

Agriculture and the Immigration Reform and Control Act of 1986: Reform or Relapse?

The Immigration Reform and Control Act of 1986 ("IRCA") included a precedent-setting provision which imposes sanctions against U.S. employers who knowingly hire illegal immigrants. Because the perishable crop industry historically has depended in part on illegal seasonal laborers, growers were concerned that their traditional labor source might be depleted as a result of IRCA. As a defensive measure, the agricultural industry successfully lobbied for inclusion of special provisions in IRCA to protect its labor market against projected labor shortages, which never actually materialized. Further, a key policy goal of IRCA, legalizing the American farm labor workforce, has not been achieved. This comment provides an analysis of IRCA's legislative history, implementation and impact upon the agricultural industry, and proposes changes in the Act to remedy its structural and practical flaws.

I. INTRODUCTION

The Immigration Reform and Control Act of 1986¹ (IRCA) represented the most sweeping immigration legislation in a quarter-century. The product of a turbulent history, IRCA expressed Congressional intent to control the entry of undocumented workers into the U.S. by prohibiting their employment, thereby removing the economic incentive for illegal immigration.² The primary aim of IRCA was to reduce the overall influx of illegal refugees to the U.S.,³ while asserting greater

¹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (amending the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1524 (1952); adding § 210 to the Immigration and Nationality Act, 8 U.S.C. § 1160 (1986)). In its initial stages, IRCA was commonly known as the Simpson-Rodino Act, in reference to sponsors Sen. Alan Simpson (R-Wyo.), Senate Judiciary Immigration Subcommittee Chairman, and Rep. Peter W. Rodino, Jr. (D-N.J.), House Judiciary Committee Chairman.

² H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 46, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

³ "What bothers us is this invasion is taking over our nation and we've got to stop it . . . the only way we're ever going to control this border is through a reform in our legislation that makes it illegal to hire these people. They're coming for jobs." Remarks

levels of management and control over the rising tide of foreign farm workers seeking employment in U.S. agriculture.⁴

IRCA consists of two main parts. The first part imposes sanctions for the employment of undocumented aliens in American businesses.⁵ For the first time in U.S. history, employers who knowingly hire undocumented workers can be fined or jailed.⁶ Only those with a legal right to be in the U.S., whether citizens or non-citizens, may be hired.⁷

IRCA's second part established two major amnesty provisions wherein undocumented aliens could obtain legal residency status. The first provision, not at issue here, authorized the granting of legalization status to aliens who had been present in the United States unlawfully since January, 1982.⁸ The second provision, the Special Agricultural Workers program (SAW),⁹ allowed individuals having employment experience in perishable crops to apply for permanent resident alien status. Approximately one million foreign farm workers, mostly from Mexico, applied for SAW status.¹⁰

SAW was premised upon Congressional recognition of U.S. agriculture's long-standing dependence upon foreign labor,¹¹ and the unre-

of Harold Ezell, Western Regional Immigration and Naturalization Service Commissioner, quoted on *MacNeil/Lehrer Newshour: Border Clashes* (PBS television broadcast, July 8, 1985), available in LEXIS, Nexis Library, Omni File.

⁴ An accompanying increase in Immigration and Naturalization Service personnel was authorized by Congress to provide enforcement muscle at border points of entry. IRCA § 111 (b)(1). See *infra* section VII.

⁵ 8 U.S.C. § 1324a (1988); *infra* section V.

⁶ Employers who violate IRCA restrictions against the hiring of undocumented workers are subject to cease and desist orders or civil fines. 8 U.S.C. § 1324a(e)(4). Contumacious violators are subject to criminal prosecution and injunctions. 8 U.S.C. § 1324a(f)(1992). See also Patrick McDonnell, *New Era Begins for Agriculture, and for the INS; Growers Join Ranks of Those Who Face Sanctions in Hiring*, L.A. TIMES, Dec. 3, 1988, at part 2, page 1.

⁷ 8 U.S.C. § 1324(a) (1982). Prior to IRCA, it was not against the law to hire illegal immigrants.

⁸ 8 U.S.C. § 1255a (1988). Aliens were required to have resided continuously and unlawfully in the United States since January 1, 1982, and to have been continuously physically present in the U.S. since November 6, 1986, the date of IRCA's enactment. 8 U.S.C. § 1255a (a)(2)(A) (1988); 8 U.S.C. § 1255a (a)(3)(A) (1988). This one-time only legalization program permitted aliens to apply for lawful temporary resident status. After a one-year waiting period, applicants could apply for permanent residency.

⁹ 8 U.S.C. § 1160 (1986).

¹⁰ See *infra* section III.

¹¹ Congress recognized that "[a]gricultural interests, particularly western growers of perishable agricultural commodities . . . have come to rely heavily on the existence of an undocumented work force." H. REP. NO. 682, *supra* note 2, at 83.

dictable labor demands of perishable crop farming.¹² In addition to providing employer sanctions to deter illegal employment, SAW simultaneously seeks to stabilize the agricultural labor supply.¹³ Congress intended that this generous, one-time-only amnesty program for farm workers would ultimately result in the legalization of a sizable undocumented workforce and the elimination of the threat of deportation.¹⁴ Mindful of foreign farm workers' historical vulnerability to exploitation and deprivation of legal rights, IRCA's bi-partisan drafters hoped that the transition to a legalized workforce in American agriculture would alleviate some of the hardships of foreign laborers, such as depressed wages, abuses by employers, and fear of contact with government authorities.¹⁵

As a further concession to domestic agricultural interests, the Replenishment Agricultural Workers program (RAW)¹⁶ was created to prevent potential labor shortages in the event that large numbers of newly legalized SAWs left agriculture for other professions. Scheduled to expire at the end of fiscal years 1992 and 1993, respectively, SAW and RAW were created to satisfy the labor needs of growers of perishable crops regardless of labor market conditions. Hard fought and hard won, these provisions were adopted to allay the fears of an industry

¹² 131 CONG. REC. S11330 (Sept. 12, 1985) (statement of Sen. DeConcini): "The perishable crop industry differs from the rest of the agricultural industry in two important ways . . . First, it is impossible for growers of perishable crops to predict more than a few days in advance when their need for workers will occur. Second, their need for workers is very short and it is very intense."

¹³ *Id.* IRCA agricultural provisions were intended to prevent "labor shortfalls and dislocations which have the potential to disrupt harvests and interfere with marketing process."

¹⁴ 132 CONG. REC. H8514 (daily ed. Sept. 26, 1986), statement of Rep. Panetta: "The choice of this institution is either to allow the continuation of having illegals work in agriculture, to bring in another 300,000-350,000 guest workers in this country to solve that issue, or to try and legalize and provide green cards to those who work in agriculture."

¹⁵ 132 CONG. REC. S16879 (daily ed. Oct. 17, 1986), statement of Sen. Alan Simpson, a principal Senate author of IRCA, who voiced his concern for what he described as "a whole subculture of human beings who are afraid to go to the cops, afraid to go to a hospital, afraid to go to their employer who says 'One peep out of you, buster, and you are down the road'."

¹⁶ H.R. REP. NO. 682, 99th Cong., 2d Sess., *supra* note 2. The eligibility requirements for RAW are generous. RAWs receive three years of temporary resident status, and eligibility for permanent resident status, by working at least ninety days in seasonal agricultural work in each of those three years. RAWs continuing to perform seasonal agricultural services for an additional two years become eligible for naturalized U.S. citizenship.

determined to preserve its plentiful and inexpensive labor source. However, after seven years of rocky implementation, the continued presence of countless thousands of illegal workers in U.S. agriculture seems to vindicate IRCA's early detractors. Structural flaws in IRCA have resulted in fraud, bias, and a swelling of the agricultural labor force with illegal workers.

The comment that follows provides a retrospective analysis of the development, implementation, and overall effect of IRCA's main agricultural provisions¹⁷ since their enactment in 1986.

II. LEGISLATIVE HISTORY: A HOUSE DIVIDED

A. Background

The 1986 IRCA legislative package faced an uncertain future. Numerous ill-fated immigration bills were offered by both the House and Senate since 1982, yielding no successful compromise.¹⁸ Although diligent lobbying efforts by grower associations and trade groups assured U.S. agriculture an influential voice in the immigration debate,¹⁹ division over the acceptability of IRCA's agricultural aspects proved an annual obstruction to the passage of a comprehensive bill.²⁰ Mean-

¹⁷ A third IRCA agricultural provision known as H2-A revised the previously existing H-2 guestworker program. 8 U.S.C. § 1186 (1986). Because H-2A is a non-immigrant visa program, it is not discussed in detail herein. IRCA, Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411. See Stephen Yale-Loehr, *Foreign Farmworkers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986*, 15 N.Y.U. REV. LAW AND SOC. CHANGE 333, 335-346 (Apr. 1987); Gail S. Coleman, Note, *Overcoming Mootness in the H-2 Guestworker Program*, 78 GEO. L.J. 197 (1989).

¹⁸ 132 CONG. REC. H9708 (Oct. 9, 1986) (statement of Rep. Garcia): "We are debating the Rasputin of legislation . . . It will not die, no matter the circumstances or changes made." See also Robert Pear, *House Approves Immigration Bill Considered Dead Two Weeks Ago*, N.Y. TIMES, Oct. 10, 1986, at A1; Maxwell Glen, *Immigration Bill Knocked Out In Final Round, But Sponsors Promise Rematch*, NATIONAL JOURNAL, Nov. 3, 1984, at 2086; Paul M. Keep, *Overhauling the Immigration Code-This Year, Congress May Finally Act*, NATIONAL JOURNAL, Mar. 19, 1983, at 616.

¹⁹ See generally W. John Moore, *Michael V. Durando, Growers' Point Man Gathers Unusual Allies*, NATIONAL JOURNAL, Sept. 6, 1986, Vol. 18, at 2131; Ann Cooper, *Senate Immigration Bill Singles Out Growers For Special Treatment*, NATIONAL JOURNAL, Oct. 19, 1985, at 2362; Bill Keller, *Obscure Western Farm Groups Win Foreign Worker Measure*, N.Y. TIMES, July 21, 1984, sec. 1 at 12; see also Julia Malone, *Growers' Influence Blossoms As Immigration Bill Takes Shape*, CHRISTIAN SCIENCE MONITOR, Sept. 19, 1985, at 1, quoting Sen. Alan Simpson on the influence of growers: "They are heavy hitters . . . They spend big bucks, and they are quite effective, thank you."

²⁰ See *Future of Immigration Reform Doubtful As House Delays Mark Up of Its*

while, illegal immigration to the U.S. had grown more acute. During April 1986, arrests of illegal aliens from Mexico reached record proportions in Arizona and California.²¹ With time running out on the 99th Congress, policy makers grappled to fashion a response to the growing perception that U.S. borders were out of control and that aliens were flooding the domestic job market.²²

B. *Employer Sanctions: Choice of a Lesser Evil*

The employer sanctions lynchpin of IRCA is based upon the premise that illegal immigration will be deterred if the economic incentive of employment is removed.²³ The policy of requiring employer verification of worker documents had never before been required by law,²⁴ representing a particular problem for agriculture given its dependence upon undocumented workers.

On humanitarian grounds, Senator Edward M. Kennedy called the sanctions provision "a slap at millions of Hispanic citizens"²⁵ who might be snubbed by employers because of foreign accents or appearances, reflecting prevalent concern that employers would discriminate against foreign-looking or foreign-sounding persons by not hiring them for fear of possible penalties.²⁶ Further opposition arose over the policy of compelling businesspersons to bear the burden of IRCA

Measure, DAILY LABOR REPORT, June 12, 1986, at A8. Rep. Charles Schumer (D-N.Y.) was a key drafter of IRCA agricultural provisions: "It's no secret that agricultural provisions have done in this bill more than once."

²¹ See Patrick McDonnell, *Alien Arrests Hit New High For One Month*, L.A. TIMES, May 6, 1986, part 2, at 2. During April 1986, INS agents in Arizona and California apprehended 103,594 illegal aliens, a 53% increase over the same time period in 1985.

²² Robert Pear, *House Approves Compromise Bill On Illegal Aliens*, N.Y. TIMES, Oct. 16, 1986, at B15. Rep. Hamilton Fish (R-N.Y.) said: "This may be our last opportunity for comprehensive immigration reform before the problems at our borders preclude compassionate solutions."

²³ 132 CONG. REC. H9708 (daily ed. Oct. 9, 1986), statement of Rep. Rodino: "[U]ntil the magnet that draws people here—jobs—is removed, we will never be able to effectively control our borders."

²⁴ Verification of citizenship status can currently be established by production of such documents as a valid passport or a certificate of citizenship or naturalization to establish identity. A total of seventeen different documents are currently suitable to accomplish such verification. IRCA §§ 274A(a)(1)(B), 274(b); 8 U.S.C. § 1324a.

²⁵ See Robert Pear, *Congress, Winding Up Work, Votes Sweeping Aliens Bill; Reagan Expected to Sign It*, N.Y. TIMES, Oct. 18, 1986, at 1. Sen. Kennedy is the chairman of the Senate Subcommittee on Immigration and Refugee Affairs.

²⁶ 132 CONG. REC. S16879 (daily ed. Oct. 17, 1986) (statements of Sen. Hart, Sen. DeConcini).

enforcement.²⁷

Faced with unpalatable and politically risky policies such as jailings and massive deportations of illegal workers to control illegal employment, employer sanctions represented an imperfect but acceptable alternative. Concurring with its Senate colleagues, the House Judiciary Committee declared employer sanctions to be "the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens."²⁸ The first hurdle to an overall immigration reform bill cleared, IRCA sanctions received a modest, if not wholehearted bipartisan push in both the House and Senate.²⁹

Because employer sanctions were expected to winnow thousands of undocumented workers out of the domestic job market, growers feared potential depletion of their labor supply. The prospect of crops left to rot in fields for want of workers motivated the agricultural lobby to demand special protection against anticipated IRCA-induced labor shortages.³⁰ Once again, the elusive and divisive foreign farm worker issue represented the crucial factor upon which the fate of immigration reform precariously rested.

C. IRCA Agricultural Provisions: Resurrected from the Ashes

As the adjournment of the 1986 legislative session drew near, the House of Representatives had not reached a consensus over the acceptability of IRCA's agricultural prong. Some House members supported immigration reform but strenuously opposed the agricultural provisions, preferring a bill which focused on the control of U.S. borders

²⁷ 132 CONG. REC. S16879 (daily ed. Oct. 17, 1986) (statements of Sen. DeConcini, Sen. Cranston).

²⁸ H.R. REP. NO. 682, *supra* note 2, at 46. See also 132 CONG. REC. H10583 (daily ed. Oct. 15, 1986), statement of Rep. Rodino: "The sanctions provisions are fair to decent and honest employers, but at the same time, ensure that repeat offenders will be subject to strong civil and criminal penalties."

²⁹ 132 CONG. REC. S16879 (daily ed. Oct. 17, 1986), statement of Sen. Wilson: "Employer sanctions may be distasteful, but they offer the only device by which we may hope to reverse this tide of unfortunate humanity with the gumption to seek a better life." Then-Sen. Pete Wilson is the current Governor of the state of California.

³⁰ *Business Wire: Farmers May Face Uncertain Future Concerning Foreign Worker Program*, Sept. 30, 1985, available in LEXIS, Nexis Library, Wires File. "Although our members are opposed to employer sanctions, we realize that if a bill passes it will have to have sanctions as a core component. Our emphasis is . . . a workable supplementary labor program that is essential for agriculture." California Farm Bureau Federation, the largest farm organization in the state, issued the above-quoted statement.

rather than agricultural labor.³¹ Others charged that growers were attempting to engineer a perpetual low-cost labor supply under the guise of immigration reform.³²

The most divisive and heatedly debated issue of all, however, was whether or not to adopt a special guestworker program for the sole benefit of the agricultural industry. The Senate backed a guestworker compromise offered by Sen. Pete Wilson (R-Cal.), permitting the annual importation of 350,000 non-resident aliens for harvest work.³³ The Wilson guestworker compromise, supported by ranking minority House Judiciary Subcommittee member Dan Lungren (R-Cal.),³⁴ and staunchly opposed by Chairman Rodino,³⁵ represented the key stumbling block in the path of IRCA's passage. Because a supplemental labor program had long been the make or break issue for the agricultural lobby,³⁶ the House showdown was inevitable.

Opponents of the Wilson guestworker measure expressed concerns over the adverse impact of foreign workers on the availability of jobs for American farm workers, in addition to the possibility of labor exploitation by unscrupulous employers.³⁷ A strong anti-guestworker bloc fought to avoid a repetition of the negative history associated with an infamous defunct guestworker program known as the Bracero program, which was marked by the abuse and exploitation of foreign farm workers.³⁸ The insistence of U.S. growers for inclusion of the guestworker provision proved an insurmountable obstacle, and caused the whole bill

³¹ 132 CONG. REC. H9708 (daily ed. Oct. 9, 1986), statement of Rep. Sensenbrenner: "[T]his bill is not immigration reform . . . the Agricultural Labor program . . . is certainly not a critical element in solving our illegal alien problem."

³² 132 CONG. REC. H9708 (daily ed. Oct. 9, 1986), statement of Rep. Roybal: "[T]his is not immigration reform. This bill is designed to provide a steady flow of cheap labor to the farmers and growers of the United States."

³³ 131 CONG. REC. S11730 (daily ed. Sept. 19, 1985) (statement of Sen. Wilson).

³⁴ 132 CONG. REC. H2577 (daily ed. May 8, 1986), 132 CONG. REC. H2463 (May 7, 1986) (statement of Rep. Lungren).

³⁵ *Immigration Bill Debate Focusing on Democrats' Farmworker Compromise*, DAILY LABOR REPORT, Sept. 11, 1986, at A8. Chairman Rodino said: "[S]hould there be a guestworker program adopted, I would have no part of it."

³⁶ See Robert Pear, *The Institutionalization of the Illegal Alien*, N.Y. TIMES, Sept. 29, 1985, at A1; *Giving Immigration the Business*, N.Y. TIMES, Sept. 22, 1985, at A10.

³⁷ 132 CONG. REC. H647 (daily ed. Feb. 26, 1986) (statement of Rep. Bustamante); 131 CONG. REC. E4376 (Oct. 3, 1985) (statement of Rep. Conyers).

³⁸ H. REP. NO. 682, *supra* note 2, at 83-85; see also 132 CONG. REC. E3276 (daily ed. Sept. 25, 1986) (statement of Rep. Richardson); 131 CONG. REC. E5055 (daily ed. Nov. 7, 1985) (statement of Rep. Garcia).

to fail.³⁹ However, rather than going home empty-handed, three Democrats sculpted an eleventh hour effort to save IRCA in a manner that would be acceptable to both growers and legislators alike.

In what Chairman Rodino termed a "miraculous compromise,"⁴⁰ the Schumer-Panetta-Berman amendment⁴¹ was offered and eventually adopted by the House. After some fine tuning, this compromise took the form of SAW and RAW. SAW, discussed in the next section of this comment, provides certain farm workers with permanent residency rather than guestworker status, thereby increasing personal mobility and reducing workers' reluctance to air grievances before government agencies. Moreover, SAWs are not required to remain in agriculture at all.⁴² Although RAWs must remain in agriculture, RAW status is preferable to guestworker status because RAWs are not legally bound to one particular employer or geographical area and may flee abusive situations. Rep. Schumer admitted that although the compromise was not flawless, it recognized the needs of both agribusiness and easily exploited foreign farm workers.⁴³

Despite estimates that illegal farm workers comprise less than 15% of the total undocumented population within the U.S., domestic growers wielded dominant influence throughout years of protracted debate over immigration reform.⁴⁴ IRCA was reduced to a simple political

³⁹ See Bob Sexter, *House Rejects Effort To Curb Illegal Aliens*, L.A. TIMES, Sept. 27, 1986, at 1. A disappointed Sen. Alan Simpson lamented: "We have defaulted, we have deferred, we have relegated our legislative power to a bunch of guys who really didn't give a crap about immigration reform, whose sole interest is that the people be in the fields when the figs are ready, the peaches, the grapes . . ."; see also Steve Gerstel, Simpson, *Greed Killed Immigration Bill*, UPI, Sept. 27, 1986, available in LEXIS, Nexis Library, Wires File.

⁴⁰ Quoted in *Conferees Must Work Quickly to Resolve Immigration Bill Differences as 99th Congress Winds Down*, DAILY REPORT FOR EXECUTIVES, Oct. 14, 1986, at A5.

⁴¹ Schumer-Berman-Panetta workers, as they were called in 1986, (Schumer workers, for short), were named after amendment sponsors Rep. Charles Schumer (D-N.Y.), Rep. Howard Berman (D-Cal.), and Rep. Leon Panetta (D-Cal.).

⁴² 132 CONG. REC. H9708 (daily ed. Oct. 9, 1986) (statement of Rep. Schumer): "[I]f that grower decides not to give you a toilet, not to give you running water, to pay you 90 cents an hour, you are no longer stuck. You no longer have to continue working on that farm . . . or in agriculture."

⁴³ *Immigration Bill Debate Focusing On Democrats' Farmworker Compromise*, supra note 35 at A8. Rep. Schumer said the compromise acknowledges "that American agriculture does need extra help" and "provides workers some protection."

⁴⁴ 132 CONG. REC. S13684 (daily ed. Sept. 27, 1986) (statement of Sen. Simpson): "[O]nly 8 to 15 percent of the illegal undocumented persons work in agriculture. So we fiddle around with the issue—watching this tremendous tail which is larger than a

proposition. Without harvest insurance for U.S. growers, the chances for an immigration bill were slight at best. Against this divided background,⁴⁵ the most comprehensive immigration reform bill in thirty years can be fairly characterized as an homage to patience, and the formidable political and financial muscle of Western growers.

III. THE SPECIAL AGRICULTURAL WORKERS PROGRAM

The Special Agricultural Workers program⁴⁶ (SAW) constitutes the primary agricultural portion of IRCA, affecting aliens who have performed seasonal agricultural services in the U.S.⁴⁷ The program allows the Attorney General to grant legal residency to seasonal, alien farm workers who "i) resided in the U.S. and, ii) performed seasonal agricultural services for at least 90 man-days"⁴⁸ between May 1, 1985 and May 1, 1986,⁴⁹ and can otherwise demonstrate admissibility into the United States as immigrants.⁵⁰ SAW enables previously undocumented workers to more fully participate in American life without fear of deportation because successful applicants assume the legal status of aliens lawfully admitted for temporary residence.⁵¹

The SAW program was designed to maintain the availability of agricultural labor, while "protect[ing] workers to the fullest extent of all applicable federal, state, and local laws . . . to provide them with a status that insures their employment is fully governed by all relevant

mastodon's tusk controlling the whole body of immigration reform, which is about the size of a pack rat, then you know something is out of whack in America and the growers make it out of whack." *See also* 132 CONG. REC. S16789 (daily ed. Oct. 17, 1986) (statement of Sen. Helms), 132 CONG. REC. H9708 (daily ed. Oct. 9, 1986) (statement of Rep. Mazzoli).

⁴⁵ 132 CONG. REC. H8514 (daily ed. Sept. 26, 1986), statement of Rep. Anthony Beilenson (D-Cal.), who prophetically projected that the resolution of the agricultural worker issue ". . . will never be completely neat or rational or acceptable to many Members of Congress or to the general public. It is by its very nature a messy and a complex problem with no terribly good solution."

⁴⁶ 8 U.S.C. § 1160 (1986).

⁴⁷ Seasonal agricultural services constitute "the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities as defined by the Secretary of Agriculture." *Id.* § 1160(b).

⁴⁸ A "man-day" is defined as "the performance during a calendar day of at least 4 hours of seasonal agricultural services." 8 U.S.C. § 1161(g)(4) (1986).

⁴⁹ 8 U.S.C. § 1160 (a)(1)(B) (1991).

⁵⁰ 8 U.S.C. § 1160 (a)(1)(c) (1986).

⁵¹ *Id.*

law without exception."⁵² SAWs are not required to continue working in agriculture to gain permanent residency,⁵³ and may freely travel beyond U.S. borders in a manner similar to permanent resident aliens.⁵⁴ To be eligible for the SAW program, applicants must have filed for temporary residency during an eighteen-month window which began on June 1, 1987, and ended on November 30, 1988.⁵⁵

SAW contained a two-phase temporary residency provision. Applicants in Group 1 became eligible for legalized permanent residency on December 1, 1989 if they had performed agricultural services for ninety man-days during three consecutive years.⁵⁶ There is a cap of 350,000 Group 1 SAWs.⁵⁷ Group 2 covered all other qualified applicants for Group 1 SAWs who would be eligible but for the 350,000 Group 1 limit, and all other farm workers with temporary residency status under INA § 210.⁵⁸ Group 2 SAWs obtained permanent residency status on December 1, 1990.⁵⁹

As of May 14, 1992, a total of 965,827 SAW applicants had obtained permanent residency in the U.S., thereby taking advantage of this preferential admission status.⁶⁰ These workers will no longer have to look over their shoulders in fear of INS roundups.⁶¹ Although it was

⁵² H.R. No. 682, *supra* note 2, at 83-84 (1986). But SAWs were not originally included in IRCA anti-discrimination provisions. *See infra* section V.

⁵³ 8 U.S.C. § 1160(a)(5) (1986); 8 U.S.C. § 1161(d)(5) (1986).

⁵⁴ 8 U.S.C. § 1160(a)(4) (1986).

⁵⁵ *Id.* § 1160(a)(1)(A).

⁵⁶ *Id.* § 1160(a)(2).

⁵⁷ *Id.*

⁵⁸ 8 U.S.C. § 1160(a)(2)(B), (C) (1986).

⁵⁹ *Id.*

⁶⁰ Provisional Legalization Application Statistics, STATISTICS OFFICE OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE (1991) "Technical Notes" page. SAW applicants are predominately male (82%), 54% have never married, and their median age is 27 years. Workers from Mexico comprise the overwhelming majority in SAW participation with respect to country of origin (81.6%). The most preferred destination of SAWs is California, mostly because its strong agricultural economy has traditionally provided a reliable source of employment for non-English speaking persons. With respect to category of admission, in 1990, 56,668 persons out of the 880,372 total that were legalized through IRCA were SAWs. In 1991, SAW participation increased drastically to 909,159 out of the total of 1,123,162 persons legalized. *See also* Philip L. Martin, *The Outlook for Agricultural Labor in the 1990's*, 23 U.C. DAVIS L. REV. 499, 521: "[T]he SAW program has proven an anomaly in recent federal legislation because it favored farm workers over non-farm workers."

⁶¹ Telephone interview with Stephen Rosenbaum, Staff Attorney, California Rural Legal Assistance, San Francisco, Ca., (Jan. 17, 1992). Mr. Rosenbaum concluded, "[f]or farm workers, what it meant was a chance to come out of the shadows . . . a

hoped that the massive legalization of foreign agricultural labor through SAW would freeze out illegals and lead to improved conditions for workers, a preponderance of evidence compels an opposite conclusion. The next section of this comment will show that the rampant proliferation of fraudulent documents created to circumvent the sanctions provision of IRCA has strengthened, rather than weakened, the resolve of undocumented, job-seeking agricultural workers.

IV. DOCUMENT FRAUD: THE NEUTRALIZATION OF IRCA EMPLOYER SANCTIONS

A. *Background*

As a result of IRCA, U.S. employers are currently subject to penalties for hiring illegal workers.⁶² Depending upon the number of repeat violations involved, IRCA authorizes a range of fines for each individual worker illegally employed.⁶³ More egregious offenders who knowingly hire illegal workers face criminal penalties, which include incarceration for up to six months.⁶⁴

However, despite the intended deterrent effect of sanctions on employers who hire illegal workers, IRCA's sanctions provision contains a basic and damaging structural flaw which has resulted in the neutralization of its intended deterrent powers.

B. *The Loophole*

The fundamental loophole in IRCA grants employers an affirmative defense to employer sanction actions if the employer relied "in good faith" on fraudulent documentation provided by workers.⁶⁵ As a result, farm employers accrue no liability for hiring illegal workers whose documents simply appear to be genuine. Although employers should not be expected to become document experts, this program provides a disin-

good opportunity for any undocumented person in any country."

⁶² See generally 8 U.S.C. § 1324(a)(1); 8 U.S.C. § 1324a(b). The Act mandates: "It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—(A) an alien knowing the alien is an unauthorized alien . . . or (B) an individual without complying with the requirements of subsection (b) of this section" (which contains an explanation of the system by which employers are required to verify the eligibility status of their employees).

⁶³ 8 U.S.C. § 1324a (e)(4)(A) (Supp. IV 1986). Fines range from \$250 to \$10,000 per illegal worker, depending upon the number of previous employer violations.

⁶⁴ 8 U.S.C. § 1324a (f)(1). Repeat violators face imprisonment for up to six months and a fine of up to \$3000.

⁶⁵ 8 U.S.C. § 1324a (B)(3) (1988).

centive for compliance, and an invitation to fraud.⁶⁶

C. The Consequences

The prospect of widespread document fraud created uneasiness among Federal officials from the outset.⁶⁷ INS spokespersons have freely admitted that employer sanctions had definitely been "eroded by fraudulent documentation."⁶⁸ Inevitably, aliens with fraudulent papers have integrated with the newly legalized, thereby compounding the difficulty in attempting to manage the foreign farm worker population.⁶⁹

The farm workers themselves are sometimes the unwitting victims, as the procurement of counterfeit documents by anxious immigrants can result in disappointment. Disreputable entities are known to prey upon vulnerable aliens by charging exorbitant fees in exchange for empty promises of legal residency. The loss of trust, hope and security endured by those who have been cheated compounds the legal difficulties they might possibly encounter for lack of proper documentation. Since the enactment of IRCA in 1986, document scams have been reported continuously in areas where high concentrations of illegal aliens

⁶⁶ See William Langewiesche, *The Border: Boundaries Between United States and Mexico* part 1, THE ATLANTIC, May 1992, at 53: "It was a perfectly tailored solution—the kind of spontaneous adaptation that in other circumstances we admire . . . [a]t first the counterfeits were crude imitations; by now many are indistinguishable from the real thing. Either way, employers are off the hook and IRCA has collapsed." See also 138 CONG. REC. E1847 (daily ed. June 16, 1992) (statement of Rep. Gallegly); David Whitman & Steve L. Hawkins, *The Unstoppable Surge of Illegal Aliens*, U.S. NEWS AND WORLD REPORT, June 6, 1988, at 36.

⁶⁷ Remarks of Immigration and Naturalization Service Deputy Assistant Commissioner Aaron Bodin, head of the SAW program: "When I first saw the proposal for this program, I said to myself, my God, how are we ever going to administer it? How are persons who are eligible, given the nature of the farm labor market, going to produce the records to prove their eligibility status unless we have very loose evidentiary requirements, and in doing so how are we going to keep from throwing the gates open to people who will take unfair advantage of it?" Quoted in Jon Nordheimer, *Aliens Rush to Farmhands' Amnesty*, N.Y. TIMES, July 17, 1988, at 14.

⁶⁸ See remarks of INS spokesman Duke Austin, quoted in Scott Armstrong, *Growth In Illegal Immigration Causes Stir Over Sanctions*, CHRISTIAN SCIENCE MONITOR, Apr. 23, 1991, at 1; see also *infra* note 77.

⁶⁹ The Fraud Section Chief of the Immigration and Naturalization Service in Los Angeles recently commented: "We knew it was going to be big-time [document] fraud, but it far exceeded anything we could have projected." Quoted in Ashley Dunn, *Immigration Control Lost in a Storm of Phony Papers; Fraud: 1986 Law is Cited as Giving Rise to a Network of Counterfeiting and Bilking that is Beyond Regulation*, L.A. TIMES, Dec. 27, 1991, at A1. John Brechtel, head of INS investigations, said: "We took a quarter-million documents off the street."

reside.⁷⁰

Although IRCA agricultural provisions should have left growers with little excuse to hire illegal aliens, their initial adjustment was slow. As late as February, 1989, a majority of surveyed California farm employers reported that their employment practices had not significantly changed as a result of IRCA.⁷¹ However, farm employers have not enjoyed total immunity from inconvenience as a result of IRCA's toothless bite. Growers surveyed by the Center for Immigration Studies of Washington, D.C., unanimously objected to stepped-up levels of the quantity and complication of paperwork related to the citizenship status of their employees.⁷² This multi-regional study of growers of perishable crops throughout the U.S. between 1989 and 1990 reflected the viewpoint that IRCA has not stemmed the flow of illegal immigration, but has instead created a fraudulent documents industry.⁷³ Many respondents viewed such fraud as a positive development.⁷⁴ Because IRCA-induced labor shortages have failed to take place, farm employers are thus ensured of abundant, cheap labor, whether the workers are legal or not.⁷⁵ The focus of agribusiness' worst fears about employer sanctions have never materialized. In 1991, the president of the California Grape & Tree Fruit League estimated that "somewhere between a quarter and sixty percent" of California's farm workers were still illegal.⁷⁶ As a result, an underground farm labor market remains despite

⁷⁰ See generally, Roberto Suro, *Boom in Fake Identity Cards for Aliens*, N.Y. TIMES, Feb. 19, 1992, at A18; Sebastian Rotella, *Crime, Abuses Hound Latino Immigrants*, L.A. TIMES, Dec. 30, 1991, at A1; Santiago O'Donnell, *Suit Says Law Groups Defrauded Immigrants*, L.A. TIMES, October 25, 1991, at B1; Patrick McDonnell, *Swindled Immigrants Get Relief From Court*, L.A. TIMES, Aug. 4, 1991, at A3.

⁷¹ Martin and Taylor, *The Initial Effects of Immigration Reform on Farm Labor in California*, CAL. AGRIC., Jan.-Feb. 1990, at 24.

⁷² CENTER FOR IMMIGRATION STUDIES, WASHINGTON, D.C., IMMIGRATION REFORM AND PERISHABLE CROP AGRICULTURE: COMPLIANCE OR CIRCUMVENTION? 40 (Monica L. Heppel and Sandra L. Amendola, eds., 1991). Sponsored by a grant from the Ford Foundation, the Center, a conservative think-tank, investigated the farming of labor-intensive crops in California, Florida, Michigan, New York, Pennsylvania and Washington. Twenty-six hundred U.S. growers involved in perishable crop agriculture responded.

⁷³ CENTER FOR IMMIGRATION STUDIES, WASHINGTON, D.C., IMMIGRATION REFORM AND PERISHABLE CROP AGRICULTURE: COMPLIANCE OR CIRCUMVENTION? (Monica L. Heppel and Sandra L. Amendola, eds., 1991), vol. 2 at 5.

⁷⁴ *Id.*

⁷⁵ CENTER FOR IMMIGRATION STUDIES, WASHINGTON, D.C., IMMIGRATION REFORM AND PERISHABLE CROP AGRICULTURE: COMPLIANCE OR CIRCUMVENTION? (Monica L. Heppel and Sandra L. Amendola, eds., 1991), vol. 1 at 75.

⁷⁶ Remarks of Michael V. Durando, past President of the California Grape & Tree

IRCA.⁷⁷

In 1992, a year dominated by presidential politics⁷⁸ and economic difficulties, immigration reform issues have been relegated to the backburner. No major steps to address the specific issue of farm workers and document fraud are pending. Although there has been sporadic debate over the larger issue of a national identification card to combat document fraud,⁷⁹ the Bush Administration did not advocate its adoption⁸⁰ and it seems unlikely that the Clinton Administration will do so either. To effectively combat sophisticated outlaw document providers, tighter governmental controls over documentation must become an essential component of future enforcement strategy. Whether a "fraud-proof" document is possible remains to be seen. However, the implementation of sophisticated technology such as holography and other security measures similar to those used by banks and credit card companies would represent some progress toward inconveniencing purveyors of fraudulent documents.

Moreover, it is illogical to expect a resolution of the complex immigration issue without an accompanying comprehensive analysis of the root causes of illegal immigration from Mexico and Central America. As poor economic conditions and civil unrest swept these regions through the last decade, rising numbers of understandably-desperate immigrants have procured fraudulent documents irrespective of the purported deterrent effect of IRCA sanctions against U.S. employers.⁸¹ During the 1986 IRCA debates, the situation was aptly characterized

Fruit League, a grower trade association in Fresno, in *Worker Glut Keeps Wages Low*, SACRAMENTO BEE, Dec. 8, 1991, sec. 1, at 2.

⁷⁷ Jerry Seper, *1986 Amnesty Law Cited In Immigration Increase*, WASH. POST, June 10, 1992, at A7, quoting INS spokesman Duke Austin: "The message has clearly gone back to people who desire to work in the U.S. that all you need is a driver's license and a fraudulent social security card to meet the burden of proof for employers."

⁷⁸ *Bush v. Clinton: What Would Be Best Immigration Policy?; Unfortunately, Neither One, Nor Perot, Has Faced Up to One of America's Most Significant and Politically Fractious Issues*, WASH. TIMES, Oct. 26, 1992, at B6.

⁷⁹ *See Illegal Immigration: Would A National I.D. Card Help?*, BUSINESS WEEK, Aug. 26, 1991, at 14; Scott Hodge, *A National Identity Card: Inching Toward Big Brother*, HERITAGE FOUNDATION REPORTS, May 29, 1990, at 771.

⁸⁰ *Administration Is Opposed To Universal IDs For Work Authorization*, DAILY LABOR REPORT, July 16, 1990, at A2.

⁸¹ One illegal farm worker, interviewed for a 1989 story on IRCA, wryly admitted: "If they (federal authorities) were so stupid to make it so easy to cheat, then I guess I'm stupid enough to take advantage of it." Quoted in George Ramos, *Fraud Charged As Disputed Amnesty Program Closes*, L.A. TIMES, Dec. 1, 1989, at A1.

by Rep. Henry Gonzalez (D-Texas) who drew an analogy to a more ancient immigration issue: "When the 12 tribes of ancient Israel fled Egypt, they certainly did not wait for a visa."⁸²

V. IRCA SANCTIONS AND DISCRIMINATION: UNINTENDED BUT NOT UNEXPECTED

The unintended consequence of discrimination against foreign-looking or foreign-sounding people as a result of IRCA sanctions was eventually confirmed. After four years of IRCA, Congressional attention focused upon reports of job discrimination against Hispanic and Asian-Americans, and other Americans who may look or sound foreign. A 1990 report by the California Fair Employment and Housing Commission charged that agricultural employers had discriminated against SAWs by paying them less than minimum wage or by employing only U.S. citizens and permanent residents to avoid sanctions.⁸³ To alleviate some of these hardships, the Immigration Act of 1990⁸⁴ extended SAWs the belated protection of IRCA's anti-discrimination provision.⁸⁵

Moreover, the Employer Sanctions Repeal Act of 1991,⁸⁶ co-sponsored by Sen. Orrin Hatch (R-Utah) and Sen. Edward M. Kennedy (D-Mass.), is pending as of this writing. The proposed bill would eliminate penalties against employers who knowingly hire illegal workers. The push for repeal was sparked by an unfavorable and widely-circulated General Accounting Office (GAO) report,⁸⁷ which linked the em-

⁸² 132 CONG. REC. H10583 (daily ed. Oct. 15, 1986) (statement of Rep. Gonzalez).

⁸³ 1986 *Law Causing Bias In California, Report Says; Sanctions Moratorium Urged*, DAILY REPORT FOR EXECUTIVES, Jan. 11, 1990, at A4.

⁸⁴ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978(1990): the Act "amend[s] the Immigration and Nationality Act to change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization . . ."

⁸⁵ 8 U.S.C. § 1324b (a)(1) states that it is an unfair immigration-related employment practice "to discriminate against any individual (other than an unauthorized alien) with respect to the hiring . . . of the individual . . . because of . . . national origin or . . . citizenship status." Section 532 of the Immigration Act of 1990 provides for "Inclusion of Certain Seasonal Agricultural Workers Within Scope of Anti-Discrimination Protections." See also Dick Kirschten, 'Citizens-Only' Hiring, NATIONAL JOURNAL, Jan. 27, 1990, at 19.

⁸⁶ S. 1734, 102nd Cong., 1st Sess. (1991). This bill was designed to repeal employer sanctions and simultaneously to bolster the policy of deterring illegal immigration.

⁸⁷ *General Accounting Office, Immigration Reform[:] Employer Sanctions and the Question of Discrimination* 71 (March 1990). It concluded in part that IRCA has resulted in a widespread pattern of employment discrimination against individuals who look or sound foreign. But see note 89 *infra*.

ployer sanctions provisions of IRCA to workplace discrimination.⁸⁸ Ironically, the GAO has never actually recommended repeal, advocating instead for both a reduction in the number of documents required to prove residency and documents which cannot be easily duplicated by counterfeiters.⁸⁹

Ten percent of the more than four and one-half million U.S. employers surveyed for the GAO report admitted that they discriminated on the basis of national origin to avoid the possibility of sanctions.⁹⁰ These employers discriminated by requiring persons suspected of being foreigners to provide documents that are not required of other Americans who apply for work.⁹¹ The largest civil penalty yet for discriminatory practices, \$85,000, was offered as a settlement with the U.S. Justice Department by the now-defunct South Florida Tomato & Vegetable Growers Association and 51 individual growers and labor contractors in Homestead, Florida, who reportedly acted in an overzealous manner with respect to seeking workers' documentation.⁹²

While this comment was being constructed, the Senate Subcommittee on Immigration and Refugee Affairs began holding hearings on the Employer Sanctions Repeal Act of 1991.⁹³ If repeal eventually succeeds, those agricultural workers seeking to leave the fields may be more likely to secure jobs in other U.S. industries if the threat of employer sanctions is removed.

Though controversial, IRCA sanctions are predicated on the sound principle that undocumented workers are less likely to be hired if penalties are imposed on employers for doing so, thereby reducing job opportunities for illegal immigrants. Unfortunately, discrimination is an unintended by-product of this policy. Perhaps such discrimination could have been mitigated by imposing sanctions solely upon flagrant or repeat offenders within targeted industries which traditionally profit from

⁸⁸ GAO Finds 'Widespread Pattern of Discrimination' Prompts Call For Repeal of IRCA Employer Sanctions, DAILY LABOR REPORT, March 30, 1990, at A9.

⁸⁹ Mary Benanti, *Although Critical, GAO Backs Employer Sanctions*, Gannett News Service, Apr. 3, 1992, available in LEXIS, Nexis Library, Omni File: Lowell Dodge, GAO's Director of Justice Issues said, "To be a part of the legitimate work force in this country, one ought to have legal status."

⁹⁰ Employers from all industries, including agriculture, participated in this survey.

⁹¹ *Senate Immigration Panel Hears Views on Repealing Employer Sanctions*, BNA WASHINGTON INSIDER, Apr. 6, 1992 (see comment of Sen. Edward Kennedy).

⁹² *Growers Settle Federal Lawsuit*, MIAMI HERALD, Aug. 1, 1992, at C3. The association did not admit liability.

⁹³ *IRCA Sanctions Result in Bias, Hispanic Groups Tell Panel*, DAILY LABOR REPORT, Apr. 13, 1992, at A9.

an undocumented labor source, rather than upon all U.S. businesses across the board.

VI. THE REPLENISHMENT AGRICULTURAL WORKERS PROGRAM: A FALSE ALARM

IRCA created a new category of aliens who are temporarily admitted into the U.S. in the event of a farm labor shortage: Replenishment Agricultural Workers ("RAWs").⁹⁴ This program permits the importation of foreign agricultural workers in the event of a domestic labor shortage. Unlike SAWs, RAWs must work in agriculture for three consecutive years to legally remain in the U.S.⁹⁵ RAWs are to be admitted only pursuant to a joint determination by the Secretaries of Agriculture and Labor that "there will not be sufficient able, willing, and qualified workers available to perform seasonal agricultural services required in the fiscal year involved."⁹⁶

Scheduled to expire in 1993, RAW has never required implementation. There has been no attempt to extend RAW as of this writing, presumably because the agricultural labor market in America today remains intact such that the importation of foreign farm workers has not been required. Similar conditions are expected to continue for the foreseeable future.⁹⁷ According to recent government estimates, no additional aliens were to be admitted to the United States on the basis of worker shortages during fiscal year 1992.⁹⁸

Ironically, although the overall goal of IRCA was to prevent job-seeking illegal aliens from coming to the U.S., RAW actually permitted growers their own private supply of foreign replenishment workers. Yet despite this special protection mandated by Congress to benefit agriculture, the guaranteed supplemental labor source bargained long and hard for by shortage-conscious growers has never been summoned.

⁹⁴ See *supra* note 2.

⁹⁵ 8 U.S.C. § 1161(d)(5)(A) (1986).

⁹⁶ *Id.* § 1161(a)(3).

⁹⁷ Martin, *supra* note 60, at 523.

⁹⁸ "Notice," 56 Fed. Reg. 49,738 (1991).

VII. IRCA IMPACT UPON THE AGRICULTURAL LABOR SUPPLY: BUSINESS AS USUAL

A. Availability of Workers: A Bumper Crop

The overall impact of IRCA has not been as detrimental to growers as some agricultural observers predicted.⁹⁹ Major farm labor shortages have not transpired,¹⁰⁰ nor has the anticipated exodus of newly-legalized farm workers to other unskilled vocations such as in the manufacturing and service industries. In many cases, language barriers have precluded farm workers from making the transition to other occupations. Other laborers chose to remain within a familiar lifestyle, which includes an existing social network of relatives and friends among their fellow workers.¹⁰¹

According to a 1991 study conducted by the University of Arizona, IRCA has neither diminished Arizona's farm labor supply nor reduced the number of illegal workers state-wide.¹⁰² Commenting on the glut of workers in California and the difficulties resulting from this surplus, United Farm Workers leader Cesar Chavez recently said, "There are three people for every job out here (in California). All they (growers) have to say is 'If you don't accept my wages, I've got men under the trees waiting to take your job'."¹⁰³ Similarly, other sources have found that IRCA has neither resulted in a tighter labor market nor improved wages or conditions for farmworkers.¹⁰⁴

⁹⁹ Lloyd G. Carter, *Alien Registration Success Debated*, UPI, Sept. 30, 1987, available in LEXIS, Nexis Library, Wires File; Patrick McDonnell, *Farm Groups Sound Warning of Impending Pickers' Shortage*, L.A. TIMES, June 26, 1987, section 2, at 3; Ted Appel, *Growers Claim Labor Shortage Approaching Crisis Proportions*, June 18, 1987, available in LEXIS, Nexis Library, Wires File; Stephen Koopp, *Rotten Shame; Who Will Pick The Crops?*, TIME MAGAZINE, June 22, 1987, at 49.

¹⁰⁰ Joe Bigham, *Immigration Reform Hasn't Dried Up Pool of Farm Workers*, L.A. TIMES, Aug. 27, 1989, section 1, at 3; *IRCA Has Had Limited Impact on West Coast Farm Labor, GAO Report Says*, DAILY LABOR REPORT, Aug. 23, 1989, at A10.

¹⁰¹ CENTER FOR IMMIGRATION STUDIES, WASHINGTON, D.C., *supra* note 72, at 39-42.

¹⁰² Howard Fischer, *Immigration Law Hasn't Hurt Supply of Farm Labor, Study Says*, THE BUSINESS JOURNAL-PHOENIX AND THE VALLEY OF THE SUN, June 3, 1991, sec. 1 at 10.

¹⁰³ Douglas Haberman, *Labor Leader Chavez Spotlights Living Conditions of Workers*, Gannett News Service, Oct. 11, 1991, available in LEXIS, Nexis Library, Omni File. See also remarks of Claudia Smith of California Rural Legal Assistance, quoted in Sebastian Rotella, *Border Arrests Rose Sharply Over Holidays*, L.A. TIMES, Jan. 22, 1992, at A1: "Work is very hard even for documented immigrants to get."

¹⁰⁴ See generally Alex Pulaski, *Farm Labor Protection Lacking, Workers Say*, FRESNO BEE, June 18, 1992, at B1; Alex Pulaski, *Mexico Brings Inquiry to Fresno*,

B. The Increasing Use of Farm Labor Contractors: A Nod and a Wink

Another setback for farm workers can be traced to the increasing use of farm labor contractors by U.S. growers. Farm labor contractors ("FLCs") benefit the agricultural industry by assisting growers with the fulfillment of their labor needs.¹⁰⁵ Growers pay the FLCs the amount of the crew's wages plus a percentage for overhead and profit. The FLCs then pay the workers and, in some cases, secure housing for them. Growers benefit because some FLCs perform as a shield between the grower and the INS with respect to responsibility for the verification of workers' documents. However, in enacting IRCA, Congress failed to anticipate that this arrangement between growers and FLCs would weaken IRCA sanctions by shielding the landowner from penalties when the FLC engages in worker documentation violations. It has been alleged that some FLCs actually supply fraudulent documents to the workers themselves.¹⁰⁶

The Center for Immigration Studies estimates that a greater number of FLCs have been operating since IRCA's passage, and FLCs have hired a larger percentage of farm workers during this period than before IRCA.¹⁰⁷ An accompanying study points to IRCA-related paperwork and the threat of employer sanctions as the causes of this increase.¹⁰⁸ Although it would be both costly and time consuming to demand that farmers re-verify the citizenship status of each employee

FRESNO BEE, Sept. 11, 1991, at A2; Kathleen Sharp, *For Migrant Workers, Legality Lowers Wages*, N.Y. TIMES, Dec. 3, 1989, section 3, at 12.

¹⁰⁵ In California, "[a] 'farm labor contractor' designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging or transportation for such workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons." CAL. LABOR CODE § 1682(b) (West 1991).

¹⁰⁶ George Ramos, L.A. TIMES, *supra* note 81, at A1.

¹⁰⁷ CENTER FOR IMMIGRATION STUDIES, *supra* note 72, at 84.

¹⁰⁸ Suzanne Vaupel, *The Effect of the Immigration Reform and Control Act on Farm Labor Contractors in California*, in CENTER FOR IMMIGRATION STUDIES, *supra* note 73, at 199, 207: "In California as a whole, average annual employment by FLCs increased 36 percent in 1988 compared to the 1984 number, while the number of workers hired directly by growers in fruits increased less (approximately 9 percent); the number of workers hired directly by growers in vegetables and melons decreased by almost 11 percent of the 1984 number."

hired by the FLC, the policy goal of legalizing the agricultural workforce through IRCA becomes frustrated when illegal workers are hired along with their newly legalized counterparts.

Reports of worker abuse by FLCs are commonplace.¹⁰⁹ Some deduct exorbitant charges from workers' paychecks for meals and rides to the fields and in extreme cases, flee the area before scheduled paydays due to insolvency.¹¹⁰ Other FLCs have been known to supply alcohol and/or drugs to migrants dwelling in labor camps.¹¹¹ According to one survey, legalized farm workers who participated in SAW associated FLCs with all the negative aspects of their previously-illegal status and believed that labor recruitment practices have not significantly changed since IRCA.¹¹²

For growers desiring to forego paperwork and labor-management problems, FLCs represent either a necessary evil or a welcome convenience, or both. In any event, FLCs operate as a protective shield against IRCA's employer sanctions. Although IRCA was never touted as a panacea for problems associated with employer/employee relations, Congressional failure to squarely address the role of FLCs as anti-sanction insurance for growers has precluded meaningful progress toward the policy objective of a legalized agricultural labor force. Moreover, farm workers should be entitled to full governmental protection from FLC abuse in situations where they cannot protect themselves.

C. *Post-IRCA Illegal Immigration: Wake of the Flood*

Although IRCA purported to shore up the border-patrol by authorizing 1,000 new agents, Congressional funding for such has not yet been provided. As a result, IRCA's enforcement prong has failed to

¹⁰⁹ See *Agricultural Workers Initiate Strike to Protest Labor Abuses*, Notimex Mexican News Service, Jul. 27, 1992, available in LEXIS, Nexis Library, Wires File; *Raid Ousts 187 Illegal Aliens in N.C.*, THE ATLANTA JOURNAL AND CONSTITUTION, July 24, 1992, at A3; Santiago O'Donnell, *Labor Lawyer Finds He Has A Tough Road To Hoe*, L.A. TIMES, Apr. 11, 1992, at B1.

¹¹⁰ See Miles Corwin, *The Grapes of Wrath Revisited: Squalor and Poverty Have Again Become Common for Farm Workers in California. Gains Made In the 70's Have Been Lost as Growers Rely on Labor Contractors and the U.F.W.'s Influence has Declined*, L.A. TIMES, Sept. 29, 1991, at A1; Tom Dresslar, *Growers Oppose Increase In Liability*, SAN FRANCISCO DAILY JOURNAL, May 20, 1992, at 3.

¹¹¹ Peter T. Kilborn, *Drugs and Debt: Shackles of Migrant Worker*, N.Y. TIMES, Oct. 31, 1989, at A1.

¹¹² CENTER FOR IMMIGRATION STUDIES, *supra* note 73, at 85.

keep pace with increasing levels of illegal immigration.¹¹³ By 1990, apprehensions of illegal immigrants at the U.S.-Mexico border began to rise.¹¹⁴ In 1991, arrests topped 1.1 million.¹¹⁵

The consequences of greater numbers of illegals in agriculture impacts negatively upon the farm worker's struggle for day-to-day subsistence. At present, current budget constraints have eroded government-funded immigrant services at both the federal and local levels, further hampering the social and economic progress of farm workers granted legal amnesty.¹¹⁶ In California, it has been widely reported that rising levels of illegal workers have destabilized an already tight housing market.¹¹⁷ Although the actual impact of undocumented workers on state social services budgets has not yet been definitively determined, the issue evokes a wide range of hypotheses.¹¹⁸

¹¹³ See Scott Armstrong, *Despite Federal Plans, Border Expected Still to Be Porous*, CHRISTIAN SCIENCE MONITOR, Feb. 21, 1992, at 3; Richard Behar, *The Price of Freedom; Immigration laws are fueling a lucrative black market in human cargo*, TIME MAGAZINE, May 14, 1990, at 70; George Papajohn, *Study Finds Immigration Reform Failing*, CHICAGO TRIB., May 12, 1992, at 4; Jake Henshaw, *Immigration Reform Limp Along In Calif.*, GANNETT NEWS SERVICE, Mar. 25, 1991, available in LEXIS, Nexis Library, Wires File.

¹¹⁴ Sebastian Rotella, *Border Arrests Rose Sharply Over Holidays*, *supra* note 103.

¹¹⁵ Ashley Dunn, *Arrests Rise for Illegal Immigrants*, L.A. TIMES, Nov. 19, 1991, at A3, remarks of Dave Simcox, director of the Center for Immigration Studies: "I think it's safe to say that word is back to Mexico that employer sanctions are surmountable, and the deterrent effect is gone."

¹¹⁶ See *Congress Cuts Aid Proposed for Immigrant Care*, L.A. TIMES, Oct. 2, 1992, at A3; *Budget Aftermath: It's Not All California's Fault; Blame the Governor? Or the Legislature? What About Uncle Sam?*, L.A. TIMES, Sept. 3, 1992, at B6; Tony Quinn, *What Is Really Driving California's Budget Woes?*, L.A. TIMES, Dec. 22, 1991, at M6.

¹¹⁷ Remarks of Ilene Jacobs of the Marysville, Cal. office of California Rural Legal Assistance: "I have clients who live in barns, next to horses and cows . . . in old tool sheds, old trailers that don't have . . . electricity. There simply isn't an adequate supply of housing, and what there is [sic] substandard and overpriced." See Clark McKinley, *Lawmakers Get Dismal Assessment of Farm Workers' Housing*, UPI, Oct. 15, 1992, available in LEXIS, Nexis Library, Omni File. See also Pamela J. Podger, *The Valley's Invisible Harvest*, pts. 1 & 2, FRESNO BEE, Oct. 13, 14, 1991, at A1; *Migrant Workers Dwelling in Caves*, FRESNO BEE, Sept. 11, 1991, at A2.

¹¹⁸ Sergio Munoz, *Perspective on Immigration; The Divisiveness of Half-Truths: Do Undocumented Workers Take More Than They Give In Taxes? No. This Scapegoating Is Getting Dangerous*, L.A. TIMES, Nov. 12, 1992, at B7 (Mr. Munoz is executive news director of KMEX-TV in Los Angeles); See also remarks of Gov. Pete Wilson, quoted on John McLaughlin's One-On-One (television broadcast, Mar. 22, 1991), who said: "California is experiencing more than its share of the refugee population, more than its share of immigrants, legal and illegal. And they are about 70 percent, in the case of the refugee population, people on welfare."

It is impossible to determine how many illegal immigrants successfully penetrate U.S. borders each year, much less the percentage of illegal immigrants who work in agriculture rather than factories or restaurants. The federal government's inability to accurately enumerate and identify the foreign farm worker population places any reform attempt at a disadvantage.¹¹⁹ This lack of dependable information may partially explain the prolonged debates and flawed laws which ultimately resulted in the final version of IRCA, and the absence of predicted, IRCA-induced mass labor shortages. Accurate problem definition should begin with accurate data. If federal farm worker data remains insubstantial or inaccurate, then policies directed toward managing and controlling their numbers cannot be well founded.

VII. CONCLUSION

Through SAW and RAW, IRCA guaranteed U.S. growers an ample supply of agricultural labor both by design and by accident. Because the widespread prevalence of document fraud has never been successfully quashed, countless thousands of illegal workers continue to work in U.S. agriculture.

IRCA's agricultural provisions are less a comprehensive solution to the foreign farm worker issue than a tribute to the perseverance of pro-farm interests. Because a weary Congress ultimately settled on compromise measures rather than spending another year hammering out a more perfect piece of legislation, it is not surprising that IRCA has proven unequal to the problems it attempted to address. Even so, IRCA's major Congressional proponents certainly deserved a more satisfying result given their tenacity with respect to this complex and politically thankless issue. Nonetheless, just as IRCA has not stopped illegal immigration, its agricultural provisions have not legalized the U.S. agricultural labor market.

POSTSCRIPT

The Commission on Agricultural Workers is a bi-partisan panel created by Congress in 1986 to study the impact of IRCA on the agricultural industry, particularly with respect to perishable crop farming.

¹¹⁹ After 30 years, America's Continuing Harvest of Shame: Hearing Before the Select Committee on Aging, House of Representatives, 101st Cong., 2nd Sess. at 1 (1990), remarks of Chairman Roybal: "The most glaring problem is the lack of Federal accountability for farm workers. We do not know . . . who they are, where they are, or, how they live."

Composed primarily of major agribusiness leaders,¹²⁰ the Commission was initially created as a concession to growers concerned over the possibility that large numbers of newly-legalized workers would leave agriculture as a result of IRCA. Released subsequent to the creation of this comment, the Commission echoes many of the findings contained herein. In what appears to be a self-critical appraisal, the Commission concluded that IRCA has yielded none of its expected benefits, particularly with respect to farm worker wages¹²¹ and working conditions.¹²² The report acknowledges that "the farm labor supply is registering a pronounced surplus,"¹²³ pointing to delayed enforcement and the persistence of illegal immigrants as the causes.¹²⁴ Committee Chairman Henry J. Voss, director of the California Department of Food and Agriculture, and a peach grower himself, disclosed that IRCA has done little to block the flow of illegal immigration.¹²⁵ In addition, it was reported that employers have little incentive to improve wages and working conditions as a result of the easy availability of fraudulent documents to illegal workers.¹²⁶

The Commission made the following recommendations, among others:¹²⁷

- 1) tightening of border controls;
- 2) stricter enforcement of employer sanctions;
- 3) a fraud-proof work authorization document;

¹²⁰ The Commission includes chairman Henry J. Voss, Director of the California Department of Food and Agriculture; Richard B. Abell, an Assistant Attorney General in the Reagan Administration; Lloyd W. Aubry, Jr., Director of the California Department of Industrial Relations; Michael V. Durando, former President of the California Grape and Tree Fruit League; Ben M. Gramling, II, a South Carolina peach grower; Delores Huerta, First Vice President of the United Farm Workers; Roger M. Mahony, Roman Catholic Archbishop of Los Angeles; Philip L. Martin, agricultural economist at the University of California at Davis; Russell Pitzer, a West Virginia fruit grower; George Sorn, Executive Vice President of the Florida Fruit and Vegetable Association; and Russell L. Williams, President of Agricultural Producers of California. Russell Pitzer, a West Virginia fruit grower, and Othal E. Brand, Mayor of McAllen, Texas served partial terms.

¹²¹ COMMISSION ON AGRICULTURAL WORKERS, REPORT OF THE COMMISSION ON AGRICULTURAL WORKERS 93 (Nov. 1992). Although the report itself is officially dated November 6, 1992, it was presented before Congress in March, 1993.

¹²² *Id.* at 104.

¹²³ *Id.* at 129.

¹²⁴ *Id.*

¹²⁵ See Peter T. Kilborn, *Law Fails to Stem Abuse of Migrants*, U.S. Panel Reports, N.Y. TIMES, Oct. 22, 1992, at A1.

¹²⁶ COMMISSION ON AGRICULTURAL WORKERS, *supra* note 121, at 129.

¹²⁷ *Id.* at 131-39.

4) assessment of liability upon farmers for claims against farm labor contractors they use;

5) allowing farm workers benefits similar to those of other workers, such as unemployment insurance and workers' compensation insurance;

6) providing day care, health care and education to children already provided to other workers' families;

7) compilation of a reliable farmworker data base for the benefit of federal agencies seeking to allocate resources for local farmworker programs.

The agricultural establishment should be praised for this honest self-examination. Clearly, it is time for the industry to get into step with other U.S. businesses by offering benefits to workers and eliminating dangerous or abusive practices which render agriculture less appealing to American workers and more appealing to an undocumented workforce that is less likely to complain of mistreatment. Ironically, had IRCA accomplished its intended purposes, this valuable critique would never have been necessary.

STEVEN ALAN ELBERG