NATIONAL COUNCIL OF LA RAZA
Office of Research, Advocacy, and Legislation

Perspectivas Públicas

Backgrounders

With this mailing, the National Council of La Raza initiates a new policy analysis report series. These Perspectivas Publicas/Backgrounders represent major products of NCLR's Office of Research, Advocacy, and Legislation, funded in part through a policy analysis grant from the Rockefeller Foundation.

In the past, NCLR has sent out Action Alerts to its network and friends, urging quick action on legislative and administrative issues of special importance to Hispanics. These Action Alerts will continue. However, the quick response required for the Action Alerts typically does not permit NCLR to provide a strong informational background for the needed action. The new series is designed to fill this gap -- to provide Hispanic groups with concise but specific descriptions of the history and current status of topics which are likely to become significant policy issues, requiring advocacy, in the near future.

Enclosed along with the Perspectivas Publicas/Backgrounders will be Reaction Sheets, asking your assessment of the paper and your plans for using it. We would greatly appreciate your completing and returning these Reaction Sheets, to help improve the system and determine its utility to the NCLR network.

We urge you to keep copies of these Perspectivas Publicas/Backgrounders in a three-hole binder (all will be sent to you on three-hole punched paper), and to use them for future reference, should advocacy on these issues become imminent. All reports will be numbered and dated, and will be referenced in Action Alerts on similar topics. For further information on any paper, contact the author at NCLR offices in Washington, D.C. For other information about policy issues affecting Hispanics, contact any of the following:

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Perspectivas Públicas

Backgrounders

Number: One

Date: March 23, 1981

Title: Perspectives on Undocumented Workers

Contact: Francisco Garza

The attached backgrounder summarizes views on immigration of national Black and Brown leaders. Their perspectives were obtained, then updated, over a period of nearly two years.

The National Council of La Raza--like many other Hispanic organizations at the national, state and local levels--seeks effective coalitions with Black groups on a wide range of civil rights and human services issues of mutual concern. In the past, immigration has been a divisive issue. It is NCLR's hope that improved understanding of and respect for respective Black and Hispanic viewpoints on this issue will reduce its divisiveness.

For further information on Black/Brown coalition efforts, contact Mr. Guadalupe Saavedra NCLR's Vice President for Special Projects.

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PERSPECTIVES ON

UNDOCUMENTED WORKERS:

BLACK AND HISPANIC VIEWPOINTS

Prepared by:

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Prepared in 1979;
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PREFACE

This paper was developed to present and examine Black and Hispanic views on the issue of immigration and undocumented workers. It was developed following interviews with Black and Hispanic leaders, as well as a review of pertinent literature. The paper describes what is known about the issue and points out what is not known. Interviews with leaders of national Black and Hispanic organizations were used to gain perspectives on the areas of agreement and disagreement between these two groups.

It is hoped that the paper will promote reasoned dialogue on this important nationally divisive issue, especially among the members of the Working Committee on the Concerns of Hispanics and Blacks. This national group was established in 1978 to explore, articulate, and advocate issues of concern to Blacks and Hispanics, and to encourage cooperation and joint action by the two largest U.S. minority groups. The Committee's founders are Mr. Carl Holman, President of the National Urban Coalition, and Mr. Raul Yzaguirre, President of the National Council of La Raza.

The material obtained for this paper through private interviews was provided with the understanding that the names and affiliations of those interviewed would be kept confidential. Any attributed quotations therefore come not from the interviews but from public statements or published documents.

I. HISTORY OF IMMIGRATION POLICY IN THE U.S.

The history of immigration policy in the United States has been shaded by the twin policies of economics and racism. Inequitable policies have been directed at a wide range of groups; for example:

> While the American population had little difficulty tolerating the involuntary immigration of millions of Black persons, it was quite intolerant of the voluntary immigration of persons from Italy, Poland, and Turkey coming to participate in the land of opportunity as free individuals.[1]

From the beginning of our nation, immigration policy has brought in additional workers when they were needed to aid the economy, and because of racial, ethnic, and religious prejudice has excluded immigrants whenever it was felt that the work force needed to be controlled. The first two immigration laws passed by the United States Congress were the Alien Act of 1798, which excluded potential political agitators, and an Act in 1807 that banned the importation of slaves.[2] There were no further federal laws in the following 70 years. During that time, laborers were imported to build the Erie Canal and pick and shovel workers were imported to build railroads. Many of those workers were refugees from the potato famine in Ireland and from other parts of Europe. Scandinavians and Northern Europeans were encouraged to homestead the farmland of the Midwest in areas where the federal government had granted huge tracts of land to the railroads to encourage westward expansion of transportation and commerce.

Chinese were imported, often against their will, as extremely cheap labor to build railroads in the West. But after the transcontinental railroad was completed in 1869, there was an increasing resentment of

the presence of the Chinese. In 1876, the Supreme Court ruled that the federal government could pre-empt all state authority in the area of immigration. In 1882, Congress passed the Chinese Exclusion Act which precluded Chinese immigration until 1943, when China was finally allowed a small annual quota of immigrants.[3]

During the middle and the late 1800's, workers were encouraged to migrate from Ireland and Northern Europe to work in the flourishing factories of Chicago and New York. Later in the century, when more workers were needed, immigration was also encouraged from Southern and Eastern Europe. At the time, this was considered to be a relaxation of racial and ethnic standards necessary in order to increase the labor supply for economic reasons. As the need for a growing industrial work force tapered off, resentment of darker-skinned Italians and Southern Europeans began to fester. In 1921, Congress passed the Quota Law which imposed the greatest restrictions against the smallest ethnic minorities then present in the United States. The Immigration Act of 1924, the next piece of legislation dealing with immigration, in effect gave a preference to Northern Europeans.[4]

Immigration from Mexico had grown rapidly from the mid-1800's to about the time immediately preceding the passage of the 1924 Act. Control of Mexican undocumented workers now became a paramount concern, and using the Immigration Act of 1924 as its legal reference, the Immigration and Naturalization Service (INS) spent nearly $1 million extra in patroling the U.S./Mexico border. Prior to this action, Mexican groups crossing the border did not concern the INS as much as other immigrant groups trying to come into the United States. These latter

groups included Europeans and Canadians. The effect of the extra patrols was to reduce Mexican immigration.

When unemployment skyrocketed during the Great Depression of the 1930's, the federal government acted by stopping immigration from Mexico and by deporting thousands of workers already in the U.S., including some U.S. citizens. Much of the Mexican and Mexican-American work force was deported illegally, on the basis of race and language. The start of World War II, however, saw another labor shortage in the United States, and again the federal government allowed both legal and undocumented Mexican immigrants to work here. A small-scale "bracero" program was initiated in 1942, to provide low-cost temporary agricultural labor. Immediately after the war in 1947, returning American soldiers flooded the U.S. labor market and the federal government again started deporting thousands of Mexican workers from California and Texas. In 1954, the military effort called Operation Wetback extended the massive deportation project to a number of U.S. cities. The total number of Mexicans expelled after World War II totaled nearly five million.[5]

The next major piece of immigration legislation, in 1951, established a full-scale "bracero" program. The program was initiated to deal with the problem of providing farmers with a stable, low-cost work force while at the same time dealing with the issue of undocumented workers. Many growers considered a "documented alien" work force as a practical, safe, and economically and politically feasible alternative to undocumented immigration. The braceros entered the country legally to work during the agricultural season; most came as single men. The number of documented Mexican braceros peaked at 445,197 in 1956 and

remained over 400,000 persons each year until 1959. In that year a steady decline began, and it continued until the end of the program in 1964.

The Immigration and Nationality Act of 1952 became the nation's basic U.S. immigration law. It was the product of extensive immigration study and brought together, for the first time, all the nation's laws on immigration and naturalization. It prescribed a total mechanism for dealing with immigration, detailing the conditions for admitting aliens into this country and allowing them to stay. The Act was administered and enforced by the Attorney General and the Secretary of State of the United States. Operating responsibilities, that is, the execution of the policies in the Act, rested with the Immigration and Naturalization Service (INS) and the Visa Office.

On October 3, 1965, another far-reaching revision of immigration policy in the United States was enacted. The Immigration and Nationality Act Amendments of 1965 repealed the national origins quota system which had been the cornerstone for numerical restrictions on immigration. The 1965 amendments rejected nationality and ethnic background as determinants of immigration policy and substituted instead a system of priorities based on (1) reunification of families and (2) skills needed in this country. However, far from diminishing the importance of the concept of numerical restrictions in U.S. immigration policy, the Act in its final form imposed an annual ceiling of 120,000 on Western Hemisphere immigration.

Further amendments were enacted in 1976 in order to fill the gaps left by the 1965 amendments. The focus had been so much on the repeal of the national origins quota system that policy-makers had not adequate-

ly considered implications of immigration policy on Western Hemisphere migration. Immigration policy up to that time hampered Western Hemisphere immigration to the benefit of Eastern Hemisphere immigration. The 1976 amendments modified the seven-point preference system already in use as well as imposing a 20,000 person per country per year limit on both hemispheres. This meant that the ceiling for the Eastern Hemisphere was to be 170,000 while the ceiling for the Western Hemisphere remained 120,000. The provision causing greatest controversy in the Immigration and Nationality Act Amendments of 1976 was the extension of the 20,000 limit to Mexico. Before this Act, immigration from all independent countries in the Western Hemisphere had been limited only by the over-all ceiling of 120,000 immigrant visas, exclusive of immediate relatives and with no per country limitation. The effect of the new quotas was to restrict immigration from the countries of Latin America, the area expected to have the greatest future population growth.[6]

One can gain a perspective on the number of undocumented immigrants coming into this country by citing more immigration figures. During the period 1934 to 1943, apprehensions of undocumented aliens averaged just under 12,000 per year. The number continued to rise annually, reaching a peak in 1954 when 1,089,583 aliens were apprehended. The 1970's have seen an increase in the number of apprehensions (and presumably in the number of undocumented workers trying to gain entrance into the U.S.). For instance, total apprehensions during the ten-year period 1960-1969 equaled 1,333,687. In the seven years 1970-1976, they equaled 4,579,880.[7]

In 1980, the Refugee Act was passed. It was designed to change procedures for determining who could enter the country as a political

refugee -- a classification used for Southeast Asian "boat people" and Cuban refugees, and generally denied Haitians, Ethiopians, and Latin Americans. Court challenges are further defining U.S. refugee policy.

More changes in immigration law and policy are likely. Major changes have been proposed by the Carter Administration. Reaction has been so varied, and the issues are so complex, that a Select Commission on Immigration and Refugee Policy was established, and is now in the process of formulating recommendations for a revamping of U.S. legislation, policies, and procedures governing immigration. Commission recommendations are expected at the beginning of 1981.

II. UNDOCUMENTED IMMIGRANTS IN THE U.S.

A. Flow of Undocumented Workers

Undocumented workers, most of them destined to become racial and ethnic minorities in the United States, continue immigrating to the U.S. in search of work at an estimated rate of 600,000 persons per year. However, this figure is based on a "flow" concept rather than as "stock" concept. According to Dr. Jorge Bustamante, among the foremost authorities on Mexican immigration, only 9% of the undocumented workers who enter the U.S. each year settle here permanently. Many cross the border several times a year, then return to their home countries. Others come for up to several years, then return home. The Washington Post recently has carried several articles describing temporary immigrants from small towns in El Salvador who use the money earned in the U.S. to buy small farms and build decent houses for their families.

B. Job Displacement

Undocumented immigrants are the most exploited and defenseless group in the United States. Yet at the same time, undocumented immigrants are widely believed to be displacing American citizens in the labor force, specifically unemployed Black and Hispanic citizens, in substantial numbers. The public believes this displacement to be particularly severe for blue-collar and/or low-skill jobs most often serving as a labor market entry for youth and minorities. Because unemployment in the Black community is presently at crisis proportions, Blacks are extremely concerned over this possible displacement. There is also concern among Hispanics, although they generally take a more

sympathetic view towards undocumented immigrants, due to cultural and linguistic ties. Some Black spokespersons are calling for the immediate deportation of undocumented immigrants as a quick-fix remedy for the chronically high unemployment rate. One Black official of a national organization admits that she is not sure whether Blacks would take menial jobs, such as picking cucumbers and harvesting lettuce, but according to her, "We're not going to find that out until the aliens are gone."

The Congressional Black Caucus has not taken a position arguing large-scale displacement. Instead, it is urging the President to reaffirm his commitment to his "war on joblessness" proposal. Other Black citizens make a direct link between Black unemployment and undocumented Hispanic immigration. In 1979 an article in Ebony magazine claimed that undocumented workers are syphoning jobs from Blacks, especially young Black men. It further stated that many disadvantaged Blacks "would work these jobs if only they were offered to them."[8] Similar statements concerning displacement of Black citizens by undocumented workers have appeared in articles by well-known Black columnist William Raspberry.[9] As he stated in the opening paragraph to a recent column on the subject, "...one small piece of the [unemployment] problem can be dealt with fairly simply: the displacement of American workers by illegal immigrants." Mr. Raspberry then goes on to commend Senator Walter Huddleston (D-Ky) for proposing "...an amendment to the Immigration and Nationality Efficiency Act of 1980 to make it unlawful for employers knowingly to hire illegal aliens. The penalty would be $1,000 per violation or two years in jail."[10] Hispanics are very much opposed to employer sanctions since these would lead to civil right violations against Hispanic U.S.

citizens in that they would bear the differential onus of having to prove their citizenship. They would moreover give employers an excuse for discriminating against Hispanics. Others have contended that employers seem to prefer "illegal aliens" because they can be exploited more readily than Black workers.[11]

Some Blacks argue that in certain places, such as Miami, their lack of fluency in Spanish has excluded them from jobs for which they are otherwise more qualified than their Hispanic counterparts. At least in areas where there are large concentrations of Hispanics, then, one implication is that otherwise equally skilled Blacks will have to acquire Spanish language skills in order to qualify for the same jobs. Blacks contend that the U.S. Office of Education is presently concentrating more of its efforts upon making Hispanics fluent in English and Spanish than in insuring that Blacks have the opportunity to acquire Spanish-language skills.

On the surface, the argument pointing to undocumented immigrants as the economic enemies of American citizens, and Blacks in particular, <u>seems</u> to make sense. The U.S. labor force is believed to include anywhere from three to 12 million undocumented workers.[12] There is little hard evidence, however, to indicate that undocumented workers are worsening U.S. unemployment problems. The massive unemployment we are experiencing now, as in the past, is symptomatic of the cyclical recessions so endemic to capitalistic economies.[13] Just as we can expect our economy to experience periods of tremendous growth, so may we expect this growth to eventually peak and to usher in a period of hard-times.

The idea that immigrants necessarily take away jobs of natives rests on the so-called "lump of labor" theory, namely, that "there is a

limited amount of work to be done in the country, and if a stranger is allowed to nibble at the lump, there will be less of it for the natives." Many reputable economists have shown this to be a fallacy.[14] According to the Conference Board's economist Harold Wool, for instance, the influx of young people into the labor force in the 1960's helped to upgrade the labor force position of Blacks because the young people were willing to accept, on a transitional basis, the menial, low-level, unskilled jobs formerly held by Blacks.[15] An immigrant work force can have the same effect. This argument acquires greater significance if one expects, as has been forecast, a labor shortage in the years ahead. Respected labor economists project that from 1982 to 1987 a declining number of young workers will be entering the labor force each year. Within this context, the migrations from Mexico can be looked upon as a mixed blessing, endowing American manufacturing with some competitive strength. Indeed, management theorist Peter F. Drucker predicts that the Southwest (a region experiencing much illegal migration) "may be the only region in the developed world to show a sizeable growth in traditional manufacturing industry in the next 20 to 25 years."[16]

Economists assert that the notion that at any moment in time, there exist only a fixed number of jobs in an economy, is a "short-run" perception. It is a conclusion reached without giving consideration to the full interplay of factors which immigration to an economy engenders. Job opportunities in a society will expand with a rising population as immigrants become a reason for the expanding number of jobs. For instance, an influx of immigrants to an economy means a rising level of social-capital and private investment expenditures as they stimulate the demand for public and private goods. The Dutch Centraal Planbureau

recently estimated that an annual addition of 1% of the total Dutch labor force would create a further labor shortage equal to one quarter of the original shortage after one year, if the immigrants had the same family size as the Dutch.[17]

Far from hampering an economy, then, an immigrant labor force contributes to job creation itself. Indeed, the favorable impact that immigrants have does not stop here. Many economists have characterized the American economy as segmented, with one sector being a "secondary labor market," a sector composed of jobs which the native population shuns due to the demeaning and/or onerous character of the jobs. In effect, American workers, in leaving this sector, create a vacuum which undocumented workers, bereft of other opportunities and eager to make money, fill. In the words of Grace M. Davis, Deputy Mayor of the City of Los Angeles, "If they [the illegal aliens] pulled out now, the garment, restaurant and auto repair business would fall over."[18] Without an immigrant labor force, in other words, many "marginal" labor-intensive industries would collapse, with adverse economic consequences for both domestic and foreign workers.

The fact that undocumented workers receive "sub-poverty" wages is widely recognized. In 1975, one out of every four undocumented workers earned less than $2.10 per hour; more than 65% received $2.50 per hour or less; and more than 95% earned $4.50 per hour or less.[19] In terms of occupations, the largest group of undocumented workers is concentrated in farm work, with many of the remainder occupying in extremely low paying service and industrial jobs. It is estimated that more than half of all undocumented workers are now going directly to the big cities, where they generally enter the labor market at the bottom of the salary

scale in such jobs as dishwashers or busboys. The majority of these urban undocumented workers are concentrated in domestic service and in janitorial, laundry, food processing, garment or shoe factory jobs.[20]

The acceptance by immigrants of low-status, low-paying jobs has, in time, another beneficial effect upon the host country economy, according to economists. As long as relative wages for different types of labor can change in response to an increase in the size of the undocumented population, there will not only be no increase in the rate of unemployment of the native population, but a general occupational upgrading. This will occur because an increase in the proportion of unskilled workers in the economy (in this case the undocumented worker) means a corresponding relative decline in the proportion of skilled workers in the labor force. The relative wage of skilled workers thus increases, causing an increase in the financial return for training for these skilled jobs. Workers in the lower skill grades will thus come to view training for higher skill jobs as increasingly attractive and in time a general upgrading in the level of skills on the part of the domestic population will occur. It is in this sense that immigration permits an occupational upgrading throughout the entire population.[21]

The economic benefit to the United States of Mexican immigration is best demonstrated by California agriculture, the most prosperous, diverse, and specialized in the world. When Cesar Chavez began organizing the farmworkers a few years ago, his opponents complained that paying them higher wages and granting them unemployment benefits and health insurance would make it impossible for California agriculture to compete with other agricultural states which did not treat their workers as well.

Available research suggests that there is some displacement of native workers by undocumented workers,[22] but it appears to occur narrowly, in the short-term, and not at the levels and not with the great consequences so widely circulated by the media. The consequences so widely predicted of massive distortions in the labor market due to the influx of undocumented workers (i.e., depressed wages and working conditions) seem to occur only in the simplest kinds of labor markets: those in which there are massive concentrations of low-skilled labor within a very compressed geographical area. In the words of former Immigration and Naturalization Service Commissioner Leonel Castillo:

> There is some displacement but the displacement effect is limited to certain skills, certain sectors of the economy, and certain regions of the country...It should be defined very narrowly, and I think it can be.[23]

Extensive research, moreover, has found that while Mexican undocumented workers receive low wages for low-status jobs, overall they are not paid less than U.S. workers who do comparable work. In other words, for most enterprises, illegal status per se is not a determinant of the wage level a person will receive. Clearly, then, if undocumented workers are not paid less for comparable work, one would not expect wage payment differentials to be a cause for displacement of the native population by illegals.[24]

There is one additional reason for optimism. Many economists have noted that all industrialized economies create a certain number of low-skilled, low-wage, low-status jobs which are rejected by nationals of those countries. Only under the harshest of consequences will these jobs be taken by the native population. In the U.S., according to labor market economist Eli Ginzberg, the number of such jobs has been increas-

ing relative to "good" jobs, at least since 1950.[25] A long-term case can be made for more foreign low-skilled labor if such is the case.

C. Costs to the Government

Along with job displacement, undocumented immigrants have also been charged with draining the U.S. social and welfare system and depriving American citizens of benefits. These accusations are not, however, of major concern to Black leaders. One of the biggest problems among Blacks is that they do not know what statistical sources can be trusted. They feel that these accusations are an attempt by "White America" to promote conflict between Blacks and Hispanics.

Indeed, the existing evidence on this issue appears to contradict the charges made against undocumented immigrants. The Domestic Council Committee on Illegal Aliens, a group formed by former President Gerald Ford, reported:

> Allegations of heavy alien use of tax supported income transfer programs are common. An examination of these programs show that a majority depend on characteristics such as old age, a female head of household, or disabled status for eligibility. Present information shows that illegal aliens are unlikely to be making heavy use of such programs due to very different personal characteristics. Our tentative conclusion is that the welfare use issue is overdrawn.[26]

A Department of Labor study presents more solid evidence. The undocumented workers interviewed in this study were far more likely to be paying taxes than they were to be receiving social services and welfare payments. Statistics from the study indicated the following:

Contributions to U.S. Economy

77% paid Social Security taxes
73% paid federal income taxes
44% paid hospitalization premiums
31% filed U.S. income tax returns

Drain on U.S. Economy

0.5% received welfare payments
1.3% received food stamps
1.4% participated in U.S. funded job training programs
3.7% had children in school
3.9% received unemployment insurance[27]

These findings are reinforced by a recent survey in the Adams-Morgan/Mt. Pleasant area of the District of Columbia. Out of the 33 documented immigrants questioned in the survey, only four utilized the Aid to Families with Dependent Children (AFDC) Program. Of the 23-undocumented people questioned, none had utilized the AFDC program. The following findings were also a result of the study:

- Four out of 42 legal residents questioned received general assistance while none of the 30 undocumenteds received general assistance;
- Five out of 41 legal residents questioned received emergency assistance and only two out of 28 undocumenteds received emergency assistance;
- Eight out of 38 legal residents received food stamps and none of the 30 undocumenteds received food stamps;
- Eleven out of 35 legal residents received Medicaid and none of the 30 undocumenteds received Medicaid;
- Four out of 42 legal residents received Social Security benefits while none of the 30 undocumenteds received Social Security benefits.[28]

These facts suggest that undocumented immigration is a large financial plus for this country. According to social scientist Wayne Cornelius:

> More generally, it could be argued that Mexican migrants represent something of a windfall for the United States in the sense that they are young, highly productive workers, whose health care, education, and other costs of rearing have been borne by Mexico, and whose maintenance during periods of unemployment and retirement is also normally provided by their relatives in Mexico. The significance of this windfall becomes more apparent when one considers that as of 1977 the cost of preparing a U.S.-born man or woman for integration into the U.S. labor force was about $44,000.[29]

The only social service that has been used in any substantial manner by undocumented immigrants is emergency medical services. This was evidenced in a study which found that 44% of undocumented workers had hospital insurance paid by themselves or by their employers.[30]

The fact is that the typical immigrant, whether entering the country with proper documentation or not, comes here to work. Only the most ambitious poor people of other countries come to the United States in search of work and a better life. They are striving for self-sufficiency and not hand-outs. Moreover, undocumented immigrants typically avoid applying for social service benefits for which they are eligible because they are afraid of being caught and deported. There is no evidence that a significant number of immigrants are taking money from the public treasury. Rather, they are contributing tax dollars from their earnings. Black leaders generally accept this assessment as accurate. Their concern about undocumented workers centers around the displacement issue, not use of social services.

Traditionally, undocumented workers in the United States have been tolerated only when there is the clear impression that they are serving the host country and giving more to it than they are taking out. When such workers are viewed as unneeded, e.g., during rough economic times, action to exclude them is urged. Businesses dependent upon their labor remain silent today, while the public mood favors their exclusion. Meanwhile, undocumented immigrants and their families are excluded from much of the human resources programming in our country. For instance, undocumented immigrants are legally excluded from the receipt of Supplemental Security Income (SSI) and from participation in employment and manpower training programs, the unemployment compensation program, the

AFDC program, and, in some cases, as in Texas, have even been excluded from attending public schools. Undocumented immigrants further, have no role in decisions affecting their lives since they lack the political right to vote.

D. Media Attention

The issue of undocumented workers coming in to this country has received much media attention. More often that not, the arguments have been made in a rhetorical style fraught with emotional and inflammatory language. This has typically been true in the general and White media, and also sometimes in the Black media. Casting the arguments in such a tone does little to point out the facts on this very controversial issue. The discussion of undocumented workers has focused on their alleged job displacement of American citizens and other deleterious effects. The following remarks are typical of what this media discussion has engendered:

> I believe in helping foreigners by sending them aid in disasters such as earthquakes, floods, and famine, but when I see them over-running our country by the thousands, crowding us and taking jobs that should go to Americans, I object!
>
> We feed, clothe, and educate them when many of our own go without. Those bleeding heart liberals are going to ruin this country if they don't get tough and shut down immigration until we can take care of our own. Charity begins at home!

Central to the discussion of undocumented workers is the fact that they are a powerless group at the bottom rung of American society. Inflammatory media discussion and public opposition serve to keep them there, creating, as Business Week recently put it, "a permanent, hidden underclass --frequently illiterate, reluctant to seek medical care, defiant of authority, and strangers to any notion of civil rights."[31]

III. POLICY TO CURB FLOW OF UNDOCUMENTED IMMIGRANTS

A. Employer Sanctions

The Carter Administration and a number of members of Congress have proposed various legislation that would apply sanctions upon employers who hire undocumented workers. In his remarks to the Congress of the United States on August 4, 1977, President Carter gave the following reason for proposing employer sanctions:

> "...to limit employment opportunities of those who are competing with American workers for scarce jobs..."[32]

Many Black leaders, although not all, argue that employer sanctions are the only way to curb undocumented immigration and job displacement of American citizens by undocumented workers. They support the President's program, which would make unlawful the hiring and recruiting of undocumented workers, and which would be "accompanied by severe penalties and enforcement powers for violation by both employers and employees and by a national identification card" for all citizens and legal immigrants.[33] They believe that employers who repeatedly hire undocumented workers should be prosecuted and fined. If undocumented workers are deported, they will make another attempt to re-enter the United States. If employer sanctions are imposed, however, it will prevent employers from hiring undocumented workers. Since undocumented workers do not know their rights with respect to minimum wage laws, pension plans, and Occupational Safety Health Administration (OSHA) requirements, employers hire them before the more knowledgeable Blacks. Many Black leaders thus contend that justice demands that since the employers profit most from the "illegal alien problem," they should pay the price.

Most Black leaders admit that employer sanctions have drawbacks, but as one said, "It's the best way we can think of" for dealing with undocumented immigration. Others, however, are adamantly opposed to employer sanctions. A case in point is Representative Walter E. Fauntroy of the District of Columbia. Congressman Fauntroy argues that "enforcement will not deal with the issue, [and that an effective policy will be a possibility only when we] understand that we are dealing with human beings, and are secure enough to deal with the root causes...."[34] Congressman Augustus Hawkins of California is also on record against employer sanctions.

The legislation proposed by the Carter Administration exempts employers from sanctions if they can demonstrate that they asked for and received some form of documentation of the job applicant's right to reside in the United States. In this way, by presenting documentation, Hispanic citizens and legal residents could relieve prospective employers from the threat of prosecution. But contrary to the Administration's argument, Hispanics contend that any type of employer sanction legislation would allow for "legitimized" discrimination in hiring. It would adversely affect all persons in this country, Hispanic or not, who speak with an accent or look foreign. It would turn employers into policemen, and it would increase the exploitation of undocumented workers since they would still come into the country in search of jobs.

The first danger to Hispanics is the possibility that only Hispanic applicants might be required to document their resident status to prospective employees. Unless the law and its implementing regulations were to require that employers demand such documentation from all applicants, regardless of race, language, or suspected national origin, it

would result in discriminatory practices against Hispanics. The second danger to Hispanics is that even if documentation were required of all applicants, employers might still discriminate by utilizing the option of requiring more extensive documentation from minorities than from other job applicants. The proposed law or its implementing regulations would therefore have to specify exactly what form of documentation would be required of every applicant. Blacks generally agree with Hispanics that having to furnish documentation is not a good idea. Having been faced with discrimination throughout their history, they realize that undergoing additional documentation checks provides avenues for further harassment.

To be equitable, the proposed employer sanctions law would have to provide for every job applicant in the United States to pass an identical test for establishing his/her right to reside and work in the United States. It is unlikely, though, that such an identical test would be instituted if an employer sanctions law were passed. There is no simple type of document possessed exclusively by all citizens and legal permanent residents of the United States that unmistakably identifies the holder and is not subject to counterfeit by others seeking false identification. Undocumented workers already possess Social Security cards, drivers licenses, counterfeit birth certificates, and other such documents. Counterfeiters who sell such documents would almost certainly step-up their job if an employer sanctions law that depended on such documentation were ever adopted.

An alternative proposal has been to establish a new, "counterfeit-proof" national identity card system. But such a system has two major drawbacks. One, the estimated cost of implementing such a plan is said

to be in excess of $500 million. And two, it infringes on the personal freedom of workers. Moreover, unless every job applicant in the United States were in fact required to produce the card for inspection by prospective employers, the impact of the national identification card system would be to discriminate against minorities.

Hispanic leaders consider all proposed employer sanction laws to be either unworkable or a threat to their civil rights. Hispanic leaders recommend not a new federal law but rather an enforcement of existing laws outlawing the exploitation and abuse being experienced by undocumented workers. They believe that many of the economic incentives that employers now have to hire foreign workers would be reduced substantially with more vigorous enforcement of minimum wage, job safety and other fair labor practices. A sincere commitment to full employment would also help alleviate some of the problems that employer sanctions pretend to resolve. Some Blacks, including Representative Walter E. Fauntroy, of the District of Columbia are in complete agreement. As he puts it,

> "Rather than formulating policies which are harsh and repressive and blame the victims of exploitation, I am taking a position that emphasizes penalization of exploitative employers who operate outside of our fair labor laws, deny the rights of collective bargaining, pay below the minimum wage, and who attempt to destroy the limited labor organizations we have by using defenseless and unorganizable undocumented workers."

B. INS Enforcement Efforts

The Carter Administration proposed legislation dealing with INS efforts to stop undocumented worker migration at the border. The following enforcement measures were recommended:

- An increase in and reorganization of enforcement resources at the border;

- Shifting of enforcement personnel to border areas having the highest reported rates of undocumented alien entry;

- Establishment of an Anti-Smuggling Task Force to seek ways to reduce the number and effectiveness of smuggling rings that systematically smuggle undocumented immigrants in the U.S.;

- An increase by the State Department in the issuing of visa resources abroad;

- Passage of pending legislation to improve criminal sanctions on those who knowingly use false information to obtain identity documents issued by our government, or who knowingly use fraudulent government documents to obtain legitimate government documents;

- Consultation with source countries of undocumented immigrants about cooperative border enforcement and anti-smuggling efforts.

Black leaders agree that several specific actions need to take place related to existing INS border efforts. One is an examination of INS practices which inhibit the effective execution of immigration policies and the determination of a means of correcting them. The second is an allocation of the necessary resources to effectively carry out INS purposes. A third is tighter border security. The fourth is a training program for personnel within INS, especially in its district offices.

Black leaders, agreeing with Hispanic leaders, have expressed the concern that Carter's plan to increase the number of patrol officers at the border would lead to more cases of police brutality. They contend that more officers would result in greater harassment of those persons who look and speak differently. Black leaders do not believe that this type of enforcement will help to curb the flow of undocumented immigrants.

Hispanic leaders oppose increased border enforcement because it reflects a commitment to enforcement as a solution to the problem of undocumented immigration rather than a commitment to socio-economic solutions. They also do not believe that it would help to curb the flow of undocumented immigrants. As one Hispanic leader said, "It would take nothing short of an army" to efficiently patrol the 2,000 mile U.S./Mexican border. Hispanic leaders also agree with Blacks that an increase in patrol officers would lead to an increase in harassment.

C. Other Alternatives to Stem Illegal Immigration

Some of the other proposals that have been advanced for dealing with undocumented workers are stepped-up processing of visa applications and cooperation with source countries.

Hispanic leaders support stepped-up processing of visa applications for two major reasons. First, it would be a just measure. And second, they believe it would help to curb the flow of undocumented immigrants. Hispanic leaders agree that attempts to correct the inefficiency of INS would also help to curb the flow of undocumented immigrants somewhat, but do not feel it would make any considerable impact. As one Hispanic leader stated, "The whole immigration policy of the United States needs revamping."

Carter's proposed immigration policy also includes a provision for cooperation with source countries. In this provision, Carter has promised to explore with source countries means of providing assistance. His plans include bilateral or multilateral economic assistance, technical assistance, encouragement of private financing, and enhanced trade or population programs.

Many Black leaders support cooperation with source countries. However, they do not support direct economic assistance. Instead, they support some type of economic development that would contribute to income redistribution. They feel that the best way of accomplishing this is through natural resource development. Natural resource development seems like a practical solution because of what it has done for such countries as Brazil in boosting economies and creating jobs.

Some Black leaders feel that the oil and gas discoveries in Mexico will help in this regard. They believe that potential immigrants will then stay in Mexico and many Americans will go there in search of jobs. Their reasoning is that immigrants would rather stay in their own country if they have opportunities there. Other Black leaders, however, see the oil and gas discoveries as benefiting only the relatively skilled workers at the expense of the relatively unskilled workers. These leaders feel that the unskilled, lower class of Mexico will still come in massive numbers to America.

Hispanic leaders wholeheartedly support cooperation with source countries. The United States and Mexican economies are already intertwined, so Hispanics would support assistance such as technology transfer and loans to Mexico. To other countries, such as the Dominican Republic and Guatemala, Hispanics would support direct economic aid.

Some Hispanic leaders feel that since former United Nations Ambassador Andrew Young pushed for economic aid to African nations, there is no reason why Blacks should not agree that Hispanic leaders can do the same for Spanish-speaking nations. As one Hispanic said, "America's heart is big, and I feel that she can do substantially more than what she was been doing."

The Carter Administration's proposed immigration policy also includes a provision for adjustment of status. It provides for a two-tiered "amnesty" system in which undocumented immigrants who have resided in the United States continuously from before January 1, 1970 to the present may apply to the INS for immigrant status. Those undocumented immigrants who have resided in the United States continuously prior to January 1, 1977, would become a new immigrant class, "temporary resident immigrants."

Black leaders support adjustment to permanent resident status for those who have met the health, moral character and public charge standards of the law. They believe that January 1, 1970 is a reasonable cutoff date and gives some assurance that undocumented immigrants will not rush into this country hoping they they will come within a more flexible adjustment period. Black leaders, like Hispanic leaders, find Carter's temporary resident status provision to be questionable, since there is no assurance that the undocumented immigrants will not be deported at the end of the five-year period. The temporary resident status provision does, however, remove the fear of apprehension for five years, and provides protection of the law under fair labor standards and health and safety standards for the working environment.

However, even though Black leaders support an adjustment of status policy, they do not think that it would solve the problem of undocumented immigration. They argue that some immigrants would falsify their arrival date to the U.S. in order to meet the requirements of the Administration's proposal. Black leaders consider the chances of success for an adjustment of status policy to be nil, because unless the President of the United States announces on a set date that one group of immigrants

will become permanent residents and another group will be deported, there is too much opportunity for falsification. They also believe that such a statement would be politically unfeasible.

Hispanic leaders support a liberal adjustment of status policy. Some will support any policy from unconditional adjustment of status to a two-tiered system like that proposed by Carter, but with a change of the cutoff date. Hispanic organizations support July 4, 1976, the U.S. bicentennial, as the cutoff date, rather than January 1, 1970.

Since Hispanics feel that Congress would not support an unconditional adjustment of status policy for undocumented immigrants, a compromise has to be reached. One Hispanic leader suggests the idea of a "jubilee year" policy, which would provide for a year of adjustment of status every ten years by the federal government.

D. Temporary Worker Programs

The Carter Administration's proposed immigration policy also provides for a comprehensive review of the current temporary foreign worker (H-2) certification program. The President expressed the belief that this program can be structured to meet the needs of both employees, by protecting domestic employment opportunities, and employers, by providing a needed workforce.

Black leaders perceive temporary foreign worker programs to be a source of exploitation and discrimination. As the head of one national Black organization said, "These programs are a cop-out" for employers who want to hire workers they can exploit. Black leaders believe that temporary foreign worker programs contribute to the creation of a subclass because temporary workers compose a group of people who will continue to be exploited and will never "make it" in U.S. society.

Black leaders are also worried about the impact of these programs on domestic employment. In a recent case in Virginia, unscrupulous farmers were bringing in women from Jamaica and Haiti, under the existing H-2 program, to pick apples. Blacks argued that employers were using these workers to keep from giving the jobs to them. The incident produced publicity to the effect that the H-2 program was being used to displace native Black workers with low-income workers from foreign countries.

Hispanic leaders are also generally suspicious of the temporary foreign worker program. They are afraid they will turn out to be like the "bracero" program, when many workers were actually brought in as strikebreakers. Hispanic leaders agree with Blacks that a temporary foreign worker program lends itself to abuse because many employers use it to exploit these temporary workers and to depress wages. They contend that temporary foreign worker programs contribute to the creation of a "sub-class," i.e., a stratum of society which is the poorest of the poor and with few avenues for advancement. Moreover, like Blacks, they believe employers sometimes hire foreign workers when citizens are available, because the employers have greater control over "guest workers."

The British Crown Colony of Hong Kong has established rules that grant an undocumented worker full citizenship if he escapes sophisticated detecting devices. Hong Kong, in effect, does not want the establishment of an underclass of persons with less rights than its citizens. Some Hispanics in this country legally are still in a sub-class, so they can sympathize with the undocumented workers on this issue. As one Hispanic leader said, "We are second-class citizens, but such a sub-class is even below them."

Insofar as this country is concerned, Blacks and Hispanics must work out a compromise which recognizes immigration as providing a needed work force while at the same time having provisions that the immigration will not cause the presumed massive distortions in the labor market.

IV. VIEWS OF BLACKS AND HISPANICS ON UNDOCUMENTED IMMIGRATION

A. Black-Hispanic Coalition

Blacks, like Hispanics, form coalitions to increase their influence and their resources. As the largest minority group in the country, Blacks are gaining power at the municipal level and at the national level. They have done this through a period of activism, and by building strong coalitions based on familiar American political principles.

The events of the 1960's convinced Hispanics that their best interests would be served if they turned inward. Hispanics have therefore been attempting to build strong political and service organizations within their own communities. Blacks, having achieved these goals more fully, have reached out beyond their own communities to work with other groups for mutually valued purposes. Hispanics, too, have begun this process.

Although there is still tension between Blacks and Hispanics on many issues, there is some cooperation taking place. In 1978, in Washington, D.C., national leaders of Hispanic and Black organizations formed the "Working Committee on the Concerns of Hispanics and Blacks." This committee is comprised of Black and Hispanic leaders working jointly to promote understanding of each other's current national public policy objectives and to promote collaboration, cooperation and coalitions in support of jointly held goals. Membership of the Working Committee consists of the heads of many of the nation's largest Hispanic and Black organizations, including the National Urban Coalition, the National Council of La Raza, the National Urban League, the League of United Latin American Citizens (LULAC), the NAACP, the American G.I.

Forum, ASPIRA, and several others, including women's organizations and other organizations representing Puerto Ricans, Cubans, and Chicanos.

At a meeting on February 26, 1979, the Committee agreed to eliminate unnecessary friction on the issue of undocumented workers. Hispanics explained that attempts to penalize employers who hire undocumented workers cause discrimination against Hispanic citizens and legal residents of the United States. Black Committee members agreed to issue no further statements on undocumented workers until they have first conferred with Hispanic leaders to reach a better understanding of Hispanic concerns. Since that time, joint statements have been made on several immigration issues, including the influx of Cuban refugees.

B. Perspectives on Immigration and Undocumented Workers: Summary and Analysis

Interviews with Black and Hispanic leaders identify areas of agreement as well as disagreement on immigration and undocumented workers. Areas of greatest agreement include:

- Necessity of refraining from making statements that would be detrimental to the unity of Blacks and Hispanics;
- Elimination of the violation of the human rights of undocumented workers, including the elimination of job discrimination and economic exploitation;
- Humane treatment for those undocumented immigrants who are apprehended, including more rapid processing by the INS of apprehended persons and reunification of families;
- Reunification of families (Blacks can identify with this issue because it is a humane issue and because they faced the same problem when their family members were separated during times of slavery);
- Need for stronger laws to reduce the number and effectiveness of the smuggling rings which smuggle undocumented immigrants into the United States;

- Necessity of addressing economic problems in source countries;
- Increase in the immigration quota for Mexico;
- Some version of an adjustment of status policy;
- Limitation of the H-2 Program; and
- Need for revision of immigration laws.

There is broad agreement that Black and Hispanic leaders must resist allowing areas of disageement to divide them.

Many Black leaders feel that the proposed Carter Administration's immigration policy is an effort by "White America" to pit Blacks against Hispanics, recognizing this as one way to insure that Blacks and Hispanics do not unite and gain strength. Moreover, both Black and Hispanic leaders feel that the Carter Administration's immigration policy serves to maintain the present racial imbalance of the population through forced control mechanisms, and creates a scapegoat to be blamed for this country's economic difficulties. Black and Hispanic leaders agree that attention is hardly ever concentrated on the relevant issue: recognition that the prevailing immigration policy of the United States is unenforceable and inequitable. Instead, undocumented immigration is increasingly being perceived as a threat to the welfare of the domestic labor force. The real issue at hand is whether or not the United States should implement an immigration policy that can accomplish its stated purpose of regulating immigrant flow, encouraging reunification of families, and meeting U.S. skill needs.

In spite of this recognition of the danger of allowing the undocumented worker issue to split the two groups, there are several significant areas of disagreement, as discussed throughout this paper. They include:

- Need for action to avoid perceived displacement of American workers -- including employer sanctions;
- The question of who is a "political" refugee;
- Extent of economic aid to source countries;
- Scope of adjustment of status programs; and
- Extent and focus of immigration law revisions.

The most divisive issue remains the question of displacement, and the resulting acceptability of employer sanctions. Black leaders do not put much stock in the economic hypothesis that immigrants stimulate job opportunities for native workers. They argue that the immediate impact of the immigration of undocumented workers is to create much hardship and unemployment.

One Black leader was asked for an opinion of the hypothesis advanced by the Preliminary Report of the Domestic Council on Illegal Aliens in 1976 that immigrants, by depressing unskilled worker salaries (and thereby raising in relative terms the wages of skilled workers) upgraded the native worker force into higher skilled occupations. He decried such theories as ignoring the realities of the labor market, by not recognizing that displaced workers are displaced for long periods of time and that long-run benefits from immigration, if they occur at all, occur only in a very distant future. Moreover, employer programs to help those displaced would be hard to develop since one wouldn't know exactly which workers were being displaced by the immigrants.

Overall, Black leaders share many of the civil rights concerns of Hispanic leaders, but often disagree on the economic issues. Black leaders feel that the undocumented workers coming into this country are definitely taking jobs from unskilled Blacks. As one national Black organization official put it, "It all boils down to jobs." When His-

panics and others argue that undocumented workers are taking jobs that Americans do not want, Black leaders disagree. As one Black leader said, "That's pretty hard to tell your constituents when they are sitting there without jobs." Hispanic leaders do not argue that jobs are not at issue. However, they state that the dimensions of the problem are unknown, and believe that the help undocumented workers afford this country can, in principle, be much greater than the harm.

Another potentially divisive issue is the question of who shall receive political refugee status. The recent influx of Cubans has sharpened this concern. On the one hand, some Blacks believe that Cubans are displacing Black citizens and exacerbating an already serious employment problem in Miami. While this problem was not the direct cause for recent civil disturbances in Miami (it resulted directly from a "not guilty" decision by a jury in the case of a Black killed by four policemen), it is considered a related issue. On the other hand, Blacks believe that the political refugee status afforded Cubans should also be applied to Black refugees, particularly Haitians and Ethiopians. Hispanics generally support this view, and the courts recently agreed on the Haitian issue. Citing that his courtroom was "populated by the ghosts of individual Haitians -- including those who have been returned from the United States -- who have been beaten, tortured, and left to die in Haitian prisons," Judge James J. King of the Federal District Court in Miami, on July 3, 1980, ordered Haitians to be accorded political refugee status under the Refugee Act of 1980.[36]

The immigration issue may be prevented from seriously dividing Blacks and Hispanics by serious efforts at mutual support, such as joint statements in support of both fair treatment of the Cubans and similar

political refugee status for those from other countries, Caribbean, Latin American, and African.

While media articles, such as Mr. Raspberry's and those covering the Miami riots in June 1980, continue to present divisive viewpoints, there is considerable evidence -- based on interviews conducted for this study -- that both Blacks and Hispanic leaders are eager to listen to each other, and to maximize areas of agreement. In the case of the Miami riots, for example, Black leaders, despite media assertions pointing to Black-Cuban emmity know full well that the precipitating catalyst was the acquital of four Miami policement accused of killing a Black man by in all White jury. At least with the Black leadership, then, mutual understanding of the problems confronting two exploited peoples is possible. Similarly, because of this common bond, agreement on civil rights issues should be possible.

Differing views of the economic issue remain difficult to resolve. Blacks have fought hard for the rights and the opportunities they have attained. They empathize with their "Brown brothers and sisters," and Black leaders indicate a desire to help them acquire their full civil rights. Yet they oppose any policies or practices which they view as threatening their own hard-won gains. Thus Black/Brown consensus on undocumented worker issues remains difficult. However, increased dialogue, especially within groups such as the Working Committee on the Concerns of Hispanics and Blacks can serve to identify areas of Black/Brown agreement and minimize the divisiveness resulting from areas of disagreement.

FOOTNOTES

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6. Select Commission on Immigration and Refugee Policy, 96th Congress, "U.S. Immigration Law and Policy: 1952-1979."

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8. Jacquelyne J. Jackson, Ph.D., "Illegal Aliens: A Big Threat to Black Workers," Ebony, April 1979, p. 34.

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29. Lou Cannon, "Three Cheers for Illegal Aliens," Washington Post, August 5, 1979, Sec. B, p. 1.

30. Ibid, p. 3.

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32. President Jimmy Carter, "Undocumented Aliens," Remarks on Transmitting a Message to the Congress, August 4, 1977, p. 1169.

33. President Jimmy Carter, "Undocumented Aliens," Message to the Congress, August 4, 1977, p. 1170.

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Perspectivas Públicas

NATIONAL COUNCIL OF LA RAZA
Office of Research, Advocacy, and Legislation

Backgrounders

Number: Two

Date: March 23, 1981

Title: Sunset Legislation

Contact: Janet Schroyer

Sunset legislation is currently being considered by the 97th Congress, and some version will most probably be passed during this session. The National Council of La Raza is opposed to many of the elements found in some proposed Sunset bills, and plans to monitor their progress and attempt to defeat their passage. Should the opposed version of Sunset legislation be passed, many key social and economic programs could be indiscriminately eliminated under the Sunset process.

The attached paper analyzes the possible effects of implementing a Federal Sunset law and looks at the alternatives offered by concerned members of Congress. With this background, the National Council of La Raza and members of its advocacy network will then be able to formulate a sound understanding of the various aspects of proposed sunset legislation and develop well-thought-out positions on such proposals.

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NATIONAL COUNCIL OF LA RAZA

ISSUE ANALYSIS

ON

SUNSET LEGISLATION

Prepared By:

Janet L. Schroyer

January, 1981

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SUNSET LEGISLATION

Introduction

"Sunset" is a concept which was originally instituted in several states as a means of increasing legislative control over state programs. The basic premise behind such legislation is the need for a systematic method for evaluating established government programs and determining the need for continuing them in light of changing priorities. These reviews are usually scheduled on a rotating basis, depending upon the number of programs, agencies, or boards covered by the Sunset legislation in that state. Oftentimes, Sunset laws include a provision for automatic termination of programs if the legislature fails to approve their continuation by a specified date.

The U.S. Senate and House of Representatives are expected to consider bills during the next seesion of Congress which would institute Sunset legislation at the federal level. Several versions of such legislation have been considered by Congress during the previous two sessions, but in spite of the diversified support, there was disagreement concerning the appropriate scope of the Sunset activities. The 96th Congress failed to pass any version of this legislation prior to its adjournment. However, Sunset legislation will almost certainly be introduced and seriously considered by the 97th Congress.

History of Sunset in the States

The Sunset concept was popularized in 1975 by the Colorado Chapter of Common Cause. Public meetings were held throughout the state of Colorado to publicize the tenets of Sunset, and these succeeded in obtaining strong support for the passage of such innovative legislation which would control the "rampant" spending of tax dollars. The concept

of Sunset quickly attracted interest in other areas of the country, and even before the Colorado Legislature passed its legislation in 1976, similar bills were pending in California, Illinois, Florida and Louisiana. Currently, over 30 states have Sunset laws, and several other states have included Sunset provisions in newly created government programs.

Colorado's Sunset legislation is generally considered to be the model state Sunset law. Under this legislation, 39 of the state's regulatory boards and commissions are subject to legislative review every six years. Following a performance audit conducted by the State Auditor's Office, the legislature holds hearings to determine public sentiment. Incorporating the findings of both the audits and the hearings, the legislators then decide whether to reauthorize, modify, or eliminate the board or commission under consideration. There is no automatic termination deadline should an agency fail to be reauthorized prior to its "Sunset date"; in fact, the Legislators gave themselves an extension in 1977 when they foresaw their inability to evaluate five of the agencies under consideration. This review process resulted in six agencies being terminated and 19 modified from 1977-1979 in the state of Colorado.

Other states have been less successful in implementing their Sunset reviews. The principal deterrent to successful implementation is the factor of time. The burden of conducting several comprehensive reviews each year in addition to the already pressing schedules of most legislators and their staff members has proven a major obstacle in effectively implementing Sunset laws. Many legislators have found that the time required to conduct a thorough evaluation of an agency or program greatly reduces the time they are able to devote to other legislative

business. Some states have found it necessary to hire additional staff to handle the increasing workload, while others have formed special committees to deal solely with Sunset reviews. Without such additional manpower, many states would be unable to thoroughly evaluate the agencies which were designated in the Sunset legislation. This would in fact make the process meaningless, as agencies would fail to be properly reviewed, thereby making it impossible for legislators to make logical and accurate decisions regarding their fate. It is generally felt that the factors of time and energy will be of even greater concern should more extensive and complex programs be subject to Sunset laws in the future.

States have also found it difficult to determine the overall effectiveness of their Sunset laws. Many foresaw that enacting Sunset reviews would decrease wasteful government spending by modifying or eliminating ineffective agencies. However, such was not the case in many states. These states found that it cost them more to conduct the Sunset reviews than it cost to continue to operate the terminated agencies. The Colorado State Auditor had the following observations regarding the Sunset process:

> If the criterion to determine if Sunset is cost beneficial is the elimination of regulatory boards with their associated expenditures, compared to the cost of reviews, then it is definitely not cost beneficial to continue the reviews.

This statement, and other similar observations, suggest the difficulty of judging the worth of comprehensive reviews. However, there are several positive nonmonetary effects cited by state lawmakers during discussion of Sunset bills. By institutionalizing the review process, legislatures now feel compelled to critically evaluate agencies'

performance, thereby improving government services, as well as government spending practices. Agencies are motivated to improve their effectiveness and efficiency in the knowledge that their work will be thoroughly analyzed on a regular basis. This thereby creates an internal improvement process within the agencies which encourages them to institute corrective methods independent of the legislative mandates incurred during the review process.

Most state legislators agree that Sunset laws can be successful when applied to relatively "minor" agencies, as has been the case in the states to date. However, when asked to conceptualize the transfer of such Sunset legislation to broader areas of government, some lawmakers think that it would be an unsuccessful move. Many feel that it is unrealistic to think that a termination deadline can force comprehensive reviews of major agencies such as those responsible for education, social services, or corrections. They think that it is impractical to consider terminating these agencies. They also doubt that such major regulatory agencies as banking, insurance, or public utilities could be terminated. However, they do not deny the effectiveness, and need for, proper evaluation and improvement in the operation of these agencies. It is simply doubted that Sunset reviews are the proper vehicle for conducting such evaluations.

Sunset at the Federal Level

As stated earlier, several attempts have been made during previous Congressional sessions to enact some form of Sunset legislation at the Federal level. The introduction of this concept in the U.S. House and Senate has sparked widespread discussion regarding the applicability of Sunset reviews to the complex Federal programs authorized by the Congress.

While most Congresspersons feel that legislative oversight should be improved, there is disagreement concerning the extent of this added responsibility. Some feel that it is at the heart of Sunset legislation to include automatic termination deadlines which would force Congresspersons to take some action to assure the improvement and continuation of existing programs. Others feel that automatic termination deadlines are detrimental to the goal of thoroughly evaluating programs in order to assess their strengths and weaknessess and develop changes which would improve their administration. These Congresspersons think that a system in which programs faced the threat of termination every few years might result in the arbitrary "death" of valuable programs if Congress failed to reauthorize them prior to their "Sunset dates". Controversy has also centered on the scope of programs to be reviewed under the Federal Sunset Law. Many lawmakers feel that specific dates should be designated in the legislation for the review of predetermined programs. Others feel that each Congress, and each committee in particular, should be responsible for identifying the programs it wishes to review during the upcoming session of Congress. This would allow the legislators the flexibility to review key programs dependent upon changing national priorities and independent of a preconceived schedule of review. Such a system would also limit the burden on Congress to review innumerable programs during a given session, with little time to devote to throughly evaluating any of them.

The varying perspectives described above have resulted in the development of two distinctly different Federal Sunset bills. The first calls for the review of virtually every program authorized by Congress, with between 150 and 200 programs subject to review every two years (See

attachment 1 for a partial listing of these programs). Under this version, programs would be reviewed by the legislative committee with jurisdiction in the area, and recommendations would be made to the full House and Senate. It would then be necessary for the House and Senate to vote to reauthorize the programs and for the President to sign the bills. Any program which failed to be reauthorized by its "Sunset date" would automatically be terminated.

This version, which succeeded in passing the Senate during the 95th Congress, was reintroduced during last year's 96th session by Senator Edmund Muskie (D-Maine). A similar bill was also introduced in the House that session by Representatives James Blanchard (D-Michigan), Norman Mineta (D-California), and Richard Gephardt (D-Missouri). While neither of these bills passed during the 96th session, strong support was gathered and a major move for passage is expected during the up-coming year. This was made apparent in the House when Representative Blanchard reintroduced his version of the law during the initial days of the 97th Congress, calling for the assignment of the same bill number that it had carried during the previous session, H.R. 2.

Senator David Durenberger (R. Minnesota) is expected to introduce a bill in the Senate similar to that introduced previously by Senator Muskie. This version is almost certain to pass quickly out of the Governmental Affairs Committee, which will review it first, as this Committee approved the bill during the previous session of the Senate.

A second version of Sunset would permit each committee to select those programs which it felt needed to be reviewed during a given session. The full Congress would then be able to add to, or subtract from, the committees' lists. This version calls for the review of 30% of the

programs within a committee's jurisdiction every six years. These reviews would have to be completed by the second session of Congress, and while the findings would have to be reported to the full Congress, there would be no requirement that the committee report any legislation continuing, modifying, or terminating the programs under review. Therefore, programs under this version would not automatically be terminated on a specified date.

This version of Sunset actually developed through Committee hearings when the original version was under consideration. While the original version was supported by both the House's Governmental Operations Committee and the Senate's Governmental Affairs Committee, both the House and the Senate's Rules Committees modified the original version and produced bills similar to this second version of Sunset. The Senate Rules Committee modified the original bill through amendments, which actually resulted in the two versions having the same bill number, distinguishable only by the Committee which had reported the bill. However, in the House a separate bill was finally introduced by Congressman Gillis Long (D-Lousiana), Chairman of the House Rules Committee. This bill, which reflected the concepts of the "second version", failed to pass during the 96th Congress, but was reintroduced by Representative Long in January, 1981, and numbered H.R. 58.

Opposition to Original Federal Sunset Law

While a diversified base of support has developed for the passage of a Federal Sunset bill, there are an equally large number of opponents to such legislation. Civil rights groups, unions, education groups, senior citizen organizations, and other nonprofit social change organizations have united to stop passage of the original version of the bill.

Under this version, with its automatic termination deadlines, social advocates fear that vital but controversial social and civil rights programs, which have taken years to develop, will be indiscriminately cut as Congress fails to reauthorize them prior to their Sunset date. Congressional leaders who opposed a particular program would be in a position to expedite its termination simply by doing nothing. The uncomplicated process of termination found in the original Sunset bill could become an easy method of eliminating many programs which benefit the poor, minorities, the aged, and other needy populations.

A related concern is the possible termination of "costly" social programs as Congress seeks to lower budgetary levels. With the current political sentiment for lowering government spending and balancing the budget, Sunset reauthorizations could prove an easy means for Congress to cut spending levels by simply terminating or modifying programs which are viewed as "wasteful" or "uncontrollable". Many groups believe that the victims of Sunset will inevitably be major social programs which currently lack strong political support due to the recent changes in Federal leadership.

Programs could also be threatened with illogical termination due simply to the lack of time available to reauthorize the immense number of programs concurrently scheduled for review. Implementing the proposed Sunset legislation could result in an overwhelming increase in the Congressional workload. In light of the current overload of work lamented by many Congresspersons, it appears inconceivable that they could be able to effectively review all of the programs set forth in the original Sunset bill, while still maintaining their current workload. Senator Howard Baker (R-Tenn.) estimated, in his testimony before the

Rules Committee, that floor activity on authorizations would increase by at least 20 percent if Sunset were implemented. This means that Congresspersons would most likely be unable to devote the time necessary to accurately review all of the affected programs and make critical decisions regarding their continuation. It is suspected that the current Congressional staff would also be inadequate for meeting the increased workload. This could mean that data collected for the Sunset reviews and reports developed for the use of Congresspersons in making their decisions would be inaccurate, incomplete or biased. This could in turn result in programs being terminated on the basis of such imprecise data, without conscientiously accurate evaluations.

Opponents to Sunset also worry that more "pressing" issues will take precedence over the Sunset reviews, thereby sentencing many ongoing programs to needless deaths, simply because Congress has insufficient time to complete their reauthorization. These concerns seem not unfounded, in light of the continuing budget resolutions hurriedly passed during the final days of the 96th Congress to maintain Federal agencies which would otherwise have been without funds. This type of last-minute legislation reflects the system under which many Sunset reviews might take place. Social advocates feel that such a negative, pressurized environment is not proper for conducting meaningful evaluations which will have lasting impact.

Conclusion

The concept of increasing governmental oversight of programs in order to prevent wasteful spending of tax money is sound. There is little disagreement regarding the need for such a process. However, many organizations doubt that Sunset, particularly in its "original"

version with automatic termination of programs on a specified date, will be capable of providing this review capacity. Of particular concern is the feasibility of implementing such Sunset legislation at the Federal level. It appears that numerous logistical barriers will make it difficult to effectively institute Sunset reviews which will accomplish their intended purpose.

With the imminent reintroduction of several versions of Federal Sunset bills, it appears that there will once again be major debate surrounding the passage of such legislation. Sunset, as outlined in the original version, could have the following positive effects:

1. Compels the Congress to evaluate and exercise its oversight responsibilities;
2. Avoids continuation of an agency or program simply because it currently exists;
3. Institutionalizes the evaluation process; and
4. Creates an incentive for programs to implement corrective administrative changes on their own.

However, the following negative aspects of the original version of Sunset have been noted as well:

1. Relatively simple termination of successful but controversial social programs as opponents fail to reauthorize them by their Sunset date;
2. Over-emphasis on maintaining existing programs rather than developing new ones;
3. Possible termination of social programs as a means of decreasing government spending;
4. Lack of time for Congresspersons to thoroughly evaluate all of the designated programs;
5. Loss of time to devote to other Congressional matters;
6. Need for additional staff persons to carry out Sunset reviews and develop recommendations; and
7. Possible last minute decisions on the fate of major programs.

The National Council of La Raza will closely monitor the introduction and debate surrounding all proposed Sunset laws. The Council will work with other organizations concerned with minority and low-income Americans to develop sound analyses of the implications inherent within the proposed bills. In all likelihood, the National Council of La Raza will oppose any Sunset bill which would allow for:

1. Automatic termination deadlines;
2. Scheduling of an excessive number of reviews during a single session of Congress;
3. No distinction between the review of minor programs and complex programs;
4. Indiscriminate termination of programs based on changes in budget priorities, rather than on the findings of thorough evaluations; or
5. More money being spent to conduct the reviews than is saved by the termination or modification of ineffective programs.

These issues concern many civil rights groups and other social advocacy organizations. It is expected that in the future the concept of Sunset legislation will gain more widespread support as it is linked with other proposals to cut government spending and decrease Federal involvement in social programs. With this in mind, organizations such as the National Council of La Raza will need to create a strong base of opposition to Sunset legislation containing the negative elements described above,in order to counter the growing support for such a law.

The National Council of La Raza could support an alternative version of the Sunset bill, which does not have automatic termination deadlines and allows committees to decide which programs to review. As Sunset legislation is introduced in Congress and bills are made available to

the public, the Council will review the provisions of each and determine which could be supported by the Council, in view of the preceding requirements. It is NCLR's hope that a review process can be developed which will improve the quality of Federal programs, while continuing to guarantee the continuation of necessary services to minority and low-income individuals.

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NATIONAL COUNCIL OF LA RAZA
Office of Research, Advocacy, and Legislation

Backgrounders

Number: Three

Date: March 23, 1981

Title: Spending Limitations

Contact: Patricia Dominguez Greene

The Issue

The current economic crisis has created a new conservative mood in Congress characterized by a sense of "Balance the Budget Fever." Numerous bills have been introduced proposing formula spending limit measures which would provide an overall programatic discipline legally obligating Congress to limit government spending in accordance with the various formulas proposed.

While none of the bills proposed actually reached the floor in the last Congress, political expediency indicates that the concept will be reintroduced in the 97th Congress.

Purpose of Analysis

Any attempt to limit spending will immediately affect opportunity creating programs which are currently utilized by the Hispanic Constituency. Cuts currently proposed by the Reagan Administration clearly indicate this fact.

Understanding of the issue and the many perspectives relevant to it will enable NCLR to examine the impact of the various proposals on the Hispanic community. Policy and testimony in support of our positions can then be formulated.

Recommendations

NCLR must continue to monitor this issue, closely examining its development. Congressional representatives must be continuously reminded that a law limitng spending must not allow disproportionate cuts for the Hispanic population.

NATIONAL COUNCIL OF LA RAZA

ISSUE ANALYSIS OF

SPENDING LIMITATIONS

Prepared By:

Patricia Dominguez-Greene

February 1981

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SPENDING LIMITATIONS

I. INTRODUCTION

A. The Congressional Budget Process

The Congressional Budget and Impoundment Act of 1974 (P.L. 93-344) represented an historic legislative development. It equipped Congress for the first time with the procedures needed to assert proper control over the federal budget. In the past, Congress had been unable to develop an overall budget policy because it lacked both the required technical information and adequate procedures. Each session it would consider 13 separate appropriations bills, several supplemental requests, and any number of "backdoor" spending proposals ("Backdoor" authority is a term generally used to denote legislation enacted outside the normal appropriation process that permits the obligation of funds). Congress would consider these various measures at different times and upon the recommendations of different committees. Tax decisions were also made separately.

At no time had either the House or Senate or any committee considered the overall level of federal spending in relation to either projected revenues or general economic conditions. The Congressional Budget Act was enacted to correct these inadequacies. It established committees on the budget in both House and Senate, with primary responsibility for developing and coordinating a comprehensive budget policy each year. To ensure both committees and Congress an adequate source of budget expertise, it also created a new non-partisan Congressional Budget Office (CBO).

The 1974 Budget Act also disciplined Congressional procedures. It provided for the adoption each session of a series of "concurrent resolutions on the budget." Under the Budget Act, the House and Senate must agree on the First Budget Resolution, which sets spending targets, expected revenue levels and the budget deficit for the coming fiscal year. While these targets are not legally binding on Congress, they do provide guidelines as individual taxing and spending decisions are made throughout the year. The Budget Committees are required to report out the first budget resolution by April 15. By May 15 Congress completes action on the first budget resolution. The second budget resolution must be completed by September 15. The second resolution sets spending and taxing figures which are binding on the Congress. Members of Congress cannot spend more unless an amended third resolution is passed.

Within the structure provided by the Budget Act, Congress already has the tools to "limit" spending through a variety of steps in the process:

- When considering "new" legislation or authorizing legislation Congress examines the substance of programs and sets or "authorizes" the maximum amount of money which can later be appropriated to those programs.

- On an annual basis, Congress reviews legislation and makes decisions on the amount of funds it will appropriate to various authorized programs.

- Through "reconciliation" Congress can re-examine the original law and change the amounts of money authorized. This technique is a relatively new one which is being utilized more and more. It allows Congress more autonomy in that the usual public review process (such as the public hearings during reauthorization) can be circumvented.

The problem of controlling spending arises when politicians have to consider the pressures placed on their chances for re-election when they are forced to prioritize which programs will expand or receive cuts or even be ended. Almost everyone agrees that there is a need to cut government spending, but when faced with the prospect of slashing funds for their own "pet" programs, which help maintain the support of the voters back home, balancing the budget presents serious problems.

The conservative mood of the country (as demonstrated in the last election), the rise in inflation and the pressures to increase defense spending have caused an environment of impatience which has propelled a keen interest in finding a quick and simple solution to the problem of capping government spending.

B. The Problem

Even with an annual federal budget of approximately $600 billion, there is not enough money to go around. Resources are limited, and choices have to be made. The major obstacle to any attempt Congress makes to balance the budget has been the tremendous growth of "entitlement" programs; Social Security, Medicare, Medicaid, educational grants, food stamps, and many other endeavors that give individuals legal claim to federal funds constitute the "entitlement" programs.

While there is much support for continuation of these social service programs, in both a political and practical sense it is very difficult to project how much the various programs will cost on an annual basis -- since there is no way of estimating how many eligible people will apply for such assistance.

During the past decade, benefits in most of the programs have been "indexed" to rise automatically with increases in the cost of living. Combined with the growing elderly population, which ensures growing numbers of beneficiaries, this means the programs will lay claim to a growing share of the federal budget. The Office of Management and Budget estimates that programs of payments for individuals, which include Social Security, Medicare and Medicaid, and most other entitlement programs, will consume 50% of total outlays in fiscal 1985, up from 49% in 1981, 37% in 1971, and 20% in 1961. Therefore, while there is a majority in agreement that the entitlement programs are worthy, they still cause immense frustration to those who have tried to control federal spending. Since entitlement programs make up 51% of the 75% of the federal budget which is categorized as "uncontrollable," it seems likely that any attempt to limit spending will eventually force Congress to begin to explore strategies for cutting entitlement costs.

The other 24% of the "uncontrollable" portion of the budget is made up of the following costs: interest payments on the national debt, spending out of the Highway Trust Fund, Defense Department spending out of prior years, and other prior year contractual obligations of the U.S. government.

C. The Concept of Spending Limitations

In an attempt to define "spending limitations" in its broadest sense one must examine five major approaches. These include:

- Reliance upon existing budgetary processes and a commitment from Congress to use these processes in pursuing a balanced budget.

- A tax limitation to restrict the availability of revenues.

- A constitutional amendment mandating a balanced budget.

- A constitutional amendment providing for a limitation on total federal government spending.

- A statutory limitation upon total spending or annual spending increases.

II. POSSIBLE METHODS FOR LIMITING FEDERAL SPENDING

A formally legislated tool such as an amendment to the Budget Act is now being recommended to provide a formula approach to capping federal spending.

A spending limitations amendment would provide a shield for legislators to use to protect themselves when voters begin to ask why certain services are being cut or eliminated. It is with this concept in mind that Congress has begun to explore the more specific definition of "spending limitations."

A. Spending Limit Proposals

In the House, more than 30 "formula" spending limit plans have been introduced, linking government spending to such measures of economic activity as the Gross National Product (GNP). According to Budget Committee member James R. Jones (D-Okla), "Unless there is some artificial limit under which politicians can take cover, you aren't going to get the specific cuts." Mr. Jones is the sponsor of a spending limit plan.

Rules Chairman Richard Bolling (D-Mo) appointed a special task force headed by Anthony C. Bielenson (D-Ca) to review the dozens of spending limit plans on file and recommend a single proposal to the full committee. Eleven days of hearings were held on the subject on the following dates: January 30; February 6, 13, 20, 27; March 5, 10, 13, 19 and 20, 1980. The four major proposals examined by the task force are summarized as follows:

. H.R. 5371 Rep. Jones J., et al.; 9/24/79. Rules.

Amends the Congressional Budget Act of 1974 to prohibit the adoption of any concurrent resolution on the budget which sets forth a level of total budget outlays in excess of 21 percent of the Gross National Product in fiscal year 1981, or 20 percent of the Gross National Product for each fiscal year thereafter. Establishes procedures to enable the President and the Congress to suspend such limitations on the level of budget outlays.

. H.R. 6021 Rep. Giamo, et al.; 12/4/79.

This bill would limit both direct spending and tax expenditures to 28.3 percent of Gross National Product in 1981; 28 percent in 1982 and 27.5 percent in 1983. It provides that a majority of both houses could overturn the limit upon recommendation by the President should an emergency arise.

It would also provide a federal credit program control system to assist in the annual review of direct and guaranteed loans under federal credit programs. The system would provide a way of considering resource allocation effects of federal loans and loan guarantees or the reasonableness of the total volume. It would allow Congress to exercise the same control over federal credit activities as it does over direct spending activities.

. H.R. 6056 Rep. Holt; 12/6/79. Rules.

Would limit spending to 21 percent of Gross National Product in fiscal 1981 and 20 percent thereafter. Would phase in control on federal loan programs. It provides that the limit could be suspended upon recommendation by the President and a majority vote of both houses of Congress.

. H.R. 5797 Rep. Gephardt; 11/2/79. Rules, Banking, Finance and Urban Affairs; Government Operations.

Would require the Federal Reserve Board to recommend annual aggregate spending, revenue and deficit figures for the coming fiscal year. It would require adoption by March 15 of a resolution setting total figures for spending and revenues. Congress then would fit line item spending to these totals.

B. Problems with GNP-Linked Proposals

Of primary concern to Bielenson and his panel is whether federal outlays should be tied to GNP. Because of the way the GNP fluctuates, such a link could cause spending to decrease during bad economic times and increase during times of high inflation. For example, if the budget is limited to a percentage of GNP and the economy slips during a recession, the budget automatically increases as a proportion of the GNP, so cuts are required. The ability to spend is restricted because the budget is likely to bump up against the ceiling.

A second problem is that spending trends for responding to an economic shift would be limited. During a recession a spending limit could have only the choice of a tax cut for stimulus, with the limit precluding jobs programs requiring a direct outlay.

In addition, as Congressional Budget Office Director Alice M. Rivlin told the study group, any agency charged with developing the GNP estimate would be under immense political pressure to boost the figure to allow for extra spending.

Another problem with a spending limit tied to GNP is that according to studies made by Representative Solarz (D-NY), the percentage of GNP spent by government has no direct effect on the rate of inflation. Since one of the original motives for a spending limitation was to reduce the rate of inflation, a spending limitation tied to GNP would not accomplish that goal. He cites the following facts to illustrate the point: Sweden, Canada, West Germany, Belgium, the Netherlands, France, Austria, and Norway all have lower rates of inflation than we do, yet they all spend a significantly higher percentage of their GNP on government programs.

The Netherlands, which spends more of its GNP (51.2 percent) on government programs than any other Western county, has an inflation rate of only 3.8 percent. The United States, which spends only 34 percent of its GNP on federal, state and local programs has an inflation rate of approximately 12 percent.

In his letter to Congress in December of 1979 Solarz further states that the most likely practical effect of both the Jones and Giaimo bill will be to kill the budget process. He described the probable scenario:

> Under both the Giaimo and Jones bill a separate vote is necessary to suspend the spending limitation before a resolution breaching the limitation can be considered. Given the politics of the House, no such motion to suspend the limitation will be adopted by a recorded majority vote. Republicans and conservative and politically insecure Democrats will vote against such a motion the way they vote against increases in the debt ceiling. As a result, the House will have to consider a budget within the spending limitation. However, such a budget will not be able to get the support of members. Conservatives will oppose the resolution because of cuts in defense, liberals will oppose the resolution because of cuts in social programs, and moderates will oppose the resolution because their local elected officials will be upset about the cuts in aid to state and local governments. The results will be that we will have no budget resolution and spending and tax cut bills will pass without consideration for their impact on the deficit.

Other problems the panel must evaluate include:

- Unless credit programs and tax expenditures are controlled along with direct spending, lawmakers could circumvent spending limits by passing tax breaks or new loan or loan guarantee programs. Giaimo warned the task force that such programs were becoming "the wave of the future" because they were not subject to the same control as direct spending. And Reuss predicted, "Rigid formulas would simply send legislators scurrying for ways to get around them."

- Many lawmakers argue that a precise definition of tax expenditures has not been developed. They also protest that it is impossible to determine in advance of budget year how many taxpayers will take advantage of such tax breaks as mortgage writeoffs or child care credits.

C. Problems with the Proposals Linked to the Federal Reserve System

An alternative to a GNP based spending limitation has been suggested by Representative Gephardt (D-Mo). His proposal would require that the Federal Reserve Board recommend annual aggregate spending, revenue and deficit figures for the coming fiscal year. He would then require adoption by March 15 of a resolution setting total figures for spending and revenues.

Alice Rivlin of the Congressional Budget Office objected that Gephardt's approach would result in "unrealistically small budget resolutions that would have to be amended several times during the fiscal year as specific spending and tax bills were approved." In addition, some lawmakers fear that an approach such at Gephardt's would blur the lines between Congressional responsibility for fiscal control and the Federal Reserve Board's responsibility for monetary control.

III. IMPLICATIONS OF SPENDING LIMITATIONS

Unless a spending limit proposal required cutbacks in entitlement programs -- programs for which spending is set by law -- the one-quarter of the budget that is "controllable" would have to bear the burden of annual cuts.

This "controllable" portion of the budget contains the often controversial human service programs which focus on poor and minority individuals and communities. Many of these programs are up for reauthorization in the 97th Congress. The following list indicates the critical nature of possible cuts in "controllables":

1. Youth Employment Demonstration Projects Act (CETA Title IV)
2. The Community Revitalization Act
3. The Voting Rights Act
4. The Vocational Education Act
5. The Consumer Cooperative Bank Act
6. The Clean Air Act
7. The Equal Opportunity Act

Moreover, if the spending limitation had been enacted last year, both "controllables" and the traditionally safe entitlement programs would probably have been cut. The range of cuts would have been from $41 billion to $55 billion.

In addition, the authors of the bills reviewed earlier imply in their arguments that spending limitations are essential in order to combat spiraling inflation. In economic terms their implications and arguments are without foundation for the following reasons:

- The size of the federal budget does not in itself add to inflation. This is particularly the case in the current economic stagnation when more than 6 million workers are officially counted as unemployed and the nation's industries are operating at less than 85 percent capacity -- far below their most efficient level. So limiting the size of the federal budget will scarcely make a dent in the current level of inflation.

- The current inflation does not result from excessive federal spending but rather from high unemployment and low output. The Administration itself notes that the federal budget would show a $56 billion surplus for FY 1981 if unemployment could be lowered to 5.1 percent instead of rising to an expected 7.5 percent by the end of the year.

IV. CONCLUSION

In reviewing all the information provided above, some major implications become apparent:

- In the wake of Proposition 13, Congress is beginning to feel the pressures to cut inflation, cut taxes and attempt to balance the budget.

- The current international scenario and the conservative mood of the country show additional pressure to increase defense spending.

- If any of these pressures is to be addressed, Congress must begin to re-examine priorities and find ways to "control" the "uncontrollable" expenditures such as the costs of entitlement programs.

- Despite the popularity of most entitlement programs, it is likely that these will be viewed as candidates for cuts, given the current mood of the Congress and the country.

- Social service programs which are up for reauthorization directly affect Hispanics, the poor, and all minorities, in areas such as education, employment and training, low-income housing, civil rights, economic development, as well as other areas effecting basic human needs. All indications are that there will be significant budget cuts or possible termination of some programs.

- Despite the fact that the formula spending limitations proposals in the last Congress died before coming to the floor, political expediency indicates the concept will be reintroduced in order to provide the political "shield" necessary when programs are cut. There has been discussion that a spending limitation will be included when Congress considers the first Budget Resolution in 1981.

- Any supposedly "simple" solution must be examined very closely in order to avoid superficial solutions. Congress will have to grapple with the fact that a balanced budget will mean serious sacrifices. The responsibility for organizations concerned with low-income and minority Americans will be to assure that these populations do not suffer disproportionately from budget cuts.

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NATIONAL COUNCIL OF LA RAZA
Office of Research, Advocacy, and Legislation

Backgrounders

Number: Four

Date: March 23, 1981

Title: Bilingual Education and the Lau Regulations

Contact: Tomas Saucedo, Lori Orum, Rafael Magallan

Regulations proposed in 1980 by the U.S. Department of Education concerning the educational rights of national origin minority children generated a tremendous amount of controversy. These proposed regulations, commonly referred to as the Lau regulations, dealt with the right of access to an equal education for limited and non-English proficient children. The heated debate which followed introduction of the proposed rules, unfortunately, focused on issues other than the means by which the federal government should protect the right to equal educational opportunity, as required under Title VI of the Civil Rights Act of 1967, to students with limited English speaking ability.

Public attention instead focused on issues such as what constituted "Bilingual Education", was bilingual education "American" or "unAmerican", were these regulations an intrusion of the federal government on state and local rights, etc. Lost in the charges was the fact that these proposed rules were an attempt to clarify minimal procedures and program components which need to be addressed by school districts in order to protect the civil rights of over 3.5 million children.

On February 2, 1981 the new Secretary of Education, Dr. Terrel Bell, withdrew the proposed Lau regulations, largely as a result of the attacks launched against the rules. A new set of Lau compliance rules is supposed to be developed by the Department of Education and submitted for public comment.

NCLR believes that a sufficient strong set of final Lau regulations continue to be needed and that this attack upon the proposed Lau regulations is but a forerunner of efforts against bilingual education itself, possibly such as against the Title VII (ESEA), bilingual education program, which is up for reauthorization in 1983.

This policy paper was prepared to provide a brief analysis of the key elements involved in this important issue and to give background sufficient for further action.

NATIONAL COUNCIL OF LA RAZA

ISSUE ANALYSIS

ON

BILINGUAL EDUCATION AND THE LAU REGULATIONS

Prepared By:

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January, 1981

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I. INTRODUCTION

In August of 1980 the Secretary of Education Shirley Hufstedler, issued a Notice of Proposed Rule Making (NPRM) regarding the educational rights of national origin minority children. These proposed regulations stemmed from nearly 20 years of legislative and judicial precedents. Chief among these actions is the Supreme Court's decision in Lau v. Nichols (1974) which affirmed the right of access to an equal education for limited and non-English proficient children. Commonly referred to as the "Lau Regulations," the proposed rules were based on existing practices of the Department and set forth the minimum procedural requirements for protecting the civil rights of over 3.5 million children who might be subject to discrimination on the basis of national origin.

The Lau Regulations were the subject of much Congressional debate and action during the last months of the 96th Session and again during consideration of a second Continuing Resolution to replace House Joint Resolution (HJR) 610 which expired on December 15, 1980. The National Council of La Raza (NCLR) supported language (Chiles Amendment) currently in HJR 610 which delayed publication of the regulations until June 1, 1981 to allow Congress time for consideration of the many issues raised by the issuance of these proposed regulations and to allow the Office of Civil Rights to summarize and interpret comments received at public hearings and through the mail.

The results of the November 1980 election as reflected in the new Senate and in the incoming Administration bode even more difficult times

ahead for passage of any regulations sufficiently strong enough to protect the rights of students with limited English speaking ability.

On February 2, 1981 the new Secretary of Education, Dr. Terrel Bell withdrew the proposed Lau regulations, giving the reasons that the proposed policies were "harsh, inflexible, burdensome, unworkable and incredibly costly...fiercely opposed by many, supported by few." The National Council of La Raza challenges the five assertions given and adheres to the position that this is a matter of civil rights and civil rights cannot be ignored because of the "opposition of many."

This paper was prepared to provide a brief overview and analysis of the key elements involved in this important issue, and to provide background sufficient for futher action.

II. BACKGROUND

The proposed rules were issued by the Department pursuant to its authority under Title VI of the Civil Rights Act of 1964. The Act establishes a broad prohibition against discrimination in federally funded programs. It specifically provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Department of Health, Education and Welfare interpreted Title VI and its implementing regulations to prohibit the denial of access to education programs because of a student's limited English proficiency. This interpretation was publicized through a guideline, called the May 25th, 1970 Memorandum. The U.S. Supreme Court, in Lau v. Nichols (1974) unanimously upheld this guideline as appropriate and permissible, requiring schools to eliminate language barriers in local educational programs.

Subsequent to this ruling, HEW developed a set of informal policy guidelines outlining the responsibilities of school districts in providing educational services to language minority students. Known as the "Lau Remedies," the guidelines have since formed the basis of compliance agreements negotiated between the Federal government and nearly 500 school districts across the nation.

More recently, in 1978, a Federal District Court in Alaska issued a decree, in Northwest Arctic v. Califano, requiring HEW to publish its standards for enforcing Title VI. The proposed regulations were based

largely on the existing "Remedies" and were promulgated in response to the Alaska Court order.

The proposed rules incorporated two fundamental goals crucial to implementation of Title VI and the Lau decision mandates. First, that minority children with limited English proficiency be taught English as quickly as possible; and second, that such students receive instruction in locally-required subjects in a language they can understand until they learn English.

The rules represented what many educators and civil rights organizations view as a fair and effective approach to fulfilling the responsibility of the Department under Title VI of the Civil Rights Act. In the absence of final regulations, the Lau Remedies, vague and general as they are, will need to continue as the guide for school districts.

III. EXISTING EDUCATIONAL APPROACHES FOCUSING ON LANGUAGE

In examining the variety of methods and philosophies which have evolved to meet the rights and needs of national origin minority group children, it is important to note that the goal of each method is proficiency in the English language. English is the national language and there can be no equal participation without a full command of the language. For non-English speaking and limited English speaking children, instruction of English as a Second Language (ESL) is thus a prime component in each of the three major approaches. The crucial differences among the programs center on the degree to which other complex problems

are addressed while the student learns English, especially with regard to access to instruction in subject areas. The ideal situation is one in which students have equal access to all phases of instruction and finish their schooling having received equivalent instruction in math, science, social studies, etc., to monolingual English speakers. The following approaches attempt to address these issues:

- English as a Second Language (ESL) - The instruction of English to Speakers of other Languages (ESOL) is a component in each of the following approaches but in this instance stands alone as the affirmative step taken for Limited English Proficient (LEP) students. In this type of program students receive special ESL classes in an effort to upgrade their English skills. All instruction is done in English. Although this approach is easiest to implement in diverse and small student populations, or where native language teachers are not available, it does not provide the student with the opportunity to learn the same subject matter skills taught their fluent English speaking peers and often results in the student being several grade levels behind other children by the time they have become proficient in English. This delay of meaningful education often acts to effectively deny it altogether.

- Transitional Bilingual Education (TBE) - This approach utilizes the child's native language to teach basic skills (reading, math, social studies, science, etc.) while the child is learning English through an ESL component of the program. Teachers fluent in the child's native language and English are utilized to help the child master the same curriculum as fluent English speaking children. The ultimate goal of this type of program is the acquisition of English skills while providing LEP students with the same academic opportunities as fluent English speakers. Unfortunately, some TBE programs seem to concentrate on total replacement of one language for another with but limited positive academic results.

- Full Bilingual Bicultural Education - Programs of this type attempt to address the cultural factors involved in educating children of a national origin minority group. This method is similar to Transitional Bilingual Education in that it utilizes the child's native language, strives for equivalent instruction in academic subject matter for all children, includes a

strong ESOL component and utilizes bilingual teachers. However, it also includes a cultural (multi-cultural or cross-cultural) perspective and does not concentrate on replacing the native language but rather on educating children to be truly bilingual and biliterate. It has the advantage of a holistic approach to the child's needs and avoids the pitfalls of unintentionally fostering negative attitudes related to schooling.

None of the approaches need segregate children; a healthy mix is desirable, including participation by fluent English speaking children, in view of the importance of peer interaction in language learning.

As is evident in the descriptions, the ESL approach is the most limited in what it attempts to do -- the Full Bilingual Bicultural approach the most comprehensive. The serious shortcoming of utilizing a strictly ESL approach is that it may foreclose equal access to the curricula and skills being acquired by fluent English speaking children. Although there are instances where, due to local conditions, it may be the most reasonable approach, it is well to keep in mind its inherent limitations.

IV. CURRENT PRACTICE

The proposed Lau Regulation reflected the current practices and minimal standards established by HEW five years ago in the Lau guidelines. There is much diversity among the compliance plans approved by HEW and presently being negotiated by the Department of Education. Programs ranging from transitional bilingual education to approaches which utilized only specialized methods of intensive English instruction are represented. Many districts in compliance with the guidelines

provide varied methods at different schools or for different age groups. The locally developed plans have been tailored by the districts to meet unique student needs within the resources of each LEA, each making provisions for:

- Identification of students with a primary home language other than English;
- Assessment of the relative language proficiencies of those students so identified;
- Provision of specialized services designed to afford these language minority students meaningful and equal educational opportunity;
- Definition of entrance and exit criteria which determine the level at which a student must function in English to make participation in the regular program meaningful;
- Staffing plans determined locally by needs and resources; and
- Evaluation models to provide for a critical examination of the programs' successes and failures and to account for federal dollars received.

Although each plan addresses all areas, actual staffing decisions, teaching methods, curricula, texts, evaluation and assessment instruments, supplementary materials and scheduling are left up to the LEAs.

An examination of the 40 major Lau plans submitted by LEAs to the Department and accepted as adequately protecting the civil rights of national origin minority group students demonstrates the large variety of approaches tailored to local needs. LEAs are able to meet local needs, allow for unique and appropriate programs and still comply with the Lau Guidelines.

V. ISSUES

The proposed Lau Regulations received much heated and disputatious attention. A great deal of this public controversy appears to be based on serious misinformation and or lack of a substantive understanding of the elements involved with these regulations. The following is an effort to highlight and respond to the more common objections raised to the Notice of Proposed Rulemaking (NPRM).

- Issue. The Department of Education does not have the authority to issue regulations; issuance of the proposed regulations violates Section 103, Federal-State Relationship of P.L. 96-88, Department of Education Organization Act.

  Facts. Section 103a specified that the Department of Education (DOED) is not authorized to increase its authority over State or local education. The Lau Regulations are not an increase of authority. The proposed regulations are simply a clarification of the Lau Remedies which have been in effect.

  Section 103 further states that DOED should not exercise any direction, supervision, or control over curriculum, program instruction, administration or personnel of any educational institution... except to the extent authorized by law.

- The issuance of the Regulations is not a departure from accepted procedure by DOED. DOED should have at minimum the authority to hold grantees accountable for funds received. There is vital Congressional and public interest in guaranteeing that monies targeted for LEP students be spent in an appropriate fashion and achieve the intended results.

- Issue. The Lau Regulations are an intrusion of the Federal government on State and local prerogatives.

  Facts. Rather than hampering LEAs, the proposed regulations attempt to clarify minimal procedures and program elements which need be addressed in order to protect the civil rights of LEPs. The DOED has been under court order to produce regulations so that LEAs have a clear understanding of what meets Civil Rights

compliance requirements. The absence of standards in this area leaves the door open to more litigation over the extent and quality of services LEAs must provide to avoid jeopardy regarding national origin discrimination. Such additional litigation could lead to the imposition of measures designed and ordered by the courts, as has occurred with desegregation.

Absent consistent and accepted standards, no LEA can defend itself against a discrimination charge. LEAs and administrator associations have long argued for performance standards; any such system would have to have comparable standardized items from which to base relative performance.

. Issue. The DOED proposed regulations mandate a single method of instruction for LEP students.

Facts. The proposed regulations do not require any one method of instruction. The regulations do specify that LEP students receive understandable instruction in subject areas but the proposed rules do not mandate LEAs to use a particular approach. The regulations do not prescribe the subject matter to be taught by any school, nor the method by which English should be taught. These are matters for local and State authorities.

Bilingual Education is the utilization of two languages, one of which is English, as the medium of instruction. Bilingual Education is not any one methodology. It is a collection of different approaches and methods designed to best communicate the school curriculum to LEP students. Bilingual programs are specifically designed to teach English and provide that students progress academically in their other subjects at the same time.

. Issue. The Lau Regulations encourage the maintenance of languages other than English for LEP students.

Facts. The proposed regulations are clearly intended to develop transitional language programs for facilitating the learning of English as soon as possible, yet insuring that the LEP children receive subject matter instruction through a language they can understand.

. Issue. The implementation of bilingual education programs is too costly and cannot be funded by local educational agencies.

Facts. Many local school districts in several states provide instruction for LEP students that complies with the Lau Remedies. The cost of education for LEP students sufficient to meet the Lau Remedies requirements will not increase the financial burden of schools in compliance. The Lau rules enable a LEP child to have an equal education opportunity which in the long run can prevent the historical pattern of dropouts, unemployment, public aid and crime. The immediate short-term cost are far outweighed by avoiding the expensive life long burden of unemployment and crime.

In other instances where LEP children have been referred to learning disability classes of Special Education programs, the required test and examination required for diagnosis and prescribing treatment is quite costly and could be avoided by the correct implementation of the proposed regulations.

The issue of cost for bilingual education as compared to any other approach has not been factually determine. In several instances it has been found that operation costs for high intensive English programs in comparable school districts have exceeded bilingual education programs by as much as $200 per child in a school year.

Preliminary estimates of the cost of the Title VI Language Minority Proposed Rules were prepared by DOED in August 1980, after an initial analysis indicated that the total economic cost in the first year of implementation might exceed $100 million. The estimated average annual costs for a 5-year start-up period ranged between $180 million to $360 million for Option A, and between $290 million to $590 million for Option B (both options as offered in the proposed LAU plan). The estimated cost of the current Lau Remedies was given as ranging between $170 million to $330 million over the same 5-year period.

Once programs are institutionalized, bilingual instruction need not be any more costly than regular instruction. It is not more expensive to employ a bilingual trained classroom teacher than a monolingual instructor.

Issue. Bilingual Education is an employment program for persons with bilingual language capability. These teachers tend not to be qualified and provide an inferior education in our schools.

Facts. In most cases bilingual education instructors are State credentialed teachers who have completed additional courses to gain a State credential in bilingual specialization.

The ability to speak another language in addition to English is a skill which appropriately serves LEP students; bilingual language ability can be acquired by any person. Teacher preparation in languages and bilingual methods are available to all teachers and college students. According to a 1978 National Center for Educational Statistics Study, 57% of those teachers providing bilingual instruction were in fact primary English speakers.

. Issue. There is inadequate research to support the fact that Bilingual Education works.

Fact. Evidence is beginning to emerge, from the short 15-year history of bilingual education in this country, of many excellent programs, as measured by improved academic performance, higher school retention rates, and improved self-concept among LEP students. It has become clear that many bilingual programs were initiated precipitously, without a clear idea as to direction, without appropriate curriculum or adequately trained personnel, without proper diagnosis of LEP linguistic needs, without the needed support of LEA administrators. The few evaluations that have been done are not considered an accurate assessment of the efficacy of bilingual education.

What is readily evident is that there has been very little research done on the academic or linguistic outcomes of bilingual education. Prior to 1979, there had been precious little basic or operational research on bilingual education.

However, funding for research has recently been expanded greatly. DOED spent $2 million for research in 1979, over $4 million in 1980, and plans to spend more in 1981. Most of this is to meet the Congressionally mandated series of studies on Bilingual Education authorized in 1978. Additionally, as noted in the 1980 Carnegie Corporation report on Bilingual Education and the Hispanic Challenge, "evidence is mounting that...programs of high quality do meet the goal of providing equal educational opportunity for students of non-English-speaking backgrounds." Many recent program evaluations have demonstrated that such programs have been generally effective and made an academic difference for LEPs.

> Additional studies have indicated that bilingual education may have a cumulative effect, with results that may not appear in short-term evaluations. This would suggest that bilingual instruction must be allowed a longer period of time to operate. This is the case with other special programs for educationally disadvantaged students, e.g. Head Start.

VI. EFFECTS OF ASHBROOK AND CHILES AMENDMENTS

As noted, the release of the NPRM caused much controversy. The proposed regulations were released on August 5th, 1980 for 60 days of public study and review, with 12 days of public hearings held among six major cities, and with comments and recommendations solicited from the interested public. This was with the goal of developing and refining the final regulations with adequate public input.

Unfortunately elements within Congress saw fit to attempt to oppose the proposed regulations even during this period for public comment.

On August 21, 1980 the House Appropriations Committee reported H.R. 7998, the FY 1981 Appropriations Bill for the Departments of Labor, Health and Human Services, and Education. The Committee amended the report of its Labor, HHS, ED Subcommittee by adopting the following report language, as proposed by Representative Robert Michel (R.-Illinois).

> The Committee is concerned about regulations proposed by the Department which would dictate to local school districts the methods and procedures by which they are to educate non-English-speaking children, at a potential cost of hundreds of millions of dollars to such districts. The law creating the Department of Education prohibits the Department from interfering with local decision-making in the areas of curriculum, administration, and personnel. The Committee believes that any

> final regulations should leave it up to local school districts as to how they provide equal educational opportunities to non-English-speaking children. Specifically, such regulations should not require schools to teach basic courses in languages other than English, should not prescribe requirements for staffing, teacher qualifications, or teacher training, should not prescribe specific methods and procedures for identification and assessment, and should not prescribe class size or composition. (House Report 96-1244 at p. 112.)

On August 21, Senator James McClure (R.-Idaho) introduced S. 3049, the "Local Schools Option Protection Act." The bill provided:

> That the Secretary of Education is directed to immediately withdraw those proposed rules relating to limited-English proficient students published August 5, 1980 in Volume 45, No. 152 of the Federal Register.

There was no action on the MClure bill.

On August 27, the House considered H.R. 7998, the Labor-HHS-Education Appropriations Bill. Representative John Ashbrook (R.-Ohio) introduced the following amendment from the House Floor:

> None of the funds appropriated by this Act (other than those specifically appropriated to fund authorizations for bilingual education programs) shall be used by the Secretary of Education to enforce regulations which would require a State or local education agency, as a condition of eligibility for the receipt of funds appropriated under this Act, or otherwise, to address the educational needs of students of limited English-speaking ability by a program other than one of intensive instruction in English.

Within an hour of its introduction, the amendment was passed by a vote of 213 to 194 with 25 members not voting. This amendment if adopted by the Senate would prohibit the use of DOED funds to enforce federal regulations for language minority children through bilingual education. The amendment would permit federal funds to be used only in enforcement of intensive English language instruction.

On September 10, Senator McClure proposed a similar amendment to the Senate Appropriations Bill for Labor-HHS-Education. His amendment provided:

> None of the funds appropriated by the Act shall be used by the Secretary of Education to promulgate or enforce regulations which would require a State or local education agency, as a condition of eligibility for receipt of funds appropriated under this Act, or otherwise, to address the educational needs of students of limited English-speaking ability by any particular method, program, curriculum, personnel requirements or classification.

On September 23 the Senate Appropriations Committee considered H.J. 610, the House-passed continuing resolution for FY 1981, and Senator McClure offered his amendment concerning the NPRM. Senator Chiles (D.-Florida) offered the following substitute to the McClure Amendment:

> Notwithstanding any other provision of law, no funds available to the Secretary of Education shall be used to promulgate or enforce any final regulations which replace the current "Lau Remedies" for use as a guideline concerning the scope or adequacy of services to be provided to students of limited-English-language proficiency, or for defining entry and exit criteria for such services, before October 1, 1981.

This date of October 1, 1981 was later modified to June 1, 1981.

On September 29, the Senate passed H. Joint Res. 610, which included the Chiles substitute amendment on the Language Minority NPRM. Senator Chiles noted that the intent of his amendment was to delay publication of final regulations so that Congress could fully review and discuss the regulations prior to publication.

The Chiles amendment to the continuing resolution does allow needed time for further study, comment, and discussion of the NPRM. This approach is far preferable to that embodied in the Ashbrook Amendment. As noted, the Ashbrook type of amendment seeks to prohibit DOED from en-

forcing Title VI compliance by limiting funding to only a narrow range of enforcement options or worse, prohibiting any enforcement activities at all. Such amendments hinder implementation of more appropriate educational alternatives for LEP students, and as such these riders are more restrictive than the NPRM they attack on the same basis.

In view of the fact that the Chiles Amendment provides a moratorium where the concerns of Congress can be addressed, the intent of Ashbrook and McClure-type amendments has been to make impossible implementation of the Lau Regulations. In light of the aim of the regulations to fulfill the responsibility of DOED under Title VI of the Civil Rights Act, these efforts by elements in Congress are viewed by Hispanic and other civil rights groups as obstructing the basic rights of language minority children.

In addition, the far-reaching nature of the language of these riders and the funding restrictions they impose would contradict other explicit Congressional policies. For example, these amendments could seriously undercut the goals of the Bilingual Education Act of 1968. In the law, Congress noted that:

> In recognition of the special education needs of children of limited-English-speaking ability...(it is) the policy of the United States to provide financial assistance...to develop and carry out new and imaginative...programs designed to meet these special educational needs.

The law currently supports demonstration efforts in bilingual education for only about $108 million; this covers 575 projects which serve 315,000 students, a small share of the estimated 3.5 million LEP children in this country. It is this law which has provided the technical assistance and related resources needed to deal with the educational needs of the new immigrants from Cuba, Haiti, Cambodia, and other countries. It

is this Act which is currently underwriting extensive study and research on the effectiveness and the outcomes of bilingual education approaches.

There is spreading concern among civil rights groups that the recent efforts to undermine the Lau NPRM are a precursor to political attacks on the Bilingual Education Act. They fear that the expected heated political climate resulting from such attacks will not allow for temperate, dispassionate, objective debate over the relative merits of bilingual education for LEP students, to the loss of all concerned.

VII. CONCLUSION

As recently noted by the U.S. Commission on Civil Rights, the trend toward indirect Congressional restriction of the Executive Branch's authority to enforce constitutional and statutory guarantees threatens to create a major crisis. The attempts of Congress to attach riders to appropriations bills with the intent of diminishing the Federal government's ability to enforce civil rights laws would in effect nullify Civil Rights legislation without serious consideration of the consequences.

In the case of the rights of language minority children, the issue is clear. They are legally entitled to receive instruction in a language they can understand. Full access to an equal education for limited- and non-English proficient children is predicated on their receiving understandable instruction. The NPRM in question seeks to identify and provide the requisite guidelines so that LEAs can gauge the

relative degree necessary to ensure compliance with the rights of these students.

Efforts to impair the Federal government's protection of the rights of national origin children is ultimately counter-productive for this society. The realities which generated the Bilingual Education Act and the Lau Remedies have not been eliminated and appropriate solutions must be developed. Expediency has no place in the careful and deliberate handling required by this issue.

The 97th Congress must be urged not to continue this "back door" effort to erode the 1964 civil rights legislation. Debilitating amendments, as per Ashbrook and McClure, if reintroduced should be defeated, with flexible but specific guidelines provided through appropriate Executive methods.

With the February 2, 1981 withdrawal of the NPRM the existent Lau Remedies provisions will continue in effect. Unfortunately the Remedies document is not clearly written. Many of its provisions are vague. Some of its sections are written in highly technical language and its requirements are difficult to follow. Final Lau Regulations continue to be needed. Efforts to continue improving Bilingual Education programs need to be increased and sustained. The future of 3.5 million limited- or non-English language proficient youngsters requires no less.

NCLR

Perspectivas Públicas

NATIONAL COUNCIL OF LA RAZA
Office of Research, Advocacy, and Legislation

Backgrounders

Number: Five

Date: March 23, 1981

Title: Seals Decision

Contact: Mario Cantu and Francisco Garza

This paper discusses a recent federal court ruling acknowledging the right of children of undocumented persons to attend public schools, and the wider implications it has on the issue of human and civil rights of all undocumented persons in the U.S.

NCLR supports the Seals decision and continues in its advocacy for equitable and humane policies towards undocumented persons.

In Re: Alien Children represents the basis on which NCLR will petition to file an amicus curiae brief on behalf of plaintiffs depending on the future litigation of the case.

1725 Eye Street, N.W., Second Floor, Washington, D.C. 20006 , (202) 293-4680

NATIONAL COUNCIL OF LA RAZA

ISSUE ANALYSIS

OF THE

SEALS DECISION

IN RE: ALIEN CHILDREN DECISION

AND ITS IMPLICATIONS

FOR U.S. IMMIGRATION LAW AND POLICY

Prepared By:

Mario Cantú
Francisco X. Garza

February 3, 1981

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I. INTRODUCTION: HISTORY AND DIMENSIONS OF MEXICAN IMMIGRATION INTO THE U.S.

For many years, the 1,248-mile border between the United States and Mexico has been a source of both benefit and conflict for both countries. In the recent past, many persons, including entire families, have crossed this border both legally and illegally. Indeed, the availability of jobs amenable to being filled by an unskilled work force has created many of the opportunities inducing these workers to cross the border.

Estimates of the number of these undocumented workers are hard to come by and even to formulate. Two reasons stand out for this state-of-affairs. First, undocumented workers are not willing to reveal their presence to census takers or other investigators for fear of being deported. Second, the migration of undocumented workers is more a flow of people per any given time period than a fixed stock of people present in the United States. A migrant, that is, might cross the border many times during the year, and thus the number of undocumented individuals and families is in constant flux. Only families who cross the border in order to permanently remain in the United States fulfill the "stock" concept of immigration. Dr. Jorge Bustamante, one of Mexico's foremost authorities on Mexican immigration, has estimated that only about 9% of the total flow of undocumented aliens into this country actually settle here permanently.[1] Some estimates of the undocumented population in

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[1]ORDER, United States District Court Southern District of Texas, Houston Division, In Re: Alien Children, filed July 21, 1980, p. 18. (Hereinafter referred to as Seals brief).

population in this country have ranged as high as 12 million. The Select Commission on Immigration and Refugee Policy, created by Congress to study and reformulate American immigration policy, presently assumes a population ranging between three and six million undocumented aliens in the U.S.

The presence of undocumented workers in this country is not without benefit to American society. For example, a 1975 Department of Labor (DOL) study found that 77% of all undocumented workers surveyed paid Social Security taxes and 73% paid federal income taxes, while only a small minority received welfare or social service benefits.[2] Moreover, according to one economic view of illegal immigration, it increases the supply of available labor and therefore makes labor cheaper, prices lower, and actually expands the availability of jobs. In effect, immigration breeds profits and economic growth through social capital formation and increased private investment as immigrants stimulate the demand for public and private goods.[3] The Dutch Centraal Planbureau estimated, for instance, that an annual addition of 1% of the total Dutch labor force would create a further labor shortage equal to one-quarter of the original shortage after one year.[4]

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[2]National Commission for Manpower Policy, Manpower and Immigration Policies in the United States, February 1978, p. 3.

[3]Fogel, Walter A., "Illegal Aliens: Economic Aspects and Public Policy Alternatives," in Selected Readings on U.S. Immigration Policy and Law, Congressional Research Service, October 1980, Washington, D.C., p. 53.

[4]Organization for Economic Cooperation and Development, The Effects of the Employment of Foreign Workers, 1974, p. 54.

Many economists, furthermore, have come to view the American labor market as segmented, with one sector comprised of the secondary labor market characterized by low-paying, low-skilled jobs with little or no prospects for promotion. Because of their very nature, domestic laborers shun these jobs, especially as income-assistance programs are available and benefits approach or surpass wage levels. In leaving this sector, American workers create a vaccuum which is then filled by undocumented workers, bereft of other opportunities and eager for any chance to make money. Governor Jerry Brown of California recently commented that without undocumented workers a number of California industries (e.g. agricultural, garment, restaurant) simply couldn't survive.[5]

Yet despite these views and supportive facts, the "problem" of undocumented immigration into this country has aroused a high level of public outcry, largely because of a widespread belief that immigration has a negative impact on the economy -- specifically, that undocumented workers displace American workers and hence, contribute to the present high unemployment levels. That emotions run deep in the debate on undocumented immigration lends much to the complexity of the issue and difficulty in formulating policy. A myriad of factors are at work -- race and ethnicity, labor market impacts, labor standards and tax policy, as well as human rights considerations.

This paper addresses one aspect of the issue, the children of undocumented immigrants and their access to public education. It begins

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[5]"Without Illegal Aliens, Industries in Some States Couldn't Survive," The Wall Street Journal, August 26, 1980.

with a discussion of an important federal court ruling and then examines certain implications for the overall issue of undocumented immigration based on that ruling.

II. BACKGROUND ON THE CASE: TEXAS PUBLIC SCHOOLS AND UNDOCUMENTED CHILDREN

On Tuesday, July 22, 1980 in the U.S. Federal District Court for the Southern District of Texas, Judge Woodrow Seals rendered a landmark decision declaring unconstitutional Section 21.031 of the Texas Education Code which restricted the children of undocumented immigrants from attending Texas public schools. In his decision, Judge Seals stated that Section 21.031 violated the Constitution's guarantees of due process and equal protection of the laws. The net effect of this decision is the affirmation of the Constitutional right to an education regardless of the status under immigration laws of the parents or of the undocumented children themselves.

In Re: Alien Children represents a culmination of litigation challenging the constitutionality of a State statute enacted in May 1975 by the Texas State Legislature which amended the Texas Education Code to limit benefits from the Available School Fund and from the public free schools to citizens and legally admitted aliens. In pertinent part, the amended statute, Texas Education Code, Annotated Title 1, Section 21.031 provides that:

> (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
>
> (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian, or person having lawful control resides within the school district.

The direct impact of this legislation was to deny reimbursement to local school districts for the education of undocumented children. It also permitted local school districts to exclude these children from school or to charge them tuition. In practice, these tuition payments, on average throughout the State, amounted to over $1,000 per child annually, with some independent school districts (e.g., the Houston Independent School District) charging as much as $1,900 per year.

Prior to September 1, 1975, the Texas Education Code provided that all children between six and 21 years of age were entitled to attend the public schools of the district where they resided. However, even before 1975, education officials representing a variety of independent school districts in Texas who were concerned over the alleged burden on education resources by undocumented children saw fit to challenge the right of these children to attend public school, and excluded them in some school districts. Recognizing that there did not exist an established policy regarding the admission of undocumented children to the public schools, the Attorney General of Texas in April 1975, upon a request by the State Commissioner of Education, issued an opinion holding that all children within the State were entitled to attend the public schools in their district regardless of whether they were legally or illegally within the United States.

The Texas Education Code was amended immediately after the Attorney General's opinion as a direct response to the opinion. Strangely

enough, however, no legislative history nor even backers of the amendment can be ascertained. In his brief, Seals points out,

> The court cannot state with absolute certainty what the Legislature intended when passing the amendment to 21.031. Neither the court nor the parties have uncovered a shred of legislative history accompanying the 1975 amendment. There was no debate in the Legislature before the amendment was passed by a voice vote. There were no studies preceding the introduction of the legislation to determine the impact that undocumented children were having on the schools or to project the fiscal implications of the amendment.[6]

In May 1977, a complaint was filed challenging the constitutionality of the amended statute as applied by the Tyler Independent School District. In Doe v. Plyler, Judge Friendly, on September 14, 1978, incorporating many arguments presented by the Mexican American Legal Defense and Education Fund (MALDEF), stated that 21.031 was irrational and in violation of the equal protection clause of the U.S. Constitution. The Tyler Independent School District was permanently enjoined from denying access to public education to undocumented children.[7]

Beyond Doe and the action taken against the Tyler School District, in September 1978, four complaints were filed in the Southern District of Texas against the State and three local school districts. A similar action was filed in the Northern District of Texas in April 1979, followed by two suits in the Western District. The State of Texas and the Texas Education Agency (TEA) were named defendants and granted permission to intervene in these actions. The complaints were later amended to name the Governor of the State of Texas and the Commissioner of Education as defendants.

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[6]ORDER, op. cit.

[7]Doe v. Plyler, 458 F. Supp. 569 (ED Tex. 1978).

After finding that the claims against the State of Texas involved common questions of fact and that centralization of all these cases in the Southern District of Texas for coordinated, consolidated action would serve the convenience of all parties and promote the just and efficient conduct of the litigation, the Judicial Panel on Multidistrict Litigation on November 16, 1979, referred the case to Judge Woodrow Seals of the U.S. District Court, Southern District of Texas.

On January 11, 1980, the U.S. Department of Justice filed a motion to intervene on behalf of the undocumented children, asserting that Section 21.031 of the Texas Education Code violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. On February 1, 1980, the court granted the motion to intervene.

The Seals court held a conference on December 20, 1979 to discuss the schedule for conducting the consolidated pretrial proceedings. Also at the hearing, the parties agreed to have the court rule on the claim that the State statute was unconstitutional. The hearing on the merits of the cases was held before Judge Seals from February 19 through March 27, 1980. The parties then filed briefs with the court, the last received on June 5, 1980.[8]

On Tuesday, July 22, 1980, citing among other factors Consititutional protections of "the right to life, liberty and property," and of protection from "great harm," Judge Seals declared unconstitutional Section 21.031 of the Texas Education Code, barring the children of undocumented aliens from attending Texas public schools. "We are creating an enormous public cost, both financial and social, to be borne in the

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[8]ORDER, op. cit.

not-so-distant future," wrote Judge Seals. "It is, of course, the prerogative of the State Legislature to saddle the public with such a future public burden, provided they do so in conformance with the Constitution. That they have not done."

Immediately after the Seals decision, the State of Texas filed an appeal with the United States Supreme Court. In addition, the State filed a motion to stay an injunction entered by the Seals court attempting at a minimum to delay the entry of undocumented children into Texas schools until the case was reviewed by the Supreme Court. However, on September 4, 1980, Supreme Court Justice Powell vacated the stay entered by the U.S. Circuit Court of Appeals, citing among other reasons the fact that delay in attendance had been proven at the trial level to render significant harm to the children. As of this writing, the appeal to the Supreme Court by the State is still pending.

III. THE DECISION

The In Re: Alien Children decision rendered by Judge Woodrow Seals was litigated based on several arguments put forth by plaintiffs and defendants in the case, respectively. Included in the arguments and evidence provided on behalf of the plaintiffs were: Constitutional protections, primarily the equal protection clause of the Fourteenth Amendment; proof of great harm to children excluded from school; and pre-emption of international law and foreign policy. In its defense, the State argued essentially that by virtue of their numbers and characteristics, these children were a burden on the system of finance for the educational system, thereby reducing the quality of education, hence, rational grounds for an exclusionary policy. Despite the number and range of issues considered by the court, the court's ruling was predominantly based on the issue of access to education -- "the Constitution does not permit the states to deny access to education to a discrete group of children within its borders when it has undertaken to provide public education."[9]

The Equal Protection Clause of the Constitution

Section one of the Fourteenth Amendment of the United States Constitution states in pertinent part: "No state shall deprive to any person within its jurisdiction the equal protection of the laws." While conferring no substantive rights, the function of the equal protection clause instead is to measure the validity of classifications created by

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[9]ORDER, op. cit.

State laws. The equal protection clause serves as a measure to insure that legislative classifications are fair and that similarly circumstanced persons are impacted alike. Section 21.031 of the Texas Education Code established a separate education policy for the class of children of undocumented aliens. As Judge Seals points out, "Texas has decided to educate some children within their jurisdiction and to deprive absolutely the benefits of education to others."[10]

Both in its explicit written manner, and in the intent of the authors of the Fourteenth Amendment, these rights apply to all persons in a territorial jurisdiction, without regard to any identifying criteria such as race, language, religion, citizenship, etc. The framers of the Fourteenth Amendment meant these rights to apply universally:

> The last two clauses of the first section of the Amendment disable a State from depriving not merely a citizen but <u>any</u> person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State . . .
>
> ...It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.[11]

The Seals court concluded that undocumented aliens residing in Texas are "within the jurisdiction" of the State and therefore subject to its laws. The language of the Fourteenth Amendment affords no basis for asserting that undocumented aliens physically present within the State may not invoke the equal protection clause.

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[10] ORDER, op. cit., p. 16.

[11] 71 Congressional Globe 2766 (May 23, 1866).

Supreme Court decisions, moreover, have determined that the equal protection clause applies to undocumented aliens. In effect, these decisions have determined that all persons and not just citizens or resident aliens are protected by this clause. For example, in both Wong Wing v. United States (1891) and Yick Wo v. Hopkins (1886), the Supreme Court ruled that the equal protection clause "applied to all persons within the territorial jurisdiction" of the United States. Other federal courts have ruled that the due process clause protects undocumented aliens. For example, in Bolanos v. Kiley (1975):

> We can readily agree that the due process and equal protection clauses of the Fourteenth Amendment apply to aliens within the U.S....and even to aliens whose presence here is illegal. ...Accordingly the equal protection clause protects undocumented aliens because they are persons within the jurisdiction of the state.

In its deliberations, the Seals court was particularly influenced by evidence presented regarding the consequences of denial of the education process. Simply put, children who are excluded from school suffer great harm. The court found that the absolute deprivation of education prevents children from assimilating into society and from effectively exchanging information and ideas. Experts who testified at the trial unanimously agreed that the damage caused by exclusion was severe. Dr. Kenneth Matthews, a child psychiatrist, testified that he observed severe behavioral and emotional problems resulting from exclusion from the school system, which could plague children all through their lives. Dr. Matthews stated:

> Children who are deprived of an education frequently suffer behavioral difficulties which can vary in extent from mild adjustment difficulties, through serious behavior difficulties like hyperactivity, withdrawing behavior into fairly severe types of difficulties such as depression and breaks with reality... [W]hen a child is not allowed to be educated...

> there is a decrease in the cognitive function of the child and in the ultimate ability of that child to develop adult type thinking patterns. . . The longer the exclusion goes, the more severe the effect would be.

Dr. Matthews' testimony underlined several key points. First, he identified formal education as one of the most important variables in a child's development. The family, he said, offers no substitute for formal education. Second, Dr. Matthews noted that formal education is the only variable in a child's development under the control of government. He testified that all the excluded undocumented children he had examined would have severe difficulties adjusting in a society requiring ever more complex mathematical and verbal skills. These children, he stated, are likely to become permanently dependent on governmental services.

Dr. Lucien Jones, a clinical psychologist, examined one of the excluded plaintiff children at length. He found her to be behind her grade level by one to two years, and behind in general academic knowledge by three and one-half years. He also found the child to be withdrawn, and testified that her alienation could only worsen if she continued to be excluded from the public schools.

Testimony by other experts corroborated the conclusions reached by Dr. Matthews and Dr. Jones. For instance, Dr. Thomas Carter testified that children excluded from school were being denied the vehicle most necessary for progress in society -- education. Dr. Carter, moreover, emphasized the permanent nature of this disability, since adults rarely learn to read or write. Dr. Brams, a sociologist specializing in the sociological, historical, and psychological foundations of education, testified about the connection between illiteracy and participation in

the nation's political process. She emphasized that due to the low socio-economic status of most undocumented children, their need for education is greater than that of the average child. Without education, she said, uneducated persons will be unable to understand or to participate in our form of government, and will remain permanently unaware of the opportunities and protection afforded by this society. Given Dr. Brams' qualifications as an expert witness, Judge Seals concluded that her testimony should be given great weight.

On the basis that the provision of education is a State function and that Section 21.031 absolutely deprives undocumented children of access to education, thereby causing great harm, the court concluded that the statute violated the equal protection clause and was therefore unconstitutional.

Additional Plaintiffs' Arguments

In addition to the above arguments, plaintiffs in In Re: Alien Children asserted that Section 21.031 was invalid due to international law and foreign policy. In effect, the supremacy clause of the U.S. Constitution (Article VI, Clause 2) confers upon the federal government exclusive power in the area of foreign policy, i.e., international treaties. As the plaintiffs argued, the United States is committed to the goal of rapid eradication of illiteracy and expansion of educational opportunities for all, pursuant to Article 31 of the Charter of the Organization of American States (ratified December 13, 1951). This goal is articulated in other international agreements such as the Charter of the United States (1945), the Universal Declaration of Human Rights (1948), and the Declaration on the Rights of the Child (1959). Since

Section 21.031 restricted educational opportunity, plaintiffs argued that it intruded into the conduct of foreign policy and was invalid under the supremacy clause. However, after extensive review of these arguments, the Seals court rejected them, citing the fact that internationally recognized human rights, despite their prescriptive or normative content, do not necessarily supercede inconsistent State laws unless duly acted upon by the Congress or the President, establishing their domestic applicability.

State Arguments in Defense of Section 21.031

In its defense, the State of Texas presented its rationale for excluding undocumented children from the public school system. The State presented evidence relating to: (1) the numbers of undocumented children in Texas, (2) the financial impact of educating the children on state and local resources, and (3) the impact of educating undocumented children on the quality of education. The State had also argued that the equal protection clause did not apply to undocumented aliens, but as discussed above, Seals concluded "jurisdiction" and scrutinized case law supporting due process and equal protection of undocumented aliens.

At the outset, Judge Seals was concerned that prior to the amended statute, the State never attempted to estimate the number or effect of undocumented children on the education system. Only in preparation for the case at hand did the State attempt an estimate. However, as expert testimony revealed, there is no indisputable or acceptable measure of the number of undocumented children. The State in its study estimated the undocumented children population at 80,000 but this was heavily rebutted by questions as to the methodology employed in the estimate.

Dr. Jorge Bustamante of the Universidad Iberoamericana in Mexico City presented evidence that the number of undocumented children of school age in the State was much closer to 20,000.

The State contended that Section 21.031 was rational in that it saved money and preserved State resources for education, arguing that educating larger numbers of undocumented children would cost more and spread State education dollars thinly. The State argued that this would result in a decline in the quality of education in the state.

The State of Texas, in this case before the Court, made numerous assertions of significant cost savings being realized by limiting educational opportunities to only citizen or resident alien children. The Court found, however, that the cost saving projections were based on faulty data and faulty assumptions.

In the first case testing the legality of Sections 21.031 of the Texas Education Code, Doe v. Plyler (1978), the State of Texas made the claim that a reduction in students would be accompanied by cost savings greater than the loss in school funds caused by the decline in enrollment. With each child excluded from a school district by Section 21.031, that local school district loses approximately $800 per year. This is because State funding is contingent upon student enrollment as measured by the Average Daily Attendance Reports received by the Texas Education Agency. Poor school districts which contribute a relatively small amount in local funds in comparison to the State aid they receive may well be hurt more than helped by Section 21.031 of the Texas Education Code. Dr. Firestine, a Tyler Independent School District official, testified that administrative costs and fixed maintenance costs accounted for approximately 25% of current operating expenditures. With respect

to restricting educational opportunities to some children, Dr. Firestine stated, "We cannot presume that specific expenditures for maintenance operations and for administration would commensurately decline -- that is, school buildings still have to be maintained in the usual way." Dr. Firestine further testified that significant enrollment reductions in a given grade at a given school are necessary before even one teacher can be released and that even then, tenure provisions result in the release of the less experienced, cheaper teachers.

Surprisingly, Dr. Firestine's testimony in Doe v. Plyler was corroborated by the defendant in the suit -- Mr. Jim Plyler, the Superintendent of the Tyler Independent School District. Mr. Plyler admitted the intractability of fixed costs, and his Business Manager, Mr. Dick Lindsey, testified that "You would, in fact, need a fairly significant number of students in a particular given grade or a given school before you could produce any savings by excluding children from school."

The State of Texas made similar financial claims in the case at hand, In Re: Alien Children. To these claims Judge Seals answered:

> ...the State has not shown that excluding children from school is in any way necessary to the improvement of the education in the State. As the State argued in Rodriguez, there is no evidence that the quality of education is somehow strictly tied to the amount of money expended on each child. ...The State now wishes the court to assume without any credible supporting evidence that a proportionately small diminution of the funds spent on each child will have grave impact on the quality of education . . . Barring the doors to a distinct group of children, moreover, is the most, not the least, drastic alternative available.

The State's claims of an adverse fiscal effect were also discredited by evidence submitted at the trial which demonstrated that the largest single source of funds for bilingual education is the federal government. In 1977-78, the State appropriated approximately $6.9

million for the State bilingual program. In the same year, the federal government provided grants of over $14 million pursuant to Title I of the Elementary and Secondary Education Act and the Emergency School Aid Act bilingual grants. This figure does not include funds provided through the Title I Migrant Education Program, which can also be used for bilingual education. Texas receives more Title I Migrant funds than any other State in the nation. As Judge Seals stated, nothing in the federal statutes or regulations prohibits the use of federal funds for the education of undocumented children.

IV. IMPLICATIONS

While the Seals decision was an important victory for the civil rights of undocumented persons in this country, the case itself dealt with one issue -- education, or more specifically, access to a free public education for the children of undocumented workers. In a narrow sense Seals' ruling is only a part of a series of court cases instituted on behalf of undocumented aliens. However, In Re: Alien Children was the first to address the question of whether the Fourteenth Amendment's provision of equal protection of the laws applies to undocumented persons. Seals' answer was in the affirmative:

> Equal protection of the law is meaningless unless it applies to the unpopular as well as the popular, the weak as well as the strong. The undocumented children residing in the State of Texas are entitled to that protection.

The Seals decision represents for Hispanic groups an adequate response by the judiciary system, taking into account the critical needs of a particular group of people -- in this case, the children of undocumented persons. Recognizing that education is the sine qua non of upward mobility, these children's welfare is protected at least for the time being. However, the State of Texas is appealing the Seals decision, and thus final judicial review has not been completed.

By virtue of the assertion of the right to equal protection of the law, the Seals decision contains some broader implications for undocumented persons beyond the field of education. Other public services are important, too. For the population of undocumented individuals in the U.S., access to proper health care, housing programs, food stamps and other services are critical considerations. Will "equal protection" be

liberally interpreted by other courts to include access to these and other services by the undocumented immigrant? How will the majority society view measures in this direction?

In Re: Alien Children represents a challenge to one set of prohibitions created by a State law which was enacted for the sole purpose of denying admission to a free public education to undocumented children. To date, Texas is the only State to have enacted such prohibitions. But in New York City a significant movement is also attempting to bar the children of undocumented people from attending public schools. Other States and local areas with heavy populations of undocumented immigrants could enact laws limiting access to public services by the undocumented.

Perhaps the greatest significance of the Seals decision is that it establishes an important precedent supporting the rights of undocumented persons in the United States. Insofar as States and local areas are considering measures to deny public services to undocumented individuals, the Seals decision will be of considerable import to these policy-makers.

The ruling by the Seals court is expected to have the greatest impact on the poverty-stricken border areas of this country where many undocumented aliens live, and where local jurisdictions have little education money to supplant State or federal aid. In a study conducted under contract with the Southwest Border Regional Commission,[12] researchers portrayed the impact of attendance in school by Mexican resident alien children on border school districts as extremely significant.

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[12]Organization of U.S. Border and Cities, Impact of Resident Aliens and Migrant School Chidren on Border Public School Districts. Southwest Regional Border Commission, No. 681-766-008.

Virtually every school district surveyed along the border exhibited overcrowded school conditions, which affect educational quality and are believed to be caused to a large extent by the influx of alien children. In Texas, the situation is exacerbated by restrictions on State funds for the construction of public school facilities. There exist two sources of federal funding for school facility construction, but resources under these programs and the Title I Migrant Education Programs prove limited. The Seals decision may alleviate this situation, since local school districts can now include undocumented children in the formula for State assistance. This will increase revenues for districts which have not been strictly enforcing the State statute. However, area school officials fear that the Seals decision may lead to an increase in the number of undocumented children enrolling in school. This situation requires careful monitoring at the area and State level.

V. CONCLUSION AND RECOMMENDATIONS

Conclusions

In many ways In Re: Alien Children underscores the pressing need for an adequate and timely national response to the issue of undocumented immigration in this country. The relative inability or incapacity of the federal government to comprehensively regulate immigration can be viewed as a major factor contributing to the development of the case. On the one hand exists a host society willingly absorbing immigrants for what they offer -- cheap labor -- and, on the other, a society hostile to the notion of accommodation of these same immigrants, much less their children and families. The court determined that the State reaction to the "confluence" of problems tied to present federal immigration policy is impermissible. And while a basic Constitutional issue has been contested and resolved to the benefit of the undocumented children, the overall condition of undocumented immigration remains at status quo and feeds other social injustices. The broader issue and its resolution are currently the responsibility of the Select Commission on Immigration and Refugee Policy, and its legislative and policy outcomes are still awaited.

The ruling by the Seals court is widely viewed as a civil rights victory, and as a just and fair resolution to the matter. At stake is the welfare of children of undocumented persons, many of whom are and will remain permanent residents of the United States. In many instances the children themselves are citizens by virtue of birth in this country. As Judge Seals noted, by denying an education to this group of children,