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U.S. IMMIGRATION REFORM: EMPLOYER SANCTIONS
AND ANTIDISCRIMINATION PROVISIONS*

*Senator Alan K. Simpson***

I. INTRODUCTION

The maximum effort in Congress to control illegal immigration to the United States has been expended over the last fifteen years. Despite public opinion polls showing that the American public—as well as the major ethnic minority groups in America—strongly favored an end to uncontrolled immigration,¹ Congress had found it exceedingly difficult to pass legislation toward achieving that goal. In addition, despite the plethora of bills introduced by members of all ideological perspectives,

*From an address delivered for the Ben J. Alzheimer Lecture Series at the University of Arkansas at Little Rock School of Law on November 17, 1986.

**Republican United States Senator from Wyoming. Former Chairman and current ranking Republican member of the Senate Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary and Senate author of the Immigration Reform and Control Act of 1986. Senator Simpson sincerely wishes to acknowledge the assistance of Carl W. Hampe, Counsel to the Senate Subcomm. on Immigration and Refugee Policy, in the research, footnoting and outlining required for the preparation of this article.

1. FEDERATION FOR AMERICAN IMMIGRATION REFORM, *HISPANIC AND BLACK ATTITUDES TOWARD IMMIGRATION POLICY: A NATIONWIDE SURVEY FOR FAIR* (1983); FEDERATION FOR AMERICAN IMMIGRATION REFORM, *SPECIAL REPORT: THE MOST COMPREHENSIVE NATIONAL POLL EVER TAKEN OF BLACK AND HISPANIC OPINION ON IMMIGRATION REFORM* (Aug. 1983) (available from the Federation for American Immigration Reform, 2028 P Street, Washington D.C. 20036); Schreiner, *How Bay Residents Feel About Illegal Immigrants*, *San Francisco Chron.*, Oct. 2, 1986; Pear, *Rising Public Support for Limits on Immigration Is Found in Poll*, *N.Y. Times*, July 1, 1986; *What our Readers have to Say*, *U.S. NEWS & WORLD REPORT*, Feb. 17, 1986, at 71.

there is a common feature to every bill that has been seriously considered: inclusion of "employer sanctions"² as the main enforcement mechanism.

Employer sanctions have been considered essential for the following reasons: (1) Almost all immigration scholars agree that the main incentive for illegal immigration is the availability of U.S. jobs,³ and employer sanctions would remove that incentive; and (2) under modern U.S. immigration law, until the immigration bill was signed by the President, it was illegal to be an undocumented alien but *not* illegal for an employer to hire such an alien,⁴ thus creating a clear incentive for the illegal immigration of unauthorized workers. Despite the difficulties the many bills containing employer sanctions have experienced in the legislative process, each vote in the full House or Senate on the propriety of employer sanctions as an enforcement tool has displayed significant support for the provision.⁵

One of the most commonly expressed criticisms of employer sanctions is that they would tend to encourage employment discrimination against legal residents of the United States who might "look or sound foreign." The argument has been propounded most frequently by ethnic (particularly Hispanic) organizations, some religious groups and some civil rights organizations. In recent years, legislators who supported the concept of employer sanctions have attempted to fully listen to and consider the fears of those who predicted a discriminatory

2. "Employer sanctions" are shorthand for penalties against employers who knowingly hire, recruit, or refer for a fee aliens who are unauthorized to work in the United States.

3. *Knowing Employment of Illegal Immigrants: Hearings Before the Senate Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 194-235 (1981) (testimony of Professor Vernon Briggs, Cornell University; Professor Mark Miller, University of Delaware; David North, New TransCentury Foundation, etc.) and *Immigration Reform and Control Act: Hearings on S. 529 Before the Senate Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 140-53, 426-35, 510-22 (1983) (testimony of the Reverend Theodore M. Hesburgh, president, Notre Dame University; Honorable William French Smith, Attorney General; Lane Kirkland, president, AFL-CIO; etc.).

4. Previous § 274(a) of the Immigration and Nationality Act held that it was illegal to "willfully or knowingly conceal[], harbor[], or shield[] from detection . . . any alien . . . not duly admitted by an immigration officer . . ." but with the following proviso: "Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." Immigration and Nationality Act, Pub. L. No. 82-414, § 274(a), 66 Stat. 166, 228 (1952) (codified as amended at 8 U.S.C. § 1324 (1982)).

5. 130 CONG. REC. H5702 (daily ed. June 13, 1984) (Schroeder amendment to sunset employer sanctions outright three years after enactment, failed by a vote of 137 to 274); 130 CONG. REC. H5715-16 (daily ed. June 13, 1984) (Roybal amendment to delete employer sanctions and substitute provisions to increase enforcement of present labor laws, failed by a vote of 120 to 304).

impact.

This article will trace the history of immigration reform legislation during the past fifteen years, discuss the debate and legislative response to allegations that employer sanctions would create employment discrimination, and evaluate the attempts to "mix" civil rights issues with immigration reform legislation.

II. EARLY EMPLOYER SANCTIONS LEGISLATION

The first major immigration bill to contain employer sanctions (H.R. 16188) was introduced by Congressman Peter Rodino (D-NJ), Chairman of the House Judiciary Committee, on August 3, 1972. The bill was the result of a Nixon Administration proposal (H.R. 2328, 92nd Congress) and a subsequent series of hearings by the House Judiciary Committee. The Rodino bill would have made it unlawful for an employer to "knowingly" hire an illegal alien, and after a warning notice the employer would be liable for fines of up to \$500 per alien for the first offense and up to \$1,000 and one year imprisonment per alien for the second offense. An employer would not have been penalized if he could establish that he had made a good faith inquiry into whether the employee was authorized to work in the United States, and an employer could satisfy this requirement by obtaining a signed statement from the employee attesting to his employment eligibility. House of Representatives Bill No. 16188 (H.R. 16188) passed the House on September 12, 1972 by a vote of 297 to 53,⁶ but was not acted upon by the Senate during the 92nd Congress. A nearly identical bill, H.R. 982, was introduced in the 93rd Congress by Chairman Rodino on January 3, 1973, and it also passed the House by a comfortable margin: 297 to 63. Again, the Senate took no action on the legislation.

Neither of the early Rodino bills contained any specific provisions to remedy employment discrimination after it occurred, largely because the sponsors did not believe such discrimination would occur. Nonetheless, charges of potential discriminatory impact were noted, and the Committee responded in the following manner:

In order to further alleviate objections that legislation of this nature would result in employment discrimination, the subcommittee concluded that such legislation should contain safeguards to insure the conscientious employer that he would not be subject to civil or crimi-

6. The roll call vote was actually on a motion to recommit the bill to committee, effectively killing it. That motion failed by a vote of 53 to 297, and the bill was then passed by a voice vote. 118 CONG. REC. H30,185-86 (daily ed. Sept. 12, 1972).

nal sanctions. Therefore, in order to replace the presumption—that failure to inquire as to the citizenship or alien status of a prospective employee constitutes evidence of the employer's knowledge of the alien's illegal status—the subcommittee favored a provision that the making of such a bona fide inquiry shall exempt the employer from penalties.⁷

The Committee also noted that “employers, employment agencies and unions which engage in employment discrimination on the basis of national origin would be in violation of Title VII of the Civil Rights Act of 1964.”⁸ Significant efforts were then underway to strengthen Title VII enforcement mechanisms, and members were undoubtedly aware of expected improvements in Title VII. These were confirmed in the 1972 amendments to Title VII.⁹

In addition, Congressman Rodino, during the House-Senate Conference Committee on the Immigration Reform and Control Act of 1984, recalled that the first groups who voiced fears about potential employment discrimination were those employers who were hiring illegal aliens. Only after these self-serving complaints, said Mr. Rodino, were such concerns later voiced from ethnic minority groups who resisted all forms of the legislation.

After the second Rodino bill, no significant immigration reform legislation reached the floor of the House or Senate until 1982. Nonetheless, a number of bills were introduced, and some were considered and approved at the committee level. In the second session of the 92nd Congress, Senator Kennedy introduced legislation (S. 3827) that was nearly identical to Congressman Rodino's earlier employer sanctions bill, except that the penalties had been increased to \$1,000 per alien for the first offense, and \$2,000 per alien for the second offense. The bill was not acted upon by the Senate.

The 94th Congress saw the introduction of three major immigration bills: S. 561 by Senator Kennedy (D-MA), S. 3074 by Senator Eastland (D-MS), and H.R. 8713 by Congressman Rodino. Senator Kennedy's bill contained an employer sanctions provision that was nearly identical to that in his earlier bill. Senator Eastland, Chairman of the Senate Judiciary Committee and the man responsible for the death by neglect of Congressman Rodino's first bills, introduced legislation that established a graduated system of employer sanctions and ex-

7. *Illegal Aliens, A Review of Hearings Conducted during the 92nd Congress by Subcomm. No. 1 of the House Comm. of the Judiciary* 93d Cong., 1st Sess. 25 (1973).

8. *Id.* See 42 U.S.C. § 2000e-2 (1982).

9. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

panded the temporary worker ("H-2") provisions in current law. Neither bill moved beyond the subcommittee level. Congressman Rodino's bill refined somewhat his system of penalties against employers who knowingly hired illegal aliens, clarifying the judicial review that accused employers could expect and granting the Attorney General the power to seek an injunction in district court against egregious violators. The bill also granted the Attorney General authority to bring a civil action in district court against any employer who discriminated against an employee based on national origin.¹⁰ This was a modest expansion of the current enforcement mechanisms in Title VII, in which the Equal Employment Opportunity Commission (EEOC) could bring a civil action after attempts at conciliation, or in which the Attorney General could bring such an action when discrimination had been engaged in by a government agency or by a private employer on a pattern or practice basis. The Rodino bill was passed by the House Judiciary Committee, but this time it was not considered on the House floor.

Despite the modest addition to EEOC procedures in the Rodino bill, the immigration bills of the 94th Congress (and the Kennedy bill of the 93rd Congress) did not focus on antidiscrimination provisions. Instead, the bills added the new concept of "legalization"—legalizing (or "granting of amnesty" to) a portion of the current undocumented population. The original Rodino bills had not included such a program, and this was a new step in immigration reform legislation. The Kennedy bill in the 93rd Congress would have granted legal status to those aliens who had resided illegally in the United States for at least three years. The 94th Congress Kennedy bill would have made the legalization cut-off date almost current (January 1, 1975), the 94th Congress Rodino bill set a date approximately seven years prior to the bill's introduction (June 30, 1968), and the Eastland bill mirrored the Rodino legislation in this aspect.

To summarize, no immigration bill passed by the House of Representatives in the 1970's contained provisions that assumed discrimination would occur. Therefore, no attempts were made to remedy possible discrimination—obviously since the sponsors felt that the original legislation's employer sanctions provisions would not create such discrimination. While one of the bills in the 94th Congress did contain a narrow antidiscrimination provision, the more important addition in these later bills was the program to legalize workers who were currently in the country in an illegal status.

10. H.R. 8713 § 3, 94th Cong., 1st Sess., 121 CONG. REC. H23,300 (1975).

III. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY

The 95th Congress saw a revival of the most recent Rodino bill, this time introduced by Congressman Joshua Eilberg (D-PA), and the introduction of legislation developed by the Carter Administration: S. 2252/H.R. 9531. The Carter bill would have penalized employers \$1,000 per alien for knowingly hiring an illegal alien, and directed the Attorney General to seek civil penalties and injunctive relief in district court against employers displaying a "pattern or practice" of violation. The bill contained no specific antidiscrimination provisions, although President Jimmy Carter noted that "to prevent any discriminatory hiring, the federal civil rights agencies will be charged with making much greater efforts to ensure that existing antidiscrimination laws are fully enforced."¹¹ The bill also included a provision for the legalization of the status of certain illegal aliens.¹²

As a result of the strident controversy and legislative inaction that greeted the Administration proposal, President Carter, on October 5, 1978, appointed a "Blue-Ribbon Panel" to study the problem of immigration reform: the Select Commission on Immigration and Refugee Policy. It was chaired briefly by Reubin Askew, former governor of Florida, then permanently by Father Theodore Hesburgh, the President of Notre Dame University and a former member and chairman of the U.S. Commission on Civil Rights. The Commission included among its members four cabinet secretaries, four U.S. senators, four U.S. congressmen, and three private sector citizens closely involved with the immigration issue.

After lengthy hearings, deliberations, and extensive staff research, the Commission published its final report and recommendations in March of 1981.¹³ The report stated broadly:

1. Employers who *knowingly* hire undocumented aliens should be penalized. A recommended penalty structure would be, (A) first offense, administrative citation, (B) second offense, \$1,000 civil fine per alien, and (C) for continued violation, availability of injunction in federal district court. A majority of the commissioners recommended a

11. Undocumented Aliens: President Carter's Message to the Congress 1977 PUB. PAPERS 1416, 1418 (Aug. 4, 1977).

12. The Carter Administration bill granted permanent residence to those aliens who had entered the U.S. prior to January 1, 1970, and granted a temporary five year residence to those who had entered prior to January 1, 1977. It was left unresolved what would become of those granted temporary residence after the five year period ended.

13. Final Report of the Select Commission on Immigration and Refugee Policy: U.S. Immigration Policy and the National Interest (1981). This is not an exhaustive list of the recommendations of the Select Commission.

requirement of universal verification of new employees, and a smaller majority recommended a more secure verification system to achieve this objective.¹⁴

2. Border Patrol and interior enforcement capabilities of the Immigration and Naturalization Service should be improved to deter people from seeking illegal entry into the United States.

3. Legalization of a portion of the current population of illegal aliens should be undertaken, only after the new enforcement measures had been instituted. A minimum period of U.S. residence should be required, and the cut-off date should be no more recent than January 1, 1980.

The Select Commission was extremely conscious of possible employment discrimination arising from employer sanctions and responded by stressing the need for a secure and uncomplicated employer verification system:

To protect the rights of employers and employees alike, the Commission has considered the institution of a system which would facilitate establishing employment eligibility. It acknowledges the criticism leveled at previous employer sanctions legislation on the basis of the vague, and therefore unenforceable, requirement that employers must *knowingly* hire undocumented workers. It, therefore, holds the view that an effective employer sanctions system must rely on a reliable means of verifying employment eligibility. Lacking a dependable mechanism for determining a potential employee's eligibility, employers would have to use their discretion in determining that eligibility. The Select Commission does not favor the imposition of so substantial a burden on employers and fears widespread discrimination against those U.S. citizens and aliens who are authorized to work and who might look or sound foreign to a prospective employer. Most Commissioners, therefore, support a means of verifying employee eligibility that will allow employers to confidently and easily hire those persons who may legally accept employment. Without some means of identifying those persons who are entitled to work in the United States, the best-intentioned employer would be reluctant to hire anyone about whose legal status he/she has doubts.¹⁵

Father Hesburgh, in congressional testimony after the expiration of the Select Commission, expanded on the need for a secure employment verification system. This is illustrated in his response to questions during Senate hearings on the Immigration Reform and Control Act of

14. *Id.* at 61.

15. *Id.* at 66-67 (emphasis in original).

1985:

SENATOR SIMPSON: How do you respond to those persons who claim that discrimination is only going to increase due to employer sanctions?

FATHER HESBURGH: I find that the most flimsy argument that I have heard in this whole area, because if you take seriously what I have said as a kind of tripartite approach to this problem; namely, employer sanctions, a good ID card of some kind, and legalization, then if you go to get employment, and someone says I am not interested because you look un-American, or some such things, you just flash a card that says you are eligible for employment, and [if] someone does not employ you, there is a very serious law about that kind of behavior.

The ID is what saves you from the discrimination. . . .¹⁶

In addition, the Staff Report of the Select Commission discussed at length the issue of potential discrimination being caused by employer sanctions:

Much of the objection to an employer sanction and employment eligibility system is based on four doubtful premises:

- First, that employers will be left with discretionary decisions that inevitably will be discriminatory;

- Second, that the civil rights violations that exist now are minor compared to the ones that would occur under the proposed system;

- Third, that there can never be enough safeguards to eliminate the threat of governmental control; and

- Fourth, that development and implementation of any system—no matter what kind—would be exceedingly costly and a waste of the taxpayers money.

Establishing Eligibility

The systems that were considered by the Select Commissioners would be universally applicable—employers could not avoid requiring and checking the evidence of eligibility of *all* persons. Past legislation sometimes rested on assertions of the right to work by citizens and aliens, with only the latter requiring some evidence or potential follow up. In all options examined by the Commission, citizens and aliens alike would be required to participate in the system, and employers could not fail to check on some employees without being guilty of non-compliance and attendant penalties.

More importantly, the critical decision about eligibility would not

16. *Immigration Reform and Control Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 9 (1985) (testimony of Father Theodore Hesburgh).

be left to the employer. *An applicant would be presumed to be eligible until the government told the employer to the contrary.* While this leaves some potential for subjective discrimination against applicants who might be foreign in appearance or speech, in fact eligible alien employees would have more protection against discrimination than they have now. The employer could not use the excuse that he "thought the applicant was an illegal" when faced with charges of discrimination.¹⁷

The Staff Report reiterated that "Commission members . . . believed that a verification mechanism would guard against employer discrimination in cases where potential employees might appear or sound foreign,"¹⁸ and strongly asserted its belief that a secure employment verification system would actually alleviate discrimination:

The staff believes that the use of an employee eligibility/employer responsibility system can avert any such an eventuality with an approach that could be turned to the advantage of the civil rights and liberties of all U.S. citizens. It further believes that such a system—if based on an easy, reliable mechanism for employment verification and equipped with the appropriate safeguards—will not impose an undue burden on the U.S. workforce and actually will reduce the likelihood of employer discrimination.¹⁹

Thus, despite the failure of past congressional efforts to enact employer sanctions legislation, the Select Commission strongly recommended that such provisions be included in new immigration reform legislation.²⁰ It responded at length to fears that employer sanctions would encourage employment discrimination, but its solution was to prevent discrimination with a secure worker verification system instead of creating new antidiscrimination remedies that would address the problem only *after* it occurred.

IV. "SIMPSON-MAZZOLI" IMMIGRATION LEGISLATION, 97TH CONGRESS

After the Final Report to the Congress of the Select Commission on Immigration and Refugee Policy in March 1981, the House and Senate Subcommittees on Immigration, chaired respectively by Con-

17. Staff Report of the Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interests at 576-77 (1981) (emphasis in original).

18. *Id.* at 568.

19. *Id.* at 583.

20. The Commissioners voted 14 to 2 to include employer sanctions provisions in their recommendation. Final Report, *supra* note 13, at 61.

gressman Romano L. Mazzoli (D-KY) and Senator Alan K. Simpson (R-WY), began a series of hearings on the Select Commission's findings and on the central issues involved in immigration reform legislation.²¹ On March 17, 1982, a joint bill, the Immigration Reform and Control Act of 1982 (S. 2222/H.R. 5872), was introduced in each body, sponsored by Senator Simpson and Congressman Mazzoli. Following closely the recommendations of the Select Commission, the bill included the following provisions: (1) Penalties against employers who knowingly hire illegal aliens; (2) procedures for an employer verification system, including provisions to make that system more secure if necessary; (3) improvements in the enforcement capabilities of the Immigration and Naturalization Service (INS); and (4) a legalization program for those aliens residing in the United States in an illegal status since before January 1, 1980. The bill also included provisions addressing the asylum adjudication system, temporary worker ("H-2") program, the legal immigration system, and other somewhat less significant areas of immigration law.

The issue of potential discrimination arising from employer sanctions was addressed in the manner recommended by the Select Commission: a universal employee verification requirement was included, and mechanisms were provided to improve the verification system if current documents proved inadequate.

The first antidiscrimination provision was included despite the objections of some business groups, in particular the U.S. Chamber of Commerce. The bill would have required employers to check the documents of all new employees—regardless of their immigration status—and to keep a record of this check. Failure to do so would have exposed the employers to a \$500 civil fine per person. This penalty was available in addition to the stiffer fine for knowingly hiring an illegal alien. Once the verification procedures had been complied with, the employer had an affirmative defense against the employer sanctions. The legislative history is clear on the intent of this provision: "[t]he provision for a penalty for merely failing to comply with the verification procedure, even if the applicant were a U.S. citizen, is designed to make it less likely that an employer will discriminate by requiring verification only of those he believes 'look or sound foreign.'"²²

The bill also required a Presidential Study of the existing docu-

21. See *Summary of Hearings Held by the Senate Judiciary Subcomm. on Immigration and Refugee Policy, July 1981 to April 1982, prepared for the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983).*

22. S. REP. NO. 485, 97th Cong., 2d Sess. 31-32 (1982).

ments that the bill initially prescribed in order to establish employment eligibility. Three years after enactment, the President was directed to implement such improvements as necessary to make the system more secure against fraudulent use. While the bill did not specify what changes could be made, it did prohibit any new identity document that might be developed from being (1) a "national ID" card, (2) used for other law enforcement purposes, (3) withheld for any reason other than lack of employment eligibility, and (4) required to be carried on one's person. The provisions requiring a secure verification system addressed concerns of both the bill's sponsors and many Select Commissioners that, without secure identity documents, employers would be less likely to accept without question certain current documents that are believed to be easily counterfeited or abused. Not only would such a situation dilute the effectiveness of employer sanctions, but it could lead to increased incentive for employers to scrutinize the documents of those employees who sounded or appeared foreign. While increased document scrutiny is not a form of discrimination that is as objectionable as actual denial of employment, the bill's sponsors nonetheless wished to avoid it.

In the Senate, S. 2222 was the target of four amendments that attempted to include additional antidiscrimination language. Two amendments were proposed during Senate Judiciary Committee consideration of the bill in May of 1982. One, sponsored by Senator Kennedy, would have required that employer sanctions terminate three years after enactment unless the President certified ninety days before that deadline that the sanctions had not resulted in a pattern of discrimination against U.S. citizens or other eligible workers seeking employment. The amendment was defeated in committee by a vote of 3 to 11. The other amendment, sponsored by Senator DeConcini, required the President to submit a report on whether the implementation of employer sanctions had resulted in discrimination in employment or unnecessary regulatory burdens on employers, and on whether the sanctions should be continued. The amendment was defeated by a vote of 3 to 11 as well.

The bill was then subject to two additional antidiscrimination amendments when it reached the Senate floor in August of 1982. The first was an identical version of Senator Kennedy's "sunset" amendment proposed in Judiciary Committee. It was defeated by a vote of 22 to 69. The second amendment, also proposed by Senator Kennedy, required the General Accounting Office (GAO) to prepare three reports (every eighteen months) on whether employer sanctions had: (1) been

carried out satisfactorily; (2) caused a pattern of unlawful discrimination against U.S. citizens or legally resident aliens; or (3) created an unnecessary regulatory burden on employers. The amendment was acceptable to the floor manager, Senator Simpson, and it was passed by a voice vote.

On August 17, 1982, the Senate finally passed the bill by a vote of 80 to 19. The bill was brought to the floor of the House of Representatives in late December of 1982, but no final action was taken on the bill and it died with the expiration of the 97th Congress.

V. 98TH CONGRESS: BILLS PASSED IN BOTH BODIES

Both House and Senate bills were reintroduced in the 98th Congress (H.R. 1510 and S. 529, respectively). Senator Simpson introduced the same bill that was passed by the Senate in the previous Congress, and Congressman Mazzoli introduced the identical bill favorably reported by the House Judiciary Committee in the previous year.

Action on the bill again began first in the Senate. On April 19, 1983, the Judiciary Committee considered nine amendments to the bill before favorably reporting it. Three dealt with discrimination issues and did the following: (1) Required the GAO to report once a year for five years on the discriminatory and regulatory impact of employer sanctions, required Judiciary Committee hearings on these reports, and authorized funds for further enforcement of existing antidiscrimination laws; (2) required that employer sanctions be "sunsetting" in five years unless Congress specifically voted at that time to reenact them; and (3) required that sanctions be "sunsetting" in eight years unless Congress then acted affirmatively. The first amendment, offered by Senator Kennedy, was accepted by a voice vote. The second amendment, also offered by Senator Kennedy, was defeated by a vote of 5 to 11, and the third amendment, offered by Senator Joe Biden (D-DE), was defeated by a vote of 5 to 10.

Two significant antidiscrimination amendments were offered on the Senate floor. The first, sponsored by Senator Kennedy, would have provided for the termination of employer sanctions thirty days after receipt of the final GAO report on employer sanctions if that report were to find that employer sanctions had caused a widespread pattern of discrimination against U.S. citizens or legally eligible workers, and Congress approved of that report by adoption of a concurrent resolution stating its agreement with the GAO findings (this process has since been invalidated by the Supreme Court's rejection of the legislative

veto in *Immigration and Naturalization Service v. Chadha*²³). The amendment was defeated by a vote of 40 to 51.

The second amendment, offered by Senators Gary Hart (D-CO) and Carl Levin (D-MI), would have created a new antidiscrimination agency in the Department of Justice to hear claims of national origin discrimination not covered by Title VII,²⁴ and it would have created a new class of prohibited discrimination based on "aliengage" (the lack of U.S. citizenship, excluding illegal alien status). The amendment would also have instituted a new enforcement mechanism for discrimination claims, rejecting the EEOC's conciliation and district court proceedings for the creation of a quasi-judicial body, manned by administrative law judges who would make determinations on cases and issue administrative orders. The amendment, a significant first step in a drive to create a new, reactive administrative structure to address potential discrimination, was defeated by a vote of 29 to 59.

There were no other major antidiscrimination amendments, although certain alterations were made in the provisions that required the President to implement a more secure worker verification system. An amendment, sponsored by Senator Mark Hatfield (R-OR) and accepted by the two floor managers of the bill, required that any proposal by the President for a new card or other document be first sent to Congress, which could reject the proposal if within thirty days it passed a concurrent resolution objecting to the new card (this amendment's mechanism has also since been invalidated by *Chadha*). Senator Hatfield's concerns were not with discrimination but with his wish to avoid the development of any "national ID card," and the employer's verification responsibilities were not changed at all. However, the amendment was an omen of things to come in the House, where there was much less support for a secure worker verification system. On May 18, 1983, the Senate passed the bill once again by a vote of 76 to 18.

The bill on the House side was subject to significant changes at the subcommittee and full committee level before it was favorably reported by the Judiciary Committee on May 13, 1983. This bill contained significant differences from the Senate-passed bill in the area of employer sanctions and antidiscrimination provisions. While the em-

23. 462 U.S. 919 (1983).

24. The major areas of national origin discrimination not presently covered by Title VII are employers who do not employ at least 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (codified as amended in 42 U.S.C. § 2000e(b) (1982)).

ployer penalties themselves were essentially similar, the House Committee bill contained the following different approaches: (1) There was no requirement that employers record the document numbers of all new employees, unless the employer had been previously found in violation of the law; (2) the President was required to report to Congress in three years on the need for a more secure verification system, but he was not given the authority to implement one; and (3) the U.S. Commission on Civil Rights was to join the GAO in the monitoring of employer sanctions; and a task force appointed by the Attorney General, Secretary of Labor, and Chairman of the EEOC was to monitor and review any allegations of continuing employment discrimination.

The bill was sequentially referred to four committees, one of which, Education and Labor, proposed an amendment relating to antidiscrimination concerns. This amendment would have: (1) appointed a Special Counsel to the U.S. Immigration Board (an independent agency in the Justice Department, created by the bill) to prosecute violations of employer sanctions; (2) created a quasi-judicial hearing and review structure using administrative law judges and the Board to make determinations on the cases that the Special Counsel chose to bring; and (3) used this structure to prosecute "unfair immigration-related employment practices"—namely, discrimination based on national origin that is not covered by Title VII, and discrimination based on "alienage."

When the bill reached the House floor on June 11, 1984, sixty-five amendments were designated by the Rules Committee to be "in order" to the bill, two of which dealt directly with antidiscrimination concerns. The first amendment, described above, from the Committee on Education and Labor, was defeated by a vote of 166 to 253. The second, proposed by Congressman Barney Frank (D-MA), reproduced the antidiscrimination provisions and Special Counsel enforcement structure of the Education and Labor Committee amendment, but deleted the reorganizing of the employer sanctions enforcement procedures. The amendment was presented late in the evening of June 12, 1984, as a "noncontroversial" antidiscrimination amendment. Its later opponents did not oppose it at the time, and it was passed by a vote of 404 to 9. This amendment marked a significant change in the antidiscrimination actions of either body. Previously, no amendment had been accepted by either body that would have created new antidiscrimination mechanisms—or that even significantly modified current ones. In addition, no amendment had previously been accepted that assumed discrimination would occur and then developed a mechanism to remedy such discrimi-

nation. The acceptance of this amendment proved to be a major stumbling block in the later attempts to resolve House and Senate bills in a Conference Committee.

There were also significant amendments made to the worker verification system during House floor consideration. Congressman Dan Lungren (R-CA) was successful in reinserting a requirement that employers record the document numbers of *all* new employees, whether or not the employer had previously violated the section, and that a \$500 civil fine per person be imposed on employers who failed to comply. Congressman Lungren argued that such an amendment was necessary for both effective enforcement of employer sanctions and elimination of incentive for employment discrimination.²⁵ The House approved an amendment offered by Congressman Sam Hall (D-TX) that required establishment of a nationwide “telephone call-in” system which would verify the Social Security numbers of applicants, and act as the sole step an employer would be required to take in verifying an employee’s eligibility. Congressman Edward Roybal (D-CA) successfully proposed an amendment that deleted the requirement that the President study the security of existing documents and report back to Congress in three years. The House bill now contained no provisions—other than the Hall telephone system, that relied on existing Social Security cards, that would provide for a secure worker verification system. Congressman Roybal claimed this approach was necessary to avoid a “national identification system.”²⁸

The bill was passed by the House on June 20, 1984, by a vote of 216 to 211.

A Conference Committee was convened on September 13, 1984, to resolve the differences between the House and Senate bills.²⁷ Two of the major issues faced by the conferees were the question of a secure worker verification system and the form of the antidiscrimination provisions.

House conferees insisted that no language on a more secure verification system—not even a study on such a system—should be included in the Conference Report. Despite the apparent “conference strategy” of Congressman Roybal to retain in conference the House Judiciary Committee’s study provisions,²⁸ House conferees demanded that any

25. 130 CONG. REC. H5635 (daily ed. June 12, 1984) (statement of Rep. Lungren).

26. *Id.* at H5659.

27. There is no official record kept of conference committee proceedings, and therefore the following is compiled from notes kept by the Senate immigration subcommittee staff.

28. Mr. Roybal: Well, first of all, it would be part of a national identification system.

language on secure documents be eliminated, else it jeopardize the conference bill on the House floor. Senate conferees then reluctantly agreed to delete all of the secure verification system provisions in the conference bill with the exception of the telephone system.

The second issue, whether "alienage" prohibitions and new antidiscrimination structures should be included in the bill, was even more contentious. House conferees, in particular Congressman Frank, insisted that the alienage protection and new antidiscrimination provisions remain in the bill. Senate conferees, and Senator Simpson in particular, stated serious objections to placing "civil rights legislation on an immigration reform bill." House conferees argued that: (1) a new antidiscrimination mechanism was necessary because the EEOC did not handle cases swiftly enough; (2) alienage coverage was important to safeguard minorities once employer sanctions were enacted and to protect newly legalized aliens from employment discrimination; and (3) additional national origin protection was necessary for those employees that Title VII did not cover.

Senate conferees countered that: (1) a new enforcement agency within the Justice Department was redundant with existing structures, and any current dissatisfaction with EEOC should result in separate amendments to improve the EEOC; (2) there was no evidence of any more than anecdotal incidents of alienage discrimination, and employer sanctions could not logically be construed to encourage alienage—as opposed to national origin—discrimination; and (3) the amendment's establishment of a new "agency-sized bureaucracy" (the Office of the Special Counsel) was extremely costly and would encourage frivolous litigation through private right of action and attorney's fees provisions. In addition, Senator Simpson and many of the other Senate conferees did not feel that "alienage discrimination" was something that should be prohibited by federal law. As Senator Simpson asked rhetorically at the Conference Committee proceedings, "Should a U.S. employer be exposed to a federally-funded lawsuit if he chooses to hire a citizen of

By deleting the language that we now have in the bill the committee can then go to conference and meet with the Senate's version. They would at least have no language at all.

If they go to conference with the language that they now have, they will probably come back as a compromise with the House version.

But it seems to me that the conferees on the part of the House would have a better opportunity to negotiate with the Senate if there was no language in the House version.

That is the main reason for proposing this amendment, together with the many arguments that I would like to give.

the United States over the citizen of a foreign country? I think not.”

Indeed, many Senate conferees were uncomfortable requiring that the private sector refrain from alienage discrimination while the federal government actively practiced and required it (Executive Branch employees must be U.S. citizens because of a Presidential Executive Order, and many contractors to the federal government are required to hire only U.S. citizens). Alienage discrimination prohibitions had never been advanced during earlier consideration of the Civil Rights Act of 1964, and most Senate conferees saw no reason to alter that approach now.

Senate conferees then proposed an alternative provision that would have extended Title VII coverage to small employers and provided a GAO study of alienage discrimination that would trigger alienage coverage only if such discrimination were found to have occurred. House conferees rejected this compromise.

After over ten days of meetings, the conferees reached accord on all issues except two: (1) the antidiscrimination language before mentioned; and (2) a statutory \$4 billion limit or “cap” over four years to reimburse state and local governments for the costs they might incur due to legalization. A possible compromise (the Senate would accept the “Frank Amendment,” and the House would accept a statutory cap on federal reimbursement for legalization costs) was defeated when the statutory limit was rejected by the House conferees by a vote of 13 to 15 on October 9, 1984, and the bill then died in the Conference Committee.

It is important to note that, after passing both Houses of Congress for the first time, the bill later failed in the Conference Committee largely because of a provision that had never before been viewed as crucial. While antidiscrimination issues had always been a prime concern for all sponsors of employer sanctions legislation, the consensus solution in the past had been to prevent its occurrence (rather than remedy it after the fact) through simple employer responsibilities and a secure worker verification system. Prior versions of employer sanctions legislation had never contained any new antidiscrimination agency, and the Senate had voted down a nearly identical proposal, 29 to 59. Indeed, the House debate on such a significant change in civil rights law was swift and insubstantial: for example, the Republican bill managers who had cautiously accepted the Frank amendment on the House floor were later some of its most vociferous opponents in Conference Committee. At that time, the proposal had had almost no examination in committee hearings by either body. After a decade-long struggle to en-

act employer sanctions legislation, the demise of this bill by an ancillary, and largely unexamined provision so late in the game was deeply disappointing to its sponsors.

VI. 99TH CONGRESS

Immigration reform legislation was introduced again in the 99th Congress, this time independently by Senator Simpson in the Senate, and by Congressmen Rodino and Mazzoli in the House.

The Senate bill, S. 1200, was substantially similar to the prior Senate legislation with respect to employer sanctions, except for a change in the worker verification procedures. S. 1200 no longer contained the \$500 civil fine against employers who "failed to keep the paperwork on all new employees" hired. However, the bill stated that for any employer who failed to keep the paperwork on *all* of his new employees, and was later found with an illegal alien in his employ, the judge could *presume* that the employer had knowingly hired the alien. The employer could overcome this presumption of knowledge through the presentation of "clear and convincing" evidence to the contrary. The intent of this change was to continue to encourage employers to verify employment eligibility and to retain employment records, but to avoid creating a civil penalty structure for mere paperwork violations.

In addition, S. 1200 augmented the GAO reporting requirements on employer sanctions. It called for the creation of a task force, appointed by the Attorney General, the Chairman of the EEOC, and the Chairman of the U.S. Commission on Civil Rights to review the GAO reports. If those reports detected employment discrimination occurring because of employer sanctions, the task force was required to send legislative recommendations to Congress to address the problem. The House and Senate Judiciary Committees were required to hold hearings on the recommendations within sixty days.

The secure worker verification system had been altered as well to respond to concerns that Congress would not have sufficient opportunity to review any new verification system which the President might decide to implement. While the bill still directed the President to implement a more secure system if current documents did not prove adequate, the following new restrictions were added: (1) A non-major change in the system (such as an improvement or change in the existing Social Security card) could not be implemented without sixty days' notice to Congress; and (2) a major change to the system (such as a new document or identifier, or a telephone verification system) could not be implemented without two years' notice to Congress, nor

could it be implemented unless Congress specifically appropriated funds for it.

One antidiscrimination amendment was proposed to S. 1200 when the Judiciary Committee considered the bill in July of 1985. Senator Kennedy introduced an amendment to require expedited procedures on any joint resolution introduced to terminate ("sunset") employer sanctions upon receipt of the third annual GAO Report, if that report found that such sanctions had been solely responsible for a "widespread pattern of discrimination." The amendment was defeated by a vote of 7 to 9. However, this identical amendment was later accepted by the floor manager, Senator Simpson, when the full Senate considered the legislation in September of 1985. Senator Simpson said in floor debate:

I think Senator Kennedy's amendment provides the protections that are sought by all of us concerned about discrimination without inserting a whole new concept of civil rights legislation into the bill. I deeply appreciate that, because I think that would be a tough one to hurdle if it got in there. I think Senator Kennedy shares some of that concern, that we need not go to a new agency of government. If [new employment discrimination] happens, I, and I think everyone else in this Chamber, believe that we would want to have a swift and expedited manner to address discrimination problems. I think Senator Kennedy's 30-day expedited procedures for Congress to act is appropriate, and I accept it. In doing so, I assert that civil rights legislation should appear separately from an immigration reform bill, especially when we have tried so desperately to protect minorities in this country, and in this bill.²⁹

The other antidiscrimination amendment, offered again by Senators Hart and Levin, and nearly identical to the Frank amendment in the House, was withdrawn after significant floor debate. According to Senator Hart: "The sponsors of this amendment also do not want a highly negative vote on an issue we merely wish to preserve for the future."³⁰ The "future" event of which Senator Hart spoke was a joint House/Senate hearing on antidiscrimination issues that was agreed to by Senator Simpson and planned for October of 1985. The Senate bill was then passed for the third time on September 19, 1985, by a vote of 69 to 30.

The House Subcommittee on Immigration then held a series of hearings on the new "Rodino-Mazzoli" bill, and one hearing—concerning, as agreed to, employer sanctions and antidiscrimina-

29. 131 CONG. REC. S11,423 (daily ed. Sept. 13, 1985).

30. *Id.* at S11,439.

tion provisions—was held jointly with the Senate Immigration Subcommittee in October. This hearing focused specifically on the antidiscrimination language embodied in the Frank amendment, which was included in the new bill that Congressmen Rodino and Mazzoli introduced.

The hearing did place on the record much information that had neither been formally submitted nor examined, but there was little new information presented that “long time players” in the immigration debate had not previously encountered. Administration witnesses³¹ opposed the Frank provision because of the redundancy of its new enforcement mechanism and the lack of evidence that alienage discrimination was currently a problem or would become one after the immigration bill was passed. Business representatives³² also opposed the provision, claiming that the mechanism would encourage litigation and focus enforcement on smaller employers who are less able to afford legal representation. Proponents of the Frank provision³³ argued that new antidiscrimination mechanisms and rights of action would be necessary after passage of employer sanctions, and that the current enforcement structure of Title VII did not offer sufficient protection. Finally, an employment discrimination law specialist³⁴ sharply criticized the creation of a new antidiscrimination unit, contending that it would hopelessly confuse and complicate enforcement, and recommended that if Congress really felt that alienage discrimination protection were necessary, it should simply add it as a class of prohibited discrimination to Title VII.

Title VII is the key to the entire debate over the Frank proposal. Its present language and form are the motivation for many proponents of the Frank amendment, and the proponents’ criticism of the alleged

31. *Antidiscrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (administration witnesses included: William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice; Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights; and James Troy, Director of the Office of Program Operations, Equal Employment Opportunity Commission).

32. *Id.* at 70-110 (business witnesses included: Kathleen Alexander, Vice-President for Personnel Services, Marriott Corporation; Pat Choate, Director of Policy Analysis, TRW).

33. *Id.* at 110-83 (proponents of the Frank amendment included: the Honorable Robert Garcia (D-NY); Arthur F. Fleming, former Chairman of the U.S. Commission on Civil Rights; Richard H. Keatinge, Chairman, American Bar Association; and Benjamin Reyes, Deputy Mayor, City of Chicago).

34. *Id.* at 208-34 (Paul Grossman, esq., Paul, Hastings, Janofsky and Walker (co-author of SCHLEI & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (1983))).

unresponsiveness of Title VII is at least as pronounced as their criticism of its lack of a specific prohibition against alienage discrimination. However, the question of "What sort of administrative mechanism should a federal antidiscrimination agency contain?" was the central issue when the Civil Rights Act of 1964 was debated and finally passed. This has always been one of the most controversial of all past antidiscrimination topics. A portion of a Senate subcommittee staff report on this issue is excerpted below:

b) *Administrative Mechanisms:*

The question of what type of administrative mechanism should process claims of employment discrimination was central to the debate over the Civil Rights Act of 1964. Title VII of that Act has since been the object of many attempts to amend it.

When the Kennedy Administration originally had introduced the Civil Rights Act of 1963, its Title VII only prevented discrimination in employment of government contractors and subcontractors in federally assisted programs. This prevention would have been coordinated by the already-existing President's Committee on Equal Employment Opportunity.

The House version of the Administration bill, H.R. 7152, was referred to a subcommittee of the Judiciary Committee, where it was substantially revised. The original Title VII was deleted, and a bill recently reported by the Education and Labor Committee was substituted. This bill, H.R. 405, prohibited employment discrimination based on race, religion, color, national origin or ancestry by employers of 25 or more. The prohibition was patterned on the National Labor Relations Board. According to Richard Berg, a Justice Department attorney in 1964, "the Commission was to consist of an Administrator, whose task was to investigate complaints and to bring formal charges, and a five-member Board, which would hear and determine the cases brought by the Administrator and issue cease-and-desist orders where discrimination was established. Orders of the board were subject to judicial review, but the Board's findings of fact were conclusive if supported by substantial evidence." Thus this version of Title VII has significant similarities to the Hart-Levin/Hawkins/Frank amendments, and all have a common parent: the NLRB.

However, there was concern in the full Judiciary committee that a motion to strike the whole title on the House floor may be successful. Therefore, a more conservative version, adopted in the previous Congress by the Education and Labor Committee, was substituted. This version did not grant the EEOC quasi-judicial powers and denied it the ability to determine cases or issue cease-and-desist orders. The EEOC could seek a reversal of discriminatory practices under this

model by a civil suit in federal court, but a *de novo* trial would be held by the court instead of a review of the Commission's determination. This version of Title VII withstood serious attempts to weaken it on the House floor, and the whole bill was passed on February 10, 1964.

The legislation faced spirited opposition in the Senate, and both the motion to proceed to the bill and the bill itself were filibustered. Realizing that any bill which could successfully invoke cloture had to have broad bipartisan support, the Johnson Administration attempted to work out a compromise version of Title VII with Senator Everett Dirksen, the Minority Leader. The compromise that was reached created what we recognize today as the EEOC by making the following alterations to the House bill: (1) deleting the EEOC's right to bring suit and substituting a private cause of action by the person aggrieved, (2) requiring 60 days of conciliation at the state level before federal procedures could commence, and (3) exempting large classes of business and labor organizations from the recordkeeping requirements and curtailing the Commission's investigative authority. This version was passed by the Senate on June 19, 1964, on July 2, 1964 by the House and signed by President Johnson on that same day.

Significant amendments to Title VII were made in 1972 by PL92-261. One of the most important changes was to increase the coverage of employers: (1) expanding the 1964 Act's authority over employers of 25 or more to employers of 15 or more, and (2) including state and local governments and educational institutions in the coverage. Specific procedures were created to allow EEOC to sue in federal court, to permit injunctive relief, to allow an individual to sue in court after administrative remedies were exhausted, and to establish penalties of "such affirmative action as may be appropriate." In addition, the office of the General Counsel was created, the commission was granted investigative powers similar to the NLRB, and specific provisions were inserted to prevent discrimination in federal government employment. George Sape and Thomas Hart, former members of the EEOC and the House Committee on Education and Labor, write that, upon passage of the 1972 amendments, "the tools have now been made available to mount an all-out attack on every aspect of employment discrimination in all areas of the country."

The 1972 amendments had a legislative history similar to that of the original 1964 Act. The House Committee on Education and Labor reported out a bill, introduced by Congressman Hawkins, which would have covered employers of 8 or more, granted the EEOC broad investigatory powers, allowed it to make determinations on cases, and given it power to issue cease and desist orders in the case of a violation—a model similar to the initial subcommittee proposal during consideration of the 1964 Act. However, this approach was rejected

on the House floor and replaced by a substitute system sponsored by Congressman Erlenborn. The new version, which the House ultimately passed, dropped the cease-and-desist approach and instead allowed EEOC to seek compliance through civil action in the federal district courts. The Senate version of the bill originally contained cease-and-desist orders, but support from less than 50 senators—along with a filibuster led by Senators Sam Ervin and James Allen—forced a compromise along the lines of the House passed bill. A conference committee faced few major differences and a compromise bill was quickly approved in both houses and signed by President Nixon.

Since the 1972 amendments, there have been approximately 100 bills introduced that would in some way amend Title VII. Most dealt either with expanding the definition of discrimination to include such bases as age, handicap, pregnancy, or sexual preference, or with outlawing the imposition of numerical quotas when requiring “appropriate affirmative action.” One effort was successful, and became the 1978 amendments to the Civil Rights Act of 1964. This legislation stated that discrimination “because of sex” also included discrimination based on pregnancy or childbirth, and also contained provisions relating to fringe-benefit and insurance programs and to collective bargaining.

The final proposals to either amend Title VII or create new administrative mechanisms are the aforementioned Hart/Levin, Hawkins and Frank amendments. Each proposal would create a new anti-discrimination unit in the Justice Department—the Special Counsel to the U.S. Immigration Board. The U.S.I.B. would have quasi-judicial powers: it could initiate its own investigations, subpoena records and witnesses, make determinations on cases, issue injunctions and cease-and-desist orders, and assess a range of penalties which include reinstatement, backpay, recordkeeping, and civil fines of up to \$4,000 per violation. The U.S.I.B. would be presidentially appointed, as would the Special Counsel. Not only would the Special Counsel’s office handle charges of alienage discrimination and national origin discrimination by employers of four to fourteen, but it would also handle charges of alienage or national origin discrimination from employees who either work less than 20 weeks per year for a particular employer or are otherwise not covered by Title VII. While Senate conferees at the House-Senate Conference Committee on the Simpson-Mazzoli bill offered an amendment as an alternative to this structure which would have extended EEOC jurisdiction in national origin discrimination to employers of four or more, the House parliamentarian ruled the proposal out of the “scope” of the conference.

The history of civil rights legislation since 1964 is complex and confusing, but the following conclusions can be drawn: 1) proposals to insert alienage into current civil rights law are recent and few, and 2)

the question of what sort of administrative mechanisms should respond to claims of discrimination was the central issue when both the Civil Rights Act of 1964 and the 1972 Amendments to that Act were considered.³⁵

It was clear that the Frank amendment's approach had been proposed before and that it had been rejected by the U.S. Congress, twice during the last twenty years. However, the proposal seems to re-emerge once every decade, and this appears to be the resurgent effort for the 1980's.

The immigration bill was introduced on the House side on July 25, 1985, by the Chairman of the Judiciary Committee, Congressman Peter Rodino, and the Chairman of the Immigration Subcommittee, Congressman Romano L. Mazzoli. The bill was considered during four days of hearings in full committee in September and October 1985, and the Immigration Subcommittee considered the bill on November 18 and 19 of 1985. The bill reported from the Immigration Subcommittee (H.R. 3380) contained certain changes to the Frank antidiscrimination proposal, while retaining the basic concept. These changes were: (1) adoption of the previous year's Conference Committee analysis of only prohibiting discrimination against "intending citizens" instead of discrimination based on "alienage"; (2) permitting discrimination against an individual on the basis of the individual's lack of English language skill, where such skill would be a bona fide occupational qualification necessary to the normal operation of that particular business; (3) an extension of the time periods allowed to the special counsel and the administrative law judges for review and action on cases before a private right of action could be allowed; and (4) limitation of private rights of action to allegations of "knowing and intentional" discrimination, or allegations of a "pattern or practice" of discrimination. "Intending citizen" was defined as an alien who was a green card holder, temporary resident, or refugee or asylee, who filed a "declaration of intent" to become a citizen, but the definition did not include an alien who failed to apply for naturalization within six months of the date the alien had first become eligible, or an alien who applied on a timely basis but who had not been naturalized as a citizen within two years of the date of the application. Attempts to delete the entire structure of the Frank amendment at the subcommittee level were unsuccessful.

35. *Alienage Discrimination in Employment and Antidiscrimination Agencies*, a Staff Report prepared for the use of the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 13-18 (June 1985) (unpublished report) (footnotes omitted).

During House Judiciary Committee consideration of the bill, one further major change was made to the antidiscrimination provisions: employers of three or fewer employees were exempted from coverage of the amendment. Attempts to delete the entire antidiscrimination mechanism at full committee were again unsuccessful, and the immigration bill was reported favorably from that committee on July 16, 1986.

After long delay by opponents, the full House of Representatives finally considered the bill on October 9, 1986. Two amendments specifically addressed the Frank antidiscrimination language. The first amendment, sponsored by Congressman Dan Lungren (R-CA), stated that preferring a U.S. citizen over a lawfully resident alien would not be illegal if the two individuals were "equally qualified." This amendment addressed concerns that protecting against discrimination based on "alienage" or "intending citizenship" would have the effect of discriminating against U.S. citizens. The amendment would allow an employer to raise, a defense in any proceedings brought against him, that he hired the U.S. citizen over the alien because the U.S. citizen was equally qualified, or more so. The amendment was accepted by a voice vote.

The second amendment, sponsored by Congressman F. James Sennsenbrenner (R-WI), would have deleted the entire Frank antidiscrimination amendment. This amendment was defeated by a vote of 140 to 260. A sizeable number of Republicans supported the majority of Democrats who voted against the amendment to delete the Frank provisions, and the general discussion of the amendment indicated that many congressmen felt that the bipartisan coalition in the House that supported the bill would be weakened by the passage of this amendment.³⁶ The immigration bill as a whole was approved by the House later that day, by a vote of 230 to 166.

During Conference Committee consideration of the legislation, the Frank antidiscrimination provision was again revisited and became one of the main points of contention. Senate conferees argued that the "three year sunset" approach to discrimination was fully sufficient since Congress would be able to vote to entirely repeal employer sanctions if a "widespread pattern of discrimination" arose. House conferees, however, argued that the antidiscrimination mechanism needed to remain in order to address potential cases of employment discrimination.

36. 132 CONG. REC. H9770 (daily ed. Oct. 9, 1986) (see especially the remarks of Rep. Hamilton Fish (R-NY)).

It became apparent to Senate conferees that the House members were not likely to agree to delete the core of the Frank language, and the Senate agreed to accept the Frank language with the following modifications: (1) Attorneys' fees (previously allowed to prevailing parties, other than the United States) would only be allowed if the losing party's argument is "without reasonable foundation in law and fact;" (2) the antidiscrimination mechanism would be disassembled if employer sanctions were terminated under the thirty day expedited procedure as established by the Kennedy amendment; and (3) the Frank provisions would terminate if the Comptroller General, in the third annual report to Congress, were to report that no significant discrimination had resulted because of employer sanctions, or if the Frank amendment had created an "unreasonable burden on employers," and Congress had enacted a joint resolution that approved of the Comptroller General's findings within the thirty day period under the expedited procedures. To clarify the intent of the conferees, the following language was inserted in the joint "managers' language" statement of the conferees:

The antidiscrimination provisions of the bill will only provide this broadened protection while the sanctions are in effect; if the sanctions are repealed by joint resolution, the antidiscrimination provisions will also expire, the justification from them having been removed.

The antidiscrimination provisions would also be repealed in the event of a joint resolution approving a GAO finding that sanctions had resulted in no significant discrimination, or that the administration of the antidiscrimination provisions had resulted in an unreasonable burden on employers. In this regard, the Conference also expects that GAO would specifically look into the issue of whether the antidiscrimination mechanism and remedies are being utilized in a manner that is inconsistent with their original purpose (i.e. to guard against employment discrimination based on national origin or citizenship status). Conferees wish to emphasize that the antidiscrimination provision has been included in order to respond to the fears and concerns expressed by many that sanctions will result in employment discrimination based on national origins or citizenship status. Thus, the antidiscrimination provision does not in itself in any way set a precedent for the expansion of other Title VII protections. Furthermore, nothing in this bill shall prevent the use of language as a Bona Fide Occupational Qualification.³⁷

To further clarify the conferees' intentions with this language, and

37. *Immigration Reform and Control Act of 1986: Conference Report on S. 1200, the Immigration Reform and Control Act of 1986*, 99th Cong., 2d Sess. 87-88 (1986).

to illustrate the sensitive nature of the issue, the following statements of legislative history were made in the Congressional Record by both House and Senate conferees:

All conferees clearly agreed that we do not intend this provision to act as a precedent for future efforts to broaden civil rights coverage generally for classes now protected under title VII, nor is it the intent of this Congress that this language be abused by some who would hope to establish, through its administrative procedures, a particularized agenda. In fact, in the statute, we have specifically said that such exploits might jeopardize the entire Frank mechanism.

We clearly do not expect to see harassment suits initiated under this language, nor efforts to extort jobs from small employers through the threat of administrative action. In this regard, we incorporated into the attorneys' fees provisions of the Frank amendment limitations on recovery. We agreed that attorneys' fees should not be awarded unless the losing party's argument "is without reasonable foundation in fact or law." This language is intended to frustrate frivolous suits by taking away the incentive to bring them.

Further, it should be clear that the possible sunset of Frank is tied to the absence of "significant discrimination" resulting from sanctions. Such a sunset is intended to parallel the expedited sunset contained in the original Kennedy language in the Senate bill.³⁸

During Conference Committee consideration of the legislation, House conferees also agreed to adopt the Senate provisions with regard to a future method of establishing a secure worker verification system. While this provision had been very controversial in the House during the 98th Congress, the added safeguards of the Senate bill appeared to remove much of the opposition to such provisions in the House during the 99th Congress. The House passed the conference report on October 15, 1986, and the Senate passed the report two days later.

With the inclusion of the statement of managers' language concerning the Frank amendment and the comments in the floor debate, the Administration removed its previous opposition to the inclusion of such antidiscrimination language in the immigration bill, and President Reagan signed the bill into law on November 6, 1986.

VII. CONCLUSIONS

Despite the long and tortuous history of employer sanctions and their corresponding antidiscrimination provisions, a number of conclu-

38. 132 CONG. REC. H11,148 (daily ed. Oct. 16, 1986) (statement of Congressman Rodino).

sions may be formed regarding the relationship of these two topics:

(1) A simple employer responsibility program, along with a secure U.S. worker verification system, is essential for any nondiscriminatory employer sanctions program. Inclusion of such provisions should ensure that well-meaning employers will not be encouraged to avoid hiring potential employees who "look or sound foreign." The essential element of an employer responsibility program is a simple requirement that employers record the document number of *all* new employees, and a corresponding guarantee that the employer will have an affirmative defense against the penalties once he has complied with this requirement. A secure worker verification system must provide a mechanism for the improvement or replacement of existing documents if their insecurity should allow the system relying upon these documents to be easily defeated. A more secure system will ensure that employers conduct the screening activities that are so essential to the legislation's effective and nondiscriminatory operation.

(2) The Frank amendment would not seem to be the ideal solution for the potential problem of employment discrimination. It would be much more appropriate to insert provisions to prevent the occurrence of discrimination, rather than to create "after the fact" remedies. In addition, there is no evidence that "alienage" or "intending citizen" discrimination is a problem now, or that it will become a problem after employer sanctions take effect. A new administration agency would be redundant with the EEOC and could cause significant litigatory confusion for employees, the Immigration Service, and employers. If the EEOC is not working properly, then separate amendments should be proposed to improve it, not disregard it. The approach and the mechanism established by the Frank amendment was rejected by Congress during previous debates when the civil rights mechanism issues were examined in particular detail—as was surely *not* done during debate on the immigration bill.

(3) However, given the fact that it was most unlikely that the immigration bill would have been enacted unless some form of the Frank amendment had been accepted, the various compromises reached and reported here were politically reasonable.

The statement of managers' language on the immigration bill states unequivocally that the Frank amendment is not intended to harass employers or to be used as a justification for future expansions or elaborations of existing civil rights laws. Congress clearly stated its sole intent that this new mechanism was to be a solution to employer sanctions problems *only*.

In addition, Congress would be able, under special and expedited procedures, to terminate the Frank amendment if the third report by the Comptroller General should determine that no significant discrimination had arisen because of the enactment of employer sanctions, or if the report should show that the Frank amendment had created an unreasonable burden on employers covered by the Frank amendment. The Frank amendment would also be rendered inapplicable if employer sanctions were terminated under the "Kennedy amendment," which allows Congress to vote on termination of the sanctions if a "widespread pattern of discrimination" arises because of the imposition of employer sanctions.

Employer sanctions bills have always been accompanied by serious and well-founded concerns about possible employment discrimination during their lives as legislative proposals. However, most of the bills' sponsors in both the House and the Senate have been careful to ensure that immigration reform legislation did not become consumed by a tangential and divisive civil rights debate. It would have been ideal if we were to allow present laws to address the type of discrimination—national origin—that some have alleged might result from the enactment of employer sanctions. It would also have been ideal if further discrimination concerns would have been resolved, not by creating new civil rights structures or statutes, but by creating employer sanctions-based solutions: for example, a national employer responsibility program, a more secure worker verification system, and a "modified sunset" provision to terminate employer sanctions only if they actually proved to be discriminatory.

It was not politically possible for the "ideal" solution to the antidiscrimination problem to emerge in the final version of the immigration bill, yet the final version did provide valid assurances of protection for those who most genuinely fear and predict discrimination, and also a mechanism to terminate those measures for thoughtful opponents of such a provision should the new amendment prove to be unnecessary or clearly onerous to employers. Given the eternal necessity for compromise when functioning as a legislator in the U.S. Congress, the final result was acceptable in the context of the critical national need for legislative reform in the area of illegal immigration. I have a basic satisfaction in the completed work product.

