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Title: SECOND THOUGHTS ON EMPLOYER SANCTIONS: A BRIEF ANALYSIS

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I. OVERVIEW

The Immigration Reform and Control Act of 1983 (H.R. 1510), also known as the Simpson-Mazzoli bill, will soon be considered by the U.S. House of Representatives. One of the major provisions in the bill establishes a system of penalties against employers found to have "knowingly hired" undocumented workers, commonly referred to as employer sanctions. Under the Simpson-Mazzoli bill, each newly hired employee and his/her employer would have to sign a form stating that the employee is entitled to work in the United States and that the employer has inspected documents establishing this right. Initially, employers would rely on existing forms of identification such as a birth certificate, driver's license or Social Security card. Eventually, the federal government would have to devise a more secure identification system capable of verifying that each and every citizen and legal resident is entitled to work in the United States. Employers would be required to verify the documents of each worker hired (but not of each applicant). This is known as the "uniform verification" requirement. An employer charged with hiring, recruiting, or referring an undocumented worker would be presumed to be innocent if that employer could produce records showing that documents were inspected. This is known as the "good faith" defense.

It is widely suggested that employer sanctions are necessary in order to protect American workers from being displaced by undocumented persons. Some proponents of the bill have gone so far as to characterize Simpson-Mazzoli as a "jobs bill." These proponents claim that, once employer sanctions are enacted, jobs currently held by undocumented persons will be available for American workers.

Hispanic organizations, civil rights groups, and others have charged that employer sanctions will increase employment discrimination because employers, in trying to comply with the law, would place stricter scrutiny against citizens and legal residents that looked "foreign" or otherwise fit immigrant stereotypes.

The purpose of this analysis is to provide interested persons with the research findings and empirical evidence necessary to judge the validity of these claims.

II. THE EXTENT OF JOB DISPLACEMENT

The Judiciary Committee Report accompanying H.R. 1510 asserts that sanctions are needed because the United States is "obligated to protect our own workers from adverse competition in the labor market...." The Report goes on to note that the current high unemployment rate underscores the need for sanctions (House Report

98-115, pp. 32, 33). The Report provides no evidence of the existence of job displacement, and makes no attempt to quantify the impact of the alleged displacement. What the Report does is assume that displacement is a serious problem without offering any substantiation for that position.

This assumption is refuted by many economists. For example, Niles Hansen, Professor of Economics at the University of Texas, explains:

> [The] notion -- known as the "lump-of-labor" fallacy -- suggests that there is only a fixed, total amount of work that can be performed in our society. In fact, the size of the nation's economic pie depends on the way in which all productive factors -- labor, capital, land, and entrepreneurship -- interact. The undocumented may, in effect, create their own employment, or jobs may be created for them because they have special skills or because they are willing to perform tasks shunned by American workers. The fact that [the] undocumented...have little difficulty in finding jobs in the United States suggests that they do not displace U.S. citizens to a significant degree (Hansen, The Border Economy, University of Texas, 1981 p. 110).

More important, empirical evidence contradicts the notion that large-scale job displacement occurs as a result of undocumented immigration. If that position were valid, one would expect that those cities and states with the largest numbers of undocumented workers would have correspondingly high rates of unemployment. In fact, the reverse is true. As the U.S. Chamber of Commerce has pointed out:

- In 20 cities with a high concentration of undocumented workers, the unemployment rate was 7.17% in 1981; while
- In 20 cities with little or no concentration of undocumented workers, the unemployment rate was 10.9%;
- In 10 states with a high concentration of undocumented workers, the unemployment rate was 6.8% in 1981; while
- In 10 states with little or no concentration of undocumented workers, the unemployment rate was 9.4% (Thompson, House Hearings, Subcommittee on Immigration and Refugee Policy, September 1981, p. 99; emphasis in the original).

A more detailed recent analysis by the Urban Institute confirms these findings. The Urban Institute study examined the effects of immigration on Southern California, which has the highest population of undocumented persons in the country. Using special tabulations of the 1980 Census and other empirical data, the Urban Institute researchers found that:

> ...the immigrant influx was not accompanied by job losses for other workers....Although Hispanic workers filled a large proportion of jobs added during the decade [1970s], particularly in manufacturing, there is no indication that work opportunities for nonimmigrants lessened. Despite mass immigration to Southern California, unemployment rates rose less rapidly there than in the remainder of the nation (Muller, The Fourth Wave, A Summary, 1984, p. 13.).

Many of the jobs held by undocumented workers are in the "secondary labor market"; jobs that offer little security, opportunity for advancement, or prestige -- jobs often shunned by native workers. Wayne Cornelius, noted immigration expert from the University of California's Center for U.S.-Mexican Studies, has pointed out that:

> Workers cannot be displaced if they are not there, and there is no evidence that disadvantaged native Americans have ever held, at least in recent decades, a significant proportion of the kinds of jobs for which illegals are usually hired.... (Cornelius, "Research Findings," Congressional Record, July 13, 1977, p. H7063).

Cornelius' findings have been verified recently through follow-up studies carried out in the aftermath of "Project Jobs." Project Jobs was a national campaign conducted by the Immigration and Naturalization Service (INS) in April 1982 to remove undocumented workers from jobs paying above the minimum wage. INS reported 5,440 apprehensions of undocumented persons who made an average wage of $4.81 per hour. Studies showed that, within a few months, about 80% of those jobs were filled again by undocumented persons because American citizens either wouldn't take them or left because they were considered undesirable positions. (Larry Stammer and Victor Valle, "Most Aliens Regain Jobs After Raids: Survey Contradicts INS Findings That Sweeps Succeeded," Los Angeles TIMES, August 1, 1982).

It has also been suggested that undocumented workers depress wages for all workers. Empirical studies suggest that this may occur, but to a limited degree. Economists Barton Smith and Robert Newman compared wages paid in areas along the U.S.-Mexico border with wages paid in areas further from the border and found that the differential between the two areas was about eight percent. They concluded:

> If migration from Mexico is having a negative impact on wages along the border, it is not as severe as many have contended. In fact, this differential is of the order of magnitude that it could represent the implicit premium that individuals are willing to pay for nonpecuniary advantages such as remaining close to their cultural heritage (Smith and Newman, cited in the Staff Report of the Select Commission on Immigration and Refugee Policy, April 30, 1981, p. 509).

The Urban Institute study in California did find that wages in some industries were depressed by immigrant workers. Where this occurred, however, the net effect was to increase employment overall. Moreover, Urban Institute researchers determined that wages of all employees in the area increased, that the area's competitive advantage in manufacturing was preserved, and that the effect of immigration on per capita income was positive (See National Council of La Raza, "Highlights and Implications of the Urban Institute's Study on the Impact of Immigration on California," March 1984, pp. 2-3).

In addition, researcher Michael Piore has pointed out that many undocumented persons hold jobs that tend to benefit American workers. As summarized by the staff of the Select Commission:

> Some of the secondary labor market jobs that undocumented/illegal aliens take are in industries that would [otherwise] close or relocate outside the United States.... Since these industries also

have jobs desired by U.S. workers, undocumented/illegal aliens actually provide opportunities rather than displace citizens (Piore, cited in Staff Report, p. 512).

It is also interesting to review the studies upon which the claims of displacement are founded. Vernon Briggs, Ray Marshall and others have repeatedly asserted that employment displacement is a major problem, and that Mexican Americans are the chief losers from the employment of undocumented workers (See, for example, Briggs, "Illegal Aliens: The Need for a More Restrictive Border Policy," Social Science Quarterly, December 1975). As Gilberto Cardenas of the University of Texas has pointed out, however, these advocates of the displacement theory have yet to gather a single piece of data to support their claims (Cardenas, Remarks at the Center for Immigration Policy Studies, Georgetown University, May 24, 1983).

More recently, Senator Alan Simpson (R-WY) cited the work of Rice University Professor Donald Huddle in support of his claim that undocumented workers were displacing American workers in the construction industry in the Southwest (Congressional Record, April 28, 1983 p. S5571). The Huddle study, however, is of questionable value because of two severe methodological flaws. First, Huddle failed to use accepted sampling procedure. Second, Huddle's method of identifying undocumented workers was clearly unacceptable. As Huddle himself later admitted, he used the color of construction workers' helmets to distinguish between legal and illegal workers, a practice inconsistent with any accepted verification method. (See excerpt from Huddle's testimony in Garcia et. al. v. INS et. al., cited by Estevan Flores, The Impact of Undocumented Workers on the U.S. Labor Market, UCLA: Institute of American Cultures, April 21, 1983.) Flores suggests that the Huddle study, which has not been published, would have been rejected by any professional journal because of the above-cited methodological flaws.

In summary, then, the proponents of the displacement theory continue to assume that displacement occurs without demonstrating it. In contrast, a growing body of theoretical and empirical evidence contradicts the alleged negative effects of undocumented workers on unemployment and wages. Employer sanctions are based on the premise that job displacement and depressed wages are caused by the undocumented. However, that premise is not supported by existing research.

III. THE EFFECTIVENESS OF EMPLOYER SANCTIONS

Even if one were to assume that large-scale employment displacement is taking place, and that, therefore, there is a need for employer sanctions, need alone does not justify policy. The proposed policy must also provide an acceptable means of fulfilling that need. While sanctions are proposed as a way of reducing the employment of undocumented workers, and thereby the flow of undocumented persons, there is little evidence that they actually have this effect. A recent General Accounting Office (GAO) study of employer sanctions laws in 20 countries concluded that, for the most part, these laws were not "an effective deterrent to stemming illegal employment" (GAO, "Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries," August 31, 1982).

Moreover, there has been considerable experience with employer sanctions laws in the United States. Eleven states have employer sanctions laws on the books. Dr. Carl E. Schwarz, Professor of Political Science and Public Law at Fullerton College studied how these laws have been implemented, and found that not a single conviction has been obtained under California's 12-year-old sanctions law; the situation in the other states is similar:

> The main pattern in all these states (speaking of Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont, and Virginia) is an almost perfectly consistent failure to enforce employer sanctions statutes (Schwarz, "Employer Sanctions Laws: The State Experience As Compared With Federal Proposals," America's New Immigration Law: Origins, Rationales, and Potential Consequences, University of California at San Diego, 1983, p. 84).

There is even a federal employer sanctions law, embodied in the Farm Labor Contractor Registration Act, as amended. Schwarz has noted, and testimony before the House Agriculture Committee verifies, that this law has not significantly reduced the employment of undocumented persons in agriculture (See Schwarz, p. 91; see also, for example, testimony of representatives from the Western Growers Association, the Farm Bureau Federation, the National Council of Agricultural Employers, and others who describe their reliance on, and need for, undocumented workers; House Hearings, Committee on Agriculture, June 15, 1983).

The reasons for the uniform ineffectiveness of employer sanctions in other countries, at the state level, and at the federal level are twofold. First, as noted by the GAO, "Employers either were able to evade responsibility for illegal employment, or once apprehended, were penalized too little to deter such acts." Second, the laws generally were not being effectively enforced because of strict legal constraints on investigations, noncommunication between government agencies, lack of enforcement resolve, and lack of personnel" (GAO Report, p. 2). This experience has been replicated in the United States as well. In his study of state employer sanctions laws, Schwarz found that:

> When interviewed about why employer sanctions laws were not enforced, state and local prosecutors...most often attributed nonenforcement to judicial rulings....Such rulings parallel the experience of the 20 nations with employer sanctions laws studied by the U.S. General Accounting Office (Schwarz, p. 91).

As Wayne Cornelius has concluded:

> Clearly, judges do not consider the employment of undocumented workers a serious crime, and they are reluctant to impose penalties. And the more severe the penalty, the less likely it is to be applied, especially criminal fines and jail sentences (Wayne Cornelius, "Simpson-Mazzoli vs. the Realities of Mexican Immigration," America's New Immigration Law: Origins, Rationales, and Potential Consequences, p. 143).

Given the historical underfunding of, and the documented inefficiencies within, the INS, there is little reason to believe that the enforcement of federal employer sanctions laws would be significantly more effective than the previous experiences of other countries and the states (For a review of INS' record of underfunding and poor management, see NCLR, "Hispanic Concerns with the Immigration and Naturalization Service," August 1982). Similarly, the kinds of judicial rulings to which state and local prosecutors and the GAO attribute the nonenforcement of sanctions are already embodied in U.S. law. Cornelius summarizes the existing research on sanctions by stating:

> [T]here is still not a single documented case of successfully using employer sanctions laws to reduce the population of illegal immigrants anywhere in the world (Cornelius, p. 144).

IV. EMPLOYMENT DISCRIMINATION AND EMPLOYER SANCTIONS

The existence of employment discrimination against Hispanics is widely acknowledged (See, for example, U.S. Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination, November 1981; and Unemployment and Underemployment Among Blacks, Hispanics and Women, November 1982). If employer sanctions are enacted, the available evidence suggests that this discrimination will increase in two ways. The most obvious is that the legislation will provide a pretext for employers who are inclined to discriminate anyway. If the Simpson-Mazzoli bill passes, these employers will be given an affirmative defense against charges of employment discrimination. Thus, the inclusion of sanctions in the bill risks exacerbating existing employment discrimination.

The second type of discrimination will result from good faith efforts on the part of employers to comply with the law. The bill would create a "suspect class" of persons -- those who, on the basis of physical characteristics, language, or other factors, appear "foreign" to employers. These persons will not be hired by employers because of the possibility of them being undocumented (See, National Council of La Raza, Employer Sanctions and Employment Discrimination Issue Brief, August 1983).

The possibility of sanctions has already triggered discrimination against Hispanics. The response of many employers to Operation Jobs and to Operation Cooperation, two recent INS initiatives, shows that employers tend to go beyond the law's minimum requirements to demonstrate their compliance with immigration-related rules. As a result of the two INS initiatives, some employers terminated employees of Hispanic origin even though they were legally entitled to work (See, for example, testimony of Antonia Hernandez, Mexican American Legal Defense and Education Fund, before the House Agriculture Committee, June 15, 1983). In fact, some employers involved in the INS initiatives admitted reluctance even to take back workers who managed to prove their legal status to arresting officers (See, "Dragnet for Illegal Workers, Time Magazine, May 10, 1982).

It is not argued that if employer sanctions are enacted all employers will discriminate against all Hispanics. Employers will react to sanctions in

different ways, and some reactions will have discriminatory effects. Sanctions could be that slight difference that would make Hispanics less attractive to some employers, thus placing them at a competitive disadvantage in the job market.

V. NCLR POSITION

NCLR opposes employer sanctions for three reasons. First, they are likely to increase employment discrimination against Americans of Hispanic and Asian descent, and others who "appear foreign" to employers. Second, given even the possibility of employment discrimination, there is no evidence to suggest that employment displacement is of sufficient magnitude to justify the risk of such discrimination. Finally, sanctions have not worked when tried before, either in the United States or in other countries.

Many persons reluctantly support the Simpson-Mazzoli bill because they believe in the need for immigration reform. Such persons should consider that viable, less onerous, and more effective alternatives to sanctions do exist. These alternatives include:

- Strict enforcement of existing labor laws. Wage and hour laws already prohibit many of the practices that some employers use to exploit undocumented workers. Once these laws are strictly enforced, there will be little incentive for these employers to hire undocumented persons.

- Enhanced enforcement activities. Too many of the INS' resources are expended in attempting to seek out undocumented persons already in the country. These persons are familiar with immigration law and INS procedures, and are, therefore, very difficult to apprehend. If more resources were redirected to the border and other points of entry, with special emphasis on smugglers, illegal immigration could be significantly reduced.

These and other positive approaches are embodied in the proposed Immigration Reform Act of 1984 (H.R. 4909), sponsored by Rep. Edward Roybal (D-CA). NCLR supports the Roybal bill because it avoids the use of employer sanctions, includes a legalization program that is likely to be more effective than that included in the Simpson-Mazzoli bill, and does not include expanded "guestworker" programs which are likely to increase exploitation of foreign workers.

Immigration is a complex, international phenomenon. It is unreasonable to expect a simple, domestic solution to the problems created by immigration. The Simpson-Mazzoli bill, through the imposition of employer sanctions, purports to provide this simple solution, but as this analysis suggests, the need for sanctions is unproven, and the possibility for success is doubtful. As immigration law specialist Kitty Calavita of Middlebury College has written:

> [C]ongressional supporters of the (Simpson-Mazzoli) bill have chosen to ignore consistent research findings about employer sanctions, which make it illegal to knowingly employ an undocumented worker. That research has shown that employer sanc-

> tions are at best ineffective, and at worst exacerbate the vulnerability of both the documented and undocumented worker (Kitty Calavita, "Employer Sanctions Legislation in the United States," America's New Immigration Law: Origins, Rationales, and Potential Consequences, 1982, p. 143).

Those who call Simpson-Mazzoli a "jobs bill" assume that the enactment of sanctions will reduce unemployment, despite the lack of evidence proving that displacement occurs. They further assume that sanctions work, despite the growing body of research that demonstrates the opposite. Finally, these proponents ignore the loss of jobs by Hispanic- and Asian-Americans likely to result from employment discrimination created by sanctions. The National Council of La Raza supports the Roybal bill as a positive alternative which offers real immigration reform and protects the civil rights of all those who live in the United States.