, in many instances by the very agencies, such as the Wage and Hour Division and the Occupational Safety and Health Administration, which are charged with enforcement of labor laws in general. It

is clearly preferable to make such expenditures for non-discriminatory programs which deal with the problems caused by illegal immigration but do so in a way that benefits all American workers.

We therefore ask the Commissioners to express themselves forcefully against any employer sanctions scheme.

DISCRIMINATORY EFFECTS OF EMPLOYER SANCTIONS PROPOSALS

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DISCRIMINATORY EFFECTS OF EMPLOYER SANCTIONS PROGRAMS UNDER CONSIDERATION BY THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY

This paper presents an analysis by the Institute for Public Representation ("IPR") of proposals for the imposition of sanctions against employers hiring undocumented alien workers. The analysis focuses on the discriminatory effects of alternative schemes for employer sanctions combined with systems for uniform verification of worker status.

IPR is a public interest law firm affiliated with Georgetown University Law Center. One of IPR's chief objectives is the prevention of employment discrimination based on race and national origin.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

Employer sanctions proposals which are not combined with safeguards against racial discrimination are widely regarded as

unworthy of serious consideration. All observers recognize that a law simply making it illegal for an employer to hire persons suspected of being undocumented aliens would cause a massive increase in employment discrimination. A person who "appeared foreign", whether he was a citizen, a resident alien, or an undocumented worker, would be subjected to special scrutiny and other discriminatory burdens when seeking employment. Such a result is patently unacceptable in a society committed to stamping out racial discrimination in the hiring and promotion of workers. Accordingly, the sanctions schemes receiving careful attention by the Commission contain some method for uniform verification of worker status. Proponents of these various schemes assume that because the programs would involve objective verification and recordkeeping responsibilities for employers, they would not operate in a discriminatory manner.

IPR undertook this analysis in order to test the assumption that the various "objective verification" schemes under review would eliminate the potential for discrimination in the employer sanctions proposals. As explained in detail herein, we have determined that this assumption is untenable. While the opportunities and incentives for discrimination that would be created by the proposed "objective" schemes would be less obvious than those created by a "subjective" verification program, they would be no less real or significant.

Our analysis indicates that each of the proposed programs would substantially increase employment and law enforcement discrimination against Hispanic Americans, Asian Americans, black Americans, other

minority citizens and legal aliens. The proposed schemes would cause employment discrimination on two distinct levels. First, the programs are designed so as to make it disproportionately burdensome for minority citizens to obtain government permission to work. The administrative burdens imposed on employees by each of the programs would fall almost exclusively on marginal workers with transitional work status. In contravention of their stated purposes, the programs would place more barriers in the path of minority youth seeking employment. In addition the administrative procedures that would be employed by the programs to ascertain work authorization status would be extremely discriminatory. Each of the schemes would accord government officials extensive discretion to decide who is authorized to work. These officials will inevitably apply a far more stringent test to Hispanics, Asians and other persons of foreign ancestry.

On an independent level, the sanctions programs would increase employment discrimination by creating various incentives and opportunities for employers to discriminate. Any highly publicized sanctions scheme would foster employer attitudes that are conducive to discriminatory hiring practices. Employers already inclined to discriminate will perceive that discrimination against persons of foreign ancestry is somehow legitimized by the program. Other employers may feel it is their civic duty to go beyond the minimum requirements of the sanctions program and make their own subjective assessments of a job applicant's work authorization status.

Moreover, the proposed programs would encourage many employers to discriminate by furnishing an apparently legitimate but actually

pretextual basis for discrimination based on race and national origin. Employers would be delegated the authority to match the characteristics of prospective employees with information furnished by the government. An employer who is in fact discriminating could insulate himself from a civil rights action by claiming that he was not satisfied that a particular applicant conformed to the government's description.

The proposed programs would also increase employment discrimination by creating business incentives for employers to discriminate. In order to avoid burdensome recordkeeping and verification obligations or to minimize risks associated with accidental violations, employers will "play it safe" by refusing to hire any foreign-looking persons. In addition, many employers will realize it makes good business sense to ignore job applicants who may have their employment applications delayed by the government pending an investigation of their work authorization status. In order to prevent disruption of hiring procedures, these employers will only consider applications which they perceive will be regularly cleared by the government.

Finally, the proposed programs will cause employers to discriminate by rendering existing civil remedies less effective. Since claims of employment discrimination against Hispanics, Asians and other persons of foreign ancestry will substantially increase, the already backlogged EEOC will be capable of handling fewer cases alleging employment discrimination against blacks and other minorities.

Each of the sanctions programs under review will also cause law enforcement discrimination. When INS agents conduct spot checks of businesses or raid factories suspected of noncompliance, they will check the work authorization status of foreign-appearing persons far more frequently than they check the status of white employees. This discriminatory enforcement strategy will have additional undesirable consequences. For example, employers will be disinclined to hire, promote or train persons who may be subjected to disruptive and time-consuming status checks.

In addition to encouraging discriminatory enforcement tactics by INS agents, the programs would separately increase the incidence of discriminatory law enforcement abuses by local police officers. The programs would create strong incentives for local police to regularly stop Hispanics and other minorities and demand proof of their work authorization status. As a result of the programs, American citizens of foreign ancestry, even though not suspected of committing any crimes at all, would be exposed to repeated harrassment at the hands of local police.

Since the programs under consideration would increase employment and law enforcement discrimination they would be legally unacceptable. By causing a disparate impact on and treatment of citizens and legal aliens of particular races and national origins, the proposed schemes could be successfully challenged on both statutory and constitutional grounds. Moreover, by allocating excessive authority to private employers to decide who is legally permitted to work, the programs would be subject to challenge as violations of due process.

Because the sanctions programs would substantially increase discrimination and may be found to be legally invalid, the Select Commission should recommend against adoption of these programs. The advisability of rejecting these schemes is even clearer in light of other decision-making considerations. Of primary importance, there is at present no conclusive evidence that employer sanctions programs would be effective in achieving their objectives. There is considerable debate over whether undocumented aliens displace American workers or depress working conditions in the United States. In addition, it is uncertain whether the programs proposed would be successful in preventing more than a negligible number of employers from hiring deportable aliens. Finally, there is no guarantee that even a successful "drying up" of job opportunities would deter significant numbers of aliens from illegally immigrating to the United States.

It is IPR's conclusion that employer sanctions proposals of uncertain value and effectiveness should not be recommended when the clear impact of these proposals is significant increases in discrimination and civil liberties violations. As an alternative to the employer sanctions schemes, we suggest that the Select Commission endorse a more carefully tailored and less dangerous approach to the issues which may be raised by the presence of undocumented aliens in the United States. This approach is described in detail in Sections VII and IX below.

II. PROPOSALS UNDER CONSIDERATION

The particular employment sanctions/objective verification schemes under consideration by the Commission and the subject of the present analysis are:

1. Issuance of worker authorization or identification cards

Under this scheme, workers seeking new jobs or falling within certain age brackets would apply for work permits at local Employment Service offices. A worker would nominate two or more data sources to validate his or her application for a work permit, including: (a) filing an income tax return nine years or more before the date of application; (b) withholding of social security taxes in the same time frame; (c) service in the United States armed forces at any time; and (d) employment by the United States government.

Workers found eligible would be issued work authorization cards with their photographs, other identifying data and, perhaps, fingerprints. Workers unable to prove legal status but whose applications appeared "plausible" would be issued temporary permits while various data systems would be searched for proof of legitimate presence in the work force. Workers whose applications did not appear plausible would be referred to the nearest INS office for deportation proceedings. In this system, employers would be delegated the responsibility to check the work cards of job applicants. First, employers would be required to make sure each applicant has a card. Second, the employer would have to match the photograph and other information on the card with the job applicant's actual characteristics in order to determine whether the card belonged to that individual. The employer could not hire any person without a card or whose characteristics did not match those on the card.

Employers would be required to keep detailed records of all "transactions" with workers so that INS could assess compliance with verification obligations.

2. National employability data bank

Under this scheme, workers would apply for work authorization status in similar fashion to the process described above. Workers found eligible would be given a unique work permit number and would have a work permit file constructed for him or her. The work permit file would consist of data from the nominated data sources and identifying information on the individual, such as full name, date and place of birth, full names of both parents and height and weight.

When an individual applied for a job, the employer would call the data bank and provide the job applicant's number, and, in turn, would be provided with two sets of information. First, he would be told either that the number was a valid one for a legitimate worker, or that the number did not exist, in which case the worker could not be hired. Secondly, if the number was valid, identifying data would be supplied to the employer. The employer would be required to compare this data with the worker's actual characteristics. If the information supplied did not accord with the worker's characteristics, the employer would be prohibited from hiring the worker. The computer would provide a unique transaction number to the employer, which would be entered in the employer's records. This number would indicate that the conversation had taken place and the outcome of the transaction.

3. Affidavit-based employer reporting system

In this scheme, employers would be required to keep records containing employee affidavits asserting legal authorization to work in the United States and some form of substantiating documentation. A copy of these employee records would be sent to the government which would screen them, focusing attention on geographical areas and industries where undocumented workers are expected to concentrate. When incomplete or unclear data is submitted, employers would be required to secure additional information and forward it to the government.

When INS received complete employee records it would check these records against its own data files and other data systems. Where INS' follow-up of a specific worker's records indicated a high probability of illegal status, the employer would be required to give the worker a brief period of time to obtain documentation from INS of his legitimacy; if the worker did not do so he would be fired at the end of the time period.

A variation of the affidavit-reporting system which has received particular attention by the Commission staff was proposed by David S. North. */ In this system, all new employees and employers would be required to complete a New Hire Reporting Form. The employer would be obligated to furnish identifying information on himself and, under penalty of perjury, to certify whether or not he assisted the employee in filling out the form. The employee would be required to provide identifying information, to

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*/ See D. North, Employer Sanctions Without a Work Permit: An Exploration of an Alternative.

specify his status in the United States and, under penalty of perjury, to certify entitlement to work in the United States.

The first level of enforcement in this system would relate to the new-hire reporting forms. A geographic sampling system would be devised to determine which forms government officials should review. A rough screening technique would then be employed to select those forms "worthy of further consideration." These forms would be checked against existing INS records to determine the validity of information supplied on the form. In addition, concentrations of scrutinized reports in the file of a single employer would identify that employer for on-site investigation.

The principal enforcement activity would take place in the field by INS investigators. Employers would have the responsibility of maintaining a file of new-hire reports. Investigators would examine the file and ask a "sampling" of workers to identify themselves. One or more instances of new workers who could not be linked with the new-hires reports file would suggest that the employer had failed to file reports and could subject the employer to prosecution.

Another type of investigation conducted by INS under this system would occur on the basis of information developed by the new-hire reporting system indicating a particular employee was undocumented, or INS knowledge that an employer had hired undocumented workers in the past. With this category of employers, all employees hired after a certain date would be interrogated, "matched" against their filed statements and on-site determinations would be made

regarding the legitimacy of their status. Those persons determined to be undocumented would be removed for INS processing and the employer's records would be reviewed carefully to determine if he or she failed to report any new hires or colluded in the filing of fraudulent reports. In addition, in North's scheme employers would be subject to prosecution for a pattern and practice of hiring undocumented workers even if such persons had not violated the reporting requirements.

III. IMPACTS OF PROPOSED SANCTIONS SCHEMES ON EMPLOYMENT DISCRIMINATION

Employer sanctions schemes that do not safeguard against racial discrimination are regarded as unworthy of serious consideration in a society committed to stamping out racial bigotry in the hiring and promotion of workers. Accordingly, the fundamental acceptability of the proposed sanctions schemes under review hinges on the assumption that they would not cause discrimination. Proponents of the systems would support this assumption by arguing that the schemes involve simple objective verification responsibilities for employers which furnish little room for an employer's exercise of discretion. Since each employer's obligation is to check the work authorization status of every job applicant or to gather records on all potential employees, the sanctions schemes will not operate in a discriminatory manner.*/

*/ We note with concern that David North's proposal, summarized above, would directly compel employers to make subjective assessments of worker status. That proposal would subject employers to penalties for engaging in a "pattern and practice" of hiring undocumented aliens, regardless of whether employers comply with all reporting obligations imposed on them. This procedure would clearly create a subjective verification requirement. Employers would be required to refuse to hire persons whom they believe are undocumented workers in order to avoid prosecution. The extraordinary potential for discrimination [footnote continued]

The assumption that the schemes will operate in a non-discriminatory manner is as incorrect as it is superficially appealing. The proposed schemes will generate discrimination against Hispanic-Americans, Asian Americans, other minorities of foreign ancestry and blacks in both the employment and law enforcement contexts. This section will examine how the proposed schemes would furnish numerous opportunities and incentives to government officials and employers to discriminate against minorities and deny them equal employment opportunity.

A. Discrimination in the Administration of the Program

1. Discrimination in the Determination of Work Authorization Status

Under the proposed systems, receiving government authorization to work will be essential for all individuals seeking legal employment in the United States. It is highly unfortunate, then, that the basic administrative structure of the programs would severely discriminate against minority citizens, making it more difficult for them to obtain work authorization status.

[footnote continued from page 11]
against persons of foreign ancestry in such a system is obvious. As noted above, the Select Commission has focused on objective verification schemes precisely because of the general consensus that reliance on an employer's personal assessment of worker status would necessarily involve an unacceptable potential for discrimination. The dangers of such discrimination are not alleviated by attaching the proposal to an affidavit/reporting system; it simply allows a subjective verification system in through the back door. This or any similar effort should be recognized by the Commission for what it is and summarily rejected.

Under the proposed programs, only workers seeking new jobs or changing jobs would be required to obtain government authorization to work. In addition, only these persons would be required to present identification cards to employers for verification, have their status checked by computer or submit affidavits. Thus, the program's administrative burdens would fall squarely on individuals with a highly transitional and fluid work status. Those persons with permanent, stable employment would hardly be affected by the programs. Persons with unstable occupational patterns, in turn, are disproportionately minority citizens. */ Thus, the proposed systems place their heavy administrative burdens primarily on those minority individuals who find it most difficult to get stable jobs and who have historically been exposed to extreme employment discrimination. The systems rely on administrative structures which result in discrimination against individuals already suffering the consequences of past discrimination.

The practical consequences of these administrative burdens on already marginal minority workers would be severe. Many of these workers may drop out of the employment market altogether instead of expending time and energy obtaining government permission to work at tedious and low-paying jobs. Other poor, minority persons, too unsophisticated to comply with the requirements of the proposed systems or wary of contact with the government will, in essence, become illegal workers. Employers will

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*/ See, e.g., Equal Employment Opportunity Commission, Equal Employment Opportunity Report: Job Patterns for Minorities and Women In Private Industry, p. xvii (1975).

benefit from the "black market" in labor that will flourish under the proposed systems by paying these workers even lower wages and providing even worse working conditions than are presently available. Employees who have not achieved legal work authorization status will be unlikely to report Fair Labor Standards Act or Occupational Health and Safety Act violations to the government. Thus, the proposed programs will result in loss of employment for many minority workers and poorer occupational conditions for many more. Even the potential for such occurences should result in the rejection of proposals which have as their ostensible purpose the upgrading of employment opportunities for American workers.

The procedures by which applicants must obtain government authorization to work under the systems will discriminate against minority citizens in another way. As noted above, in the ID card and data bank schemes, individuals seeking work authorization must nominate at least two data sources to document legitimate presence in the United States. Simiarly, in the affidavit-based system, INS will direct employers to fire persons whose affidavits are not supported by valid data sources. While established, economically secure members of society will have no trouble finding themselves in IRS or social security data banks, this will be no easy task for many minority job applicants. It is apparent that low-income, marginally employed persons, particularly minority youth, will often not have generated the records required for work authorization. The failure to support a work permit application or affidavit with valid data sources will result in complete denial of governmental

permission to work or, at least, a delayed determination of employment eligibility. Again, the systems would operate so as to hamper the employment prospects of the very persons they are supposed to assist: minority youth with unstable employment histories.

The proposed systems would discriminate in the ascertainment of work authorization status in a third, related way. In the ID card and data bank schemes, workers who cannot nominate 2 data sources but whose applications appear "plausible" will be issued temporary work permits while their work authorization status is analyzed. */ Workers whose applications do not appear 'plausible' will not be issued temporary permits and will be referred to INS for deportation proceedings. It is clear that the decision as to plausibility would be made in a blatantly discriminatory fashion. Applicants whose characteristics do not suggest foreign ancestry will surely have their applications deemed "plausible" by program administrators. These persons will receive temporary government permission to work. On the other hand, Hispanics, Asians and other "foreign-looking" persons without appropriate documentation will invariably have their applications labeled implausible. The American citizens and legal aliens in this group will be denied work authorization status solely on the basis of their race. Therefore, disparate treatment of similarly situated persons in the issuance of work authorization status is built into the administrative structure or the proposed programs. **/

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*/ In the affidavit-based system, a similar standard would most likely be applied by INS officials determining which affidavits are valid.

**/ As a result, the programs could be successfully challenged on equal protection grounds. See p. 53, infra. In addition, the programs could have the anomalous result of exposing employers to suits under Title VII of the Civil Rights Act of 1964 simply for performing verification responsibilities imposed on them. See discussion at p. 46, infra.

Further, even as to those persons who can nominate two data sources, there is also a risk that this same discriminatory "plausible/implausible" standard will be applied as a matter of administrative necessity as a substitute for the objective procedure of checking those data sources. Considering the massive undertaking involved with processing millions of applications for work authorization status or affidavits, a sizable backlog in the determination of work status can be expected to develop. In order to avoid the disastrous systemic and personal economic consequences of delaying issuance of all work authorization permits or review of affidavits for weeks or months, program administrators are likely to circumvent the prescribed process of checking data sources. The most logical means of streamlining the systems would be to adopt the plausible/implausible test at the outset; i.e., to grant temporary or permanent work authorization to all persons whose applications appear plausible at the initial application stage and to defer or deny conferral of work authorization status to all persons whose applications of affidavits appear implausible. In this way the inherently discriminatory standards build into the systems for determining the status of persons unable to offer sufficient documentation of legal presence may become the standards applicable to all persons at the initial stage where they apply for permits or submit affidavits. */

*/ It should be pointed out that the streamlined, discriminatory processes described above could develop in one of two ways. They could officially be imposed by high-level administrators in response to delays in the processing of applications or affidavits. Perhaps more likely, individual government officials charged with processing applications or affidavits could undermine the officially recognized systems because of pressure to screen huge numbers of affidavits or applications or simply because of the perceived senselessness of preventing "obvious legal" workers from obtaining or keeping employment. Under either scenario, de facto, expedited systems for granting work authorization status or processing affidavits will develop that would function in a highly discriminatory fashion.

It is foreseeable, then, that the systems may operate so that race becomes the overriding criterion in every determination on whether to grant temporary or permanent governmental permission to work. A white, middle-class applicant will surely have his work permit application or affidavit deemed plausible. Since there would be no sense in holding up this individual's application or adding to the backlog to go through the empty ritual of validating his or her application or affidavit, permission to work would be summarily granted. On the other hand, the permit application or affidavit of a poor Hispanic, Asian or other 'foreign-looking' person will be viewed as implausible from the start. Such a person's permit application will at least be subjected to the prescribed documentation requirements (proof of legal presence as substantiated by two data sources) during which time he will be legally barred from obtaining employment. Under the affidavit-based system, such persons will be exposed to INS surveillance from the time they submit affidavits. Thus, the entire brunt of the inevitable backlog in the processing of worker applications or affidavits will fall squarely on persons of foreign ancestry. In addition to the humiliation of being subjected to stricter governmental scrutiny to obtain permission to work, these citizens and legal aliens will be denied ready access to the labor market solely because of their racial characteristics.

2. Discrimination in the Reissuance of Lost Cards

The foregoing discussion suggests another way in which the administration of the identification card system will discriminate against foreign-looking persons. It can be expected that many people

will lose or accidentally destroy their work authorization cards. The process for reissuing lost cards will invariably function in a discriminatory way. Persons without characteristics indicating foreign ancestry who claim loss of their cards will at least be granted temporary replacement cards while their data records are analyzed. Hispanic-Americans claiming loss of ID cards are not likely to be so treated; their applications for reissuance will be viewed skeptically until their authorization to work is definitively established. Again, it is highly likely that the proposed systems will be administered in a fashion that treats individuals differently solely on the basis of their race or national origin.

3. Discrimination in the Resolution of Conflicts Between Data Bank Records and Information Supplied by Employers

As the descriptions of the proposed systems reveal, even job applicants with worker authorization cards or work permit numbers or who fill out affidavit forms will not be permitted to work unless information submitted by the employer matches a particular data bank file. When an employer calls a permit number into the data center, or submits an employee affidavit, a government official must determine whether information submitted by the employer matches information on that employee in the government's possession. It can be expected that discrepancies between information furnished by the employer and existing or newly constructed data bank records will occur frequently. In many instances, there will be errors in the transcribing of information from the employee's original work permit application to the data bank record. In other cases employers

will commit errors when relating particular information to the data bank clerk. Finally, there will be occasions where a job applicant is not legally authorized to work and is fraudulently using another person's work permit number and data bank record. Under the affidavit-based scheme, errors may occur in the employee's initial provision of data or in INS's search for existing government information on a particular employee.

These inevitable informational discrepancies will be resolved in a highly discriminatory fashion. As the above discussion suggests, questions about job applicants who are not apparently of foreign ancestry will be treated in a different fashion from questions about applicants who "appear" foreign or have foreign surnames. Informational discrepancies that arise for persons who are legal citizens, i.e., white persons with Anglo-Saxon surnames, will be regarded as merely bureaucratic errors. Employers seeking government clearance on these persons will invariably be given the go-ahead by the relevant government official. Questions about job applicants who are of foreign ancestry will not be viewed in so cavalier a fashion. With persons who "may turn out to be" undocumented workers, government officials will feel an obligation to thoroughly investigate and resolve information conflicts. The job applications of these persons will be held up while questions are resolved. Obviously, persons whose authorization status is held in limbo will suffer in the labor marketplace compared with the job applicants whose "employability" is ascertained immediately.

4. Summary

Overall, the employer sanctions systems under consideration will discriminate against minority citizens in the preliminary granting of governmental permission to seek employment and in the resolution of conflicts that will arise over a particular worker's authorization status. In some respects, the systems are inherently designed so that they cause discrimination against poor blacks, Hispanics, Asians and other minority groups. In still more ways they are likely to be administered in a manner that discriminates against these groups.

B. Discrimination by Employers Against Minority Citizens and Legal Aliens

The employer sanctions schemes will furnish numerous opportunities and incentives to employers to discriminate on the basis of race and national origin. It can be expected that there will be a substantial increase in discriminatory hiring practices following implementation of any of the programs.

1. Impact on Employers' Attitudes and Perceptions

An extremely important factor in any assessment of the discriminatory impacts of an employer sanctions scheme is the way in which employers will perceive the objectives and values that underlie the scheme. Those persons extolling the nondiscriminatory virtues of objective verification systems focus exclusively on the prescribed structural design of the system. These commentators ignore the perceptions and attitudes that such schemes will encourage independent of the intended functioning of the systems.

An inevitable byproduct of a large-scale, highly publicized program of criminal and civil sanctions for the hiring of undocumented workers will be reinforcement of employer attitudes that are conducive to discriminatory hiring practices. Employers already disposed to discriminate against 'foreign-looking' persons will perceive that the new law not only legitimizes this behavior but actively encourages it. */ In order to achieve any significant level of deterrence, the new sanctions will have to be heavily advertised over the mass media. The principal message that will be conveyed will be the government's official denunciation of the practice of hiring undocumented aliens. It seems inevitable that already bigoted employers will interpret the official message as one sanctioning strict scrutiny of all 'foreign-looking' job applicants, particularly Hispanics, Asians and other minorities associated with the 'illegal alien problem'. Instead of receiving a uniform government message condemning discrimination in hiring, employers will be exposed to communications suggesting that the refusal to hire certain 'types' of persons is a good thing. The perception of systemic authorization to consider race as a factor when assessing potential employees will fuel the discriminatory hiring practices of employers presently biased against 'foreign-looking' job applicants.

We note that there is a considerable lack of sophistication in the ways that most people, including lawyers and others concerned

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*/ Cf. V. Briggs, The Quest for an Enforcible Immigration Policy, Employment and Training, p. 393 (Fall, 1979) (one result of an employer sanctions program would be to put the "moral weight" of the law against the employment of certain types of persons).

with social issues, distinguish between American born citizens, naturalized citizens, and various kinds of alien status. Such a lack of sophistication may be expected to confuse the hiring decisions made by employers. A widespread perception that hiring "aliens" is prohibited may extend to decisions about hiring legally resident aliens or naturalized or native citizens who manifest signs of foreign identity. Even were an identity card to be issued, there may still be obstacles posed to certain minority members by employers whose confusion and excessive caution would converge to form a reluctance or refusal to deal with "close cases". */

Moreover, employers who are not currently prejudiced may develop biased attitudes towards all job applicants of foreign ancestry as they are bombarded with government messages decrying the practice of hiring undocumented aliens. Instead of adopting a purely neutral stance of simply complying with the objective verification or recordkeeping requirements, these employers may easily be encouraged to take a more active role to prevent the hiring of unauthorized workers. Many employers may not draw the line at checking for valid worker identification cards submitting affidavits or contacting the

*/ See Milton Morris and Albert Mayio, Illegal Immigration & U.S. Foreign Policy, (U.S. Department of Labor, October 1980.) Pg. V6:

> "In several localities where many legal immigrants from developing countries settle, the rest of the population often views them as "illegals". Through interviews with community leaders in several such communities (reported in a separate study), we found that local residents routinely commented about the country's illegal immigration problems by reference to this entire new immigrant population. Moreover, some immigrants complained about this perception of them as an affront, and a basis for discriminatory treatment."

These interviews are more fully reported in a forthcoming study by Morris and Martin Smith of the effects of current immigration patterns on localities, to be published by the Department of Housing and Urban Development.

national data bank. They may perceive these obligations as the absolute minimum requirements imposed by the government in the "war on illegal aliens". Patriotic employers may feel compelled to undertake additional policing tactics when Hispanics or other minorities apply for jobs. For example, employers may decide to scrutinize ID cards held by Hispanics to determine if they are counterfeited, a task they are not authorized to perform under the proposed sanctions schemes. Or employers may voluntarily seek more information on Hispanic or Asian job applicants than they would be obligated to under the programs. At the extreme, an employer wishing to 'assist' the government in its 'anti-illegal alien' crusade may simply decide not to hire anyone who the employer thinks is an undocumented worker. Despite the supposedly neutral verification system in place these employers will feel constrained to make subjective evaluations of work authorization status. Of course, this type of subjective assessment is precisely what the proponents of objective verification systems seek to avoid. It is apparent, however, that any widely publicized sanctions scheme will motivate many employers to make subjective determinations of legal status. Discrimination against American citizens of foreign ancestry and legal aliens will become just as inseperable a component of the proposed sanctions schemes as if a subjective verification system were officially instituted.

The employer sanctions system will create employer perceptions that are conducive to discrimination in another way. Again, in order to deter violations there will have to be repeated media broad-

casts or other high-visibility communications stating that hiring undocumented workers is a criminal act. If these messages are effective, many employers will become fearful of incurring sanctions. These employers will perceive that the safest way to avoid sanctions is by not hiring anyone who could turn out to be an undocumented worker, i.e. any "foreign-looking" job applicant. In addition, unsophisticated employers may be unaware that their obligations extend only to objective verification of ID cards submission of affidavits and detailed recordkeeping. Receiving only the general message that "hiring undocumented workers is a crime," these employers may become frightened at the prospect of sanctions and avoid hiring anyone who could (in the mind of the employer) be an undocumented alien.

Even employers aware of their precise responsibilities may determine that accidental recordkeeping violations (for example, forgetting to make a notation of an employee's data bank number) would be inevitable. These employers may perceive that the best way to avoid sanctions under such circumstances would be by not hiring anyone who may be an undocumented worker. The assumption underlying this perception is that the government would be unlikely to investigate or prosecute an employer merely for a technical recordkeeping violation, i.e. when that employer has not, in fact, hired an undocumented worker. Therefore, employers knowledgable of program requirements may also feel that the programs pressure them to discriminate against 'foreign-looking' persons.

The foregoing discussion of the ways in which the proposed systems would affect employer attitudes highlights an inherent

conflict between program effectiveness and the desire to minimize discriminatory impacts. The sanctions schemes' success in deterring the hiring of undocumented workers would largely depend on the government's success in making the new laws visible to employers. As the above analysis suggests, the higher the level of publicity surrounding the sanctions program the more likely it is that employer perceptions that are conducive to discriminatory hiring practices will be created and strengthened. Discriminatory behavior on the part of employers, therefore, appears to be an unavoidable byproduct of any employer sanctions law, since such a law must be widely publicized in order to achieve its intended results.

2. The Programs Accord Discretion to Employers Which Will be Used in a Discriminatory Manner

The above discussion suggests how the employer sanctions schemes would influence employer perceptions in ways likely to lead to employment discrimination even if the verification systems were designed to be purely objective. Unfortunately, the proposed schemes are not designed to require employers to make only purely objective determinations. On the contrary, the programs would accord employers discretion to evaluate which employees are authorized to get jobs. As noted in the descriptions of the ID card and data bank systems, employers would be obligated to 'match' job applicants with worker authorization cards or data bank records. In the ID card scheme, employers would be required to determine

that the applicant looks like the picture on the worker permit card, and is of the approximate height, age and weight specified on the card. In the data bank scheme, employers would be required to determine that information supplied by the government conforms to each job applicant's physical characteristics.

The discretion to match characteristics accords employers both an opportunity and an incentive to discriminate in hiring. For employers already disposed to discriminate, the systems create a seemingly legitimate pretext. Employers can justify the failure to hire Hispanic-Americans, blacks or any other minority citizens by claiming "he didn't look like the picture on the ID card" or "his age didn't seem to match that provided by the computer". Since matching someone's appearance with a picture or assessing a person's age are, in large measure, subjective processes, it would be impossible to distinguish between an employer's good faith efforts to comply with the program and a purposefully discriminatory hiring practice. Accordingly, the discretion furnished to employers to match identifying characteristics would insulate employers who are, in fact, discriminating on the basis of race from civil rights actions. */ By making it more difficult to prove illegal discrimination the programs would encourage bigoted employers to both continue and strengthen discriminatory hiring practices.

In addition, the discretion to match characteristics will be used in a discriminatory fashion by employers not predisposed to discriminate in hiring. When matching characteristics these employers

*/ See p. 48, infra for explanation of how the discretion to match characteristics would furnish a legitimate-seeming pretext that could be used by employers to defeat Title VII actions.

will tend to impose differing standards of review for different 'types' of persons. For job applicants who 'appear' to be American citizens employers will invariably be lax when matching personal characteristics. The predictable response of employers confronted with applicants who are "obviously American citizens" will be that the process of matching characteristics is a useless charade, and therefore should not be taken very seriously. On the other hand, when these employers are confronted with "foreign-looking" applicants, they are likely to try to match identifying characteristics carefully. Most employers would realize that undocumented workers are ordinarily persons with a "foreign" appearance or a foreign surname. Employers would conclude that only persons with characteristics suggesting foreign ancestry should be subjected to "strict scrutiny" when employers are matching identifying factors. The purpose of the program would, apparently, be achieved by only carefully matching characteristics of those "types" of persons who may have undocumented workers in their ranks.

On a more selfish level, these employers would realize that strict scrutiny of foreign-looking persons would be an important way to limit their potential exposure to sanctions. Employers would perceive that carelessness in matching characteristics of persons who are "obviously" not undocumented workers would be unlikely to lead to the imposition of penalties. Conversely, employers would assume that intense care when matching characteristics of persons who "may" be undocumented workers is a necessary business strategy for limiting potential liability. It seems highly likely, then, that

employers would develop distinct screening processes for persons "not likely to be illegal entrants" and for racial categories perceived as likely to contain undocumented aliens. The discretion accorded to employers to match identifying characteristics would be, as a matter of perceived business necessity, employed in a highly discriminatory fashion.

3. The Programs Would Create Economic Incentives for Employers to Discriminate in Hiring

The foregoing discussion reveals that the proposed systems would accord discretion to employers to determine which employees are authorized to work. Employers would exercise this discretion in a discriminatory manner, in part because of a perceived business motivation to do so. Even if discretion were not built into the systems, however, the programs would create positive business incentives for employers to discriminate against job applicants of foreign ancestry.

Many employers would decide that the regulatory requirements of the proposed systems hinder the operation of their businesses. At a minimum, requirements for detailed recordkeeping as to all job applicants, their ID numbers and their work authorization status will be perceived as burdensome. In addition, each of the programs would require employers to perform even more onerous tasks. The ID card and data bank programs would mandate that employers undertake some verification of the work status of all employees. The affidavit-based system would obligate employers to gather additional

information on government request and to forward all records to a central location. Finally, because obtaining government clearance on all job applicants in each of the systems will take a substantial amount of time, many employers would conclude that the programs interfere with orderly hiring procedures.

It seems highly likely that employers will seek strategies for circumventing the recordkeeping and verification obligations imposed by the programs. The safest way for employers to ignore their administrative reposnsibilities and still avoid sanctions would be by not hiring anyone who may "turn out" to be an undocumented worker. It is unlikely that administrative officials will seek to prosecute an employer who has not, in fact, hired any undocumented workers. Enforcement efforts will focus on employers who will flout the clear purpose of the legislation by intentionally hiring undocumented alien workers. Employers sensitive to this may avoid liability by not hiring anyone who may be an undocumented worker. Accordingly, the programs will create positive business incentives to discriminate against job applicants of foreign ancestry for employers seeking to circumvent compliance with burdensome administrative obligations.

The proposed programs might also create business incentives to discriminate for employers who do not decide to circumvent the administrative responsibilities imposed by the programs. As

suggested above, many employers will be concerned that errors will occur in the performance of administrative responsibilities. For example, employers may feel that accidental ommissions in the detailed recordkeeping required by the programs will be inevitable. Similarly, employers may perceive that miscommunications with government officials at regional data banks or at INS offices concerning the employablility of job applicants will frequently occur. Employers concerned with the high potential for administrative errors will fear that such errors will expose them to civil and criminal sanctions. As with employers intentionally circumventing program requirements, employers intentionally circumventing program requirements, employers concerned with accidental omissions will determine that the safest way to avoid sanctions is by not hiring anyone who 'may be' an undocumented worker. Employers aware of the high possibility of administrative errors will seek to ensure that these errors will be viewed by the government as mere 'technical' violations of regulatory obligations. As noted above, employers will realize the government will be unlikely to seek the imposition of sanctions against employers who have not, in fact, hired undocumented workers. Thus, employers will attempt to minimize the risks associated with recordkeeping mistakes by not hiring persons who 'may turn out to be' unauthorized workers. Again, the program will create business incentives for employers to discriminate in hiring.

There is still another way in which the proposed schemes would create positive business incentives for employers to discriminate.

As noted above in the data bank and affidavit-based systems there will be many occasions where discrepancies will occur between information supplied by employers and information held by government. These conflicts will be resolved in a highly discriminatory fashion; work applications of persons of foreign ancestry will be delayed while applications of other persons will be regularly approved by the government. This situation will create incentives for employers to discriminate in hiring in two ways. Employers will not view favorably job applications which are being delayed pending the government's investigation of discrepancies in information. Since employers generally wish to fill employment vacancies as quickly as possible, they will turn to job applications which have been cleared by the government. Employers will, out of business necessity, ignore the applications of persons which are held in limbo; these will almost exclusively be applications of persons of foreign ancestry. */

The government's unequal resolution of discrepancies in information will lead to employment discrimination on a more pervasive basis. Most employers will become familiar with the government's tendency to delay the work applications of persons of foreign ancestry where discrepancies in information occur. Accordingly, employers will view these applications from the time they are initially received in a less favorable light than applications of persons likely to be cleared by the government as a matter of course. An employer

*/ See Section IIIA. supra.

will see no reason to go through the process of sending or phoning into the government an application which may be delayed pending an investigation when applications which will be summarily authorized are available. Many employers will feel that the programs pressure them to consider only job applications which will readily receive government clearance, i.e., job applications of persons not of foreign ancestry. Conversely, employers will disfavor job applications they perceive may frustrate efficient hiring practices: applications from Hispanics, Asians and other persons of foreign ancestry. */

A distinct but similar business incentive to discriminate is furnished by the affidavit-based system. Under this system employers will quickly realize that hiring or promoting workers of foreign ancestry increases the risk of business disruption on two levels. First, hiring these workers will substantially raise the possibility that INS will at some time require the employer to gather information on particular workers. INS will obviously concentrate its review and followup of affidavits on persons with foreign surnames or foreign appearances. Second, in the affidavit-based system, employers hiring Hispanics or Asians take a grave risk that at some indeterminable point in the future, INS will decide these workers are undocumented and should be fired. These employees may be trained and established in jobs before INS screens their affidavits and

*/ As noted at p. 38, infra, the government's tendency to enforce the various schemes in a discriminatory fashion will also furnish employers with incentives to refrain from hiring foreign-appearing workers. In light of these legitimate business concerns, the proposed schemes may substantially enlarge the operation of the business necessity defense to Title VII suits. See legal analysis at p. 48, infra.

determines they are deportable aliens. The only way to minimize the risk of such an occurence would be by not hiring or promoting anyone who "may be" undocumented, i.e., any person of foreign ancestry. In these ways, the programs create unique incentives for employers to discriminate against job applicants solely on the basis of their racial characteristics.

C. Special Discriminatory Features of David North's New Hires Reporting System

Because David North's proposal for a New Hires Reporting System ("NHRS") */ has received particular attention from the Commission staff, careful analysis of its potential for discrimination is warranted. While this system may minimize employer discretion in determining work authorization it would leave intact incentives to discriminate. In addition, the NHRS would also create unique opportunities for employers predisposed to discriminate. **/

This system would require an employer merely to ask each new employee to fill out a form and to present some documentation. The employee would be told that he was liable to fines or prison terms for making false statements. The employer's duty would be to maintain files and submit them to INS for screening, which INS would do in consultation with other government agencies such as IRS. The employer would be liable for either recordkeeping violations or a pattern and practice of hiring undocumented workers.

*/ See description at p. 9, supra.

**/ It should be noted that North has admitted the NHRS would increase employment discrimination. See D. North, Employer Sanctions Without a Work Permit: An Exploration of an Alternative, p. 10. This express recognition from the principal advocate of the NHRS should suggest that it be rejected.

It is obvious that an extensive enforcement procedure is essential for success of the reporting system proposed by North, since it contains no guarantees against fraud. Deportable aliens filling out reports could simply 'borrow' personal information from documented workers. Moreover, undocumented aliens could, in collusion with employers, submit no reports at all. Unfortunately, the enforcement efforts necessary to prevent such fraud would inevitably be conducted in a discriminatory manner.

As the description of the NHRS suggests, INS would selectively screen the 70,000,000 reports that would be submitted by employers each year. The criteria that would be used for identifying applications worthy of further scrutiny would place unequal burdens on aliens, minority citizens and all persons of marginal economic or social status. Groups suggested by North for particular attention are young male applicants, persons who needed help in completing their forms and those who did not indicate the country of their birth or the name of their elementary school. Other groups likely to be the focus of INS' screening process would be aliens and persons with surnames suggesting foreign ancestry. */ Employers hiring large numbers of persons in these "scrutinized" categories would, in turn, be subjected to special attention by the INS. This attention may take the form of requests for "follow-up" data on particular employees or on-site spot checks of business records.

To avoid disruption of their operations and possible sanctions for recordkeeping omissions, employers will seek to deflect INS

**/ As noted at p. 37, INS' present enforcement activities focus almost exclusively on persons with characteristics suggesting foreign ancestry.

attention away from themselves. */ As we have argued elsewhere the simplest way to avoid such attention is to not hire types of workers who will invite it.

The New Hires Reporting System will also furnish new opportunities for employers predisposed to discriminate. As noted above, employees would be required to specify their legal status in the United States. Obviously, employers will have access to this data as it is their repsonsibility to forward the forms to the government and to keep them on file. Thus, employers will know whether applicants are native born citizens, naturalized citizens, permanent resident aliens or aliens legally present in the United States. Xenophobic employers can be expected to use this information to discriminate in hiring and promotion against all but citizens or all but the native born. **/

Even employers not predisposed to discriminated may react to knowledge of a worker's status in a discriminatory way. As noted above, many employers lack an awareness of the legal implications of the varieties of immigration status. ***/ In particular,

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*/ An employer would feel particularly inclined to shield himself from attention in view of the fact that, under the proposed system he would be liable for a pattern and practice of hiring undocumented workers regardless of his compliance with reporting requirements. Clearly, the only certain way for him to avoid liability would be to avoid hiring any "doubtful cases" at all.

**/ The discriminatory porcess that will occur is a variant of the pre-employment inquiries unrelated to job performance that have been condemned by various federal agencies. See, e.g. Department of Labor Regulations Implementing Rehabilitation Act Amendment of 1974, 29 C.F.R. § 32.15 (1980) (employer may not conduct pre-employment inquiries of an applicant for employment or training as to whether the applicant is handicapped).

***/ See discussion at p. 21, supra.

employers often do not understand whether persons with particular types of immigration status are authorized to work. Thus, employers learning from new-hires forms that potential employees are aliens or naturalized citizens may suspect or believe that such persons are not permitted to work and refuse to hire them.

Thus, the New Hires Reporting System leaves intact both the business incentives to discriminate against "workers who might be undocumented" and the employer's discretion in determining the sufficiency of any proof of eligibility which an applicant may present. It therefore continues to pose a high likelihood of discriminatory impact.

Each of the systems for verification of employee eligibility is intended to be objective and to avoid the possibility of unintentional or intentional discrimination by employers. However, each of these systems leaves intact either or both of an employer's discretion in determining eligibility and the business incentive to discriminate against workers who may later be found ineligible. All these systems are highly likely to result in discrimination against minority workers and should, therefore, be rejected.

IV. THE PROGRAM WILL INCREASE LAW ENFORCEMENT DISCRIMINATION

A. Discrimination in INS Enforcement Activities

It seems obvious that employers who presently rely on an undocumented alien labor supply will not voluntarily comply with a ban on the hiring of these workers. Accordingly, if the sanctions scheme is to have more than a negligible impact on hiring practices, there will have to be an extensive enforcement effort on the part of INS. Unfortunately, it is ineveitable that methods for enforcing the sanctions scheme against employers will result in discrimination against workers of foreign ancestry.

The only feasible method for enforcing the new law would be periodic spot checks of businesses, involving on-site checks of business records and comparison of these records with the actual authorization status of employees. Since the ultimate purpose of the employer sanctions program is not simply to compel employers to comply with detailed recordkeeping requirements, but rather to deter the hiring of aliens who have illegally entered the United States, investigating officers will focus their efforts on checking the authorization status of workers suspected of being deportable aliens. Current INS practices, as documented by the United States Commission on Civil Rights, suggest that workers likely to be considered undocumented would almost exclusively be Hispanics, Asians and blacks.*/ Only employees with certain racial charac-

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*/ According to the Report of the U.S. Commission on Civil Rights, The Tarnished Golden Door, Civil Rights Issues in Immigration 85 (1980), current INS investigations are conducted in a highly discriinatory manner. When INS agents conduct factory raids, they interrogate individuals soley on the basis of their skin color or ethnic appearance.

teristics will be subjected to humiliating work status checks during INS enforcement visits.

Even if INS were to conduct checks in random fashion rather than targeting foreign-looking workers, problems that may arise in the ascertainment of workers' status will be resolved in a discriminatory manner. Any complications in the determination of the status of foreign-looking workers will be interpreted as indicating that that worker is illegally present in the workforce. For example, an Hispanic or Asian worker who happens to forget his ID card may be presumed by INS officials to be an undocumented worker. Similarly, any discrepancy arising between an Hispanic worker's actual characteristics and a data bank record will be perceived by INS agents as evidence of undocumented status. As a result, workers of foreign ancestry will be subjected to arrests, searches and seizures solely on the basis of their racial characteristics. Conversely, <u>if</u> any whites are subjected to status checks in the first place, complications that develop will not be viewed in a similarly sinister light. With persons unlikely to be illegal entrants, difficulties in the ascertainment of work status will be viewed as mere administrative mistakes. These persons will be presumed to be legitimate workers regardless of any problems INS agents may have in making determinations of status. The result of this selective law enforcement will be the exposure of workers with particular physical characteristics to INS harassment.

Discriminatory INS enforcement practices sure to arise upon adoption of a sanctions program will have other serious consequences. It is suggested above that employers who become aware of the government's tendency to "hold up" job applications of

Hispanic or Asian workers pending analysis of their work status will perceive a business incentive to ignore the applications of these persons. */ Employers will also quickly realize that foreign-looking workers, regardless of the legality of their status, are considerably more likely to be exposed to authorization checks and detained by INS agents than white workers. This will furnish employers an additional incentive to discriminate in hiring and in promotion. In order to avoid disruptive and time-consuming authorization checks and the disruption of production resulting from removal of a worker, employers will refuse to hire persons they perceive as being susceptible to such checks or such removal. **/ Employers will be less likely to put those whom they do hire in responsible positions, since the temporary detention or removal of a supervisor would be even more disruptive than the removal of an ordinary worker. Thus, the discriminatory techniques that will be used by INS to enforce the sanctions program will result in discriminatory employment practices. We note also that if, as seems quite likely in the light of past history, INS were to target workplaces for spot inspection according to the concentration of foreign-looking workers therein, an employer wishing to avoid the disruptive effects of spot checks of this kind would find it easiest to simply avoid

*/ See p. 31, supra.

**/ See Testimony of George Lundquist to the Civil Rights Commission, Texas Open Meeting Transcript, Reported in The Tarnished Golden Door, Civil Rights Issues in Immigration, United States Commission on Civil Rights (1980) pg. 72 regarding the consequences of an INS factory raid: Mr. Lundquist said that the first attempt to verify the lawful status of employees, was

> "really disruptive.... There ...[were] fantastic anxiety levels. Where things were normally running smoothly at 10 minutes after 7, there was no flow. There was lots of discussing, lots of talking, lots of - just nervousness. It took about 20 minutes, 30 minutes for them to check these 60 people."

hiring types of people whose presence in his workforce would subject him to particular scrutiny.

B. Discrimination by State and Local Law Enforcement Agencies

The foregoing section describes how an employer sanctions scheme would inevitably be enforced by INS in a highly discriminatory fashion. Of even greater concern are the discriminatory law enforcement abuses by state and local police officials that will flow from adoption of the employer sanctions program.

At present, despite their inability to make accurate determinations of immigration status, local police are heavily involved in the enforcement of immigration laws, in large measure because of prompting by the INS .*/ It is also clear that these local immigration law enforcement activities occur in a highly discriminatory and abusive fashion. There are numerous examples of local police departments systematically making investigative stops and arrests solely on the basis of racial and ethnic characteristics.**/

*/ See The Tarnished Golden Door, Civil Rights Issues in Immigration 91 United States Commission on Civil Rights (1980); The Border Patrol Handbook, 11-7 which is published by the INS provides that the "continued cooperation of all local law enforcement authorities must be sought and cultivated."

**/ In The Tarnished Golden Door, Civil Rights Issues in Immigration 91 (1980) the United States Commission on Civil Rights describes one instance. In Moline, Illinois the city police department instituted a practice whereby its officers would enter local neighborhood establishments and interrogate persons of Latin ancestry about their status in the United States, although the overwhelming majority of those interrogated were United States citizens or legal resident aliens. The lack of sophistication and careless attitudes of many local law enforcement officers is illustrated by a trial transcript quoted at age 92:

Q. Now is this the normal routine that you follow when you arrest Mexicans in Grand Praire?
A. Are you speaking of an illegal alien or a Mexican?
Q. Well, how can you tell the difference? Do you know what the difference is?
A. No sir. When I can't determine, that's why I put them in jail for investigative charges.

Because of their lack of expertise in making immigration status determinations local police regularly arrest and detain American citizens of foreign ancestry. Many such citizens who have committed no crimes at all are arrested and jailed simply because they have no detailed proof of legitimate immigration status. */

The already pervasive and discriminatory local law enforcement practices would be multiplied manifold by an employer sanctions program. Local officials would perceive the program as an invitation to increase involvement in enforcement of immigration laws. The widespread publicity the new program must receive in order for there to be any significant level of effectiveness would reinforce local officials' perceptions that undocumented workers are an insidious national problem. As a result, these officials would experience a renewed sense of responsibility to assist in the detection and deportation of illegal entrants.

The sanctions program would also increase local enforcement of immigration laws by furnishing a simple mechanism for the detection of unauthorized workers. Local police officials will, along with everyone else, realize that worker identity cards and data bank records are only furnished to "Americans". These officials will arrive at the conclusion that persons without authorization cards or data bank records are deportable aliens. This understanding, in combination with the heightened desire to "catch" aliens, will substantially increase the number of discriminatory stops by local

*/ In one case, Cervantez v. Whitfield, No. 79-206 (N.D. Tex. Filed Dec. 12, 1979), an American citizen of Hispanic ancestry was arrested and incarcerated for three days solely because he did not have on his person the necessary documentation to prove his United States citizenship.

police. The introduction of a straightforward and efficient method for assessing legality of presence will accord local police an extraordinary temptation to stop foreign-appearing persons and demand proof of their status. The apparent ease with which a deportable alien can be discovered will motivate many local police officers to check the status of all minorities who "may be undocumented", i.e. Hispanics, Asians and other persons of foreign ancestry.

Thus, the sanctions program will greatly increase the number of American citizens who will be stopped and subjected to humiliating interrogation by local police for no reason except their race or national origin. In addition, a large proportion of these citizens may be arrested, searched and detained as a result of status checks by local police. Many individuals will not carry their identification cards at all times. Since the cards are for work status ascertainment by employers, most persons would, quite reasonably, not consider it necessary to keep the cards in their possession at all except when applying for a job. Many more persons would carry the card irregularly, perhaps only bringing it to their jobs. Finally, a large number of citizens and legally admitted aliens, such as the self-employed, will not have applied for work status and therefore will not have acquired worker identification cards they are entitled to. When foreign-looking persons are stopped by local police, valid claims that cards have merely been left at home or have not yet been applied for will fall on deaf ears. Local police will assume illegal status and arrests and detentions are sure to follow. */

*/ The burdens likely to befall mistakenly arrested Hispanics are suggested by the practice of the El Paso Police Department (Reported in The Tarnished Golden Door, supra at pg. 93), which returns people without documentation forthwith to the Mexican side of the border.

Moreover, even when an Hispanic citizen who is stopped by local police presents a legitimate identification card, there is no assurance he will not be exposed to continued harassment. Since local police will systematically interrogate persons "most likely to be" undocumented, they will take a skeptical view of identification cards that are presented. Past experience suggests that, whatever the reasons, there is an inclination on the part of local police to be highly skeptical of claims of legal presence made by Hispanic Americans in certain areas. Thus, when comparing photographs or data on an identification card with actual physical characteristics, police will engage in an extremely searching scrutiny. This skepticism may lead them to conclude that apparently valid identification cards are counterfeit. In either case, local police will arrest, search and detain many "foreign-looking" citizens and legally admitted aliens as a result of the new sanctions program.

The foregoing discussion suggests that an increase in discriminatory law enforcement practices will result from the desire of local police departments to assist in enforcement of immigration laws. Many local police officials will perceive that the sanctions scheme facilitates their "needed" involvement in the detection of deportable aliens. Unfortunately, many more local police, without even a purported law enforcement motivation, may see the program as an opportunity to abuse and harass racial minorities. The program extends to bigoted police a new tool for social repression. Particularly in inner cities where racial tensions between residents and police already run high, police may stop blacks and other minorities upon little or no suspicion of criminal activity and demand their identification cards. A failure to produce the card, for any of

the reasons enumerated above, will lead to additional harassment and possibly detention.

C. Additional Civil Liberties Consequences of Abusive Law Enforcement Practices

The law enforcement abuses that will result from adoption of a sanctions scheme may have even more frightening consequences than those described above. Foreign-appearing persons and other minorities may, over time, gain an awareness that not carrying an identification card is a dangerous business. As the number of INS spot checks and local police investigatory stops increases, many minority citizens will determine that the safest course of action is to carry the identification card at all times. This may be perceived as the only means to minimize the possibility of law enforcement harassment and abuse. Thus, it is forseeable that a de facto system may develop where particular minority groups feel compelled to constantly keep their work identification cards on their persons. The effective result would be an "internal passport" for certain identifible minorities, a system generally associated with totalitarian regimes.

V. LEGAL CONSIDERATIONS

In the preceding sections of this memorandum, we have discussed the potential discriminatory effects of employer sanctions proposals. This section explains how those discriminatory effects will lead to specific violations of civil rights statutes (particularly Title VII of the Civil Rights Act of 1964) and the constitution (particularly the Fifth & Fourteenth Amendments).

A. Types of Discrimination

The proposed work authorization systems are intended to be fair in form, and to preserve the right of legal residents to work without unduly burdening that right. However, in operation the systems will create real obstacles to employment for racial and ethnic minorities, and for resident aliens. As argued in Section III above, the administrative processing of work applications will operate against those unfamiliar with or intimidated by bureaucracy and those seeking relatively insecure positions at the low end of the wage scale, especially those applicants whose prior history of employment is minimal and in occupations where documentation is unlikely to be available. At each stage of the work authorization process, "foreign-looking" and minority applicants will be at a relative disadvantage, both because of the history of discrimination against them, which will be reflected in their diminished ability to produce satisfactory documentation, and because bureaucrats will view them with more suspicion than applicants apparently from the mainstream of American society. As argued in Section IV above, law enforcement officials are highly likely to use discriminatory

criteria to focus their enforcement efforts, thus fostering discrimination in hiring and promotion by employers seeking to avoid the disruption of production which might result from removal of a worker, and also subjecting minority citizens and resident aliens to particular burdens upon personal liberty.

As argued in Section III above, the proposed schemes will encourage employers to view certain kinds of people with suspicion, and this will result in discriminatory hiring decisions. Some of these decisions will result from caution. Other employers will use the sanctions program as a pretext for discrimination. In the event a card is lost, or an employer is suspicious that a card has been altered, or that the card carrier is not the person to whom the card is issued, an inescapable degree of subjectivity is incorporated in the systems. Subjectivity in hiring decisions is a ready vehicle for discrimination, whether intentional or not, that has been condemned by the courts. See, e.g., Rowe v. General Motors Corp, 457 F.2d 348, 359 (5th Cir. 1972). Any program which encourages such subjectivity in employment decisions is of doubtful legality and should be carefully scrutinized. Even if such opportunities for subjective judgments by potential employers were eliminated, however, the overall structure of the programs is so inherently discriminatory that they are inconsistent with both Title VII and the Constitution.

B. Employer Sanctions and Title VII

"The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those

discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Since in their operation the various employer sanctions systems are likely to result in increased employment discrimination, they will create and foster precisely the kinds of practices which Title VII seeks to eliminate. Furthermore, such schemes will provide pretexts for discriminatory practices, or defenses to discrimination claims, which will make the prosecution of claims considerably more difficult. */

1. Disparate impact

Employment qualifications with a disparate impact not related to business necessity were condemned under Title VII in Griggs v. Duke Power Company, 401 U.S. 424 (1971). ("What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract.")

As explained above, each of the proposed employer sanctions schemes creates inequalities in access to work authorization, which would be essential to obtain any job. However, the actual possession of such work authorization is certainly not related to capacity to perform a particular job. Nor is it, in view of the room for mistake and delay in granting authorization, a reliable indicator of an individual's actual status. In this respect any one of the schemes is

*/ Since it is highly likely that any of the proposed employer sanctions schemes will result in an increase in the number of actions that are brought under Title VII, they will also add to the already heavy burden felt by the Equal Employment Opportunity Commission in its attempts to enforce Title VII. The present backlog of cases at the Commission is roughly 70,000. Between 7,000 and 10,000 new complaints are received by the Commission every month. Clearly, the creation of a significant number of new cases will slow down the rate at which all minority persons may expect relief from the administrative process.

inconsistent with Title VII's prohibition against the use of criteria (in this case actual authorization) which are unrelated to job performance to deny job opportunities to minority workers at a substantially higher rate than to white workers. The effect of the employer sanctions programs would thus be to create a broad exception to Title VII; practices with disparate impact would be condemned, except where such impact results from implementation of an employer sanctions scheme. Any proposal which is so plainly inconsistent with the fundamental purposes of Title VII should be rejected.

2. Disparate Treatment

Under the Supreme Court's analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a plaintiff establishes a prima facie case of employment discrimination when he shows that 1) he belongs to a racial minority; 2) he applied and was qualified for a job; 3) despite his qualifications, he was rejected; 4) the position remained open after his rejection and the employer continued to seek applicants with the plaintiff's qualifications. Once this much is established, the burden shifts to the employer to "articulate some legitimate non-discriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, supra at 802.

This elaboration of the requirements of Title VII is clearly intended to prevent deliberate racial or national origin discrimination. Our discussion at Section III above suggests that there will be many instances under any employer sanctions scheme, where a minority citizen or legally resident alien will be subjected to uncertainty and delay in determining work authorization or to questions about whether his physical characteristics conform to an identification card or government information. Under such circumstances, the vagaries of the sanctions system may well provide an employer with a "legitimate, non-discriminatory reason" for a refusal to hire, even where the employer's actual intention is to discriminate on the basis of race or national origin. It would be extremely difficult for an employee to prove that such reason was actually a pretext.

That this is not an insubstantial concern is indicated by the language of two Supreme Court opinions purporting to provide a gloss on McDonnell Douglas Corp. v. Green, supra. In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), the Court said

> [the employer] need not prove that he pursued the course which would enable him to achieve his own business goals and allow him to consider the most employment applications.

Id. at 577 (emphasis added). Therefore, under the proposed systems, an employer may deny applications with impunity by claiming that there was a serious questions as to the authenticity of a minority applicant's work authorization.

In Board of Trustees v. Sweeney, 439 U.S. 24 (1978), the Supreme Court drew a careful distinction between "articulating some legitimate, non-discriminatory reason" and "proving absence of discriminatory motive", rejecting the latter formulation of the rebuttal required by the employer to defeat a prima facie case. In light of this relaxed standard of proof, it may be very easy for a discriminatory employer to escape liability, or at least to shift the burden of proof back to the complaining employee. Procedures such as the employer sanctions systems which so radically alter the nature of proof required in Title VII actions should be rejected.

C. Due Process Considerations

Among the practical results of the various schemes which have been proposed are

1. Particular difficulties for marginal and minority workers in obtaining work authorization.

2. The loss of immediate job opportunities while a "doubtful" worker is subjected to scrutiny.

3. The fostering among employers of a sentiment disfavoring employment of "aliens."

4. The delegation of discretion to employers to determine a worker's status.

5. The creation of economic incentives for employers to discriminate.

Thus, we are here faced with government action which heavily burdens an individual's basic right to pursue a livelihood. Hampton

v. Mow Sun Wong, 426 U.S. 88, 116 (1976). See also, Board of Regents v. Roth, 408 U.S. 564, 572-74 (1972). As such, any of the proposed sanctions schemes constitutes a potential violation of Due Process on several separate grounds. First, insofar as a scheme denies immediate authorization to persons whose applications are deemed "questionable," or grants authorization which is so contingent that it discourages an employer from hiring an "uncertain" worker, it deprives them of liberty and property without a hearing of any kind. Such a denial without any procedural safeguards would violate the Due Process Clause. See Vitek v. Jones, 63 L. Ed. 2d 552 (1980); Meachum v. Fano, 427 U.S. 215 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972).

Second, insofar as any scheme fosters a perception disfavoring alien employment or creates economic incentives for employers to discriminate, it is infirm unless rationally related to a government interest. As argued at Section VI(A) below, it is by no means clear that any of the schemes represents a rational response to the social problems that it purports to address. This too violates the right to Due Process.

Third, the sanctions schemes are both under-inclusive and over-inclusive in creating a presumption of ineligibility for employment. We have dealt at some length (see Section III(A)) with the difficulties which socially or economically marginal individuals and many minority citizens and aliens will have in proving their right to work authorization. In the absence of clear documentation they will be subject to burdens upon employability, even though they may actually be legally entitled to work. Conversely, the schemes are also over-inclusive, because they presume the eligibility of persons who may

not be entitled to work at all, but have previously paid taxes and had social security withheld. This too would violate the requirements of Due Process. See Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)(Powell, J., concurring.)

We note also that many of the proposed schemes delegate to an employer the authority to determine the right of an individual to work. Insofar as this authority is delegated under vague standards, such delegation may be subject to challenge as encouraging arbitrary and capricious action by agents of the government. Courts have carefully scrutinized delegations of legislative power to the executive to ensure that they contain definite standards. Osius v. City of Clair Shores, 344 Mich. 693, 75 N.W. 2d 25, 26 (1956). See Kent v. Dulles, 357 U.S. 116 (1958) and American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

Where an employer sanctions scheme delegates to an employer discretion to determine the work authorization status of an individual worker, as the I.D. card and data bank schemes do, it delegates directly to a private party the power to make decisions according to standards which are too vague. If we conceive of any such scheme as a delegation of legislative power to the executive which in turn delegates it to a private party, then it seems to run afoul of the traditional limitations on such delegation. On the

other hand, we may assume that the delegation of legislative power is valid, and conceive of such schemes merely as delegations of enforcement power to a private party. Insofar as such enforcement power is likely to adversely affect those whom it should not, as argued above at Section III(B), it creates the possibility of arbitrary and capricious action. Such action would be illegal if taken by an executive body and must surely be even more illegal when taken by a private agent or delegate of such an executive body.

D. Equal Protection Considerations

We have argued that each of the proposed systems will result in substantial discrimination, on the basis of race and national origin, against minority citizens and legally resident aliens. While the proposed legislative classifications may in themselves not be discriminatory, their consequence will be unequal treatment of similarly situated groups. Those groups who will be burdened are "identifiable classes of persons who, entirely apart from the system itself, are already subject to disadvantages not shared by the remainder of the community." Hampton v. Mow Sun Wong, 426 U.S. 88, 102. Where, as here, proposed systems of classification are inherently susceptible of discriminatory application against protected groups, they violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, */ Yick Wo v. Hopkins, 118 U.S. 356 (1886), unless justified under an exacting standard.

*/ While the Fifth Amendment contains no explicit references to equal protection, the Supreme Court on numerous occasions has held that equal protection of federal law is guaranteed by the Due Process Clause and that equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. E.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

The Supreme Court has ruled that distinctions based on national origin or race, such as will inevitably result from employer sanctions schemes, are subject to the test of "strict scrutiny." Oyama v. California, 322 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943). The Court has consistently required that the adoption of a suspect classification must satisfy a "heavy burden of justification," McLaughlin v. Florida, 379 U.S. 184, 196 (1974), a burden which, though variously formulated, requires the government to meet certain standards of proof when the classification is challenged:

> In order to justify the use of a suspect classification, the Government must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.

In re Griffiths, 413 U.S. 713, 721-22 (1973) (footnotes omitted).

We note below at Sections (VI) and (VII) that there are serious questions about whether employer sanctions effectively address the problem of illegal immigration and its adverse social impact, and about the practical effectiveness of any such scheme in deterring employer misbehavior. We note also that there are less discriminatory methods for accomplishing many of the ends which employer sanctions wish to accomplish. On such a record, none of the proposed schemes meets the burden of justification necessary to sustain it against a challenge on Equal Protection grounds.

VI. GENERAL CONSIDERATIONS

A. Employer Sanctions - Clear Assumptions and an Uncertain Reality

The distinct purposes of employer sanctions programs are interrelated, but need to be distinguished for purposes of analysis. The broad purpose is to discourage unauthorized entry into the United States by removing what some commentators hold to be the primary incentive to such entry, viz. employment opportunity. The narrower purposes are twofold. There is, on the one hand, the perceived need to counter the direct displacement of American workers by unauthorized workers, or the disadvantaging of American labor by a swelling labor supply during a period of high unemployment. There is also a widespread perception that those who do work illegally are frightened by virtue of their clandestine status, docile by virtue of this and their lack of economic options, and eminently exploitable by virtue of the fact that even the marginal American economy offers them a vast improvement over their accustomed working and living conditions. In this context, employer sanctions appear as a way to inhibit the development of this marginal sector of the economy by imposing costs on an employer to offset any economic advantage he may derive from employing particularly vulnerable workers. The desired end is to inhibit the depressing effect of undocumented workers on working and living standards in general, and therefore to force such jobs into the mainstream economy where they will seem desirable to citizens and legally resident workers. An important incidental result is the drying up of employment opportunities for undocumented workers.

To conclude that employer sanctions would significantly ameliorate these problems requires that one make two essential assumptions. The first is that the marginal (sometimes called "secondary") economy is what it is because it employs vulnerable undocumented workers. The other is that the inhibition of the "pull" factor of job opportunity will have a significant effect upon migration patterns which by common agreement are the result of a complex "push-pull" phenomenon, including conditions in the source countries, physical proximity, ease of access (particularly through the services of alien-smugglers or "coyotes") and cultural and family ties.

We do not argue that these assumptions are categorically wrong. We do believe, however, that there is sufficient doubt about their validity to suggest caution in proposing ways to deal with the problem of unauthorized immigration. No employment regulation scheme which raises serious concerns about civil liberties and discrimination can be premised on such a scant showing of appropriateness and effectiveness.

We note that many American industries have moved to third-world nations in response to a perceived economic need to do so. Since many of these are akin to those still here which employ undocumented workers, one cannot entirely ignore the possibility that such industries would move their operations to places which offered them the vulnerable labor force which might be denied to them by employer sanctions. Clearly, the benefit to American workers would be nil.

We note also that economists such as Michael Piore and Roger Waldinger of the Massachusetts Institute of Technology have suggested that the marginal economy may exist in its present form by virtue of its function in the total economy distinct from the availability of migrant labor. If this is so, then there is considerable question about whether inhibiting the employment of migrant labor will do much to raise wages and standards in this marginal sector. Indeed, as Piore suggests, many mainstream jobs are dependent upon the marginal economy, (Undocumented Workers and U.S. Immigration Policy, Appendix D, American Friends Service Committee Testimony to the Select Commission, San Francisco, June 1980.) Clearly, speculative as all this is, there is no way to convincingly argue one way or the other. However, we are convinced that a good deal of further analysis and research is necessary before one may feel confident that one has not devised a counter productive scheme.

We note also that job opportunity is but one of the many factors which contribute to the flow of migrants, authorized or not, to the U.S.A. If employer sanctions are effective in inhibiting particular job opportunities, they may nevertheless only marginally inhibit the migrant flow itself. This outcome would threaten to create a large undocumented population, lacking economic self-sufficiency, which would either impose other social costs, on public order or medical services for instance, or would increase the labor force available to an underground economy.

Indeed, if the factors other than job opportunity which lead to unauthorized migration are as intractable as they appear, */ the flow of people will continue towards whatever percentage of the job market remains free of the effects of employer sanctions enforcement. It is particularly ironic that a scheme that is at least partly designed to save the jobs of minority workers is likely, as argued above, to cause employment discrimination and to place particular burdens upon marginal and transitional workers, a large proportion of whom are black or Hispanic Americans. It is clear that any scheme which imposes the social and financial costs that employer sanctions does must offer a more certain outcome.

We may add to such uncertainty about the social outcomes of employer sanctions an equal uncertainty about precisely how sanctions will influence employer behavior. In as far as sanctions will require a showing of intent on the employer's part, they will be

*/ Such factors include: a) the perception, as evidenced by the entertainment of the hazards of surreptitious entry by present migrants, that the superiority of opportunities and standard of living in the U.S.A. over those in the source country merit a serious attempt to overcome obstacles (such as employer sanctions, perhaps). One may expect even an underground economy in the U.S.A. to continue to offer better wages and conditions than the economies of the source countries; b) the impulses provided by family and cultural ties, which lead a migrant to expect aid and comfort in dealing with such obstacles; c) the lack of economic opportunity in the source countries. Much of this is the result of the investment policies of the corporations and governments of the developed world in the developing world. (See Gustavo Esteva, The Future of Rural Mexico, Appendix E, American Friends Service Committee Testimony Submitted to the Select Commission, San Francisco, California, June 1980). The displacement of peasants and craftspeople by capital intensive investment and the maintenance or intensification of inequalities in wealth which result from these clearly constitute a compelling "push" factor for widespread immigration, particularly from nations in close proximity to the U.S.A. (See Milton Morris & Albert Mayio, Illegal Immigration and United States Foreign Policy (U.S. Department of Labor, October 1980) pg. V-32, to the effect that economic pressures for migration can be so compelling as to make the availability of jobs at the destination irrelevant, as evidenced by large scale rural to urban migration despite a total lack of opportunity in urban centers.)

enforced only at great effort, perhaps never effectively enough to have the desired nationwide impact. In as far as they will depend upon a showing of formal non-compliance with recordkeeping requirements or a pattern and pracice of wrongdoing, they will become alternative costs of doing business, to be absorbed as the costs of compliance might be. Either way, one may expect greater exploitation of unauthorized workers with a consequent depression of the labor market, as employers compensate themselves for the costs of a sanctions scheme by exploiting their workers more thoroughly to preserve profit margins.

B. Employer Sanctions and Civil Liberties

If an employer is to be effectively subjected to penalties, then it is important to devise a precise system of recordkeeping and enforcement. This is necessary to discourage the "overkill" defensive reaction of refusing to hire all foreign-looking workers. However, the more detailed information about a worker that needs to be stored and retrieved, the more civil liberties concerns are raised. It also seems that in order for there to be effective monitoring of the viability of an individual's application to work, government officials would need to cross-check with other data systems. Increased government access to personal data on such a massive scale raises serious concerns about privacy. */

*/ The proposal of a uniform identification card may dispense with the need to store or frequently retrieve information about a worker, but in as far as it does so, it is susceptible to fraud by a worker, an employer, or both and therefore ineffective. Furthermore, an identification card raises civil liberties concerns about law enforcement practices, as detailed above in Section V.

VII. MITIGATING THE ADVERSE IMPACT OF UNAUTHORIZED EMPLOYMENT - ALTERNATIVE MEANS

The Institute for Public Representation suggests that the three aspects of the unauthorized employment problem which can be attacked without threatening civil rights or liberties are 1) the economic dynamics of underdevelopment in the source countries (insofar as American aid and investment practices are responsible for these); 2) the ease of access over the land borders, particularly the operations of "coyotes" or alien-smugglers; and 3) the incentive that exists for employers to hire undocumented workers. We propose that the Commission recommend measures which are designed to deal with these aspects of the problem.

1) Development aid and investment policies should be tailored so as to encourage labor-intensive development. Not only will this constitute a frontal attack on the very conditions which impel migration (perhaps regardless of "pull" factors) but it will also have valuable incidental effects. Whereas employer sanctions would emphasize national self-preservation at the cost of inhibiting the economic relief that source countries derive from migration, a precisely targeted aid and investment policy would both reduce the incentive to migrate and make the lack of such migration economically tolerable. Such a policy would contribute to the stability of our neighbors and other source countries, whereas merely choking off migration might increase their instability. This also promises to be a more thorough-going and permanent amelioration of the total complex which produces large-scale unauthorized migration.

2) There should be a thorough revaluation of the effectiveness of exclusion at the land-borders. We believe that the best targeted and most cost-effective scheme would be one which concentrated upon the investigation, apprehension and vigorous prosecution of "coyotes", or smugglers of unauthorized entrants. In view of the limited resources available and the length of our land borders, such a scheme would represent the most systematic and focussed attack on an admittedly difficult problem.

3) Laws which are designed to regulate union organization should be expanded to cover agricultural and domestic workers. Laws should be enacted prohibiting INS from responding to employers' complaints about unauthorized workers in their establishments when union organizing attempts are underway or when employers are found in violation of labor laws. Finally, there should be expanded enforcement of laws such as the Fair Labor Standards Act and the Occupational Safety and Health Act, which monitor the conditions under which all workers must work.

To the extent that an employer's ability to exploit his workers constitutes a significant reason for the existence of a marginal economy which acts as a magnet for unauthorized entry, policing employer behavior with respect to working conditions, wages and hours, or allowing union organization to police it, will inhibit the viability of this "pull" factor.

VIII. COST

It may well be argued that such efforts will require more resources than are available for them. We note, in response, that

successful employer sanctions schemes would demand considerable resources for recordkeeping and enforcement. We note also that the establishment of a totally new system would entail startup costs, whereas what we propose requires an extension only of present operating costs. We note also that the enforcement of existing laws regulating work conditions and terms would be tailored to the real violators of our policy against employment of undocumented workers, i.e. those who employ them for reasons of profit. Such enforcement would also yield incidental benefits for health and purchasing power without entailing the social costs presented by employer sanctions. In view of the similar practical difficulties presented by the enforcement of sanctions and the enforcement of workplace protections, the balance is clearly better struck in favor of the latter.

IX. PROPOSALS TO THE SELECT COMMISSION

We believe that, given the present state of knowledge and analysis, there are compelling reasons for refraining from recommending an employer sanctions law to Congress. While we are not presently qualified to adopt a position on the necessity for stringent measures to curtail unauthorized entry and employment, we are aware of the widespread sentiment in favor of some such measures. However, given what is presently known, we do not believe that employer sanctions are appropriate means for accomplishing the desired ends. We have proposed alternative means above.

The rationale for our position is as follows. We have detailed at length our concerns about the risk of discrimination posed by the scheme. We also summarize above some threats to essential civil

liberties and personal autonomy. Clearly, such risks should not be undertaken without both a compelling necessity for and a reasonable expectation that the scheme will indeed yield the desired and expected outcome. There has yet been no such showing. */

We believe that there are significant doubts about whether employer sanctions are necessary to curtail illegal employment. There are also significant doubts about how effectively an employer sanctions scheme can or will be enforced. We do not believe that such an equivocal record justifies the entertainment of serious risks to equal employment opportunity and to civil liberties. In view of the equally compelling social interests implicated in such a scheme and the extremely delicate balance between them, it is important to exercise care in considering its desirability. There should be no mistake about the impact of an employer sanctions scheme on American life. The mechanisms required for effective enforcement of such a scheme will have more than a marginal effect on our society. Not only will any such scheme raise concerns about discrimination and civil liberties, but will do so in the context of one of the most significant areas of an individual's life, employment.

While these effects will vary with the particular scheme used, there can be no question that any such scheme will bring the government into aspects of the individual's life hitherto impermeable to such intervention. While the regulation of the employment relation-

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*/ Indeed, Vernon Briggs, Professor of Industrial and Labor Relations at Cornell University and a leading scholar and proponent of employer sanctions, has stated that

> Candidly speaking, one must say that the enactment of a law against employment of illegal aliens will not accomplish much.

Briggs, The Quest for an Enforceable Immigration Policy, Employment and Training, Fall 1979, Pg. 385, 393.

ship to ensure minimum standards for workers and peaceful and effective dispute-resolution is a commonplace of our law, employer sanctions will be concerned with something more than such incidental aspects of the relationship. In order to be enforceable, a sanctions scheme will inevitably allow government to determine who may or may not work. One may legitimately be concerned about the susceptibility of such a scheme to abuse by government officials. The obtaining and proving of authorization to work will become additional considerations in decisions to relocate and to seek or change jobs, inhibiting the mobility of domestic labor.

Clearly, any such scheme must promise to be effective in accomplishing its central purposes. If it is not, then we as a society will have paid a social price for a scheme which not only does not work but which may, in its very ineffectiveness, have created problems of its own. One may contemplate a situation where, if "push" factors remain strong enough, employer sanctions will have failed to curb the flow of unauthorized workers, but will, to some extent, have hampered employment opportunities for them. One clearly needs some reassurance that such an outcome, with all the dangers that the existence of such a marginal population would pose for the public health, order and welfare, will not come about. In order to be so reassured, one needs greater certainty than is presently available about the appropriateness of employer sanctions as a tool of immigration policy.

The Institute for Public Representation proposes, in the light of the above considerations that

1) The Select Commission refrain from recommending an employer sanctions law to Congress and the President;

2) The Commission transmit to Congress and the President its sense that the concerns detailed above suggest that such a law would, on the present record, be ill-advised;

3) The Commission should recommend to Congress and the President the expansion and enhanced enforcement of laws which protect efforts at labor organization. Specifically the Commission should recommend that Section 2(3) of the National Labor Relations Act (29 U.S.C. § 152(3)) be amended so as to extend its protections to the agricultural and domestic sectors. The impact of agricultural labor practices upon interstate commerce has been recognized in § 2 of the Farm Labor Contractor Registration Act (7 U.S.C. § 2041);

4) The Immigration and Nationality Act should be amended to prohibit the Immigration and Naturalization Service from acting upon complaints about undocumented workers from employers who are faced with union organizing drives or complaints about terms and conditions of work;

5) The Commission should recommend to Congress and the President the enhanced enforcement of the Fair Labor Standards Act and the Occupational Safety and Health Act. These should be seen not only as a way of protecting the welfare of individual workers but also as a way of altering the structural bases of the unemployment of American workers, with all its attendant social ill-effects;

6) Section 6 of the Federal Farm Labor Contractor Registration Act (7 U.S.C. § 2045), providing for disclosure and recordkeeping in

connection with the terms and conditions of employment, should be more rigorously enforced as a deterrent to the depression of living standards resulting from the deliberate exploitative acts of some farm labor contractors;

7) Section 5(b)(6) of the Federal Farm Labor Contractor Registration Act (7 U.S. C. § 2044(b)(6)), providing for refusal of a certificate to contractors hiring violators of the immigration laws should be more vigorously enforced for the same reasons;

8) The Commission should recommend the creation of a task force to carry out the detection, investigation, apprehension and prosecution of "coyotes" or alien-smugglers. Such a task force should be composed of INS personnel, Federal investigators, and authropologists and social workers who are familiar with the social matrix of the origins and destinations of aliens who seek to enter in this way. The United States Government should enter into co-operative arrangements with the Canadian and Mexican governments to facilitate the carrying out of police operations against coyotes; and

9) The Commission should recommend a thorough revaluation of our foreign aid and investment policies. These policies should be redesigned to create the economic conditions for autonomous development of the source countries.

Whatever its recommendations, the Commission should specifically refer to the following concerns:

1) There is a high likelihood that employers will, in the absence of a system of worker identification, protect themselves from liability by denying employment to members of certain minorities;

2) The systems of worker identification which have hitherto been proposed either require an employer to exercise discretion in scrutinizing a job applicant and his identification or do not. In that they do, they provide either a pretext to discriminate, or an incentive to do so in order to avoid liability. In that they do not they are either impossible to enforce effectively or require stringent recordkeeping and detailed centralized information storage and retrieval which raises civil liberties concerns;

3) There is some likelihood that, in the determination and certification of the right to work, there will be particular placed upon people who, by virtue of their economically or socially marginal status, do not possess the full range of documentary proof; and

4) The introduction of any system of employer sanctions will create an adverse climate for all members of certain ethnic and racial minorities. It will do this by creating a climate of opinion which disfavors the employment of "foreigners" (in the context of a lack of sophistication about distinctions between various kind of "alien" status). It will also provide a further pretext for extra scrutiny and harassment of Hispanics, Asians, Blacks and others by both INS enforcement officials and by local police.

In conclusion, any such scheme raises serious concerns about civil liberties and equal employment opportunity. The primacy of these values in our society demands no less than that they be constantly borne in mind and that lawmakers be scrupulous to preserve them even as they attempt to deal with pressing social and economic problems.

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DISCRIMINATORY EFFECTS OF DEPARTMENT OF LABOR PROPOSALS FOR A WORK AUTHORIZATION DATA BANK

We have studied the data bank work authorization systems proposed by the United States Employment Service of the Department of Labor (A Work Authorization Enrollment and Verification System: A Technical Working Paper October 1980). We understand that those variants which do not require an employer to visually match physical charateristics of an applicant with a description obtained from a data bank would reduce employer discretion to deliberately discriminate. However in every other respect these systems present a high likelihood of threats to equal employment opportunity in the manner detailed in our study of employer sanctions and uniform verification schemes.

We particularly note the following points:

1) It is not specified what documentation will be required for initial enrollment. It seems likely, that underprivileged citizens (disproportionately minorities) with economically and socially marginal status will have greater difficulty providing such documentation.

2) Sanctions will be imposed only if there is both "negative verification" and actual employment of an undocumented worker. An employer wishing to avoid the burdens of the verification process or distrustful of its reliability may insure against liability by hiring only workers "likely to be documented", i.e. not minority workers.

3) There is no guarantee that the data bank will be proof against error and malfunction. In the event of inadvertant error in transmission of information or equipment malfunction, e.g. loss or temporary unavailability of current enrollment data, minority applicants will be viewed with greater suspicion while white workers will be presumed to be victims of a mistake.

4) The schemes suggested by USES provide that only "new hires" will be required to enroll, at least initially. Thus, people with transitional work histories and relative job insecurity (i.e. disproportionately the poor and minorities) will be subject to greater burdens than others.

5) New entrants on the labor market will be required to enroll before obtaining a job. Thus, all new entrants will technically be subject to delay in beginning work. However, one may expect an employer to provisionally hire someone who is "obviously American" and for whom ascertainment of status is a mere formality, whereas "doubtful cases" will be denied such opportunities.

6) Workers changing jobs will be required to become enrolled upon being hired by a new employer. Since such workers may subsequently be found ineligible, an employer who does not wish to have this operation disrupted will be encouraged to hire only "safe" (i.e. not minority) workers, particularly in supervisory positions where the disruptive impact of a subsequent determination of ineligibility would be greatest. The variation which would require mail verification only heightens this discriminatory impact by making delay in verification an integral part of the whole process.

7) All the systems, leave a prejudiced employer free to mistate an applicant's characteristics when verifying authorization.

For the above reasons, we do not believe that the most recent Department of Labor design for a data bank overcomes objections to the discriminatory impacts of such a system.