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Report of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York: An Analysis of Discrimination Resulting From Employer Sanctions and a Call for Repeal

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EXECUTIVE SUMMARY

Background

The Immigration Reform and Control Act (IRCA),¹ signed into law on November 6, 1986, represents the most profound change in

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

immigration law and policy since the McCarran-Walter Act of 1952.² IRCA's enactment was preceded by years of controversy. While its legalization provisions and their implementation have been the focus of much comment and criticism, particularly in light of the lower than predicted number of individuals who benefited, it is IRCA's broad employer sanctions provisions that are now the center of debate.

Employer sanctions were designed to be the primary legal deterrent to unlawful immigration into the United States. The statute mandates an inquiry into the immigration status of all individuals who are hired, recruited, or referred for a fee, through completion of an Employment Eligibility Verification Form (the I-9 form). Employers who fail to comply with this requirement or who knowingly hire aliens not authorized to work are subject to sanctions.

Because of the concern that sanctions might result in discrimination, Congress incorporated into IRCA a mandate that the General Accounting Office (GAO) prepare three annual reports describing the results of the implementation and enforcement of the employer sanctions provisions.³ Each of these reports must address whether: (1) such provisions have been carried out satisfactorily; (2) a pattern of discrimination on the basis of national origin has resulted against eligible workers seeking employment; and (3) an unnecessary regulatory burden has been created for employers hiring such workers.⁴ In its third report, the GAO must also certify whether or not a "widespread pattern of discrimination has resulted against citizens or nationals of the United States or against eligible workers seeking employment solely from the implementation of" employer sanctions.⁵ If the GAO finds such discrimination, IRCA provides a mechanism for expedited congressional review of the employer sanctions provisions.⁶

On January 30, 1989, the Association of the Bar of the City of New York hosted a symposium to discuss the legal interpretations and methodologies relevant to the GAO's mandate.⁷ The Symposium was attended by more than 120 individuals from across the country, including experts in civil rights and immigration law, representatives of state and local human rights organizations, and social scientists.

2. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1982)).

3. IRCA § 274A(j)(1). The IRCA provisions concerning the GAO mandate are codified at 8 U.S.C. §§ 1324a(j)-(n).

4. IRCA § 274A(j)(1).

5. *Id.* at § 274A(k)(1).

6. *Id.* at §§ 274A(l)-(n).

7. The Association of the Bar of the City of New York, Methodology, Legal Definitions and Interpretations in Documenting the Employer Sanctions and Anti-Discrimination Provisions of IRCA (Jan. 30, 1989) [hereinafter Symposium] (available from the Association, 132 West 43rd Street, New York, N.Y. 10036).

Participants included representatives of the GAO, the staffs of the Senate and House subcommittees on immigration, the Special Counsel for Unfair Immigration Related Employment Practices of the United States Department of Justice, the New York State Inter-Agency Task Force on Immigration Affairs, the New York City Commission on Human Rights, the Chicago Commission on Human Relations, Hunter College, the University of California at Irvine, Radcliffe College, the American Civil Liberties Union, the Mexican American Legal Defense Fund, the Coalition for Humane Immigration Rights of Los Angeles, the National Center for Immigrants Rights, and the Center for Immigrants Rights. This Report of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York draws from the Symposium, the first and second GAO reports, the legislative history of IRCA, and other relevant materials to ascertain the congressional intent in enacting the GAO reporting requirement and to make certain recommendations pertinent to the GAO's third report.

There is already considerable evidence that discrimination has resulted from employer sanctions. For example, the GAO's second report⁸ on employer sanctions issued in November 1988 reported that (1) 528,000 (or sixteen percent) of employers surveyed began or increased discriminatory activity after the implementation of employer sanctions,⁹ (2) at least 395 charges of IRCA-related discrimination were filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), the Equal Employment Opportunity Commission (EEOC), and state and local human rights agencies,¹⁰ and (3) nongovernmental groups, including civil and human rights groups, have assembled numerous individual case studies documenting additional instances of IRCA-related discrimination.¹¹ In addition, a study conducted by the New York State Inter-Agency Task Force on Immigration Affairs estimated that there had been at least 22,262 instances of sanctions-related discrimination in the New York City metropolitan area. These results are supplemented by the report of the New York Immigration Hotlines, which receives approximately sixty calls per month regarding sanctions-related discrimination.

8. U.S. GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER THE SECOND YEAR, No. GAO/66D-89-16 (Nov. 1988) [hereinafter SECOND GAO REPORT].

9. *Id.* at 46.

10. *Id.* at 40, 43.

11. *Id.* at 39.

Despite the magnitude of the discrimination uncovered by these investigations, the GAO concluded in its second report that the data did not demonstrate even a pattern of discrimination, much less a “widespread” pattern.¹²

Analysis

The legislative history of the GAO mandate and the plain language of the statute indicate that in preparing its first and second reports, the GAO adopted an unduly stringent standard, limiting the types of employment discrimination relevant to its inquiry, understating the level of discrimination reflected in the data and requiring, *inter alia*, quantification of the victims of any discrimination and evidence of a wide geographic or cross-industry spread of discrimination. In fact, when properly analyzed under the less onerous standard intended and enacted by Congress, the evidence collected by the GAO in preparing its second report is more than sufficient to establish either a “pattern” or a “widespread pattern” of discrimination resulting solely from employer sanctions.

CONCLUSIONS AND RECOMMENDATIONS

In light of our analysis of the legislative history of IRCA and the data available from the GAO and other groups which are engaged in monitoring the implementation of employer sanctions, the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York makes the following recommendations:

1. The third GAO report should not restrict its inquiry to hiring issues, but should attempt to assess the impact of employer sanctions on a broad range of discriminatory practices, including hiring, firing, recruiting and referral, wage disparities, promotions, harassment, and workplace conditions. The GAO should review IRCA-related EEOC charges that concern a broad range of discriminatory behavior actionable under Title VII,¹³ not only those cases where the person was not hired or was fired. Similarly, in determining whether or not charges filed with the OSC are sanctions-related, the GAO should review case files that concern a broad range of sanctions-related employment discrimination. These are the types of discrimination that Congress sought to monitor when it enacted the GAO reporting provisions.

2. In conducting its inquiries, the GAO should focus on identifying discriminatory policies as well as the victims of those policies. The

12. *Id.* at 60.

13. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000e-2000e-17).

existence of such policies, whether or not actual victims can be identified, constitutes relevant discrimination under the GAO's mandate. This is consistent with the legislative history of the GAO's mandate and conforms to the accepted construction of the term "discrimination" in other civil rights contexts.

3. As set out in the IRCA provisions governing the third GAO report, the GAO should gather data concerning any discrimination against "citizens or nationals of the United States or against eligible workers,"¹⁴ and should not limit its inquiries to discrimination on the basis of national origin. This is consistent with the plain language of IRCA, the intent of Congress, and accepted principles of statutory construction.

4. GAO inquiries should determine whether a nexus between employer sanctions and discriminatory activity exists and should not rely exclusively on the particular date of November 6, 1986 for making such a determination.

5. The GAO should make realistic extrapolations from the data it collects through employer surveys, monitoring of newspaper advertisements, employment "testing," individual case studies documented by governmental and nongovernmental groups, job applicant surveys, available social science surveys, and other methods of ascertaining the level of discriminatory activity.

6. In assessing the results of its investigation to determine whether or not a widespread pattern of discrimination has resulted from employer sanctions, the GAO should apply the standard enacted by Congress—a low threshold which reflects congressional desire to reconsider employer sanctions in the event that discrimination appears to have resulted from their implementation.

7. Congress should not be seduced by the misguided argument made by some that a national identity card or other work authorization document is the logical way to combat discrimination. The immediate and potential encroachments on civil liberties as well as the costs represented by such unrealistic programs clearly outweigh any benefits to be gained.

8. The evidence compiled by the GAO compels the conclusion that employer sanctions have resulted in a widespread pattern of discrimination. Moreover, this evidence is bolstered by additional evidence compiled by interested groups across the country. In compliance with its mandate, the GAO should certify the existence of a widespread

14. IRCA § 274A(I).

pattern of discrimination resulting from employer sanctions, triggering expedited congressional review. Upon such review, Congress should repeal the employer sanctions provisions of IRCA.¹⁵

INTRODUCTION

Congress passed IRCA in the fall of 1986 after more than a decade of debate, much of which centered around the potential effects of employer sanctions. As a direct result of Congress's concern that employer sanctions might lead to increased discrimination against certain authorized workers, section 274A(j)-(1) of IRCA directs the GAO to monitor the effects of employer sanctions and triggers an expedited congressional review of employer sanctions if they are deemed to result in increased discrimination.¹⁶

Under this provision, the GAO is directed to prepare three annual reports addressing the effects of employer sanctions. In each report, the GAO is required to "make a specific determination as to whether the implementation of [employer sanctions] has resulted in a pattern of discrimination in employment [against other than unauthorized aliens] on the basis of national origin."¹⁷ In addition, the third GAO report must assess whether "a widespread pattern of discrimination has resulted against citizens or nationals of the United States or against eligible workers seeking employment solely from the implementation" of employer sanctions.¹⁸

In anticipation of the upcoming third GAO report, this Report of the Committee on Immigration and Nationality Law in Part I reassesses the data available through the GAO's second report and other sources, concluding that this data supports a finding of a "widespread pattern of discrimination" resulting from employer sanctions. In Part II, we review the GAO's narrowly-gauged research design and recommend specific changes dictated by the broad scope of the GAO's mandate. We then examine the statutory language and legislative history of the GAO's mandate to ascertain the congressional intent behind the enactment of the reporting requirement. Finally, in Part III, because of the significant civil liberties issues and potential for abuse, we reject the suggestion that a national identity card or

15. Two members of the Committee, Noel Ferris, Assistant United States Attorney, Southern District of New York, and Carlyle M. Dunaway, Jr., dissented from the last sentence only, *i.e.*, from the recommendation that sanctions be repealed. They concurred with the balance of paragraph eight and all of the other recommendations.

16. On the basis of the third GAO report, the employer sanctions and/or antidiscrimination provisions could be repealed if Congress enacts a joint resolution within 30 days of the GAO report, stating in substance that it approves the GAO's findings. IRCA § 274A(l)(1)(A).

17. IRCA § 274A(j)(2).

18. IRCA § 274A(l)(A).

similar identification program be implemented to address such discrimination.

PART I: THE DATA COLLECTED TO DATE DEMONSTRATES A
WIDESPREAD PATTERN OF DISCRIMINATION

A. *The GAO's Second Report*

The GAO's second report on employer sanctions reported that: (1) 528,000 (or sixteen percent) of employers surveyed began or increased discriminatory activity after the implementation of employer sanctions (including an estimated 53,000 employers in California);¹⁹ (2) at least 395 charges of IRCA-related discrimination were filed with the OSC, EEOC, and state and local human rights agencies;²⁰ and (3) nongovernmental civil rights, immigrants, and refugee rights groups had assembled numerous individual case studies documenting additional instances of IRCA-related discrimination. The GAO obtained some data through its own surveys of employers and collected the remainder from other governmental and nongovernmental entities.

In assessing the assembled data, the GAO concluded that "the results of the survey cannot be relied on to show if the law has caused a pattern of discrimination because the responses to the survey questions cannot be verified or further refined so as to indicate the extent and impact of the practices."²¹ The formal charges of discrimination and documented case studies were likewise deemed insufficient to establish a pattern of discrimination.²²

19. The GAO suggests that an increase in discrimination might result merely from the increase, under IRCA, of the portion of the nation's employers subject to federal antidiscrimination laws. However, since the GAO's surveys specifically measure *new* discrimination adopted in anticipation of or in response to employer sanctions, the GAO has effectively controlled its results for the increase in the number of regulated employers. See SECOND GAO REPORT, *supra* note 8, at 17.

20. This number very likely understates the number of relevant charges filed. As discussed *infra*, the GAO improperly limited its review to only those EEOC charges arising from hiring and firing. Similarly, the GAO's unduly narrow view of its mandate reduced its tally of relevant OSC claims. See *infra* text accompanying notes 38-39.

21. SECOND GAO REPORT, *supra* note 8, at 39. In contrast, the GAO reports concerning the effectiveness of employer sanctions in other countries were based solely on surveys of government officials, without any independent review of the laws, yet the GAO did not question their reliability. See U.S. GENERAL ACCOUNTING OFFICE, *ILLEGAL ALIENS: INFORMATION ON SELECTED COUNTRIES' EMPLOYMENT PROHIBITION LAWS* (1985); U.S. GENERAL ACCOUNTING OFFICE, *INFORMATION ON THE ENFORCEMENT OF LAWS REGARDING EMPLOYMENT OF ALIENS IN SELECTED COUNTRIES* (1982).

22. SECOND GAO REPORT, *supra* note 8, at 39. In general, the Second GAO Report gave too little weight to the valid inferences regarding increased discrimination

In fact, assessed under the proper standard, the data set out in the Second GAO Report does indicate a widespread pattern of discrimination. Moreover, an examination of the Second GAO Report suggests that the GAO seriously underestimated the level of discriminatory activity.

As discussed more fully below, the legislative history of the GAO's mandate indicates that the phrase "widespread pattern of discrimination" was intended to establish a low threshold, ensuring that Congress would review the impact of employer sanctions in the event that any significant discrimination resulted from sanctions.²³ The data collected by the GAO itself establishes that at least 528,000—about one out of every six—employers surveyed adopted discriminatory practices as a result of sanctions, in addition to the considerable evidence of individual instances of discrimination documented by the OSC, EEOC, and other governmental and nongovernmental groups.²⁴ Even considered independently, either the survey evidence or the documented case studies would meet the standard enacted by Congress to establish a "widespread pattern of discrimination."²⁵ In combination, this multi-faceted evidence demonstrates that the new discrimination is sufficient to trigger expedited review of employer sanctions under IRCA and to require the repeal of sanctions by Congress.

B. Additional Data Also Indicates a Widespread Pattern of Discrimination

The data indicating a widespread pattern of discrimination set out in the GAO's second report is augmented and verified by additional evidence collected by many interested groups, including the New York State Inter-Agency Task Force on Immigration Affairs, which has chronicled the development of a widespread pattern of discrimination in New York resulting from employer sanctions.²⁶ Based on telephone surveys of a selected stratum of 400 employers in the New York City metropolitan area—an area chosen because of its concentration of immigrants—the Task Force concluded, *inter alia*, that (1) in 942,313 of the area jobs where the I-9 is used, employers have difficulty determining what documents are allowable under the verifi-

which can be drawn from the documented case studies provided by civil rights, immigrants' rights, and refugee service groups. *Id.*

23. See *infra* text accompanying notes 94-105.

24. SECOND GAO REPORT, *supra* note 8, at 39.

25. See *Catlett v. Missouri Highway and Transp. Comm'n*, 828 F.2d 1260, 1265 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1574 (1988) (either statistics or nonstatistical evidence "alone may be sufficient to establish a pattern or practice of discrimination").

26. NEW YORK STATE INTER-AGENCY TASK FORCE ON IMMIGRATION AFFAIRS, WORKPLACE DISCRIMINATION UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: A STUDY OF IMPACTS ON NEW YORKERS (1988).

cation provisions of IRCA,²⁷ (2) 977,213 area jobs are in workplaces where employment is unjustifiably denied to individuals until they produce appropriate documents,²⁸ and (3) seven percent of area employers selectively screen potential employees, requiring only those who look foreign or "risky" to produce work authorization documents.²⁹ The Task Force estimated that "there have been at least 22,262 cases in which people were either temporarily denied work or not hired by an employer" as a result of employer sanctions.³⁰

The New York State Task Force also reviewed case studies provided by forty-six organizations, yielding about 168 detailed, individual cases of discrimination arising from the implementation of employer sanctions. Forty-three percent of these cases involved individuals with work authorization status who were simply refused employment, presumably because they appeared "risky" to employers concerned about employer sanctions. The remaining fifty-seven percent of the cases were refugees and asylees, authorized to work, but whose documents appeared illegitimate to potential employers.³¹ The Task Force observed that

[t]he case studies compiled from community organization interviews consistently present the dilemma of authorized workers unable to acquire or maintain employment due to lack of confidence by employers in the work authorization documents presented or loss of employment due to expiration of temporary work authorization documents, which may be extended by the Immigration and Naturalization Service (INS) upon request.³²

Based upon this data, the New York State Task Force concluded that "for the purposes of Congressional review of the impact of employer sanctions as currently implemented a 'widespread pattern of discrimination' has been documented in New York."³³ The Task Force further called upon the GAO to monitor "the various ways in which United States citizens and alien workers have suffered hardship in the workplace, [including] non-acceptance of certain documents and refusal to allow job applicants grace periods to permit further documentation."³⁴

In addition to the Task Force's work, the New York Immigration Hotline reports that it receives approximately sixty calls per month

27. *Id.* at 8.

28. *Id.*

29. *Id.* at 9.

30. *Id.*

31. *Id.* at 6-7.

32. *Id.* at 7.

33. *Id.* at 10.

34. *Id.*

with inquiries regarding sanctions-related discrimination.³⁵ As Russell Pearce of the New York City Commission on Human Rights observed during the Symposium, this is more than the average number of employment discrimination complaints which the Commission received in 1988 for all legally protected classes combined.³⁶ Moreover, the numbers of calls received by hotlines and immigrants' groups are a fraction of the true number of violations, most of which are never reported because of ignorance or fear.³⁷

C. Critique of the GAO's Research Design

The clear evidence that a widespread pattern of discrimination has resulted from IRCA's employer sanctions is bolstered by the fact that, in all likelihood, the GAO underestimated the level of discriminatory activity represented by its data. There are two explanations for this: first, the GAO relied on an inappropriately narrow definition of its mandate, and second, the GAO failed to make reasonable extrapolations from its data.

As discussed more fully in Part II of this Report, the definitions used by the GAO in preparing its second report caused the GAO to underestimate the actual impact of employer sanctions. In its second report, for example, the GAO indicates that those charges it considered to be related to employer sanctions were generally those which included information in the allegation directly related to the I-9 process—a requirement which excludes a significant number of sanctions-related charges.³⁸ A reassessment of OSC charges under an ap-

35. Helen Lauffer, Testimony of the New York Immigration Hotline Before the Public Hearing on National Origin and Immigrant Discrimination, at 2 (Nov. 15, 1988).

36. Symposium, *supra* note 7, at 51 (remarks of Russell Pearce).

37. Data compiled by the Office of Fair Housing and Equal Opportunity of the Department of Housing and Urban Development suggest that despite comparable levels of discrimination, Hispanics are less likely than other minorities to file discrimination complaints. *Joint Hearing on the Immigration Control and Legalization Amendments Act of 1986 (H.R. 3810) Before the Subcomm. on Housing and Community Dev. & Select Comm. on Aging of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 2d Sess. 211-37, 304-34 (1986) (statement of Charles Kamasaki, Director of Policy Analysis, National Council of La Raza).

38. SECOND GAO REPORT, *supra* note 8, at 41. The GAO offers the following example of an OSC charge which it deems to be *not* related to sanctions: "an allegation by a newly legalized worker that an employer fired him because the employer preferred to hire only unauthorized aliens." *Id.* However, if the employer began or increased his illegal policy of preferring unauthorized aliens after, or in anticipation of, the implementation of employer sanctions, it can be assumed that the employer adopted that policy because sanctions created new opportunities for exploitation of undocumented workers. *See, e.g., Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403, 410 (S.D.N.Y. 1982) (presumption of retaliation when employee was fired shortly after EEOC filing). If that is the case, the charge filed by the legalized worker *does* constitute an example of discrimination against an eligible worker resulting from employer sanctions. Several speakers at the Symposium indicated that the type of policy described in the GAO's example is an unintended consequence of employer sanctions, resulting in the inhumane exploita-

appropriate definition of discrimination would likely yield additional instances of sanctions-related discrimination pertinent to the GAO's third report.

In its second report, the GAO also adopted an unduly narrow view of relevant discrimination in its examination of EEOC filings. The GAO states that it examined only those IRCA-related charges "where the person was not hired or was fired."³⁹ In preparing its third report, the GAO should examine charges filed with the EEOC that allege any mode of employment discrimination resulting from employer sanctions.

Similarly, the GAO employer surveys used to collect data for the second report asked only whether an employer's discriminatory activity "started or increased. . . since November 7."⁴⁰ This question fails to address the possibility that employers may have adopted discriminatory policies in anticipation of employer sanctions. Future inquiries should continue to emphasize the nexus between discriminatory practices and the implementation of employer sanctions, but should not focus solely on November 7, 1986, since the prospect of sanctions, which were widely (and inaccurately) publicized prior to their formal commencement, may have caused employers to adopt such practices prior to that date.

The GAO's second report also did not make adequate use of, or draw reasonable conclusions from, the collected data. For example, in its second report, the GAO estimated that twenty-two percent, or 900,000, of the employers it surveyed were not aware of the laws relating to employer sanctions.⁴¹ An additional 60,000 to 300,000 employers did not clearly understand one or more of IRCA's major provisions.⁴² And of those employers who were aware of the law, 958,000 (or fifty percent) had not complied with the I-9 requirement, often because they did not understand the document verification law.⁴³ It is clear that an incomplete understanding of IRCA's

tion of the undocumented workers. *See, e.g.,* Symposium, *supra* note 7, at 167-68 (remarks of Kitty Calavita, Professor, Program in Social Ecology at the University of California at Irvine).

39. SECOND GAO REPORT, *supra* note 8, at 20.

40. SECOND GAO REPORT, *supra* note 8, at app. II.

41. In addition, the GAO discovered that a substantial proportion of the state and local agencies surveyed were unfamiliar with IRCA's antidiscrimination provisions and did not even have OSC's forms to use in filing a charge. SECOND GAO REPORT, *supra* note 8, at 39, 55.

42. *Id.* at 22.

43. *Id.* at 22, 27. These general results were confirmed by a Nustate, Inc. study of employers in Texas and California, which showed that 56% of employers surveyed knew

provisions might well cause employers to give differential treatment to certain eligible workers based on misunderstandings or partial knowledge of their responsibilities under IRCA; they are unlikely to be familiar with work authorization documents, the grandfather provisions, or the provisions of IRCA designed to protect those who need time to obtain documents. In its second report, however, the GAO drew no conclusions from this dramatic evidence of employers' incomplete understanding of the law. Similarly, it failed to acknowledge that differential treatment resulting from an incomplete understanding of IRCA constitutes discrimination.⁴⁴

It is probable, moreover, that the survey *underrepresents* the actual level of employment discrimination. At the very least, those employers who intentionally discriminate would not be expected to admit to their wrongdoing in response to the survey, yet the GAO made no note of this fact.

Further, the GAO reported that it detected seventy-eight instances where employers advertised an illegal United States-Citizens-Only hiring policy in five major city newspapers.⁴⁵ The second report, however, does not indicate the size or type of these employers, nor does the GAO draw the obvious conclusion that many other employers outside of these five major cities or advertising in other venues are likely adopting similar policies.

The OSC also reports that several cases which it initiated, and which ultimately settled, involved multinational corporations that had engaged in sanctions-related discrimination against hundreds of employees and potential employees.⁴⁶ Many of the cases filed with the OSC and the EEOC represent multiple violations in a single workplace, yet were apparently given little weight by the GAO.⁴⁷

Even without extrapolation, however, the data collected to date indicates a "widespread pattern of discrimination." In its second report, the GAO has documented discrimination that is indisputably more than sporadic. Discrimination has also been independently doc-

"just a few details" about IRCA. *Id.* at 25.

44. See *infra* text accompanying notes 106-13.

45. SECOND GAO REPORT, *supra* note 8, at 42.

46. Symposium, *supra* note 7, at 108 (remarks of Lawrence J. Siskind, Special Counsel for Unfair Immigration Related Employment Practices, U.S. Dep't of Justice). See Department of Justice Press Release (Jan. 6, 1989) (OSC settlement with BDM Corporation); Department of Justice Press Release (Nov. 29, 1988) (OSC settlement with Northrop Corporation); Department of Justice Press Release (Aug. 8, 1988) (OSC settlement with American Airlines). At the Symposium, Richard Larson, Counsel to the Mexican American Legal Defense Fund, raised the question of how the GAO would treat such claims. Symposium, *supra* note 7, at 109-16 (remarks of Richard Larson). Clearly, counting these claims as a single instance of discrimination would improperly minimize their significance. The American Airlines policy, for instance, directly affected at least 33 individuals. Department of Justice Press Release (Aug. 8, 1988) (OSC settlement with American Airlines).

47. SECOND GAO REPORT, *supra* note 8, at 60.

umented in particular industries in Los Angeles County⁴⁸ and among particular employers in the New York City metropolitan area.⁴⁹ A fair reading of IRCA requires that the GAO certify in its third report that employer sanctions have resulted in a "widespread pattern of discrimination" against eligible workers. As a matter of sound public policy and in recognition of the dire effects this law has had on hundreds of thousands of citizens and documented workers, Congress should respond by repealing employer sanctions.

PART II: LEGISLATIVE ANALYSIS OF THE GAO REPORTING REQUIREMENT

A. Purpose and Context of the Reporting Requirement

An analysis of the legislative history of IRCA indicates that the GAO's mandate in section 274A(j)-(l) should be expansively interpreted to enable meaningful congressional review of evidence of new discrimination resulting from employer sanctions. This interpretation of the GAO mandate is illuminated by the relationship of section 274A(j)-(l) to two of IRCA's major sections, the employer sanctions and antidiscrimination provisions.

The employer sanctions provision, section 274A, establishes that it is "unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States [any unauthorized alien]." ⁵⁰ It is also unlawful knowingly to retain an employee who is or has become unauthorized to work or knowingly to obtain the services of an unauthorized alien through contract. ⁵¹ A series of graduated penalties are imposed for violations of this section, with the prospect of criminal sanctions if an employer engages in a "pattern or practice" of unauthorized employment. ⁵²

As part of IRCA's employer sanctions scheme, employers must ask each new employee to provide documents establishing his or her

48. This evidence was gathered by the Coalition for Humane Immigration Rights of Los Angeles (CHIRLA). See Symposium, *supra* note 7, at 49-54 (remarks of Anne Kamsvaag, Coalition for Humane Immigration Rights of Los Angeles). COALITION FOR HUMANE IMMIGRATION RIGHTS OF LOS ANGELES, PRELIMINARY REPORT: THE EFFECTS OF EMPLOYER SANCTIONS ON WORKERS (1988).

49. See discussion of New York State Task Force Report and New York Immigration Hotline, *supra* text accompanying notes 25-33.

50. IRCA § 274A(a)(1).

51. Under a grandfather clause in the statute, however, an employer may continue to employ unauthorized aliens who were hired before November 6, 1986. IRCA § 274A(n)(3).

52. IRCA §§ 274(e),(f).

employment authorization within three days of hiring.⁵³ The employer must then retain for three years after hiring or one year after termination, whichever is later, records of the employee's identification information on the I-9 form. These forms are subject to inspection by the INS and Department of Labor.⁵⁴ Failure to comply with the record-keeping requirement is punishable by fines ranging from \$100 to \$1,000 per job applicant.⁵⁵

The antidiscrimination provisions, section 274B of IRCA, were added to the final House version of the immigration bill in October 1986.⁵⁶ Proposed by Representative Barney Frank (D. Mass.), the "Frank Amendment" responded to concerns of legislators, minority groups, and civil rights advocates that employer sanctions and the related verification requirements would lead to increased employment discrimination on the basis of citizenship or national origin. Members of Congress feared that many employers might simply attempt to avoid the risk of sanctions altogether by discharging or failing to hire "individuals who appear 'foreign,' whether by name, race or accent."⁵⁷ Of particular concern were industries such as manufacturing, farming, and other employers with large numbers of foreign employees.⁵⁸

Section 274B attempts to fill the gaps in existing civil rights laws by providing additional protection to authorized aliens. Under the section, an employer may not discharge or refuse to hire, recruit, or refer for a fee "any individual (other than an unauthorized alien)" on grounds of national origin or citizenship status.⁵⁹ The section also creates a separate administrative entity, the OSC, to investigate violations and bring complaints.⁶⁰ Individuals may bring private actions if the OSC opts not to pursue their claims.⁶¹

53. IRCA § 274A(b); 8 C.F.R. § 274a.2(b)(1)(ii) (1988).

54. IRCA § 274A(b)(3).

55. IRCA § 274A(e)(5).

56. The antidiscrimination provisions were initially proposed in 1983. See 129 CONG. REC. 12,556 (1983). They were subsequently adopted by the House-Senate Conference Committee and passed by both Houses. See 132 CONG. REC. H10,598-99 (daily ed. Oct. 15, 1986); 132 CONG. REC. S16,915 (daily ed. Oct. 17, 1986). See generally Eig & Violet, *Comprehensive Immigration Reform: History and Current Status*, 1 GEO. IMMIGR. L.J. 27 (1985).

57. *Antidiscrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigration, Refugees & Internat'l Law of the House Judiciary Comm. & Subcomm. on Immigration & Refugee Policy of the Senate Judiciary Comm.*, 99th Cong., 1st Sess. 111 (1985) (statement of Rep. Garcia).

58. See, e.g., *INS v. Delgado*, 466 U.S. 210 (1984) (garment industry); *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981) (factory); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982) (restaurant).

59. IRCA § 274B(a)(1). An employer may, however, prefer an individual United States citizen over an alien on a case-by-case basis if the two are "equally qualified." IRCA §§ 274B(a)(2)(c), (4).

60. IRCA § 274B.

61. IRCA § 274B(d)(2).

While section 274B provides opportunities for redress of identifiable instances of discrimination, it does not address the possibility that employer sanctions may lead to a more general increase in discrimination. That possibility is instead the subject of the GAO monitoring requirement, which provides for congressional review of employer sanctions in the event that they result in a "widespread pattern of discrimination."

The particular mechanism and specific language of the GAO reporting requirement is the product of compromise during the final days of Congress's consideration of the immigration bill. One group of legislators favored an automatic "sunset" provision for employer sanctions which, they argued, would force Congress to face up to any new discrimination resulting from sanctions; an automatic sunset would place the burden on Congress to disprove assertions of new discrimination if it wished to perpetuate employer sanctions beyond the sunset. As spokesperson for this viewpoint, Senator Edward Kennedy (D. Mass.) proposed an automatic sunset provision numerous times during the years of Senate debate of immigration reform. Each time, however, it was defeated by legislators who felt that since employer sanctions are central to IRCA's scheme to deter illegal immigration, an automatic sunset was too drastic a response to the mere possibility of increased discrimination.⁶²

An automatic sunset provision was also voted down during early debates of the immigration bill in the House.⁶³ Nevertheless, both Houses of Congress did adopt early versions of IRCA requiring periodic review of employer sanctions—by the President, the Civil Rights Commission, and the GAO—to determine whether sanctions resulted in increased discrimination.⁶⁴

In 1985, Senator Kennedy proposed to augment these monitoring provisions with a modified sunset that would simply trigger congressional review of employer sanctions in the event that the GAO found

62. See 128 CONG. REC. 21,013 (1982); S. REP. NO. 62, 98th Cong., 1st Sess. (1983), to accompany S. 529, 4/21/83 (minority views of Sen. Kennedy) at 134-35.

63. See 130 CONG. REC. 16,195 (1984) (rejecting Rep. Schroeder's proposal for a three-year automatic sunset on sanctions).

64. 128 CONG. REC. 21,013 (1982) (accepting Kennedy Amendment requiring GAO reports on discrimination); H.R. REP. NO. 890, 97th Cong., 2d Sess., pt. 1, at 44 (1982) (President and Civil Rights Commission to monitor "any pattern of discrimination"); S. REP. NO. 62, 98th Cong., 1st Sess. (1983) (President and GAO to monitor "any pattern of discrimination . . . against eligible workers"); H.R. REP. NO. 115, 98th Cong., 1st Sess., pt. 1, at 47 (1983) (President, Civil Rights Commission, and new task force to monitor discrimination).

a widespread pattern of discrimination in its third annual report.⁶⁵ The Kennedy Amendment was narrowly rejected by the Senate Judiciary Committee but Kennedy re-introduced the amendment on the Senate floor and it was adopted.⁶⁶ Both the Senate and House versions of the immigration bill were then considered by the House-Senate Conference Committee. Weighing the Kennedy Amendment against the automatic six-and-a-half year sunset on employer sanctions proposed by the House legislators,⁶⁷ the Conference Committee opted for the Senate version.⁶⁸

The Committee's rejection of an automatic sunset did not reflect acceptance of an increased level of employment discrimination, but a decision not to anticipate such discrimination before sanctions had been implemented. Representative Daniel Lungren (R. Cal.) later described the Conference Committee's reasoning as follows:

Employer sanctions are obviously at the heart of the enforcement thrust of the legislation. Hence, an automatic sunset provision was not acceptable to most of the Republican members [of Congress] as well as to the Senate Conferees. The approach adopted by the Senate had been crafted by Senator Kennedy and was directly tied to the question of discrimination. The problem in the House bill was that it could give rise to a sunset regardless of whether discrimination was found to exist. Under such a formulation, it would have been possible to have a significant legislation program without any assurance that the major enforcement provision of the bill would endure. The symmetry created by the dual tracks of legislation and enforcement would be destroyed. Aside from the public policy questions raised by the amendment, it was most unlikely that such an approach could have passed the Senate. In the end, the Senate provisions were adopted.⁶⁹

This view of the GAO reporting requirement comports with the theme sounded by congressional leaders again and again as they were considering the possible effects of employer sanctions—that Congress wanted to create a trigger for further consideration of sanctions in the event that sanctions resulted in discrimination. Senator Bingaman (D. N.M.), for example, observed when voting to approve the Conference Report on the immigration bill that “[t]he compromise, by adopting the Senate provision [concerning GAO Reports], *guarantees at a minimum that we revisit the issue of employer sanctions.*”⁷⁰

In sum, the legislative history of the GAO reporting requirement indicates that Congress wanted to reassess employer sanctions in the

65. S. REP. NO. 132, 99th Cong., 1st Sess. 104 (1985) (minority views of Sen. Kennedy); 131 CONG. REC. 23,320-21 (1985).

66. 131 CONG. REC. 23,717-20 (1985); S. 1200, 99th Cong., 2d Sess. (1986); S. REP. NO. 132, 99th Cong., 2d Sess. § 121 (1986).

67. See H.R. Res. 580, 99th Cong., 2d Sess., 132 CONG. REC. D1284 (daily ed. Oct. 8, 1986).

68. H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 86-87 (1986).

69. Lungren, *The Immigration Reform and Control Act of 1986*, 24 SAN DIEGO L. REV. 277, 288-89 (1987).

70. 132 CONG. REC. S16,894 (daily ed. Oct. 17, 1986) (emphasis added).

event of increased discrimination and wanted a mechanism to trigger that re-evaluation. It was not Congress's intention to enact an impossibly high threshold for a GAO finding of "a widespread pattern of discrimination." Instead, Congress recognized that it has a heightened responsibility to monitor discriminatory effects of employer sanctions since such effects are, by definition, byproducts of congressional action.⁷¹ The legislative history discussed above demonstrates that, in recognition of its special role and responsibility, Congress intended to enact a mechanism whereby it would be alerted to any increase in discrimination resulting from sanctions.

B. Interpretation of the GAO Mandate

In addition to this contextual evidence, an expansive interpretation of the GAO reporting mandate is supported by the congressional debate of the statutory phrase "widespread pattern of discrimination" resulting "solely" from employer sanctions.

1. What is "Discrimination"?

a. Scope of Discrimination

In carrying out its mandate, the GAO must begin with an understanding of what types of discrimination are relevant to its task. The statute itself provides a clear definition: "discrimination" in the context of section 274A(I) includes, at the very least, all discriminatory practices in employment directed against "citizens or nationals of the United States or against eligible workers" that are linked to employer sanctions.⁷² This unambiguous language of the GAO mandate indicates that when Congress accepted the modified sunset provision, it intended the scope of the third report to include all forms of employment discrimination.⁷³ Any other reading of IRCA section 274A(I)(1)(A) violates the "plain meaning rule" and undermines

71. See *infra* text accompanying notes 77-80.

72. IRCA § 274A(I). The GAO has taken the position that its mandate extends only to discrimination in employment. Symposium, *supra* note 7, at 124 (remarks of Alan Stapleton, Group Director, General Government Division, U.S. GAO).

73. Compare IRCA § 274A(j)(2) and IRCA, § 274A(I)(1)(A). Despite this unambiguous statutory language, Senator Simpson has indicated his belief that the GAO's mandate with respect to the third report excludes "alienage" discrimination. 131 CONG. REC. 23,710 (1985) (statement of Sen. Simpson). Senator Simpson's interpretation of the GAO's mandate is, however, at odds with the plain language of the statute and is contradicted by the statements of Senator Kennedy, the chief sponsor of the modified sunset provision.

the statutory language by failing to give effect to each word in the statute.⁷⁴

Even assuming for the sake of argument that the legislative history suggested that the GAO's mandate extended only to national origin discrimination rather than citizenship discrimination as well, "the legislative history of a statute may not compel a construction at variance with its plain words."⁷⁵ Where, as here, the statute's language is unambiguous, the legislative history is irrelevant to its construction.⁷⁶ Moreover, looking beyond the statute's plain words to the congressional debate, it is evident that this narrow reading of the GAO's mandate does not reflect the consensus of members of Congress.

In fact, Congress's overriding concern was its responsibility to avoid passing legislation which resulted in any increase in discrimination against eligible workers. As Senator Kennedy stated during the 1983 debate, "I believe we must be extremely cautious to avoid any legislative action that raises the level of intolerance and discrimination in our society."⁷⁷ This position was echoed by Senator John Glenn (D. Ohio), who observed that "in enacting [employer sanctions] into law, we assume a great responsibility to insure that they do not in practice result in discrimination based on national origin or alien status."⁷⁸ With that legislative intent in mind, Representative Peter W. Rodino (D. N.J.) noted that the purpose of the reports was simply to "reveal whether sanctions work, whether they result in discrimination and whether the antidiscrimination mechanism has been effective in responding to discriminatory conduct."⁷⁹ His views comport with Senator Kennedy's statements that the provisions relating to expedited review of employer sanctions were designed to address "any *unintended* discrimination" arising from the implementation of employer sanctions.⁸⁰ In sum, the GAO's third report should give full effect to the statutory language of the GAO mandate by report-

74. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 163 (1982) (statute must be construed so that all of its parts are given effect); J. SUTHERLAND, *STATUTORY CONSTRUCTION* § 46.06 (C. Sands 4th ed. 1984) ("effect must be given, if possible, to every word").

75. 73 AM. JUR. 2D *Statutes* § 151 (1974); see also *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[a]bsent a clearly expressed legislative intention to the contrary, [the statutory language] must ordinarily be regarded as conclusive").

76. 73 AM. JUR. 2D *Statutes* § 194 (1974); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) ("[W]here no ambiguity appears, it has been presumed conclusively that the clear and explicit terms of a statute express the legislative intention.").

77. 129 CONG. REC. 10,188 (1983) (statement of Sen. Kennedy).

78. 129 CONG. REC. 12,592 (1983) (statement of Sen. Glenn).

79. 132 CONG. REC. H10,584 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino).

80. 131 CONG. REC. 23,717 (1985); see also S. REP. NO. 62, 98th Cong., 1st Sess. 134-35 (1983) (minority views of Sen. Kennedy).

ing on both national origin and citizenship discrimination arising from employer sanctions.

In addition, the third report should examine a wide range of employment-related discrimination, not just discrimination relating to hiring or firing of eligible workers. This reading of the statute is supported by the congressional debate concerning sanctions, which reflects legislators' wide-ranging concerns that sanctions might lead to increased discrimination not only in hiring, but also through discriminatory enforcement of documentation requirements and more general exploitation of authorized workers. Senator Kennedy repeatedly indicated that he offered the GAO reporting amendment "[t]o assure that Congress will not ignore *any* discrimination that arises in the implementation of employer sanctions."⁸¹ Senator DeConcini (D. Ariz.), who voted against the Conference Committee report because of his continued opposition to employer sanctions, specifically described the types of discrimination which he feared would result from sanctions:

I am concerned that an employer would have a slightly higher employment standard for an individual with a Hispanic surname simply because that employer would want to avoid any chance of having to pay a fine or go to jail. I am concerned that an employer would develop different procedures for interviewing and hiring foreign-looking and sounding individuals. For instance, an employer might verify the employment eligibility of a Japanese-American before the interview process begins and check on the Anglo-American after the hiring decision has already been made.⁸²

All of these modes of employment discrimination, whether or not the affected individual is ultimately hired or fired, were of concern to Congress and should be assessed and reported by the GAO under section 274A(j). With the passage of employer sanctions, Congress for the first time enacted a law that risks engendering new discrimination. Congress cannot now close its eyes to certain types of discrimination by arguing that conduct which is concededly discriminatory is not technically encompassed within the GAO mandate. If there is discrimination resulting from employer sanctions, it must be acknowledged and addressed, not minimized by narrowly defining the GAO's mandate.

81. 129 CONG. REC. 10,188-89 (1983) (emphasis added).

82. 132 CONG. REC. S16,879-80 (daily ed. Oct. 17, 1986); *see also* 128 CONG. REC. 23,514-15 (1982) (Rep. Schroeder (D. Col.) expressing concern about exploitation of workers); 130 CONG. REC. 9056-57 (1984) (Rep. Berman (D. Cal.) describing exploitative effects of sanctions in California).

b. *Policies Versus Victims*

In its second report on employer sanctions, the GAO emphasized the perceived need to identify the victims of discriminatory policies in order to determine whether “widespread discrimination” is occurring.⁸³ For example, despite the findings that sixteen percent of employers surveyed engaged in unlawful practices, the GAO states that

[t]here is no data on the number of persons who applied for the estimated 67.5 million jobs filled in a given year who were not hired because of employers’ fear of sanctions. Without this information, we may not be able to determine what is a “widespread pattern” of discrimination versus “no significant” discrimination.⁸⁴

The view that victims must be identified is not warranted by the GAO’s mandate. In analogous civil rights contexts, discrimination is generally proved when a discriminatory policy is identified. The identification of victims, while perhaps necessary to establish standing and useful in assessing damages, is not a requisite to determining the existence of discrimination.⁸⁵

For example, in the Title VII case of *Trans World Airlines v. Thurston*, the plaintiff presented direct evidence that TWA had adopted a policy that linked employment promotions directly to age, thus discriminating against those over age sixty.⁸⁶ The Supreme Court found for the plaintiff and struck down the TWA policy, without requiring any proof that the policy affected individual employees.⁸⁷ In *International Brotherhood of Teamsters v. United States*,⁸⁸ another Title VII case, the Supreme Court cited Senator Hubert Humphrey’s statement during congressional debate of the “pattern and practice” requirement:

There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of the system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.⁸⁹

Senator Humphrey’s definition is noteworthy because he specifically describes the quantum of evidence *of employers’ practices* necessary

83. SECOND GAO REPORT, *supra* note 8, at 16.

84. *Id.* at 17.

85. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342-43 n.24 (1977). This approach to discrimination is not altered by the Supreme Court’s recent decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), which instead dealt with the *quantum* of proof required to establish the existence of discriminatory policies.

86. 469 U.S. 111 (1985).

87. *Id.* at 120 n.15; see also *Lowe v. Monrovia*, 775 F.2d 998, *as amended*, 784 F.2d 1407 (9th Cir. 1986) (discriminatory statement of personnel manager and fact that no blacks employed on police force constituted direct evidence of discriminatory policy).

88. 431 U.S. 324 (1977).

89. *Teamsters*, 431 U.S. at 336 n.16 (quoting 110 CONG. REC. 14,270 (1964)).

to constitute a "pattern," without mention of any need to identify victims.

As a legal matter, "discrimination" may be established through the identification of discriminatory policies, without proof of the number of victims of those policies.⁹⁰ This is particularly true where the victims include potential job applicants, deterred by discriminatory practices from even applying. As noted by the Supreme Court, "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection."⁹¹ Courts have taken a similar approach in cases assessing housing policies under the Fair Housing Act (FHA), striking down discriminatory practices without requiring proof that potential residents were turned away or deterred from applying.⁹²

In carrying out its mandate under IRCA, the GAO's task is to use social science to determine whether or not there is a widespread pattern of discrimination, an undertaking that is much broader than assessing individual claims arising under Title VII or the FHA. Yet even cases under those statutes hold that the existence of discriminatory policies is sufficient to prove discrimination.⁹³ In accordance with the legislative history of IRCA and the evidence gleaned from judicial construction of the term "discrimination" in the civil rights context, the GAO should focus on discriminatory employment policies linked to employer sanctions without regard to the ability to actually identify particular individual victims of such policies.

90. See, e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984) (identification of policies and affected groups sufficient to sustain EEOC charge of "pattern or practice" of discrimination).

91. *Teamsters*, 431 U.S. at 365; see *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2122 n.7 (1989) (citing *Teamsters* with approval); see also *Ratliffe v. Governor's Highway Safety Program*, 791 F.2d 394, 402 (5th Cir. 1986) (nonapplicant not barred from recovering under Title VII); *Lams v. General Waterworks Corp.*, 766 F.2d 386, 393 (8th Cir. 1985) (no proof of application required when employer policies discouraged plaintiffs from applying).

92. 42 U.S.C. § 3613 (1982); see *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971) (number of blacks actually turned away or discriminated against was not determinative of FHA pattern or practice violation); *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776 (D. Miss. 1972) (number of blacks rejected is not determinative of pattern or practice in FHA case).

93. See *supra* notes 91, 92 and accompanying text.

2. What is a "Widespread Pattern" of Discrimination?

In its second report, the GAO suggested that the phrase "widespread pattern" requires a finding that discrimination has a non-random distribution through certain regions or industries.⁹⁴ However, the legislative history of IRCA indicates that the phrase "widespread pattern" in the Kennedy Amendment does not set so high or particularized a standard.

In fact, the legislative history of this provision indicates that much less evidence of discrimination than that already uncovered by the GAO is sufficient to establish a "widespread pattern of discrimination" under the GAO mandate. Congress contemplated that a geographic spread of discriminatory practices, a spread of such practices across a spectrum of industries, a concentration of discrimination in certain areas of the country or certain industries, or a significant increase in discriminatory activity, regardless of distribution, would all constitute a "widespread pattern" for purposes of the third GAO report.⁹⁵ As Senator Kennedy stated on the Senate floor,

[t]his amendment simply offers a guarantee, built into the statute, that Congress can act expeditiously to rectify *any unintended discrimination*. If, contrary to all the protections and intentions contained in the bill, new job discrimination does develop and not just a few isolated cases of discrimination, but a widespread pattern of discrimination then Congress can sunset employer sanctions.⁹⁶

Senator Kennedy further indicated that he offered the amendment to ensure that "if a serious pattern of discrimination emerges, Congress will not ignore it."⁹⁷ Senator Levin stated that the bill provides "for a review and possible phase-out of employer sanctions if discrimination becomes a serious problem."⁹⁸

94. SECOND GAO REPORT, *supra* note 8, at 47.

95. See, e.g., 130 CONG. REC. 15,938-39 (1984) (Rep. Bartlett discussing concentration of discrimination in Southwest United States); 128 CONG. REC. 27,483-85 (1982) (Rep. Schroeder noting that "undocumented workers are concentrated in industries that employ large numbers of menial workers, such as restaurants, agribusiness, and the garment industry"). In designing its research scheme, the GAO has apparently proceeded on the assumption that a uniform nationwide distribution of discrimination is not necessary to trigger the modified sunset provisions. Thus, the GAO has concentrated its survey efforts in selected states and cities, SECOND GAO REPORT, *supra* note 8, at 18-19, reviewed EEOC charges only in selected cities, *id.* at 20, and stratified its samples to emphasize certain industries. *Id.* at 18-19.

96. 131 CONG. REC. 23,717 (1985) (emphasis added). On another occasion, Senator Kennedy noted that "[i]f no discrimination materializes, then under my amendment, sanctions will be continued." 131 CONG. REC. 23,321 (1985) (emphasis added). Kennedy's statement echoes Senator Humphrey's view of what constitutes a "pattern or practice" violation: "The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice." *Teamsters*, 431 U.S. 324, 336-37 (1976) (citing 110 CONG. REC. 14,270 (1964)); see *supra* text accompanying notes 88-89.

97. 131 CONG. REC. 23,321 (1985) (emphasis added).

98. 132 CONG. REC. S16,907 (daily ed. Oct. 17, 1986) (emphasis added).

The term "pattern" is given a similar construction under the FHA, Title VII, the Voting Rights Act,⁹⁹ and the criminal penalty provisions of IRCA.¹⁰⁰ Each of these statutes prohibits a "pattern or practice" of discrimination and adopts the phrase's generic meaning: "regular, repeated and intentional activities. . . [not] isolated, sporadic or accidental acts."¹⁰¹ The Supreme Court construed this standard in *Teamsters*, where it cited Senator Humphrey's statement that a "pattern" might be established through the discriminatory practices of "a number of companies or persons in the same industry or line of business."¹⁰²

This definition of "pattern" has been applied quite literally by courts, particularly in suits under the FHA. For example, in *Havens Realty Corporation v. Coleman*,¹⁰³ the Supreme Court stated that five incidents of discrimination might constitute a "continuing pattern" sufficient to extend the statute of limitations period for FHA claims. Similarly, in *United States v. Gilman*,¹⁰⁴ two instances of housing discrimination by the management of an apartment building were sufficient to constitute a "pattern or practice" under the FHA.¹⁰⁵

In sum, the GAO need not find discrimination by every employer, in every region, or in every industry to conclude that discriminatory activity is widespread. The level of discriminatory activity already identified in its two previous reports is sufficient to warrant the GAO's certification of the issue to Congress for its expedited review of employer sanctions.

3. What Does "Solely" Mean?

The GAO has suggested that the term "solely" requires an inquiry into the motivation of employers to determine if employer sanctions

99. 42 U.S.C. § 1971(e) (1982).

100. IRCA §§ 274(e), (f).

101. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1 at 59 (1986).

102. *Teamsters*, 431 U.S. at 336 n.16 (quoting 110 CONG. REC. 14,270 (1964)).

103. 455 U.S. 363, 380-81 (1982).

104. 341 F. Supp. 891 (S.D.N.Y. 1972); see also *United States v. Bob Lawrence Realty*, 474 F.2d 115, 124 (5th Cir.), cert. denied, 414 U.S. 826, reh'g denied, 414 U.S. 1087 (1973) ("a 'group pattern or practice' of blockbusting is established when a number of individuals utilize methods which violate [the FHA]").

105. See *United States v. Mintzes*, 304 F. Supp. 1305, 1314-15 (D. Md. 1969) (three FHA violations found sufficient to establish a pattern or practice); see also Goldsmith, *RICO and 'Pattern,'* 73 CORNELL L. REV. 971 (1988) (discussing RICO's provision that a pattern requires at least two acts of racketeering activity).

is the single causal factor in their discriminatory activity.¹⁰⁶ However, the legislative history relating to the term “solely”—requiring that discrimination relevant to the GAO’s mandate arise “solely” from the implementation of employer sanctions—indicates that the term should not be so narrowly construed.¹⁰⁷

Instead of an inquiry into an employer’s motive, the determination of causation can properly be made by empirical review of the mode and timing of discrimination. Discrimination which utilizes some aspect of employer sanctions—the I-9 form or the documentation requirements, for example—as the vehicle of the discrimination is clearly effected “through” employer sanctions and relevant under the GAO’s mandate.

This objective approach is supported by the interpretation adopted by courts in analogous contexts. For example, a similar construction has been given the term “solely” under the Employee Retirement Income Security Act (ERISA).¹⁰⁸ ERISA exempts from the Act’s coverage any employee benefit plan that is “maintained ‘solely’ for the purpose of complying with. . . [state] disability insurance laws.”¹⁰⁹ But rather than engage in a “swearing contest concerning [an employer’s] motives,”¹¹⁰ the Supreme Court has indicated that an objective test should apply:

The test is not one of the employer’s motive—any employer could claim that it provided disability benefits altruistically, to attract good employees, or to increase employee productivity, as well as to obey state law—but whether the plan, as an administrative unit, provides only those benefits required by the applicable state law.¹¹¹

Under IRCA, the circumstances under which a discriminatory practice was adopted provide a good indication of whether the test of “solely” is met. It is impossible and unnecessary to read an employer’s mind to determine with certainty that a discriminatory practice would not have been adopted absent employer sanctions. But if, for example, a discriminatory practice admittedly began or increased

106. SECOND GAO REPORT, *supra* note 8, at 17.

107. 132 CONG. REC. H10,584 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino (D. N.J.)); *see also* 131 CONG. REC. 23,718 (1985) (statement of Sen. Simpson); 131 CONG. REC. 23,315-18 (1985) (statement of Sen. Simpson); S. REP. NO. 132, 99th Cong., 1st Sess. 104 (1985) (minority views of Sen. Kennedy). For example, Senator Carl Levin (D. Mich.), when he voted to approve the Conference Committee’s Report on the immigration bill, noted that “[t]he bill also provides for GAO review of the employer sanctions and the possibility that the sanctions will be phased out after 3 years if it is found that they lead to discrimination against legal residents.” 132 CONG. REC. S16,907 (daily ed. Oct. 17, 1986) (emphasis added).

108. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461) [hereinafter ERISA].

109. ERISA § 4(b)(3) (codified at 29 U.S.C. § 1003(b)(3)).

110. *Delta Air Lines v. Kramarsky*, 650 F.2d 1287, 1307 (2d Cir. 1981), *aff’d in part sub nom.*, *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

111. *Shaw v. Delta Air Lines*, 463 U.S. 85, 107 (1983).

in conjunction with the implementation of employer sanctions or in anticipation of the sanctions provisions, it can fairly be said to result from employer sanctions. Thus, a discriminatory practice accomplished through use of the I-9 requirement is *prima facie* within the GAO's mandate.¹¹² A discriminatory practice that does not relate directly to the I-9 requirement, such as failing to promote foreign-looking workers, may nevertheless have begun or increased as a result of, or in anticipation of, employer sanctions, and thus fall within the scope of the GAO's inquiry.¹¹³

In sum, the term "solely" does not mandate an inquiry into an employer's motivation. Instead, this standard can be met by a determination that the discrimination is accomplished through the I-9 requirement or that the discrimination began or increased as a result of, or in anticipation of, employer sanctions.

PART III: THE DEBATE OVER A NATIONAL IDENTIFIER

The keynote address at the Symposium was given by Representative Howard Berman (D. Cal.), a member of the House Judiciary Committee and Subcommittee on Immigration, Refugees, and International Law. Representative Berman acknowledged that the Second GAO Report and evidence collected by other governmental and non-governmental groups indicate that IRCA has caused serious discrimination. The Congressman warned, however, that instead of a reassessment of employer sanctions, this evidence may encourage Congress to reconsider a national identifier as a means to deter discrimination,¹¹⁴ responding to those who contend that discrimination can be deterred by providing all eligible workers with uniform documentation. In fact, the possibility that Congress would sidestep the modified sunset provision by reviving the national identifier debate was addressed during the final Senate debate and passage of IRCA,

112. A similar approach has been adopted in Title VII retaliation suits under 42 U.S.C. § 2000e-2, where courts examine the timing of the claimant's and employer's actions, rather than the employer's subjective intent, to evaluate a *prima facie* case of retaliation. See *supra* note 38.

113. In essence, the GAO adopts this approach in its second report in setting out the following hypothetical: "An example of what appears to be a potential sanction-related charge would be if an employer, after November 6, 1986, started a policy to hire only U.S. citizens." SECOND GAO REPORT, *supra* note 8, at 21. This is the same information sought by the GAO's Survey of Employer Views, which asks "[f]or each action/activity, please indicate . . . whether or not your organization has started or increased that action/activity since November 7." *Id.* at 78, app. II, question 17.

114. See Symposium, *supra* note 7, at 2-16 (speech by Rep. Howard Berman (D. Cal.)).

when Senator Alan Cranston (D. Cal.) presciently observed that:

[e]mployer sanctions can be the first step toward a national identification card-internal passport system—a primary tool of totalitarian governments to restrict the freedom of its citizens. And, when employer sanctions are discovered not to be working. . .that is when the danger of taking the second step occurs.

This danger underscores the importance of the provision crafted by the very able senior Senator from Massachusetts, Edward Kennedy, for a triggered sunset of employer sanctions upon a finding by GAO that employer sanctions are causing discrimination.¹¹⁶

The pros and cons of a national identifier, either in the form of a new identification card, a social security card, or a computer registry, were exhaustively debated during Congress's consideration of IRCA.¹¹⁶ Congress ultimately concluded that the costs of such an identification program and the risks that it would result in serious civil liberties violations were too great to outweigh the possible enhanced enforcement of employer sanctions. Thus, while IRCA contemplates some exploration of alternative employment verification systems,¹¹⁷ the immigration law specifically provides that “[n]othing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.”¹¹⁸ Further, under IRCA, any proposed alternative verification system must provide a reliable determination of the holder's identity, use counterfeit-resistant documents, be used only for purposes of verifying work authorization, and protect the privacy and security of personal information used in the system.¹¹⁹ These limits on work authorization systems represent important, minimal protections which are not met by any of the proposed identification systems.

Nevertheless, new enthusiasm for a national identification card may be appearing. While a detailed discussion is beyond the scope of this Report, the prospect of a “national identity card” raises many profound issues and appears to the Committee to be a fundamentally misguided response for several reasons, a few of which are discussed below.

First, a national identifier would be neither tamper-proof nor a reliable indicator of the holder's identity. As the Social Security Administration (SSA) informed Congress in 1981 regarding the utility

115. 132 CONG. REC. S16,904 (daily ed. Oct. 17, 1986) (statement of Sen. Cranston).

116. See, e.g., *Systems to Verify Authorization to Work in the United States: Hearings Before the Senate Subcomm. on Immigration Comm. of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); *Employer Sanctions: Hearings Before the Subcomm. on Immigration, Refugees and Internat'l Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter *Employer Sanctions Hearings*].

117. IRCA § 274A(d).

118. IRCA § 274A(c).

119. IRCA § 274A(d)(2).

of Social Security numbers (SSNs) for identity purposes, “[w]e do not know of any way to make an absolutely tamper-proof or counterfeit proof social security card. Even if a very secure card could be developed, it would only be as valid as the documents it is based on, and they themselves may not be reliable.”¹²⁰ Moreover, the cost of setting up such a system would be prohibitive. According to the SSA, “[t]o verify the identity of 200 million people who now possess SSN cards and reissue those cards on banknote paper would cost close to one billion dollars and require over 50,000 federal employees.”¹²¹ The same limitations and verification costs are inherent in any national identification scheme or computer registry.¹²²

Second, there is no effective means to limit the use of a national identity document. The effects of misuse are potentially devastating. As John Shattuck of the American Civil Liberties Union noted in testimony before Congress:

Because employment—or the inability to obtain it—are central factors in determining a person’s quality of life, a dossier system that can so easily be used to control the employment opportunities and trace the movements of hundreds of millions of people may be the most powerful tool for social control that any government has ever devised. Neither good intentions nor supposedly “stringent safeguards” can, in the long run, prevent its perversion and abuse.¹²³

The government’s inability to guarantee the privacy and security of information gathered for identification purposes was most recently demonstrated in the controversy surrounding the SSA’s routine verification of millions of SSNs for private credit companies.¹²⁴ Both the Social Security Act and the Privacy Act forbid disclosure of this confidential information.¹²⁵ Yet more than three million numbers

120. *Employer Sanctions Hearings*, *supra* note 116, at 234 (testimony of Sandy Crank, Associate Commissioner for Operational Policy and Procedures, Social Security Administration).

121. *Id.*

122. The government is also unable to guard against human error in data handling. Stories of incorrectly inputted data producing unforeseen detrimental consequences have become commonplace. *See, e.g.*, *Bryant v. TRW, Inc.*, 487 F. Supp. 1234 (E.D. Mich. 1980), *aff’d*, 689 F.2d 72 (6th Cir. 1982) (error in consumer credit report). If the national identifier was necessary to obtain employment, the effect of such errors would be the loss of the individual’s livelihood.

123. *Employer Sanctions Hearings*, *supra* note 116, at 327 (testimony of John H. Shattuck, National Legislative Director, American Civil Liberties Union).

124. *See, e.g.*, Tolchin, *U.S. Checked Private Data for Business*, N.Y. Times, Apr. 11, 1989, at A16, col. 6.

125. Tolchin, *U.S. Wary Giving Social Security Numbers*, N.Y. Times, Mar. 30, 1989, at A19, col. 1; *Social Security: On Whose Account?*, N.Y. Times, Apr. 12, 1989, at A24, col. 1.

were verified before Congress was alerted to the situation.

In sum, a national identifier is not an appropriate response to the evidence that widespread discrimination has resulted from employer sanctions. A national identification system is costly and badly suited to the task of deterring discrimination. More importantly, such a system would pose significant threats to the civil rights and civil liberties of all United States residents.

CONCLUSION

The legislative history and statutory analysis set out above indicate that the phrase "widespread pattern of discrimination" was not intended to be a stringent or technical test, but rather one that would alert Congress to any new or increased discrimination resulting from sanctions. The data set out in the GAO's second report meets this standard, particularly when augmented by the significant evidence collected by the New York State Inter-Agency Task Force and the individual case studies documented by civil rights groups, immigrants' and refugee rights groups, and other nongovernmental entities.

Reconsideration of a national identifier is not an appropriate response to this evidence of discrimination. The statute itself dictates the remedy: evidence of widespread discrimination will trigger expedited congressional review of the employer sanctions provisions. In the event that the GAO's third report finds levels of discrimination that do not contradict the data set out in the second report, the GAO is required by IRCA to certify the existence of a widespread pattern of discrimination resulting from employer sanctions, and Congress should immediately undertake the expedited review that such a report would trigger. Upon such review, in recognition of the overwhelming evidence that employer sanctions have resulted in a widespread pattern of discrimination, Congress should repeal the employer sanctions provisions of IRCA.