
The Immigration Reform and Control Act: Assessing the Evaluation Process

A Report of the
United States Commission on Civil Rights

September 1989

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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Melvin L. Jenkins, *Acting Staff Director*

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Letter of Transmittal

July 28, 1989

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Sirs:

The United States Commission on Civil Rights transmits this report to you pursuant to Public Law 98-183, as amended.

The Immigration Reform and Control Act: Assessing the Evaluation Process examines the United States General Accounting Office's (GAO) statutorily required evaluation of the Immigration Reform and Control Act of 1986 (IRCA). IRCA requires GAO to submit three annual reports that evaluate the extent of discrimination and the regulatory burden on employers caused by provisions of the law. The third and final report, due in a few months, is especially important to the future of immigration policy: its findings, with congressional assent, could lead to the repeal or revision of IRCA's employer sanctions or antidiscrimination provisions. Our report, which is part of a comprehensive study, is based on public briefings held by the Commission in February 1987, December 1987, and March 1989; on extensive interviews and written exchanges with local, State, and Federal agencies and numerous private organizations; and on staff research.

GAO has been given a large and difficult task. It not only must amass sufficient information to evaluate the law, but it must also establish criteria that, in effect, weigh that information in judgment of the law's worth. Given the magnitude of the task, GAO has done a credible job. Significant and innovative improvements made in research methods on discrimination for the third report particularly hearten us. We are concerned, however, that GAO's second report has understated the extent of discrimination resulting from IRCA. Despite serious deficiencies in the data provided in the second report, we find clear and disturbing indications that IRCA has caused at least a "pattern of discrimination," if not a "widespread pattern." Moreover, we are concerned that information gathered by GAO about the effects of IRCA on illegal entry into the United States is insufficient to make judgments about what are clearly interrelated provisions of the law.

To evaluate IRCA satisfactorily in its next report, GAO will need substantially better data on the extent of discrimination, the regulatory burden, and the effectiveness of the law. Although, the innovations GAO has made for its third report make a firm determination on the extent of IRCA-related discrimination at least possible, this determination is unlikely given the limited applications of these innovations. Therefore, we recommend that Congress amend IRCA to extend GAO's evaluation period by 2 years or more in which to conduct at least one additional study. The additional time would allow GAO to extend and refine the innovations developed for the third report, thereby improving significantly the prospects of adequately evaluating IRCA.

GAO's task of evaluating IRCA would be facilitated immeasurably if the criteria by which the law is to be judged were more precisely defined. The Commission urges Congress to amend IRCA to provide clearer meaning of terms such as "widespread pattern of discrimination" and "no significant discrimination."

Employer sanctions may be revised or repealed if GAO's final report finds a "widespread pattern of discrimination." The Commission believes that employer sanctions should also be judged by whether they have effectively reduced illegal immigration and employment. Accordingly, we urge Congress also to amend IRCA so as to trigger the employer sanctions sunset provision if GAO cannot establish that employer sanctions have been effective.

There can be no doubt that the employer sanctions have caused many employers to implement discriminatory hiring practices. Unless and until convincing evidence shows that a pattern of discrimination has ceased to exist, IRCA's prohibitions against national origin and alienage discrimination should remain in place.

Respectfully,

William B. Allen, *Chairman*
Murray Friedman, *Vice Chairman*
Mary Frances Berry
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Publication Note

This report was originally released in July 1989. This second release contains discussion of the General Accounting Office's new hiring audit. This material was earlier withheld to protect the details of the GAO's procedures until after completion of the hiring audit.

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CHAPTER 1: INTRODUCTION

After several years of considering major changes to the Nation's immigration laws, Congress overwhelmingly passed the Immigration Reform and Control Act of 1986, commonly referred to as IRCA.¹ In doing so, Congress sought to stem the influx of illegal immigration, curtail the exploitation of aliens authorized to work in the United States, and demonstrate concern for the many persons not accorded legal status despite having lived here for several years.

IRCA has three major components. First, to complement existing immigration law, the statute established civil and criminal sanctions against employers who hire aliens not authorized to work in the United States.² Second, the statute established a one-time legalization program, permitting legal resident status and, eventually, citizenship to be bestowed upon aliens who had resided illegally within the country for a continuous time.³ Third, recognizing that employer sanctions could lead to increased employment discrimination on the basis of national origin or alienage, Congress included antidiscrimination provisions as part of the statute.⁴

Role of GAO

As a further protection against IRCA-related discrimination, Congress directed that the U.S. General Accounting Office produce three reports,⁵ with the last due in November 1989. The first two

¹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 [hereinafter IRCA]. An earlier version of IRCA was introduced by Senator Simpson and Representative Mazzoli in the 97th Congress. Legislation was also introduced in the 98th Congress. Another version of the bill was introduced in the 99th Congress and, with changes, was passed by both houses of Congress and enacted into law on November 6, 1986, upon the President's signature. H.R. REP. NO. 99-682(I), 99th Cong., 2d Sess. 54-55. *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5658, 5659.

² Immigration Reform and Control Act of 1986, § 101(a)(1), 8 U.S.C.A. § 1324a(e)(4) & (f) (West Supp. 1988). Employment of persons unauthorized to work is prohibited, because they entered the United States illegally, their legal status expired, or their immigrant status does not permit employment.

³ 8 U.S.C.A. § 1255a (West Supp. 1988).

⁴ *Id.* at § 1324b.

⁵ GENERAL ACCOUNTING OFFICE REPORTS--

(1) IN GENERAL--Beginning one year after the date of enactment of this Act, and at intervals of one year thereafter

(continued...)

reports were to address whether IRCA has caused a "pattern of discrimination" against U.S. citizens, nationals, or authorized workers, whether an "unnecessary regulatory burden" has been caused for employers, and whether IRCA has been carried out satisfactorily.⁶ The third report is to address, in addition, whether IRCA has caused a "widespread pattern of discrimination," whether IRCA has produced "no significant discrimination," and whether the antidiscrimination provisions have created an "unreasonable burden on employers."

Congress further mandated that the Chairman of the Civil Rights Commission, the Attorney General, and the Chairman of the Equal Employment Opportunity Commission establish a taskforce to review each of the three reports.⁷ Consistent with this mandate and with its own statutory responsibility to monitor discrimination,⁸ the Commission reviewed the methodology and conclusions of GAO's first and second reports.

This report addresses GAO's methods and conclusions to date and examines prospects for GAO's third report. The potential for discrimination and general effectiveness of IRCA are reviewed,

⁶(...continued)

for a period of three years . . . the Comptroller General . . . shall prepare and transmit to the Congress and to the [statutory] taskforce . . . a report describing the results of a review of the implementation and enforcement of this section during the preceding twelve-month period, for the purpose of determining if--

- (A) such provisions have been carried out satisfactorily;
- (B) a pattern of discrimination has resulted against citizens or nationals of the United States or against eligible workers seeking employment; and
- (C) an unnecessary regulatory burden has been created for employers hiring such workers.

⁸ U.S.C.A. § 1324a(j)(1) (West Supp. 1988).

⁶ GAO released its first report in November 1987 and the second a year later.

⁷ 8 U.S.C.A. § 1324a(k) (West Supp. 1988). If GAO finds that IRCA's employment sanctions have resulted in a "pattern of discrimination" in employment, the taskforce is to make recommendations to Congress to remedy the discrimination. Within 60 days of receipt of such recommendations, the Judiciary Committees of each house are required to hold hearings on the recommendations.

⁸ Among other things, Commission jurisdiction extends to "apprais[ing] the laws and policies of the Federal Government with respect to discrimination . . . because of . . . national origin or [in] the administration of justice" and "study[ing] and collect[ing] information concerning legal developments constituting discrimination . . . because of . . . national origin or in the administration of justice." 42 U.S.C.A. § 1975c(a)(3)&(2) (West 1981 & Supp. 1988).

primarily through a critique of GAO's evidence and the Commission's differing interpretations of the data.

The significance of GAO's attempts to assess employer sanction-related discrimination should not be underestimated. Had GAO's first or second report found a pattern of discrimination stemming from IRCA, the taskforce established by IRCA would have been obligated to submit recommendations to Congress to remedy or deter the discrimination, and Congress would have been obligated to undertake expedited hearings.⁹ Congress, interested observers, and the Commission, therefore, paid considerable attention to these reports.

The third and final GAO report, which is likely to be delayed beyond the November 1989 date in the law,¹⁰ will produce even greater interest. Should GAO determine that 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 IRCA's employer sanctions provisions, Congress must undertake an expedited review to determine whether to repeal the employer sanctions.¹¹ Should Congress concur with the finding by a joint resolution, the employer sanctions *and* antidiscrimination provisions would be repealed.¹² Similarly, should GAO find in its last report that "no significant discrimination"¹³ has resulted against U.S. citizens, nationals, or authorized workers, or that the statute creates an unreasonable burden on employers, congressional concurrence, after an expedited review, would repeal the antidiscrimination provisions.¹⁴

This report is based on Commission briefings, interviews, and staff research. Providing information at the Commission's briefings on February 13, 1987, December 17, 1987, and March 17, 1989, were representatives of GAO, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, the Immigration and Naturalization Service, the Equal Employment Opportunity Commission, the Chicago Commission on Human Relations, California Tomorrow, the Mexican American Legal Defense and Educational Fund, the League of United Latin American Citizens (LULAC), the Asian American Legal Defense Fund, and the National Council of La Raza. Commission staff supplemented information gathered at the briefings through subsequent interviews and

⁹ 8 U.S.C.A. § 1324a(k) (West Supp. 1988).

¹⁰ Interview with Alan Stapleton, Project Director, and Linda Watson, Project Director, GAO, May 25, 1989.

¹¹ 8 U.S.C.A. § 1324a(l)-(n) (West Supp. 1988). "Widespread pattern of discrimination" contrasts with a "pattern of discrimination" in that the former is the test relating to termination of the employer sanctions.

¹² *Id.* at § 1324b(k)(1) (West Supp. 1988).

¹³ *Id.* at § 1324b(k)(2)(A)(i) (West Supp. 1988).

¹⁴ *Id.* at § 1324b(k) (West Supp. 1988).

correspondence and, in addition, sought the views of other governmental and nongovernmental agencies and organizations.¹⁵

¹⁵ Additional information on immigration reform can be found in: U.S. Commission on Civil Rights, "Briefing on Civil Rights in Immigration and Education" (January 1986); Colorado Advisory Committee to the U.S. Commission on Civil Rights, *Implementation in Colorado of the Immigration Reform and Control Act: A Preliminary Review* (January 1989); Rhode Island Advisory Committee to the U.S. Commission on Civil Rights, *Implementation in Rhode Island of the Immigration Reform and Control Act: A Preliminary Review* (May 1989); and New Mexico Advisory Committee to the U.S. Commission on Civil Rights, *Implementation in New Mexico of the Immigration Reform and Control Act: A Preliminary Review* (May 1989). Reports concerning immigration reform are also being prepared by the California, Texas, and Arizona Advisory Committees to the U.S. Commission on Civil Rights.

CHAPTER 2: IRCA SUMMARY AND LEGAL ANALYSIS

The primary purpose of IRCA is to end illegal immigration, principally through the imposition of sanctions on employers who hire or retain unauthorized workers. The House report on IRCA noted its belief that employment is a cause of illegal immigration:

Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.¹⁶

The House report noted further that: "Now, as in the past, [we] remain convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens. While there is no doubt that many who enter illegally do so for the best of motives . . . immigration must proceed in a legal, orderly and regulated fashion. As a sovereign nation, we must secure our borders."¹⁷

Employer Sanctions

IRCA makes it unlawful for any business knowingly to hire for employment, "or to recruit or refer for a fee," an alien not authorized to work within the United States.¹⁸ Furthermore, a business may not continue to employ an individual after discovering that he was never authorized to work or has become unauthorized to work.¹⁹ IRCA also establishes the minimum paperwork that all employers must prepare and retain in verifying that all new hires are authorized to work in the United States.²⁰ IRCA provided an 18-

¹⁶ H.R. REP. NO. 682(I), 99th Cong. 2d Sess. 46 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5650.

¹⁷ *Id.*

¹⁸ 8 U.S.C.A. § 1324a(a)(1) (West Supp. 1988). With regard to referral, the legislation is not intended to apply to labor unions or other organizations that do not actually refer individuals for employment for a fee or profit motive.

¹⁹ *Id.* at § 1324a(a)(2) (West Supp. 1988).

²⁰ *Id.* at § 1324a(a)(1)(B) (West Supp. 1988). Although the last violation suggests the need for a continuing review of the authorization status of employees, the House Judiciary report on IRCA clarifies that "[t]he [House Judiciary] Committee does not intend to impose a continuing
(continued...)

month phase-in period. During the initial 6-month education period ending May 31, 1987, no IRCA sanctions were permitted. In the subsequent 12-month period ending May 31, 1988, citations were issued for a first offense and penalties for subsequent offenses.²¹

Although the antidiscrimination provisions apply only if the business has four or more employees,²² the employer sanctions apply to *all* employers.²³ The reason for limiting the scope of the antidiscrimination provisions of IRCA is similar to the rationale for such limitations in Title VII: Congress considered it inappropriate to visit liability on employers of a minimum size in spite of the possibility that small businesses might use sanctions as a pretext for discrimination, or that, fearing penalties under the sanctions, they might "play it safe" with foreign-sounding or looking individuals and not hire such persons.

Legalization

Recognizing the past failures of the immigration law to provide an effective deterrent to illegal immigration, Congress established an amnesty program to "legaliz[e] the status of aliens who [were] present in the United States for several years."²⁴ The Select Commission on Immigration and Refugee Policy noted that "in a sense, our society has participated in the creation of the [immigration] problem. Many undocumented/illegal migrants were induced to come to the United States by offers of work from U.S. employers who recruited and hired them under protection of present U.S. law."²⁵

In weighing passage of the IRCA legislation and adoption of a legalization program, Congress took note of the large undocumented alien population living and working within U.S. borders, particularly in areas of high concentrations of aliens.²⁶ Although theoretically the United States could have increased internal efforts to apprehend

²⁰(...continued)

verification obligation on employers. However, if an employer has knowledge that an alien's employment becomes unauthorized . . . sanctions would apply." H.R. REP. NO. 682(I), 99th Cong., 2d Sess. 57, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5661.

²¹ The phase-in period is set forth in 8 U.S.C.A. § 1324a(i) (West Supp. 1988).

²² *Id.* at § 1324b(a)(2)(A) (West Supp. 1988).

²³ *Id.* at § 1324a(a) (West Supp. 1988).

²⁴ H.R. REP. NO. 682(I) 99th Cong., 2d Sess. 49, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653.

²⁵ Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest* (1981), p. 12.

²⁶ GAO's second report identifies New York, California, Florida, Illinois, and Texas as "high alien population states." U.S. General Accounting Office, *Immigration Reform: Status of Implementing Employer Sanctions After Second Year* (November 1988), p. 18. (Hereinafter cited as *GAO's second report*.)

such individuals, the associated cost, complexity, legal concerns, and resulting deportations made that unfeasible.²⁷ Moreover, many persons unauthorized to work had resided here for several years, becoming integral parts of their communities. Many had strong family ties to U.S. citizens and lawful residents, and the Nation benefited from their talents, labor, and tax dollars. Nonetheless, many of these individuals lived in a subculture, at times victimized by employers, landlords, or others, yet afraid to seek help.

Individuals eligible for legalization under IRCA had to have entered the United States before January 1, 1982, and to have had continuous residence here since that date in an unlawful status. After enactment of IRCA, a person had to have been physically present in the United States since November 6, 1986, except for "brief, casual, and innocent absences." Additionally, the applicant had to have been otherwise eligible for admission under most provisions of the immigration law.²⁸

Verification

All newly hired employees, whether citizens or not, must now submit for examination a document or documents as proof of identity and of citizenship or authorization to work in the United States.²⁹ Within 3 days of employment, the employer and employee must sign an Employment Eligibility Verification Form, commonly referred to as Form I-9.³⁰ An affirmative defense is available to an employer if

²⁷ See Select Commission on Immigration and Refugee Policy, at 72-75.

²⁸ 8 U.S.C.A. § 1255a(a)-(d) (West Supp. 1988). The first stage was a temporary resident status. Individuals were required to apply for adjustment to temporary resident status during a 12-month period beginning May 5, 1987. The second stage, permanent resident status, must be applied for within a 12-month period beginning with the 19th month after the person was granted temporary status. For permanent resident status, the applicant must demonstrate a minimal understanding of English, United States history and government, or that he or she is satisfactorily pursuing instruction to achieve that minimal understanding. 8 U.S.C.A. § 1255a(a)&(b) (West Supp. 1988).

²⁹ For the verification requirements discussed in this subsection, see 8 U.S.C.A. § 1324a(b)(1)(B)-(D) (West Supp. 1988). Acceptable as proof of work authorization and identity are a U.S. passport, a certificate of citizenship or naturalization, an unexpired foreign passport containing a valid endorsement of work authorization, or a resident card or other alien registration card containing the individual's photograph and other information required by the Attorney General. Documents that evidence work authorization but not identity are a social security card, a U.S. birth certificate (including a certificate of U.S. nationality at birth), or other document authorized by the Attorney General. For documents that establish only work authorization, documents confirming identity are also required. An employer may not limit verification documents so as to exclude documents acceptable under IRCA.

³⁰ Control of Employment of Aliens, 52 Fed. Reg. 16,222 (1987). The (continued...)

the employer complied in good faith with the verification procedures.³¹

Antidiscrimination Provisions

Some members of Congress thought that the verification provisions of the employer sanctions would provide sufficient protection to minimize discrimination because the provisions required that employers verify *all* newly hired personnel.³² Others favored including antidiscrimination provisions in the IRCA legislation, arguing that the documents of individuals who looked or sounded foreign would be subjected to a much closer scrutiny by employers fearing employer sanctions.³³ Worse, they argued further, the employer sanctions might be used as a pretext for discrimination. The House Judiciary Committee disagreed with this assessment, citing a GAO study of employer sanctions in other countries which did not turn up resulting discrimination. Nevertheless, expressing a need to minimize the employer sanctions' potential for discrimination, the Committee supported mechanisms to remedy any discrimination that might result.³⁴ Consistent with this view, Richard Keatings, chairman of the American Bar Association's Coordinating Committee on Immigration Law, testified before joint congressional hearings:

Any perceived or likely ill-effects, especially where they concern discrimination . . . in the workplace, must be protected against *even if* such feared results never occur.

³⁰(...continued)

verification form must be held for 3 years after hiring or 1 year after termination of employment, whichever is longer. The material must be made available for the INS to inspect upon demand. 8 U.S.C.A. § 1324a(b)(3) (West Supp. 1988).

³¹ 8 U.S.C.A. § 1324a(a)(3) (West Supp. 1988). An affirmative defense involves new factual allegations rather than a simple denial of the factual allegations made against the defendant. BLACK'S LAW DICTIONARY 378 (5th ed. 1979). In this context, the employer would have to establish that he or she acted in good faith with the verification requirements by attesting on Form I-9 that the employment eligibility and identity of the individual hired, recruited, or referred was verified. "The attestation may be made if the document or combination of documents examined in the verification process reasonably appears on its face to be genuine." Control of Employment of Aliens, 52 Fed. Reg. 16,219 (1987) (*to be codified at* 8 C.F.R. Parts 109 and 274a). See also H.R. REP. No. 682(I), 99th Cong., 2d Sess. 62.

³² Telephone interview with Congressman Daniel E. Lungren, Member of Congress from 1979 to 1988, May 26, 1989.

³³ See, e.g., *Anti-Discrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigration, Refugees, and International Law, of the House Comm. on the Judiciary, and Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 123-128 (1985) (statement of Rep. Robert Garcia).

³⁴ H.R. REP. No. 682(I), 99th Cong. 2d Sess. 68.

. . . So anti-discrimination protections are essential to this bill if only to protect against a result we all hope will never occur.³⁵

IRCA prohibits employer discrimination against any individual, other than an unauthorized alien, "because of [the] individual's national origin or, . . . in the case of a citizen or intending citizen . . . because of [the] individual's citizenship status."³⁶ The prohibition against discrimination applies to hiring, recruitment or referral for a fee, or discharge of an employee.³⁷ To investigate and prosecute charges of IRCA-related discrimination, Congress established the Office of Special Counsel for Immigration-Related Unfair Employment Practices under the Department of Justice.³⁸ IRCA's antidiscrimination protection for noncitizens applies only to "intending citizens."³⁹ Within this category are legal permanent residents, political refugees and asylees, and individuals obtaining amnesty under IRCA's legalization program.⁴⁰

IRCA's antidiscrimination provisions do not apply to (1) employers of fewer than four persons; (2) national origin discrimination already covered by Title VII; (3) citizenship status discrimination necessary to comply with laws, government contracts, or the Attorney General's determinations that such employment decisions are essential for an employer to do business with a government agency; and (4) discrimination based on skill in speaking English that is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁴¹ Some individuals are not protected by the statute's antidiscrimination provisions against discrimination based on citizenship status. A temporary student, an individual with a

³⁵ *Id.* at 159 (emphasis added).

³⁶ 8 U.S.C.A. § 1324b(a)(1)(A) & (B) (West Supp. 1988). Possible penalties against employers who discriminate in violation of IRCA include fines of as much as \$2,000 and employment, with backpay, for each person discriminated against. 8 U.S.C.A. §§ 1324b(g)(2)(B)(iii) & (iv) (West Supp. 1988).

³⁷ *Id.* at § 1324b(a)(1) (West Supp. 1988).

³⁸ *Id.* at § 1324b(c)-(d) (West Supp. 1988). Although investigation of charges is the statutory mandate of the Office of Special Counsel, it also considers independent investigation and education as primary components of its responsibilities. Commission staff interview with Andrew M. Strojny, Acting Special Counsel, and Lisa Chanoff, attorney, Office of Special Counsel, May 24, 1989.

³⁹ 8 U.S.C.A. § 1324b(a)(3)(A) & (B) (West Supp. 1988).

⁴⁰ *Id.*

⁴¹ H.R. REP. NO. 682(I), 99th Cong., 2d Sess. 70, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5674; 8 U.S.C.A. § 1324b(a)(2) (West Supp. 1988); *see also* JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. 88 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5843.

business or exchange scholar visa, or a special agricultural worker (SAW) are not "intending citizens" under the antidiscrimination provisions and thus cannot invoke this provision of IRCA.⁴²

IRCA-Related Discrimination

An imprecision in the evaluation provisions has given rise to the issue of what kinds of discrimination GAO is to measure in its three reports, that is, whether it must measure only IRCA-related national origin discrimination or also IRCA-related citizenship discrimination. For purposes of ascertaining in its third report whether IRCA has caused a "widespread pattern of discrimination," GAO's Office of General Counsel has tentatively concluded that GAO is required to measure only national origin discrimination.⁴³

FINDING 1:

Where statutory language is inconsistent or ambiguous, it should be construed to avoid manifest incongruity and to serve the policy or purpose for which the statute was enacted. The Commission thus concludes that in determining whether IRCA has caused a "pattern of discrimination," "widespread pattern of discrimination," or "no significant discrimination," GAO should measure both national origin and citizenship discrimination.

The general provision requiring that GAO issue reports on IRCA, to be found at 8 U.S.C.A. § 1324a(j)(1), specifies that one purpose of the GAO reports is to determine whether "a pattern of discrimination has resulted against citizens or nationals of the United States or against eligible workers seeking employment."⁴⁴ It

⁴² 8 U.S.C.A. § 1324b(a)(3) (West Supp. 1988). Note that to be protected under the antidiscrimination provisions based upon citizenship, an individual admitted for temporary residence must be admitted under the basic legalization provision (8 U.S.C.A. § 1255a(a)(1) (West Supp. 1988)). 8 U.S.C.A. § 1324b(a)(3) (West Supp. 1988). SAWS, however, are eligible for temporary residence under a different section (8 U.S.C.A. § 1160 (West Supp. 1988)).

⁴³ "Legal Analysis of the Comptroller General's Determinations under the IRCA Termination Provisions," July 14, 1989 (hereinafter Draft GAO Legal Analysis).

⁴⁴ 8 U.S.C.A. § 1324a(j)(1) (West Supp. 1988). It should be noted that IRCA's evaluation provisions were taken from S. 1200, which, when passed by the Senate, did not contain antidiscrimination provisions. In contrast, the House bill, H.R. 3080, which included the antidiscrimination provisions, also required that three reports be submitted to Congress by the President and three reports by the Civil Rights Commission. The Presidential reports were to include "a description of the impact of section 274A . . . on (i) discrimination against citizen and permanent resident alien members of minority groups, and (ii) the paperwork and record keeping burden on (continued...)"

does not specify whether the discrimination is to be based upon national origin or citizenship.⁴⁵ However, paragraph (2) of the same subsection directs that GAO make a specific determination of whether a "pattern of discrimination" has occurred based upon national origin, with no mention of citizenship.⁴⁶ This is consistent with language in the subsection that follows it, describing what actions the taskforce is to take if GAO finds a pattern of national origin discrimination in its first or second reports.⁴⁷ Again, there is no mention of citizenship discrimination.

Inconsistency arises when the GAO evaluation provisions in IRCA's employer sanctions section--requiring that GAO evaluate national origin discrimination--are contrasted with IRCA's antidiscrimination section. Congress' clearly expressed concern in enacting this section was to prohibit IRCA-related employment discrimination, whether based on national origin *or* citizenship status.⁴⁸ Moreover, IRCA's antidiscrimination section *also* contains a GAO evaluation provision, providing for repeal of the antidiscrimination provisions if Congress concurs by joint resolution with a GAO finding in its third report that IRCA has resulted in "no significant discrimination."⁴⁹ Inasmuch as this provision appears in the antidiscrimination section, one would be hard pressed to argue that GAO is not here charged with measuring both national origin *and* citizenship discrimination.

Thus, GAO's position that it need only measure national origin discrimination in determining whether IRCA has caused a "widespread pattern of discrimination" results in a troubling incongruity: GAO would determine whether there exists a "widespread pattern of discrimination" based on *national origin*, triggering possible repeal of the employer sanctions and anti-discrimination provisions, while separately determining whether there exists "no significant discrimination" based on *national origin or citizenship*, triggering possible repeal of the anti-discrimination provisions. Moreover, not only is this position incongruous, it runs

⁴⁴(...continued)

United States employers." The Commission's reports were to describe the implementation and enforcement of IRCA, for the purpose of determining if a pattern of discrimination had occurred based on *race or nationality*. *Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on Judiciary*, 99th Cong. 1st Sess. 87-88 (1985).

⁴⁵ *Id.*

⁴⁶ The statute states: "(2) DETERMINATION ON DISCRIMINATION.-In each report, the Comptroller General shall make a specific determination as to whether the implementation of that section has resulted in a pattern of discrimination in employment (against other than unauthorized aliens) on the basis of national origin." 8 U.S.C.A. § 1324a(j)(2) (West Supp. 1988).

⁴⁷ 8 U.S.C.A. § 1324a(k)(2) (West Supp. 1988).

⁴⁸ 8 U.S.C.A. § 1324b(a)(1)(A) & (B) (West Supp. 1988).

⁴⁹ 8 U.S.C.A. § 1324b(k)(2)(A)(i) & (B) (West Supp. 1988).

contrary to the intent of the antidiscrimination provisions, which define discrimination both in terms of national origin and citizenship, and which should govern the scope of GAO's assessment.⁵⁰

Pattern of Discrimination

As noted above, the three GAO reports are to evaluate whether IRCA's "provisions have been carried out satisfactorily," whether a "pattern of discrimination" has resulted from IRCA's employer sanctions, and whether an "unnecessary regulatory burden has been created for employers."⁵¹ In addition, in its third report, GAO is to assess whether a "widespread pattern of discrimination" has resulted from employer sanctions,⁵² whether the antidiscrimination provisions create an "unreasonable burden" on employers, and whether "no significant discrimination" has resulted.⁵³ A major difficulty for GAO in its first two reports stems from the fact that IRCA does not define these terms. Furthermore, GAO goes on to state:

IRCA's legislative history does not provide guidance on the meaning of such terms as "widespread pattern of discrimination," "unnecessary regulatory burden," and "unreasonable burden." Without such guidance, we analyzed the available data to help us draw conclusions that could address these questions. However, data limitations, partly related to the act's newness, and methodological problems caused us to qualify our answers to the mandated questions. These problems probably will persist into the third report, causing us to qualify those results too.⁵⁴

⁵⁰ See generally 2A SUTHERLAND STATUTORY CONSTRUCTION 561-93 (4th ed. 1984):

In applying the doctrine of equitable interpretation, American decisions usually rationalize an extended or restricted interpretation in language by noting that "the spirit of a statute governs the letter." But there are other judicial expressions that have a similar effect. An extended or restricted interpretation may be reconciled, for example, on the ground that "the intent prevails over the letter"; that "the reason of the statute controls the letter"; that the literal meaning of the statute is subject to its "object," "aim," "scheme," "real intent," or "that implied is as much a part of the statute as that expressed."

Id. at 564-55 (citations omitted). See also *id.* at 570 ("It is therefore a correlative of equitable interpretation that where there is doubt about how inclusively a statute should be applied, it will be construed to apply only so far as is needed to remedy the perceived mischief.").

⁵¹ 8 U.S.C.A. § 1324a(j)(1)(C) (West Supp. 1988).

⁵² *Id.* at § 1324a(l)(A) (West Supp. 1988).

⁵³ *Id.* at § 1324b(k)(2)(A)(i) & (ii) (West Supp. 1988).

⁵⁴ GAO's second report, p. 16.

FINDING 2:

IRCA is deficient in not defining "pattern of discrimination," "widespread pattern of discrimination," "pattern or practice of discrimination," or "no significant discrimination." In construing these terms, however, IRCA's legislative history and analogous terms in other statutes provide at least some evidence of congressional intent, particularly with respect to what constitutes a "pattern" or "widespread pattern" of discrimination.

While "pattern of discrimination" and "widespread pattern of discrimination" are not defined in the text of the statute, in point of fact the legislative history provides at least some guidance. In introducing the amendment which contains the "widespread pattern of discrimination" language, Senator Kennedy declared that it meant "not just a few isolated cases of discrimination."⁵⁵ As the following discussion points out, the meaning Senator Kennedy ascribed to "widespread pattern" is not dissimilar to the meaning of "pattern or practice" language found elsewhere in IRCA or to similar or identical terms in other statutes.⁵⁶

⁵⁵ 131 CONG. REC. S11422 (daily ed. Sept. 13, 1985) (statement of Sen. Kennedy). The amendment was adopted without disagreement over what would constitute a "widespread pattern of discrimination." The context of Senator Kennedy's reference to "widespread pattern" was as follows:

This 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 the employer sanctions.

⁵⁶ Statutory interpretation by reference to other statutes is an accepted practice. See, e.g., 2A SUTHERLAND STATUTORY CONSTRUCTION 549 (4th ed. 1984):

Those forces which operate to produce a sufficient incidence of congruence even among statutes on different and dissimilar subjects are conventional modes of thinking about legislative problems and solutions, common idioms and customary language usage, and established approaches to the design of the statutory provisions. They produce a general state of harmony within the system of enacted law.

Id. at § 53.01. See also § 53.03 ("On the basis of analogy the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships.")

The term "pattern or practice" can be found both in 8 U.S.C.A. § 1324a, prohibiting hiring, recruiting, or referring of unauthorized workers,⁵⁷ and in § 1324b, permitting a person with a complaint to bring an action alleging "pattern or practice" discrimination before an administrative law judge if the Special Counsel has not acted upon the complaint within 120 days.⁵⁸ Elaborating upon the meaning of "pattern or practice" in these contexts, the House Judiciary Committee noted that:

The term "pattern or practice" has received substantial judicial construction, since the term appears in the Voting Rights Act, the Civil Rights Act of 1964, and the Fair Housing Act of 1968. The Committee emphasizes that it intends to follow the judicial construction of that term as set forth in *U.S. v. Mayton*,⁵⁹ *International Brotherhood of Teamsters v. U.S.*,⁶⁰ and *U.S. v. International Association of Ironworkers Local No. 1*.⁶¹ These cases all indicate that the term "pattern or practice" has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts. The same interpretation of "pattern or practice" shall apply when that term is used in this bill with regard to the injunctive remedy that may be sought by the Attorney General for recruitment, referral or employment violations, as well as for certain unfair immigration-related employment practices.⁶²

⁵⁷ 8 U.S.C.A. § 1324a(f), entitled, "Criminal Penalties and Injunctions for Pattern or Practice Violations," imposes penalties upon employers who engage in a "*pattern or practice of violations*" of the general prohibitions of § 1324a against hiring, recruiting, or referring for a fee unauthorized workers (emphasis added). Furthermore, paragraph (2) of subsection (f), entitled "Enjoining of Pattern or Practice Violations," allows the Attorney General to bring a civil action if he "has reasonable cause to believe that a person or entity is engaged in a *pattern or practice* of employment, recruitment, or referral" in violation of IRCA (emphasis added).

⁵⁸ 8 U.S.C.A. § 1324b(d)(2) (West Supp. 1988).

⁵⁹ 335 F.2d 153 (1964).

⁶⁰ 431 U.S. 324 (1977).

⁶¹ 438 F.2d 679 (1971).

⁶² H.R. REP. No. 682(I), 99th Cong., 2d Sess. 59 (citations omitted). The closing reference to "unfair immigration-related employment practices" must, in fact, be a reference to the private right of action given to those whose pattern or practice complaints have not been acted upon by the Special Counsel within 120 days. See also Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,403 (1987) (to be codified at 28 C.F.R. Part 44). Commenting upon this provision, the Department of Justice regulations explain that Congress gave private citizens the authority to pursue pattern or practice discrimination "to make plain that a private party could not only bring a case alleging isolated or sporadic acts of
(continued...)

The Supreme Court case cited by the House Judiciary Committee, *International Brotherhood of Teamsters v. U.S.*, provides further discussion of "pattern or practice."⁶³ The Court there held that the Government had met its burden of making out a prima facie case of "pattern or practice" discrimination under Title VII in establishing "by a preponderance of the evidence that racial discrimination was the [appellant's] standard operating procedure--the regular rather than the unusual practice."⁶⁴ Further construing "pattern or practice," the Court noted that:

The "pattern or practice" language in § 707(a) of Title VII . . . was not intended as a term of art, and the words reflect only their usual meaning. Senator Humphrey explained: "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons

⁶²(...continued)

intentional discrimination but could also bring a case of repeated, intentional activities with many victims." *Id.* at 37,404.

⁶³ The lack of a statutory definition of pattern is not unique to IRCA. On June 26, 1989, the Supreme Court decided a case that hinged upon the meaning of "pattern" of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act (RICO), an issue that had given rise to numerous lawsuits. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 26, 1989). Looking to RICO's legislative history, the Court said that:

Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by "sporadic activity," and a person cannot "be subjected to the sanctions of title IX simply for committing two widely separated and isolated offenses." Instead "[t]he term 'pattern' itself requires the showing of a relationship" between the predicates, and of "the threat of continuing activity." "It is this factor of *continuity plus relationship* which combines to produce a pattern."

57 U.S.L.W. 4951, 4953 (citations omitted; emphasis in original). *But see* the concurring opinion, which expresses doubt "that the lower courts will find the Court's instructions [regarding 'continuity plus relationship'] much more helpful than telling them to look for a 'pattern'--which is what the statute already says." 57 U.S.L.W. 4951, 4957 (Scalia, J., joined by C.J. Rehnquist and O'Connor; J. and Kennedy, J., concurring in the judgment that predicate acts constituting a single scheme (or single episode) can support a cause of action under RICO); *see also* Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law (March 28, 1985), pp. 193-208, for a discussion of "pattern" under RICO.

⁶⁴ *Teamsters v. U.S.*, 431 U.S. 324, 336.

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 its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice"⁶⁵

Based upon the foregoing, it is evident that the terms, "pattern or practice of discrimination," "pattern of discrimination," "significant discrimination," and "widespread pattern of discrimination," each of which appears in IRCA, are similar in meaning. While it goes without saying that "widespread pattern" implies a greater quantity of evidence than simply "pattern," it is difficult to discern how "significant discrimination" is different from either of these terms.

In applying these terms to the evidence of discrimination caused by IRCA, it is noteworthy that the only legislative history to be found which defines "pattern" or "widespread pattern" is Senator Kennedy's reference to "not just a few isolated cases." IRCA's legislative history, sparse though it may be, and judicial interpretations of similar language in other statutes strongly suggest that the standard that would justify a finding of a "widespread pattern of discrimination" and "pattern of discrimination" is not an unreasonably high one.

For purposes of preparing its third report, GAO's Office of General Counsel has tentatively concluded in a legal analysis of IRCA's termination provisions that the "widespread pattern of discrimination" element may consider a variety of quantitative measures:

⁶⁵ *Id.* at 336-37. The statistical evidence showed, in part, that appellant's workforce was made up of 5 percent blacks and 4 percent Hispanics, and line-drivers, the job category at issue, was made up of 0.4 percent blacks and 0.3 percent Hispanics. The Government bolstered its statistical evidence with testimony from individuals who recounted over 40 specific instances of discrimination. This had the effect, the Court said, while not essential to meeting the burden of proof, of bringing "the cold numbers convincingly to life." *Teamsters*, 431 U.S. 324, 339. The Court also cited consistent understandings of pattern or practice discrimination under Title VII and Title II of the Civil Rights Act of 1964. *Teamsters*, 431 U.S. 337 n. 16, *citing* 110 Cong. Rec. 12946 (1964) (remarks of Sen. Magnuson); 110 Cong. Rec. 14239 (1964) (remarks of Sen. Humphrey) ("an establishment or employer that consistently or avowedly denies rights under these titles is engaged in a "pattern or practice of resistance."); and 110 Cong. Rec. 15895 (1964) (remarks of Rep. Celler) ("pattern or practice . . . where there is discrimination by several concerns in the same industry or line of business, where a chain of motels or restaurants discriminated in all or part of its branches, or where a single company regularly refused to treat Negroes without discrimination. . . . There is no requirement that the pattern or practice be pursuant to a conspiracy or concert of action. . . .").

These measures might include: the number of employers engaged in discriminatory purposes; the number of employees or applicants potentially affected; percentages of employers and of the workforce involved; and the distribution of discriminatory practices by industry type and geographic region.⁶⁶

Although use of such measures is reasonable, another aspect of its analysis raises a concern where it suggests that GAO's determination of whether IRCA has caused a "widespread pattern of discrimination" should be carried out mindful that the consequence of an affirmative determination is termination of the employer sanctions.⁶⁷ According to the analysis, keeping sight of this consequence in turn requires that the assessment of a "widespread pattern of discrimination" take into account a consideration of "the nature and impact of discrimination":

For example, a pattern of refusal to hire "foreign appearing" persons would be more severe than discrimination that could only be tied to the verification process. It also is appropriate to consider whether or to what extent discrimination appears to result from confusion or misunderstanding about how to apply IRCA's requirements, that might be expected to diminish with greater experience or education, or from deep-seated fear of sanctions on the part of employers that might be expected to continue indefinitely. It is appropriate as well to consider the effectiveness of the IRCA antidiscrimination provision and other statutory and administrative means to deal with discrimination short of terminating employer sanctions.⁶⁸

FINDING 3:

A GAO finding of an IRCA-related "widespread pattern" of discrimination would invoke congressional review of GAO's findings and possible repeal of employer sanctions. Congress is the proper body to assess the "nature and impact" of any discrimination that may constitute a "widespread pattern."

While GAO's position that it should assess the "nature and impact of discrimination" in determining what discrimination should be included in a "widespread pattern" has a certain common sense appeal, particularly given the lack of statutorily defined terms,

⁶⁶ Draft GAO Legal Analysis, p. 19.

⁶⁷ *Id.* ("In addition to quantitative measures, it is necessary to keep sight of the fundamental context for the Comptroller General's determination: whether discrimination has resulted to such a degree that termination of the employer sanctions is warranted.")

⁶⁸ *Id.*

compelling arguments support a contrary conclusion. IRCA charges GAO with determining whether a "widespread pattern of discrimination" has resulted solely from IRCA's implementation.⁶⁹ The statute says nothing about assessing the nature and impact of the discrimination it finds. If GAO determines that such a pattern has resulted, the employer sanctions will be terminated *only if* Congress passes a joint resolution approving GAO's findings.⁷⁰ Congress may not agree with GAO's findings, or it may even ignore them, and employer sanctions would continue.⁷¹ But ultimately Congress should decide whether to terminate employer sanctions, or, alternatively, to increase efforts to educate employers on IRCA's provisions or improve IRCA's antidiscrimination mechanisms. The standard GAO uses in deciding upon a finding of a "widespread pattern of discrimination" should not be affected by the gravity of a consequence properly the subject of congressional judgment.

Moreover, the admitted difficulties in determining whether IRCA-related discrimination constitutes a "pattern" or "widespread pattern" are compounded if GAO is also to consider the "nature and impact"⁷² of that discrimination. IRCA directs GAO simply to determine whether a "widespread pattern of discrimination" has resulted solely from IRCA, not whether the discrimination stems from "a refusal to hire 'foreign appearing' persons," from "the verification process," from "confusion or misunderstanding," or from "deep-seated fear of sanctions."⁷³ The task of defining "widespread pattern," given the absence of clear statutory guidance, is difficult enough as it is.

The next chapter will, among other things, apply the above analyses to the evidence of IRCA-related discrimination that GAO weighed in its second report in determining that IRCA has not caused a "pattern of discrimination," and examine issues relating to GAO's third report.

⁶⁹ 8 U.S.C.A. § 1324a(l)(1)(A) (West Supp. 1988).

⁷⁰ *Id.* at § 1324a(l)(2) (West Supp. 1988).

⁷¹ 131 CONG. REC. 23,717 (daily ed. Sept. 13, 1985) (statement of Sen. Kennedy in introducing amendment containing termination provisions).

⁷² Draft GAO Legal Analysis, p. 19.

⁷³ *Id.* Furthermore, the termination provisions provide for termination of § 1324a upon congressional concurrence with GAO's finding of a "widespread pattern of discrimination." The presence of both the employer sanctions and the verification provisions in § 1324a argues against discounting discrimination resulting from the verification provisions, as GAO suggests, as less severe than a pattern of refusal to hire "foreign-appearing" persons.

CHAPTER 3: GAO'S FIRST TWO REPORTS

The principal conclusions on discrimination in the 1988 GAO *Report to Congress on Immigration Reform* are that "[t]he data on discrimination does not establish:

(1) a pattern of discrimination caused by employer sanctions or (2) an unreasonable burden on employers."⁷⁴

The report also finds that "[i]nformation is insufficient to determine if the employer sanction provision has caused an unnecessary regulatory burden on employers."⁷⁵

The Commission believes that there is sufficient evidence in the GAO's second report to raise serious concerns about discrimination caused by IRCA and about the effectiveness (and thus necessity) of employer sanctions. GAO bases its conclusions not on strong positive evidence, but rather upon its judgment that the current evidence is not strong enough to meet its standards for a contrary finding.

GAO's Finding on Discrimination

GAO based its finding that "[t]he data on discrimination does not establish . . . a pattern of discrimination caused by employer sanctions . . ."⁷⁶ upon its judgment that the evidence of discrimination which it found was unable to meet two standards:⁷⁷

- It must show discrimination caused by employer sanctions.
- It must show discrimination against authorized workers.

GAO used three major sources of data on discrimination for the second report: a GAO-sponsored survey of employers, counts of complaints made to enforcement agencies, and reports gathered by private organizations.

⁷⁴ U.S. General Accounting Office, *Immigration Reform: Status of Implementing Employer Sanctions After Second Year* (November 1988), p. 4. (Hereinafter cited as *GAO's second report*.) The phrase "unreasonable burden" is used in connection with antidiscrimination provisions of IRCA and is different from "unnecessary regulatory burden," which refers to employer sanctions.

⁷⁵ *Ibid.*, p. 3.

⁷⁶ *Ibid.*, p. 4.

⁷⁷ *Ibid.*, p. 39.

FINDING 4:

Based on the evidence in GAO's second report, the Commission believes that employer sanctions have created a "pattern of discrimination" against authorized workers.

The evidence in GAO's second report is more than sufficient to establish a pattern of discrimination. The Commission stops short of finding a "widespread pattern of discrimination" primarily because GAO's data are not complete enough to support an adequately precise estimate of the extent of discrimination. If more strongly linked to discrimination against authorized workers, as the Commission believes it would be with more complete data, GAO's evidence would constitute a "widespread pattern of discrimination" under the statute. Prospects for compiling an empirical basis in GAO's third report sufficient for such a finding are discussed in chapter 4.

This finding is based upon Finding 2 in chapter 2 and the discussion below, specifically Findings 4A through 4F.

Employer Survey

The major independent effort by GAO to gather data for its second report was its *Survey of Employer Views of the 1986 Immigration Reform and Control Act*. A mailing of 5,998 survey questionnaires led to a final sample of 3,169 completed questionnaires.⁷⁸

The results of GAO's employer survey contain significant evidence of discriminatory practices. Sixteen percent of all employers in the survey reported that since sanctions began on November 7, 1986, they had begun discriminatory hiring policies prohibited by IRCA. Using a conservative weighting scheme, GAO projected that this represents 528,000 employers nationally.⁷⁹ Ten percent of employers said they had adopted new policies of hiring only U.S. citizens. Seven percent of employers responding said they had started policies of asking for documents only from applicants who looked or sounded foreign. Over 80 percent of employers reporting either practice said they were motivated primarily by sanctions.⁸⁰

⁷⁸ GAO's second report, pp. 84-85. Of the 5,998 questionnaires, 2,017 were dropped. Of those dropped, 1,714 forms could not be delivered by the Post Office, 242 said they had no employees, and 61 indicated an unbelievably large number of employees. Using the number of questionnaires not dropped as a base, GAO calculated a 78 percent response rate.

⁷⁹ GAO did not reweigh its data for nonresponses. This means that the 528,000 employers cited and other projections made by GAO represent 78 percent of employers. If nonrespondents had answered in the same way as those who did respond, the projected number would have been approximately 677,000. GAO's second report, p. 46.

⁸⁰ GAO's second report, p. 78.

GAO does not consider responses to its employer survey to be evidence of a pattern of discrimination because it is not satisfied that all of the conditions for a finding are met. It has stated that this is "[b]ecause we do not know (1) whether or not the persons affected were authorized to work and (2) if the employers' actions were caused by sanctions."⁸¹ The number of employers who were asked if they started particular discriminatory employment practices because of employer sanctions was considered too small by GAO to make a projection. Moreover, because the survey asked employers only if they had started discriminatory practices, GAO could not determine how many authorized workers were actually affected.⁸²

FINDING 4A:

In determining whether discriminatory employment practices were primarily a reaction to employer sanctions, GAO did not apply proper statistical standards to evidence from the employer survey. The Commission believes the employer survey provides strong and convincing evidence that employer sanctions were the primary cause of the discriminatory practices found in the survey.

Causation was a key reason that evidence of discrimination in the employer survey was not considered evidence of a pattern of IRCA-related discrimination. GAO does not believe that it can establish that employer sanctions are the primary cause of the discriminatory practices found in the survey.

For each of several employment practices, employers in the survey were asked "whether or not your organization has started or increased that action/activity since November 7, 1986" Only employers who answered "yes" were then asked if this was "primarily because of employer sanctions provisions." Of these employers, 83 percent of those screening job applicants selectively, 81 percent of those screening current workers selectively, and 88 percent of those establishing a citizens-only policy said that their actions were primarily because of IRCA.⁸³

On their face, these results clearly establish a causal link between discriminatory practices and IRCA. However, GAO argues that the number of employers (328) reporting such practices and answering the followup question is too small to be statistically

⁸¹ Written responses by GAO to questions sent by the United States Commission on Civil Rights as a followup to GAO's oral statements at the Commission's March 1989 IRCA Briefing.

⁸² GAO was aware before the survey that it would not be able to discern the number of authorized workers affected by a discriminatory practice. Employers themselves may not know, as discrimination may occur precisely because the employer is unsure of the worker's status.

⁸³ GAO's second report, p. 78.

reliable. GAO's estimate of the maximum sampling error for these combined questions was 9 percent.⁸⁴ This exceeded the conservative 5 percent sampling error that GAO had set as a maximum permissible standard for projections in the report.⁸⁵

GAO is interpreting its data too stringently. A sampling error is defined as "the difference between the value of the estimator and the true value of the parameter."⁸⁶ When over 81 percent in each category say that they were motivated by IRCA, a sampling error of 9 percent establishes a lower bound of at least 72 percent.⁸⁷ Even with this lower bound, it is clear that a majority of firms reporting discriminatory practices were primarily motivated by IRCA.

FINDING 4B:

GAO's employer survey should not be rejected as evidence of IRCA-related discrimination solely because it does not explicitly count authorized workers affected. Evidence that many employers discriminate because of IRCA is sufficient to establish a "pattern of discrimination" against authorized workers.

The evidence of discrimination in GAO's employer survey failed to pass a second test for a pattern of discrimination: that discriminatory practices actually affected authorized workers. GAO projected 528,000 employers with new discriminatory hiring policies.

⁸⁴ Ibid., table III.3, p. 90.

⁸⁵ Interview with Alan Stapleton, Project Director, and Linda Watson of GAO, May 25, 1989. This is also implied in the discussion of sampling error on p. 89 of *GAO's second report*.

⁸⁶ Jan Kmenta, *Elements of Econometrics* (New York: MacMillan, 1971), p. 156.

⁸⁷ The sampling error of 9 percent is described on p. 90 of *GAO's second report* as based on a composite variable created to look at those employers who had admitted at least one new discriminatory practice. No composite estimate was reported for the percentage who said that they were motivated by IRCA, so the minimum percentage from any single discrimination question of 81 percent has been assumed. GAO did not report what statistical confidence level was used in calculating the sampling error.

In a July 19, 1989, letter responding to this report, GAO replied that:

This combined sample error cannot be applied to an individual variable as stated in the Commission's draft report. If we had computed errors for each individual variable, the interval would have been very wide.

However, it is precisely the composite variable, the existence of any discriminatory practices, that is under discussion. The use of the 9 percent sampling error is fully appropriate in this instance.

These practices were most common at medium-sized employers with 10 to 50 employees.⁸⁸ However, GAO would not use this as evidence because it could not project the number of authorized workers affected.

It would be reasonable for GAO to conclude, at a minimum, that substantial numbers of authorized workers would be affected by employment policies that are so widespread. Most "foreign-looking" job applicants are likely to be citizens or otherwise be authorized to work. Most noncitizens applying for jobs are also likely to be authorized. While direct evidence obviously is preferred to *a priori* judgment, assumptions and judgments are necessary in conducting any statistical study.

FINDING 4C:

The measures of discrimination in GAO's employer survey have many potential problems, but the Commission believes that they probably underestimate the full extent of IRCA-related discrimination.

Questions arise when evaluating the results of any survey. Besides statistical error, many problems could bias responses to survey questions. In GAO's employer survey, most sources of response bias would lead to underestimates both of the full extent of discrimination and of the extent to which such discrimination results from employer sanctions and I-9 paperwork requirements.

For example, employers with "something to hide" would probably be much less likely to return the survey.⁸⁹ Those who do respond may be unwilling to report anything that may attract government attention to their employment practices. GAO's assurances to employers of anonymity do not solve the problem of receiving honest answers to potentially incriminating survey questions. To the extent that employers were unwilling to admit any questionable practices the survey's estimates of discrimination are too low.

Another source of bias in the survey stems from employer confusion over IRCA's provisions. Admission of certain practices may reflect, in part, what employers *thought* the government wanted to hear. For example, some employers may think that IRCA requires hiring only citizens. The same may be true of the practice of requesting documents only from foreign-looking or sounding people.

⁸⁸ GAO's second report, p. 51.

⁸⁹ Twenty-two percent of employers did not return the survey. If these employers are likely to have answered the survey questions differently from those who did respond, this is a source of bias. Employers with discriminatory policies, employers with unauthorized workers, and small employers without personnel departments may all have been less likely to respond. GAO's second report, p. 85.

As above, such misperceptions will bias the survey if and only if employers lie about their employment practices. In this case, however, the survey's estimates of discrimination would be biased upwards.

Employer confusion, however, is probably not a serious source of bias, in part because IRCA's antidiscrimination provisions are spelled out elsewhere in the survey. For example, question 18 stated that IRCA prohibited discrimination based on citizenship status. Question 15.7 asked about employer knowledge of penalties for employers who discriminate. Question 24 asked if the employer completes an I-9 form for "every" employee.⁹⁰ Furthermore, most employers who erroneously believe that IRCA mandates certain discriminatory practices will not wish to violate their understanding of the law and so engage in them. Therefore, misperception by employers would make such practices more likely, and the GAO report correctly points to the need for more employer education.⁹¹

FINDING 4D:

GAO gives too little emphasis to evidence of higher rates of discrimination in areas with high concentrations of alien workers. There is strong evidence of higher rates of discrimination in both States and industries that have a high number of alien workers.

In its employer survey, GAO found that "no consistent pattern of unfair hiring practices exists between the five high alien population states and industries and other states and industries . . ."⁹² However, the rate of discriminatory practices is higher in most of these States and industries. For example, although 10 percent of employers nationally said that they hired only U.S. citizens, this figure was 14 percent in California and 13 percent in the garment and construction industries. Selective screening of job applicants was acknowledged by 7 percent of employers nationally. However, 13 percent acknowledged selective screening in Florida, 12 percent in New York, and 13 percent in the hotel/restaurant, garment, and farming industries. For each type of discriminatory practice, four out of five States with high alien populations and four out of five industries with high alien work forces had higher rates than the average for the other 45 States. Since some employers may have admitted only one of these practices, this strongly implies that the percentage of employers admitting discriminatory practices in high alien States and industries is greater than the national estimate of 16 percent.⁹³

⁹⁰ GAO's second report, pp. 73-82 (emphasis in original).

⁹¹ Ibid., p. 5.

⁹² Ibid., p. 47.

⁹³ Ibid., pp. 49-50, 78.

Finding higher levels of discrimination in States and industries with large proportions of alien workers lends credibility to the survey's results: If employers gave accurate answers, one would expect more reports of discriminatory practices in areas with high alien populations. If, on the other hand, there is widespread misunderstanding of IRCA, one would expect employers in high alien areas to be more knowledgeable and admit fewer illegal practices.

Complaint Counts from OSC and EEOC

FINDING 4E:

Counts of formal discrimination complaints are not a good measure of the full extent of IRCA-related discrimination. GAO's second report gives complaint counts undue emphasis.

GAO's findings on discrimination place a heavy emphasis upon the number of complaints filed with Federal agencies.⁹⁴ GAO concluded that "[t]he number of discrimination charges filed, to date, does not establish a pattern of discrimination."⁹⁵ This implies a lack of a pattern, rather than insufficient data.⁹⁶ With evidence from the employer survey discounted by GAO, the stronger conclusion on "pattern of discrimination" is based largely on charges filed with Federal enforcement agencies through September 1988. The Commission does not believe that the evidence from complaint counts was sufficient for the stronger finding.⁹⁷

The Justice Department's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) was established by IRCA and began operations in April 1987. OSC has

⁹⁴ This statement comes, in part, from Commission staff's judgment on the prominence of complaint counts in GAO's assessment of discrimination. Several groups expressed a similar opinion during discussions with Commission staff.

⁹⁵ *GAO's second report*, p. 3.

⁹⁶ This is a much stronger finding than that which GAO made on "unnecessary regulatory burden" where it found that "information is insufficient." *GAO's second report*, p. 3.

⁹⁷ *Ibid.*, pp. 53-58. In its response to a draft of this paper, GAO stated:

We believe that each of our measures of discrimination has unique advantages and disadvantages that make it difficult if not impossible to rank order them in importance. Even if we were to consciously prioritize these measures, it is quite likely members of Congress may assess their importance differently. Since we included all the data in the report, the issue seems irrelevant and could be deleted from the draft report.

July 19, 1989, letter from Arnold P. Jones to James Cunningham and William Howard, Commission staff.

jurisdiction for citizenship discrimination cases involving employers with 4 or more employees and national origin discrimination for employers with 4 to 14 employees (larger employers remain under the jurisdiction of EEOC for national origin cases).⁹⁸ As of September 1988, 286 complaints had been filed with the Office of Special Counsel.⁹⁹

In the same period, the Equal Employment Opportunity Commission (EEOC) had received 148 discrimination complaints believed to be IRCA related. Of these, 54 were also filed with the OSC, leaving 380 IRCA-related complaints to the two Federal agencies. GAO's criteria for judging that a complaint is IRCA related are not clearly stated in its report.¹⁰⁰

Complaint counts seldom represent a good measure of the full extent of discrimination. It is impossible to know how many unreported incidents there are for every official complaint. In the specific case of IRCA-related discrimination, many factors suggest that complaint counts seriously underestimate the full extent of IRCA-related discrimination:

1. The OSC is new, not well known, and small.

Between April 1987 and February 1989, the Office of Special Counsel expanded to a total staff of 30, with 15 attorneys. It has no field offices, but promotes a toll-free "800" number to provide information on IRCA and how to file a complaint. In a GAO survey of State and local human rights agencies,¹⁰¹ 37 out of 81 did not have the address of the Office of the Special Counsel and 44 out of 81 did not have the OSC form to file a complaint.¹⁰²

Although the Office is still not widely known, complaints to OSC are increasing. During the 17-month period from April 1987 to September 19, 1988, OSC received an average of 17 complaints a month. During the 4-month period from September 19, 1988, to February 10, 1989, an average of 40 complaints per month were received.¹⁰³ While this increase shows that OSC is becoming better known, it also casts doubt on the reliability of earlier complaint levels as indicators of discrimination.¹⁰⁴

⁹⁸ 8 U.S.C.A. § 1324b(a)(2)(B) (West Supp. 1988).

⁹⁹ GAO's *second report*, p. 40.

¹⁰⁰ *Ibid.*, pp. 43-45.

¹⁰¹ OSC is now attempting to enter into agreements with most State and many local enforcement agencies to allow them to receive complaints on behalf of OSC.

¹⁰² GAO's *second report*, pp. 55, 94-98.

¹⁰³ Commission staff interview with Andrew M. Strojny, Acting Special Counsel, and Lisa Chanoff, attorney, Office of Special Counsel, May 24, 1989.

¹⁰⁴ A similar update of statistics for discrimination complaints sent to (continued...)

2. IRCA discrimination victims may be less willing to complain.

The most serious problem with complaint counts, generally, is that most victims of discrimination never file a complaint. Aliens with valid work permits, a group more likely to be subject to IRCA-related discrimination, may be less willing than others to become further involved with the legal system. Fear of retaliation from either employers or government may be particularly strong for those in IRCA's legalization program or with some other matter pending with the INS.

3. Complaints may go to State and local agencies.

Cases of national origin discrimination against both citizens and noncitizens may be reported to State and local authorities and not to EEOC or OSC. Cases related to citizenship status also may be reported locally, but classified as other types of discrimination. In each case, it is unlikely that the local agency maintains statistics on how many cases were "IRCA related."

California, for example, does not forbid discrimination based on citizenship status, but does based on national origin. Although the California State Department of Fair Employment and Housing reports no noticeable increase in complaints since IRCA, it does receive many complaints from authorized aliens based on national origin, including 63 from Mexican nationals in 1988.¹⁰⁵ It may often be difficult to distinguish citizenship from national origin as a source of discrimination.

4. IRCA-related discrimination occurs primarily during hiring.

Most survey and anecdotal evidence of IRCA-related discrimination involves I-9 forms, document acceptance, and other stages of the hiring process. Discrimination in hiring is particularly hard for a victim to prove or, often, even to know that it occurred. For example, of a total of 15,260 national origin complaints to EEOC in FY 1985 involving private employers, only 805 complaints were hiring related.¹⁰⁶

¹⁰⁴(...continued)

EEOC was not possible. GAO, in conjunction with EEOC's regional offices, made a determination as to which complaints were IRCA related.

¹⁰⁵ Summary statistics provided by the California Department of Fair Employment and Housing in February 1989.

¹⁰⁶ *EEOC Annual Report for 1985*, p. 14.

Complaints Made to Private, State, and Local Organizations

FINDING 4F:

Evidence of discrimination gathered by private, State, and local organizations did not receive enough emphasis in GAO's second report.

The second GAO report also contains reports of IRCA-related discrimination from various concerned private organizations and some State and local nonenforcement agencies. It is clear that GAO gave these much less emphasis than was given to official complaints. For example, the summary of the report's chapter on "Discrimination and Employer Sanctions" says only that "[o]ther organizations have developed discrimination data."¹⁰⁷

From November 1986 through November 1988, the Mexican American Legal Defense and Educational Fund (MALDEF) received 194 complaints from Los Angeles and 58 complaints from Chicago. Of the Los Angeles complaints, 148 involved authorized workers, of which only 54 were also filed with "OSC, EEOC, state or local antidiscrimination agencies, unions, or other organizations."¹⁰⁸

Other sources of complaint data cited in GAO's report include the Chicago Commission on Human Relations, which had received 122 IRCA-related complaints as of July 31, 1988, and the Center for Immigrant Rights, located in New York City, which reported 63 telephone complaints between June and August 1988.¹⁰⁹

The GAO report made only two references to complaints to State or local enforcement agencies: EEOC's district offices reported knowledge of 15 IRCA-related charges filed with State and local enforcement agencies.¹¹⁰ GAO's survey of State and local agencies did ask about complaints, but are reported, without discussion or analysis, only in appendix IV.¹¹¹

¹⁰⁷ GAO's second report, p. 39.

¹⁰⁸ Ibid., pp. 56-57.

¹⁰⁹ Ibid., pp. 55-59.

¹¹⁰ Ibid., p. 55.

¹¹¹ Ibid., pp. 94-98. In its reply to a draft of this report GAO stated:

We did not discuss or analyze the subject data from State and local agencies because we only asked them about how many national origin employment discrimination charges were filed. We did not ask them what portion of the charges were IRCA-related. Without this information, we felt there was no reason to analyze or discuss the data. For this reason we believe the subject sentence in the Commission's draft report should be deleted.

GAO has many good reasons to deemphasize the complaint counts collected by private organizations and nonenforcement agencies. Although many of these groups have modified their record keeping to accommodate GAO's needs, it would still be difficult for GAO to discern if these cases were IRCA related, or even if those filing the complaint were authorized to work. Moreover, these complaints are not usually officially adjudicated and thus have no formal determination of their merit.

These cases, however, deserve more weight than GAO accords them. Community outreach activities by an organization that generate a large number of complaints in a small geographic area provide evidence that official complaints represent a small portion of actual incidents of discrimination. An example of this is the education efforts of the Chicago Commission on Human Relations, which had received more than 400 IRCA-related complaints as of May 1989.¹¹² Many of the complaints received were resolved through discussions between the Chicago Commission and the employer at issue. Many others were received too late to meet the IRCA filing deadlines.

GAO's Finding on "Unnecessary Regulatory Burden"

In evaluating whether employer sanctions are an unnecessary burden on employers, GAO weighs two factors: the direct costs to employers, coming principally from the document verification (I-9 form) requirements, and the effectiveness of the law. GAO states, "We believe that the ultimate answer to whether the burden imposed on employers is unnecessary is the extent to which the employer requirements imposed by the law are accompanied by, and contribute to, a desired reduction in unauthorized alien employment and illegal immigration."¹¹³

Employer Costs of Compliance

The major cost to employers of employer sanctions comes from the paperwork requirements necessary for effective enforcement. GAO's estimate of direct employer costs largely agrees with previous estimates by INS. INS estimated employer costs associated with I-9 requirements to be \$182 million a year, of which \$169 million was for personnel costs to prepare the I-9 forms. GAO's projection of personnel costs is \$152 million.¹¹⁴ Based on the replies to GAO's

¹¹² Civil Rights Commission staff May 1989 discussions with the Chicago Commission on Human Relations.

¹¹³ GAO's *second report*, p. 70.

¹¹⁴ INS's estimate is largely derived from an assumption of an average of 15 minutes per form and \$10 per hour for labor. GAO's employer survey lends support to the 15-minute estimate. It found 51 percent of employers saying that an I-9 took less than 10 minutes to complete and 31 percent saying that it took between 10 and 20 minutes. Consistent with other GAO
(continued...)

employer survey, the INS estimate of employer costs of keeping I-9 records seems reasonable.¹¹⁵

FINDING 5:

GAO's estimates of direct employer costs of employer sanctions are reasonably accurate, but exclude other potentially significant, harder to measure costs.

While the estimate of direct employer costs seems reasonable, other potential costs of IRCA to employers are ignored. In terms of managerial time if not in legal expenses, the most significant costs to employers may occur if they come under INS investigation. Many of these costs would exist even for employers who have not violated the law.¹¹⁶

GAO also does not deal with the costs to workers of meeting I-9 requirements, which may be indirect costs to employers. Such costs, which include both time and fees necessary to obtain copies of some documents, will impose indirect costs on employers if it makes it harder to hire workers. Although such costs may be inconsequential for many, they could be at least a minor factor discouraging teenagers and other temporary workers from entering the labor market. This is particularly true if some employers require more documentation than is strictly required by IRCA.¹¹⁷

¹¹⁴(...continued)

projections, no imputation is made for employers who did not answer the question. Consequently, the \$152 million represents a projected total for only 89 percent of employers. Ibid., pp. 62-64.

¹¹⁵ Ibid., pp. 62-64.

¹¹⁶ The costs of INS investigations may not only be a burden to employers, but also provide a potential incentive to discriminate. Employers may discriminate as part of a strategy to minimize the risk of an INS inspection. Many employers may feel that hiring only U.S. citizens or hiring no one who looks foreign would minimize the chance of attracting INS attention. Employers who fear fines, if only due to uncertainty about the authenticity of the identification documents, are obviously more likely to fear investigation. Even though the paperwork costs are relatively small, some employers may not want to process I-9 forms. These employers may discriminate because they fear fines, not for employing unauthorized aliens, but simply for improper paperwork.

It is not clear that Congress would have intended costs to violators to be counted as a burden, but even employers in full compliance with IRCA would incur costs from an investigation.

¹¹⁷ Despite its being illegal, there are many anecdotes of employers asking for additional forms of identification from foreign-looking workers. This could mean requiring a birth certificate when a driver's license and social security card would have been sufficient.

Effectiveness of Employer Sanctions

GAO considers several indicators of the effectiveness of employer sanctions: INS Border Patrol apprehension rates, the use of fraudulent documents by unauthorized workers, INS arrests of employed unauthorized aliens, visa violation rates for nationals of five selected countries, and employer survey results. Of these, only an observed reduction in INS apprehension rates lends support to the effectiveness of sanctions.

FINDING 6:

GAO was correct in including effectiveness as a criterion for judging the necessity of employer sanctions.

When Congress asked GAO to determine if there was an "unnecessary regulatory burden" created by employer sanctions,¹¹⁸ the term was not defined. It is not clear from either the statute or legislative history that Congress intended GAO to consider the effectiveness of employer sanctions in determining "unnecessary regulatory burden." Nevertheless, the Commission believes that GAO was correct in making effectiveness a major part of its evaluation of the law's necessity. GAO should continue to do so in its third report.

When a law imposes significant burdens upon individuals and society, these burdens are unnecessary unless the law produces some desired effect. In the case of employer sanctions, the accompanying costs to employers are significant. Congress cannot judge the necessity of IRCA unless GAO provides adequate information on its effectiveness. A complete re-examination of IRCA by Congress should weigh the effectiveness of employer sanctions against both its employer costs and the discriminatory burden upon society.

FINDING 7:

GAO's analysis of the effectiveness of employer sanctions excluded many key factors necessary for a proper evaluation. In particular, recent reductions in INS apprehension rates, by themselves, do not establish the effectiveness of employer sanctions.

The GAO concluded that "the impact of the law on reducing illegal immigration and employment . . . is uncertain."¹¹⁹ Specifically discussing the effectiveness of employer sanctions, the report states that "it will be extremely difficult, if not impossible, to conclusively establish such a cause/effect relationship."¹²⁰ This finding presumably reflects inconsistencies among indicators of effectiveness examined by GAO.

¹¹⁸ 8 U.S.C.A. § 1324a(j)(1)(c) (West Supp. 1988)

¹¹⁹ GAO's *second report*, p. 70.

¹²⁰ *Ibid.*, p. 70.

Only one of the indicators, border apprehensions, showed any notable lessening of illegal immigration. However, GAO did not attempt to examine why trends in apprehension rates contradicted other indicators. The discussion below shows that a more detailed examination may have led GAO to a more definitive conclusion.

Apprehension Rates

Apprehension rates are the main evidence cited by both GAO and INS that sanctions are effective in reducing unauthorized entry or employment. Former INS Commissioner Alan Nelson cites a 40 percent drop in apprehensions as evidence of the success of employer sanctions.¹²¹ GAO cites a somewhat less dramatic 20 to 25 percent reduction in apprehension per 10-hour border watch shift.¹²² The difference between the two estimates reflects INS's allocation of personnel.¹²³ Specifically, there has been a drop in the personnel available for border patrol duties. Based on the difference between INS and GAO estimates, personnel allocation may account for more than one-third of the drop in apprehensions reported by INS.

Even after adjusting for the number of border watch shifts, as GAO has, the drop may not be due to employer sanctions. Other factors could explain the drop, but they were not explored in GAO's report.¹²⁴ These may include:

- The beginning of an economic recovery in Mexico in the second half of 1986.¹²⁵

As illustrated in figure 3.1, Mexican economic growth has had a very direct effect on past changes in raw INS apprehension rates. In every year shown (1983-87), the percentage change in INS apprehension rates moves in the opposite direction from the growth rate of Mexican Gross Domestic Product (GDP). It should be noted

¹²¹ U.S. Commission on Civil Rights Briefing on IRCA, March 1989.

¹²² GAO's *second report*, p. 68. Since tabular data were not presented, the 20 to 25 percent was judged by measuring bar length on GAO's bar graph.

¹²³ Commission staff discussions on May 25, 1989, with GAO.

¹²⁴ A July 19, 1989, Urban Institute study looks at many of these factors and concludes that, after controlling for their effects, there is still a net post-IRCA reduction in apprehensions. Commission staff conducted a preliminary examination of this study. While the Urban Institute study is clearly closer to the approach GAO needs to take, the adequacy of this study cannot be judged without more thorough examination. Michael J. White, Frank D. Bean, and Thomas J. Espenshade, *The U.S. Immigration and Control Act and Undocumented Migration to the United States* (Washington, D.C.: The Urban Institute, July 1989) (hereinafter *IRCA and Undocumented Migration*).

¹²⁵ Inter-American Development Bank, *Economic and Social Progress in Latin America: 1988 Report* (Washington, D.C.: 1988) pp. 454-461.

that figure 3.1 shows raw apprehension rates, which are not adjusted for changes in INS manpower.

- Legalization of border crossing for three million applicants to IRCA's legalization program.¹²⁶

Participants in IRCA's legalization program are no longer vulnerable to apprehension by the INS. This would affect both the number of workplace and the number of border apprehensions, as most legalization applicants were working illegally and many re-crossed the border to make visits home.¹²⁷

- Reductions in Central American refugees.

Few good indicators of the flow of refugees out of Central America exist, but there are some signs of recent reductions. A 1988 report by Linda Peterson of the U.S. Bureau of the Census notes that "[t]here are indications that the overall refugee situation in Central America is slowly being alleviated in the mid-to late 1980's. The main evidence of this is the increase in officially assisted repatriations in 1987 and 1988."¹²⁸ This trend, of course, coincides with the start of employer sanctions.

- Changing allocations of manpower and other INS resources.

IRCA has added enforcement and educational responsibilities to all components of INS, including the Border Patrol. By adjusting for the number of border watch shifts, GAO has partially dealt with this issue. However, the number of apprehensions will depend upon not only the number of patrols, but the resources provided (e.g., gasoline, electronic communication and surveillance, etc.) and the priorities assigned (e.g., drug and other enforcement activities).

These factors--Mexican economic growth, IRCA's legalization program, Central American refugees, and the effects of changes in manpower and other resource allocations--may be more than sufficient to explain the changes in INS apprehension rates. GAO needs to consider explicitly a much wider range of influences before it can properly use apprehension rates, or any other measure of the

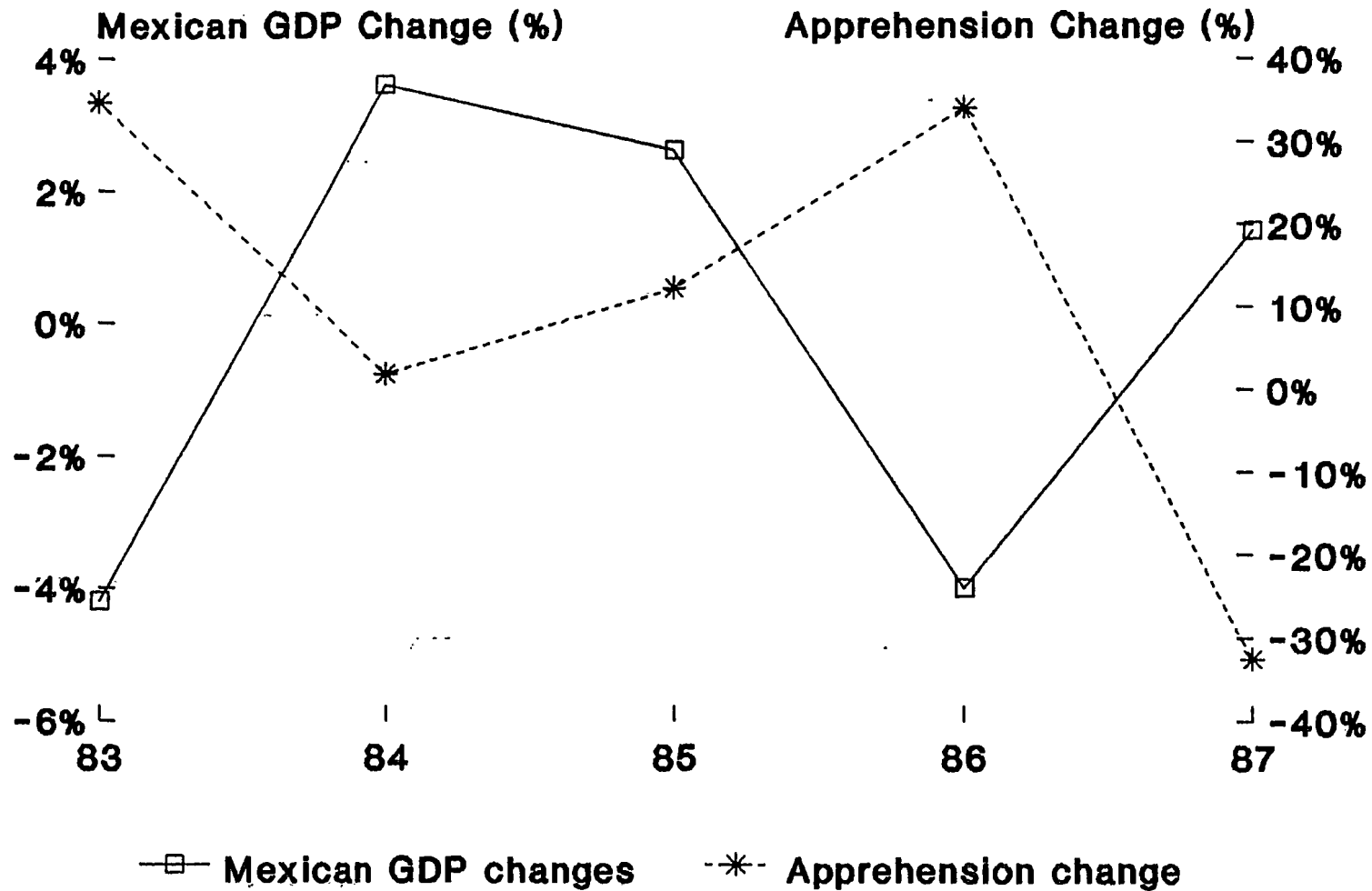
¹²⁶ No attempt has been made to quantify the size of the effect which legalization would have upon apprehensions. However, the Urban Institute study estimated that the special agricultural worker (SAW) legalization program had reduced projected apprehensions by 24 percent. *IRCA and Undocumented Migration*, p. 14.

¹²⁷ In its May 5, 1989, written reply to followup questions to the Commission's March 1989 IRCA Briefing, INS said that the amnesty program "undoubtedly had a significant impact upon the rate of INS apprehensions" but did not think it could quantify the size of the effect.

¹²⁸ Linda S. Peterson, "Central American Refugee Update Through 1988" (Center for International Research, U.S. Bureau of the Census, August 1988).

Figure 3.1

INS Apprehensions vs. Mexican Economy



Source: INS, Inter-American Development Bank

level of unauthorized immigration and employment, as evidence of the effectiveness of IRCA.

Fraudulent Documents

FINDING 8:

GAO is correct in its concern that fraudulent documents may make enforcement of employer sanctions more difficult. Widespread availability of fraudulent documents may also lead to more discrimination by employers.

The widespread availability of fraudulent documents is not itself a measure of the effectiveness of employer sanctions, but rather creates doubt that sanctions can be properly enforced. GAO's examination of the INS records of employed unauthorized aliens in five cities found that 39 percent either "provided, or were suspected of providing, counterfeit or fraudulent documents" to employers.¹²⁹ This activity allows unauthorized aliens to become employed and makes it more difficult to prosecute employers.

Widespread document fraud may also lead employers to mistrust the valid documents of authorized aliens or foreign-looking citizens. Much anecdotal evidence shows that employers often reject valid documents as possible frauds.¹³⁰ This creates another mechanism through which IRCA could result in discrimination.

GAO's Evaluation Standards

FINDING 9:

In its second report, GAO uses statistical and evidentiary standards that often are too stringent. The Commission believes that GAO should use more reasonable judgment in evaluating its data.

Throughout GAO's second report, it requires that unreasonably stringent standards be met before information can be used as

¹²⁹ GAO's second report, p. 31.

¹³⁰ Anecdotal evidence on this point was received during the May 24, 1988, Commission staff discussions with the Office of Special Counsel as well as from a number of private organizations.

evidence for a finding.¹³¹ The Commission has documented several cases in which unreasonable standards were used:

- GAO should not have discarded its employer survey as evidence of a pattern of discrimination (Findings 4, 4A, 4B).

Evidence of a large number of employers discriminating was rejected as evidence because GAO could not specifically project the number of affected workers. A separate reason GAO discarded its survey resulted from an excessively strict statistical standard required to establish that the reported discriminatory practices were caused by IRCA.

- The Commission disagrees with GAO's contention that higher incidence rates of discriminatory practices in four out of five States and four out of five industries with a large proportion of alien workers represent "no consistent pattern" (Finding 4D).

- With other evidence rejected, GAO placed undue emphasis upon official complaints to make a finding of "no pattern of discrimination" (Finding 4E).

- While the Commission agrees with GAO that the necessity of the burden of employer sanctions is linked to its effectiveness (Finding 6), GAO imposes an inappropriately high standard of evidence by stating that employer sanctions "*may* not be necessary if it could be *proven conclusively* . . ."¹³² that the law is ineffective.

It is always necessary to use reasonable judgment to interpret evidence for a finding. This is particularly true where the best evidence is statistical in nature. For its third report, GAO plans to add two new surveys and to revise the employer survey to provide a stronger empirical base. Commission staff asked GAO staff if it might be unable to issue a definitive finding if it were to have indications from its three surveys that discrimination occurs frequently, is caused by sanctions, and affects authorized workers.

¹³¹ In its reply to this section GAO states:

We continue to believe our standards should remain stringent. Congress may have 30 days from the issuance of our next report to decide whether to repeal the law using the expedited procedures. As a result, we believe that it is appropriate that our standards for interpreting the data remain conservative. To do otherwise might result in Congress repealing the law on the basis of misleading conclusions. In addition, members of Congress can still review all the data in the report and interpret it less stringently.

July 19, 1989 GAO letter to Commission Staff

¹³² GAO's *second report*, p. 62. (emphasis added)

In response, GAO said that an inconclusive finding on pattern of discrimination was still possible if the number of discrimination complaints is still small.¹³³ This is disturbing given the known problems in using complaint counts as a measure of discrimination.

¹³³ Interview with Alan Stapleton, Project Director, and Linda Watson of GAO, May 25, 1989.

CHAPTER 4: PROSPECTS FOR THE THIRD REPORT

Research for GAO's third and final report on IRCA is now being completed. It is the third report's findings that could prompt Congress to consider a joint resolution of agreement calling for the elimination of either employer sanctions or IRCA's anti-discrimination provisions. To the extent possible, the Commission has tried to investigate the methods used in and prospects for this final GAO report.

New Approaches to Measuring Discrimination

FINDING 10:

GAO's methods for its third report are significantly advanced over those used for the second, but may still not allow a definitive finding on discrimination caused by employer sanctions.

Besides counts of complaints and reports of discrimination, GAO will conduct three surveys: a job applicant survey, a revised and expanded employer survey, and a hiring audit to look more directly at discrimination in hiring. All three techniques will provide direct tests of employers' actions. An additional analysis of changes in EEOC national origin complaints will be added as well.¹³⁴

Revised Employer Survey

GAO's new employer survey features refinements in the form and questions used in its previous employer survey. It also will attempt to increase the final sample size by mailing to around 9,000 employers, a 50 percent increase over the first survey. Questions to employers about discriminatory practices will explicitly ask if such practices were initiated in response to IRCA, eliminating the need for the followup question on motive in the first survey. GAO staff are optimistic that these improvements will allow a determination of the extent to which IRCA has motivated discrimination.

The new employer survey alone still will not provide definitive evidence that IRCA-related discriminatory practices affect authorized workers. GAO will rely upon its new hiring audit to provide information on whether authorized workers are affected by the practices reported in the survey.

¹³⁴ Unless otherwise noted, the discussion of GAO's third report is based upon May 25, 1989, Commission staff discussions with GAO.

Job Applicant Survey

A survey of job applicants for the third report will ask respondents about a wide range of possible discriminatory actions they may have experienced on applying (recently) for a job.¹³⁵ GAO intends to interview two categories of job applicants: those with a high risk of encountering discrimination and applicants at low risk. The high-risk sample will be drawn from several sources such as citizenship and English as a second language classes. The low-risk sample will be obtained from applicants at State employment agencies.

As the survey will not be a representative sample of the population, GAO will not be able to make any projection of the incidence of discrimination to the general population. However, survey estimates of discrimination will be considered along with other evidence. Since GAO has been reluctant to use evidence which does not permit a projection to the general population, it is not clear whether indications of discrimination in the high-risk group would be used by GAO as evidence of a pattern of discrimination.

Hiring Audit

FINDING 10A:

GAO's new hiring audit is an innovative approach to measuring discrimination in hiring. While now limited in scope, it may serve as a pilot for later studies by GAO and other agencies.

The most important and innovative of the new methods GAO is adopting is its hiring audit. Each of 300 employers in two cities offering entry-level jobs will be visited by two testers. The testers will apply for the same job using identical documents and similar credentials. Both will be U.S. citizens, one a non-Hispanic white and the other a Hispanic with good but accented English.

This approach to measuring employment discrimination has not been attempted before. The closest analogy is the 1979 HUD Housing Practices Survey. However, compared to housing discrimination, tests of hiring discrimination contend with a far greater number of potential problems. For instance, employers may make hiring decisions on several valid, but subjective judgments about the applicant/testers, which may be very difficult for the survey to recognize. Nevertheless, this is an ambitious new type of research for the Federal government that may lead to improved civil rights monitoring and enforcement by Federal agencies.

¹³⁵ The survey form was not available for review, but GAO assured staff that it would cover a wide range of possible discriminatory behaviors by employers.

Employers who are audited will also complete the employer survey described above. By linking these two sources of information, GAO hopes that each will validate some elements of the other: The employer's responses to the survey will be required to determine whether discriminatory practices identified in the audit were motivated by IRCA. The employer's actions during the audit will be the principal evidence that the survey responses represent actual hiring practices. The need for each survey to validate the other raises a concern that, if there are unanticipated problems in interpreting the results of the audit, GAO will not reach a definitive finding.

FINDING 10B:

GAO's new hiring audit is too limited in scope to allow examination of most forms of IRCA-related discrimination.

The novelty of the hiring audit was cited by GAO as the principal reason for limiting it to a test of national origin discrimination against U.S. citizens. GAO argued that the uncertainties of this new method could be better managed if the experimental design was kept simple.¹³⁶

This is an obviously valid concern. However, simplicity in the experimental design means that several major forms of IRCA-related discrimination will not be examined. The hiring audit will not be able to address any question of discrimination against authorized noncitizen workers. It will not be able to examine how employers deal with less well understood authorization documents such as INS-issued authorizations with expiration dates or Puerto Rican birth certificates. Anecdotally, such documents are the source of

¹³⁶ In its reply to a draft of this report GAO stated:

There are two additional factors that went into our decision to keep the design simple. First, our analysis of IRCA's legislative history indicates that Congress did not intend for GAO to include citizenship discrimination in determining if the law created a pattern of discrimination. For this reason, we wanted the hiring audit to measure only national origin--not alienage--discrimination. Secondly, keeping the design simple minimized the cost. To include measures of both national origin and alienage discrimination would have required large increases in observations to remain statistically valid.

July 19, 1989, GAO letter to Commission staff.

The Commission's disagreement with GAO interpretations limiting study to national origin discrimination are discussed with Finding 1.

many complaints, including some conflicts that employers were unwilling to resolve even after contact by Federal agencies.¹³⁷

In addition, the sample size of the hiring audit may be insufficient to show discrimination in the final hiring decisions. A high number of discriminating employers could result in only a small difference in hiring offers from what could be expected randomly.¹³⁸ Without a large number of different pairs of testers, it would not be possible to control statistically for differences between testers, other than national origin and citizenship, which could affect employer's hiring decisions.¹³⁹

To the extent that the hiring audit does not test major forms of IRCA-related discrimination, the audit cannot validate evidence of those forms of discrimination in the employer survey. This may limit GAO's evaluation of IRCA-related discrimination to the issue of whether employers ask only foreign-looking applicants claiming

¹³⁷ May 24, 1989, Commission staff discussions with the Office of Special Counsel.

¹³⁸ For example, if 20 percent of employers were to reject the Hispanic applicant for discriminatory reasons, and half of remaining employers were to choose the Hispanic, the Hispanic applicant would be chosen 40 percent of the time. On a purely random basis, each applicant would have a 50 percent chance of being selected. GAO hopes to mitigate this problem by having its testers refuse all job offers, thereby allowing the other to receive an offer. However, the same problem exists if there are other applicants for the job, besides the testers. The larger the numbers of other applicants, the narrower the gap will be between the percentages of job offers for the Hispanic and non-Hispanic testers.

¹³⁹ In response to this section GAO states:

Increasing the number of pairs of testers will not control for differences between testers. We will control for differences between testers by assuring the members of each pair are equally matched on various objective criteria (e.g. education, training, and work eligibility documents) as well as subjective measures such as articulation and overall "attractiveness" to the employer.

The Commission agrees that GAO should attempt to minimize differences between each pair of applicants. However, it is impossible to assure that national origin will be the only difference perceived by employers. GAO's evaluation of the "subjective measures" of each job tester will predict only with error how these measures will be evaluated by employers. This is due both to differences in a tester's performance between interviews and differences in how employers weigh subjective factors. To the extent the error is random, a large number of tester pairs would ensure roughly the same number of mismatches favoring the Hispanic tester as those favoring the non-Hispanic. In addition, there are a number of statistical procedures to control for unmeasured individual effects which would be appropriate for these data if there are more than just a few pairs of testers.

to be citizens for authorization documents. While this practice is illegal, it represents a very small proportion of possible forms of IRCA-related discrimination.

Likelihood of a Determination on Discrimination

The methods planned for GAO's third report appear to be greatly improved over those used in the second report. New and improved surveys and procedures make it possible that GAO will be able to make a clear determination on the existence of a pattern of discrimination. The use of three very different methods to evaluate discrimination should allow GAO to be more confident about any finding. Although the Commission strongly disagrees with GAO's reasons for rejecting its employer survey as evidence of IRCA-related discrimination, it shares a reluctance to recommend a change in a major public policy based on a single limited survey. The new employer survey, the job applicant survey, and the hiring audit will each have very different types of response errors. Together, they could allow a strong determination.

While improvements are encouraging, many uncertainties will remain about how much IRCA-related discrimination is actually shown by the data collected. As a result, the Commission remains concerned that GAO's third report may find enough evidence of discrimination to create a serious policy concern but, for want of sufficiently reliable data, will fall short of allowing GAO to find a "widespread pattern" of discrimination and thus trigger congressional action. No one survey will contain all the elements GAO has said are necessary for a determination. Yet, the employer survey, the centerpiece of GAO's research, depends critically on the results from hiring audit to measure discrimination in hiring. The hiring audit is very limited in scope and, as a novel approach, faces unknown difficulties. Consequently, GAO's research strategy is vulnerable and may fail to meet the criteria for a finding on discrimination.

Criteria for a Finding on "Unnecessary Burden"

FINDING 11:

GAO is unlikely to make a definitive finding on whether employer sanctions represent an "unnecessary regulatory burden."

GAO is very unlikely to make a definitive finding on the effectiveness of employer sanctions and hence on "unnecessary burden." In its second report GAO concludes that "it is unlikely that we will be able to determine the impact on illegal immigration and employment in our third and final report to Congress."¹⁴⁰ While recognizing the many empirical difficulties involved, the Commission

¹⁴⁰ GAO's second report, p. 66.

believes that GAO's inability to make a finding is in large part due to the criteria it has set.

Though criteria are not specifically expressed, GAO states, "In principle, the burden resulting from employer sanctions (e.g., preparation of an I-9) may not be necessary if it could be *proven conclusively* that the law has not significantly decreased . . ."141 unauthorized immigration and employment. The Commission interprets this to mean that the regulatory burden imposed by employer sanctions will be judged "necessary" until evidence overwhelmingly establishes that employer sanctions are ineffective. Even if evidence points to only a weak or nonexistent effect, sanctions may not be judged "ineffective." Failure to prove ineffectiveness would have the same legal consequences as a finding that sanctions are effective.

The Commission believes that employer sanctions must show at least some evidence of effectiveness before the burden of sanctions may be judged necessary. GAO's primary role is to estimate the effect of sanctions and provide a measure of the estimate's precision. Its mandate is to alert Congress of a need to reconsider provisions of IRCA. Congress will decide whether the measured costs of sanctions, in terms of regulatory and discriminatory burdens, are large enough to warrant retaining this provision of IRCA.

¹⁴¹ *Ibid.*, p. 62 (emphasis added).

CHAPTER 5: RECOMMENDATIONS

1. Congress should extend the evaluation period for IRCA.

Congress should amend the Immigration Reform and Control Act to provide at least one additional report by GAO. To enable GAO to properly collect, evaluate, and analyze the data, the evaluation period for an additional report should be at least 2 years. The findings in the additional report should have the same expedited review provisions to ensure that Congress will be able to investigate the findings. Specifically, 8 U.S.C.A. § 1324a(j) should be amended to mandate a fourth report from the Comptroller General due two years after the transmittal date of the third report.

The long-term effects of IRCA cannot be accurately gauged so long as many employers and workers are still ignorant or unsure of its terms. Moreover, Federal agencies also are still adapting: e.g., INS is just now placing greater emphasis on enforcement. A fourth evaluation would be a review after five years and thus look at a period more typical of the long-term effects of the law.

GAO has made several significant methodological improvements for the third report. Although these innovations make a firm determination on the extent of IRCA-related discrimination at least possible, the Commission believes this is unlikely given their limited scope and scale. It is even less likely, moreover, that GAO will be able to tell whether employer sanctions have reduced unauthorized employment and immigration. The Commission does not see how Congress can weigh the regulatory and discriminatory costs of IRCA, which have been established, if not well measured, unless it knows if employer sanctions are at all effective.

The Commission believes that GAO can build upon the improvements made for the third report to enhance significantly its methodology, such that definitive findings would be likely in a fourth report. Specifically, the Commission recommends:

- **Expand the hiring audit.**

With the experience gained in conducting the first hiring audit, GAO should expand the size and scope of the procedure to consider important additional issues. In particular, an expanded hiring audit should assess discrimination against noncitizens and discrimination against workers who present valid but unusual work authorization documents. More important, an expanded survey should attempt to determine to what extent discriminatory practices, such as selective screening of documents, actually result in authorized workers losing employment opportunities.

- **Improve the analysis of employer sanctions' effectiveness.**

GAO needs to consider explicitly a wider range of influences in any determination of the effectiveness of employer sanctions. This should include, but not be limited to, changes in the U.S. and Mexican economies, IRCA's legalization program, political instability in Central America, and INS resource allocation. It is impossible to evaluate the level of unauthorized entry or employment without considering what the level would be without employer sanctions.

- **Hold hearings.**

Both quantitative and qualitative factors are necessary to determine the existence of a pattern of discrimination. One feature that is clearly missing from the present analyses of IRCA is hearings. Information from hearings can be useful in designing future surveys and in interpreting and evaluating survey data.

- **Use more data from State and local governments and private groups.**

Private organizations and State and local agencies that intervene in incidents of IRCA-related discrimination should be used more effectively in an analysis. While GAO reviewed a limited number of agencies and private organizations for the second report and will review data of additional agencies for the third report, GAO indicated that it will not be attempting to verify the data.

2. Congress should enact statutory definitions to avoid misconstruction.

To avoid additional misconstruction of terms such as "pattern of discrimination," "widespread pattern of discrimination," "no significant discrimination," "unreasonable regulatory burden on employers," and "unreasonable burden on employers," Congress should clearly define each of these terms. In particular, the evaluation provisions should be amended to avoid any possible inconsistency in the language. The most obvious example of inconsistency occurs in determining whether the evaluating agency is obligated to count citizen discrimination in determining if a pattern of discrimination exists.

3. GAO's second report found indications that one-sixth of all employers began discriminatory hiring policies after IRCA was implemented. A similar measure of discrimination in GAO's final report should be more than sufficient to establish a "widespread pattern of discrimination" if GAO finds these practices to be IRCA related and affecting authorized workers.

4. Unless GAO finds conclusive evidence in its final report that no pattern of discrimination has resulted from employer sanctions, Congress should not repeal the antidiscrimination provisions in IRCA.

IRCA's antidiscrimination provisions may be repealed if GAO finds "no significant discrimination" has resulted from employer sanctions. If evidence is insufficient for GAO to conclude whether a "pattern of discrimination" has resulted from employer sanctions, GAO should not conclude that "no significant discrimination" has resulted from employer sanctions. In its second report, GAO did not find that the evidence was sufficient to establish a pattern. This is too ambiguous a result to justify elimination of IRCA's antidiscrimination provisions.

5. Congress should explicitly ask GAO to examine the effectiveness of employer sanctions. A finding that "sanctions cannot be shown to be effective" should trigger the same expedited review and sunset provisions as would a finding of a "widespread pattern of discrimination."

Specifically: 8 U.S.C.A. § 1324a(j)(1) should be amended to require GAO to evaluate the effectiveness of employer sanctions. Congress should also amend 8 U.S.C.A. § 1324(a)(1)-(n) to provide congressional review if GAO finds in its final report that "employer sanctions cannot be shown to be effective."