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THE RODINO BILL ON ILLEGAL ALIENS: A LEGISLATIVE NOTE

Robert J. Taylor*

H.R. 8713, a bill sponsored by Representative Peter J. Rodino, Jr. currently before the Rules Committee deals with the serious problem presented by illegal aliens in the United States. However, it is not a viable solution to the very complex problem involved. The bill has three major defects: First, if enacted, the Rodino bill may affect the constitutional and civil rights of people who are not illegal aliens; specifically, legal aliens and minority groups. Second, the bill does not adequately or realistically deal with those illegal aliens who are already in the United States. Finally, the bill is based on a serious lack of information which causes it to simplify and assume too much.

The Purpose of H. R. 8713

The primary thrust of the Rodino bill is to place the burden of enforcing the illegal alien laws on the private employer. Section 2 of the bill amends Section 274 of the Immigration and Nationality Act¹ by deleting the provision which stipulates that normal employment practices shall not be deemed to constitute harboring or concealing of illegal aliens. Instead, the bill would place both civil and criminal penalties on employers, agents of employers, or anyone who, for a fee, refers an alien for employment, who knowingly employs or continues to employ any alien who has not been lawfully admitted to this country.² The sanctions are to be imposed in a three step procedure:

- 1) The Attorney General's office will issue a warning citation to the employer and lack of knowledge of the employee's illegal status will be no defense;
- 2) A civil penalty will be imposed of not more than \$500 for each illegal alien employed knowingly within two years after a citation has been issued;
- 3) For any subsequent violation, a criminal penalty or fine will be imposed not to exceed \$1,000 or a one year imprisonment, or both.

Discriminatory Aspects

Section 2 of the Rodino bill is the most controversial part of the bill because it involves tremendous constitutional and civil rights implications. There is no uniform system for accurate identification of citizenship or alien status in this country and the bill provides no guidelines in this respect. This places the burden of determining citizenship on the employer who is not qualified to deal with it. The determination can be technical and complicated, requiring knowledge of immigration laws and constitutional law. Questions of derivative citizenship, loss of citizenship, and interpretation of the proliferation of visas and other proofs are beyond the employer's competence.

The initial warning citation does not require the government to show the employer's knowledge of the illegal status of his employee. Although the other two sanctions require this knowledge, the bill does not specify what constitutes a good faith effort in complying with its provisions. Because the employer is not prepared to determine which visas authorize aliens to work and because he fears falsification of alien documents, the employer will not hire aliens at all. The safest course for the employer who wants to avoid the governmental sanctions will be to not hire any applicants who are "foreign looking." This result would affect minorities who are United States

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1. 8 U.S.C. Sect. 1234.

2. See S. 3074, introduced March 4, 1976, by Sen. James Eastland (D., Miss.).

citizens as well as aliens who are here legally with authorization to work.

In its analysis of the Rodino bill the United States Commission on Civil Rights concluded, "It is the view of this Commission that the passage of H.R. 8713 in its present form will have a direct discriminatory effect on minority persons seeking employment, whether they are citizens or aliens authorized to work in the United States Such experimentation should not be undertaken when it is clear that discrimination against minority persons will be a natural result."³ In a statement of their position on H.R. 8713, the Mexican American Legal Defense and Education Fund stated, "Specifically, the illegal alien bill has provisions which when implemented will inevitably result in certain groups being treated differently solely on the basis that members of these groups look 'foreign'."⁴

Section 3 of the bill extends to the Attorney General the power to bring a civil action against any employer who discriminates on the basis of national origin. This authority is in addition to the powers contained in Section 706 of the Civil Rights Act of 1964. This provision is not an effective solution to the systematic discrimination which the bill will engender. It simply provides another method for minority persons to file discrimination complaints to be heard by federal courts whose dockets are already overcrowded. For example, there is presently a backlog of over 100,000 cases before the Equal Employment Opportunities Commission.⁵ The provision offers little deterrent effect to employers as there is no direct penalty involved, only the remote threat of being enjoined. The alien who is legally here has no recourse in this situation in light of the recent United States Supreme Court decision which holds that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination by employers on the basis of citizenship.⁶ To deny legal aliens who are authorized to work in the United States the opportunity to work is essentially to deny them the right to live in the United States because it deprives them of any means of livelihood.

The Rodino bill also encourages discrimination against minority groups by omitting to provide requirements for the same proof of citizenship from all potential employees. The bill does not specify what type of proof is required nor does it specify that all potential employees, not just those who are suspect, must submit proof of citizenship. Employers who do not want to hire minorities could subvert the Civil Rights Act of 1964 by requiring more identification from minorities and justifying it under the guise of this bill.

Many people do not have proper proof of citizenship and this can be illustrated by the experience of the Social Security Administration.⁷ The consequences of the bill requirements could be a type of national identification card, which is opposed by civil libertarians and members of Congress. On June 11, 1975 Acting Assistant Attorney General McConnell wrote to Joshua Eilberg, chairman of the Committee on the Judiciary that "the Department of Justice opposes any requirement that citizens carry documentation of citizenship when seeking employment."⁸ But minority groups will almost be required to carry proof of citizenship to obtain or hold a job if this bill is passed.

3. Letter from U.S. Commission on Civil Rights to Rep. Don Edwards, Chairman, Subcommittee on Civil Rights and Constitutional Rights, Aug. 28, 1975.

4. Letter from Mexican American Legal Defense and Education Fund to Rep. Don Edwards, July 23, 1975.

5. United States Catholic Conference, *Summary and Analysis -- H.R. 8713*, 1975.

6. *Epinoza v. Farab*, 414 U.S. 86 (1973).

7. "The experience of the Social Security Administration clearly indicates that thousands of persons do not have proper documentation." Fragomen, *The Illegal Alien: Criminal or Economic Refugee?* 31 (Center for Migration Studies 1973).

8. H.R. Rep. No. 94-506, 94th Cong., 1st Sess. 440 (1975) (hereinafter cited as H.R. Rep.).

The reality of the threat of discrimination contained in the Rodino bill is exemplified by California's experience after enacting similar legislation (which was later declared unconstitutional for violating the preemption doctrine). During the period it was in force, hundreds of complaints were filed by citizens and resident aliens who were denied jobs by employers who feared the sanctions for employing illegal aliens.⁹ In New York, similar legislation passed by the state legislature was vetoed by Governor Malcolm Wilson on the grounds of violation of the preemption doctrine and because "the bill could result in discrimination against natural born citizens of the United States who are members of minority groups, but who cannot provide documentary proof of their birth by reasons of local vital statistics problems."¹⁰

This discussion of the discriminatory effects of the Rodino bill is summarized in the words of the United States Commission on Civil Rights: "... attempts to solve this country's serious economic problems cannot be made at the expense of the civil and constitutional rights of minority persons. The passage of any legislation which has such discriminatory effects threatens to set back significantly that progress in civil rights which has been achieved in this country only through long and laborious efforts."¹¹

Amnesty Provisions

Another serious problem with the Rodino bill is the inadequate manner in which it deals with those illegal aliens who are presently residing in this country and who have established homes and families here. The present wording of the bill would affect future employment of illegal aliens as well as the continued employment of illegal aliens hired before the bill becomes effective. The effect would be to force employers to screen their employees and dismiss large numbers of workers within 90 days after the bill is passed. This would cause problems for the employer, the illegal alien, and the Immigration Service which could have to deport all these people.

The United States Catholic Conference, in testimony before the Judiciary Committee, held that it would be inhuman and immoral to break up families, part of whom are American citizens, to cut them off from their meager existence and to force mass deportation upon them. The Conference contends, in a thoughtful and well-reasoned statement, that the Government should deal with the problem of future illegal immigration separately from the problem of those illegal immigrants who are already here. They want the Government to adjust the status of those who have been in the country for a period of time and who have established equities here. This must be done without charging against existing immigration quotas.¹²

Austin T. Fragomen, formerly staff counsel to the House Judiciary Subcommittee on Immigration and Nationality, also supports total amnesty until either the date of the bill's enactment or until the Social Security Administration promulgation of 1974 took effect, since after that date illegal aliens will have a difficult time obtaining Social Security cards for work purposes. Mr. Fragomen calls the present provision dealing with amnesty in the Rodino bill "essentially meaningless" and "an insult to the concept of amnesty itself."¹³

The amnesty provision contained in Section 4 of the bill would benefit relatively few people. To have their status adjusted, the alien must,

- 1) have been continuously present in the United States since June 30, 1968;

9. Fragomen, *supra* note 6, at 33.

10. Veto message of Gov. Malcolm Wilson, June 17, 1974.

11. Letter from Commission on Civil Rights, *supra* note 2.

12. United States Catholic Conference, *Statement on "Illegal Alien" Legislation*, Aug. 20, 1975.

13. Fragomen, *Criminal Sanctions and Amnesty Bill Passes House Judiciary Committee*, 9 *The International Migration Review* 557 (1975).

2) Be in an unlawful status since that date;
 3) and who on June 30, 1975, held a specified relation to a U.S. citizen or alien lawfully admitted or whose departure would result in unusual hardship, as determined by the Attorney General.

In addition the alien must apply within one year after the date of the Act and meet certain visa eligibility requirements.

This provision is completely inadequate for a number of reasons. The "continuous residence" requirement would mean that any absence, regardless of how short, during the relevant period would disqualify the applicant. The requirement of unlawful status since June 30, 1968, would have the absurd result of disqualifying those who were here legally for a portion of that time. The period of residence is too long and should be reduced to make it realistic. The term "unusual hardship" is not defined and as such does not provide much incentive for illegal aliens to come forward on the possibility that they might fit under this provision. In effect, the amnesty provision in the Rodino bill appears to be a cursory attempt to satisfy amnesty supporters.

Lack of Information

A major point of agreement among almost all opponents of the bill is that there is a serious lack of facts on the scope of the illegal alien problem and that before any solutions are proposed a comprehensive and objective study must be made. Those who support the bill justify it by pointing to a large number of illegal aliens presently in this country and by arguing that illegal aliens are taking jobs from Americans, not paying taxes and using up public welfare funds. Opponents argue that illegal aliens are ineligible to receive most social services and are afraid to apply for fear of discovery. They also argue that taxes are withheld from their wages like anyone else and that many do not even know how to claim deductions. Yet few of the arguments are documented with proof because there is a serious lack of it.

Congress does not know exactly how many illegal aliens there presently are in the country. Estimates range from two to twelve million.¹⁴ The Immigration and Naturalization Service itself relies on guesses rather than exact figures. The Lesco study, done by a consulting firm in Washington for the Immigration Service, arrived at a figure of eight million illegal aliens presently in this country. This figure was arrived at by using the Delphi method which is considered unscientific by social scientists. It involved taking the average of the "expert guesses" of six people knowledgeable about the subject who were not required to show how they arrived at their figures. The study has been criticized by the U.S. Census Bureau and the Congressional Research Service.¹⁵

In supporting papers presented in the House Appropriations Committee, the Immigration Service stated: "Without knowing the actual scope of the problem, it is not possible to attack it effectively. It is, therefore, mandatory that the Immigration and Naturalization Service assess the illegal alien situation to determine not only the magnitude, but also the characteristics, mode, and locations of entry, area of residence, and extent of impact of the illegal alien population."¹⁶

The administration does not know the exact makeup of the illegal alien job market. A recent article by an economist, Michael Piore, concludes that illegal aliens have no adverse effects upon the economy because they fill jobs which Americans refuse to fill or find undesirable.¹⁷ Donald Hohl states in the *International Migration Review*

14. H.R. Rep., *supra* note 7, at 38.

15. Telephone interview with Dr. Charles Keeley, chairman, Research Committee, American Immigration and Citizenship Conference, New York City, March 17, 1976.

16. United States Catholic Conference, *supra* note 11, at 2.

17. Piore, 172(8) *New Republic* 7, Feb. 22, 1975.

that a number of employers cannot find sufficient numbers of Americans to fill positions and that their business will consequently suffer if the Rodino bill is passed.¹⁸ Finally, there is no date showing how much public money is being spent on illegal aliens. In the dissenting views incorporated in the Committee report by four members of the Judiciary Committee who voted against reporting out the bill: "Acting now is premature, particularly considering the speculative nature of the date underlying the bill."¹⁹

Alternative Solutions

It is clear that H.R. 8713 is not a viable solution to the illegal alien problem. Even if the bill had none of the problems discussed above, punitive legislation is a poor solution. Criminal penalties will not alter the socioeconomic factors which underlie migration and will only push the alien labor market further underground. The following suggestions have been offered as alternatives by various people concerned with the bill. They are only partial remedies in that they attack individual elements of the great many elements that make up the illegal alien problem.

The most immediate approach is to increase funding of the Immigration and Naturalization Service. In their report on the bill, the Committee on the Judiciary states that lack of funding has seriously hampered the capacity of the Immigration Service effectively to administer the Immigration and Nationality Act. They pointed out that on occasion insufficient manpower has resulted in incomplete enforcement of their duties.²⁰ Leonard J. Chapman, Jr., Commissioner of the Immigration Service, stated before a House Subcommittee that "It is painfully evident to our investigators and Border Patrol agents that they are catching only a small percentage of the violators because of the limitations of funds and personnel."²¹ Clyde M. Webber, national president of the American Federation of Government Employees stated that "it is our firm belief that the control of illegal aliens will not be effective until the Immigration Border Patrol is brought to proper strength."²² In 1974, 90% of the total number of deportable aliens were Mexican nationals and the majority of these were located near the Southwestern border.²³ This emphasizes the particular need for increased patrol along the Southwestern border.

Closer control could be exercised over the growing granting of visitors visas since visitors who overstay their time constituted 12% of the illegal aliens deported in 1974.²⁴ The Immigration Service should maintain tighter control over aliens once they are here. For this they will also need additional funding.

A study of the possibility of issuing temporary working visas for those occupations for which illegal aliens are needed should be made. The United States is one of the few Western industrialized countries which does not have some type of temporary work visa. However, much care must be taken not to institute anything similar to the disastrous Bracero program.

Immigration statutes should be revised to place Western Hemisphere applicants on an equal basis with Eastern Hemisphere applicants. 74% of the visas for the Eastern

18. Hohl, *U.S. Immigration Legislation -- Prospects in the 94th Congress*, 9 *The International Migration Review* 59, at 61 (1975).

19. H.R. Rep., *supra* note 7, at 39.

20. *Id.* at 18.

21. Hearings on H.R. 982 and Related Bills Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 32 (1975).

22. *Id.* at 376.

23. H.R. Rep., *supra* note 7, at 4.

24. *Id.*

Hemisphere are allocated for purposes of family reunification.²⁵ The policy for Western Hemisphere families puts them on the same level of priority as single persons or retirees. The discrimination against Western Hemisphere applicants causes long waiting periods which in turn causes illegal traffic to persist. A preference system should be applied to the Western Hemisphere as it is now applied to the Eastern Hemisphere.

Proper enforcement of new Social Security Administration regulations which prohibit the issuance of social security cards to aliens who do not have the right to work should help alleviate the problem. Without social security cards, aliens will find it hard to obtain a job. Those who apply for cards for non-work purposes will have their account annotated and if any earnings are reported to their account, the Immigration Service will be notified.²⁶

Finally, it must be noted that there are those who advocate the removal of all restrictions on the entrance of aliens into this country. They feel it is anomalous for a country built on the strength of immigrants to deny entrance to new immigrants. They think that removing restrictions will eliminate some of the problems. For example, as a legal citizen the former unlawful alien could be organized by unions, thus avoiding the problem created by working for less than the minimum wage.

This note is intended to show the complexity of the illegal alien problem which H.R. 8713 does not recognize. It affects the American economy, minority communities, and legal as well as illegal aliens. There is no one solution to such a complex problem and Congress must avoid a deceptively simplistic solution which would create serious new problems.

25. Hohl, *supra* note 17, at 60.

26. Fragomen, *supra* note 12, at 559.